



Press and Information

Court of Justice of the European Union

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Advocate General's Opinion in Case C-129/18
SM v Entry Clearance Officer, UK Visa Section

Advocate General Campos Sánchez-Bordona proposes that the Court of Justice declare that a child in the legal guardianship of an EU citizen under the Algerian Kafala system cannot be classed as a 'direct descendant' of that citizen

However, following an assessment, the Member State in which the EU citizen is resident must facilitate the entry and residence of the child in its territory

Two spouses of French nationality resident in the UK applied to the UK authorities for entry clearance for an Algerian child placed in their guardianship in Algeria under the *kafala* system. In their application the spouses requested that the child be granted entry clearance as an adopted child. The *kafala* system is an institution in the family law of some countries that follow the Koranic tradition. The child had been abandoned after her birth. Legal custody of the child was awarded to the couple by decisions of the Algerian authorities. Following the refusal of the UK authorities to grant clearance, a decision which was appealed by the child, the Supreme Court of the UK asked the Court of Justice, in essence, whether, under the directive on the freedom of movement,¹ that child could be classed as a 'direct descendant' of the individuals in whose guardianship she was placed under *kafala*.

The directive establishes two routes by which a child who is not an EU citizen may enter and reside in a Member State in the company of the persons with whom he or she has a 'family life'. In the case of direct descendants, the continuity of family life occurs practically automatically, whereas, in the case of any other family member who is a dependant or member of the household of the EU citizen having the primary right of residence, a prior evaluation of the circumstances is required.

In today's Opinion, Advocate General Manuel Campos Sánchez-Bordona considers that **a child who is merely under the legal guardianship of an EU citizen, under the Algerian *Kafala* system, cannot be classed as a 'direct descendant' of that citizen within the meaning of the directive.**

The Advocate General states that, in Algeria, *kafala* is a form of guardianship under which an adult Muslim assumes responsibility for the care, education and protection of a minor and acquires legal guardianship temporarily (until the child reaches the age of majority), without creating a relationship of filiation and does not equate to adoption, which is expressly forbidden in that country. Moreover, *kafala* is revocable.

The Advocate General then determines that the concept of 'direct descendant' under the directive, as a specific sub-category of 'family member', is an autonomous notion under EU law, which needs to be given a uniform interpretation throughout the Union.

Next, he points out that, in his view, the concept of direct descendants used in the directive includes both biological and adoptive children, since, from a legal standpoint, adoption establishes filiation, for all purposes. Accordingly, if *kafala* could be classed as a form of adoption, the child, as

¹ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77).

an adoptive child, could become a 'direct descendant' of those who took the child into their custody. Nonetheless, the Advocate General considers that **the essential feature that separates adoption from *kafala* is, precisely, the parent-child relationship**. While *kafala* does not create parent-child ties, adoption always does. He points out that the same conclusion follows from an examination of the various relevant international instruments,² which govern both adoption and forms of child protection such as *kafala* without ever suggesting that the two are comparable. Moreover, he continues, in permitting this form of guardianship while at the same time prohibiting adoption, Algerian law itself does not accept such an equivalence of the two concepts. **The persons caring for the child become only its legal guardians, but *kafala* does not make the child their direct descendant**. However, this does not mean that, once the *kafala* has been established, the guardians cannot decide to adopt the child if they consider it appropriate and it is permitted under the law of the country in question. This is the solution that some Member States have opted for and, in the view of the Advocate General, would enable a child who has subsequently been adopted to become the direct descendant of the adoptive parents and, as such, to enter and reside in the Member State where the adoptive parents are resident.

The Advocate General considers that **that child may, however, fall within the category of 'other family members' if the other requirements are satisfied and following completion of the procedure laid down in the directive, in which case the host Member State must facilitate his or her entry and residence in that Member State in accordance with national legislation, having weighed the protection of family life and the defence of the child's best interests**. The Advocate General takes the view that the fact that the route for direct descendants is closed need not be an obstacle to carrying on family life – a right entrenched in the Charter of Fundamental Rights of the EU –, when the alternative route provided for by the directive (the grant of permission to reside, subject to verification that the child is a dependant or member of the household of the EU citizen having the right of residence) does not prevent the child from obtaining *actual* legal protection of that same family life. The Advocate General recalls that the protection of the child's best interests must be the primary consideration in decisions and orders adopted in relation to the child. In the context of the directive, the guarantee of that protection can also be ensured if the second route is followed, which, in establishing a prior authorisation procedure, provides an adequate legal framework to ensure the effective protection of the child within the EU, while at the same time reconciling the original objectives of the guardianship arrangements (*kafala*) with the right to family life.

The Advocate General considers that the measures provided for in the directive (freedom of movement and residence for EU citizens or their family members, or refusal, termination or withdrawal of any right conferred by the directive) may be applied, respectively, where grounds of public policy, public security or public health exist, and in the event of abuse of rights or fraud. However, he considers that such circumstances do not arise in the case at hand.

Finally, the Advocate General points out that, in the context of the prior evaluation procedure applicable in the case of 'other family members', the authorities of the host Member State may enquire into whether sufficient regard was had, in the procedure for awarding guardianship or custody, to the best interests of the child.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the

² UN Convention on the Rights of the Child of 20 November 1989; Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, signed in The Hague in 1993; Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, signed in The Hague in 1996.

dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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