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

Recognition of Kafalah Without Adoption

Question(s) at stake:

Whether a Moroccan judgement granting kafalah can be converted into an adoption in Belgium.

Outcome of the ruling:

A Moroccan kafalah judgement cannot be converted into a simple adoption in Belgium since there is no proof that the biological parents or legal guardians consented to a simple adoption.

Topic(s):

- Foreign Laws, Decisions, Acts and Institutions
- Personal Status, Family and Inheritance

Keywords:

- Adoption
- Kafalah
- Kinship and filiation
- Measures and actions involving children
- Parenthood
- Situations created abroad

Tag(s):

- Child protection

Author(s):

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Country:

Belgium

Official citation:

Court of Appeal Ghent, Judgement of 14 November 2019 (Hof van beroep Gent, 14 november 2019)

Link to the decision:

https://www.ipr.be/sites/default/files/rechtspraak/20201_20191114.pdf

ECLI:

No ECLI number / ECLI number unknown

Date:

14 November 2019

Jurisdiction / Court / Chamber:

Court of Appeal Ghent

Remedy / Procedural stage:

Judicial review (final)

Previous stages:

- Tribunal of First Instance East-Flanders, section Dendermonde (family and youth division), 40th Chamber

Subsequent stages:

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Branches / Areas of law:

Private international law; Family law

Facts:

A Belgian couple of Moroccan descent sought to adopt a Moroccan child born in Morocco.

On 10 December 2013, the child was entrusted to the plaintiffs through *kafalah* following a judgement of the Tangier Court of First Instance after she was officially declared abandoned.

Acting on behalf of the child, the couple obtained authorization from the Moroccan Court for the child to leave the country. Subsequently, the child was granted a visa with the intention of being adopted in Belgium.

On arrival in Belgium, the necessary steps were taken to achieve a simple adoption. Following a judgement of the Court of First Instance on 16 January 2018, the simple adoption was pronounced in favour of both plaintiffs despite the disapproval of the Public Prosecutor's office.

The Public Prosecutor's office appealed this judgement, seeking an overturning of the judgement and a refusal of the simple adoption. In a subsidiary order, the Public Prosecutor saw no objection to the recognition of the kafalah by the Belgian legal order.

The plaintiffs asked for the first judgement to be upheld and, in subsidiary order, asked for the kafalah to be recognized in the Belgian legal order and for the judgement to be transcribed into the civil status records.

Ruling:

Concerning the request for adoption

The Court distinguishes between the request for simple adoption made by the first plaintiff, in whose favour the *kafalah* was pronounced, and the subsequent request made by the second plaintiff, initiated after the child's arrival in Belgium. In the case of the first plaintiff, the request is categorized as an inter-country adoption, whereas in the case of the second plaintiff, it is seen as a national adoption.

The Court determined that pursuant to Article 66 of the Belgian Code of Private International Law (BCPIL), the Belgian courts have jurisdiction.

Regarding the inter-country adoption (first plaintiff)

According to Article 67 of the BCPIL, the establishment of the adoption is governed by the law of the state of which the adopter or both adoptees are nationals. In the present case, the application of this legal provision means that Belgian law ought to govern the establishment of adoption.

Article 68(1) of the BCPIL stipulates that the consent of the adopted person and his/her parents or legal representatives, as well as how the consent is expressed, shall be governed by the law of the state where the adopted person habitually resides immediately before the adoption transfer or, if no such transfer occurs, at the time of adoption. However, under Article 68(2) of the BCPIL, Belgian law governs the consent of the adoptee if the law specified in Article 68(1) either does not mandate such consent or lacks provisions for adoption procedures. Given that Morocco does not have adoption procedures in place, Belgian law is deemed applicable.

Under what was formerly Article 348(1) of the Belgian Civil Code, if the parenthood of a father or mother in relation to a child is established, both must consent to the adoption. However, in this case, the Court ruled that there was no documentation to the effect that the biological parents of the child had consented to the adoption. The fact that the child was declared abandoned by a Moroccan judge does not imply that the biological parents consented to the adoption.

Therefore, simple adoption cannot be granted to the first plaintiff.

Regarding the national adoption (second plaintiff)

The Court ruled that in the absence of evidence demonstrating consent from the child’s biological parents, the simple adoption in favour of the second plaintiff was to be denied.

Concerning the request for recognition of the kafalah judgement in the Belgian legal order and for transcription in the Belgian civil status registers

The Court first notes that the request for recognition of the judgement holding kafalah is not governed by the Hague Child Protection Convention of 19 October 1996. Under Article 53.2, the Convention only applies to the recognition and enforcement of measures taken after it has entered into force in the relations between the state where the child protection measures were taken – in this case, Morocco – and the requested state (Belgium).

Since Belgium ratified the Convention on 1 September 2014, it does not apply retroactively to this case. Therefore, the Court reverted to the provisions outlined in the Belgian Code of Private International Law. Given that there is no indication that any of the grounds for refusal stipulated in Article 25 of the Belgian Code are relevant, the request for recognition of the kafalah judgement is deemed justified.

The Court rules that the Moroccan kafalah judgement must be included in the Belgian civil status registers.

Main quotations on cultural or religious diversity:

- “The Court adds that, to the extent that the Moroccan decision of 10 December 2003 to entrust S.K. to K.C. in kafalah may be eligible for recognition, there is no breach of Article 8 of ECHR [European Court of Human Rights] by not providing for the conversion of the *Kafalah* into an adoption. The conversion of a *Kafalah* into adoption would also lead to so-called limping legal relations since the adoption (with all its consequences, for example in terms of parentage) could have no legal consequences (as an adoption) in Morocco, since Moroccan *law does not provide for the institution* of adoption.” (p. 12)
- “The decision must be entered in the civil status registers. This is all the more true since the Child Protection Convention (not yet applicable in this case) indeed provides for a possible effect in the contracting States of a Kafala and therefore also in legal systems that do not recognize the Kafala as an institution. Any assimilation to a legal concept from one’s own legal order is not at stake.” (p. 17)

Main legal texts quoted in the decision:

Domestic law:

- Belgian Code of Private International Law: Articles 12, 20, 23, 24, 25, 26, 66, 67, 68, and 140;
- Belgian Civil Code: Articles 360-2, 344, § 1 (old), 348 § 3 (old), 357, 344-1, 345, 346-2.

International law:

- 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children: Article 53;
- Article 8 of the European Convention on Human Rights.

Cases cited in the decision:

Relevant European Court of Human Rights case law:

Chbihi Loudoudi v. Belgium, App no 52265/10, 16 December 2014. *Harroudj v. France*, App no 43631/09, 4 October 2012.

Commentary

Recognition of Kafalah Without Adoption

This well-reasoned judgement consists of two parts: the assessment of the application for adoption on the one hand and the recognition of the Moroccan *kafalah* on the other. It is the latter part that warrants particular attention within this context.

The Court considered the Moroccan kafalah as a foreign judgement *sui generis* and did not simply convert it into an adoption. The Court was clearly inspired by the 1996 Hague Child Protection Convention. Although not applicable at the time of the judgement, the Convention does provide for recognition of a kafalah in the contracting states. The Court even goes on to say that “any assimilation to a legal concept from one’s own legal order is not at issue”.

The decision not to convert the kafalah into an adoption does not in itself constitute a violation of the right to respect for private and family life (Article 8 of the ECHR). The Court rightly refers here to the case law of the European Court of Human Rights, more specifically to *Chbibi Loudoudi v Belgium*.

Moreover, such conversion would lead to a limping legal relationship: there would be a kafalah in Morocco and adoption in Belgium, each with its own legal consequences, particularly in terms of filiation. In the view of the European Court of Human Rights, having one and the same filiation tie across borders is in the best interests of the child. Consequently, European countries must acknowledge kafalah as well as the rights that this institution establishes for the involved parties involved, especially for the child. As kafalah does not lead to a residence permit in several European countries, including in Belgium, adoption is often still preferred. Unlike kafalah, adoption entails the right to family reunification. This is discussed in detail in a separate CURDI template on the 2019 judgement of The Court of Justice of the European Union (*SM v Entry Clearance Officer UK Visa Section*; CUREDI012GB010).

Unlike the 1993 Hague Adoption Convention, the 1996 Child Protection Convention does not address the interaction between family law and migration law. Article 17 of the Adoption Convention sets out the conditions under which an inter-country adoption can take place. One of these conditions is that the child obtains a permanent residence permit in the country of adoption (Article 17(d)). A similar provision is not included in the 1996 Child Protection Convention.

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

International Social Service. 2020. “Kafalah - Preliminary Analysis on National and Cross-Border Practices”, available at <https://www.iss-ssi.org/index.php/en/news1/456-kafalah-preliminary-analysis-on-national-and-cross-border-practices> accessed 21 August 2022.

Verhellen, Jinske. 2021. “Erkenning van een kafala uit Marokko zonder adoptie in België”. *Tijdschrift voor Familierecht* (9): 257–261.

Verhellen, Jinske and Yasmina El Kaddouri. 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?”. *Statut familial de l’enfant et migrations*, 161–181. Louvain-la-Neuve: Université catholique de Louvain, CeDIE.

Yassari, Nadjma. 2015. “Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law”. *The American Journal of Comparative Law* 63 (4): 927–962.

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