

SUPERIOR COURT OF NEW JERSEY
BERGEN COUNTY
CHANCERY DIVISION: FAMILY PART

BRIAN KINYANJUI DAVIS,)	Docket No. FD-02-315-11
)	
Plaintiff,)	STATEMENT OF INTEREST OF
)	THE UNITED STATES
v.)	
)	
NICOLETTE SAMAKANDE,)	
)	
Defendant.)	
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PRELIMINARY STATEMENT

In an e-mail dated August 17, 2010, Judge Bonnie Mizdol asked the Department of State, on behalf of Judge William DeLorenzo, whether the Superior Court of New Jersey may exercise jurisdiction over defendant Nicolette Samakande—the daughter of an accredited diplomatic agent—and/or over Ms. Samakande’s minor child. Specifically, Judge Mizdol asked whether orders from the Superior Court for the taking of DNA samples would be enforceable against Ms. Samakande and her minor child and whether this Court has the authority to order that the child remain in New Jersey.¹ Pursuant to 28 U.S.C. § 517,² the United States submits this Statement of Interest in response to Judge Mizdol’s request.

It is the position of the United States, consistent with the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (“Vienna Convention”), and the Agreement Between the United Nations and the United States of America Regarding the

¹ In communications with the Department of State, the Permanent Mission of the Republic of Zimbabwe has acknowledged that Mr. Davis is the father of Ms. Samakande’s child. This acknowledgment appears to obviate the need to address this Court’s question regarding the taking of DNA samples either from Ms. Samakande or her child.

² Under 28 U.S.C. § 517, “any officer of the Department of Justice, may be sent . . . to any State . . . to attend to the interests of the United States in a suit pending . . . in a court of a state.”

Headquarters of the United Nations, June 26, 1947, 61 Stat. 3416, 11 U.N.T.S. 11 (“UN Headquarters Agreement”), that Ms. Samakande, as an unmarried daughter residing in the household of an accredited diplomat who is her father, enjoys immunity from this Court’s jurisdiction because she is a member of “the family of a diplomatic agent forming part of his household” as that phrase is used in Article 37 of the Vienna Convention. However, Ms. Samakande’s minor child, as the grandchild of a diplomat, does not qualify as a member of the diplomat’s “family” under Article 37 of the Vienna Convention and is therefore subject to the jurisdiction of the Superior Court.

FACTUAL BACKGROUND

As the United States understands the facts, Ms. Samakande and plaintiff Brian Kinyanjui Davis are both 20 years old. Both reside in Fort Lee, New Jersey, but do not live together. Ms. Samakande is the daughter of Felix Samakande, the Second Secretary to the Permanent Mission of Zimbabwe to the United Nations. Ms. Samakande resides exclusively in her father’s home, with her mother and sisters. She is not married and is not a citizen of the United States.

In July 2010, Ms. Samakande gave birth to a daughter. Following the birth of the child, Mr. Davis applied *ex parte* to the Superior Court for a temporary restraining order preventing Ms. Samakande from taking the child out of the country or out of New Jersey, and for an order allowing Mr. Davis parenting time with the child on a daily basis. The Superior Court granted the requested temporary injunctive relief on August 3, 2010.

Ten days later, the Department of State provided a diplomatic note to the Permanent Mission of Zimbabwe to the United Nations. That note certified that Ms. Samakande, as the 20 year-old unmarried daughter of an accredited diplomatic agent residing in his household, enjoys immunity from the civil jurisdiction of the United States. The Department of State understands

that this certification of diplomatic status, attached to this brief as Exhibit 1, was previously submitted to this Court.

LEGAL BACKGROUND

The Vienna Convention, a multilateral treaty that entered into force for the United States in 1972, governs the legal status of bilateral diplomatic missions and diplomatic mission personnel. The UN Headquarters Agreement provides that diplomats accredited to the United Nations are entitled to the same privileges and immunities in the United States as the United States accords diplomatic envoys who are accredited to it. *See* UN Headquarters Agreement art. V, § 15. The UN Headquarters Agreement thus extends the same privileges and immunities provided under the Vienna Convention to the members of the diplomatic staff of foreign government missions accredited to the United Nations and, derivatively, to their family members.

Among the key immunities established by the Vienna Convention is immunity from the jurisdiction of the receiving state, in this case the United States. Specifically, Article 31 provides that a diplomatic agent³ shall enjoy immunity from the criminal, civil, and administrative jurisdiction of the receiving state. Vienna Convention art. 31.⁴ Article 31 also provides that diplomats are “not obliged to give evidence as a witness,” and prohibits any “measures of execution” taken by the receiving state. *Id.* art. 31(2), (3). And Article 37(1) extends Article 31’s immunities to “[t]he members of the family of a diplomatic agent forming part of his

³ The Vienna Convention defines “diplomatic agent” as “the head of the mission or a member of the diplomatic staff of the mission.” Vienna Convention art. 1(e). Hereinafter, the terms “diplomatic agent” and “diplomat” are used interchangeably and include members of the diplomatic staff of foreign government missions to the United Nations (as well as those of the diplomatic staff of bilateral foreign government missions).

⁴ Article 31 provides three exceptions from immunity from the civil jurisdiction of the receiving state. None is relevant here.

household,” so long as they are “not nationals of the receiving state.” *Id.* art. 37(1). As discussed above, the UN Headquarters Agreement makes these immunities applicable to members of the diplomatic staff of foreign government missions accredited to the United Nations, and to their family members.

The Vienna Convention does not define the term “members of the family” referred to in Article 37. This omission was deliberate. The International Law Commission, which drafted Article 37, explained that: “The Commission did not feel it desirable to lay down either a criterion for determining who should be regarded as a member of the family, or a maximum age for children. The spouse and children under age at least, are universally recognized as members of the family, but cases may arise where other relatives too come into the matter.” Rep. of the Int’l Law Comm’n, 9th sess, April 23—June 28, 1957, U.N. Doc. A/CN.4/SER.A/1957/Add.1, 2 Y.B. Int’l L. Comm’n 141 (1957). Accordingly, states universally accept the accreditation under Article 37 of spouses and children below the age of majority. *See* Eileen Denza, *Diplomatic Law, Commentary on the Vienna Convention on Diplomatic Relations* 393 (3d ed. 2008) (hereinafter “Diplomatic Law”). The Supreme Court has long recognized that “[i]n interpreting any treaty, the opinions of our sister signatories . . . are entitled to considerable weight.” *Abbott v. Abbott*, 130 S. Ct. 1983, 1993 (2010) (quoting *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 176 (1999) (quoting *Air France v. Saks*, 470 U.S. 392, 404 (1985) (internal alterations and quotation marks omitted)).

Consistent with this universal interpretation and practice, the Department of State has long interpreted Article 37(1) of the Vienna Convention, in conjunction with the UN Headquarters Agreement, to extend diplomatic privileges and immunities to the children of diplomatic and UN Mission members who are unmarried, are under 21 years of age, and who

“reside exclusively” in a diplomatic or U.N. Mission member’s household. The United States Mission to the United Nations has implemented this longstanding interpretation by advising United Nations Missions of the Department of State’s interpretation of Article 37(1) and the UN Headquarters Agreement for purposes of accreditation. *See* Dip. Note HC-60-02, United States Mission to the United Nations New York (Nov. 13, 2002), attached as Exhibit 2.⁵ However, absent unusual circumstances,⁶ neither the Department of State nor the United Nations accepts a diplomat’s or a UN Mission member’s grandchild as a “member[] of the family” for purposes of extending diplomatic privileges and immunities.

In order to facilitate the identification of qualifying “members of the family” and to extend to them whatever diplomatic privileges and immunities they may enjoy, the Vienna Convention requires the sending state to notify the receiving state of the arrival and departure of mission members and their family members. Vienna Convention art. 10. Under similar procedures established pursuant to the UN Headquarters Agreement art. V, § 15, Mr. Samakande was notified to the United Nations as the Second Secretary of the Permanent Mission of Zimbabwe and accepted by the United States in that capacity on September 18, 2006. At the same time, Mr. Samakande’s unmarried, then-sixteen-year-old daughter—Ms. Samakande—was

⁵ Children under the age of 23 who attend an institution of higher learning on a full-time basis are also considered “family” for Vienna Convention purposes by the United States. *See id.* Similarly, the United States advises bilateral diplomatic missions of the same definition of family members whose accreditation it will accept by diplomatic note. *See* Dip. Note 5/22/1986, Department of State to Embassies in Washington, D.C., attached as Exhibit 3.

⁶ As Denza notes, “each receiving State applies its own rules with some degree of flexibility and unusual cases are settled in negotiation at the time of notification rather than left to any kind of arbitration or adjudication in the context of legal proceedings.” Diplomatic Law 393. In the unusual situation in which a sending state requests that a grandchild be treated as a family member for Vienna Convention purposes and attests, with evidentiary support, that the diplomat who is a grandparent has legal custody of the grandchild living in the household, the United States will consider such requests. No such request has been received by the Department of State here.

notified to the United Nations and the United States as a member of Mr. Samakande's family residing exclusively in his household.⁷ As a properly notified member of Mr. Samakande's household, therefore, Ms. Samakande enjoys in the United States the privileges and immunities extended to an accredited family member of a diplomatic agent. Ms. Samakande's child, however, as the grandchild of a UN Mission member, is not entitled to the privileges and immunities established by the UN Headquarters Agreement and the Vienna Convention.

The immunities established for diplomats and their family members by the Vienna Convention and extended by the UN Headquarters Agreement to UN diplomats and their family members reflect a centuries-old practice in international law, which recognizes that the immunity from jurisdiction of diplomats and their dependents is essential to their ability to act on behalf of their sending sovereign and to fulfill their critical role in international relations. Thus, "the United States recognizes the privileges of foreign diplomats in the U.S. with the understanding that American diplomats abroad will be afforded the same protections from intrusions by the host state." *767 Third Ave. Assocs. v. Permanent Mission of the Republic of Zaire*, 988 F.2d 295, 300 (2d Cir. 1993).

DISCUSSION

Felix Samakande presently serves as the Second Secretary to the Permanent Mission of the Republic of Zimbabwe to the United Nations. Under the UN Headquarters Agreement, Mr. Samakande is accordingly entitled to the immunities specified in the Vienna Convention, which include immunity from the civil jurisdiction of the United States.

⁷ In addition to Ms. Samakande, the following family members were notified and accredited on that date as part of Mr. Samakande's household: Mrs. Ellen Samakande (his spouse), and three unmarried daughters under the age of 21: Ms. Samantha Samakande, Ms. Charmaine Samakande, and Ms. Cherice Samakande.

As explained above, under Article 37(1) of the Vienna Convention and the Department of State’s longstanding interpretation of that Article as applied to UN mission diplomats pursuant to the UN Headquarters Agreement, Ms. Samakande—as the daughter of Mr. Samakande—enjoys immunity from the civil jurisdiction of the United States as a “member[] of the family.” This immunity extends to all forms of judicial proceedings. *See e.g. United States v. Al-Hamdi*, 356 F.3d 564, 571 (4th Cir. 2004); *Case Concerning United States Diplomatic and Consular Staff in Iran*, 1980 I.C.J. 3 (1980) (“[N]o member of the United States diplomatic or consular staff may be . . . subjected to *any form of judicial proceedings.*”) (emphasis added). Ms. Samakande is therefore immune from this Court’s jurisdiction and the case brought against her is subject to dismissal. *See* 22 U.S.C. § 254d. In accordance with the Department of State’s interpretation of Article 37(1), discussed above, however, a diplomat’s grandchild does not qualify as a family member entitled to the privileges and immunities specified by the Vienna Convention. Ms. Samakande’s child is thus subject to the jurisdiction of courts in the United States, including this Court.

Although this Court may exercise jurisdiction over Ms. Samakande’s child, the exercise of jurisdiction over the child must be accomplished consistent with the requirements of the Vienna Convention. Specifically:

(1) Any order this Court might issue must be enforced in a manner that would not result in this Court also exercising jurisdiction over Mr. Samakande, Ms. Samakande, or other accredited family members in Mr. Samakande’s household. As explained above, Article 31 also forbids any “measures of execution” taken with respect to a diplomat or family member who is entitled to immunity.

(2) In addition, any order must be enforced in a manner that does not require any intrusion into the premises of the mission or into Mr. Samakande’s private residence. *See* Vienna Convention art. 22(1) (“The premises of the mission shall be inviolable” and “agents of the receiving State may not enter them, except with the consent of the head of the mission.”); *id.* art. 30(1) (“The private residence of

a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.”).

(3) Any order must not subject Mr. Samakande, Ms. Samakande, or other accredited family member in Mr. Samakande’s household to any form of arrest or detention. *See id.* art. 29(1) (ensuring the “inviolab[ility]” of “[t]he person of a diplomatic agent” and making clear that a diplomat “shall not be liable to any form of arrest or detention.”).

The Department of State’s views on the issues relevant to the Vienna Convention and the UN Headquarters Agreement in this case are entitled to great deference. “It is well settled that the Executive Branch’s interpretation of a treaty is entitled to great weight.” *Abbott*, 130 S. Ct. at 1993 (internal citation and quotation marks omitted); *see also Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982) (“Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.”). Indeed, courts have specifically deferred to the Department of State’s interpretation of the phrase “members of the family” referred to in Article 37(1) of the Vienna Convention, concluding “that the phrase ‘member of the family’ can reasonably be interpreted to exclude children who have reached twenty-one years of age and children still in school who have reached the age of twenty-three.” *Al-Hamdi*, 356 F.3d at 571.⁸

CONCLUSION

⁸ Ms. Samakande’s enjoyment of privileges and immunities under the Vienna Convention will endure only until she turns 21 or until she turns 23 if she is a full-time student. In any event, Ms. Samakande’s privileges and immunities, as well as her lawful presence in the United States, derive from her father’s status as a diplomat and his assignment at his government’s mission to the United Nations. Ms. Samakande’s privileges and immunities therefore will end when her father’s assignment terminates; when that happens, Mr. Samakande and all his family members must depart the United States. However, privileges and immunities subsist for a “reasonable period” after termination, usually 30 days, in order to prepare for departure and to depart the United States. *See* Vienna Convention art. 39(2). The duration of diplomatic assignments is variable; the Department of State generally is not advised in advance of termination dates and has no specific information with regard to Mr. Samakande’s assignment.

Based on the foregoing, it is the position of the United States that the UN Headquarters Agreement, which extends the privileges and immunities of the Vienna Convention to UN diplomats, precludes jurisdiction over Ms. Samakande, but does not preclude jurisdiction over Ms. Samakande's child.

Dated: October 28, 2010

Respectfully submitted,

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