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Kafala in the *SM* judgment of the Court of Justice and the Italian perspective

Cinzia Peraro

Abstract

The family reunification of European citizens with a foreign minor placed with them under *kafala* has been addressed in a recent judgment of the Grand Chamber of the EU Court of Justice involving the notion of direct descendant pursuant to Article 2(2)(c) of Directive 2004/38 on the free movement of Union citizens and their family members. The Court held that a minor under *kafala* is not a direct descendant but is granted the status of «other family member» pursuant to Article 3(2)(a). The ruling is significant for the Italian legal system, where the national courts have dealt with the issue of the recognition of this Islamic institution in various situations, and their interpretation appears to be in line with the CJEU judgment, although some doubts could arise as regards the difference in treatment between Italian citizens and third country nationals.

Kafala in the *SM* judgment of the Court of Justice and the Italian perspective

Cinzia Peraro*

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1. Introduction.

By a reference for a preliminary ruling from the Supreme Court of the United Kingdom[1], the Court of Justice was called upon to interpret the concept of «direct descendant» within the meaning of Article 2(2)(c) of Directive 2004/38 on the freedom of movement for European citizens and their family members[2], in order to establish whether it was possible for the UK authorities to grant an entry visa to an Algerian child who had been placed under *kafala* with a French couple married in the United Kingdom, where the husband has a permanent right of residence.

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[1] Reference for a preliminary ruling made by the decision of 14 February 2018 of the Supreme Court of the United Kingdom, received at the Court on 19 February 2018, case C-129/18, *SM* v *Entry Clearance Officer, UK Visa Section*; see also the order of 14 March 2018, by which the President of the Court of Justice dismissed the application for accelerated procedure, EU:C:2018:191.

[2] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, in *OJ* L 158 of 30 April 2004, pp. 77-123. For a general overview on family reunification in Directive 2004/38 and Directive 2003/86 (of 22 September 2003 on the right to family reunification, in *OJ* L 251 of 3 October 2003, pp. 12-18), see A. LANG, *Kafala and family reunification of third-country nationals*, in E. BERGAMINI, C. RAGNI (eds.) *Fundamental rights and best interests of the child in transnational families*, Cambridge 2019, pp. 97-113, at p. 101 ff.

The Grand Chamber of the Court of Justice delivered its judgment on 26 March 2019[3], in which it upheld the Advocate General's opinion[4] according to which a child placed under the *kafala* system cannot be defined as direct descendant. At the same time, it emphasised the role of the competent national authorities under Article 3(2) of Directive 2004/38 to facilitate the entry of family members of European citizens, including minors with this status, giving priority to their best interests.

The question referred to the European Court is not new for the Italian courts, which have addressed the issue of recognition of *kafala* not only in relation to family reunification, but also in other cases involving *inter alia* applications for adoption or parental leave where the *kafala* measure was asked to be considered as a prerequisite for the respective application. Overall, the Italian case law considers the regime created on the basis of this Islamic institution in a uniform manner, holding that it cannot be compared with adoption, but is more similar to foster care.

The Grand Chamber's ruling is therefore significant for the Italian legal system, where the approach of the Italian courts is apparently consistent with the *SM* judgment. However, it does leave some doubts concerning the difference in treatment between Italian citizens and third country nationals when seeking family reunification with a foreign minor.

2. *Kafala* in the international and European legal framework.

Kafala is an institution, widespread in Islamic countries, under which a married couple or unmarried persons (*kafil*) may take care of orphaned or otherwise abandoned children (*makful*) until they come of age. Its effects are determined according to the legislation of the country where the measure is adopted, or the act is concluded. By virtue of this relationship, no legally binding link is established with the family receiving the child and the powers of representation or protection remain with the competent

[3] Court of Justice, Grand Chamber, judgment of 26 March 2019, Case C-129/18, *SM* v *Entry Clearance Officer, UK Visa Section [SM (Enfant placé sous kafala algérienne)]*, EU:C:2019:248 (hereinafter «*SM* case»). For some comments see P. HAMMJE, *Reconnaissance d'une kafala au titre d'une vie familiale effective avec un citoyen européen aux fins d'octroi d'un droit de séjour dérivé*, in *Rev. crit. droit int. privé*, 2019, pp. 768-785; I.E. LÁZARO GONZÁLEZ, *«Kafala» y vida familiar desde el derecho de extranjería. A propósito de la sentencia del tribunal de Justicia (Gran Sala) de 26 de marzo de 2019*, in *Rev. electrónica estudios int.*, 2019, n. 37, pp. 32-38; N. MARCHAL ESCALONA, *La kafala, ciudadanía de la unión y los derechos fundamentales del menor: de Estrasburgo a Luxemburgo*, in *La Ley Unión Europea*, 2019, n. 71; F. MONÉGER, *Kafala: CJUE, gr. ch. 26 mars 2019, aff. C-129/18, SM c Entry Clearance Officer, UK Visa Section*, in *Journal droit int.*, 2019, pp. 1224-1231; M. ORLANDI, *La libera circolazione delle persone nell'Unione europea e la* kafala *di diritto islamico*, in *Dir. succ. fam.*, 2019, pp. 575-593; L. PANELLA, *Il riconoscimento della kafalah islamica nella giurisprudenza delle corti sovranazionali europee e nella giurisprudenza italiana*, in *Liber amicorum Angelo Davì*, Napoli 2019, pp. 573-596, at p. 583 ff.; G. PASCALE, *Ricongiungimento familiare, diritti fondamentali e* kafala *islamica nella sentenza* M.S. *della Corte di giustizia dell'Unione europea*, in *Studi intergr. eur.*, 2019, pp. 795-808; C. PERARO, *L'istituto della kafala quale presupposto per il ricongiungimento familiare con il cittadino europeo: la sentenza della Corte di giustizia nel caso* SM *c.* Entry Clearance Officer, in *Riv. dir. int. priv. proc.*, 2019, pp. 319-348; A. RIGAUX, *Droit de séjour dérivé des ressortissants d'États tiers*, in *Europe*, 2019, n. 5, comm. 184; F. STRUMIA, *The Family in EU Law After the SM Ruling: Variable Geometry and Conditional Deference*, in *Eur. Papers*, 2019, pp. 389-393.

[4] Advocate General Campos Sánchez-Bordona, opinion of 26 February 2019, case C-129/18, *SM* v *Entry Clearance Officer, UK Visa Section*, EU:C:2019:140.

public authorities of the country of origin[5]. This protective measure may be granted by agreement between the parties (private or consensual *kafala*), which may then be approved by the competent authority, or by a court order (judicial *kafala*) or notarised instrument. The specific status of the measure (agreement, order or instrument) is significant in terms of both its classification and recognition under the legal system of the hosting country, since it could give rise to difficulties as to its compatibility with the public policy of that country[6].

Kafala is specified as one of the measures for ensuring the protection of and care for abandoned children under the 1989 New York Convention on the Rights of the Child[7] and the 1996 Hague Convention on parental responsibility and protection of children[8], by which all Member States of the European Union are bound. In particular, Article 20(3) of the 1989 New York Convention refers to *kafala* under Islamic law as one of the legal instruments for ensuring alternative care. This is in addition to foster placement, adoption or placement in suitable institutions for the care of children, which must be adopted taking into account the need to ensure continuity in the child's education and to respect his or her ethnic, religious, cultural and linguistic origin[9]. In the 1996 Hague Convention, the provision of

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[5] In accordance with the Koranic prohibition of adoption and in keeping of the precept that obliges every Muslim to help a person in need. On this institution, see International Social Service, *Kafalah. Preliminary analysis of national and cross-border practices*, 2020, and, *inter alia*, A. BORRONI, *La kafalah: uno studio di diritto comparato*, in *Dir. e religioni*, 2019, pp. 221-260; O. FERACI, *La protezione dello status del minore attraverso le frontiere*, in AUTORITÀ GARANTE PER L'INFANZIA E L'ADOLESCENZA, *La Convenzione delle Nazioni Unite sui diritti dell'infanzia e dell'adolescenza: conquiste e prospettive a 30 anni dall'adozione*, Roma 2019, pp. 386-413, at p. 411 ff.; A. PASTENA, *Kafalah in International and European Conventions*, in *Annuario dir. comp. e studi legisl.*, 2019, pp. 963-986; C. PERARO, *L'istituto della kafala*, cited above, at p. 327 ff.; P. VIRGADAMO, *La* kafalah *tra ordine pubblico, miglior interesse del minore e tutela integrale della persona*, in *Dir. succ. fam.*, 2019, pp. 247-269; M. BAKTASH, *I giudici italiani alla prova con l'istituto della* kafalah, in *Fam. dir.*, 2018, pp. 300-312, at p. 301 ff.; G. CARAPEZZA FIGLIA, *Tutela del minore migrante ed ermeneutica del controllo*, in *Dir. fam. pers.*, 2018, pp. 223-244, at p. 239 ss.; M. ORLANDI, *L'entrata in vigore della Convenzione de L'Aja ed il riconoscimento dei provvedimenti di* kafala, in *Dir. succ. fam.*, 2017, pp. 865-893, at p. 875 ff.; S. ARMELLINI, *Qualificazione e istituti del diritto di famiglia sconosciuti*, in A. CAGNAZZO, F. PREITE, V. TAGLIAFERRI (eds.), *Il nuovo diritto di famiglia. Profili sostanziali, processuali e notarili. IV. Tematiche di interesse notarile. Profili internazionalprivatistici*, Milano 2015, pp. 743-797, at p. 794 ff.; C. PERARO, *Il riconoscimento degli effetti della* kafalah: *una questione non ancora risolta*, in *Riv. dir. int. priv. proc.*, 2015, pp. 541-566, at p. 541 ff.; A. LANG, *Considerazioni su* kafalah, *ricongiungimento familiare e diritto dell'Unione europea*, in *Dir. imm. citt.*, 2011, pp. 52-71, at p. 53 ff. On the notion of *kafala*, see also *Practical Handbook on the Operation of the 1996 Hague Child Protection Convention*, 2014, at pp. 29 and 146; as well as P. LAGARDE, *Explanatory Report on the 1996 Hague Child Protection Convention*, 1998, at p. 547; for the Italian version of the Report, see F. ALBANO (a cura di), *La Convenzione dell'Aja del 1996, Prontuario per l'operatore giuridico*, Roma 2018.

[6] As regards the Italian legal order, see M.C. BARUFFI, *La circolazione degli* status *acquisiti all'estero e il loro riconoscimento*, in *Riv. AIAF*, 2016, pp. 63-85, at p. 74; C. PERARO, *Il riconoscimento*, cited above, pp. 546-547; R. GELLI, *Il ricongiungimento del minore in kafalah al cittadino italiano: la svolta delle sezioni unite*, in *Fam. dir.*, 2014, pp. 122-133, at p. 128; R. CLERICI, *La compatibilità del diritto di famiglia mussulmano con l'ordine pubblico internazionale*, in *Fam. dir.*, 2009, pp. 197-211, at p. 208.

[7] Convention on the Rights of the Child adopted and opened for signature, ratification and accession by UN General Assembly resolution 44/25 of 20 November 1989.

[8] Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

[9] On this Article, see C. BERNASCONI, P. LORTIE, *La CRC e i lavori della Conferenza dell'Aja di diritto internazionale privato nel settore della protezione delle persone di minore età*, in *La Convenzione delle Nazioni Unite sui diritti dell'infanzia e dell'adolescenza*, cited above, pp. 107-131, at p. 121 ff.

care by *kafala* is one of the measures provided for in Article 3(e)[10]. It must be noted the Contracting States to this latter Convention also include some countries of Islamic origin, such as Morocco, which has not in fact acceded to the Convention of 29 May 1993 on the protection of children and co-operation in respect of intercountry adoption since it does not recognise adoption under its own law on the grounds that it runs contrary to the principles of Islamic law[11]. Algeria, as the country of origin of the child involved in the *SM* case, is not a party to either of the two Conventions.

As regards the recognition of *kafala*, Article 23 of the 1996 Hague Convention ensures that protection measures are fully recognised by operation of law and requires States to recognise the effects of the foreign institution as provided for in the country of origin. It follows that *kafala* cannot be regarded as equivalent to adoption, which does not in fact fall within its scope. Moreover, according to the procedure outlined in Article 33, the authority of the country of origin must consult the Central Authority or other competent authority of the country of destination, where the child's new habitual residence will be located, before issuing a *kafala* order in favour of the applicants living in the receiving State[12].

Within the European framework, there are no specific provisions governing *kafala*. The Union does not have any competence in matters of personal status and family law. However, the Union shares competence with the Member States in the field of judicial cooperation in civil matters in order to regulate cases with cross-border implications pursuant to Article 81 TFEU, which provides for special legislative procedures under family law and, in particular, the adoption of acts by the Council by unanimity. The measures adopted in that context include Regulation No 2201/2003 (Brussels IIa) on parental responsibility[13], whose Article 1 does not however mention *kafala* as one of the measures falling within its scope, alongside protection, care, other similar institutions and the placement of the child in a foster family or institution[14]. With specific regard to the 1996 Hague Convention, by Decisions adopted in 2002

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[10] See the French version which reads "*recueil légal par kafala*" and in the Italian version "*assistenza legale tramite kafala*".

[11] See A. BORRÁS, *The protection of the rights of children and the recognition of* kafala, in THE PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *A commitment to private international law. Essays in honour of Hans van Loon*, Cambridge-Antwerp-Portland 2013, pp. 77-87, at p. 80 ff. On the relationship between the 1993 and 1996 Hague Conventions and *kafala*, see H. VAN LOON, *Respecting children's dignity under private international and migration law*, in *Plurality and Diversity of Family Relations in Europe*, edited by K. BOELE-WOELKI, D. MARTINY, Cambridge 2019, pp. 47-58, at p. 55 ff. On the conversion of *kafala* into adoption pursuant to Article 27(1) of the 1993 Hague Convention, see F. SALERNO, *The Identity and Continuity of Personal Status in Contemporary Private International Law*, in *Collected Courses of The Hague Academy of International Law - Recueil des cours*, 2019, vol. 395, pp. 9-198, at p. 195 f.

[12] On the procedure and, in general, on the recognition of *kafala* under the 1996 Hague Convention, see A. LANG, *Kafala and family reunification*, cited above, p. 99 f.; M. ORLANDI, *L'entrata in vigore della Convenzione de* L'Aja, cited above, pp. 880-882 and 890.

[13] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, in *OJ* L 338 of 23 December 2003, pp. 1-29.

[14] The regulation of this institution is therefore left to the Member States individually, which are not required to enact specific legislation in this area. Nevertheless, the provisions of Regulation No 2201/2003 could

and 2008[15], the Council authorised the EU Member States to sign and ratify the Convention in the interest of the then Community. This is because, whilst the latter could not be a Contracting Party, it still had exclusive competence over certain aspects governed by that Convention[16].

Therefore, although there are no EU rules governing *kafala*, thanks to the applicable international conventions, the Islamic institution deserves protection and should be considered as one of the arrangements for providing care to minors that must be recognised under the European legal order.

3. The *SM* case before the Court of Justice.

The institution of *kafala* was brought to the attention of the Court of Justice for the first time within a question concerning the interpretation of Directive 2004/38, on the right of EU citizens and their family members to move and reside freely within the Member States, and the possibility to recognise a child placed under *kafala* as a direct descendant of the European citizens involved.

By a reference for a preliminary ruling made on 19 February 2018[17], the Supreme Court of the United Kingdom asked the Court of Justice to interpret Article 2(2)(c) of Directive 2004/38 in order to determine whether the concept of «direct descendant» could also include an Algerian minor, SM, who had been placed under *kafala* pursuant to a court order from her country of origin with a married couple, both French nationals (the husband having Algerian origin), who were assigned parental responsibility under Algerian law. They took care of the child and treated her as their natural daughter. In October 2011, the husband returned to the United Kingdom, where he and his wife married in 2001 and where he has a permanent right of residence, while the wife remained in Algeria with the child. In May 2012, SM applied for entry clearance for the United Kingdom as the adopted child of a «citizen of the European Economic Area»[18]. However, this application was rejected by the competent Entry Clearance Officer on

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be read in the light of the 1996 Hague Convention and, where a *kafala* is recognised in a Member State, its effects could then circulate throughout the EU under the Regulation, since it includes within its scope measures of protection, foster care and other analogous institutions: see the opinion in *SM* case cit., points 55-57.

[15] Council Decision of 19 December 2002 authorising the Member States, in the interest of the Community, to sign the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children (in *OJ* L 48 of 21 February 2003, pp. 1-2) and Council Decision of 5 June 2008 authorising certain Member States to ratify, or accede to, in the interest of the European Community, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children and authorising certain Member States to make a declaration on the application of the relevant internal rules of Community law (in *OJ* L 151 of 11 June 2008, pp. 36-48).

[16] See A. LANG, *Kafala and family reunification*, cited above, p. 97 f.; M.C. BARUFFI, *La convenzione dell'Aja del 1996 sulla tutela dei minori nell'ordinamento italiano*, in *Riv. dir. int. priv. proc.*, 2016, pp. 976-1019, at p. 978 ff.; C. PERARO, *Il riconoscimento*, cited above, pp. 561-562.

[17] For a description of the facts, see the order, judgment and opinion in the *SM* case, cit.

[18] As written by the referring judge.

the grounds that the guardianship under the Algerian *kafala* system was not recognised as an adoption according to English law.

SM first brought an action before the First-tier Tribunal (Immigration and Asylum Chamber), which confirmed the refusal, and then before the Upper Tribunal (Immigration and Asylum Chamber), which upheld the appeal and ruled that the minor was an «extended family member» of the European citizen under the UK immigration legislation − Article 8 of the 2006 Immigration (European Economic Area) Regulation −. The Entry Clearance Officer appealed against this decision to the Court of Appeal (England & Wales) (Civil Decision), which ruled that a child placed under *kafala* could not fall within the definition of «direct descendant» under Article 2(2)(c) of Directive 2004/38 or within the concept of «any other family members» pursuant to Article 3(2)(a). SM then appealed the judgment of the Court of Appeal to the Supreme Court of the United Kingdom, which stayed the proceedings and referred to the Court of Justice, for a preliminary ruling, questions of interpretation concerning (i) the classification of a child placed under *kafala* for the purposes of family reunification with a European citizen as a «direct descendant» under Article 2(2)(c) of Directive 2004/38[19], (ii) the possibility of refusing entry to such a child on the basis of Articles 27 and 35 of that Directive if she is a victim of or at risk of exploitation, abuse or trafficking in human beings, and (iii) the possibility for the requested State to enquire into whether the procedure for placing the child in the guardianship or custody of the EU citizen involved was such as to give sufficient consideration to the best interests of that child.

By a judgment of 26 March 2019, the Grand Chamber of the Court of Justice held that Article 3(2)(a) of Directive 2004/38 on family reunification with «any other family members» applies to the present case. The Court's arguments in principle reflect those of the Advocate General. These were based, first of all, on the absence of any parental relationship that could justify a finding that the child under the *kafala* system can be regarded as a direct descendant. They also ascertained the existence of a family relationship that can in any case be covered by Article 3 of that Directive, taking into account Articles 7 and 24 of the EU Charter of Fundamental Rights. In the decision of the Court of Justice, no emphasis is given to the international sources that refer to *kafala* as one of the protection measures for children. This is in contrast with the Advocate General's view, although its opinion did not suggest that, based on the international conventions, the notion of family member should be extended so as to classify a child under *kafala* as a direct descendant.

3.1. The notion of "direct descendant".

[19] On the categories of beneficiaries, see V. DI COMITE, *Ricongiungimento familiare e diritto di soggiorno dei familiari di cittadini dell'Unione alla luce del superiore interesse del minore*, in *Studi integr. eur.*, 2018, pp. 165-178; R. PALLADINO, *Il ricongiungimento familiare nell'ordinamento europeo*, Bari 2012, p. 60 ff.

In relation to the first question concerning the meaning of Article 2(2)(c) of Directive 2004/38, the European Court examined the legal status of the child under *kafala* and assessed whether she could be defined as «direct descendant under the age of 21» who, according to the Directive, would automatically enjoy a derived right of entry and residence.

It first ascertained the *kafala* regime applicable to SM, along with the nature and characteristics of that institution according to the applicable legislation of her country of origin (Algeria)[20]. Then, in view of the Member States' exclusive competence over matters pertaining to family and parental relationships, and absent any specific definition of direct descendants in the text of the Directive, the Court of Justice found it necessary to qualify the institution of *kafala* for the purposes of the Directive. In line with its case law, it stressed that the context, purpose and nature of the provisions must be considered when analysing and interpreting European legislation, also in order to give a proper and autonomous meaning to European Union law (which must be applied uniformly in all Member States) unless national legislation is expressly referred to[21]. In that regard, the Court observed that «the concept of a 'direct descendant' commonly refers to the existence of a direct parent-child relationship connecting the person concerned with another person. Where there is no parent-child relationship between the citizen of the Union and the child concerned, that child cannot be described as a 'direct descendant' of that citizen for the purposes of Directive 2004/38»[22]. The EU Court added that, in order to pursue the objectives of the Directive, a broad interpretation of the parent-child relationship must be adopted and biological parent-child relationships must be considered in the same way as legal parent-child relationships, so that «a 'direct descendant' of a citizen of the Union referred to in Article 2(2)(c) of Directive 2004/38 must be understood as including both the biological and the adopted child of such a citizen»[23].

However, the possibility of including minors placed in legal guardianship under the category of direct descendant is excluded. Consequently, in the Court's view, the Commission's interpretation provided in the guidance on the application of Directive 2004/38 cannot be justified[24]. With regard to the concept of direct descendants («family members in direct line»), the Commission indeed stated that «[w]ithout prejudice to issues related to recognition of decisions of national authorities», this concept «extends to adoptive relationships or minors in custody of a permanent legal guardian. Foster children

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[20] Judgment in *SM* case, cited above, point 45.

[21] *Ivi*, points 50-51; see also the opinion in *SM* case, cited above, points 58-66, where the Advocate General refers to the *Coman* judgment on the neutral concept of «spouse» (see Court of Justice, Grand Chamber, judgment of 5 June 2018, Case C-673/16); and Advocate General Mengozzi, opinion of 6 November 2013, Case C-423/12, *Reyes* v *Migrationsverket*, EU:C:2013:719, point 55.

[22] Judgment in *SM* case, cited above, point 52.

[23] *Ivi*, points 53-54.

[24] *Ivi*, point 55. See Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2009)313 final of 2 July 2009 (hereinafter «Commission Guidelines»).

and foster parents who have temporary custody may have rights under the Directive, depending upon the strength of the ties in the particular case»[25], without any limitation as to the degree of relatedness, since the status of family member must be demonstrated, and the best interests of the child be taken into account. In this respect, the Court of Justice noted that *kafala* does not create a parent-child relationship between the minor and the guardian[26].

Nevertheless, it would not appear that any similarity between *kafala* and other protective measures can be ruled out for two reasons. From a general point of view, *kafala* is - like the other institutions - a measure of protection for minors in need; more specifically, it establishes a regime that can be considered to be similar to status as a child in a legal sense. This approach is based on a broad interpretation of the parent-child relationship, which requires a case-by-case assessment of the factual circumstances as well as the best interests of the child, in line with the Commission's Guidelines.

An extension of the category of direct descendant was rejected by the Advocate General in his opinion[27]. Recalling the Commission's explanation cited above, he examined the circumstances of the child under *kafala*, first, with reference to the adoptive relationship, rejecting any equivalence between this and *kafala*, and secondly with regard to the category of «custody of a permanent legal guardian». In this respect, the Advocate General stated that to regard adopted minors as being equivalent to those minors under the care or custody of a legal guardian would not be consistent with the interpretation of Article 2(2)(c) of Directive 2004/38[28]. In fact, he considered that «being in 'custody of a permanent legal guardian' does not mean that the child in custody becomes a direct descendant (by adoption) of the guardian»[29], because such a relationship is not comparable to a parent-child relationship, whether biological or adoptive, which establishes a permanent link and can, moreover, coexist with guardianship[30]. *A fortiori* also the *kafala* measure could not establish a direct relationship, since it is not permanent in nature and does not create any parent-child ties.[31] It follows that «the concept of 'direct descendant' cannot be extended beyond adoptive children to include those in the legal custody of guardians»[32].

3.2. Possible broader interpretation of "direct descendent" by reference to international instruments.

[25] Commission Guidelines, para. 2.1.2. In relation to the adopted children, the Commission observes that «[a]doptive children are fully protected by Article 8 of the ECHR (ECtHR cases *X* v *Belgium* and *Netherlands* (10 July 19750, *X* v *France* (5 October 1982) as well *as X, Y and Z* v. *UK* (22 April 1997))» (see note 13).

[26] Judgment in *SM* case, cited above, point 56.

[27] Opinion in *SM* case, cited above, point 76 ff.

[28] *Ivi*, point 77.

[29] *Ivi*, point 78.

[30] *Ivi*, point 79.

[31] *Ivi*, points 80-82.

[32] *Ivi*, point 88.

Against this background, a different conclusion based on a broad interpretation of the relationship created by *kafala*, thereby finding it to be equivalent to a parent-child relationship, could be reached by reference to the international conventions that include *kafala* within their scope, alongside the aforementioned protection measures, i.e. adoption, foster care, guardianship, placement in a family or institution or other equivalent measures. It could admittedly be argued that the juxtaposition (within the text of the relevant provisions) of the Islamic measure with the other protective institutions could lead to the acknowledgment of the existence of differences between them, as is the case between adoption, custody and guardianship. However, its inclusion might constitute acknowledgement that *kafala* falls into the broad category of child protective measures. Thus, given that these measures can establish a family relationship, it could be concluded that also *kafala* can be classified as a valid prerequisite for the establishment of a family relationship in the same manner as the other measures envisaged[33].

With particular reference to the scope of the 1996 Hague Convention, to which all EU Member States are parties, the provision of care by *kafala* is mentioned in Article 3(e) after the measure of placement in a host family or institution. It follows that, even at European level, *kafala* should qualify as a measure of protection that establishes a family tie, albeit with its own characteristics, which differ from the characteristics of the institutions we are more familiar with. The inclusion of *kafala* in the 1996 Hague Convention, which lists measures that generally create a family relationship (although not only in a biological sense), shows that it is not equivalent to adoption, which is indeed the primary focus of the 1993 Hague Convention on intercountry adoption[34]. On the basis of these considerations, considering *kafala* to be equivalent to the measures of protection falling under the 1996 Hague Convention could imply that it also establishes a family relationship that must be safeguarded, thus meaning that the status of a child under *kafala* is similar - but not identical - to that of a child in the direct line, even though it is not a biological or adoptive child.

As mentioned above, the Court of Justice did not take into consideration the international instruments or the inclusion of *kafala* among the protective measures recognised therein. This was in contrast with the Advocate General, who considered that an analysis of the international instruments does not in any case result in a different interpretation of the category of direct descendant, since those

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[33] On the interaction between the1996 Hague Convention, private international law and migration law, and the need for Member States to be «aware of the fact that the *kafala*, although unknown in their own legal system, creates certain rights for migrant children», see S. CORNELOUP, B. HEIDERHOFF, C. HONORATI, F. JAULT-SESEKE, T. KRUGER, C. RUPP, H. VAN LOON, J. VERHELLEN, *Private International Law in a Context of Increasing International Mobility: Challenges and Potential*, Study PE 583.157, June 2017, at p. 24 f., and *Children On the Move: A Private International Law Perspective*, Study PE 583.158, June 2017, at p. 36 f.

[34] On the exclusion of *kafala* from the 1993 Hague Convention, see H. VAN LOON, *Report on Intercountry Adoption*, Preliminary Document No 1 of April 1990, at p. 27; and A. BORRÁS, *The protection of the rights of children*, cited above, at p. 78 f.

conventions do not imply any equivalence among the measures listed therein[35]. Moreover, the Advocate General argued that «the rigorous mechanisms for oversight of international adoptions provided for in the 1993 Hague Convention in order to safeguard the best interests of the child could easily be circumvented if a form of guardianship which, precisely because it does not have the same effects as adoption, is preceded by a national procedure which does not have the same guarantees (or which even, in the case of *kafala*, takes place before an *adul*, or notary, with no requirement for the involvement of the public authorities) were to be accepted as adoption»[36]. In actual fact, however, a form of control is still established for the purposes of granting the right of entry under Directive 2004/38 where the members of the family referred to in Article 2 are concerned, although it is "weaker" than the extensive examination required for the category under Article 3 of the same Directive.

3.3. The need to protect family life and child's best interests.

In the view of the Advocate General, the interpretation that a child under the *kafala* system cannot be regarded as a direct descendant also does not conflict with the need to protect family life created on the basis of *kafala*, as guaranteed by the European Court of Human Rights[37], or with the necessary overriding consideration of the child's best interests[38]. In fact, in his view, not to consider a child under *kafala* as a direct descendant does not mean not recognising the existence of a family relationship. Such family tie is indeed protected under Article 8 ECHR, which does not, however, impose an obligation on States to classify *kafala* as adoption, and thus to include the child within the category of direct descendants. Family relationship also finds protection under Article 3 of Directive 2004/38, provided that the conditions laid down therein are met[39], since this provision would enable the child to obtain effective legal protection[40] and be recognised as a "non-descendant" family member. Namely, as mentioned above, pursuant to this Article 3, a child under *kafala* would not enjoy an automatic right of entry. Only Article 2 in fact acknowledges a privileged status for core family members and would therefore more effectively protect the child's right to a family life and his or her best interests.

In favour of a broad interpretation of the concept of direct descendants, it could also be noted that, on the basis of the case law of the Court of Justice concerning the legislation preceding Directive 2004/38, the children of one spouse or partner were included within the category of direct descendants for the purposes of Article 2(2)(c) of that Directive. In this way, relevance was given to a *de facto* relationship, since the existence of a legal relationship between one spouse and the children of the other

[35] Opinion in *SM* case, cited above, points 82-83.
[36] *Ivi*, point 84.
[37] *Ivi*, points 95-97.
[38] *Ivi*, points 98-105.
[39] *Ivi*, points 106-108.
[40] *Ivi*, point 94.

spouse was not considered to be necessary[41]. Thus, assuming that the regime created by *kafala*, whether resulting from a consensual or a judicial act, also has legal relevance, the existence of a family relationship between the fostering citizens and the minor entrusted to them through *kafala* could be ascertained. However, no such suggestions may be found in the opinion of the Advocate General or in the judgment of the Grand Chamber of the Court of Justice, which held that Article 2(2)(c) was not applicable, whilst by contrast affirming the applicability of Article 3(2)(a).

3.4. Defining "any other family members".

Article 3(2)(a) consists in a residual clause, which imposes an obligation on the Member States to facilitate[42] entry and residence for «any other family members» who «in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen»[43]. According to the Court of Justice, this category of family members includes various situations that do not fall within the definitions provided for under Article 2(2) of the Directive[44]. In order to pursue the aim of the Directive, as set out in recital 6, namely of preserving the unity of the family in the broad sense, irrespective of the nationality of the individuals concerned[45], the circumstances of persons who cannot be covered by the definition of family members under Article 2 of the Directive must be subject to an in-depth examination, on the basis of Article 3. This examination must be carried out by the requested Member State in accordance with its own legislation, taking into account the relationship with the European citizen involved and any useful circumstances, including the applicant's dependence on the latter[46]. In fact, according to this Article, certain conditions must be met, i.e. the family

[41] See Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2001)257 final of 23 May 2001, in *OJ* C 270E of 25 September 2001, pp. 150-160, where, in relation to Article 2, which was then amended before the Directive was adopted, it is stated that a single and broad notion of «family member» should be embraced.

[42] This obligation to facilitate consists of an «obligation on the Member States to confer a certain advantage on applications submitted by the third-country nationals referred to in that article, compared with applications for entry and residence of other third-country nationals»: see the judgment in *SM* case, cited above, point 61.

[43] Commission Guidelines, cited above, para 2.1.1. This also includes the partner with whom the European citizen has a *de facto* stable relationship. For comments on this Article, see E. GUILD, S. PEERS, J. TOMKIN, *The EU Citizenship Directive. A Commentary*, 2nd ed., Oxford 2019, p. 77 ff.; V. DI COMITE, *Ricongiungimento* familiare, cited above, p. 171 ff.; R. PALLADINO, *Il ricongiungimento familiare*, cited above, p. 62 ff.; and the opinion in *SM* case, cit., points 25, 68-69.

[44] Judgment in *SM* case, cited above, point 60; see also Court of Justice, Grand Chamber, judgment of 5 September 2012, case C-83/11, *Secretary of State for the Home Department* v *Rahman and Others*, EU:C:2012:519, point 32.

[45] The fundamental objective pursued by the Directive is not family reunification, but the primary and individual right of European citizens to move and reside freely in EU countries: see R. PALLADINO, *Il ricongiungimento familiare*, cited above, p. 61.

[46] See recital 6 and Article 3(2)(2) of Directive 2004/38.

member must be dependent of and must live with or receive assistance due to serious health grounds from the European citizen. A family member of a European citizen is considered to be dependent on the latter when there is a real situation of dependence resulting from a state of need for material support to meet his essential needs in the State of origin, having regard to the time when the application for reunification is made[47]. The material support of the family member guaranteed by the European citizen, which does not, however, imply the existence of a right to maintenance[48], must be assessed taking into account the personal circumstances of the person concerned, such as age, professional qualifications, health and the fact that the family member's financial means allow the person concerned to reach the minimum level of subsistence in the country of origin[49].

The examination must not cover the duration of dependency or the amount; however, the family member must actually be dependent and his or her situation must be of a structural nature. In this regard, a simple commitment by the EU citizen to support the family member concerned is not sufficient to establish financial or material dependency, and the dependant family member must submit documentary evidence of his or her status as a dependant, which must be issued by the competent authorities of the country of origin, as set out in Article 10. Such proof may be provided by any appropriate means, as has been confirmed by the Court of Justice[50].

In the light of these considerations, it seems possible to conclude that, as is the case in relation to direct descendants, a *de facto* relationship is taken into account also for extended family members. This means that a situation which can be demonstrated an economic and material support, instead of a direct or legal relationship[51], can fall within the meaning of "family member" referring to a broad definition of the same concept in order to pursue the objectives of Directive 2004/38. This interpretation could

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[47] Court of Justice, judgment of 18 June 1987, case 316/85, *Lebon*, EU:C:1987:302, point 16 ff.; Court of Justice, judgment of 16 January 2014, case C-423/12, *Reyes* v *Commission*, EU:C:2014:16, points 20 ff. On this case law, see C. BERNERI, *Family reunification in the EU*, Oxford-Portland, Oregon 2017, p. 68 ff.

[48] Commission Guidelines, cited above, para 2.1.4; judgment in *Lebon* case, cited above, point 21; Court of Justice, Grand Chamber, judgment of 9 January 2007, case C-1/05, *Jia* v *Migrationsverket*, EU:C:2007:1, points 36-37.

[49] Judgment in *SM* case, cited above, point 62; judgment in *Jia* case, cited above, point 37; judgment in *Rahman* case, cited above, points 20-23, 33; Advocate General Geelhoed, opinion of 27 April 2006, case C-1/05, *Jia*, EU:C:2006:258, point 96. With reference to the concept of direct descendants aged 21 years or over, and dependent, see the judgment in *Reyes* case, cited above, point 30.

[50] Judgment in *Jia* case, cited above, point 41. See also Commission Guidelines, cited above, para. 2.1.4.

[51] See P. HAMMJE, *Reconnaissance d'une kafala*, cited above, p. 779 ff. On the relevance of the existence of a family relationship, but not from a legal perspective, see E. PATAUT, *Citoyenneté de l'Union européenne. Quand la Cour s'empare de l'effectivité*, in *Rev. trim. droit eur.*, 2019, pp. 709-729, at p. 717 ff., where the author examines the *SM* case and the judgment of the Court of Justice of 12 July 2018, case C-89/17, *Secretary of State for the Home Department* v *Rozanne Banger*, EU:C:2018:570, stressing that both cases «confirment, en effet, l'orientation de la Cour, favorable à une protection des liens familiaux d'affection et de dépendance, au-delà des considérations strictment juridiques» (p. 718) and that «l'essentiel ici est la relative indifférence de la Cour aux réalités juridiques» (p. 719).

therefore support a broad definition of the concept of family member in order to pursue the objectives of Directive 2004/38.

In any case, Article 3 gives Member States a margin of appreciation in setting the criteria for deciding whether to grant rights under the Directive to other dependent family members. However, their freedom is not unlimited. As is stated under recital 6 of the Directive, in order to preserve the unity of the family in the broad sense, the assessment must be carried out having regard to the individual right of free movement and residence of the European citizen and must be based on criteria laid down in the legislation of the country concerned «which are consistent with the normal meaning of the term 'facilitate' used in Article 3(2) of Directive 2004/38 and which do not deprive that provision of its effectiveness»[52]. As the Court of Justice pointed out in its judgment, the margin of discretion must be exercised having due respect for fundamental rights, including Article 7 of the Charter on the right to respect for private and family life, taking into account the interpretation of the European Court of Human Rights concerning the corresponding Article 8 ECHR[53]. Article 7 must then be read in conjunction with Article 24(2) of the Charter, which requires the best interests of the child to be of a primary consideration[54]. Accordingly, the Court of Justice stated that the competent national authorities must, «when implementing the obligation to facilitate entry and residence for the other family members laid down in Article 3(2)(a) of Directive 2004/38, (…) make a balanced and reasonable assessment of all the current and relevant circumstances of the case, taking account of all the interests in play and, in particular, of the best interests of the child concerned»[55]. With regard to the case at issue, it is specified that the factors to be taken into consideration are the age at which the child was entrusted through *kafala*, the existence of a common life between her and the foster parents, the closeness of the personal relationship and the level of dependence of the former on the latter[56].

Also within the context of the assessment that must be made by the States under Article 3 of the Directive, the Court of Justice added that they must take account of any risk of abuse, exploitation or trafficking to which the child concerned might be exposed[57]. In any event, according to the Court, such risks cannot be presumed simply because the placement under *kafala* did not take place in accordance with the procedure laid down in the 1996 Hague Convention, since the country of origin of the child concerned (Algeria) is a non-contracting third State, specifying that «[s]uch facts must, on the contrary, be weighed against the other relevant elements of fact»[58].

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[52] Judgment in *SM* case, cited above, point 63; judgment in *Rahman* case, cited above, point 24.
[53] Judgment in *SM* case, cited above, points 64 to 66.
[54] *Ivi*, point 67.
[55] *Ivi*, point 68.
[56] *Ivi*, point 69.
[57] *Ivi*, point 70.
[58] *Ibidem.*

The Court thus concluded that were the examination to establish both a «genuine family life» between the European citizens and the child placed under Algerian *kafala* and also that the child was dependent on the former, then «the requirements relating to the fundamental right to respect for family life, combined with the obligation to take account of the best interests of the child, *demand*, in principle, that that child be granted a right of entry and residence as one of the other family members of the citizens of the Union for the purposes of Article 3(2)(a) of Directive 2004/38, read in the light of Article 7 and Article 24(2) of the Charter, in order to enable the child to live with its guardians in their host Member State»[59]. This is all the more true if, due to a refusal to grant an entry visa to the child under *kafala*, the European citizens with whom such a child has been placed are *de facto* prevented from leading a common life in the host State because one of them would be forced to remain in his or her country of origin[60], thus hindering his or her fundamental freedom of movement and residence.

In the light of the foregoing, the relationship established under *kafala*, having regard to the specific circumstances, deserves protection for the purposes of the Directive, in particular on the basis of Article 3(2)(a). This is because a child under *kafala* is a dependent family member of the foster parents and lives with them, which could therefore justify a derived (facilitated but not automatic) right of entry for that child, giving due consideration to the right to family unity and the child's best interests. This finding was indeed pre-empted by the Supreme Court of the United Kingdom, which did not raise any doubts in that regard, but rather held that the courts are obliged to facilitate the entry of European citizens' family members in order to guarantee and give effect to their right of free movement[61].

3.5. Questions not addressed by the Court of Justice.

By the second question referred for interpretation, the national court asked whether, on the basis of Articles 27 and 35 of Directive 2004/38, children placed under *kafala* could be refused entry if it was established that they were victims of or at risk of exploitation, abuse or trafficking in human beings. Such situations are not specifically mentioned in the Directive but may be considered under Article 27 as grounds for refusal due to a violation of public policy, public security or public health. Moreover, according to Article 35, the hosting State has the power to take steps to reject the request if the case constitutes an abuse of a right or fraud[62]. This implies authority to control the circumstances of the case,

[59] *Ivi*, point 71 (emphasis added).

[60] *Ivi*, point 72. See also P. HAMMJE, *Reconnaissance d'une kafala*, cited above, p. 782 ff.

[61] Opinion in *SM* case, cited above, point 68. On this issue, see L. PANELLA, *Il riconoscimento della kafalah*, cited above, p. 589 f., who states that, for the purpose of guaranteeing the *effet utile* of EU law, especially in relation to freedom of movement and the protection of fundamental rights, the Court of Justice was able to intervene in a substantive area – family law – that is under national sovereignty.

[62] «Fraud may be defined as deliberate deception or contrivance made to obtain the right of free movement and residence under the Directive. In the context of the Directive, fraud is likely to be limited to forgery of documents or false representation of a material fact concerning the conditions attached to the right of residence»;

including an examination of the documentary evidence attesting the family relationship in order to establish whether the rights of the child, as guaranteed by the Charter (Article 24), have been violated, and whether the protective measure was adopted by the authorities of the country of origin in accordance with the best interests of the child. Consequently, States may refuse entry where the specific circumstances involve a violation of fundamental rights or the best interests of the child. As the Advocate General pointed out, there was nothing in the description of the facts in the *SM* case that justified a refusal of entry or that proved any abuse or fraud, with the result that Articles 27 and 35 of the Directive were not applicable[63]. The Court of Justice did not however answer the second question, since it noted that this question had been raised by the referring judge only with reference to a scenario in which the minor placed under Algerian *kafala* was classified as a direct descendant, and such a scenario was precluded by the answer to the first question[64].

Finally, the last question concerned the compatibility with the best interests of the child of the procedure under which that child was placed in guardianship or custody, which should be considered before assessing the classification of that child as a direct descendant within the meaning of Article 2(2)(c) of Directive 2004/38. The UK Supreme Court raised the question by referring to measures of guardianship or custody, without making any precise reference to *kafala*, thereby suggesting that the conformity control would be relevant only in the cases mentioned, and therefore only if the child under *kafala* were considered in the same way as a direct descendant[65]. No other justification to this question could be identified, since it is only if a broad interpretation of the parent-child relationship (including family situations established on the basis of *kafala*) were to be accepted that any kind of assessment under Article 2 of the Directive could be ruled out[66], with the beneficiary thus enjoying an automatic right of entry. The Court of Justice did not provide an answer to this question because it rejected the possibility of such a broad interpretation[67].

In any case, even in the scenarios referred to in Article 2 of the Directive, an assessment of compatibility with the best interests of the child on the basis of Articles 27 and 35 of the same Directive, concerning the grounds for refusal and the risk of abuse or fraud, could prove to be appropriate. On the other hand, if the child placed under *kafala* were to be considered under the category of extended family

«abuse may be defined as an artificial conduct entered into solely with the purpose of obtaining the right of free movement and residence under Community law which, albeit formally observing of the conditions laid down by Community rules, does not comply with the purpose of those rules»: see Commission Guidelines, cited above, para. 4.

63 Opinion in *SM* case, cited above, points 109-117.

64 Judgment in *SM* case, cited above, points 74-76.

65 Opinion in *SM* case, cited above, point 119.

66 *Ivi*, point 120.

67 Judgment in *SM* case, cited above, point 77.

members pursuant to Article 3, the assessment of respect for his or her best interests would already be included within the extensive examination carried out by the State[68].

4. The recognition of *kafala* in Italy.

The ruling of the Court of Justice is significant for the Italian legal system, where national courts addressed the provision of care by *kafala* not only related to requests for family reunification, whether made by Italian or third country nationals, but also with regard to other issues, such as adoption and parental leave. Overall, a common approach results within the Italian case law, which will be examined below, according to which the Islamic institution is not equivalent to adoption but is rather similar to foster care. Such interpretation is thus in line with the *SM* judgment, even if some doubts remain as to the compatibility of *kafala* with public policy and about the equal treatment between Italians and foreign nationals in relation to family reunification.

As regards the applicable legal framework, Italy ratified the 1996 Hague Convention by Law no. 101 of 18 June 2015[69], which entered into force on 1 January 2016, according to which the Central Authority is the Presidency of the Council of Ministers. Doubts still remain as to the legal status of a child placed under *kafala* entering Italy, since Law 101/2015 did not specifically regulate this institution. This is in contrast to the position under the draft bill (no. 1552), which regulated, among others, situations involving the provision of legal assistance under *kafala* to children, whether abandoned or not, the powers of foster parents and the status of the child, resulting in a measure of protection different from adoption or foster care. These proposed provisions have now been incorporated into draft bill no. 1552 *bis*[70], which has been pending before Parliament since July 2015[71].

In respect of *kafala* measures adopted before 1 January 2016[72], as well as measures adopted by countries that are not contracting parties to the Convention, Law no. 218 of 30 May 1995 on the reform

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[68] Opinion in *SM* case, cited above, points 121-122.

[69] Law no. 101 of 18 June 2015, "Ratification and implementation of The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children (adopted on 19 October 1996)", in *Gazzetta Ufficiale* 157 of 9 July 2015, in force from 1 January 2016.

[70] "Rules for the adaptation of the internal legal order to The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children (adopted on 19 October 1996)".

[71] On the path to ratification see, *inter alia*, G. CAROBENE, *Identità religiose e modelli di protezione dei minori. La kafala islamica*, Napoli 2017, p. 2215 ff.; M.C. BARUFFI, *La convenzione dell'Aja*, cited above, p. 977 ff. and 1017 ff.; C. PERARO, *Il riconoscimento*, cited above, p. 557 ff.

[72] It should be noted that, as regards the applicability *ratione temporis* of the Convention, the provisions intended to bring Italian law into line with the Convention, as contained in the original version of draft law n. 1552, provided for the applicability of the Convention to any proceedings launched on or after the date of its entry into force (Article 14). This provision was not included in the text of the adopted Law 101/2015.

of the Italian system of private international law applies[73]. In particular, Article 42 of this Law sets out the connecting factors for determining jurisdiction and applicable law on matters related to children protection, whilst Articles 64 ff. govern the recognition of foreign measures[74].

4.1. Family reunification in Italy based on *kafala*.

The issue concerning the classification of *kafala* according to the categories of Italian law (which implies the possibility of comparing *kafala* to the Italian institutions of foster care or adoption, or to a related measure, such as pre-adoptive foster care) has been addressed within the literature and case law in different contexts. Italian case law has developed mainly in relation to applications for family reunification made in Italy by Italian nationals or nationals of another EU Member State as well as by third country nationals. It dates back to the period before the entry into force in Italy of the 1996 Hague Convention on 1 January 2016[75]. Whilst the Convention has indeed helped to limit proceedings concerning the refusal of applications for entry[76], it has not however provided any answer to the question of the legal nature of the institution, which must be resolved before tackling the main request.

In most cases related to the applications made by foreign nationals of third countries, *kafala* has been considered to be similar to a measure for the protection of minors provided for by Italian law, i.e. adoption, custody or guardianship, when deciding whether to grant family reunification[77]. In this regard, it should be noted that, pursuant to Article 29, paragraph 2 of Legislative Decree no. 286 of 25 July 1998 (Consolidated Immigration Act)[78], minors adopted, fostered or under guardianship are considered as

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[73] Law no. 218 of 30 May 1995, in *Gazzetta Ufficiale* no. 128 of 3 June 1995, *suppl. ord.* no. 68, as further amended.

[74] It should be noted that Article 41, on foreign adoption measures or measures instrumental to foreign adoption, i.e. those in which the essential features of Italian adoption are recognisable, does not apply. Moreover, according to Article 42, the 1961 Hague Convention applies in any case to measures concerning the protection of minors. The 1961 Convention was not replaced – as regards this provision – by the 1996 Convention: on this failure see A. CANNONE, *Tendenze legeforiste nelle recenti modifiche delle norme di diritto internazionale privato italiano in materia di filiazione e di rapporti tra genitori e figli: alcune riflessioni*, in *Riv. dir. int. priv. proc.*, 2019, pp. 5-24, at p. 21 ff.; C. CAMPIGLIO, *Legge di diritto internazionale privato e regolamenti europei: tecniche di integrazione*, in C. CAMPIGLIO (ed.) *Un nuovo diritto internazionale privato*, Milano 2019, pp. 161-189, at p. 185; M.C. BARUFFI, *Uno spazio di libertà, sicurezza e giustizia a misura di minori: la sfida (in)compiuta dell'Unione europea nei casi di sottrazione internazionale*, in *Freedom, Security & Justice: Eur. Legal Studies*, 2017, pp. 2-25, at p. 23 f.; R. CLERICI, *Quale futuro per le norme della legge di riforma relative allo statuto personale*, in *Riv. dir. int. priv. proc.*, 2015, pp. 755-768, at p. 764 f.

[75] In general, on the Italian case law, see also A. LANG, *Kafala and family reunification*, cited above, p. 106 ff.; L. PANELLA, *Il riconoscimento della kafalah*, cited above, p. 590 ff.; P. VIRGADAMO, *La* kafalah *tra ordine pubblico*, cited above, p. 251 ff.; L. OLIVERO, *La reception de la kafala algerienne dans l'ordre juridique italien*, in *Les Cahiers du LADREN*, 2018, n. 1, pp. 256-268.

[76] See further M. ORLANDI, *L'entrata in vigore della Convenzione de L'Aja*, cited above, p. 884.

[77] For comments, see O. LOPES PEGNA, *La determinazione dello* status *familiare nella disciplina del ricongiungimento*, in *Il nuovo diritto di famiglia*, cited above, pp. 853-870, at p. 867 ff.

[78] Legislative Decree no. 286 of 25 July 1998, "Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero", in *Gazzetta Ufficiale* no. 191 of 18 August 1998, *suppl. ord.* no. 139, as amended by Decree Law no. 5 of 8 January 2007, "Implementation of Directive 2003/86/EC on the right to family reunification", in *Gazzetta Ufficiale* no. 25 of 31 January 2007, as further amended.

(«direct») children in a legal sense. It follows that, although *kafala* does not (strictly speaking) fall under any of these categories, it does create a family relationship similar to those, on the basis of which family reunification can be granted. It has been stated that the decision on family reunification does not in fact imply the attribution to *kafala* of the effects of a specific measure known within the Italian system, being it sufficient that *kafala* is generically comparable to the family ties that consist in the prerequisite for the reunification[79].

The Italian Court of Cassation (or Supreme Court) confirmed this approach with a series of rulings in 2008, in which it recognised the possibility to grant entry visas to minors placed under *kafala* on the basis of a constitutionally informed interpretation of Article 29 of the Consolidated Immigration Act. It argued that, by virtue of the principle of equality, protection should be granted to minors coming from countries where *kafala* is the only permitted measure of care. In order to establish whether the prerequisite for family reunification is met, the Supreme Court held that *kafala* (granted by a judicial act) was similar to foster care, since they presented common features, and only a few differences, as neither institution has legitimising effects, and neither affects the civil status of the child, unlike adoption[80].

In cases involving Italian or European citizens, the special rules on international adoptions laid down by Law no. 184 of 4 May 1983 were deemed to be applicable to requests for an entry visa for foreign children under *kafala*[81]. In 2010, the Supreme Court[82] in fact rejected a claim made by an Italian citizen (of Moroccan origin) holding that *kafala* (concluded by an agreement) was not an admissible precondition for reunification on the basis of Article 2(1)(b)(n. 3) and Article 3(2)(a) of Legislative Decree no. 30 of 6 February 2007 implementing Directive 2004/38[83]. The Court held that the notion of family

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[79] See Court of Appeal of Turin, order of 28 June 2007; Court of Biella, decision of 26 April 2007; Court of Appeal of Bari, order of 16 April 2004; commented by M. BAKTASH, *I giudici italiani*, cited above, p. 305 ff.

[80] Court of Cassation, judgment no. 7472 of 20 March 2008; see also Court of Cassation, judgments no. 18174 of 2 July 2008 and no. 19734 of 17 July 2008. For comments, see M. BAKTASH, *I giudici* italiani, cited above, p. 308; G. CAROBENE, *Identità religiose e modelli di protezione dei minori*, cited above, p. 203 ff.; M. ORLANDI, *L'entrata in vigore della Convenzione de L'Aja*, cited above, pp. 877 and 883; A. LANG, *Considerazioni su* kafalah, cited above, p. 52 ff.; M. IUS, Kafala: *stato civile del minore straniero*, in *Stato civ. it.,* 2008, no. 6, pp. 410-414, at p. 412 ff.

[81] "Right of the child to a family", in *Gazzetta Ufficiale* no. 133 of 17 May 1983, *suppl. ord.* and subsequent amendments.

[82] Court of Cassation, judgment no. 4868 of 1 March 2010, commented by M. BAKTASH, *I giudici* italiani, cited above, p. 308 ff.; G. CAROBENE, *Identità religiose e modelli di protezione dei minori*, cited above, p. 205 ff.; C. PERARO, *Il* riconoscimento, cited above, p. 545; A. LANG, *Considerazioni su* kafalah, cited above, p. 66 ff.; C.M. ARDITA, P. NIGLIO, *Riflessioni sull'istituto della Kafalah nell'ordinamento italiano: tra antinomie giurisprudenziali e inerzia legislativa*, in *Stato civ. It.,* 2010, no. 10, pp. 15-24, at p. 21 ff. See also Court of Appeal of Rome, order of 31 January 2011. *Contra*, Court of Appeal of Ancona, decision no. 434 of 16 November 2011, where the *kafala* was concluded on the basis of a commitment signed by the Italian spouses with the State of origin of the minor, and such a form of public control was considered to be relevant for the purpose of verifying the conformity of the measure with the best interests of the child (see G. CAROBENE, *Identità religiose e modelli di protezione dei* minori, cited above, p. 208).

[83] Legislative Decree no. 30 of 6 February 2007, "Implementation of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family

member referred to in Legislative Decree 30/2007 could also include adopted children or children pending adoption who enter Italy and acquire the status of minors in family foster care pursuant to Title III of Law 184/1983. On the contrary, children who are not direct descendants and who have no parental blood ties but are nonetheless dependent on the citizen to whom they have been entrusted according to the legislation of their country of origin cannot be classified as family members under that Legislative Decree. Indeed, the Court argued that a relationship based on *kafala* did not imply the establishment of a family relationship within the meaning of Directive 2004/38 (and hence also within the meaning of Legislative Decree 30/2007). Consequently, it clarified that the Italian citizen could seek reunification with (or rather, could seek the inclusion in his or her family of) a foreign minor under *kafala* only according to the regime provided for by Law 184/1983 on international adoptions, which is the only way of incorporating a foreign minor into the family available to Italians.

Moreover, the applicability of Article 28, paragraph 2 of Legislative Decree 286/1998 (Consolidated Immigration Act), which allows for the provisions of the Decree to be extended to foreign family members of Italian or European citizens where they are more favourable than those of Legislative Decree 30/2007, was therefore excluded. It follows that also Article 29, paragraph 2 of the Consolidated Immigration Act, which considers minors who have been adopted or fostered or who are under guardianship to be equivalent to («direct») children, was not applicable. Such an exclusion however resulted in reverse discrimination[84], i.e. in unequal treatment to the detriment of Italian citizens compared to foreigners. This is because an Italian citizen would be suspected of circumventing the Italian legislation that provides for international adoption as the only way of incorporating a foreign minor into an Italian family. Furthermore, the refusal to grant entry to a child placed under *kafala* with an Italian citizen could violate the child's best interests to preserve the family unity that was validly established in his or her country of origin.

In 2013, the Joint Divisions of the Court of Cassation addressed a question concerning the family reunification of an Italian citizen and a foreign child placed under *kafala*, reversing the previous approach based on the above observations[85]. Indeed, it held that Legislative Decree 30/2007 (implementing Directive 2004/38) was also applicable to Italian citizens, due to the reference to the more favourable provisions included in Article 28, paragraph 2 of the Consolidated Immigration Act[86], and went on to

members to move and reside freely within the territory of the Member States", in *Gazzetta Ufficiale* no. 72 of 27 March 2007.

[84] G. CARAPEZZA FIGLIA, *Tutela del minore migrante*, cited above, p. 241 ff.

[85] Court of Cassation, Joint Divisions, judgment no. 21108 of 16 September 2013.

[86] According to the Court of Cassation, the family reunification of a non-EU minor with the Italian citizen to whom he/she has been entrusted by *kafala* is governed by Legislative Decree 30/2007, because (i) this legislation is referred to in Article 28, paragraph 2 of the Consolidated Immigration Act (this provision in fact refers to Presidential Decree no. 1656 of 1965, repealed by Presidential Decree no. 54 of 2002 and subsequently by Legislative Decree 30/2007) and (ii) the applicability of the more favourable provisions set forth in the same Article

classify the child placed under *kafala* as an «other family member». The Court of Cassation argued that there was no risk of the circumvention of the Italian legislation on international adoptions in cases involving judicial *kafala* because the right of the Italian citizen to bring the child placed under *kafala* in the country of origin was not contrary to (domestic) public policy[87]. The Joint Divisions thus concluded that it was possible to issue an entry visa for family reunification to a third-country national child who had been entrusted to an Italian citizen residing in Italy under a judicial *kafala* order[88]. Such consent to entry could only be granted upon condition that the child is dependent on or living in the country of origin with the foster parent, or if the foster parent assists the child due to serious health grounds, pursuant to Article 3(2)(a) of Directive 2004/38 (which corresponds to the same article of Legislative Decree 30/2007). Moreover, the Court specified that, in any case, family reunification can only be permitted where the protection measure does not perform any functions similar to adoption, since *kafala* is not comparable to it. Indeed, it stressed that *kafala* does not establish a parent-child relationship based on biological reality, or even on the legal reality of legitimising adoption, with the result that the child cannot be regarded as a «direct descendant». Nevertheless, by virtue of the principle of the prevalence of the child's best interests, there is nothing to prevent the child from being included in the category of «other family members» under Article 3(2)(a) of Directive 2004/38 (same Article of Legislative Decree 30/2007).

It follows that, according to the Joint Divisions, in the event that an Italian citizen requests family reunification with a foreign minor entrusted to him or her under *kafala*, Article 29, paragraph 2 of the Consolidated Immigration Act, concerning the equivalence of the children who have been adopted, fostered or placed under guardianship, with legal children does not apply. However, the extension of that

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as well as Article 23 of Legislative Decree 30/2007 cannot in any case result in the application of Article 29, paragraph 2 of the Consolidated Immigration Act (on the equivalence of children who have been adopted or fostered or who are under guardianship with legal children) as it applies exclusively to reunifications involving third-country nationals.

[87] The Joint Divisions drew a distinction between domestic and international public policy, asserting that there may be incompatibility with national public policy when recognising the effects of foreign judgments or acts within Italian law; however, there can be no incompatibility whenever the foreign measure is not intended to result directly in any legal effects within the national system, but only to constitute a *de facto* requirement for a domestic administrative decision concerning family reunification. The Court went on to state that *kafala* cannot under any circumstances give rise to any effects that conflict with international public policy because this Islamic institution is expressly provided for as a valid child protection measure under international instruments. On this issue, see G. CARAPEZZA FIGLIA, *Tutela del minore migrante*, cited above, p. 242 ff.; G. CAROBENE, *Identità religiose e modelli di protezione dei minori*, cited above, p. 210 ff.; C. PERARO, *Il riconoscimento*, cited above, p. 546 ff.

[88] In this regard, the Joint Divisions observed that a further prerequisite for the grant of family reunification could be based on the principle of the protection of the best interests of the child. On this basis, the provision of care by *kafala* concluded by agreement between the parties should not have any effect, even if it has subsequently been approved by the competent authority, and should also be excluded as a *de facto* precondition for the administrative decision on reunification under Italian law, because the eligibility of the foster parent has not been verified by the competent judicial or public authority that is entrusted with responsibility for the child's care according to its national legislation.

Article to applications made by Italian citizens could be based on the reference to the more favourable provisions of the Consolidated Immigration Act made in its Article 28, paragraph 2. Consequently, the principle of equality between Italian citizens and foreigners seeking family reunification with a foreign minor under *kafala* would be respected; conversely, that principle would be violated if only foreign citizens were automatically eligible for reunification with a foreign child[89].

In other words, although the application of European law guarantees family reunification between an Italian citizen and a child under *kafala*, whose entry is in any case subject to the conditions laid down by Article 3 of Directive 2004/38, differences in treatment still remain between foreign and Italian citizens. This is because the latter cannot secure an automatic right of entry for a foreign minor entrusted to them by *kafala*[90]. Moreover, the application of the more favourable national provisions to the foreign family members of Italian nationals could be based on Article 37 of Directive 2004/38, which states that «[t]he provisions of this Directive shall not affect any laws, regulations or administrative provisions laid down by a Member State which would be more favourable to the persons covered by this Directive». In turn, Article 23 of Legislative Decree 30/2007, which implements that European provision, stipulates that the provisions of the Legislative Decree apply if they are more favourable than other relevant legislation. Both Articles seek to ensure the application of whichever of the two sets of rules is in fact more favourable in order to ensure the child's best interests. Based on these combined provisions (national and European), Article 28, paragraph 2 of the Consolidated Immigration Act, and thus also its

[89] Ruling on the basis of the principle of equality, the Joint Divisions rejected the former approach according to which Law 184/1983 on international adoptions necessarily applies to family reunification requested by Italian citizens, having found that such a request would not have been consistent with domestic public policy. Instead, the Joint Divisions found in favour of the applicability of Legislative Decree 30/2007 and recognised the (facilitated, but not automatic) right of entry in favour of a foreign child placed under *kafala*, who must be included within the category of «other family members» of the Italian citizen, and not as a direct descendant.

[90] Any other interpretation, which would be more favourable for the child under *kafala* in recognising an automatic right of entry, could be based on the need to protect the fundamental rights of European citizens, the best interests of the child, family unity and the principle of continuity of personal status, as guaranteed by Articles 7 and 24 of the Charter of Fundamental Rights of the European Union, as well as in the case law of the European Court of Human Rights. See the ECHR judgment of 4 October 2012, case no. 43631/09, *Harroudij* v *France*, in which the Court held that the French rule of private international law, Article 370-3(2) of the Civil Code, that prohibits adoption when the national law of the child forbids it, does not violate Article 8 ECHR; and S. MARINO, *Il diritto all'identità personale e la libera circolazione delle persone nell'Unione europea*, in *Riv. dir. int.*, 2016, pp. 797-825, at p. 801, where the author observes that the court considered continuity of name as an element strictly related to the status of the person and that, in the specific case, according to the law applicable to *kafala* this institution does not change the particulars of the child concerned, which had in fact been recognised in France. On French case law, see F. MONÉGER, *Kafala*, cited above, p. 1227, where the author states that the *Cour de Cassation* permitted the adoption of the child under *kafala* who later became a French citizen, as subsequently ordered by the ministerial decision of 22 October 2014. On the continuity of status and respect for cultural identity, see Y. NISHITANI, *Identité Culturelle en Droit International Privé de la Famille*, in *Collected Courses of The Hague Academy of International Law - Recueil des cours*, 2019, vol. 401, pp. 127-450, at p. 185 ff. and 279 ff.; C. RAGNI, *Art. 41 Legge 31 maggio 1995, n. 218*, in *Commentario breve al diritto della famiglia*, diretto da A. ZACCARIA, 3rd ed., Milano 2016, pp. 2501-2506, at p. 2504; and on the link between fundamental rights and family institutions, see S. TONOLO, *La famiglia transnazionale fra diritti di cittadinanza e diritti degli stranieri*, in S. AMADEO, F. SPITALERI (eds.), *Le garanzie fondamentali dell'immigrato in Europa*, Torino 2015, pp. 117-161, at p. 142 f.

Article 29, paragraph 2, could be applied also to an Italian citizen requesting family reunification with a foreign child under *kafala*.

In line with the ruling of the Joint Divisions, a subsequent 2014 judgment of the Supreme Court addressed the issue of the family reunification of Italian spouses with a Moroccan minor entrusted to them under a judicial *kafala*[91]. Article 29, paragraph 2 of the Consolidated Immigration Act was not applicable because no foreign applicants were involved. Therefore, Legislative Decree 30/2007 was deemed to be applicable, and the Court adopted a broad interpretation of the notion of «other family members» under Article 3(2)(a). It held that the family relationship need not be strictly parental, and that primary consideration should be given to the child's best interests, provided that the *kafala* measure is public in nature and the child is dependent or cohabiting in the country of origin with the Italian citizens in question.

Again in 2015 the Court of Cassation was requested to recognise the effects of *kafala* for the purposes of family reunification and confirmed that also a *kafala* concluded by agreement, and subsequently approved by the competent court of the place of origin of the child, could be deemed to constitute a valid basis for family reunification, since the constitutive act was controlled by the public authority, which verified its conformity with the best interests of the child[92]. The Court then reaffirmed that, according to Legislative Decree 30/2007, a child entrusted by *kafala* may be considered as an «other family member» and benefit from the (facilitated) right of entry, taking account of the nature and characteristics of the foreign institution, as well as the best interests of the minor in question[93]. Conversely, the possibility of applying the more favourable provision under Article 29, paragraph 2 of the Consolidated Immigration Act was not assessed. It follows that the approach developed thus far on the exclusive application of Article 29 to foreign citizens has been endorsed. Finally, the Supreme Court specified that the recognition of the foreign measure of approval of consensual *kafala* should in any case be based on Article 66 ff. of Law 218/1995 (on private international law)[94], and not on the special regime of international adoptions.

The nature of the *kafala* measure was then addressed in 2017 by the Supreme Court when examining a "private" *kafala* concluded by an Italian citizen under an agreement, which was subsequently approved by the competent authority of the State of origin of the child (Morocco)[95]. The Court argued

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[91] Court of Cassation, judgment no. 11404 of 22 May 2014.

[92] Court of Cassation, judgment no. 1843 of 2 February 2015.

[93] See G. CAROBENE, *Identità religiose e modelli di protezione dei minori*, cited above, p. 213 ff.; C. RAGNI, *Art. 41 Legge 31 maggio 1995, n. 218*, cited above, p. 2504.

[94] These articles provide for the special regime for the automatic recognition of foreign measures in specific cases falling within «*volontaria giurisidizione*» where a recognition procedure is not necessary provided that certain conditions are met.

[95] Court of Cassation, judgment no. 28154 of 24 November 2017. For comments, see M. CIRESE, *Anche la Kafalah convenzionale è istituto di protezione familiar conforme all'interesse del minore*, in *Il Familiarista.it*, 8 February 2018.

that this act could also be regarded as a valid basis for the grant of an entry visa for the purpose of family reunification to the child concerned. It held that, since there was a relationship of care between the foster parent and the child, albeit based on an agreement, respect for the child's best interests had been ensured through its subsequent approval by the competent authority of the place of origin. In line with the established interpretation on the inclusion of a child entrusted under *kafala* in the category of «any other family member» referred to in Article 3(2)(a) of Legislative Decree 30/2007, the Court concluded that the child in question could benefit from a right of entry, albeit not automatically, but following an extensive examination of the circumstances, on the basis of the said provision (which corresponds to Article 3(2)(a) of Directive 2004/38)[96].

The development of the judicial approach within the context of family reunification was based on a constitutionally oriented interpretation of national law, whilst also implementing the Directive on the free movement with a view to protecting migrant minors, balancing the State's interest in control of its borders against the rights of foreigners. Such an approach implied a weakening of the public policy exception where a minor is involved, giving priority to his or her best interests and the right to preserve family unity[97].

4.2. Other applications before the Italian courts based on *kafala*.

The Italian courts addressed the issue of the nature of *kafala* also in relation to applications to adopt children previously placed with the applicants under the Islamic institution. Whilst the solutions provided initially diverged, they were subsequently harmonised by the Joint Divisions ruling from 2013 mentioned above, which held that *kafala* was consistent with public policy and could be deemed to be equivalent to the Italian institution of foster care[98].

In a decision of 2005[99], the Court of Cassation implicitly stated that *kafala* was not equivalent to adoption, or even to pre-adoptive foster care, because the citizens entrusted under *kafala* do not have authority to represent the child, which instead remained under the competent authority of his/her country of origin. In this case, from a procedural point of view, the foster parents were not deemed to have any standing to lodge an objection against the declaration made by the Juvenile Court that the child was eligible for adoption.

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[96] This approach has been recently confirmed by the Court of Cassation, judgment no. 25310 of 11 November 2020, where the Pakistani mother entrusted the minor directly to his older brother through a private act of custody based on a notarial power of attorney.

[97] G. CARAPEZZA FIGLIA, *Tutela del minore migrante*, cited above, p. 229.

[98] On this issue see C. CAMPIGLIO, *Il diritto di famiglia islamico nella prassi italiana*, in *Riv. dir. int. priv. proc.*, 2008, pp. 43-76, at p. 70 ff.

[99] Court of Cassation, judgment no. 21395 of 4 November 2005, commented by M. BAKTASH, *I giudici italiani*, cited above, p. 307 f.; G. CAROBENE, *Identità religiose e modelli di protezione dei minori*, cited above, p. 202 f.

Previously, in 2002, the Juvenile Court of Trento[100] held that it was not possible to order the full adoption or the placement in pre-adoptive foster care of a child entrusted under *kafala* to an Italian couple; nevertheless, taking into account the specific situation, it suggested that the measure of «adoption in particular cases» provided for under Article 44(d) of Law 184/1983 might be applicable[101]. In a similar case, the Juvenile Court of Rome held that a declaration of adoption could be issued in particular cases[102]. Moreover, in 2011, the Supreme Court confirmed the similarity between *kafala* and adoption by stating that in order to recognise the foreign measure Article 41(2) of Law 218/1995, which refers to the special regime on intercountry adoptions under Law 184/1983, was applicable[103]. However, such approaches led to the conclusion that *kafala* is similar to adoption, which is not consistent with the Islamic prohibition.

This last finding was supported by the Juvenile Court of Brescia in 2013, which ruled that simple (non-legitimising) adoption could not be ordered because *kafala* is not similar to this institution, but rather to foster care, in line with the 2013 ruling of the Joint Chambers examined above. It also held that Article 66 of Law 218/1995 was applicable for the purposes of recognising the foreign act as a measure of non-contentious jurisdiction (*volontaria giurisdizione*)[104]. This provision, along with Article 23 of the 1996 Hague Convention, was also recalled by the Juvenile Court of Bologna in 2019 in upholding the automatic recognition of the Moroccan *kafala* measure and dismissing the application for the change of the child's surname on the ground that it did not have any power to change the child's surname, which was to be determined by the competent Moroccan authority[105].

According to the approach developed so far, the application of the rules on intercountry adoption would affect the nature and characteristics of *kafala* as provided for under the legal systems of origin. This was further asserted by the Court of Cassation in 2015, when it held that *kafala* does not create a pre-adoptive or foster care relationship giving rise to a full (legitimising) parent-child relationship, due to the prohibition on adoption common to the legal systems inspired by the Koran[106].

In 2017 the Supreme Court considered a complex case involving a Moroccan child who had been entrusted under *kafala* to two Moroccan spouses by a decision issued by the Court of First Instance of Rabat. This decision was subsequently recognised in Italy by the Court of Appeal of Cagliari, where they

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[100] Court of Trento, orders of 11 March 2002 and 10 September 2002. For comments see G. CAROBENE, *Identità religiose e modelli di protezione dei minori*, cited above, p. 194 ff.

[101] Whenever the conditions for the ordinary regime of adoption are not met, by virtue of Article 44(d) adoption can be declared where pre-adoptive custody is not possible.

[102] Juvenile Court of Rome, decision no. 621 of 9 May 2011, which was issued while the dispute leading to the 2013 ruling was pending before the Joint Divisions.

[103] Court of Cassation, judgment no. 19450 of 23 September 2011.

[104] Juvenile Court of Brescia, decision no. 226 of 23 December 2013, commented by C. PERARO, *Il riconoscimento*, cited above.

[105] Juvenile Court of Bologna, decision of 14 March 2019, commented by M. POLI, *Abbandonare la strada vecchia per quella nuova: l'efficiacia dei provvedimenti di* kafalah *a seguito dell'entrata in vigore della Convenzione dell'Aja del 1996*, in *Dir. fam. pers.*, 2019, pp. 1198-1209.

[106] Court of Cassation, judgment no. 6134 of 26 March 2015.

lived. However, the child was also placed with an Italian couple within the parallel adoption proceedings pending before the Juvenile Court of Cagliari[107]. The Italian couple asked to intervene in those proceedings concerning the recognition of the Moroccan *kafala* order before the Court of Appeal, but were not allowed to. This refusal was then confirmed by the Supreme Court, which held that status of foster parent conferred by the Italian adoption order does not entail the grant of procedural representation authority for the child in proceedings other than those relating to adoption.

Within the Italian case law, *kafala* has also been examined in other contexts. For instance, in 2017 the Court of Bergamo considered the recognition of *kafala* when assessing an appeal by a foster mother against a refusal by the Italian Institute for Social Security (INPS) to grant maternity leave[108]. The Institute justified the refusal on the grounds that *kafala* was not comparable to the custody measure under national law. In accordance with Article 65 of Law 218/1995, the Court of Bergamo recognised the effects of the foreign *kafala* measure, which was stipulated in the presence of notaries and subsequently approved by the court at the place of origin (Casablanca, Morocco). It also held that, due to its public nature, the measure was not contrary to (international) public policy. In line with the previous case law on family reunification, the Court of Bergamo then argued that *kafala* was equivalent to foster care, with the result that the refusal by the INPS was inappropriate and the foster mother had the right to take maternity leave[109].

In a case concerning the recognition of a *kafala* order issued by an Algerian court in 2016, the Court of Mantua acknowledged its «full and direct effectiveness» in the Italian legal system on the basis of Articles 65 and 66 of Law 218/1995 and also in light of the international conventions and the approach followed within the case law[110]. Consequently, the Court rejected the application seeking the appointment of a guardian for the foreign child, since in the event of *kafala* legal guardianship is vested in the *kafil* in accordance with the act of foster care and the applicable Algerian legislation[111].

A common classification of *kafala* is apparent from the analysis of the case law concerning the recognition of its legal effects in Italy within various contexts. Since *kafala* creates a family relationship that is not comparable under any circumstances to full adoption, and is indeed more similar to foster

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[107] Court of Cassation, order no. 29120 of 5 December 2017.

[108] Court of Bergamo, Labour Section, decision of 20 January 2017. Similarly, in relation to the Spanish system, see TSJ Cataluña, Sala de lo Social, Sentencia 3364/2019, 26 Jun. Rec. 1960/2019, that granted the «prestación por maternidad» because of the «equiparación de la kafala marroquí al acogimiento familiar» (in *Diario LA LEY*, no 9502, de 21 de octubre de 2019).

[109] In this case moreover, the INPS objected that the Italian central authority had not been consulted under Article 33 of the 1996 Hague Convention. However, as was noted by the Court of Bergamo, the Convention entered into force on 1 January 2016, i.e. after the facts to which the main proceedings related and was therefore not applicable.

[110] Court of Mantua (tutelary judge), order of 10 May 2018.

[111] On this issue, see R. GELLI, *Rappresentanza e cura del minore sottoposto a* kafalah *tra funzioni del* kafil *ed esclusione della tutela*, in *Fam. dir.*, 2019, pp. 43-47, at p. 46 f.

care, the Islamic measure can in any case be deemed to constitute a valid prerequisite for specific requests (e.g. family reunification, adoption, parental leave). This means that *kafala* must be fully accepted due to its inclusion within measures of children protection in international instruments and its aim of pursing the best interests of the child in places where this is the only available solution.

5. Concluding remarks.

The judgment of the Grand Chamber of the Court of Justice established the applicability of Article 3(2)(a) of Directive 2004/38 as regards the status of an underage third-country national who is placed under *kafala* with European citizens for the purpose of granting him/her an entry visa for family reunification. The Court of Justice also stressed the role of the competent national authorities, where there is genuine family life, to facilitate the entry of the foreign member and to carry out an examination of the case, taking account of the fundamental rights and the best interests of the child concerned[112]. Therefore, within the main proceedings, the English courts were required to apply Article 3(2)(a) of Directive 2004/38 and to examine the specific circumstances, which, as described in the opinion of the Advocate General and in the judgment, appear to require the grant of a right of entry to the child, who has been in Algeria since 2011 with only her foster mother pending the outcome of the proceedings.

The European Court ruling confirms the Italian approach that has developed first in relation to family reunification, having then been subsequently applied to other situations in which *kafala* was to be regarded as a precondition for the main request. However, some difficulties in the application of the Italian legislation still remain due the potential discrimination that may result from the reference in Article 28, paragraph 2 of the Italian Consolidated Immigration Act to the more favourable provisions. Indeed, Article 29, paragraph 2 of the Act provides for that children who have been adopted or fostered or who are under guardianship are equivalent to "legal" children. However, this Article only applies to requests for family reunification submitted by third-country nationals. Accordingly, minors placed under *kafala* with foreign nationals living in Italy would enjoy an automatic right of entry, unlike those entrusted to Italian or European citizens, because they are regarded as «other family members» under the applicable legislation (Article 3(2)(a) of Legislative Decree 30/2007 and of Directive 2004/38), as now interpreted by the Grand Chamber of the Court of Justice in the *SM* case.

A further reference for a preliminary ruling might therefore be useful in order to ascertain the compatibility of any national legislation (such as that applicable in Italy) that embraces a concept of descendant (including children who have been adopted or fostered or who are under guardianship) other

[112] See E. PATAUT, *Citoyenneté*, cited above, p. 722, where it is observed that «la protection du droit de l'Union européenne ne dépend pas de la validité du lien familial mais bien, dans la lignée de la Cour européenne des droits de l'homme, de sa réalité. En ce sens (…) la Cour fait bien preuve d'un pragmatisme libéral fondé sur la réalité des liens d'affection».

than that laid down in Directive 2004/38, insofar as it is considered to be more favourable for the child. Similarly, questions could also be raised concerning family matters other than reunification in order to verify whether the interpretation adopted in the *SM* case concerning the status of the child under *kafala* as an extended family member could be applied in different areas with a view to protecting fundamental rights and guarantying the effectiveness of Union law without any discrimination[113].

[113] See also P. HAMMJE, *Reconnaissance d'une kafala*, cited above, p. 785, where the author argues that «mais rien n'interdit de penser qu'elle pourrait à l'avenir se prolonger sur d'autres terrains, interrogeant alors sur sa confrontation avec les filiations juridiques».