

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Fernando Contreras Alcalá,)	Civil Action No. 4:14-cv-04176-RBH
)	
vs.)	
)	
Claudia García Hernández,)	<u>CONSENT MOTION FOR</u>
)	<u>PETITIONER AND WITNESS TO</u>
Respondent.)	<u>APPEAR REMOTELY</u>
)	

Petitioner Fernando Contreras Alcalá (“Petitioner”), with the consent of Respondent Claudia García Hernández, respectfully requests the Court to enter an order allowing Petitioner and his father, Antonio Contreras Monterosas (“Mr. Monterosas”),¹ to appear at trial on May 11, 2015, and May 12, 2015, telephonically or by live video (Skype), pursuant to Federal Rules of Civil Procedure Rule 43(a).² Based on the compelling circumstances of a Hague Convention trial, Petitioner and Mr. Monterosas should be granted leave to testify remotely at trial because:

- Good cause exists to permit the remote testimony:
 - Petitioner and Mr. Monterosas are unable to obtain passports and visas;
 - Petitioner and Mr. Monterosas are financially unable to travel; and
 - Petitioner would be at grave risk of losing his job if he traveled.
- Sufficient procedural safeguards are present to ensure compliance with the mandates of Rule 43(a):
 - A member of the Secretary of Foreign Relations will identify Petitioner and Mr. Monterosas by a valid identification card; and
 - Neither Petitioner nor Mr. Moneteroasas will be under improper influence to testify.

Petitioner submits a proposed order in conjunction with this Motion directly to chambers.

¹ Mr. Monteroas will appear as a fact witness on behalf of Petitioner.

² The Parties do not file a supporting memorandum with this motion as “a full explanation of the motion . . . is contained within the motion and a memorandum would serve no useful purpose.” Local Civ. Rule 7.05 (D.S.C.).

ARGUMENT

The purposes of the Hague Convention are (1) to secure the immediate return of a child wrongfully removed or wrongfully retained in any contracting state; and (2) to ensure that rights of custody and access under the law of the minor’s habitual state of residence are effectively respected in the forum state. Hague Convention, art. 1. To further these goals, the drafters of the Hague Convention directed that “[t]he judicial . . . authorities of Contracting States shall act expeditiously in proceedings for the return of children.” Hague Convention, art. 11. Courts have adopted flexible approaches to adhere to this directive, including allowing remote testimony.

Consistent with this flexible directive, the Parties request that Petitioner and Mr. Monterosas be permitted to appear by Skype or, in the alternative, by phone.³ Under Rule 43(a), a court may permit remote testimony “[f]or good cause in compelling circumstances and with appropriate safeguards.” Fed. R. Civ. P. 43(a). As the Fourth Circuit has noted, remote testimony does not “preclude the respondent from confronting and conducting relevant cross-examination of the witnesses,” and thus does not generally offend due process considerations. *United States v. Baker*, 45 F.3d 837, 843-44 (4th Cir. 1995); *see also Edwards v. Logan*, 38 F. Supp. 2d 463, 466 (W.D. Va. 1999) (approving remote testimony for prisoner’s § 1983 claim).

A. Good Cause in Compelling Circumstances

Courts applying Rule 43(a) have established several circumstances justifying a court in permitting remote testimony. One such circumstance is the inability to obtain a visa to enter the

³ The Foreign Relations Secretary’s Córdoba, Veracruz office located at Av. 3, Calle 1, C.P. 94500, Córdoba, Veracruz (tel. 271-712-34-15) has confirmed it has the ability to offer Skype for video-conferencing. In the event that video-conferencing is not available, the office will coordinate Petitioner and Mr. Monterosas’ testimony by phone. Rule 43(a) does not prohibit the use of audio-testimony. In fact, the comments suggest video conferencing should be used “when the cost is reasonable in relation to the matters in dispute, the means of the parties, and the circumstances that justify transmission.” Fed R. Civ. P. 43(a) advisory committee’s note.

country. *El-Hadad v. United Arab Emirates*, 496 F.3d 658, 668–69 (D.C. Cir. 2007). Others include the burden of travel. For instance, in *Lopez*, the court concluded that the cost of international travel for a party was also sufficient justification to authorize remote testimony. *Lopez*, 748 F. Supp. 2d at 480. This was especially true given the party’s indigent status—earning the equivalent of \$7,000 per year in Honduras. *Id.*; see also *Matovski v. Matovski*, No. 06 CIV. 4259, 2007 WL 1575253, at *3 (S.D.N.Y. May 31, 2007) (“In the limited context of an ICARA case and on these facts, I consider the father's inability to obtain a visa, his limited financial resources and his physical distance (22 hours by air travel) to satisfy the standard of ‘for good cause shown in compelling circumstances’”).

Coupled with the general relaxation of procedural rules to promote conformity with the overarching goals of the convention, sufficient cause exists for the Court to grant the Parties’ request. First, Petitioner and Mr. Monterosas are unlikely unable to obtain a visa, both for reasons outside of his control and due to his indigent status. {See Decl. of Sarah Buffett ¶ 11, ECF No. 18-2.} In fact, it is likely that Petitioner and Mr. Monterosas would be denied a visa outright because of their limited financial resources. {*Id.* ¶¶ 8, 9, 11.} Furthermore, both would be financially unable to travel.

Therefore, Petitioner and Mr. Monterosas’ inability to obtain a visa and their financial inability to travel satisfies the “good cause in compelling circumstances” to permit their testimony by Skype or telephone.

B. Appropriate Safeguards

Appropriate safeguards are also in place for Petitioner and Mr. Monterosas’ remote testimony pursuant to Federal Rules of Civil Procedure Rule 43(a). The advisory committee’s notes to Rule 43(a) suggest that appropriate safeguards should be in place:

- (1) Accurate identification of the witness;
- (2) Protection against influence from persons present with the witness; and
- (3) Accurate transmission.

Fed. R. Civ. P. 43(a) advisory committee's note. Though scant case law is available on these "appropriate safeguards," several examples of procedures used to satisfy the rule include:

- Requiring that a notary identify the witness and swear that witness in remotely. *Mission Capital Works, Inc. v. SC Rests., Inc.*, No. C-07-1807, 2008 WL 5100313, at *1 n.12 (W.D. Wash. Dec. 3, 2008);
- Ensuring that the witness is alone in the room and has been provided with the documentary evidence in advance. *Scott Timber, Inc. v. United States*, 93 Fed. Cl. 498, 501 (Fed. Cl. 2010); and
- Requiring the movant to pay all costs associated with the remote testimony and requiring that it be tested with the Court's IT personnel prior to the trial in which it is used. *Monserate v. K.K. Mach. Co.*, No. 10-3732, 2013 WL 1412194, at *4 (E.D.N.Y. Apr. 8, 2013).

In accordance with this guidance, the Foreign Relations Secretary's Córdoba, Veracruz office will facilitate the testimony of Petitioner and Mr. Monterosas as follows:

- Petitioner and Mr. Monterosas will report to the Foreign Relations Secretary's local office in Córdoba, Veracruz, Mexico, on May 11, 2015, and May 12, 2015, by 8:30 AM EST;
- When at the appropriate local office, Petitioner and Mr. Monterosas will provide sufficient documentation to a consular official who will verify their identities with the Court prior to their testimony;
- Petitioner and his counsel will troubleshoot any problems with the technology in advance of the trial, and will work with the translator and Court/Consular staff to ensure that he and Mr. Monterosas can be heard and understood;
- Petitioner and Mr. Monterosas will testify separately, in a closed room, free of any outside influence (both in-person and through other technological means) on their testimonies;
- All documentary evidence presented to Petitioner and Mr. Monterosas will be marked prior to the trial and provided to them to facilitate their testimony; and

- Petitioner (through counsel) will pay any costs associated with the remote testimony.

Petitioner will also employ any other appropriate safeguards implemented by the Court, and will work to ensure that the logistics surrounding Petitioner and Mr. Monterosas' remote testimony do not distract from the expedited nature of the proceedings.

CONCLUSION

Therefore, Petitioner requests that the Court enter an order authorizing Petitioner and Mr. Monterosas to testify telephonically or by live video (Skype) on May 11, 2015, and May 12, 2015, at 9:30 AM EST, from the Office of the Foreign Relations Secretary in Córdoba, Veracruz, Mexico.

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