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

The Qualification and Recognition of Kafalah as Adoption

Question(s) at stake:

Whether (a Moroccan) kafalah can be qualified as adoption under Dutch law.

Outcome of the ruling:

A Moroccan kafalah cannot be qualified as an adoption under Dutch law and therefore cannot be recognized as such.

Topic(s):

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

Keywords:

- Foreign decisions/judgments
- Kafalah
- Parenthood
- Recognition
- Adoption
- Custody

Tag(s):

- Classification
- Kafalah

Author(s):

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Country:

Netherlands

Official citation:

District Court Utrecht, Judgement of 5 October 2005, 192066/FA RK 05-1255 (Rechtbank Utrecht, 5 oktober 2005)

Link to the decision:

https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBUTR:2005:AU8343

ECLI:

ECLI:NL:RBUTR:2005:AU8343

Date:

05 October 2005

Jurisdiction / Court / Chamber:

District Court of Utrecht (The Bench Chamber)

Remedy / Procedural stage:

First instance

Previous stages:

- None

Subsequent stages:

- No information found

Branches / Areas of law:

Private international law; Family law

Facts:

The applicants were a married couple living in the Netherlands. The Moroccan wife, one of the applicants, had a minor half-brother who was born in Morocco and

lived there with his parents. The minor half-brother's father and mother both died, leaving the child an orphan. In accordance with Morocco's "Acte de kafala" of 1 August 2003, legalized by the Court of Nador (Morocco) on 4 August 2003, the uncle, acting as the child's "dative guardian", transferred the care of the child to the applicants. The applicants then applied in the Netherlands for recognition of the legalized kafalah*.*

Ruling:

The Court ruled that this kafalah could not be considered an adoption decree for several reasons.

First, as the judge explained, adoption establishes family law relations between the child and the adopters in such a way that the child to be adopted is treated in all respects (including inheritance law) as the adopters' own child.

Secondly, a so-called "weak" adoption, which takes place abroad and does not completely sever the ties with the original parents, can be recognized as such under Dutch law. However, a legal act that does not have the effect of changing the parental relationship can no longer be considered an adoption under Dutch law.

Third, the translation and wording of the text of the Moroccan Adoption Act suggest that the "acte de kafala" serves the purpose of a care order or a parental authority order. The "acte de kafala*"* was translated as an "act concerning the care of someone".

Finally, Article 149 of the Moroccan Family Code explicitly states that an adoption is null and void and has no legal consequences.

For all these reasons, the Court rejected the request for recognition because it could not consider kafalah as adoption.

Main quotations on cultural or religious diversity:

- “In making that assessment, the Court considers the following. The purport of an adoption is to establish family law relations between the child and the adopters in such a way that the child to be adopted is treated in all respects (including as regards inheritance) as the adopters’ own child. The adoption therefore changes the parentage of the child: the applicants become the child’s father and mother. A so-called ‘weak’ adoption made abroad, that has taken place abroad and that does not completely break the link with the original parents can in principle be recognized as such under Dutch law; however, a legal act that does not at all serve to change the parentage can no longer be regarded as an adoption”. (Section 3.6)
- “In the translation now submitted, the term ‘acte de kafala’ is translated as an ‘act concerning the care of someone’. It also appears from the wording of the deed that the *‘kafalah’* evidently serves the purpose of a care provision or a provision in guardianship, which could potentially be eligible for recognition as such, although this has not been requested. The intent of adoption cannot be discerned from this ‘acte de kafala’. This aligns with Article 149 of the Moroccan Family Law Code, the Mudawwana, which states:
- ‘Art. 149 – Adoption is void, and none of the legal consequences of a legal relationship derive from it.

– Partial adoption, or the designation of the child as heir, does not establish parentage. This is subject to the provisions on wills’.” (Section 3.7)

- “From the above, especially the wording of the deed and the first sentence of Article 149 of the Mudawwana, it must be deduced that ‘kafalah’ cannot be equated with adoption. The applicants have not sufficiently substantiated their view that this could be plausible. The Court is therefore of the opinion that the kafalah cannot be recognized as an adoption and the application must therefore be rejected”. (Section 3.8)

Main legal texts quoted in the decision:

Dutch law

- Article 6 of the Conflict Law Adoptions Act (WCA)

International law

- Article 149 of the Moroccan Family Law Code

Cases cited in the decision:

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Commentary

The Qualification and Recognition of Kafalah as Adoption

With regard to cultural and religious diversity, this ruling and vision of the Dutch Court are particularly relevant because it examines how and why *kafalah* is assessed and recognized within the Dutch legal system.

First of all, knowledge about the kafalah measure must be collected in order to fully understand the ruling.

The Moroccan legal system is based on Islamic law. Kafalah, too, finds its origin in Islamic law. It is a form of foster care in which the caretaker is called the *kafil* and the child is called the *makfool*. The kafil is obliged to protect and educate the child until he or she reaches the age of majority. Kafalah can be established by a court order or by agreement between the parents or legal representative and the child. However, in the case of abandoned children, i.e., orphans, judicial approval is usually required. (Van der Velden 2015)

As kafalah is part of Islamic law, this form of care exists in several Muslim-majority countries. In the Netherlands, it often happens that courts are requested, among other things, to regard a kafalah (established abroad) as an adoption.

In the present case, the District Court held that since kafalah cannot qualify as an adoption under Moroccan law, it cannot qualify as an adoption under Dutch law either. Kafalah is primarily considered to be “taking care of someone”, which does not change the child’s parentage. The fact that adoption is explicitly declared null

and void in the Moroccan Family Code supports the previous statement.

Whether (a Moroccan) kafalah can be qualified as an adoption under Dutch law is a very relevant question for understanding many other new rulings on kafalah*.* Because kafalah cannot be considered and/or recognised as adoption, many other questions arise that would not be relevant if the first question had been answered in the affirmative.

These questions include:

- How else could a kafalah (or a kafalah measure) established abroad be qualified under Dutch law?
- How would the parental authority of the kafalah parents be organized?
- What does the Dutch qualification of kafalah in the present case mean for the kafalah child's right to reside with the kafalah parents in the Netherlands?
- How can creating limping situations with regard to private international law be avoided?

The various questions arising from this judgment (as neither descent nor adoption resulted from kafalah) are dealt with in template CUREDI089NL003. The present decision can be regarded as the base decision, while the decision in template CUREDI089NL003 discusses the matter in more detail.

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

- Chafi, Mohamed. 2007. *La kafala ou la prise en charge des enfants abondonnés.* Collection de recherche juridique 14.
- Van der Velden, Frans. 2016. *Inleiding in de shari'a: een kennismaking met het recht van de islam en van de islam-georiënteerde wereld*. Den Haag: Boom juridisch.
- Yassari, Nadjma. 2015. "Recognizing child protection measures in Middle Eastern legal systems as equivalents to adoption - a fresh look on Maghrebian kafala, Iranian sarparasti and Iraqi damm". *Adoption: Cross-border legal issues*: 64-76. Brussels: European Parliament.

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