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

The Question of Incorporating Kafalah in the Belgian Legal Order

Question(s) at stake:

Whether the kafalah can produce legal effects in Belgium and whether kafalah should be converted into adoption?

Outcome of the ruling:

The Court of Appeal of Ghent refused to pronounce the adoption in Belgium of a Moroccan child, after an earlier *kafalah* decision in Morocco. The consent of the biological mother and father to the adoption and the report prescribed by Article 361-5, 1° of the Belgian Civil Code were missing.

The Court of Cassation dismissed the appeal. Consequently, the decision of the Court of Appeal of Ghent remained in place: the Moroccan *kafalah* judgment did not result in any form of adoption in Belgium.

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 Cassation 14 September 2015, No. AR C.13.0296.N (Hof van Cassatie 14 september 2015, AR C.13.0296.N) Court of Appeal Ghent 13 March 2013 (Hof van beroep Gent 13 maart 2013)

Link to the decision:

No link available.

ECLI:

No ECLI number / ECLI number unknown

Date:

14 September 2015

Jurisdiction / Court / Chamber:

Court of Cassation and Court of Appeal

Remedy / Procedural stage:

Judicial review (cassation)

Previous stages:

- Tribunal of first instance Dendermonde, Youth Section, 22 November 2012

Subsequent stages:

Branches / Areas of law:

Private international law; Family law

Facts:

In October 2011, a Belgian couple living in Belgium, submitted to the juvenile court a request for the full adoption (*volle adoptie*) of a Moroccan child.

The child was born from an extramarital relationship in Morocco. The mother did not want to keep the child. In March 2011, the Court of First Instance in Tétouan (Morocco) declared the child abandoned. In July 2011, the same court ruled that the Belgian couple could take care of the child through *kafalah*. Subsequently, the Moroccan court granted authorization for the child permission to leave Moroccan territory with the Belgian couple.

The Belgian Juvenile Court eventually pronounced the simple adoption (*gewone adoptie*) of the child.

The Public Prosecutor appealed this decision before the Court of Appeal of Ghent. The latter modified the judgment of the first instance court and denied the adoption request on two grounds. Firstly, the consent of the biological parents or the legal representative of the child was absent. Secondly, there was no report on the child under Article 361-5, 1° of the Belgian Civil Code available. Article 361-5, 1° of the Belgian Civil Code stipulates that the transfer of a child to Belgium for adoption from a country that acknowledges neither adoption nor the placement of a child for adoption can only take place if the competent Belgian authority has received a report from the competent authority in the country of origin. This report must contain information on the identity of the child, his background, family situation, medical history and that of his family, his social environment, as well as his special needs.

The Belgian couple brought the case before the Court of Cassation.

Ruling:

Before the Court of Cassation, the appellants produced four different arguments. Only the second argument related to the report on the child, required under Article 361- 5, 1° of the Civil Code, was declared admissible. The appellants argued that they assumed that the report was no longer an issue since the juvenile court had already ruled that it could be replaced by other equivalent documents. The appellants argued that their right of defence had been violated since they could not reasonably foresee that the Court of Appeal would require a more detailed report. This argument was ruled admissible. The Court of Cassation, however, ruled that the argument lacked a factual basis. It argued that in the application for appeal, the Public Prosecutor had invoked the absence of the report under Article 361-5, 1° of the Civil Code, which contains information about the child's identity, personal background, family situation, medical history and that of his family, social environment, household attitudes, and special needs. The question in the debate was thus whether the information sheet of the child submitted by the appellants corresponded to the report required by Article 361-5, 1° of the Civil Code.

In conclusion, the appeal was rejected.

Main quotations on cultural or religious diversity:

- "The kafalah is [...] a (reversible) form of foster care in which a dative guardian is assigned to the abandoned child, but is subject to permanent supervision of the guardianship judge to which no exception is provided if the child has been taken abroad (even with the permission of the guardianship judge)." (p. 227)
- "There is no fundamental right to adopt a child for a person who is actually raising it, and Article 8 of ECHR, which guarantees the right to respect for private and family life, does not in any way require the States Parties to grant a person the status of the adoptive parent or adoptive child." (p. 227)

Main legal texts quoted in the decision:

Belgian law

- Articles 67 and 68 Belgian Code of PIL (*Wetboek Internationaal Privaatrecht*)
- Article 348-5 of the Belgian Civil Code (*Burgerlijk Wetboek*)
- Article 361-5, 1° of the Belgian Civil Code (*Burgerlijk Wetboek*)

International law

- Article 8 European Convention on Human Rights

Moroccan law

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

Cases cited in the decision:

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Commentary

The Question of Incorporating Kafalah in the Belgian Legal Order

At the core of these proceedings lies the following question: How can the *kafalah* be incorporated in the Belgian (and other European) legal order(s)? In this case, the appellants chose to convert their *kafalah* into adoption but without success.

In Belgian case law, we see that oftentimes *kafils* try to convert the *kafalah* into guardianship or foster care.

Nonetheless, under international law, the *kafalah* should not be assimilated or converted into a known legal concept in the Belgian legal order. After all, the Hague Child Protection Convention of 1996 considers the *kafalah* to be a *sui generis* child protection measure. Article 23 of the Hague Child Protection Convention of 1996 allows for the recognition of the *kafalah* as such (thus without transformation) in all the State Parties, such as Belgium.

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

- Berte, Sara. 2014. “De kafala vormt geen toestemming tot adoptie?”. *Nieuw Juridisch Weekblad* (298): 228–229.
- 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.

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