Max Planck Institute
for Social Anthropology
Department 'Law & Anthropology'

# Application of the 1996 Hague Child Protection Convention to the Moroccan kafalah

## Question(s) at stake:

Whether a Moroccan *kafalah* judgment can be recognized in Belgium?

## Outcome of the ruling:

The recognition of a Moroccan *kafalah* judgment is not contrary to public policy since the appellants did not erroneously or deceitfully state before the Moroccan judge that they did not intend to take the child to Belgium.

## Topic(s):

- Foreign Laws, Decisions, Acts and Institutions
- Immigration and Asylum

## Keywords:

- Best interests of the child
- Children's rights
- Immigration
- Kafalah
- Measures and actions involving children
- Public order
- Situations created abroad

## Tag(s):

- Recognition of foreign institutions
- Family

## Author(s):

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**Country:**

Belgium

**Official citation:**

Court of appeal of Antwerp, 16 May 2017 (Hof van beroep Antwerpen 16 mei 2017) and court of appeal of Antwerp, 25 May 2016 (Hof van beroep Antwerpen 25 mei 2016). The latter being an interim judgment.

**Link to the decision:**

https://www.ipr.be/sites/default/files/rechtspraak/20173_20170516.pdf

**ECLI:**

No ECLI number / ECLI number unknown

**Date:**

16 May 2017

**Jurisdiction / Court / Chamber:**

Court of Appeal

**Remedy / Procedural stage:**

Appeal proceedings

**Previous stages:**

- Court of first instance of Antwerp, division Antwerp, 21 May 2015

**Subsequent stages:**

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**Branches / Areas of law:**

Private international law; Family law

## Facts:

The appellants have both the Moroccan and Belgian nationality and live in Belgium. On 22 January 2014, they requested the recognition of a Moroccan *kafalah* judgment before the Antwerp Juvenile Court in accordance with Article 22 of the Belgian Code of Private International Law (BCPIL).

In its judgment of 2 April 2014, the Juvenile Court asked the Public Prosecutor and the parties to take a stance regarding the compatibility of the appellants' request with the grounds for refusal of recognition under Article 25 of BCPIL.

On 21 May 2015, the Juvenile Court rendered the claim unfounded due to a conflict with public policy and the best interests of the child. The judge came to this conclusion because the appellants had erroneously or deceitfully stated before the Moroccan judge that they did not intend to take the child abroad. In drawing this conclusion, the judge took into account the fact that they are Moroccan nationals and residents of Morocco. However, it appears that they undeniably wanted to settle in Belgium with the child.

The appellants appealed this judgment before the Court of Appeal of Antwerp.

## Ruling:

The ruling of the Court of Appeal of 25 May 2016 can be divided into three main parts. Firstly, the court of appeal addresses the judgment on *kafalah an sich*. Secondly, it deals with the recognition of the judgment*.* Lastly, it considers the question of enforceability in the Belgian legal order.

With regard to the *kafalah* judgment *an sich*, the Court reiterates that it does not have the jurisdiction to review the merits of the Moroccan judgment. Since adoption is prohibited by Moroccan law, Moroccans in Belgium cannot adopt nor be adopted. Article 20 of the Convention on the Rights of the Child foresees that a child who is temporarily or permanently deprived of his or her family environment, or in whose best interests cannot be allowed to remain in that environment, is entitled to special protection and assistance provided by the state. This special protection and assistance can consist of the *kafalah*. The Court

continues by explaining, in general terms, the legal concept of *kafalah* and its consequences (see “main quotation on cultural or religious diversity”, para. 8 of the judgment). Following Article 24 of the Moroccan Law No 15-01, the *kafil* can, with the consent of a juvenile court judge and in the best interests of both parties, leave Moroccan territory with the *makful* to permanently reside abroad. In the case at hand, the *kafil* had obtained the permission of the Moroccan judge to permanently reside in Belgium.

Secondly, the Court assesses whether the judgment can be recognized in the Belgian legal order. Initially, it establishes that the legal concept of *kafalah* is unknown to the Belgian legal order and that it cannot be transposed into an adoption, since it does not establish filiation between the kafil(s) and the makful. Then, it focuses on the applicable legal framework. In contrast to what the parties argued, the Court confirmed that the recognition of a Moroccan *kafalah* is governed by the 1996 Hague Child Protection Convention.

Following Article 1, 1 (d) *juncto* Article 3 (e) and Article 23, 1 of the 1996 Hague Child Protection Convention, a *kafalah* pronounced in Morocco must be recognized in Belgium by operation of the law as a child protection measure. In addition, the child is entitled to the protection granted by the Belgian Constitution, which states in Article 22*bis* that in all decisions concerning children, the interest of the child is a primary consideration. Moreover, Article 20 of the Convention on the Rights of the Child expressly recognizes *kafalah* as a child protection measure.

The Court then states that, *in casu*, the recognition of the *kafalah* judgment is not incompatible with public policy. In principle, it is not contrary to Belgian public policy to recognize an appropriate protective measure with custodial effects in respect of an abandoned (Moroccan) child.

Nonetheless, the Court underlines that such recognition does not automatically result in the granting of a residence permit to the child. The recognition of the Moroccan *kafalah* judgment cannot be aimed at circumventing the migration rules.

As there is no indication that one of the refusal grounds of Article 23, 2 of the 1996 Hague Convention is present, the Court recognizes the Moroccan *kafalah* judgment. The assertion of the first judge that the appellants erroneously or deceitfully stated before the Moroccan judge that they did not intend to take the child to Belgium, is not consistent with the available information.

Lastly, the Court considers whether the Moroccan *kafalah* judgment is enforceable in the Belgian legal order. The Court raises, *propru motio,* the question of whether the procedure in Article 56 of the 1996 Hague Convention should have been followed. This article states that before the Moroccan judge can grant the *kafalah*, he must consult with the central authority, or another competent authority, in the state where the child will reside. Only upon approval of this authority can the decision be taken.

Then, the Court continues by comparing *kafalah* to Belgian foster care. In the Belgian legal order, the enforcement of a foster care arrangement requires an intervention of the juvenile court judge (Article 475*ter*, 2 Belgian Civil Code). Without such intervention, the foster care arrangement remains without legal consequences.

Therefore, the Court allowed the appellants in another hearing to take a position on whether or not the procedure of Article 56 had to be followed. Furthermore, the Court also invites the Public Prosecutor to submit an advice.

In a second decision of 16 May 2017, the Court of Appeal of Antwerp ultimately ruled that the 1996 Hague Child Protection Convention was not applicable in the present case as the Belgian legislator had failed to implement Article 33 of the Convention. In particular, the Belgian legislator refrained from appointing a central authority. Consequently, the recognition of the Moroccan *kafalah* judgment had to be assessed in the light of the Belgian Code of Private International Law. Taking into account that none of the refusal grounds mentioned in Article 25 was present, the Court of Appeal decided that the *kafala* had to be recognized in Belgium.

## Main quotations on cultural or religious diversity:

- “An alternative form of child-care can be found in the kafalah (Moroccan Law no. 15-01). The main purpose of kafalah is to place an abandoned or orphan child in a family. Within the framework of that institution, a person voluntarily takes up the commitment, the burden of maintenance, education, and protection of abandoned, destitute minors just like a father would do for his child (Article 2, first sentence). The kafil (kafalah parent) gets custody of the child; kafalah is essentially a measure for the protection of children and can be compared with a long-term form of foster care. The kafalah does not create a filiation bond nor does it give a right to succession (Article 2, second sentence). Kafalah is granted before a judge or a notary, with the consent of the child if he still has parents. The kafil must be Muslim. Moreover, he needs to be able to provide for the maintenance and protection of the child. He becomes a sort of foster guardian of the child concerned. At the request of (one of) his parents, the child can return to his or her original/birth family. The child has decisive authority if it has reached the age of reason. The final decision is taken by a judge who rules according to the best interests of the child. The kafalah automatically ends when the child reaches the age of majority. In contrast to an adoption, kafalah does not create a filiation bond.” (para. 8)

## Main legal texts quoted in the decision:

### International law

- Article 20 of the United Nations Convention on the Rights of the Child
- Article 1, 1(d); Article 3(e); Article 20; Article 23, 1; Article 56 of the 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

### Belgian law

- Article 22*bis* of the Belgian Constitution (*Belgische Grondwet*)

- Articles 22-25 Belgian Code of PIL (*Wetboek Internationaal Privaatrecht*)

**Moroccan law**

- Royal Decree No. 1-02-172 of 13 June 2002

## Cases cited in the decision:

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## Commentary

### Application of the 1996 Hague Child Protection Convention to the Moroccan kafalah

Firstly, in terms of the recognition of the judgment, the Court clarified the applicable legal framework. The parties argued that the case is governed by the BCPIL, whilst the Court correctly deemed the 1996 Hague Child Protection Convention applicable. It is the first time in the Belgian (published) case law that the aforementioned Convention is being applied when confronted with the question of recognizing a foreign *kafalah* judgment. This Convention foresees in recognition by operation of the law, if none of the refusal grounds of Article 23, 2 are present.

The Court makes the link with migration law in stating that recognition does not automatically result in the granting of a right of residence. Indeed, the Convention itself does not govern issues of migration. Nonetheless, to make it practically possible for a Moroccan *kafalah* judgment to have legal effects in Belgium, the child must be able to reside legally on the Belgian territory. Based on the Convention on the Rights of the Child and based on the duty of Belgium to respect its international obligations (such as those derived from the 1996 Hague Child Protection Convention), it can be argued that, under these specific circumstances, it is required to foresee a right of residence for such a child.

Secondly, in terms of the enforceability of the *kafalah* judgment, the Court takes matters into its own hands and raises the question of whether the procedure of Article 56 had to be followed. However, Article 56 of the 1996 Hague Convention does not deal with this question but relates to the practical operation of the

Convention. The Court accidentally referred to the wrong article. It should have cited Article 33, which reads:

“(1) If an authority having jurisdiction under Articles 5 to 10 contemplates the placement of the child in a foster family or institutional care, or the provision of care by kafalah or an analogous institution, and if such placement or such provision of care is to take place in another Contracting State, it shall first consult with the Central Authority or other competent authority of the latter State. To that effect it shall transmit a report on the child together with the reasons for the proposed placement or provision of care.

(2) The decision on the placement or provision of care may be made in the requesting State only if the Central Authority or other competent authority of the requested State has consented to the placement or provision of care, taking into account the child’s best interests.”

Lastly, the Court states that *kafalah* is a form of foster care. However, it is important to acknowledge that *kafalah* is *kafalah* and that foster care is foster care. They are two separate legal concepts, originating from separate legal systems, with separate legal consequences. Trying to assimilate *kafalah* to a known Belgian legal concept is a testament to the constraints on respecting the peculiarities of legal concepts other than our own.

## Literature related to the main issue(s) at stake:


- Foblets, Marie-Claire (ed). 2016. *Le Code Marocain de la Famille en Europe: Bilan Comparé de Dix ans d’application*. Brussels: La Charte.
- El Kaddouri, Yasmina and Jinske Verhellen. 2016. “De Kafala in de Belgische Rechtsorde: Opent Het Kinderbeschermingsverdrag Nieuwe Perspectieven?”. *Tijdschrift voor Jeugd en Kinderrechten* 4 (17): 343–351.
- Verhellen, Jinske and Yasmina El Kaddouri. 2018. “La kefala dans l’ordre juridique belge: une mesure de protection d'enfant ou/et migration?”. In Sylvie Saroléa (ed), *Statut familial de l’enfant et migrations*, 161–181. Louvain-la-Neuve: Université catholique de Louvain.

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