THE APPEALS PANEL

Established under an Agreement dated 16th October, 2002 made by and among the Foundation "Remembrance, Responsibility, and Future", the International Commission on Holocaust Era Insurance Claims, and the [REDACTED]

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Chairman: Timothy J Sullivan— Panel Members: Rainer Faupel and Abraham J Gafni

PRIVILEGED AND CONFIDENTIAL

APPEAL NUMBER: [REDACTED]
CLAIM NUMBER: [REDACTED]

BETWEEN

[REDACTED]

APPELLANT

AND

[REDACTED]

RESPONDENT

DECISION

[REDACTED] makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW and enters the following decision pursuant to section 10 of the Appeal Guidelines:

BACKGROUND

1. The Appellant is [REDACTED], born on [REDACTED] 1923 in Plettenberg, Westphalia (Germany). He is the son of [REDACTED] and [REDACTED], née [REDACTED]. [REDACTED] was born in Germany on [REDACTED] 1884. [REDACTED] was born in Germany on [REDACTED] 1900. [REDACTED] and [REDACTED] perished in a concentration camp. They were declared dead on 8th May 1945.

   The Appellant has a sister, [REDACTED], née [REDACTED], who was born on [REDACTED] 1925. She is his co-heir and co-Appellant.

2. The Respondent is [REDACTED] ([REDACTED]).

3. The Appellant submitted two claim forms dated 20th March 2000 and 27th August 2000 to the International Commission on Holocaust Era Insurance Claims (ICHEIC), in which he claims that an insurance company he could not name issued a policy or policies of life insurance.

4. The ICHEIC submitted the claims to the MOU Companies and to the German companies [MOU is the acronym for Memorandum of Understanding signed by those companies which have submitted to ICHEIC jurisdiction].

5. [REDACTED] retrieved an entry in its central register for the Appellant's father, [REDACTED]. In its final decision letter dated 13th August 2004 [REDACTED] wrote: "*With our letter dated 08.02.2002, you received our preliminary decision regarding your application. We rejected your application because we were only able to find a record of your father, Mr [REDACTED], in our central register. This entry alone is not sufficient proof of a policy having come into effect. … The auditing procedure agreed with the ICHEIC has now been completed. … The reassessment of our preliminary decision, based on the Agreement … resulted in a different* [sic ! – should read: "the same"] *outcome albeit for a different reason. … The Agreement states that compensation shall no longer be granted on policies which have been the previous subject of a compensation process. In the compensation decision of the state governor for Düsseldorf, the application for compensation for policy [REDACTED] was rejected due to a failure to prove damages were incurred (attachment 1). Due to the fact that a decision by the compensation office is to hand, your application for compensation for policy [REDACTED] is no longer valid in accordance with the Agreement*".

6. The Appellant submitted an appeal to the Appeals Office dated 24th September 2004 in which the reasons for the appeal were set out. The appeal form was accompanied by an attachment in which more reasons for the appeal were given.

7. The Appeals Office received the appeal form on 2004 and mailed copies of the appeal form and the attachment to the Respondent.

8. [REDACTED] responded in a letter dated 20th October 2004 and requested the Appeals Panel for reasons it had set out before to "*reject the appeal submitted with respect to this claim and to confirm our decision on it*".

9. On 16th November 2004 the Appeals Office informed both parties that the appeal will be decided on a "*documents only*" basis unless it received notification from either party requesting an oral hearing within 14 days of the date after receipt of this letter.

10. No request for an oral hearing has been received from either party. The appeal proceeds on a "*documents only*" basis.

11. The appeal is governed by the Agreement concerning Holocaust Era Insurance Claims dated 16th October 2002 made by and among the Foundation "Remembrance, Responsibility and the Future", the ICHEIC and the [REDACTED] and its Annexes, including, but not limited to, Annex E of the Appeal Guidelines.

    In conformity with section 3.9 of the Appeal Guidelines (Annex E of the Agreement) and based upon the Appeals Panel's general decision dated 6th July 2004 this appeal was assigned to [REDACTED].

    The seat of the Appeals Panel is Geneva, Switzerland and the Decision is made there.

THE CLAIM

12. The Appellant has submitted the following information in relation to the claim for the proceeds of a life insurance policy in the claim form dated 20th March 2002:

    a) In section three, he states that the insurance policy was purchased in Plettenberg, Westphalia, Germany. He does not know the name of the company.

    b) In section four, he states that he is unable to provide copies of documents or statements to substantiate his claim.

    c) In section five, he identifies the policy as one of life insurance. He is not aware of any payments resulting from this policy.

    d) In sections six and seven, he names his parents, [REDACTED] and [REDACTED], as the policyholder and insured person(s). He states that he is aware of other living heirs but he does not name them.

    e) In section eight, the Appellant names himself as the beneficiary. He identifies [REDACTED] (née [REDACTED]) as another living heir of the beneficiary.

    f) In section nine, he states that no one has participated in any restitution or compensation procedure regarding this claim.

    The claim file contains two more copies of claim forms dated 20th March 2000 and 27th August 2000. Neither contains additional information.

13. The Appellant provided copies of identification papers proving the biographical data.

14. The Appellant sets out the reasons for his appeal as follows: "*When considering any organisation such as a bank, insurance company or any other type of business such as factories etc, I have never before heard that two different files existed, headed by the same name and number, one being for IN and the other for OUT. The entries are always made in the same document. It is for this reason that I doubt that only the IN data is still in existence and that the OUT data can no longer be found. If the files were damaged or destroyed during the war then there would be no IN data, as well as no OUT data. The fact that the incoming data is indeed still in existence leads one to believe that the payout details, if any was due, must also be available, as must the information regarding the form that these should take and to whom they should be made*".

In an attached letter, he stated: "*On the 20.08.04 I received the final decision from [REDACTED], stating that our application for compensation, for the life assurance policy [REDACTED] held by our father [REDACTED], has been refused. The reason for this refusal was* ***"no evidence of damages incurred"****. My sister and I were only children in 1939 and we are therefore not in the best position to provide evidence for the existence or non-existence of an insurance policy. There were three insurance policies, according to the information that has come from* ***German bodies*** *and not from us. 1)* ***The [REDACTED]*** *Insurance policy no. [REDACTED] (taken out prior to 1933) …. Our reasons for rejecting the decision and the objections made by [REDACTED] are as follows: We, the children of [REDACTED] and [REDACTED] of Plettenberg in Westphalia, are unable to provide proof of a policy having existed because we were children at the relevant time. Our parents are also no longer able to provide proof because they were legally, under the German laws in place between 1938–1945, killed as being not worthy of German citizenship and, of course, as Jews. We maintain that it is unlikely, considering the German thoroughness and accuracy through which it has been possible to retrieve data and figures concerning policies between 1927 and 1939, that it is not possible to find out what occurred with the insurance money after 1939. It is possible that insufficient time and effort has been spent in trying to find out what really happened to the money. We were informed that the research has been concluded and that our application has thus been rejected. Our father certainly made his premium payments on time every year, with true German punctuality, and one must therefore assume that the final value of the policy, with its interest and compound interest, was far greater than the initial sum. We assume it would be better to let another authority that is objective and not directly interested do the research. I do not wish to express doubts about [REDACTED] but others might be more thorough. We, the heirs of [REDACTED] who was declared dead on 8th May 1945, hope that further research will find the missing records. With this in mind we would like to appeal the decision because we do not recognise the confiscations according to the law of the Nazi government and thus we do not recognise the decisions and reasoning of the above named insurance companies. We trustfully ask the Panel Members to find out the truth and we are sure that it will be possible to find out the truth eventually*".

THE INVESTIGATION AND DECISION BY THE RESPONDENT

15. [REDACTED] initially declined the claim giving as a reason that an entry in its ZRG only proves that there was an application for an insurance policy which, however, is not a proof that, in fact, an insurance contract was issued (the application could have been withdrawn by the applicant or declined by the insurance company). Later, after in the above mentioned Agreement (see paragraph 11) a solution was adopted which provided that a payment will be offered from a humanitarian fund in cases in which companies had an entry in its central register without having further information as to the details of a possible insurance contract and payments, [REDACTED] in its decision letter dated 13th August 2004, again declined the claim for another reason, namely that the claim was the subject of a compensation procedure (see paragraph 5 and 16 for more details).

16. In a letter dated 20th October 2004 [REDACTED] wrote in response to the appeal: "*We denied the claim of Mr [REDACTED] and Mrs [REDACTED] with our letter dated August 13, 2004, because the life insurance policy [REDACTED] was included in a decision by the compensation authority in Düsseldorf. During the compensation proceedings, [REDACTED] informed the heirs of Mr [REDACTED] that already by that time we did not have a contract file anymore. Thus, we asked the heirs to provide us with information as otherwise a calculation of the insurance policy was not possible. The information could have been given by affidavit, but we did not receive any information. Due to a lack of information of insurance details, we could not make any calculation concerning policy*

[REDACTED]. Thus, a damage could not be established. Therefore the compensation authority declined the claim. According to Section 2 (1) (c) of the Agreement a claim concerning life insurance policies is eligible for compensation if the policy in question was not covered by a decision of a German compensation or restitution authority. This does not apply to Mr [REDACTED]'s life insurance contract [REDACTED] which was covered by a decision of the compensation authority in Düsseldorf …".

17. [REDACTED] attached, among others, copies of the following documents:

    a) The entry in [REDACTED]'s centralregister ("Zentralregister", ZRG) for [REDACTED].

    b) A letter dated 30th July 1962 from [REDACTED] to the compensation office in Wuppertal. [REDACTED] stating that it had been unable to reconstruct details of the contract or to calculate damages due to a lack of data.

    c) A letter dated 16th May 1962 from [REDACTED] to the compensation office in Wuppertal. [REDACTED] stating that it had been unable to reconstruct the contract and asking for advice on which technical data should be used in order to make the calculation in accordance with § 128 BEG (BEG = Bundesentschädigungsgesetz, the German Federal Law on compensation for the Victims of National Socialist Persecution).

    d) A decision by the state authorities in Düsseldorf dated 2nd October 1962. The applicants [REDACTED] (née [REDACTED]) and [REDACTED], represented by Berthold Wolf, had made an application for compensation regarding insurance policies of their father, [REDACTED]. The policies concerned are an [REDACTED] policy number [REDACTED] and two [REDACTED] policies number [REDACTED] and [REDACTED] (the instant appeal relates only to the [REDACTED] policy). The claims were denied and the decision held that the heirs have no right to compensation. The decision states: "*1. [REDACTED] life insurance company, policy [REDACTED]. … The [REDACTED] life insurance company no longer possesses any documents pertaining to insurance policy no. [REDACTED]. It is not even possible to ascertain whether the insurance policy still existed in 1933 and therefore whether the policy could have incurred damages in accordance with paragraph 2 of the BEG. If it is not possible to determine the incurrence of damages, then the legal assumption in paragraph 64 BEG cannot be applied either. A claim for compensation must therefore be rejected based on a lack of evidence of damages*".

THE ISSUES FOR DETERMINATION

18. There is no doubt that the Appellant's father took out an insurance policy with [REDACTED], that the Appellant and his sister as heirs of their father could be entitled to the proceeds of this policy and that all the family members were Holocaust victims. Therefore, the claim of the Appellant in general is within the scope of the Agreement. But, the Respondent has succeeded in establishing a valid defence in accordance with the Agreement. According to Section 17.3 of the Appeal Guidelines, the Appellant is not entitled to payment from Foundation funds if:

    17.3.4 the policy (or policies) in question are considered to have been covered by a decision of a German restitution or compensation authority in accordance with section 2 (1) (c) of the Agreement.

19. The Respondent proved that the policy [REDACTED] was the subject of a compensation procedure by providing compensation and restitution authority archive evidence in the form of, among other, documents, a draft decision by the compensation authorities in Düsseldorf dated 2nd October 1962, which records that the aforementioned policy was the subject of compensation proceedings under BEG law. Since this is the case, the policy in question was covered by a decision of the compensation authority, and the Panel therefore, according to section 2.2.2 of the Appeal Guidelines, lacks jurisdiction to reopen any claim with regard to such policies.

20. It is acknowledged that the result (dismissal because the insurance policy in question had been subject of a BEG-compensation procedure) appears to be dissatisfying. The reason is that, in contrast to the BEG, the provisions of the Agreement (see paragraph 11) and its Annexes are, in many aspects, more favourable for claimants (see for instance, the relaxed standards of proof, the provisions on valuation including minimum payments, and – relevant for this appeal – the provisions for compensation of payments into so-called "blocked accounts"). It is difficult to explain and to accept why claims which have been the subject of a BEG-procedure cannot be re-opened even in cases in which a decision based on the provisions of the Agreement and its Annexes might lead to a decision in favour of the Claimant/Appellant. However, the Agreement and its Annexes are binding not only upon the Appeals Panel and its Members but also upon the parties to the appeal, the Appellant by signing appeal form, who all have accepted it (including the limitations of appeal jurisdiction). The Parties, although aware of the enhanced benefits provided under the Agreement as compared with the BEG, have, nevertheless, stipulated that claims which already have been covered by a BEG-decision are excluded from any further compensation based on the provisions of the Agreement and have given the Appeals Panel no jurisdiction to re-open such cases. None of the exceptions from this principle enumerated in Section 2 (1) (c) of the Agreement applies in the instant case. Those exceptions are:

    - The claim was rejected by the German restitution or compensation authorities due to their own lack of jurisdiction; or
    - The claim was rejected by the German restitution or compensation authorities due to the fact that the claim was made by a person not entitled to claim; or
    - The claim was not timely filed; or
    - Documentary evidence that would have led to a decision in favour of the Claimant was previously unavailable but subsequently became available (such as opening of company or government archives).

    The first three exceptions do not apply on their face. The fourth exception also does not apply, because the decision in the BEG procedure would not have been different with regard to whether the central register index card had been available during the BEG-procedure (which is not entirely clear). This card would only have helped to trace the insurance policy number (which, however, was known) and the files containing the details of the insurance policy (which were not available in the BEG-procedure). The BEG-procedure did not fail because of lack of knowledge of the insurance number but because of lack of knowledge about the details of the insurance policy.

21. The Appellant's reasons for appealing set out in the appeal form (see paragraph 14 at the beginning) appear to be based on a misunderstanding. The central register of [REDACTED] is a register as described in [REDACTED]'s letter dated 20th March 2001. It is only an instrument for retrieving policy numbers and files and not the file archive itself. Therefore, it is possible that the central register (apparently described by the Appellant as "*IN data*") does still exist, whereas the archives containing the files (apparently described by the Appellant as "*OUT data*") vanished.

The Appellant's further reasons for appealing (see paragraph 14 at the end) are based upon a lack of understanding that, based on the provisions of the Agreement, the prior BEG-procedure bars any further compensation. The Appellant's reasoning that [REDACTED] did not conduct a thorough research might also be based on a misunderstanding. It is known that [REDACTED] lost parts of its archives as a result of war damages or later for other reasons. [REDACTED] has been audited in accordance with the ICHEIC's audit standards and has been declared audit compliant. There is nothing further that indicates that [REDACTED] did not conduct a thorough research.

22. Nevertheless, in view of the above the Appellant might be considered eligible for a humanitarian payment under the relevant ICHEIC procedures. The ICHEIC will be informed accordingly

IT IS THEREFORE HELD AND DECIDED:

The appeal is dismissed.

Dated this 11th day of May 2005

_____
[REDACTED]