OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 26 February 2019(1)

Case C-129/18

SM
v
Entry Clearance Officer, UK Visa Section

(Request for a preliminary ruling from the Supreme Court of the United Kingdom)

(Reference for a preliminary ruling — Right of Union citizens and their family members to move and reside freely within the territory of the Member States — Directive 2004/38/EC — Concept of direct descendant of a Union citizen — Family reunification — Child in legal guardianship under the Algerian kafala system — Right to family life — Protection of the child's best interests)

1. Two spouses of French nationality resident in the United Kingdom applied to the United Kingdom authorities for entry clearance, as an adopted child, for an Algerian child placed in their guardianship (*recueil legal*) in Algeria under the *kafala* system. (2)

2. Following the refusal of the United Kingdom authorities to grant clearance, a decision which was appealed by the child, the Supreme Court of the United Kingdom has asked the Court of Justice, in essence, whether, under Directive 2004/38/EC, (3) the child can be classed as a 'direct descendant' of the individuals in whose guardianship she was placed under *kafala*. This would facilitate her family reunification in the Member State where those individuals are resident.

I. Legal framework

A. International law

1. Convention on the Rights of the Child (4)

3. Article 20 is as follows:

'1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children ...'

2. Hague Convention of 29 March 1993 (5)

4. The text contains no reference to *kafala*.

3. Hague Convention of 19 October 1996 (6)

5. Article 3 is as follows:

'The measures referred to in Article 1 may deal in particular with:

...

(e) the placement of the child in a foster family or in institutional care, or the provision of care by *kafala* or an analogous institution;

...'

6. Article 33 stipulates as follows:

'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 *kafala* 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.'

B. EU law

1. Charter of Fundamental Rights of the European Union (7)

7. Under Article 7:

'Everyone has the right to respect for his or her ... family life ...'

8. Article 24(2) provides that:

'In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.'

2. Directive 2004/38

9. Article 2(2)(c) establishes that:

'For the purposes of this Directive:

...

(2) "Family member" means:

...

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b)'.

10. Article 3 provides as follows:

'1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence ...

...

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.'

11. Article 7(2) is as follows:

'The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph l(a), (b) or (c).'

12. Article 27 stipulates that:

'1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

...'

13. Article 35 establishes that:

'Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. ...'

C. UK law

1. The Immigration Regulations 2006 (8)

14. Regulation 7 provides as follows:

'(1) Subject to paragraph (2), for the purposes of these Regulations the following persons shall be treated as the family members of another person—

...

(b) direct descendants of his, his spouse or his civil partner who are—

(i) under 21; or

(ii) dependants of his, his spouse or his civil partner,

...'

15. Regulation 8 stipulates that:

'(1) In these Regulations "extended family member" means a person who is not a family member of an EEA [(European Economic Area)] national under regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5).

...'

2. Adoption and Children Act 2002 (9)

16. Under Section 83, it is an offence to bring a child into the UK for the purpose of adoption there or having been adopted in another country, unless an assessment has been made by a UK adoption agency of the suitability of the adopters to adopt.

17. Section 66(1) lists those adoptions which are recognised by the law of England and Wales. *Kafala* is not included in the list.

D. Algerian law

18. The Algerian Family Code ('AFC') contains, respectively, in Chapter V of Book I entitled 'Parentage', and in Chapter VII of Book II entitled 'Legal guardianship (*kafala*)', the following regulations:

Article 46: 'Adoption (*tabanni*) is prohibited by the Sharia and by law.'

Article 116: 'Legal guardianship (*kafala*) is an unpaid commitment to take responsibility for the maintenance, education and protection of a child in the same way that a parent would. It is established by a legal act.'

Article 117: 'Legal guardianship is agreed before a judge or a notary with the consent of the child where he or she has a father and a mother.'

Article 118: 'The legal guardian (*kafil*) must be a Muslim, must be sensible and of good character, and must maintain the child who is held in guardianship (*makful*) and be capable of protecting the child.'

Article 119: 'The parentage of a child under guardianship may be known or unknown.'

Article 120: 'A child under guardianship shall retain his original parentage, if his parents are known. Otherwise, Article 64 of the Civil Status Code shall apply.'

Article 121: 'Under legal guardianship the beneficiary is a ward and is entitled to the same family and school benefits as a legitimate child.'

Article 122: 'Award of the right of legal guardianship entails a right to administer any property of the child placed in guardianship arising from an inheritance, legacy or gift, which is to be administered in the best interests of the child.'

Article 123: 'The legal guardian may bequeath or donate up to one third of his or her assets to the child under guardianship. Any testamentary disposition that exceeds that third is null and void, unless approved by the heirs.'

Article 124: 'If the father and mother, or either one of them, asks for the child under guardianship to be returned to their care, where the child is old enough to make an informed decision, it is for the child to decide whether or not to return to his or her parents' home. If the child is not old enough to make an informed decision, he or she may not be returned without the permission of a judge, who is to have regard to the child's best interests.'

Article 125: 'An application to cease legal guardianship must be made to the court that awarded guardianship. Notice of the application must be given to the public prosecutor. ...'

II. The facts in the proceedings

19. The order for reference (10) sets out the following facts:

'– The appellant, [SM], was born in Algeria on 27 June 2010. ... She is a national of Algeria. Her male guardian, Mr M, is a French national of Algerian origin who has a permanent right of residence in the United Kingdom. Her female guardian, Mrs M, is a French national by birth. They married in the United Kingdom in 2001. Finding themselves unable to conceive naturally, in 2009 they travelled to Algeria to be assessed as to their suitability to become guardians under the *kafala* system. The First-tier Tribunal judge found [in a judgment of 7 October 2013] that this was "a choice they had made having learned that it was easier to obtain custody of a child in Algeria than it would be in the United Kingdom".

– Having been assessed as suitable, in a process described by the judge [of the First-tier Tribunal] as "limited", they were informed in June 2010 that [SM] had been abandoned after her birth. They applied to become her guardians. There was then a three-month waiting period, during which under Algerian law the birth parents were able to reclaim the child.

– On 28 September 2010, the Algerian Ministry of National Solidarity and Family in the province of Tizi Ouzou made a decree placing [SM], then aged three months, under their guardianship.

– On 22 March 2011, a legal custody deed was issued, having regard to the opinion of the public prosecutor, awarding them legal custody of [SM] and transferring parental responsibility to them under Algerian law. The deed requires them: "to give an Islamic education to the child put into his custody, keep her fit physically and morally, supplying her needs, looking after her teaching, treating her like natural parents, protect her, defend her before judicial instances, assume civil responsibility for detrimental acts".

– The deed also authorises them to get family allowances, subsidies and indemnities duly claimable, to sign all administrative and travel documents, and to travel with [SM] outside Algeria.

– On 3 May 2011, the Court of Tizi Ouzou issued an order that [SM's] surname as it appears on her birth certificate be changed to that of Mr and Mrs M.

– In October 2011, Mr M left Algeria and returned to the United Kingdom to resume his employment [there] as a chef. Mrs M remained in Algeria with [SM].

– In January 2012, [SM] applied for a visa to visit the United Kingdom, which was refused. In May 2012, she applied for entry clearance as the adopted child of an EEA national under Regulation 12(1), or alternatively 12(2) of the [Immigration Regulations 2006].

– The Entry Clearance Officer (ECO) refused this on the basis (i) that as Algeria was not a party to the 1993 Hague Convention ... and was not named in the Adoption (Designation of Overseas Adoptions) Order 1973 then in force, the Algerian guardianship was not recognised as an adoption in UK law;

and (ii) no application had been made under section 83 of the [Adoption and Children Act 2002] for intercountry adoption.'

III. Proceedings in the United Kingdom (11)

20. The First-tier Tribunal dismissed SM's appeal against the ECO's decision. In its view, SM did not qualify as either a legal or a de facto adopted child, nor did she fall within the definitions of 'family member', 'extended family member' or 'adopted child of an EEA national' under the Immigration Regulations 2006.

21. In deciding SM's appeal, the Upper Tribunal upheld the decision that the child was not a 'family member' under Regulation 7 of the Immigration Regulations 2006. However, it allowed her appeal on the basis that she did fall within the definition of 'extended family member' under Regulation 8. The case was therefore returned to the Secretary of State for her to exercise the discretion conferred upon her by Regulation 12(2)(c).

22. The Court of Appeal allowed the ECO's appeal against the decision of the Upper Tribunal. In its view, the real question was not whether SM fell within the definition of 'family member' in Regulation 7 or the definition of 'extended family member' in Regulation 8 of the Immigration Regulations 2006. Rather, it was whether she was a 'direct descendant' within the definition of 'family member' in Article 2(2)(c) of Directive 2004/38; or alternatively whether she fell within 'any other family members, ..., who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence ...' in Article 3(2)(a) of the directive.

23. The Court of Appeal held that Directive 2004/38 permitted Member States to restrict the forms of adoption which they would recognise for the purpose of Article 2(2)(c). Not having been adopted in a manner recognised by UK law, SM could not fall within that article, although she could fall within Article 3(2)(a).

24. The ruling by the Court of Appeal was appealed to the Supreme Court, which is making the request for a preliminary ruling to the Court of Justice.

IV. Question referred

25. The Supreme Court 'has little doubt' that SM would fall within Article 3(2)(a) of Directive 2004/38, and makes a series of comments on the application of this provision to the proceedings, to which I shall refer below.

26. The referring court states that it 'cannot simply allow the appeal and restore the order of the Upper Tribunal, on the basis that [SM's] case should be considered under Article 3(2)(a) [of Directive 2004/38], if in reality she falls within the definition of "family member" in Article 2(2)(c). In that event she enjoys the automatic rights of entry and residence conferred by [Directive 2004/38]. What then does "direct descendant" mean?' (12)

27. Having affirmed that the expression includes consanguineous children, grandchildren and other blood descendants in the direct line, it expresses doubts as to whether it can include those who are not blood relations. In any event, it considers that it must include 'those descendants who have been lawfully adopted in accordance with the requirements of the host country'.

28. However, according to the referring court, 'there is reason to think that it goes further than that'. It bases its statement on the following arguments:

– Paragraph 2.1.2 of the Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38 (13) states that

'the notion of direct relatives in the descending and ascending lines extends to adoptive relationships or minors in custody of a permanent legal guardian'. As SM is in the permanent legal guardianship of Mr and Mrs M, she would fall within the terms of the Communication.

– The notion of 'direct descendant' cannot be interpreted in accordance with the national law of the host Member State, but is instead an autonomous term which should be given a uniform interpretation throughout the Union. (14)

– 'If some member states recognise "*kafala*" children as direct descendants but others do not, this clearly places barriers to free movement for those European Union citizens who have such children. It also discriminates against those who, for religious or cultural reasons, are unable to accept the concept of adoption as it is understood in the UK and some other European countries, that is the complete transfer of a child from one family and lineage to another.' (15)

– 'The fact that the term "direct descendant" may have an autonomous meaning does not necessarily entail that it should have a broad meaning.' The inclusion of SM in that category cannot therefore be considered *acte clair*. (16)

29. In view of the circumstances, after expressing its concerns that differences of interpretation could create opportunities for exploitation, abuse and trafficking in children, or lead to children being placed in unsuitable homes, the Supreme Court decided to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is a child who is in the permanent legal guardianship of a Union citizen or citizens, under "*kafala*" or some equivalent arrangement provided for in the law of his or her country of origin, a "direct descendant" within the meaning of Article 2(2)(c) of Directive 2004/38?

(2) Can other provisions in the directive, in particular Articles 27 and 35, be interpreted so as to deny entry to such children if they are the victims of exploitation, abuse or trafficking or are at risk of such?

(3) Is a Member State entitled to enquire, before recognising a child who is not the consanguineous descendant of the EEA national as a direct descendant under Article 2(2)(c), into whether the procedures for placing the child in the guardianship or custody of that EEA national [were] such as to give sufficient consideration to the best interests of that child?'

V. Proceedings before the Court of Justice

30. The order for reference was received at the Registry of the Court on 19 February 2018.

31. Written observations were submitted by SM, Coram Children's Legal Centre, The AIRE Centre, the Czech, German, Belgian, Netherlands, Polish and United Kingdom Governments, and the Commission. All of them participated in the hearing that was held on 4 December 2018.

VI. Assessment

A. A preliminary remark

32. The debate centres around whether the notion of 'direct descendant' (which is part of the broader notion of 'family members') in Article 2(2)(c) of Directive 2004/38 includes a child who is in the permanent legal guardianship of a Union citizen under *kafala*. (17)

33. This question cannot be answered in general terms, in the abstract. *Kafala* is an institution in the family law of some countries that follow the Koranic tradition and is not treated in the same way in all

such countries. In order to decide whether a *makful* (the child) can be considered a 'direct descendant' of the *kafils* (the adults who are his or her guardians) it will be necessary:

– first, to consider the civil law of the child's country of origin (that is, of the country that permitted the guardianship);

– to determine whether, within the framework of that law, *kafala* can take different legal forms and, if so, to analyse the legal effects of the form chosen by the *kafil* in assuming care of the child; and

– to confirm that those legal effects include the formation of a genuine parental (parent-child) tie between the *kafil* and the *makful*, which goes beyond the relationship inherent in a guardianship relationship. If they do not, one would have to examine whether the relationship between the *kafil* and the *makful* could be considered functionally equivalent to an adoptive relationship.

34. Based on this approach, I shall begin by examining *kafala* as established under Algerian law and in international documents, and the way in which it has been addressed in the case-law of the European Court of Human Rights (ECtHR), particularly as compared with adoption. I shall then go on to address whether, in the light of the regulations governing the legal status of *kafala*, a child placed under *kafala* can be classed as a direct descendant of those who have taken the child into guardianship, within the meaning of Article 2(2)(c) of Directive 2004/38. In order to do so it will be necessary to investigate the interpretation of this legislation.

B. The law governing kafala

1. Kafala under Algerian law

35. As I have already noted, there are different variants of *kafala*, depending on the law under consideration. Nevertheless, there seems to be a consensus that a common guiding principle is that it has its roots in the Koran, and that consequently only Muslims (18) who undertake to give the *makful* an Islamic education (19) can be *kafils*.

36. In Algeria, under this form of guardianship the *kafil* assumes responsibility for the care, education and protection of the *makful*, in the same way a parent would for their child. (20) While the *kafil* assumes legal guardianship of the child, this form of guardianship does not create a relationship of filiation and does not equate to adoption, (21) which is expressly forbidden in that country. (22)

37. In Algeria, a *makful* does not become the heir of his or her guardians, although the guardians may, either by gift or legacy, transfer assets not exceeding one third of their estate to the *makful*. (23)

38. In addition, *kafala* is temporary (only a child may be a *makful*) and it can be revoked, either on the application of the biological parents, if they exist, or at the request of the *kafil*. (24)

39. In terms of the procedural guarantees underpinning the grant of *kafala*, alongside private *kafala*, which is executed before an *adul*, or notary, and is not bound by very strict rules, there is judicial *kafala*, which is established or confirmed by the competent court, with the involvement of the public prosecutor, after the child has been declared to have been abandoned. It is this latter procedure that was followed in the main proceedings.

2. Kafala in international instruments

40. Article 20 of the Convention on the Rights of the Child refers explicitly to *kafala*, along with other means of protecting children who are temporarily or permanently deprived of their family environment, or who in their own best interests cannot be allowed to remain in that environment.

41. For some parties who have taken part in the proceedings, (25) that reference means that *kafala* should be recognised as equivalent to adoption, since both are included in the same provision. I believe,

however, that Article 20 of the Convention on the Rights of the Child sets out a range of child protection measures that are not necessarily on a par with each other. If one were to follow their line of reasoning, placement in foster care or care homes could be considered equivalent. Moreover, the specific attention paid to adoption in Article 21 highlights the special characteristics of this institution as compared with the others.

42. In her observations, SM cites the 'Guidelines for the Alternative Care of Children' ('the Guidelines'), (26) a supplementary text to the Convention, in support of her argument on the equivalence of adoption and *kafala*, which could be inferred from paragraph 2 of the Guidelines. (27)

43. In my opinion, however, if one reads the Guidelines in their entirety they do not lead to the conclusion that *kafala* is to be equated to adoption. The same situation arises as occurs with Article 20 of the Convention on the Rights of the Child: both the Convention and the Guidelines simply list various forms of protective measures as being appropriate ways to provide a child with a stable family environment, without meaning that they necessarily have the same legal effects. (28) This is natural, because the two documents are linked.

44. As I have already noted, the 1993 Hague Convention makes no reference to *kafala*. The reason why an international instrument designed to regulate adoption is silent on this matter must be sought, precisely, in the differences between adoption and *kafala*.

45. During the hearing, one of the parties insisted that the effects of *kafala* could be considered equivalent to those of simple adoption, (29) as the child's original family ties remained unaffected in both cases. It is true that the 1993 Hague Convention leaves open the possibility of there being no break in the pre-existing parent-child relationship (Article 26(1)(c)), but it is also true — and this is crucial — that the same subsection includes the unqualified statement that 'the recognition of an adoption includes recognition of (a) the legal parent-child relationship between the child and his or her adoptive parents'.

46. By contrast, the 1996 Hague Convention includes provision for measures relating to a child's person or property other than adoption, among which it lists the placement of the child in a foster family or in institutional care, or the provision of care by *kafala* or an analogous institution. Under Article 4 of the Convention, matters relating to the establishment of a parent-child relationship and decisions on adoption, amongst other matters, are excluded from its scope.

47. A reading of these two Hague Conventions confirms, firstly, that adoption is the only form of protection that has merited being made the specific subject of an international instrument and, secondly, that in the case of international adoptions, the arrangements differ from those that apply to other protective measures, such as *kafala*, rights of custody, guardianship, curatorship, fostering and the administration, conservation or disposal of the child's property.

48. The explanatory report on the 1996 Hague Convention (the Lagarde Report) (30) contains guidelines to aid understanding of the Convention:

– It notes that 'the [Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors] [(31)] employs the term "measure of protection" without defining it. The delegations of the States which were not Parties to this Convention wanted, if not a definition, at least an enumeration of the issues on which these measures might bear. Since the measures vary with each legal system the enumeration given in this article could only be in terms of examples'.

– With regard specifically to Article 3(e), it notes that 'the measures of placement of a child in a foster family or in institutional care are ... the prototypes of measures of protection and are obviously covered by the Convention'.

– It clarifies that 'the *kafala* is not an adoption, which would be forbidden by Islamic law, and it produces no effect on the parent-child relationship. The child who benefits from it does not become a member of the family of the *kafil* and this is the reason why *kafala* is not covered by the Convention of 29 May 1993 on intercountry adoption. But it is indisputably a measure of protection, which for this reason must fall within the scope of application of a convention on the protection of children'.

3. Kafala (in relation to adoption) in the case-law of the ECtHR

49. The ECtHR has addressed the problems posed by the relationship between *kafala* and adoption from the perspective of the European Convention on Human Rights (ECHR) in two judgments.

50. In the first judgment, based on its comparative law study, it observed that 'no State equates *kafala* with adoption but that, in French law and in other jurisdictions, it produces effects that are comparable to those of guardianship, curatorship or placement with a view to adoption'. (32)

51. In the same judgment, it reiterated that Article 8 of the ECHR does not guarantee either the right to found a family or the right to adopt, but that this does not rule out the possibility that States parties to the ECHR may nevertheless have, in certain circumstances, a positive obligation to enable the formation and development of family ties, where the existence of a family relationship with a child has been established. (33)

52. However, it found that a refusal to equate *kafala* with full adoption is not in breach of the right to family life, because the (French) legislation adopts a flexible approach towards the prohibition on adoption in Algerian law and alleviates the effects of that prohibition, based on the objective signs of a child's integration into French society. (34)

53. In the second judgment, (35) the ECtHR once again examined the right to family life in Article 8 of the ECHR, noting that the applicability of that concept is determined by the presence of 'de facto family ties'. In the specific situation on which it had to rule, it held that the existence of a tie based on *kafala* is no different from family life in its ordinary meaning, and that the continued existence of ties to the birth family did not prevent the existence of a family life with others. (36)

54. However, the ECtHR found that the refusal of the Belgian authorities to equate *kafala* to adoption did not deprive the applicants of the right to recognition of the relationship between them by other routes (in that case, through the Belgian institution of unofficial guardianship). (37)

4. Kafala and the recognition and enforcement of judgments under EU law

55. In spite of the parallels with the 1996 Hague Convention, within the European Union the Regulation on the recognition and enforcement of judgments in family matters and matters of parental relations (38) does not mention *kafala*. (39)

56. Notwithstanding that silence, I agree with Advocate General Kokott that the rules in Regulation No 2201/2003 can be interpreted in the light of the rules in the 1996 Hague Convention, for which the explanations in the Lagarde Report, which I addressed above, provide helpful guidelines. (40)

57. Based on this premiss, it would be possible for a *kafala* that has been recognised by the judicial authority of one Member State to extend its effects to another Member State under the terms of Regulation No 2201/2003, Article 1(2) of which refers to 'rights of custody and rights of access ...; guardianship, curatorship and similar institutions ...; the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child'. However, it would not be possible for the same to occur with adoption, because 'decisions on adoption, [and] measures preparatory to adoption' are excluded from the scope of application of the regulation (Article 1(3)(c)).

C. The concept of direct descendant in Directive 2004/38 (first question referred)

1. The autonomous interpretation of the concept

58. Does the phrase 'direct descendant', used in Article 2(2)(c) of Directive 2004/38 have an autonomous meaning under EU law? This is one of the points of disagreement between the parties to the proceedings. (41)

59. According to settled case-law, 'it follows from the need for uniform application of EU law and from the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union'. (42)

60. The Court of Justice has stated that that interpretation 'must take into account not only the wording of the provision but also its context and the objectives pursued by the rules of which it is part'. (43)

61. The context in which Directive 2004/38 uses the phrase 'direct descendant', as a specific sub-category of 'family member', leads me to argue in favour of the conceptual autonomy of that notion under EU law. Indeed, I believe that this must be the rule where a particular provision states, as in this case, that 'for the purposes of this directive ... means ...'.

62. The definitions used following this formula are, therefore, designed to state what 'is meant' by the corresponding term, within a very precise legal framework of EU law (in this case, that provided by Directive 2004/38). Unless the definition refers to the law of the Member States, in order to determine the boundaries of the institution described by each term one has to examine the particular meaning of the institution in question under EU law.

63. Article 2 of Directive 2004/38 contains an example of an explicit reference to the law of the Member States: alongside the spouse (subparagraph 2(a)), there is a reference to 'the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State' (subparagraph 2(b)). Apart from this case, I repeat, the concepts in that article are not dependent on their treatment under national law.

64. The judgment of 5 June 2018 handed down by the Court of Justice in respect of the concept of 'spouse' (44) in Article 2 of Directive 2004/38 may shed some light on the autonomy of interpretation of that concept, which it may be possible to extend in methodological terms to the concept of 'direct descendant'.

65. Although (unlike the Opinion, in which the Advocate General opted to use the term) (45) the judgment does not refer to an autonomous interpretation, the Court of Justice comes to the same conclusion: the concept of 'spouse' within the meaning of Directive 2004/38 has its own particular characteristics, (46) against which 'a Member State cannot rely on its national law' (47) as justification for refusing to recognise a right of residence covered by the directive.

66. The use of a legal category provided for under EU law does not mean, however, that this is necessarily devoid of any relationship to equivalent categories in the laws of the Members States. Therefore, one will have to consider the codes or law governing family law in each of the Member States (which have competence in this area), in order to determine, for the purposes of a particular directive, whether its institutions are compatible with those defined in that directive.

2. Direct descendant in Directive 2004/38

67. The importance of delimiting this concept in Directive 2004/38 becomes apparent when one examines the impact it has on the entry and residence of children who form part of the family (in a broad sense) of Union citizens but who do not come within this category:

– 'Direct descendants who are under the age of 21 or are dependants' *automatically* (48) have a right to enter and reside in the Member State of residence of their ascendants, where these are Union citizens.

– Other members of the extended family who fall within Article 3(2) of Directive 2004/38, including children, must satisfy certain preconditions (49) and must undergo an evaluation by the authorities of the host Member State. In the light of that evaluation, those authorities must: (i) in accordance with their national legislation, facilitate entry and residence for such persons; (50) (ii) undertake an extensive examination of the personal circumstances; and (iii) justify any denial of entry or residence. (51)

68. As I noted earlier, the referring court has little doubt that SM falls within this latter category. Moreover, it advises the United Kingdom authorities responsible for carrying out the evaluation that under EU law (52) they are required to *facilitate* the entry of the child into the United Kingdom. And, in particular, it informs them that 'in making that evaluation, the decision-makers, whether in the Home Office or in the appellate system, would also have to bear in mind that the purpose of [Directive 2004/38] is to simplify and strengthen the right of free movement and residence for all Union citizens, freedom of movement being one of the fundamental freedoms of the internal market. Having to live apart from family members or members of the family in the wider sense, may be a powerful deterrent to the exercise of that freedom'. (53)

69. However, not being satisfied with that possibility, the referring court considers whether the relationship established on the basis of *kafala* could, in SM's case, be equated with parentage by adoption. If so, SM would have the status provided for in Article 2(2)(c) of Directive 2004/38, which provides greater protection for family life and guarantees protection of the child's best interests.

70. My starting premiss (over which there is no doubt in my mind) is that the concept of direct descendants used in Directive 2004/38 includes both biological and adoptive children. From a legal standpoint, adoption establishes filiation, for all purposes.

71. A review of the rules of EU law that deal most closely with the subject matter of this case supports that statement. Thus, in determining 'the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States', Directive 2003/86/EC (54) extends that right, subject to certain requirements, to:

'– the minor children of the sponsor and of his/her spouse, *including children adopted* in accordance with a decision taken by the competent authority in the Member State ...;

– the *minor children including adopted children* of the sponsor where the sponsor has custody and the children are dependent on him or her ...;

– the minor children *including adopted children* of the spouse where the spouse has custody and the children are dependent on him or her ...'. (55)

72. Likewise, Article 2(j) of Directive 2011/95/EU (56) classifies 'the *minor children* of the couples referred to in the first indent or of the beneficiary of international protection, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or *adopted as defined under national law*' as family members of an applicant for international protection. This definition is repeated in Article 2(g) of Regulation (EU) No 604/2013. (57)

73. References to direct descendants in other rules of EU law are defined with respect either to Directive 2004/38 (58) or to the legislation of the relevant Member State. (59)

74. Given this premiss, if *kafala* could be classed as a form of adoption, a *makful*, as an adoptive child, could become a 'direct descendant' of those who took the child into their custody.

75. In support of this approach, the referring court, supported by some of the parties to the preliminary reference proceedings, (60) cites the Commission Communication referred to above. (61)

76. It is true that section 2.1.2 of that Communication, which deals with 'family members in direct line', (62) treats adoptive parent-child relationships in the same way as those of minors in custody of a permanent legal guardian. If this approach were to be followed, as a child under the legal guardianship of the spouses who have her in their custody, SM could be considered their adoptive daughter.

77. However, I believe that drawing such a parallel is not consistent with a strict interpretation of Article 2(2)(c) of Directive 2004/38. Moreover, it is virtually otiose to note that the Communication does not have the force of law.

78. In my view, being in 'custody of a permanent legal guardian' does not mean that the child in custody becomes a direct descendant (by adoption) of the guardian. There are various grounds for maintaining that the two concepts are not the same, both in the abstract and in the specific case of SM, as a child subject to the *kafala* arrangements that apply under Algerian law.

79. From an abstract perspective, the guardianship relationship is not comparable to a parent-child relationship. Furthermore, a parent-child relationship (whether biological or adoptive) can coexist with guardianship awarded to someone other than the (biological or adoptive) parents. As the German Government argues, in order for the two to be treated as the same, it would be essential for there to be complete legal equality.

80. If one examines the question from the perspective of the permanence of the tie, even without considering its content, guardianship (and, a fortiori, *kafala*) is a temporary rather than a permanent institution, because it applies only while the child placed under guardianship is a minor. By contrast, the parent-child relationship, even where based on simple adoption, is permanent.

81. Moreover, the last sentence of section 2.1.2 of the Commission Communication states that national authorities may request evidence of the claimed family relationship, which can be done only under the prior evaluation procedure provided for in Article 3(2) of Directive 2004/38. That procedure, however, cannot be extended to apply to 'direct descendants'.

82. Leaving the Commission Communication to one side, therefore, I believe that the essential feature that separates adoption from *kafala* is, precisely, the parent-child relationship. While *kafala* does not create parent-child ties, adoption — even in its weakest form of simple adoption — always does so.

83. The same conclusion follows from an examination of the various international instruments, cited above, (63) which govern both adoption and forms of child protection such as *kafala* without ever suggesting that the two are comparable.

84. It must also be borne in mind that the rigorous mechanisms for oversight of international adoptions provided for in the 1993 Hague Convention in order to safeguard the best interests of the child could easily be circumvented (64) if a form of guardianship which, precisely because it does not have the same effects as adoption, is preceded by a national procedure which does not have the same guarantees (or which even, in the case of *kafala*, takes place before an *adul*, or notary, with no requirement for the involvement of the public authorities) were to be accepted as adoption.

85. This point is particularly significant when one considers that Algeria has not ratified either of the Hague Conventions and is therefore not subject to international rules that establish mechanisms to oversee and guarantee child protection measures, whether these involve guardianship under the *kafala* system or any other equivalent formula.

86. It should be noted that, in permitting this form of guardianship while at the same time prohibiting adoption of the *makful*, Algerian law, under which SM was placed in *kafala*, does not accept the alleged

equivalence of the two concepts. And that prohibition applies not only where the child's parentage is known and the child therefore maintains filiation with his or her ascendants, but also in other cases. The *kafil* becomes only the legal guardian of the *makful*, but *kafala* does not make the *makful* the direct descendant of the *kafil*. Consequently, however hard one tries, I do not believe it is possible to argue that SM is the direct descendant, as their adopted child, of the people who have become her guardians. (65)

87. This does not mean that, once the *kafala* has been established, the *kafil* cannot decide to adopt the *makful*, if the *kafil* considers it appropriate and it is permitted under the law of the country in question. This is the solution that some Member States have opted for (66) and, in my view, would enable a *makful* who has subsequently been adopted (that is, who has undergone an international adoption that is subject to the 1993 Hague Convention) to become the direct descendant of the adoptive parents and, as such, to enter and reside in the Member State where the adoptive parents are resident.

88. An examination of the various EU regulatory instruments, cited above, which use the expression 'family members' and refer to children confirms that the concept of 'direct descendant' cannot be extended beyond adoptive children to include those in the legal custody of guardians.

3. The impact of the right to family life and of the child's best interests on the interpretation of the concept of direct descendant in Directive 2004/38

89. The (interim) conclusion I have reached above must successfully pass through the filter of the rights and principles safeguarded by the Charter. Indeed, it could be thought that the interpretation that I am advancing is overly formalistic, and that the requirement to respect the right to family life and the child's best interests as a 'primary consideration' (Article 7 and Article 24(2) of the Charter, respectively) requires *kafala* to be equated to adoption.

90. In this analysis it will be helpful to refer once again to the two rulings of the ECtHR (67) that have interpreted Article 8 of the ECHR (on the right to family life) in connection with the refusal of the authorities of each of the signatory States to the ECHR to equate the relationship produced by *kafala* with that produced by adoption.

(a) Kafala and the protection of family life

91. Directive 2004/38 establishes two routes by which a child who is not a Union citizen may enter and reside in a Member State in the company of the persons with whom he or she has a 'family life'. The difference lies in the fact that, while under Article 2(2)(c) (direct descendant) continuity of family life occurs automatically, (68) Article 3(2) requires a prior evaluation of the circumstances.

92. In the present case, SM applied to the United Kingdom authorities 'for entry clearance as the adopted child of an EEA national'. (69) But, leaving to one side the status of adopted child, an application for entry and residence can be allowed under the route provided in Article 3(2) of Directive 2004/38 for other 'family members', as the referring court acknowledges. Moreover, the observations of the court set out above leave the United Kingdom authorities little scope to refuse SM the right to enter and reside in the United Kingdom in order to enjoy family life with the Union citizens who have taken her into their custody.

93. I cannot therefore see why the rejection of one route (that for direct descendants) should be an obstacle to carrying on family life, when the alternative route (where permission to reside is granted subject to verifying that SM is a dependant or member of the household of the Union citizen having the right of residence) does not prevent the child from obtaining *actual* legal protection of that same family life.

94. It is true that the automatic recognition in Article 2(2) of Directive 2004/38 would pose fewer difficulties. But, in terms of what is important here, if that recognition comes up against the difficulties of interpretation which I have identified (and which, in my view, are insuperable), and at the same time there

is a mechanism available to the child such as that in Article 3(2) of the directive, I stress that the right to family life is respected.

95. The ECtHR reached a similar conclusion in the cases cited above. In the judgment in *Chbihi and Others v. Belgium*, (70) citing the judgment given in *Harroudj v. France*, (71) it held that 'the provisions of Article 8 do not guarantee the right to found a family or the right to adopt ... However, this does not rule out the possibility that States parties to the Convention may nevertheless have, in certain circumstances, a positive obligation to enable the formation and development of family ties'. It added that 'according to the principles that emerge from the case-law of the Court, where the existence of a family tie with a child has been established, the State must act to enable that tie to be developed and to create legal safeguards to enable the child's integration in his family'.

96. In that case, which has undeniable parallels with the present case, it was accepted that a *kafala* that had been duly established (in Morocco) created a legal connection between the *kafils* and the *makful*. As that institution did not exist in Belgium, the adoption that had been applied for in that country constituted a new legal situation. The ECtHR argued that it was 'necessary to arrive at a fair balance between the concurrent interests of the individual and of society as a whole' and that 'the State has some measure of discretion'. (72) On that basis, it had 'above all to verify whether the decisions of the Belgian courts to refuse adoption hindered the proper development of family ties between the child and the persons who had custody of her under a *kafala* arrangement'. (73)

97. The ECtHR concluded that 'refusal of the adoption did not deprive the applicants of recognition of the relationship between them. Indeed Belgian legislation offered the applicants another means of providing legal protection for their family life in the form of unofficial guardianship, the purpose of which was very similar to that of *kafala* ... (74) and which enables adults to obtain recognition for their commitment to a child's care and education'. (75)

(b) Kafala and the best interests of the child

98. According to Article 24(2) of the Charter, the protection of the child's best interests must be the 'primary consideration' in decisions made by public authorities or private institutions when making orders concerning that child.

99. Where, as in the present case, the acts to protect the child, who has been abandoned by her biological parents, initially take place in a third-party State (Algeria) and it is sought to give effect to them in a Member State of the Union (the United Kingdom), the oversight exercised by the authorities in the State of origin and the host State must focus on the best interests of that child, but the rules that enable those best interests to be assessed under EU law cannot be disregarded.

100. There are two aspects to the assessment of best interests: the substantive aspect (which, clearly, depends on the circumstances of the child's situation), and the aspect concerning the procedures for making the assessment.

101. With regard to the substance, custody within a family satisfies the requirements to protect the child's best interests, as understood by the Court of Justice: 'The integration, on a continuous and long-term basis, into the home and family of a foster parent, of children who on account of their difficult family situation are particularly vulnerable, constitutes an appropriate measure to safeguard the best interests of the child, as enshrined in Article 24 of the Charter of Fundamental Rights of the European Union.' (76)

102. In terms of the procedural aspects, I will simply note here that the treaty instruments governing the recognition of adoptive and parental relationships with an international element, and EU law itself, address the key elements of those evaluation procedures.

103. With regard to those treaty instruments, precisely to ensure that the child's best interests are taken into account, it should be noted that:

– in regulating international adoption, the 1993 Hague Convention establishes a dual review procedure, involving the authorities of both the State of origin and the receiving State; (77)

– Article 33 of the 1996 Hague Convention also introduces a dual mechanism, stipulating that '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 *kafala* 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'. (78)

104. In a similar approach, albeit one restricted to the rules of law of the European Union that determine when the placement of a child in care in one Member State is to have effect in another Member State, Article 56 of Regulation No 2201/2003 contains a review procedure that involves the authorities of both Member States. (79)

105. I refer to these provisions in order to highlight a characteristic of the process for safeguarding the child's best interests in circumstances similar to those that apply in the present case, namely that the assessment is a matter for the authorities of the two Member States involved in the procedure, which are charged with carrying out a prior review.

106. Within the scope of Directive 2004/38, this safeguard can be ensured only by following the route offered by Article 3(2), which provides a legal framework designed to ensure the effective protection of the child within the Union, while at the same time reconciling the original objectives of the guardianship arrangements (*kafala*) with the right to family life.

107. If, on the contrary, one were to allow the automatic recognition provided for in Article 2(2) of Directive 2004/38, a review would be possible only *a posteriori*, which would produce a paradoxical outcome: guardianship under *kafala*, awarded in a State such as Algeria that has not ratified the 1996 Hague Convention, would have immediate effect (and the authorities in the host Member State would be unable to conduct a prior review of the child's best interests), whereas decisions by Signatory States to the 1996 Hague Convention would have to be subject to approval by the authorities of the receiving State.

108. To summarise, in circumstances such as those in the present case, the 'primary consideration' of the child's best interests requires the case to be assessed in accordance with a prior evaluation procedure that is different from the procedure applicable to direct descendants. (80)

D. The second question referred

109. The referring court requires clarification as to whether Directive 2004/38, in particular Articles 27 and 35 thereof, allows entry to be denied to children in guardianship under *kafala* if they are the victims of exploitation, abuse or trafficking or are at risk of such.

110. Under Article 27 of Directive 2004/38, freedom of movement and residence for Union citizens or their family members may be restricted 'on grounds of public policy, public security or public health'.

111. In so far as, in this case, SM can, as a *makful*, be classed as a member of the extended family of the spouses (Union citizens) who have custody of her, there would, in principle, be nothing to prevent Article 27 coming into play. The same would apply to the spouses, who are Union citizens, whose freedom of movement and residence could be restricted for reasons connected with public policy, security or health. (81)

112. There is nothing in the order for reference, however, that would enable one to surmise what grounds of public policy, public security or public health could be invoked in this case. (82) The referring court refers to 'children who are or might be the victims of exploitation, abuse or trafficking', (83) but, if these grounds did exist, it would potentially be the perpetrators of these serious offences (and not the victims, in

the case of children such as SM) who could be subject to restrictions on their right to travel and reside in the United Kingdom. (84)

113. Under Article 35 of Directive 2004/38, Member States are authorised to 'refuse, terminate or withdraw any right conferred by this directive in the case of abuse of rights or fraud ...'. The scope of this authorisation is very broad: it covers both *ex ante* measures (refusal of rights) and *ex post* measures (termination and withdrawal of rights already conferred). In both cases, the existence of abuse of rights or fraud is sufficient, provided that this has been demonstrated through an individual examination of the particular case. (85)

114. While the provision cites 'marriages of convenience' as a specific example of abuse or fraud, it does not rule out other scenarios. Indeed, recital 28 of Directive 2004/38 treats these fictitious marriages on a par with 'any other form of relationships contracted for the sole purpose of enjoying the right of free movement and residence'.

115. As noted by The AIRE Centre, (86) the forms of child exploitation referred to in Directive 2011/36 (87) could fall within the category of abuse. The phenomenon of trafficking in human beings covers various forms of exploitation, some of which, where they affect children, could be facilitated by illegal adoptions. (88)

116. The guardianship of the child would be *fraudulent* where its real purpose, dressed up in the legal guise of *kafala*, was to transfer the child from one country to another in order to use the child for 'sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs'. (89)

117. In these circumstances, the host country's authorities would be entitled to act against the abuse or fraud through recourse to the 'necessary measures' referred to in Article 35 of Directive 2004/38. As with Article 27 of that directive, there is nothing in the order for reference that would trigger such measures in the case of SM.

E. Review by the Member State of the procedure under which guardianship or custody of the child was granted

118. In summary, the referring court wishes to ascertain whether, before recognising a child in SM's situation 'as a direct descendant under Article 2(2)(c)' of Directive 2004/38 the United Kingdom authorities can investigate or enquire into whether 'the procedures for placing the child in ... guardianship or custody ... was such as to give sufficient consideration to the best interests of that child'.

119. Since, in my view, the premiss on which this question is based does not apply in the case of SM, who cannot be classed as a direct descendant within the meaning of that provision, it is not necessary to answer the question.

120. Moreover, if one were to accept that SM is a direct descendant by virtue of the family ties inherent in *kafala* and, therefore, that her entry into a Member State should benefit from the *automatic* recognition granted to such descendants under Article 2(2)(c) of Directive 2004/38, it would not be possible to undertake the *enquiry* about which the referring court harbours doubts.

121. By contrast, that enquiry is possible if one accepts the route provided for in Article 3(2) of Directive 2004/38 as a means of facilitating the entry and residence of the child in the United Kingdom, thus enabling her to enjoy family life in the company of the Union citizens who took her into their custody.

122. Indeed, in undertaking 'an extensive examination of the personal circumstances' of the family members, as required under the final part of that article, the competent authorities in the United Kingdom must have regard to the best interests of the child, as a 'primary consideration'. Without needing to repeat the comments I made on this point in my analysis of the first question, (90) that assessment can include,

among other points, an examination of the substantive and procedural circumstances under which custody of the child was granted.

VII. Conclusion

123. In line with the arguments set out above, I suggest that the Court of Justice should reply to the Supreme Court of the United Kingdom in the following terms:

(1) Article 2(2)(c) of 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC is to be interpreted as meaning that a child cannot be classed as a 'direct descendant' of a Union citizen where the child is only in the legal guardianship of that Union citizen under the institution of *recueil legal (kafala*) that applies in the Republic of Algeria.

That child may, however, fall within the category of 'other family members' if the other requirements are satisfied and following completion of the procedure laid down in Article 3(2) of Directive 2004/38, in which case the host Member State must facilitate his or her entry and residence in that Member State in accordance with national legislation, having weighed the protection of family life and the defence of the child's best interests.

(2) Articles 27 and 35 of Directive 2004/38 can be applied in any of the situations referred to in that directive where grounds of public policy, public security or public health apply, and in the event of abuse of rights or fraud.

(3) In applying Article 3(2) of Directive 2004/38, the authorities of the host Member State may enquire into whether sufficient regard was had, in the procedure for awarding guardianship or custody, to the best interests of the child.

---

1 Original language: Spanish.

---

2 On the characteristics of this arrangement, see points 35 to 39 below.

---

3 Directive 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77).

---

4 UN Convention of 20 November 1989.

---

5 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption ('the 1993 Hague Convention').

---

6 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children ('the 1996 Hague Convention').

---

7 OJ 2000 C 364, p 1.

8 SI 2006/1003.

9 2002 c. 38.

10 Paragraphs 11 to 15.

11 Based on the order for reference, paragraphs 14 and 15.

12 Paragraph 22 of the order for reference.

13 COM(2009) 313 final; 'the Communication'.

14 In support of this position it cites the Opinions of Advocate General Wathelet in *Coman* (C-673/16, EU:C:2018:2), point 32, and of Advocate General Bot in *Rahman and Others* (C-83/11, EU:C:2012:174).

15 Final part of paragraph 27 of the order for reference.

16 Ibid.

17 Although the referring court refers to '"*kafala*" or some *equivalent arrangement provided for in the law of his or her country of origin*' it does not give any indication of this latter arrangement, and I will therefore restrict myself to an analysis of *kafala*, which is the only guardianship mechanism used in this case.

18 Article 118 of the AFC.

19 This is included in SM's custody deed (paragraph 12 of the order for reference).

20 Article 116 of the AFC.

21 Islamic legal systems are based on the principle of the preservation of blood ties and the exclusion of adoption, which is prohibited in most (but not all) Muslim countries. The written observations by The AIRE Centre and SM note the differences in the regulations of the various different countries (paragraphs 51 and 65 respectively).

22 Article 46 of the AFC.

23 Article 123 of the AFC.

24 Articles 124 and 125 of the AFC.

25 The AIRE Centre, SM and Coram Children's Legal Centre.

26 General Assembly of the United Nations, Sixty-fourth Session, 24 February 2010 (A/RES/64/142). Their purpose is to enhance the implementation of the Convention on the Rights of the Child (paragraph 1).

27 One of its purposes is 'to support efforts to keep children in, or return them to, the care of their family, or failing this, to find another appropriate and permanent solution, including adoption and *kafala* of Islamic law'.

28 According to paragraph 123 of the Guidelines, which is part of the section on 'Residential care', the objective is to secure the child's stable care in an alternative family setting. Paragraph 152, on 'Provision of care for a child already abroad' treats *kafala* as comparable to placement with a view to adoption. Paragraph 161, dealing with 'care in emergency situations' and situations where family reintegration is impossible, advises that consideration should be given to 'stable and definitive solutions, such as adoption or *kafala* of Islamic law', but also refers to other 'long-term options ..., such as foster care or appropriate residential care, including group homes and other supervised living arrangements'.

29 In countries where it is permitted, simple, or less than full, adoption usually allows family ties with the previous family to be maintained, without prejudice to this kind of relationship between the adopter and the adoptee.

30 Text adopted by the Eighteenth Session of the Hague Conference on Private International Law. Paris, 15 January 1997.

31 https://www.hcch.net/en/instruments/conventions/full-text/?cid= 39.

32 ECtHR, judgment of 4 October 2012, *Harroudj v. France* (CE:ECHR:2012:1004JUD004363109), § 48, which repeats the comments made in paragraph 21: 'Out of the 22 Contracting States of which a comparative law study has been made ..., none of them regard *kafala* established abroad as adoption. In cases where the domestic courts have recognised the effects of *kafala* granted in a foreign country, they have always treated it as a form of guardianship or curatorship, or as placement with a view to adoption.'

33 Ibid., § 41.

34 Ibid., §§ 46 to 52.

35 Judgment of 16 December 2014, *Chbihi Loudoudi v. Belgium* (CE:ECHR:2014:1216JUD005226510).

36 Ibid., §§ 78 and 79.

37 Ibid., §§ 101 and 102.

38 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338, p. 1).

---

39 In defining its scope of application, Article 1 refers to parental responsibility with reference to rights of custody and rights of access; guardianship, curatorship and similar institutions; the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child; the placement of the child in a foster family or in institutional care; and measures for the protection of the child relating to the administration, conservation or disposal of the child's property. Like the 1996 Hague Convention, it immediately goes on to exclude matters relating to parent-child relationships and adoption from its scope of application.

---

40 View in *Health Service Executive* (C-92/12 PPU, EU:C:2012:177), point 17: 'In connection with the interpretation of Regulation No 2201/2003 having regard to its drafting history and its scheme, [the Lagarde Report] may offer guidance to the interpretation of the relevant provisions of the regulation. The provisions on custody in the regulation are based on the preparatory work for the Child Protection Convention and are identical in large parts, including with regard to the provisions on scope to be interpreted here. Furthermore, the provisions of the Regulation and corresponding provisions in other conventions ought, so far as possible, to be interpreted in the same way, in order to avoid different results according to whether a case concerns another Member State or a third country.'

---

41 While the Polish and United Kingdom Governments maintain that the definition of the term falls within the exclusive competence of the Member States, the other interveners argue in favour of an autonomous interpretation for the whole of the European Union.

---

42 Judgment of 18 October 2016, *Nikiforidis* (C-135/15, EU:C:2016:774), paragraph 28 and the case-law cited. The Polish Government underlines the use of the adverb 'normally' in that case-law, but does not explain why, in spite of the fact that the aforesaid precept in Directive 2004/38 makes no express reference to national law, the general rule should not apply in this case.

---

43 Judgment of 27 September 2017, *Nintendo* (C-24/16 and C-25/16, EU:C:2017:724), paragraph 70 and the case-law cited. This guidance is referred to in relation to Directive 2004/38 by Advocates General Bot and Wathelet in their respective Opinions in *Rahman and Others* (C-83/11, EU:C:2012:174), point 39, and *Coman and Others* (C-673/16, EU:C:2018:2), points 34 and 35.

---

44 *Coman and Others* (C-673/16, EU:C:2018:385).

---

45 Opinion of Advocate General Wathelet in *Coman and Others* (C-673/16 EU:C:2018:2), points 33 to 42.

---

46 Judgment of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385), paragraph 35: 'it should be pointed out, first of all, that the term "spouse" within the meaning of Directive 2004/38 is gender-neutral and may therefore cover the same-sex spouse of the Union citizen concerned'.

---

47 Ibid., paragraph 36.

---

48 The adverb *automatically* must be qualified in that, under Article 10 of Directive 2004/38, 'the right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called "Residence card of a family member of a Union citizen"'. The issue of this document is conditional on presentation, among other documents, of a document 'attesting to the existence of a family relationship or a registered partnership' and 'in cases falling under points (c) [direct descendants] and (d) of Article 2(2), documentary evidence that the conditions laid down therein are met'.

---

49 These include being dependants or members of the household of the Union citizen having the right of residence, which is the case in these proceedings.

---

50 First subparagraph of Article 3(2) of Directive 2004/38. Third-country nationals who belong to the extended family therefore have an advantage as a result of their family relationship with Union citizens, as Member States are required (albeit not unconditionally) to facilitate their entry and residence.

---

51 Final subparagraph of Article 3(2) of Directive 2004/38.

---

52 'Whilst ... Article 3(2) of Directive 2004/38 does not oblige the Member States to accord a right of entry and residence to persons who are family members, in the broad sense, dependent on a Union citizen, the fact remains, as is clear from the use of the words "shall facilitate" in Article 3(2), that that provision imposes an obligation on the Member States to confer a certain advantage, compared with applications for entry and residence of other nationals of third States, on applications submitted by persons who have a relationship of particular dependence with a Union citizen.' Judgment of 5 September 2012, *Rahman and Others* (C-83/11, EU:C:2012:519), paragraph 21.

---

53 Paragraph 21 of the order for reference.

---

54 Council Directive of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12).

---

55 Article 4(1)(b)(c) and (d) of Directive 2003/86 (emphasis added).

---

56 Directive of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9).

---

57 Regulation of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180, p. 31).

---

58 See Regulation (EC) No 1931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention (OJ 2006 L 405, p. 1), Article 3(4)(i); Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2016 L 77, p. 1), Article 2(5)(a); or Directive (EU)

2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (OJ 2016 L 132, p. 21), Article 3, number 24.

---

59 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1), Article 1(i).

---

60 The AIRE Centre, Coram Children's Legal Centre, SM and the Commission itself.

---

61 Point 28.

---

62 'Without prejudice to issues related to recognition of decisions of national authorities, the notion of direct relatives in the descending and ascending lines extends to *adoptive relationships or minors in custody of a permanent legal guardian*. Foster children and foster parents who have temporary custody may have rights under the Directive, depending upon the strength of the ties in the particular case. There is no restriction as to the degree of relatedness. National authorities may request evidence of the claimed family relationship' (emphasis added).

---

63 Points 40 to 47 of this Opinion.

---

64 This point is made by the United Kingdom Government (paragraph 52 et seq. of its observations) and the German Government (paragraph 32 et seq. of its observations).

---

65 In point 56 of her written observations, SM herself (or rather, those appointed to defend her) declare that 'it will be abominable for Mr and Mrs M to (or for them to be expected to) disregard their promise given to the Algerian Court that they give [SM] an Islamic education and adopt her under the [1993] Hague Convention, which is forbidden by Algerian law'.

---

66 In the case of France, the ECtHR held that the choice of law rule in Article 370(3) of the Civil Code ('An order for the adoption of a foreign child may not be made where his personal law prohibits that institution, unless the child was born and habitually resides in France') which, when applied to Algerian makfuls, prevented them from being adopted in France because of the prohibition in Algeria, could open the door to the possibility of adoption once the child had obtained French nationality. See the judgment of 4 October 2012, *Harroudj v. France* (CE:ECHR:2012:1004JUD004363109), § 51.

---

67 Judgments of 4 October 2012, *Harroudj v. France* (CE:ECHR:2012:1004JUD004363109), and of 16 December 2014, *Chbihi and Others v. Belgium* (CE:ECHR:2014:1216JUD005226510).

---

68 With the qualification already noted in footnote 48.

---

69 Paragraph 13 of the order for reference.

---

70 Judgment of 16 December 2014 (CE:ECHR:2014:1216JUD005226510), § 89.

71 Judgment of 4 October 2012 (CE:ECHR:2012:1004JUD004363109).

72 Judgment of 16 December 2014 (CE:ECHR:2014:1216JUD005226510), § 92.

73 Ibid., § 93.

74 The ECtHR refers to paragraphs 64 and 65 of its own judgment, where it describes the unofficial guardianship arrangements by transcribing Article 475 bis of the Belgian Civil Code: ‘Where a person who is at least 25 years of age undertakes to maintain an unemancipated child, to educate him and to place him in a position where he can earn his living, that person may become his unofficial guardian by means of an agreement between the persons whose consent is required for the adoption of children.’

75 Ibid., paragraph 102.

76 Judgment of 20 November 2018, *Sindicatul Familia Constanţa and Others* (C-147/17, EU:C:2018:926), paragraph 71. This case concerned a Romanian institution which ‘aims to integrate the foster child on a continuous and long-term basis, into the home and family of his or her foster parent’ (paragraph 62). The content of this type of fostering arrangement is similar to that of *kafala* as regards care for the child.

77 Articles 4 and 5, and Article 14 et seq.

78 Paragraph 2 adds that ‘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’. Cooperation between the authorities of the various States is of the utmost importance given that, by contrast with the general rule that measures taken by the authorities of a Contracting State shall be recognised by operation of law, recognition may be refused, amongst other cases, where the procedure in Article 33 has not been followed (see Article 23 of the 1996 Hague Convention).

79 ‘The aim of Article 56(2) of the regulation is, first, to enable the competent authorities of the requested State to give or refuse their consent to the possible admission of the child concerned and, secondly, to allow the courts of the requesting State to be satisfied, before taking the decision to place a child in institutional care, that measures will be taken in the requested State to permit placement in that State. ... The placement must have the consent of the competent authority in the requested Member State before the court of the requiring Member State makes the placement order. The fact that consent is mandatory is underlined by the fact that Article 23(g) of the regulation provides that a judgment relating to parental responsibility is not to be recognised if the procedure laid down in Article 56 has not been complied with.’ Judgment of 26 April 2012, *Health Service Executive* (C-92/12 PPU, EU:C:2012:255), paragraphs 80 and 81.

80 Where the direct descendants are adopted, the interests of the child have already been verified in accordance with the procedural rules for giving effect to the adoption under the legislation of the country concerned (or, in the case of an international adoption, under the 1993 Hague Convention).

81 Naturally, this restriction on freedom of movement and residence must satisfy the rigorous requirements laid down by the case-law of the Court of Justice.

---

82 That does not render the question referred inadmissible, as some parties have argued, since only the referring court is in a position to know whether the facts of the case have a bearing on the matter raised in that question.

---

83 Paragraph 30 of the order for reference.

---

84 Recital 23 of Directive 2004/38 invokes the principle of proportionality where an expulsion measure is to be applied, noting that it should ‘take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin’.

---

85 See the judgment of 18 December 2014, *McCarthy* (C-202/13, EU:C:2014:2450), paragraphs 43 to 58, on the guarantees and limits on the application of Article 35 of Directive 2004/38.

---

86 Paragraphs 76 and 77 of its observations.

---

87 Directive of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ 2011 L 101, p. 1).

---

88 Recital 11 of Directive 2011/36 makes reference to ‘illegal adoption or forced marriage’.

---

89 These are the forms of exploitation cited in a non-exhaustive list in Article 2(3) of Directive 2011/36.

---

90 Points 58 to 108 of this Opinion.