



Press and Information

Court of Justice of the European Union

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Judgment in Case C-129/18  
SM v Entry Clearance Officer, UK Visa Section

## **A minor in the guardianship of a citizen of the EU under the Algerian *kafala* system cannot be regarded as a ‘direct descendant’ of that citizen**

*However, that citizen’s Member State of residence must facilitate, following an assessment, that minor’s entry to and residence in its territory*

Two spouses of French nationality resident in the UK applied to the UK authorities for entry clearance, as an adopted child, for an Algerian child who had been placed in their guardianship in Algeria under the *kafala* system, which is an institution in the family law of some countries that follow the Koranic tradition. The British authorities refused to grant that application, a decision which was appealed by the child. In that context, the Supreme Court of the United Kingdom asks the Court of Justice, in essence, whether, under the directive on the freedom of movement,<sup>1</sup> the child can be regarded as a ‘direct descendant’ of the persons who took her in under Algerian *kafala*, a status which would give her a right of entry to the UK.

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, that right of entry and residence is practically automatic, whereas, regarding 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 assessment of the situation is required for the purpose of granting such rights.

In today’s judgment, the Court finds, as a preliminary point, that under Algerian law, *kafala* is where an adult undertakes to assume responsibility for the care, education and protection of a child, in the same way a parent would for their child, and to assume legal guardianship of that child. Unlike adoption, which is prohibited by Algerian law, the placing of a child under *kafala* does not mean that the child becomes the guardian’s heir. In addition, *kafala* comes to an end when the child attains the age of majority and may be revoked at the request of the biological parents or the guardian.

Next, the Court examines whether the concept of a ‘direct descendant’ of a citizen of the EU referred to in the directive on the freedom of movement is to be interpreted as including a child who has been placed in the permanent legal guardianship of one or more citizens of the EU under Algerian *kafala*.

The Court states, in that regard, that the need for a uniform application of EU law and the principle of equality require that, where no reference is made to the law of the Member States, the terms of the directive on the freedom of movement must normally be given an independent and uniform interpretation throughout the EU. In addition, given that the directive does not contain any definition of the concept of a ‘direct descendant’, it is necessary, for the purposes of interpreting that concept, to take account not only of the wording of the provision in question, but also of the context in which it occurs and the objectives pursued by the rules of which it is part.

<sup>1</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the EU 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, and corrigendum OJ 2004 L 229, p. 35).

In that context, the Court notes that the concept of a 'direct descendant' commonly refers to the existence of a parent-child relationship. That concept of a 'parent-child relationship' must be construed broadly, so that it covers any parent-child relationship, whether biological or legal, and the concept of a 'direct descendant' of a citizen of the EU must consequently be understood as including both the biological and the adopted child of such a citizen, since it is established that adoption creates a legal parent-child relationship between the child and the citizen of the EU concerned.

The Court states that, **given that the placing of a child under the Algerian *kafala* system does not create a parent-child relationship between the child and its guardian, a child who is placed in the legal guardianship of citizens of the EU under that system cannot be regarded as a 'direct descendant' of a citizen of the EU.**

However, the Court considers that such a child falls under another concept referred to in the directive on the freedom of movement, namely that of one of the 'other family members'. That concept is capable of covering the situation of a child who has been placed with citizens of the EU under a legal guardianship system such as Algerian *kafala* and in respect of whom those citizens assume responsibility for its care, education and protection, in accordance with an undertaking entered into on the basis of the law of the child's country of origin.

The Court emphasises, in that regard, that the objective of the directive on the freedom of movement is to 'maintain the unity of the family in a broader sense' by facilitating entry and residence for persons who maintain close and stable family ties with an EU citizen on account of specific factual circumstances, such as economic dependence, being a member of the household or serious health grounds.

The Court stresses that the Member States must therefore provide the possibility for 'family members, in the broad sense' to obtain a decision on their application for entry that is founded on an extensive examination of their personal circumstances, taking account of the various factors that may be relevant, and, in the event of refusal, is justified by reasons. In addition, the discretion which the Member States have in these matters must be exercised in the light of and in line with the provisions of the Charter of Fundamental Rights of the European Union, in particular the right to respect for family life and the protection of the best interests of the child.

The Court concludes that **it is for the competent national authorities to facilitate the entry and residence of a child placed in the legal guardianship of citizens of the EU under the Algerian *kafala* system as one of the 'other family members' of a citizen of the EU, by carrying out a balanced and reasonable assessment of all the current and relevant circumstances of the case which takes account of the various interests in play and, in particular, of the best interests of the child concerned.** That assessment must also take account of possible tangible and personal risks that the child concerned will be the victim of abuse, exploitation or trafficking, on the understanding that such risks cannot, however, be assumed solely in the light of the fact that the procedure for placement under the Algerian *kafala* system is based on an assessment of the suitability of the adult and of the interests of the child which is less extensive than the procedure carried out in the host Member State for the purposes of an adoption or the placement of a child.

In the event that it is established, following such an assessment, that the child and its guardian, who is a citizen of the EU, are called to lead a genuine family life and that that child is dependent on its guardian, the requirements relating to the fundamental right to respect for family life, combined with the obligation to take account of the best interests of the child, demand, in principle, that that child be granted a right of entry and residence in order to enable it to live with its guardian in his or her host Member State.

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**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

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 judgment is published on the CURIA website on the day of delivery.

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