International Kafala: A Right for the Child to Enter and Stay in the EU Member States?

Julie Malingreau[*]

Abstract

Much attention has already been paid to the relationship between European (family) law and law from Muslim majority countries in studies of private international law or of comparative law, often discussing family law institutions such as polygamy or repudiation. Among those institutions, there is one that has largely been neglected: kafala, a form of guardianship that is specific to Islamic law.

The reception of this institution in the Member States raises several questions, such as its consequences in terms of legal parentage or its conformity with the best interest of the child or with public order. However, this contribution focuses on the migration angle since some difficulties may appear after this particular guardianship was pronounced abroad when the question of the entrance and the stay of the child with their guardians in a Member State arises.

The research consists of determining whether some EU or international instruments could grant the guardians a right to request that 'their' child lives with them in their country and examines whether such a right is always desirable and justifiable. Taking France as an example, the author asks the following question: does not France, as a Member State of the European Union, have to ensure under European law and international obligations that the child and the couple will be able to live together on its territory?

Keywords: kafala, adoption, migration, reception, European.

A. Introduction

Because the Muslim population is expanding and distributed throughout the countries of the European Union (EU), much attention has been paid to the relationship between European law and law from Muslim-majority countries in studies of private international law or of comparative law, often discussing family law

* Julie Malingreau is a PhD candidate at the University of Utrecht, and holds an LLM in European Private Law from the University of Amsterdam, as well as a Master Degree in Law in Belgium. She currently works as a lawyer in Amsterdam, assisting with commercial contracts. Her areas of interest include national/European/International family law, Islamic law, Alternative Dispute Resolutions, private international law, human rights, intellectual property and labour law.

institutions such as polygamy or repudiation.[1] Among those institutions, there is one that has largely been neglected and that was central to a recent decision of the European Court of Human Rights (ECtHR), namely *kafala*. Indeed, on 4 October 2012, the Court ruled for the first time about this form of guardianship that is specific to Islamic law.

The reception of this institution in the Member States raises several questions, such as its consequences in terms of legal parentage or its conformity with the best interests of the child or with public order. However, this article will focus on the migration angle since some difficulties may appear after this particular guardianship was pronounced abroad when the question of the entry and stay of the child in a Member State arises. An example can illustrate the research angle: Imagine a childless couple from France who decides to go to Morocco and take into charge an abandoned Moroccan child via *kafala*. The Moroccan authorities allow it, but when the spouses want to go back to France with the child, their request for a visa is rejected. The two reactions, apart from the path of clandestinity, are either that the couple goes to live with the child in Morocco or that the spouses leave the child in Morocco and go back to their own country. A solution that would help the 'kafalian' family to live together in the Member State of the spouses seems needed in this example. My research will consist of determining whether some (EU) instruments could grant the guardians a right to request that 'their' child lives with them in their country, and will examine whether such a right is always desirable and justifiable. In other words, does not France, as a Member State of the EU, have to ensure under European law and international obligations that the child and the couple will be able to live together on its territory?

In Section B, I will define the institution of *kafala* and its different categories, compare its reception in the Member States and develop the decision of the ECtHR in the *Harroudj v. France* case. This will allow me to locate *kafala* in a legal context and to introduce my analysis in the following sections. In Section C, *kafala* and EU law will be discussed in order to see, more particularly, whether the European family reunification procedure, the European citizenship and the European Convention on Human Rights (ECHR) could contain any remedies to ensure that the child and the initiators of the *kafala* will live together in a Member State and whether those remedies would be justifiable and desirable. Finally, in Section D, I will assess international conventions that could have an influence on the problematic stay of the child taken in by *kafala*.

B. International *Kafala*

The institution of *kafala* (or *kefala* or *kafalah*) attracts more and more interest from many host countries, yet its meaning, its origins and its variety of practices across the Muslim world remain poorly known among Western legal professio-

1 *See,* among others, J.-Y. Carlier & M. Verwilghen (dir.), *Le statut personnel des musulmans, droit comparé et droit international privé*, Bruxelles, Bruylant, 1992; S. Ferrari & A. Bradney (Eds.), *Islam and European Legal Systems*, Ashgate, Hants, 2000.

nals.[2] Therefore, and in order for the reader to understand the analysis that I will make in this article, the introduction of this institution is necessary here. I will define its origins and effects and then make a short comparison about how the Member States receive it in their national law. Eventually, I will discuss the *Harroudj v. France* case from the ECtHR that will be used as a contextualisation to show the issues triggered by the internationalisation of *kafala*.

I. The Institution of Kafala

In the pre-Islamic period, adoption held an important place, but it changed with the Prophet of Islam – who was himself an adopted child[3] – and his new organisation of the family.[4] Indeed, after having adopted a son called Zayd, Mohammed wanted to marry the wife of Zayd, and as it was contrary to the laws on incest he had issued previously, Mohammed had a revelation that was the inspiration for the three verses (K 33:4-52 and 373) of the *Sura* XXXIII that are devoted to adoption and challenge it when it sets links that are equivalent to those of filiation.[5] In this way, Islam legitimised a new vision of kinship that is exclusively biological and suspended the effects of adoption,[6] in the sense that Islam prohibits the type of adoption that severs the links with the legitimate parents and establishes full paternity with the adoptive parents. Consequently, nowadays, we find a ban on strong adoption in most countries under Islamic law, except in Indonesia, Turkey, Tunisia, Somalia and Lebanon.[7] With this prohibition, logically, even if some tricks were found to avoid child abandonment,[8] a legal alternative was necessary. The authorities became aware of it, and in order to manage and to control abandoned children and to respect the Islamic principles, they created a new legal arrangement: *kafala* or 'tutelage'. The word *kafala*[9] derives from the Arabic verb *kafala*[10], which means to feed, to support, to provide.[11] The institution corresponds to a legal guardianship that is to appoint a provider (*kafil*) and seeks to help, in most cases, a so-called minor (*makful*).[12] The guardian undertakes to take charge of the maintenance, education and protection of the *makful*, just as would a father for his son, but in any case – and that is the biggest difference with the

2 Centre international de référence pour les droits de l'enfant privé de famille (SSI/CIR), 'Fiche de formation No. 50 – Cas particulier: La Kafala', < www.iss-ssi.org>, last accessed 30 June 2013.

3 M. Voorhoeve, note under European Court of H.R. No. 43631/09, 4 October 2012 (Harroudj/France), *European Human Rights Cases*, January 2013, p. 93.

4 E. Barraud, 'Les multiples usages sociaux de la Kafala en situation de migration: protection et non protection des mineurs recueillis', *e-migrinter*, Vol. 2, 2008, p. 133.

5 *Id.*, at 134.

6 *Id.*

7 *Id.*

8 Such as 'wild adoption' that violates religious and legal prohibitions and that consists of a discreet arrangement between two parties, whether or not in the same family group, after which a couple just pretends that a certain baby is theirs. *See* E. Barraud, 'L'adoption au prisme du genre: l'exemple du Maghreb', *CLIO. Histoire, femmes et sociétés*, Vol. 34, 2011, p. 159.

9 كفالة

10 كفل

11 E. Barraud, 'Kafâla transnationale. Modalités de formation des familles kafilates de France', *Autrepart*, Vol. 1, Nos. 57-58, 2011, p. 248.

12 *Id.*, at 249.

adoption understood by European countries – *kafala* never recognises a filial relationship between the *kafil* and the *makful*.[13] It is a revocable and temporary contract established by a legal act,[14] and the procedural arrangements for establishing *kafala* depend on the domestic law of each Muslim State.[15] Moreover, the child normally does not take the name and does not inherit from his or her guardian, because the rules of succession, as determined by the Koran and renewed by the positive rights, are strictly based on consanguinity and alliance.[16] The Convention on the Rights of the Child (CRC) explicitly recognises *kafala*, as well as adoption, as a protective measure for an abandoned child.[17]

In this article, I will focus on the Algerian and Moroccan *kafala*, which were respectively codified in 1984 and in 1993 in national law, because they are the most discussed ones in the context of migration[18] and because many people of the Member States are turning to Morocco or Algeria to collect a child through *kafala*.[19]

Another clarification is necessary: speaking about *kafala*, I can distinguish the extrafamilial and the intrafamilial *kafala*. The first concerns a situation in which a stranger undertakes to take a child into care via *kafala*, most of the time with a view to adoption, and the second situation is one in which a person entrusts their child to a family member through a *kafala*, for instance a situation in which a mother gives her child to her sister who is infertile. This distinction is of importance with regard to the family reunification procedure, as will be seen below.

Now that the notion of *kafala* has been developed, the question arises as to how Member States welcome this particular institution when people come back with a child from a Muslim-majority country. Indeed, no Member State organises this particular institution in its national law and, inevitably, solutions have to be found in terms of qualification and consequences, especially on the personal status of the child. In the next section, I will briefly cover the way some Member States receive *kafala,* and particularly the situation in France, as there are many cases of international *kafala* – given that France is the largest Muslim household in the Western world and its historical ties with the Maghreb countries – and as this can have a link with the decision that I will discuss in the third section.

II. The Reception in the Member States

In this section, two aspects of the reception of *kafala* in the Member States can be assessed: the parentage of the child and the stay of the child in a Member State.

With regard to the parentage of the child, although *kafala* can be seen as a form of adoption because it is a protective measure that creates a link between a child and an adult, it must be said that no State assimilates a *kafala* established

13 *Id.*
14 *Id.*
15 European Court of H.R. No. 43631/09, 4 October 2012 (Harroudj/France), §17.
16 Barraud, 'Kafâla transnationale', 2011, at 249.
17 Art. 20 (3) of the Convention on the Rights of the Child of 20 November 1989.
18 According to the French International Social Service, only Morocco, Algeria, Jordan and Pakistan admit the international *kafala*.
19 Barraud, 2008, at 133.

abroad to an adoption in the sense Western countries know it because *kafala* does not create legal parentage between the child and the adult. Indeed, Member States have always treated it as a form of guardianship or curatorship, or as placement with a view to adoption.[20] However, even though there is not any assimilation from *kafala* to adoption, the adoption of a child after a *kafala* in order to establish legal parentage is not impossible in the EU: the private international law rules in matters of adoption tend to vary. In several States, the national law of the child does not constitute an obstacle to adoption even if in some of them there is a certain reluctance towards the adoption of children from countries prohibiting adoption that leads the national legislator to impose additional conditions in such cases.[21] Among the Member States, three solutions can be found, and I will develop only the situation of a few countries to illustrate them.

There is the case of creation of a specific category, as in the United Kingdom. According to the Adoption and Children Act 2002, a 'special guardianship' can be granted by a tribunal to transfer parental responsibility to a special guardian without severing ties with the birth family.[22] The aim is to give some stability and permanence to a child to whom the solution of adoption is not appropriate – knowing that "some ethnic communities have cultural or religious difficulties to admit adoption as it is known in England and Wales"[23] – but who cannot return to live with their birth parents, that adults with whom the child lives have parental responsibility to raise them daily.[24] This concept has similarities to simple adoption in French law.

There is also the possibility – but not automaticity – of adoption after *kafala* under certain circumstances. That is the solution in the Netherlands, Belgium, Italy and Spain for example. In Belgium, adoption after *kafala* is allowed but restricted since 2005 with particular conditions. First, the formal conditions provided in Article 361-5 of the Belgian Civil Code on how to adopt a child whose country does not know the institution of adoption have to be respected. Second, the *makful* must be an orphan or a child of unknown parentage, and there is a principle of subsidiarity: the child can be adopted in Belgium only if it was not possible to place them in a family in their country of origin.[25] In the Netherlands, private international law rules provide that a decision of adoption from abroad is normally legally recognised.[26] But because *kafala* is not assimilated to adoption,[27] the providers will have to adopt the child in the Netherlands, and Article 10:105 of the Dutch Civil Code will apply.[28] In 2009 the Minister said that adoption of a

20 European Court of H.R. No. 43631/09, 4 October 2012 (Harroudj/France), §21.
21 *Id*., §22.
22 K. O'Donovan, 'L'adoption dans le droit du Royaume-Uni', *Revue internationale de droit comparé*, Vol. 55, No. 4, 2003, p. 854.
23 *Id*., at 855.
24 *Id*., at 854.
25 H. Englert, 'L'adoption internationale – le bilan 7 ans après la réforme', *ADDE Newsletter*, September 2010, p. 13.
26 Art. 10:108 of the Dutch Civil Code.
27 Rechtbank Utrecht, 5 October 2005, LJN AU8343.
28 Voorhoeve, 2013, at 94.

makful was not possible because it did not exist in their country of origin, but some months later, the Secretary of State declared that he would use his discretionary power case by case to decide whether permission for adoption has to be granted in the "best interest of the child".[29] A similar solution is found in Italy.[30] Adoption after *kafala* in Spain can be obtained via a decision pronounced by the Courts of the family domicile that apply the Spanish International Adoption Act (Law 54/2007 of 28 December), which does not state explicitly the impossibility of adopting Moroccan minors.[31] However, this solution will apparently change *vis-à-vis* Morocco as Angel Llorente, Spanish General Director of the International Judicial Cooperation in Rabat, explained orally a few months ago to the Moroccan Minister of Justice, Mustapha Ramid, that the Spanish legislature was planning to introduce a clause in the law on Spanish international adoption that would expressly state that it is forbidden to change the tutelage system of Moroccan children under *kafala* who reside on Iberian soil; thus, the parentage of the child will remain in order to conserve the biological links and the Moroccan nationality.[32]

Eventually, there is one Member State that is isolated because it absolutely forbids adoption in itself when the law of the child does not allow it: France. Indeed, if the French judges used to accept adoption before the law of 6 February 2001, however, because this law introduced a new Article 370-3 in the Civil Code, the adoption of a child whose national law prohibits that institution is not possible anymore, unless he or she acquired French nationality by declaration (after having resided for five years in France and having been in the care of a French national).[33] French courts impose on *kafala* the status of delegation of parental authority.[34] While some authors, on the basis of the *Wagner* decision of the ECtHR in which the Court said that *de facto* links created between the child and the applicant should be legally protected and that private international law rules have to respect Article 8 of the ECHR,[35] thought that French law would be challenged before the Court of Strasbourg, the Court finally decided in the *Harroudj v. France* case, which I will discuss in the next section, that French law makes a good balance of the interests involved and that the law of 2001 does not violate Article 8 of the ECHR. At this stage, another question arises: what is going to happen when a couple files a petition for recognition in France of an adoption regularly

29 *Id.*

30 H. Al-Dabbagh, *L'adoption internationale à l'épreuve de l'immigration: le cas de la kafala islamique au Québec et en France*, Conference at the INRS Montreal on the 14 January 2013, < www.ucs.inrs.ca>, last accessed 28 May 2013.

31 G.F. Vericat, 'Adoption or Fostering? The Case of Morroco', < www.ciimu.org>, last accessed 28 May 2013.

32 A. Baba Ali, 'L'Espagne s'engage à respecter les principes de la *kafala*', *Les Inspirations Eco*, March 2013, < www.leseco.ma>, last accessed 10 August 2013.

33 Art. 21-12 of the French Civil Code.

34 A. Vulbeau, 'La kafala ou le recueil legal de l'enfant', *Informations Sociales*, Vol. 2, No. 149, 2008, p. 24.

35 European Court of H.R. No. 74240/01, 28 June 2007 (Wagner/Luxembourg).

pronounced in Belgium and Spain after a *kafala*?[36] This issue goes beyond the scope of this article but shows that the questions linking private international law rules, human rights and *kafala* matters are in their infancy and makes the reader aware of the complexity of *kafala* in the context of migration.

As far as the arrival and stay of the child are concerned, there are different solutions in the Member States. In Spain, "the visa conceded to these minors is via 'family regrouping' (law of immigration) and requires a favourable resolution for the residence of the minor by the corresponding Government subdelegation."[37] In Belgium, owing to the failure to create a legal relationship between the *kafil* and the *makful*, *kafala* does not open the right to family reunification. The Foreign Office has ruled on this point by taking a decision of the Council of State (Case No. 117667, 28 March 2003) and has refused to extend a visa on the basis of *kafala*. However, in special circumstances (*e.g.* the death of the parents) and on case-by-case requests, it happens that on humanitarian grounds the Belgian State makes use of its discretion and assigns a residence permit to the child confided in *kafala*.[38] Finally, there is the case of France where the right of residence of the child is not automatic and where the situation differs according to whether the child comes from Algeria or from another Maghreb country. If the *makful* is from Algeria and their two providers are Algerian, there is a Convention between France and Algeria that provides that he or she will benefit from the family reunification procedure, if it is in his or her interest.[39] After the filing of an application for family reunification in France, a special request procedure for a long-term visa at the French consulate in Algeria is possible and the child will have to reside five years in France before he or she can obtain French nationality.[40] However, if the child comes from another country or with binational or French providers, their stay in France is not impossible, but they cannot invoke this family reunification procedure: the French State Council essentially refers to the right to respect for private and family life under Article 8 of the ECHR to decide whether or not the child can stay in France.[41]

Having discussed how the Member States welcome *kafala* on their territory, the already-mentioned *Harroudj* case still has to be discussed because it is the first time the ECtHR has said something about *kafala*, and this is a good contextualisation for the subsequent developments in this article.

36 M.-C. Le Boursicot, 'La kafâla ou recueil légal des mineurs en droit musulman: une adoption sans filiation', *Droit et Cultures*, Vol. 59, 2010, p. 295.

37 Vericat, 2013.

38 ADDE, *La Kafala en droit marocain*, < www.adde.be>, last accessed 30 June 2013.

39 Art. 4 of the Franco-Algerian Agreement of 27 December 1968 relating to the movement, employment and residence in France of Algerian nationals and their families.

40 *See* for example the *Harroudj case*, §29, in which the French government states that the naturalisation of the Algerian child was possible because she had been in the applicant's care in France for more than five years.

41 Le Boursicot, 2010, at 288.

III. The Decision of the European Court of Human Rights Harroudj v. France

An applicant living in France was granted, by the President of an Algerian court, the right to take an abandoned Algerian child into her legal care (*kafala*), and she was also authorised in January 2004 to leave Algeria and to settle in France. Since then the applicant and the child have been living in France, and in 2006 the applicant applied for the full adoption of the child. Because French private international law rules prohibit adoption when it is not allowed according to the national law of the child (Article 370-3 of the Civil Code), Lyon's *Tribunal de grande instance*, Lyon's Court of Appeal and the *Cour de cassation* dismissed the application for adoption. Therefore, the applicant filed a complaint with the ECtHR, arguing that the refusal to recognise a legal parent-child relationship between her and the child constituted a disproportionate interference with her family life (Article 8 of the ECHR).

In its decision, the ECtHR agreed on the existence of family life between the applicant and the child but denied that the inability to adopt the child constituted an interference with the applicant's family life.[42] Because the applicant argued that, in order to ensure respect for the continuance of her family life, it was necessary to equate *kafala* with full adoption and thus to recognise a legal parent–child relationship, the Court examined the complaint in terms of positive obligations. Concerning the margin of appreciation, the Court decided that it was broad because no State equates *kafala* with adoption and took the view that "by gradually obviating the prohibition of adoption, the respondent State, which seeks to encourage the integration of children of foreign origin without cutting them off immediately from the rules of their country of origin, has shown respect for cultural pluralism and has struck a fair balance between the public interest and that of the applicant."[43] Therefore, there has been no breach of the applicant's right to family life and no violation of Article 8.

The case before the Court of Strasbourg was about legal parentage and the interdiction of strong adoption in a *kafala* matter. However, there is another issue that is also interesting in Europe in which circulation is the primordial goal. If the child had been from Morocco, there would have been less certainty about their stay in France.[44] Indeed, as I mentioned earlier, the right for the child to stay with their guardian is not automatic and not that easy to get as France does not accept adoption for a child under *kafala*, and several families have trouble with such matters. At this stage, I can plainly reiterate my research question and confirm that, in order to make it easier and clearer, I will ask it considering the situation of France. Assuming that the French prohibition to adopt the child is not contrary to European law, it can be said that the child will not be authorised to enter and stay with their guardian(s) in France, and the question is, does not France, as a Member State of the EU, have to ensure under European law and international

42 European Court of H.R. No. 43631/09, 4 October 2012 (Harroudj/France), §§46-47.

43 *Id*., §51.

44 Indeed, there is no such agreement between Morocco and France about family reunification as the one provided in the Convention between Algeria and France.

obligations that the *makful* and the *kafil* will be able to enter and live together on its territory? That is what I will discuss in Sections C and D.

C. *Kafala* and EU Law

Among European laws, three potential instruments are relevant to find a track for the answer to my research question. First, there is the family reunification procedure, and two relevant directives, and second, linked to that procedure, the recent developments about European citizenship by the European Court of Justice (CJEU). Finally, there are the European human rights that are set out either in the European Charter of Fundamental Rights or in the ECHR.

I. Family Reunification Procedure

In the majority of Western European countries, family reunification is the most important form of migration from abroad both in terms of numbers and in terms of its impact on the receiving society.[45] The right to family reunification in European law was first included as one of the essential elements of the free movement of European workers from the very beginning.[46] Indeed, at the origins, the fundamental objective of the European Communities was the stimulation of economic development through the free movement of goods, capital, people and services. The free movement of persons is therefore a key element of the EU. The first regulation on free movement of workers, adopted in 1968, acknowledged that workers had the right not only to move freely, but also to bring with them their family members, regardless of their nationality.[47] Later, through many stages and because of the plans to create an area of freedom, security and justice, the Maastricht Treaty came into force in 1993 and established the citizenship of the Union, which has been widely used to enhance the freedom of movement for citizens and their family members within the territory of the Member States, even for the family members from third countries in order to ensure that European citizens and also third-country nationals legally residing on the territory of the Member States will effectively use their freedom of movement in the Union,[48] thus giving similar rights to economic and non-economic actors of the EU.

During the past decade, the EU has adopted legislative texts on the field of immigration. Among them, two directives are relevant for my analysis: (a) the Directive 2003/86/EC on the Right to Family Reunification and (b) the Directive 2004/38/EC on the Right of Citizens of the Union and their Family Members to Move and Reside Freely Within the Territory of the Member States.

45 K. Groenendijk, 'Family Reunification as a Right Under Community Law', *European Journal of Migration and Law*, Vol. 8, 2006, p. 215.

46 *Id.*

47 European Union Agency for Human Rights, *Manuel de droit européen en matière d'asile, de frontières et d'immigration*, <www .fra .europa .eu/ fr/ theme/ asile -immigration -et -frontieres>, last accessed 27 June 2013, p. 21.

48 *Id.*, at 21.

The 2003 Directive determines and harmonises the conditions under which the right to family reunification of the third-country nationals legally residing on the territory of the Member States is exercised.[49] In other words, it would have to be considered, for instance in the case of a Moroccan couple that has been living in France for eight years, who goes to Morocco to take into care a child under *kafala* and who wants the child to live with them in France.[50] Under French law,[51] children taken under *kafala* are normally excluded from the family reunification procedure because the child beneficiary of family reunification is the child having an established legal parentage, including the adopted child.[52] However, there is an exception for Algerian children, according to a Convention between France and Algeria, and that makes it possible to apply for family reunification for a child raised by *kafala*, subject to an assessment by the competent authority of the possibility for family reunification under the best interests of the child.[53] Moreover, it should also be noted that, exceptionally, some children entrusted to a third party as part of a delegation of parental authority may have the right to join their guardians. Referring to the ECHR and the CRC, the French administrative law judge believes that in some very specific cases, the particular situation of the child justifies an extension of the scope of the concept of family reunification, as defined by the laws.[54] To this end, an interministerial circular of 17 January 2006 on family reunification of foreigners exceptionally specifies that some children entrusted to third parties as part of a delegation of parental authority (and therefore a *kafala*) may fall within the scope of family reunification, relying on it to the ECHR and the CRC.[55] However, permissions of this nature should be exceptional and only concern specific situations.[56] Therefore, there remain a lot of situations in which the guardians cannot use the reunification family procedure for the *makful*. Can the 2003 Directive be of any help?

The Directive is of minimal harmonisation and adopts a narrow definition of family, protecting only the nuclear family, the spouse and the minor children[57] of the third-country nationals legally residing in the territory of the Member States.[58] By 'minor children', the European legislature means children who have

49 Art. 1 of the Directive 2003/86/EC on the right to family reunification.

50 Addressing my research question with Morocco has more interest as the bilateral Convention between France and Algeria provides, under certain conditions, a right to family reunification between a *kafil* and a *makful*. I have to clarify that in September 2012 the Moroccan Minister of Justice, Mustapha Ramid, signed a circular providing that *kafala* is henceforth only possible for Moroccan people living in Morocco. However, the text is not binding, and some Moroccan judges continue to accept international *kafala*.

51 Art. L. 314-11 of the *Code de l'entrée et du séjour des étrangers et du droit d'asile (CESEDA)*.

52 La Défenseure des enfants République Française, *Rapport d'activité*, 2010, p. 107. <www.defenseurdesenfants.fr/>, last accessed 3 July 2013.

53 Art. 4 of the Franco-Algerian Agreement of 27 December 1968 relating to the movement, employment and residence in France of Algerian nationals and their families.

54 CE, 24 March 2004, No. 220434 et No. 249369.

55 La Défenseure des enfants République Française, 2010, at 107.

56 O. Dubos, 'La kafala et le juge administratif: court séjour au pays de l'insécurité juridique', *Droit de la famille*, January 2009, pp. 22-23.

57 Recital 9 of the Directive 2003/86/EC on the right to family reunification.

58 Art. 4 (1) of the Directive 2003/86/EC on the right to family reunification.

their legal parentage established with the third-country national(s), namely direct descendants (biological) or adopted.[59] Therefore, because *kafala* does not establish any precise legal child–parent relationship, it seems obvious that the children taken under *kafala* do not fall under the notion of family and thus under the reunification family right provided by the Directive. Indeed, even in the extensions of the notion of 'family' that the Directive suggests, there is nothing that concerns the particular link between the *makful* and the *kafil*, and even if there was, that would not be sufficient to impose an obligation on France, as they are possibilities to extend the protection and not obligations for the Member States. However, we cannot leave that Directive without thinking about the eventual case of an interfamilial *kafala*: what if the *makful* and the *kafil* are blood-related? Is it not a family issue within the meaning of the Directive? If all the descendants of the European worker were concerned by the family reunification,[60] then this is not the case in the 2003 Directive[61] – as I mentioned earlier, the only family members who are protected are the *direct* descendants and the spouse. Relationships between nephews and aunts and uncles are not covered either.[62]

At present, I can assess the 2004 Directive that applies to situations in which a European citizen used the possibility to move to another Member State and wants a family member to join them in that country. That Directive modifies Regulation 1612/68 on Freedom of Movement for Workers and repeals six directives. Once again, as an example, I imagine a Belgian couple, living in France, who went to Morocco to make a *kafala*. Could that couple use the Directive to request that the child stay with them in France? If I develop this Directive as well, it is because I believe that it provides something different than the 2003 Directive and that it could be a potential way to attribute a right for the child under *kafala* to live with their guardians in the Member State they moved to: Article 3.2.1 (a) of the 2004 Directive. Under this provision, the host Member State (in our case France) shall *facilitate* the entry and residence of family members, if in the country of origin (here, Morocco), they are *dependents* or members of the household of the Union citizen beneficiary of the right to principal residence. I think, as suggested by the Belgian lawyer Hélène Englert,[63] that the concept of *dependence*, contained in that provision, could be used by that Belgian couple to obtain permission for the child to stay with them in France as *kafala* clearly implies that the child is at the charge of the guardian(s) and thus dependent. However, contrary to the opinion of the Advocate General Bot, the CJEU recently said that the term *facilitate* does not require the Member States to accept any request for the entry or residence made

59 Art. 4 (1) (b,c,d) of the Directive 2003/86/EC on the right to family reunification.

60 Art. 10, §1, a) of the Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

61 ADDE, *Analyse: Directive 2004/38: quel droit au regroupement familial pour les citoyens UE dans un autre Etat membre?*, < www.adde.be>, last accessed 30 June 2013, p. 8.

62 ADDE, *Analyse: Les lignes de force de la réforme du regroupement familial*, <www .adde .be>, last accessed 30 June 2013, p. 6.

63 H. Englert, 'La relativité des effets des actes de tutelle étrangers reconnus en Belgique sur le droit de séjour, une politique conforme aux engagements internationaux de la Belgique?', *ADDE Newsletter*, December 2010, p. 3.

by people who show that they are members of the family in charge of a Union citizen, in the sense of Article 3.2.1 (a) of the 2004 Directive,[64] but it gives the obligation to provide a certain advantage, compared with the entry and residence applications of other third-country nationals, to requests submitted by persons who have a particular link dependency to a citizen of the Union.[65] Without knowing what this 'certain advantage' covers[66] but because the Court said that the criteria provided in national laws should not deprive Article 3.2.1 (a) of its *effet utile*, I think that France, in the example I chose, would have to facilitate the entry and residence of the child. Indeed, with that disposition, the European legislature wants to encourage Union citizens to exercise their right to move and reside freely within Member States. And which dependent person is likely to have the greatest influence on the freedom of movement and residence of an EU citizen? In my view, it is the child of whom the citizen has charge and who is dependent on that citizen because the citizen knows that most often the child is abandoned and that if the child cannot enter and reside in the Member State, it will create a situation in which the citizen will be most likely to leave the EU to live with the child in their country of origin.

Therefore, I believe that the discussed provision can be interpreted in the sense that a Member State has to give an advantage to children dependent on EU citizens who have exercised their freedom of movement, by permitting them to live with their guardian(s), providing that it is consistent with their best interest to avoid abuses, for instance.

The obligation for the Member States to facilitate the entry and residence of family members other than only the spouse and the direct descendants seems to grant the right to family reunification for a wider family than the one under the 2003 Directive. This would be logical as the 2003 Directive aims to ensure equal treatment to non-EU nationals legally residing in the EU, whereas the 2004 Directive wants to promote the free movement of EU citizens and their integration in the Member State of destination. Objectives related to EU citizen status are primordial for the EU legislature, and it is probably normal if they are somewhat more promoted than those concerning equal treatment of third-country nationals legally residing in the territory of the Member States. As explained earlier, the Belgian couple could invoke the 2004 Directive because they want to have the right to exercise their freedom of movement to France – which the Directive wants to promote – and that will not be possible if their *makful* cannot enter and stay in France with them: the couple desiring a child is not going to want to abandon the child in his or her country of origin and will likely bring themselves to leave France and the EU to live with the child if France does not *facilitate* the entry and stay of the family member *dependent* on the Belgian couple.

64 C.J.E.U. No. C-83/11, 5 September 2012 (Rahman), §18.

65 *Id*., §21.

66 M. Benlolo-Carabot, 'Citoyenneté européenne (Directive 2004/38/CE): Première interprétation du droit de séjour des membres de la famille du citoyen de l'Union autres que le conjoint, l'ascendant ou le descendant direct', *Lettre 'Actualités Droits-Libertés' of the CREDOF*, 22 September 2012.

As far as the intrafamilial *kafala* is concerned, the same reflection as the one developed on the 2003 Directive applies.

From these two European directives, it can be inferred that the child taken under *kafala*, either by EU citizens who have used their freedom of movement or by a third-country national, does not benefit automatically from the right to family reunification. In the first case, it seems that the current 2003 Directive does not provide such a right at all, whereas in the second case I believe that the notion of "dependent family members, other than the nuclear ones" in Article 3.2.1 (a) of the 2004 Directive is a gap through which a *makful* could be granted the right for family reunification with EU citizens. Indeed, who would be more concerned by that disposition than a child dependent on EU citizens? Moreover, this would be a good solution because it is a proper counterparty to the fact that European law does not impose on the Member States that they provide adoption of the *makful*: the Member States would not have to allow something that is not authorised in the country of origin of the child (strong adoption) but would have to allow them to enter and live in the country of the *kafil*, which would respect either the decision of the country of origin that admitted the international *kafala* situation or, most often, the interest of the child – except in situations of domestic use of children, explained below – and the provider. Moreover, abuses with respect to a parent–child relationship created without the standard safeguards (diversion of the rules of adoption) are avoided but allow EU citizens, who take a child (often abandoned) in charge with an option for adoption, to keep the child with them in the Member State. If only the nuclear family is concerned in the 2003 Directive, it is because the EU wants to frame immigration. However, since it also wants to promote facilitation of integration of third-country nationals, and as *kafala* is often used by a childless Muslim couple to have a child and as the Muslim population is a community of its own in the EU, should we not provide something in that Directive (provided of course that the interests of the child and the risk of them being used as a domestic servant are kept in mind)?[67] Indeed, it is not uncommon for Maghreb people, for whom something other than biological parentage might be seen as a shame, to choose to take a child under *kafala* more in order to use them as a servant in a Member State than with the motive of adoption. A lot of cases have been observed in Morocco, for instance, in which Moroccan families choose their little housemaids directly in an orphanage, and for free, or by arranging with the family of the child in exchange for a paid job or money and property, under the guise of *kafala*.[68] This kind of situations exist in the EU as well: in the department of Gironde in France for instance, a number of minors accompanied by an abusive guardian, sexually and violently sometimes, have been found.[69] In those unfortunate cases, family reunification should not be a potential tool to encourage it, and therefore a non-automatic solution for the *makful* in the 2003 Directive, accompanied by safeguards, seems the most appropriate.

67 Barraud, 2008, at 137.
68 *Id.*, at 138.
69 *Id.*

After all those developments, one question remains: what about the situation in which a French couple who lives in France collects a child via *kafala* in Morocco? The first idea is to say that because the French couple did not make use of their freedom of movement to another Member State, it is an internal situation and therefore EU law does not apply, French immigration law and principles being applicable. However, this would be to leave out of consideration the recent case law of the CJEU and its decisions in *Zambrano*, *McCarthy* and *Dereci*, recognising that citizens of the EU do not need to move to invoke their human rights or at least some of them, such as residing in the state in which they are nationals, contained in the important concept of European citizenship. In the next section, I will assess those cases and see whether they can have an impact on the right to family reunification for EU citizens with a *makful* in an internal situation.

II. European Citizenship

European citizenship is established in Article 20 of the Treaty on the Functioning of the European Union (TFEU), and "all citizens derive various rights (especially freedom of movement and residence) from this status, although the scope of certain rights may vary depending on whether the citizen is engaged in economic activity."[70] Traditionally, a cross-border element is necessary for all those rights to be triggered, and in the absence of such an element, which triggers the application of EU law, "the orthodox approach would be to consider the situation a wholly internal one, to be regulated by national law".[71] Therefore, in the case of the French couple, who lives in France and who collects a child via *kafala* in Morocco, one would logically think that EU law does not apply and that the question remains under national appreciation (French law) because the couple invoking EU law did not make use of their freedom of movement in the EU. Indeed, in family reunification cases, national law applies to situations in which nationals request that members of their family join them. However, as Jean-Yves Carlier recalls it, because an internal situation is subject to the often more restrictive national rules of the Member States, it leads to reverse discrimination that strikes static nationals of Member States and their family: "what is European law for distinguishing to such an extent citizens according to whether they are migrants or sedentary persons?"[72] Because some national jurisdictions and Advocates General of the CJEU invited the CJEU to reconsider its case law, the Court seemed to do so with three judgments: *Zambrano*, *McCarthy* and *Dereci*.[73] Those three decisions sowed doubts about EU law and internal situations, using European citizenship. In the three cases, the Court was confronted with the issue of whether third-country nationals can derive a right of residence from their family relationship

70 A. Hinarejos, 'Citizenship of the EU: Clarifying "Genuine Enjoyment of the Substance" of Citizenship Rights', *The Cambridge Law Journal*, Vol. 71, 2012, p. 279.

71 *Id.*, at 280.

72 J.-Y. Carlier, 'Purely Internal Situations and EU Citizens' Rights After the *Zambrano*, *Mc Carthy* and *Dereci* Judgments', *Online Journal on Free Movement of Workers Within the European Union*, Vol. 5, 2013, p. 6.

73 *Id.*

with an EU citizen who has never exercised their free movement rights.[74] Indeed, the Court determined to what extent the national authorities of a Member State have an obligation under Article 20 TFEU (European citizenship) to protect the family unit of a citizen of the EU with a national of a third State, and clarified certain notions. At first sight, the situation of the *makful* of a French couple seems to be similar, but first let me discuss what the Court decided in the three judgments and later, whether lessons can be learned.

First, in *Zambrano*, the CJEU made a swift move away from the traditionalist cross-border situation logic by accepting that "the Colombian father of 'static' Belgian children had a right to reside and work (in Belgium) under EU law because the children would otherwise be deprived of the genuine enjoyment of their rights as citizens of the Union".[75] The Court decided that the situation at issue fell within the scope of EU law, despite the lack of exercise of free movement rights, and accepted the extension of the EU citizens' rights to third-country nationals. This decision was based on the idea that the EU citizen's status is intended to be fundamental for nationals of Member States, and the Court said that Article 20 precludes national measures that have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by the status of citizen of the Union.[76] According to the Court, the refusal of a residence and a work permit for the father of the European children would have such an effect because the children would have to leave the territory of the Union to accompany their parents; they could not stay in the Union on their own, without the necessary resources, and in such conditions it would be impossible for the children to exercise the substance of the rights conferred by the status of citizen of the Union.[77]

From that decision it can be retained that "what matters is the taking into consideration of purely internal situations when the substance of citizen's rights is at stake".[78] However, the question remained as to what exactly this 'genuine enjoyment of the substance' of EU citizens' rights entailed or, in other words, how broad the *Zambrano* exception was. The Court had the occasion to clarify this in two subsequent cases: *McCarthy* and *Dereci*.

In the *McCarthy* case, the Court had to rule about Mrs McCarthy, a British-Irish national who was born in the United Kingdom, who had always lived there and who was not allowed to live therein with her husband, a Jamaican staying illegally in the United Kingdom. The Court pointed out that it is not because a Union citizen has not made use of her right of free movement that her situation is, for that only reason, to be considered as purely internal,[79] and quoted the key passage of *Zambrano* about the deprivation effect that the national measures

74 P. Van Elsuwege & D. Kochenov, 'On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights', *European Journal of Migration and Law*, Vol. 13, 2011, p. 444.

75 *Id.*, at 444.

76 C.J.E.U. No. C-34/09, 8 March 2011 (Zambrano), §42.

77 L. Panhaleux, *L'extension par la Cour de justice du Droit de l'Union européenne à des ressortissants d'Etats tiers*, <www.pg-avocats.fr>, last accessed 20 July 2013, p. 4.

78 Carlier, 2013, at 6.

79 C.J.E.U. No. C-434/09, 5 May 2011 (Mc Carthy), §46.

must have on the "genuine enjoyment of the substance of the rights conferred by virtue of the status provided by Article 20 TFEU".[80] However, this time, the Court decided that the contested national measure that did not allow the husband to stay legally in the United Kingdom did not cause 'serious inconveniences' to Mrs McCarthy because, in contrast to the case of the children of Ruiz Zambrano, the national measure did not have the effect of obliging Mrs McCarthy to leave the EU.[81] The Court said that because Mrs McCarthy was a national of the United Kingdom, she enjoyed an unconditional right of residence in the United Kingdom and was therefore not obliged to leave the EU. It could have said the same concerning the Belgian children in *Zambrano,* but it chose by its two judgments to distinguish the situations involving dependent children and independent adults: A European child generates an almost unconditional right of residence and work for their parents because of their dependence on them but this dependence does not exist (with some exceptions) in the case of a European adult that would impose to recognise an unconditional right to stay for the non-EU spouse.

From that decision it can be retained that "in order for a national measure to fall within the scope of EU law, the latter must produce either a 'deprivation effect' or an 'impeding effect'."[82] Moreover, with regard to the outcomes in *Zambrano* and *McCarthy*, "it could be inferred that if the family life of parents with their young child pertained to the substance of the rights of European citizens, that was not the case regarding the family life of the spouses."[83]

Eventually, in *Dereci*, the question was whether several Austrian citizens who had not exercised their freedom of movement could rely on EU law and obtain a right of residence for their relatives.[84] The Court adopted the same position as in *Zambrano* and *McCarthy* about EU law, internal situations and the deprivation effect, but further clarified that the *Zambrano* exception "refers to the situation in which the Union citizen had, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole".[85]

The exception then appears to be very narrow because the citizens will have to prove that they will be forced to leave the territory of the Union as a whole. On this point, A. Hinarejos said that "'being forced' to leave the Union is interpreted so strictly that, for the purposes of family reunification, it seems limited to the cases of absolute dependence of the citizen on a third country national, the relationship between the child and caregiver being the typical example".[86] If that summarises the three discussed decisions, one may ask, in the situation I imagined above, whether it can also apply to the reverse context: the case of absolute dependence of the third-country national on a Union citizen. I will try to see,

80 *Id*., §47.
81 *Id*., §50.
82 K. Lenaerts, 'The Concept of EU Citizenship in the Case Law of the European of Justice', *Era Forum*, Vol. 13, 2013, p. 574.
83 Carlier, 2013, at 6.
84 Hinarejos, 2012, at 281.
85 C.J.E.U. No. C-256/11, 15 November 2011 (Dereci), §66.
86 Hinarejos, 2012, at 281.

thanks to the lessons of the three cases, whether that jurisprudence can also apply to the case of a French couple taking care of a child from a third country.

First of all, a preliminary clarification is necessary. In my view, the difficulty concerning the definition of family members does not arise here because this line of case law is not restricted to only the nuclear family or legal children. Indeed, the focus in that case law is whether, because of national measures, a citizen of the EU is deprived of the genuine enjoyment of their rights as citizens of the Union. Of course, because the notion of deprivation is strictly appreciated, the degree to which the EU citizen and their relatives are linked will influence the answer as to whether or not the EU citizen, because of a certain national measure, is forced to leave the Union. However, it is not obvious why the relationship between a European child taken into care via guardianship and a third-country national could not be such that the child would have to leave the Union if a national measure was to refuse a right of residence to their guardian(s) and thereby would suffer deprivation of their substantial citizen's rights. The criterion that the national courts have to check is whether or not a national measure would force a Union citizen to leave the Union and from the moment a child is dependent on an adult (which can be because of a guardianship also), if the adult cannot stay with them because of a national measure, it can be assumed that the child will be forced to leave the Union within the meaning of the CJEU. Therefore, it appears that the guardianship in an internal situation may be protected by the case law *Zambrano*. While it is likely that *Zambrano* would apply for a guardianship between an EU child and his or her third-country guardian(s), the question remains whether it would also apply in the case of a guardianship between a EU guardian and a third-country child (for instance, in the case of a *kafala*). The clarifications of *McCarthy* and *Dereci* will complete my analysis.

In the case of a French couple living in France and who would like their *makful* to have a right of residence in France on the basis of Article 20 TFEU, the couple would have to prove that the French measure that does not allow such a right deprives them of the genuine enjoyment of their rights as citizens of the Union. In order to do so, they would have to demonstrate that because of that measure they would be forced to leave the Union. In this demonstration, there are two elements: 'forced to leave' and 'the Union'.

I will start with the most questionable one: 'forced to leave'. In my view, the answer is not entirely obvious. At first sight I think that the French measure that would not allow the child to reside with the French couple would not absolutely force the couple to leave its national country. Indeed, the concept is strictly interpreted, and the couple could decide to send the child back to their country of origin. However, the obligation to leave is always relative: Would the Belgian children of Zambrano not have been able to stay in Belgium in an orphanage or foster home while their father was leaving for Colombia? That would not have been the best solution in the interest of the child and so would not be the solution to send the *makful* back to Morocco, but it shows that the Court could have interpreted the obligation to leave more strictly in *Zambrano*, but that maybe the fact that children, and not only spouses, were involved explains why the Court ruled in the way it did. It could be argued, then, that the French guardians would be morally

forced to leave France with the child because they would not want to abandon the *makful*, probably for the second time in his or her life. If the child was taken in *kafala* with another goal than collecting an abandoned child (better education in a Member State or better living conditions than in their family of origin, for instance), the argument of being 'morally forced to leave France' might be weaker because the providers would know that the child would not be alone in their country of origin and probably would not feel obliged to leave with them.

The second consideration is whether the providers would be forced to leave not only France but also the Union, a requirement that was highlighted by the Court in the *Dereci* case? I can come back on the solution adopted by the Court in the *Zambrano* case. While some might argue that the children could perhaps have moved to another Member State and not automatically to the third country of their parents, taking their family with them, the Court nonetheless chose a much more certain and immediate solution, probably because children were involved, whereas in *McCarthy* and *Dereci* the Court took into account the possibility of the adults to move to another Member State and thus were not forced to leave the Union.[87] In the situation of the French couple, they would also have, as adults, the possibility to exercise their freedom of movement to another country[88] without necessarily having to leave the Union as a whole. It is precisely here that the success of the request of the French couple, based on Article 20 TFEU, might be compromised: As a matter of fact, "rightly or wrongly, their situation is thus considered not as a dire, and this is where the Court chooses to draw the line."[89] In other words, because the situation of the French couple would not be seen as a dramatic one, the Court could decide that the *Zambrano* case law does not apply to their situation.

Did the CJEU only want to privilege situations in which the children were the EU citizens? Probably it wanted to set some limits because the case laws *Zambrano*, *McCarthy* and *Defeci* had to stay exceptional and for extreme cases.[90] A cautious approach is indeed necessary because "a wider interpretation would have dramatic effects on the equilibrium of powers between the Union and the Member States".[91] Therefore, it is predictable that the CJEU would be careful with the internal French situation suggested earlier, and Article 20 TFEU is probably not the best weapon for the French couple.

In the next section, I will cover a last tool that could be used by a *kafil* to require a right for the *makful* to stay in a Member State: European human rights, either under the Charter of Fundamental Rights or under the ECHR.

III. European Human Rights

In October 2012, the ECtHR ruled that French law of 2001 containing private international rules on adoption that do not allow adoption after *kafala* did not

87 *Id.*

88 Even nationals moving to other Member States only to benefit from easier family reunification requirements could be seen as 'abuse of rights'. *See* Van Elsuwege & Kochenov, 2011, at 459.

89 Hinarejos, 2012, at 281.

90 Lenaerts, 2013, at 582.

91 Hinarejos, 2012, at 282.

violate Article 8 of the ECHR. In this section, I will assess whether a *kafil* could successfully invoke their right to private life and family life in order, this time, to keep the *makful* with them (entry and stay of the *makful*).[92] The first provision I refer to is Article 8 of the ECHR, well-known in European family law, but there is also a second relevant disposition: Article 7 of the Charter of Fundamental Rights. Indeed since December 2009, with the entry into force of the Lisbon Treaty, the European Charter is legally binding, having the same status as primary EU law.[93] This provision will apply only if EU law applies to the situation[94]; otherwise Article 8 of the ECHR will have to be assessed.

Concerning the right to private and family life under Article 7 of the Charter of Fundamental Rights, it has to be first checked whether EU law applies to a situation in which a *kafil* goes to Morocco and comes back to France with a child he has taken into care under *kafala*, wanting the child to stay with him in France. In the present case, EU law will apply to the situation if France implements EU law when deciding about the right of entry and residence for the child. For the question of how to know whether France implements EU law or not, I can mention two decisions of the CJEU: one concerning the implementation of European secondary legislation (*Iida* case) and the other concerning the implementation of European primary law (*Dereci* case).

In the *Iida* case, the Court said that to determine whether a national measure falls within the implementation of EU law within the meaning of Article 51 of the Charter, it must be ascertained among other things whether the national legislation at issue is intended to implement a provision of EU law, what the character of that legislation is and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting that law, and also whether there are specific rules of EU law on the matter or capable of affecting it.[95]

In the case at hand, a Japanese citizen had not been granted a "residence card of a family member of a Union citizen" by the German authorities, and the Court said that even if the issue of the attribution of such a card is indeed intended to implement EU law (Article 10 of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States), "it is nonetheless the case that the situation of the claimant in the main proceedings is not governed by European Union law, since he does not satisfy the conditions for the grant of that card in accordance with Article 10 of Directive 2004/38".[96] From this and applying the case law *Iida* to the situation developed earlier with the 2003 Directive (with a Moroccan couple who has been living legally in France for more than a year), it can be said that, because the relationship between the *kafil* and the *makful* in this case is not protected under that Directive which grants a right to family reunification for the members

92 As there is nothing about the right to stay in cases of *kafala* in French law, the administrative judges often evaluate the requests on the basis of Art. 8 of the ECHR, but the question here is, would they have to grant the right to stay on that basis in order to respect human rights?

93 Art. 6 of the consolidated version of the Treaty on European Union of 30 March 2010.

94 Art. 51 of the Charter on Human Rights of the European Union of 18 December 2000.

95 C.J.E.U. No. C-40/11, 8 November 2012 (Iida), §79.

96 *Id*., §80.

of the nuclear family – as I demonstrated it – the situation is not governed by EU law. Indeed, this is similar to the situation of the Japanese in the *Iida* decision who did not satisfy the conditions for the protection of the Directive 2004/38 and whose situation was therefore not ruled by EU law. Because the situation of the Moroccan couple is not governed by EU law, Article 7 of the Charter does not come into play, and it is Article 8 of the ECHR that will be relevant. Also, if I look at the solution found concerning the 2004 Directive (right to family reunification extends to the dependents of the Union citizen who exercised their freedom of movement), I believe that because Article 3.2.1 (a) of the Directive applies to the situation, Article 7 of the Charter might be examined.

As far as primary EU law is concerned – still in order to determine whether EU governs the situation – considering the EU citizenship provided in Article 20 TFEU and the recent case law of the CJEU discussed above, it is only after having established that the national measure in question produces a 'deprivation effect' that the restriction brought about by that measure may be examined in light of the Charter.[97] If a French guardian cannot establish that the refusal by the French authorities to allow the *makful* to reside in France creates a deprivation effect of their rights as a EU citizen, and at that stage fundamental rights are not yet taken into account for the purposes of determining the existence or absence of a 'deprivation effect',[98] the contested French measure does not fall within the scope of EU law and the Charter does not apply. Therefore, the French measure will have to be confronted by resort to Article 8 of the ECHR. If the CJEU was to accept the 'deprivation effect' in such a situation, either there would be no need to answer the question concerning fundamental rights because Article 20 TFEU by itself opposes the national measure, or the Court could also consider the compatibility of the French measure with Article 7 of the Charter.[99]

The meaning and scope of any right provided in the Charter of Fundamental Rights that corresponds to the rights guaranteed by the ECHR should be consistent with those defined by it.[100] As Article 7 of the Charter corresponds to the rights granted under Article 8 of the ECHR, the following developments about Article 8 apply to Article 7 of the Charter.

Applying the ECHR to immigration cases has always been a balancing exercise between the effective protection of human rights and the contracting states' autonomy to regulate migration flows.[101] Because the ECHR does not contain any reference to immigration, in the first 30 years of its existence, the Court in Strasbourg remained largely silent on matters of migration.[102] However, some recent judgments confirm that the ECtHR has started a new era in its human rights jurisprudence in the field of immigration.

97 Lenaerts, 2013, at 581.
98 *Id*., at 579.
99 *Id*., at 579-580.
100 Art. 52 §3 of the Charter of the Fundamental Rights of the European Union of 7 December 2000.
101 D. Thym, 'Respect for Private and Family Life Under Article 8 of the ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?', *International and Comparative Law Quarterly*, Vol. 57, 2008, p. 87.
102 *Id*., at 103.

As far as family reunification is concerned, the Court recalled that the ECHR does not grant a right to family reunification,[103] while EU law does in its secondary legislation.[104] The Court provides a wide margin of appreciation for immigration control on the part of the Member States and only imposes a minimum level of protection that has to be respected.[105] As a Member State is under no obligation to admit foreigners in their own right but may be obliged to do so out of respect for the human rights of their family members,[106] I can ask whether a *kafil* could argue that their right to family life under Article 8 is not respected if the *makful* cannot stay in the Member State with them.

In its case law, the Court in Strasbourg considers the particular circumstances of each case, and in this matter it really wants the States to strike a fair balance between the interest of the applicant and the interests of the State.[107] Starting with my case, I have to assess whether the situation falls under the notion of 'family life'. In my opinion it does. Indeed, the Court is not confined to the nuclear family: it has extended the notion to *de facto* social ties made without fraud abroad[108] or also "to ties between relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life".[109] In immigration cases, the ECtHR applied this concept to the relation between the applicant with their parents and siblings and rejected the invocation of 'family life' between an aunt and nieces and nephews owing to the lack of "further elements of dependency involving more than the emotional ties".[110] Therefore, because the dependence between the *makful* and the *kafil* goes beyond the emotional ties, assuming that *de facto* ties were created without fraud in Morocco and because the Court does not like to make distinctions between children on the basis of circumstances of their birth,[111] I think that the situation falls within the scope of Article 8 of the ECHR. Later, I will analyse whether the decision of the French authorities constitutes an interference with the right to family life of the *kafil*. In immigration cases, the ECtHR has checked whether the Member State had a positive obligation to grant a right of residence. In its *Sen v. The Netherlands* case, the Court mentioned three criteria: the age of the child, the situation in their country of origin and the degree of dependence *vis-à-vis* parents. In my example with *kafala*, if the child is young and was abandoned in his or her home country, those two parameters would probably influence a response in the direction of a positive obligation for France. However, the Court already refused to admit such interference when it was the original choice of the parents to have a

103 A. Wiesbrock, 'Court of Justice of the European Union: The Right to Family Reunification of Third-Country Nationals Under EU Law; Decision of 4 March 2010, Case C-578/08, Rhimou Chakroun v. Minister van Buitenlandse Zaken', *European Constitutional Law Review*, Vol. 6, 2010, p. 473.
104 Groenendijk, 2006, at 219.
105 Van Elsuwege & Kochenov, 2011, at 462.
106 Thym, 2008, at 103.
107 Wiesbrock, 2010, at 473.
108 European Court of H.R. No. 74240/01, 28 June 2007 (Wagner/Luxembourg).
109 Thym, 2008, at 90.
110 *Id*., at 90.
111 *See,* among others, European Court of H.R. No. 6833/74, 13 June 1979 (Marckx/Belgium), §31.

family life split between two countries[112] or when it was still possible to have a family life in another country.[113] If I can affirm that the *kafil* always intends that the *makful* lives with them from the beginning and hence that there is no choice for a split family life, I can also say that in the situation envisaged, a family life for the *makful* and the *kafil* is still likely to be possible in the country of origin of the child. In its *Ahmut v. The Netherlands* case, the Court said that "Article 8 does not guarantee the right to choose the most suitable place to develop family life."[114] Therefore, and also because the positive obligation that is asked from the Member State – to authorise a child to enter and stay – is a stronger obligation than when the State is subject to a negative obligation, the margin of appreciation of the Member States is wider.

From all those elements, I can reasonably say that, even if there have been many developments in the sense of the protection of human rights in case of immigration, Article 8 of the ECHR (and, consequently, Article 7 of the Charter of Fundamental Rights) is not a strong basis for the *kafil* to request the child to live with them because the right to family life of the *kafil* is not flouted by France if family life is still possible in Morocco, for instance.

At the end of Section C, I can take stock of the solutions.

In my view, only Article 3.2.1 (a) of the 2004 Directive offers a real potential right for the child taken under *kafala* to stay in the Member State in which lives their *kafil*, who is a citizen of the EU who has exercised their right to freedom of movement. The European citizenship and the right to family life, while remaining in the interpretation of the CJEU and the ECtHR, do not seem to confer such a right, in the current state of case law. In this way, the right for the *makful* to stay in a Member State would be granted only when the freedom of movement of an EU citizen is concerned. This could be for two reasons: on the one hand, migration policy strongly remains a national concern, and on the other hand, the *kafala* does not offer the same guarantees as the ones offered by adoption. With regard to the first reason, this explains why the ECtHR gives a wide margin of appreciation to the Member States. With regard to the second exception, I can be a bit more expansive. Because the *kafala* can be obtained easily and faster than an adoption, abuses can happen, also against the interest of the child. Therefore, it is safer, not only to limit immigration, if the EU does not encourage people to do a *kafala* by granting a child an automatic right to stay with their providers; from my analysis, the only case when EU law would grant a right of residence to the *makful* would be when an extremely important objective of the EU is concerned such as the freedom of movement of the citizens. Thereby, there seems to be a good balance between the will not to encourage situations that might not respect the European guarantees, the will to limit immigration and the objectives of the EU.

In Section D, I will briefly cover the international obligations that the Member States are supposed to respect, and assess whether there is among them one

112 European Court of H.R. No. 31465/96, 21 December 2001 (Sen/The Netherlands), §39.
113 European Court of H.R. No. 21702/93, 28 November 1996 (Ahmut/The Netherlands), §71.
114 *Id.*

that would grant a right for the child taken under *kafala* to stay with their guardian in a Member State.

D. *Kafala* and International Conventions

In this last section I will analyse three international instruments that Member States might have to respect when taking a decision about the right of residence of a child taken under *kafala* in a Muslim country: The Hague Convention concerning parental responsibility and measures for the protection of children, the existence of bilateral conventions between a Member State and a Muslim country and, finally, the CRC and its well-known concept of the best interest of the child.

I. The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children

With the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption, the Convention of 19 October 1996 is the third piece of a triptych to protect children in international situations. This aims at determining and ensuring the implementation of protective measures taken on behalf of minors (custody, guardianship, placement of the child and administration of his property), and provides explicitly in its Article 3 (e) that *kafala* is a protective measure and thus expressly falls under the scope of application of the Convention, while it does not under the Hague Convention of 1993 on international adoption because it does not precisely constitute an adoption.[115] The Convention also states under its Article 23 (1) that "the measures taken by the authorities of a Contracting State shall be recognised by operation of all in all other Contracting States". Taking again the example of an international *kafala* linked to Morocco and France, which are both parties to the Convention and in which the Convention entered into force respectively in 2002 and 2013, the question arises whether that provision could be a basis for an obligation for France to let the *makful* live with their guardian(s) on its territory.

Even if the Convention does not cover immigration questions, I see Articles 3 (e) and 23 (1) as potential bases for granting a right of residence to the *makful* in a country that ratified the instrument. Indeed, in my view, the obligation of recognition of the measures implies, if we want the provision to have an *effet utile*, that the receiving State of the measure will accept the child to reside in it, with their guardians; otherwise the measure taken does not protect the child. However, an additional question arises when a *kafala* has been done in the Maghreb country not in order to protect the child but as a 'gift' to a family member who

115 *See* the "Projet révisé du manuel pratique sur le fonctionnement de la Convention de la Haye du 19 Octobre 1996 concernant la compétence, la loi applicable, la reconnaissance, l'exécution et la coopération en matière de responsabilité parentale et de mesures de protection des enfants établi par le Bureau Permanent de la Conférence de la Haye de droit international privé", May 2011, < www.hcch.net>, last accessed 10 July 2013, p. 19.

was not able to give birth, for instance (in the case of a notary *kafala*); do the national authorities have to check case by case or do they have to consider every *kafala* as assimilated, as Article 3 (e) provides it, as a measure of protection? I think that automatic assimilation is a good answer, especially when considering what follows.

In my original example, I assume that the *kafil* could invoke the Hague Convention of 1996 in order to impose that French authorities give a right of residence to the child taken under *kafala* in Morocco, but only if the two countries involved respect the cooperation procedure provided under Article 33 of the Convention. Indeed, if that procedure is not respected, the recognition of the measure can be refused by the receiving State[116]: the obligation on the receiving State exists only because there has been some cooperation between the signatory States, which means that a certain number of guarantees have been ensured, avoiding the risk of abuses or actions against the interest of the child. Therefore, I can safely affirm that such an obligation (granting a right of residence to a *makful* in a signatory state) exists under the discussed Convention. Ideally, because "if an authority [...] 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,"[117] Morocco shall consult the French central authorities before accepting a *kafala* for a *kafil* who intends to go back to France with the child. According to Article 33 (2), the decision can be taken only if the French authorities have consented to the placement or provision of care, taking into account the child's best interests.

Therefore, I have to nuance the statement I made above: in my example, it is only if French authorities authorised *kafala* that they will have the obligation to grant the child the right of residence on the French territory, in order to comply with Article 3 (e) of the Convention. In this view, it is likely that the French authorities will, in most cases, have to make a balance between their migration policies and the best interests of the child (to be or not be protected by a *kafala*).

Having said that, I can move on to the last short sections covering, respectively, the bilateral conventions between the State of the *makful* and the State of the *kafil* and the notion of the child's best interest.

II. Bilateral Conventions

In this short section, I will cover the easiest and clearest way to answer the question about the right to stay for the child taken under *kafala*: a convention between the State of the *kafil* and the State of the *makful* that organises such a right.

116 Art. 23 (f) of the Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children.

117 Art. 33 (1) of the Hague Convention of 19 October 1996.

At this stage I refer again to the Franco-Algerian Agreement of 27 December 1968 relating to the movement, employment and residence in France of Algerian nationals and their families. In French law over family reunification, the foreigner who legally resides in France for at least 18 months can benefit from their right to be joined by their spouse and their minor children, biological or adopted.[118] Therefore, the *makful* is rejected from this provision and has to get a long-stay visa. However, there is an exception to this regime for the Algerian children, under certain conditions, provided by the Convention of 27 December 1968. According to Article 4, an Algerian national with a residence certificate in France valid for at least one year only has to be present in France for at least one year to be reunified with his children under family reunification. The children may be "the minor children of the Algerian national or the children under the age of eighteen he legally supports under a decision of the Algerian authority in the child's best interest (notably under a judicial *kafala*)".[119] This exception only concerns Algerian *kafil* and Algerian *makful,* and it is clearly provided in an instrument. I can also cite another example in which it is not obvious: the Convention between Morocco and Belgium of 17 February 1964 related to occupation of Moroccan workers in Belgium, which states that family reunification is granted to the spouse and to the minor children in the charge of the Moroccan worker.[120] Some authors wanted to use the notion of 'minor children in charge' as a solution to give the Moroccan children taken under *kafala* a right to stay in Belgium, but the *Conseil du Contentieux des Etrangers* did not follow this argument considering that the 'minor children in charge' under the Convention did not cover another notion than dependent descendants of the Moroccan worker.[121]

The example of the Franco-Algerian Agreement of 27 December 1968 is the ideal solution regarding the issue of residence of the *makful* in another country than their country of origin, provided that it is specified that the children under *kafala* are involved, because then there is of course an obligation on the receiving State to grant the child concerned by the Convention the right of residence on its territory. Yet, while this kind of instrument is the ideal and most practical one, it is not the easiest one to adopt. Indeed, the countries involved have to find arrangements about precise issues, and in the topic under discussion it can be hard: either the receiving State wants to limit immigration towards its territory or the two countries do not find a compromise. I can refer to the Franco-Moroccan Agreement of 9 October 1987 on residence and employment, which does not provide anything about *kafala* but only the right to reunification for the

118 Arts. L.411-1 and 411-4 of the *Code de l'entrée et du séjour des étrangers et du droit d'asile (CESEDA).*

119 Point de contact national du Réseau Européen des Migrations, *Détournements du droit au regroupement familial: mariages de complaisance et fausses déclarations de paternité*, < www.interieur .gouv.fr>, last accessed 15 July 2013, p. 11.

120 Art. 13 of the Convention between Morocco and Belgium of 17 February 1964 related to occupation of Moroccan workers in Belgium.

121 Englert, 2010, at 3.

descendants of Moroccan nationals,[122] and therefore to its Article 9 that states that for the issues untreated by the Agreement, countries must refer to their own national law on residence of foreigners.

That being said, the Member States that are strongly concerned by international *kafala* should try to find an arrangement concerning the right of residence, specifically with each country that knows the institution of *kafala*, even if it is obvious that before being a question of law the whole process is a question of internal policies and political negotiations between the countries.

In the last section, I will cover the concept of 'best interest of the child' under the CRC, often in family law cases.

III. The Best Interest of the Child

Family law is characterised by the existence of a set of rules that protect the rights of children. An essential principle that the family court or the juvenile judge must assess is that of the 'best interest of the child'. Indeed, under Article 3 of the CRC, each decision concerning a child has to be taken with regard to that concept, which must be a primary consideration.

In that respect, many associations have argued that a *makful* had to be granted the right to reside in the country of their guardians. At first sight, this argument seems strong to put such an obligation on a receiving State that is party to the CRC. However, objections can arise: Is the 'best interest of the child' not materialised in order to justify everything, even when it is contrary to public order or when there are other interests involved as well such as migration policies? And also, can it be affirmed that the best interest of the *makful* is always to stay with their guardians?

First, it is true that the concept of 'best interest of the child' is easily used nowadays to try to justify any right that should be granted when a child is involved, as when an illegal surrogacy is legitimised *a posteriori* by according adoption to the intentional parents in the name of 'the best interest of the child'.[123] However, it can be said that in a field as delicate as family law, such an un-scoped concept is needed because a defined concept is surely good for legal certainty, but on the other hand it means that, ideally, the definition has to cover every single situation involving a child, and this is hardly possible, looking at advances in medically assisted procreation for instance. Therefore, taking everything into consideration, the choice for a broad concept was a good one.

Second, if I believe that the notion can be used and interpreted largely by the national judges and authorities, I also think that in the case of *kafala* it has to be evaluated *in concreto*: it cannot be affirmed that "because it is in the best interest of the *makful* in general, a receiving State has to authorise them to reside on its territory". Indeed, the unfortunate situations in which providers abuse children do exist. However, Article 3 of CRC has to be respected and checked each time an

122 Art. 5 of the Convention between Morocco and Belgium of 17 February 1964 related to occupation of Moroccan workers in Belgium.

123 In Belgium, for instance. *See* Y.-H. Leleu, *Droit des personnes et des familles*, No. 119, 2nd edn, Larcier, Bruxelles, 2010, p. 144.

authority takes a decision about the stay of a *makful*. In this way, each time a child was abandoned in their country of origin and was taken into care via a *kafala* and the guarantees about their best interest were respected in that country, it should be possible to say that granting them a right to stay in the receiving State is in their best interest. The last complex question that remains is whether or not a receiving State has to or should give priority to that interest on the national migration policies. I will not develop an answer to that question here, but will just return to a finding already expressed earlier in this article with the decision in *Harroudj v. France*, but this time concerning the right to stay: it is for the States to strike a fair balance between the best interest of the child, which can be invoked successfully in a lot of *kafala* cases, and the migration policies.

With this Section D, I found that three international instruments could be used to put an obligation on a receiving Member State of the EU, party to those instruments, to grant a *makful* the right of residence on its territory: the Hague Convention of 1996, a bilateral Convention or Article 3 of the CRC. Thus it seems that international obligations provide more possibilities for the rights of the *makful* and the *kafil* even if each of them is dependent on different elements: respect of a preliminary procedure, political context and interpretation. Therefore, the right of residence is not guaranteed under international law either, and I believe that this is logical, in order to avoid abuses and diversion of adoption or rules on family reunification, as no instrument is expressly dedicated to the *kafala* issue. Indeed, because *kafala* is recognised as a full-fledged family institution in the CRC and applies only in countries that have their laws based on particular religious principles, there should be an instrument providing the conditions, respect of guarantees and consequences of that institution, such as the Hague Convention on international adoption for instance. In the meantime, the authorities will continue to interpret the international, European and national rules and try to balance them as well as they can when deciding about the right of residence of a *makful*.

E. Conclusion

The institution of *kafala*, often neglected by the authors but well recognised by different international instruments, raises different difficulties when it takes place in an international situation. Among them, there is the question of its interactions with national immigration policies and its consequences – the study focusing on European family law – when a provider comes back with a child taken in by *kafala* in a Member State and wants them to have a right to enter and stay there. If the ECtHR has recently discussed this institution in connection with adoption, the fact remains that nothing has been made clear yet on the relationship between this particular form of tutelage and migration, either in European jurisprudence or in the current state of EU law. For that reason, I chose to ask whether the impossibility, sometimes, to get a visa for a *makful* in a Member State (in my thesis, France) is not contrary to EU law or to the international obligations of the Member States. Throughout the analysis, I found some European and

international provisions or principles that could constitute, under several conditions and in specific situations, an obligation for the Member State to grant a right of residence to the child confided in *kafala* in order for them to enter and live in the country of the *kafil*.

As far as France is concerned, the ambivalence of *kafala*, sometimes an effective measure to protect minors, sometimes an instrument for trafficking and diverted for economic purposes, has led French authorities to develop repressive legislation in general.[124] However, while it is sure that abuses have to be prevented, one cannot make an amalgam of all *kafala* either: there must be something to protect *kafala* that are real protective measures also, an instrument that organises the right of the *makful* to enter and stay in a Member State, while providing guarantees. This leads to the following final suggestion.

Because the Muslim migration and community have become more and more important in the EU, it seems to be time to establish an EU instrument on the topic of *kafala* or because *kafala* involves third States, an international instrument such as the Hague Convention, rather than all Member States starting to elaborate bilateral conventions with Muslim-majority States that are concerned. Indeed, that would be good not only for legal certainty, but also to ensure that children without family in a Muslim-majority country, in most cases, will not be abandoned once again and that their status will not be forgotten by the Member States. In my view, a right of residence in the Member States should be organised, under certain requirements and certain guarantees in the country of origin of the child, in order to avoid abuses and diversion of adoption or rules on family reunification, and if a situation does not fall under the scope there will always be the possibility for family life in the country of origin but at least the right of residence for the *makful* will be legally and uniformly organised.

To conclude this work, I express a final thought about the future of *kafala*. Just as it seems to be the case with the right to adopt after a *kafala* with the *Harroudj* decision, when the question about the right of residence starts to be asked and answered, other questions will arise and will have to be elucidated. I can refer for instance to the recent promise of Spain to Morocco, which had blocked requests for international *kafala*: a commitment to ensure the Muslim education of children taken under *kafala*.[125] By doing so, does Spain not infringe freedom of religion? This is a question that could reasonably arise in the future, and it shows that it is only the beginning with the *kafala* issues. If compromises and solutions for adoption and for surrogacy were, and still are, not easy to reach, I think that it will be even more the case concerning the institution of *kafala*. Indeed, besides the problems linked to the strong national sovereignty in family law issues, another difficulty emerges: the gap between a law based on Islam and European laws. Taking into consideration that the ECtHR stated more than ten years ago that Islamic law was incompatible with democracy and human rights, particularly with regard to its criminal law and criminal procedure, to the place it provided to

124 Barraud, 2008, at 139.

125 L. Clavijo, 'Kafala: l'Espagne viole sa constitution pour mieux se soumettre à l'Islam', *Riposte Laïque*, February 2013, No. 292, < http://ripostelaique.com>, last accessed 15May 2013.

women in the legal system and its performance in all areas of private and public life in accordance with religious norms,[126] it can be deduced that a law based on Islam will contain some important differences with European laws that are based on democracy. However, because those differences do not mean 'impossibility for rapprochement' but 'slowdown for the approximation' and because things are changing – the new Moroccan family Code may be an example in that direction – I think that the potential rapprochement between European law and law in Muslim-majority countries will be at the discretion of interpretation, concessions, maturation and time. To be continued.

126 European Court of H.R. No. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003 (Refah Partisi (the welfare party) and others/Turkey), §123.