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

The Ambiguities Accompanying Recognition of Kafalah under French Law

Question(s) at stake:

Whether kafalah can be assumed to be the equivalent of simple adoption, thus supporting the conclusion that Morocco authorizes the adoption of a Moroccan child in France.

Outcome of the ruling:

Kafalah cannot be considered equivalent to simple adoption. The request to adopt a child placed under kafalah was denied.

Topic(s):

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

Keywords:

- Adoption
- Kafalah
- Children
- Parenthood
- Parental rights
- Best interests of the child
- Non-discrimination
- Right to respect for family life
- Situations created abroad
- Guardianship
- Recognition

Tag(s):

- Makful
- Kafil
- Simple adoption
- International law
- Arrangements between countries

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Country:

France

Official citation:

Court of Cassation, Judgment of 10 October 2006, 06-15.246 (Cour de cassation, Arrêt du 10 octubre 2006, 06-15.246)

Link to the decision:

https://www.legifrance.gouv.fr/juri/id/JURITEXT000007053721

ECLI:

No ECLI

Date:

10 October 2006

Jurisdiction / Court / Chamber:

Court of Cassation, First Civil Chamber

Remedy / Procedural stage:

Cassation

Previous stages:

- Court of Appeal of Reims (2 December 2004)
- First Instance Court (no information available)

Subsequent stages:

- None

Branches / Areas of law:

Private international law; family law

Facts:

An abandoned child Z, born in Marrakesh and of Moroccan nationality, was taken into the care of French couple X and Y by *kafalah* granted in Morocco in 2003. The couple requested the full adoption of Z in France or, alternatively, simple adoption. Their request was denied in the court of first instance, but they were then granted simple adoption of Z by the Court of Appeal of Reims. The Attorney General appealed. Z had been living with the couple in France for a year at the time of the decision.

Ruling:

The Court of Cassation concluded that simple adoption of Z could not be granted to the couple, as Article 370-3, paragraph 2 of the French Civil Code requires that the personal law of the child does not prohibit adoption. The court noted that *kafalah* could not be considered equivalent to adoption, as the former does not establish a formal legal parent-child relationship between the adult and the child, and that Moroccan law authorizes *kafalah* and explicitly prohibits adoption. This being the case, Z's personal law was considered to be prohibitive of adoption and thus her adoption was denied.

Main quotations on cultural or religious diversity:

- "Attendu que pour prononcer l'adoption simple de l'enfant par les époux X..., l'arrêt infirmatif attaqué, après avoir relevé que le code du statut personnel

marocain dispose que "l'adoption n'a aucune valeur juridique et n'entraîne aucun des effets de la filiation", retient, comparant les effets de l'adoption simple et de la kafala, que cette dernière met à la charge des tuteurs désignés les obligations parentales du droit français, qu'il s'agisse de l'entretien, de l'éducation ou de la protection de l'enfant abandonné et que l'adoption simple confère à l'adoptant les droits et obligations de l'autorité parentale à l'égard de l'enfant, sans porter atteinte à ses origines et sans instaurer un lien fictif de filiation; Qu'en statuant ainsi, alors que, selon ses propres constatations, la loi marocaine interdit l'adoption, que la kafala n'est pas une adoption et que, par ailleurs, le mineur n'était pas né et ne résidait pas habituellement en France, la cour d'appel a violé le texte susvisé."

"Whereas in order to pronounce the simple adoption of the child by the spouses X [...] after noting that the Moroccan Personal Status Code stipulates that 'adoption has no legal value and does not entail any of the effects of filiation', the judgment under appeal, comparing the effects of simple adoption and kafalah, notes that the latter places the parental obligations of French law on the designated guardians, and that simple adoption confers on the adopter the rights and obligations of parental authority over the child, without prejudice to the child's origins and without creating a fictitious filiation link; That in so ruling, when, according to its own findings, Moroccan law prohibits adoption, kafalah is not an adoption and, moreover, the minor was not born and did not habitually reside in France, the Court of Appeal violated the aforementioned text".

Main legal texts quoted in the decision:

- Article 370-3 of the French Civil Code
- Article 149 of the Moroccan Family Code

Cases cited in the decision:

None

Commentary

The Ambiguities Accompanying Recognition of Kafalah under French Law

Kafalah is an institution developed and practised in Muslim-majority countries influenced by Islamic law whereby an adult (*kafil*) commits to taking care of and educating a child (*makful*) until the age of legal maturity. The child maintains their legal ties with their biological family (Buchler and Kayasseh 2018). It is internationally recognized as a child protection measure by Art. 3 and Art. 33 of the Hague 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 (1996 Hague Child Protection Convention) and Art. 20 of the United Nations Convention of 20 November 1989 on the Rights of the Child.

Such an arrangement raises the question of whether recognition is possible under French law (or more generally in Europe) in the absence of exact equivalence. It has been argued by several claimants, including the ones in question, that such an arrangement should be treated as an adoption. What raises an issue in French law (though not only in France) is the fact that, unlike adoption, *kafalah* does not establish a new parent-child relationship, while French law requires that a child's personal law must allow their adoption in France. In this case, the question becomes whether Morocco may be considered as a country that allows adoption of its minor citizens given that it allows *kafalah*.

The French position on this is clarified in the case at hand. Article 370-3 of the French Civil Code explicitly provides that "the adoption of a foreign minor cannot be granted if his or her personal law prohibits such an institution, unless the minor was born and habitually resides in France." This article thus creates two types of adoptable children: those whose personal law authorizes adoption (and are therefore adoptable) and those whose personal law prohibits it (and are therefore not adoptable unless the conditions are met).

The case in question, along with another one decided on the same day concerning a *kafalah* granted in Algeria (Court of Cassation, 10 October 2006, 0615265), makes clear that the latter type would naturally be the case for most children placed under *kafalah*, since many Muslim-majority countries prohibit adoption and provide a framework for *kafalah* as an alternative. This form of child

protection allows an adult to care for and educate a child without becoming their legal parent, thereby overcoming the prohibition generally accepted by Muslim legal scholars (Buchler and Kayasseh 2018). This is the case in Morocco (and Algeria) where, as this case highlights, adoption is prohibited and is considered to have "no legal value and does not entail any of the effects of filiation" (Article 149 of the Moroccan Family Code). In this regard, children placed under *kafalah* whose personal law prohibits adoption would not be adoptable unless they are born and have their habitual residence in France. The way out of this impasse could possibly be to treat *kafalah* as an equivalent of simple adoption, which also would not cut any existing kinship ties with the biological parents. The court in the case in question rejected such an equivalence and referred to Moroccan law, which clearly distinguishes between the two and provides for an explicit prohibition of adoption.

The issue surrounding this conversion of status has since been taken all the way to Strasbourg following a similar case decided in 2009 (Court of Cassation, 25 February 2009, 0811033) where the applicant, a French national requesting the adoption of an Algerian child placed under her care by *kafalah*, argued that denying the equivalence of *kafalah* to adoption constituted a violation of Article 8 ECHR (right to respect for private and family life) alone and in conjunction with Article 14 (non-discrimination). This argument was made on the grounds of the consideration that a child not born in a country which prohibits adoption (usually a Muslim-majority country) would be adoptable, but not others whose national law prohibits it.

In *Harroudj v France* (ECtHR, 4 October 2012, App. no. 43631/09), the ECtHR considered that this provision was not discriminatory, as French law does offer possibilities to alleviate the consequences of this limit. Article 21-12 of the Civil Code provides that the following may qualify for French nationality: "(1) a child who, for at least three years, has been taken in by court order and raised by a person of French nationality, or has been entrusted to the child welfare service; (2) a child who has been taken into care in France and raised under conditions that have enabled him or her to receive a French education for at least five years,

either by a public body or by a private body meeting the criteria set by a decree of the Conseil d'Etat."

The court thus concluded that the child was able to reside in France for a number of years and eventually obtain nationality, meaning that sufficient time is given for the integration of the child within French society. This comes in addition to the exception already provided by Article 370-3 of the Civil Code for a child who was born and habitually resides in France. The reasoning is that the continuity of the child's personal status should be secured across different jurisdictions, and the child's ties with the country of origin should not be severed abruptly. *Kafalah* is thus recognized as such and produces effects comparable to a form of guardianship (*recueil légal*).

The ECtHR also added in a later case that the right to respect for private and family life (Article 8 ECHR) does not oblige states to grant adoption of a child placed under *kafalah* (*Chbihi Loudoudi and Others v Belgium*, 16 December 2014, App. no. 52265/10; see Den Haese and Verhellen forthcoming). However, taking these two rulings together (*Harroudj* and *Chbihi Loudoudi*), one could in principle conclude that a limitation on adoptability could be considered discriminatory if a state does not establish clear ways to alleviate its consequences and allow the child to eventually become adoptable under their national law (such as through the exceptions provided by the article in the French Civil Code itself or the possibility of becoming a national) (Kinsch 2014).

While the position of the ECtHR does, at first sight, secure continuity of personal status in line with the best interests of the child and thus provides more legal certainty, it also introduces some confusion as regards the effects attached to it in practice and raises questions in relation to the rights of the child in comparison with adopted children. [Fillod Chabaud 2020]

Immigration rights can be cited as an illustration of the legal effects attached to *kafalah*, as *makfuls* are in principle allowed to enter and reside in France. Consistent administrative jurisprudence has confirmed that "it is in a child's interest to live with the person who, by virtue of a court decision having legal

effect in France, has parental authority over him or her" (Conseil d'Etat, December 28, 2007, no. 304202; December 9, 2009, no. 305031; February 7, 2013, no. 347936). Under European Union law, a *makful* will also be allowed entry and residence where their *kafil* exercises their rights of free movement (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; ECJ, *SM v Entry Clearance Officer*, UK Visa Section, 26 March 2019, Case C-129/18; see Den Haese and Verhellen 2025).

Having said that, research has shown that *kafils* often face difficulties in explaining their relationship to the child in hospitals, administrative offices, and embassies as well as in obtaining visas and the right of residence, often leaving them blocked at the border for weeks – an issue not generally faced by adoptees (Fillod-Chabaud 2020). The discretion of administrative authorities in determining the effectiveness of the status remains prominent.

Remedies to ensure the smooth transfer of the effects of a *kafalah* placement order have been provided in international law. Authorization of French authorities can be obtained before the *kafalah* placement order is granted with respect to a child who is meant to leave for France in order to ensure its recognition. This mechanism, which was introduced by the 1996 Hague Child Protection Convention, provides a framework and mechanisms of cooperation between the country of origin granting the *kafalah* placement order and the receiving country before such an order is effectively granted. A central authority is designated in both countries and a file concerning the child is communicated between them (Art. 33). The consent of the receiving state thus becomes a condition to grant the *kafalah* placement order, as it increases the chances of recognition and facilitates the arrival of the child in the receiving country. It should be noted that both France and Morocco are Contracting Parties to the Convention, but no reference was made to this in the case at hand, nor to whether its mechanisms offered an effective remedy for the claimants.

Moreover, it is unclear whether the family in question had issues deriving from the ambiguities that could be associated with *kafalah* and what the reasons were

for their request to convert the status to that of adoption. This may have been linked to rights associated with the latter that are more favourable to the child, for example with regard to their access to French citizenship. While *makfuls* would only qualify for citizenship after residing with their *kafil* for three years in accordance with the aforementioned provision, an adoptee would be considered a French national from birth if a full adoption order is granted (Art. 20 of the French Civil Code). In the case of simple adoption, the adoptee can apply for citizenship without needing to meet any residence duration requirements (Art. 21-12 of the French Civil Code).

The case in question underlines the importance of recognition of a status obtained abroad in order to maintain the ties created with the country of origin, but also highlights its inadequacy in the absence of a clear legal regime regarding the effects that derive from that status, which may lead to requests for conversion of the status to one already existing in the national legal system in question. The respect for foreign legal cultures can only truly be effective in practice if the status is secured after recognition through the establishment of national policies addressing cross-border effects of *kafalah*, such as post-arrival monitoring and protection mechanisms, access to immigration and citizenship rights, etc. – that is, so long as such policies are consistent with the best interests of the child.

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

- Abis, A. 2023. “Child Fostering Care: Kafala in Western Countries”. In Giovanni G. Valtolina and Laura Zanfrini (eds), *Migrant Families and Religious Belonging*, 84–99. Amsterdam: IOS Press.
- Buchler, A. and E.S. Kayasseh. 2018. “Fostering and Adoption in Islamic Law – Under Consideration of the Laws of Morocco, Egypt, and the United Arab Emirates”. *Electronic Journal of Islamic and Middle Eastern Law* 6: 31–56.
- Den Haese, Sarah and Jinske Verhellen. Forthcoming. “Kafalah, Adoption, and Residence Status of Children”. *Cultural and Religious Diversity under*

State Law across Europe, DOI: 10.48509/CUREDI061BE013.

- Den Haese, Sarah and Jinske Verhellen. 2025. "The Child Placed under Kafalah Can Obtain a Right of Residence under EU Law as Another Family Member". *Cultural and Religious Diversity under State Law across Europe*, DOI: 10.48509/CUREDI012GB010.
- Ez-Zahoud, N.S. "La Kafala n'est pas une adoption!" *Village de la Justice*, 26 April 2011.
- Fillod-Chabaud, A. 2020. "The Other Children of the French Republic: The Government of Kafala by the Institutions of Adoption". *French Politics, Culture & Society* 38: 86.
- Kinsch, P. 2014. "Harroudj v. France: Indications from the European Court of Human Rights on the Nature of Choice of Law Rules and on Their Potentially Discriminatory Effect". In Sarcevic et al. (eds), *Yearbook of Private International Law: Volume XV*, 39–44. Boston: Otto Schmidt/De Gruyter European law pub.

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