

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

AGRIPPAH M. MUTAMBARA et al.,

Plaintiffs,

v.

LUFTHANSA GERMAN AIRLINES,

Defendant.

Civil Action No.: 02-0827

Document No.: 2

**MEMORANDUM OPINION**

**ORDERING FURTHER BRIEFING ON THE *FORUM NON CONVENIENS* ISSUE**

**I. INTRODUCTION**

Ambassador Agrippah M. Mutambara, Esther Mutambara, and their two children Ibrahim and Mwaarianesu (collectively, “the plaintiffs”) bring this suit against Lufthansa German Airlines (“Lufthansa” or “the defendant”). The plaintiffs allege that Lufthansa personnel at the Frankfurt International Airport harassed and discriminated against the plaintiffs based on their African and perceived Muslim origin by questioning the validity of their visas and refusing to allow the two children to board a connecting flight to Moscow. The case comes before the court on Lufthansa’s motion to dismiss for *forum non conveniens* and failure to state a claim on which relief can be granted. For the following reasons, the court does not rule on the motion but instead orders a status report and supplemental briefing.

## II. BACKGROUND

Ambassador Mutambara is a citizen of Zimbabwe and serves as Zimbabwe's ambassador to Russia. Compl. ¶ 4. He and his family live at the Zimbabwean Embassy in Moscow. *Id.* The defendant is a German corporation. *Id.* at 3-4.

On May 31, 2001, the plaintiffs flew on a Lufthansa flight from Moscow to Boston. *Id.* The itinerary included a transfer at Frankfurt International Airport. *Id.* During their return trip from Boston to Moscow on June 14, 2001, the plaintiffs once again had to board a connecting flight in Frankfurt. *Id.* The plaintiffs allege that “while waiting in the queue for boarding” their connecting flight in Frankfurt, Lufthansa officials questioned them regarding the validity of their diplomatic and service passports and visas. *Id.* Despite Ambassador Mutambara's attempts to explain that diplomatic agreements between Russia and Zimbabwe exempted certain holders of diplomatic and service passports from carrying their visas, Lufthansa officials allegedly told him that although he and his wife could board the airplane, his children could not. *Id.* As a result, the family missed their connecting flight to Moscow. *Id.*

After the incident, Lufthansa officials allegedly denied the plaintiffs access to their luggage for clothing and medication, and rudely rebuffed the plaintiffs' attempts to speak with a manager. *Id.* Consequently, the plaintiffs were stranded in the airport and forced to sleep overnight on chairs. *Id.* The plaintiffs further allege that as a result of being denied access to warm clothing, “the family, especially, the youngest child became physically ill [due] to the stress of the situation and environment.” *Id.* The family boarded a flight to Moscow the next day. *Id.* ¶ 7.

The plaintiffs claim that Lufthansa officials acted in such a manner because the airline “maintains a policy of subjecting to special interrogation, scrutiny and questioning . . .

individuals of African, or perceived Muslim ethnicity, ancestry or appearance based on their race, religion and/or national origin.” *Id.* ¶ 9. As a result of the incident, the family experienced humiliation, shame, and emotional distress. *Id.* ¶ 8.

In their complaint, the plaintiffs set forth eight counts. In their opposition to Lufthansa’s motion to dismiss, the plaintiffs concede that they failed to state a claim on counts I (Federal Aviation Act), III (Civil Rights Act of 1866), IV (Civil Rights Act of 1964) and VI (loss of consortium) but urge the court not to dismiss the remaining four counts. Pls.’ Opp’n at 1-2. The remaining four counts allege violations of the common law duty to provide non-discriminatory transportation via common carrier, violations of “local human rights laws,” violations of the Warsaw Convention, and false imprisonment. *Id.* ¶¶ 15-37.

In its motion to dismiss, Lufthansa argues that the court should invoke the doctrine of *forum non conveniens* to determine that this district is not a proper forum for the plaintiffs’ claims. Def.’s Mot. to Dismiss at 11-13. Lufthansa also argues that the court should dismiss the claims for failure to state a claim on which relief can be granted. *Id.* at 5-11. For the reasons that follow, the court orders a status report and further briefing on the *forum non conveniens* issue. The court will not address Lufthansa’s additional arguments until it determines whether this district is an appropriate forum for this case.

### **III. ANALYSIS**

#### **A. Legal Standard for the *Forum Non Conveniens* Doctrine**

The court first outlines the purpose of the *forum non conveniens* doctrine. Next, the court discusses the two-pronged inquiry for determining whether *forum non conveniens* applies to this case.

## **1. Purpose of the *Forum Non Conveniens* Doctrine**

The doctrine of *forum non conveniens* is “a supervening venue provision, permitting displacement of the ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined.” *Am. Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994). Under *forum non conveniens*, dismissal ordinarily is appropriate where trial in the plaintiff’s chosen forum would impose a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1981). This determination is committed to the discretion of the trial court and is entitled to substantial deference. *Am. Dredging Co.*, 510 U.S. at 455.

The central purpose of any *forum non conveniens* inquiry is to ensure that the trial is reasonably convenient in light of the governing circumstances. *Piper*, 454 U.S. at 256. Generally, courts give great deference to a plaintiff’s choice of home forum, as it is “reasonable to assume that this choice is convenient.” *Id.* When the plaintiff does not reside in the United States, however, “this assumption is much less reasonable” and the court should give the plaintiff’s choice less deference. *Id.*

Applying the standard for *forum non conveniens*, the court first must determine whether there is an adequate alternative forum. *Jackson v. Am. Univ. in Cairo*, 2002 U.S. App. LEXIS 25896, at \*2 (D.C. Cir. Dec. 13, 2002). If so, the court must balance public and private interest factors regarding the respective forums. *Id.*

## **2. Adequate Alternative Forum**

An alternate forum is adequate when the defendant is amenable to process in the other jurisdiction. *Piper Aircraft*, 454 U.S. at 255 n.22. However, “[i]n rare circumstances . . . where

the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied.” *Id.* For example, “dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute.” *Id.* In assessing the adequacy of the alternate forum, the court should not give substantial weight to the possibility of a change in substantive law. *Id.* at 247. Nor should a court consider a foreign forum inadequate merely because it employs different adjudicative procedures or because of general allegations of corruption in the judicial system. *El-Fadl v. Centr. Bank of Jordan*, 75 F.3d 668, 678 (D.C. Cir. 1996).

Finally, the defendant bears the burden of proving that such an adequate alternative forum exists. *El-Fadl*, 75 F.3d at 677. To meet its burden, the defendant must provide evidence or other information that enables the District Court to evaluate the suitability of the alternative forum. *Id.* The amount of information that the defendant must provide depends on the facts of the individual case. *Id.* For example, the defendant must provide more detailed information if the plaintiff controverts the defendant’s evidence. *Id.* If the record before the court is so “fragmentary” that the court cannot make a sound determination of whether an adequate alternate forum exists, the court can order further development of the facts. *Id.*

### **3. Balancing of Public and Private Interest Factors**

As to the second prong of the *forum non conveniens* inquiry, once a court determines that an alternative forum exists, it must evaluate the relevant private interest factors affecting the convenience of the litigants and public interest factors affecting the convenience of the forum. *Am. Dredging Co.*, 510 U.S. at 448. Private interest factors include: (1) relative ease of access to sources of proof; (2) availability of compulsory process for attendance of unwilling witnesses; (3) costs of obtaining attendance of willing witnesses; (4) possibility of viewing the premises;

(5) other practical problems that impact the efficiency and cost of a trial; and (6) enforceability of a judgment if one is obtained. *Id.* The public interest criteria include: (1) administrative difficulties flowing from court congestion; (2) local interest in having localized controversies decided at home; (3) avoidance of unnecessary choice of law problems; and (4) unfairness of burdening citizens in an unrelated forum with jury duty. *Id.*

Utilizing these factors, a court should consider whether trial in the chosen forum would “establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff’s convenience,” or if the trial would be inappropriate “because of considerations affecting the court’s own administrative and legal problems.” *Id.* Thus, either private interest factors or public interest factors can require dismissal. *Jackson*, 2002 U.S. App. LEXIS 25896, at \*4.

**B. The Court Orders Further Briefing on the *Forum Non Conveniens* Issue  
Because Lufthansa Failed to Demonstrate that Germany is an  
Adequate Alternative Forum**

For Lufthansa to prove that the court should dismiss the matter based on *forum non conveniens*, it must demonstrate that an adequate alternative forum exists for the plaintiffs’ claims. *Jackson*, 2002 U.S. App. LEXIS 25896, at \*2. Because Lufthansa has failed to satisfy its burden, the court will not at this time dismiss the matter based on *forum non conveniens*.<sup>1</sup> *El-Fadl*, 75 F.3d at 677.

Lufthansa asserts that Germany would function as an adequate alternative forum. Def.’s Mot. to Dismiss at 11-12. Lufthansa explains that because its principal place of business is in Germany, it is amenable to service of process there. *Id.* at 12. Second, Lufthansa argues that Germany has anti-discrimination laws that could apply to the plaintiffs’ claims. *Id.*

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<sup>1</sup> Because the existence of an adequate alternative forum is a threshold inquiry for *forum non conveniens*, the court does not, at this time, express an opinion as to whether Lufthansa has shown that the balance of public and private interest factors favors dismissal. *El-Fadl*, 75 F.3d at 677.

A similar situation arose in *El-Fadl*, where the plaintiff, a Lebanese national living in Jordan, asserted various tort claims against the Petra International Banking Corporation (“the PIBC”) and several Jordanian institutions. *El-Fadl*, 75 F.3d at 670. In arguing for dismissal on *forum non conveniens* grounds, the PIBC proffered an affidavit from a Jordanian attorney who concluded that, “Jordanian courts are open to El-Fadl to adjudicate these claims against the defendants.” *Id.* at 677. To refute this, El-Fadl proffered an affidavit from a different Jordanian attorney disputing the availability of Jordanian courts for the claims. *Id.* at 678. This circuit determined that the defendant’s affidavit did not sufficiently demonstrate that Jordan was an alternative forum. *Id.* at 678-79.

In the case at bar, Lufthansa similarly has failed to provide the court with enough information to evaluate the proposed alternative forum. *El-Fadl*, 75 F.3d at 677. Lufthansa’s vague and conclusory statements are similar to those in the affidavit submitted by the defendant in *El-Fadl*. *Id.* Even though the plaintiffs have provided little in their opposition to refute Lufthansa’s argument that Germany is an adequate alternate forum, Lufthansa’s unsupported statements about Germany do not satisfy Lufthansa’s burden of proof on this issue. *Id.* In addition, in *El-Fadl*, this circuit noted that information about the proposed alternate forum should consist of affidavits or other evidence. *Id.* Here, Lufthansa has provided neither. Lufthansa has left the court without guidance on a number of important issues that would assist it in evaluating the adequacy of the alternative forum.<sup>2</sup>

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<sup>2</sup> A non-exhaustive list of possible issues the defendant could have addressed include: Do these “German anti-discrimination laws” address discrimination in places of public accommodation or common carriers? See Def.’s Mot. to Dismiss at 11. Are persons of African or perceived Muslim ancestry, persons with African or Muslim sounding names, and persons born in Africa and the Middle East protected by such laws? See Compl. ¶¶ 9-11. Would the laws provide for *direct* remedies to the plaintiffs? See *Nemariam v. Fed. Dem. Republic of Ethiopia*, 315 F.3d 390, 395 (D.C. Cir. 2003).

Consequently, the court cannot make a sound determination of whether an adequate alternative forum exists. *El-Fadl*, 75 F.3d at 677; *see also Nemariam v. Fed. Dem. Republic of Ethiopia*, 315 F.3d 390, 395 (D.C. Cir. 2003) (stating that while a more limited recovery than is available in the plaintiff's forum of choice does not automatically make the alternative forum inadequate, an alternative forum in which the plaintiff can recover nothing for a valid claim is not adequate). As a result, the court cannot consider the second prong of the *forum non conveniens* inquiry, the balancing of public and private factors. Because the court will not address Lufthansa's failure to state a claim arguments before determining the jurisdictional issue -- whether this district is a proper forum for this case -- the court orders further briefing on the *forum non conveniens* issue.<sup>3</sup>

#### IV. CONCLUSION

For all these reasons, the court orders Lufthansa to file a supplemental brief that will replace the section of the motion to dismiss that addresses *forum non conveniens*.<sup>4</sup> The court encourages the parties to confer and discuss the possibility of narrowing any of the issues in dispute in light of the court's memorandum opinion. By April 30, 2003, the parties shall file a joint status report that informs the court of any narrowing of the issues. If the plaintiffs maintain that this district is the proper forum for their case, then Lufthansa shall state in the status report whether it intends to file a supplement that replaces the *forum non conveniens* section of its motion to dismiss. The supplement must be filed by May 19, 2003, the response by June 9,

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<sup>3</sup> The parties' supplemental briefing should address the adequacy of any proposed alternative forum and should also explain why this forum is appropriate (given the lack of an obvious connection between this case and this particular district).

<sup>4</sup> The supplement is not required if the defendant determines that, due to the available evidence, it must withdraw the *forum non conveniens* argument.



2003, and the reply by June 23, 2003. The supplement and response are limited to eight pages, and the reply is limited to five pages, not including exhibits. An order directing the parties in a manner consistent with this Memorandum Opinion is separately and contemporaneously issued this 24th day of March, 2003.

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Ricardo M. Urbina  
United States District Judge

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

AGRIPPAH M. MUTAMBARA *et al.*,

Plaintiffs,

v.

LUFTHANSA GERMAN AIRLINES,

Defendant.

Civil Action No.: 02-827

Document No.: 2

**ORDER**

**ORDERING FURTHER BRIEFING ON THE *FORUM NON CONVENIENS* ISSUE**

For the reasons stated in this court's Memorandum Opinion separately and contemporaneously issued this 24th day of March, 2003, it is

**ORDERED** that by April 30, 2003, the parties file a joint status report as described in the conclusion to the Memorandum Opinion; and it is

**FURTHER ORDERED** that the defendant file a supplemental brief that will replace the section of its motion to dismiss that addresses *forum non conveniens*. The supplement must be filed by May 19, 2003, the response by June 9, 2003, and the reply by June 23, 2003. The supplement and response are limited to eight pages, and the reply is limited to five pages, not including exhibits.

**SO ORDERED.**

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Ricardo M. Urbina  
United States District Judge

**Service List in *Mutambara v. Lufthansa German Airlines*, Civil Action Number 02-827**

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