Italy and *Kafalah*: Reinventing Traditional Perspectives to Accommodate Diversity?*

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Abstract

In September 2013, the Italian Court of Cassation introduced a new principle: in certain well-defined circumstances, local authorities cannot refuse to issue entry visas, for purposes of family reunification, to foreign minors taken under *kafalah* by Italian citizens residing in Italy. The Court was asked to determine whether it was possible to place Italian and foreign citizens on the same level in matters of *kafalah* and family reunification. Previously, foreign minors given under *kafalah* to Italian citizens by means of a measure granted by a foreign court were not entitled to entry visas for family reunification. The Court stressed that interpreting family reunification rules in a manner that denied Italian citizens the right to reunification with the child given to them under *kafalah* was not compatible with Italian constitutional principles and international conventions. This awareness guided the judge's reasoning and paved the way to acceptance of this debated institution.

I. Corte di Cassazione 16 September 2013 no 21108: The Facts

A long and complex case led the Italian Court of Cassation to the 2013 ruling on *kafalah*.[1] An Italian engineer had worked for many years in several African countries. In 2006, he decided to settle with his wife and his daughter in Rabat. In 2007, the engineer and his wife applied for custody of an abandoned child in accordance with Moroccan law. One year later, after the family had undertaken a series of initiatives in favour of orphaned and abandoned children, it was entrusted with an orphaned child under the Islamic institution of *kafalah*. The judicial measure was issued by the Court of Tangier on 16 February 2009. On 19 January 2010, the couple was authorized to apply for the child's passport and to leave Morocco. When

* Corte di Cassazione-Sezioni Unite 16 September 2013 no 21108, *Rivista di diritto internazionale*, 271-279 (2014); Corte di Cassazione 2 February 2015 no 1843, *Nuova giurisprudenza civile commentata*, I, 707-717 (2015).

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[1] Corte di Cassazione-Sezioni Unite, n * above.

the Italian engineer was posted to Kazakhstan for work, the rest of the family decided to return to Italy. They asked the Italian Consulate in Casablanca to issue, for the child, an entry visa for family reunification. On 4 February 2010, the visa was denied on the following grounds: *kafalah*, unlike adoption, was unsuitable to justify the request; the minor would not live with his foster parents; and the Court of Tangier would issue the authorization of expatriation.

The decision was challenged by the engineer before the Court of Tivoli, in conformity with decreto legislativo 25 July 1998 no 286, also known as *Testo Unico sull'Immigrazione*. The Italian court ordered the consular authority to issue the entry visa, on the grounds that the minor had been living with the Italian family since his birth and that the Moroccan court had allowed him to leave the country.[2]

Both the Italian Ministry of Foreign Affairs and the Italian Consulate in Casablanca appealed against the sentence. In 2011, the Court of Appeal in Rome overturned the ruling issued at first instance.[3] The Italian engineer appealed against the judgments, and the reasons for the appeal were illustrated in a memorandum. The public authorities cross-appealed against the judgment.

On 1 December 2011, in closed session, it was decided to refer the case file to the First President of the Court, in order to submit the issue to the Court's Joint Divisions. In particular, it was necessary to decide whether it was possible to give an extensive interpretation to the notion of 'relative' contained within decreto legislativo 6 February 2007 no 30, which sought to enforce Directive 2004/38/EC.

The cross-appealing authorities submitted a memorandum in which they asserted that, on 9 May 2011, the Juvenile Court in Rome had ruled on the adoption of the child[4] and the Italian Consulate accordingly issued the entry visa for family reunification. Thus, given that the matter at issue had ceased to exist, the petition was allegedly inadmissible due to mootness.

[2] Analogous application of Art 3 para 2 of decreto legislativo 6 February 2007 no 30.

[3] The Court of Appeal emphasized that Arts 2 and 3 of decreto legislativo 6 February 2007 no 30 were to be applied, instead of Art 28 of decreto legislativo 25 July 1998 no 286. The Court highlighted the following: the claim was intended to avoid the rules on international adoption; international adoption could not be granted in accordance with Italian law because Moroccan law did not approve it, and there was no relevant bilateral agreement between Italy and Morocco. Also, the minor could not be considered a 'relative' under Directive 2004/38/EC, in light of decreto legislativo 6 February 2007 no 30, because *kafalah* did not imply any legal representation. The Court of Appeal referred to Corte di Cassazione 1 March 2010 no 4868, available at http://www.procmin.milano.giustizia.it/FileTribunali/20320/Sito/Documenti/Giurisprudenza/Cassazione%20%20Civile/Sent4848_2010.pdf (last visited 24 May 2016).

[4] Art 44, *lett*. a) legge 4 May 1983 no 184.

However, the Court of Cassation stressed the importance of both examining and resolving a much-debated matter, to delucidate the principle of law.[5] Indeed, it was necessary to establish whether Italian citizens who resided in Italy and had custody of a child under a *kafalah* measure were entitled to obtain entry visas for family reunification.[6]

II. At the Heart of the Debate: Defining *Kafalah*, between Islamic Law and International Law

The institution of *kafalah* constitutes the basis of the whole judicial case. The current *kafalah* guardianship system is not an Islamic law construct.[7] In particular, it has only been introduced in recent years. The etymology of the word has two distinct meanings in Arabic: one meaning is 'to guarantee' (*daman*), and 'to take care of', from the root verb *takafala.*[8] In accordance with its first meaning, *kafalah* appears to be very close to the Western surety bond.[9] Consequently, the word has been used mainly in the field of business transactions and commerce. As for its second meaning, the word *kafalah* implies meeting all of an individual's basic needs (food, clothes, education). This latter meaning is that according to which the word is used in the Koranic verse 'and her Lord accepted her with full acceptance and vouchsafed to her a goodly growth; and made Zachariah her guardian'.[10]

Kafalah is best translated as foster parenting. Generally defined as 'the commitment to voluntarily take care of the financial support, of the education and of the protection of a minor, in the same way a parent

[5] Art 363 of the Code of Civil Procedure, as amended by Art 4 of decreto legislativo 2 February 2006 no 4.

[6] This issue was introduced with the petition. First, it censures the challenged measure on the grounds of its incompatibility with a judgement handed down by the Court of Cassation in 2008: Corte di Cassazione 20 March 2008 no 7472, *Rivista di diritto internazionale privato e processuale*, 809 (2008). Second, it criticizes having been mistakenly referred to another ruling of the Court of Cassation (Corte di Cassazione, n 3 above). Furthermore, it opposes the lack of grounds and the missing evaluation of a recent communication of the Commission to the Parliament and to the European Council of June 2009, establishing the conditions according to which it is necessary to interpret Directive 2004/38/EC.

[7] A. Cilardo, 'Il minore nel diritto islamico. Il nuovo istituto della kafala', in A. Cilardo ed, *La tutela dei minori di cultura islamica nell'area mediterranea. Aspetti sociali, giuridici e medici* (Napoli: Edizioni Scientifiche Italiane, 2011), 236.

[8] J. Bargach, *Orphans of Islam: Family, Abandonment, and Secret Adoption in Morocco* (Lanham, Maryland: Rowman & Littlefield, 2002).

[9] A. Cilardo, n 7 above, 236.

[10] Surat Al Imran, 3:36.

would for a child',[11] the institution of *kafalah* is the main tool available to protect abandoned children in several Muslim countries. It constitutes a form of legal guardianship by which the *kafil*, the foster father or the foster mother, assumes responsibility to support the *makful*, the foster child, until he or she reaches adulthood, without creating any legal parent-child status.[12]

Taking care of homeless and orphaned children is very important in Islam. The Qur'an devotes much attention not only to orphans, but also to the weak and the poor. This is due to the changes that Arabic society was undergoing at the time of the Prophet Muhammad.[13]

Generally, *kafalah* is often considered as analogous to Western adoption. In Western jurisdictions, adoption is the practice by which an adopted child acquires new kinship ties that are equivalent to biological ties, thus becoming the actual child of the adoptive parents. In contrast, a very important principle in Islamic law is that adoption is prohibited.[14] According to the Qur'an, adopted sons and daughters are not to be regarded as real sons and daughters. Islamic scholars unanimously agree that adoption is contrary to Islamic norms.

The Islamic *kafalah* system creates no filial bonds, no right to inherit (except when the *kafil* entitles the *makful* to inherit) and, finally, no right for the minor to acquire the name of the guardian.[15] Consequently, the child maintains his or her blood ties with his or her family of origin, throughout his or her entire life. Moreover, it is worth emphasizing that legitimate filiation is necessarily bound to biological procreation under Islamic law.[16] In addition, the parent-child bond can only arise through a lawful relationship between parents.[17] Accordingly, there is no room for the concept of illegitimate filiation.

[11] International Reference Centre for the Rights of Children Deprived of their family (ISS/IRC), 'Specific Case: Kafala', Fact Sheet No 51 (Geneva: ISS, 2007).

[12] Corte Suprema di Cassazione, Ufficio del Massimario e del Ruolo, 'Relazione per le Sezioni Unite su questione di massima di particolare importanza n. Reg. Gen. 9608/20111', no 100, (Rome, 10 May 2012), 3-4, available at http://www.ca.milano.giustizia.it/ArchivioPubblico/B_144.pdf (last visited 24 May 2016).

[13] M. Sayed, 'The Kafala of Islamic Law: How to approach it in the West', in P. Lindskoug, U. Maunsbach and G. Millkvist eds, *Essays in Honor of Michael Bodgan* (Lund: Juristforlaget, 2013), 313-511.

[14] '(...) Nor does he regard your sons as adopted sons. These are mere words which you utter with your mouths; but Allah declares the Truth and guides you to the Right Way' (Qur'an, 33:4).

[15] A. Cilardo, n 7 above, 237.

[16] R. Aluffi Beck-Peccoz, *La modernizzazione del diritto di famiglia nei paesi arabi* (Milano, Giuffrè, 1990), 152.

[17] F. Castro, *Il modello islamico* (Torino: G. Giappichelli Editore, 2007), 40.

Kafalah rules tend to be different, depending on the Muslim State. In several Muslim countries, *kafalah* is mediated by the state. In this case, judges issue *kafalah* through a formal procedure. Judicial *kafalah* requires foster parents (or one of them) to make a 'revocable' statement before the judge, in which they declare that they will take care of the abandoned minor.[18] Alternatively, the families involved may reach an agreement, which must be approved by a judge or a notary.[19] This is known as consensual *kafalah*.

In general terms, for *kafalah* to be valid, Islamic rules require both a formal declaration of abandonment of the child and the suitability of a married couple or of a single parent to become *kafil*.[20] The need to prove that these requirements exists makes space for further investigation by special commissions. In any case, supervision by a court is required not only at the beginning of the *kafalah* relationship, but also as long as *kafalah* is in force, given its remit as a form of social protection.[21]

The *kafil* acquires a wide range of authority and obligations. Nevertheless, it is important to emphasize that the authority granted to the *kafil* does not include legal representation of the child. On the other hand, minors enjoy many rights under Islamic law. With regard to *kafalah*, the rights involved range from the right to life, to the right to live within their family, and to the right to be brought up in accordance with their own religious background.

Before the institution of *kafalah* was introduced, it was upon the family and the entire Muslim community to protect children in need. However, economic growth prompted changes in society and family structures. To face these changes, lawmakers introduced the institution of *kafalah*. This clearly reflects the transition from a patriarchal family to a nuclear family.[22]

As noted above, the regulatory framework applicable to *kafalah* is not the same for all Muslim States, varying rather from country to country. However, in current times, regardless of these differences, the question is: what happens when *kafalah* rules come into contact with a Western legal order that does not contemplate this institution? This is the case with Italy, as well as several other Western States. Nevertheless, several Western countries must deal with the Islamic rules on *kafalah* due to the

[18] M. Nisticò, 'Kafala Islamica e Condizione del Figlio minore: la rilevanza della kafala nell'ordinamento italiano' (2013), available at http://www.gruppodipisa.it/wp-content/uploads/2013/05/NISTICO.pdf (last visited 24 May 2016), 9.

[19] Suprema Corte di Cassazione, Ufficio del Massimario e del Ruolo, n 12 above, 3.

[20] Ibid.

[21] A. Cilardo, n 7 above, 236.

[22] Ibid.

growth of their Muslim populations. This suggests the need to intervene not only on domestic norms, but also on an international level. The common ground for this analysis is to consider *kafalah* as a tool to protect minors coming from the Islamic world. The need to take into account this form of delegation of parental authority is closely bound to the theoretical imperative of avoiding discrimination against Muslim children in need of help. An interesting case arises with regard to Moroccan *kafalah*, which lies at the core of the decision given by the Court of Cassation on 16 September 2013, no 21108.

The situation of abandoned children is addressed in various Moroccan legislative acts: the new Family Law Code (the *Mudawwana al-usra*), the Penal Code and the Labour Law.[23] In 2002, Morocco implemented an additional law on the *kafalah* guardianship system. *Kafalah* was first regulated by the so-called *dahir portant loi* no 1-93-165 10 September 1993. However, from 13 June 2002, it was replaced by new rules (*dahir portant loi* no 1-02-172 13 June 2002) according to which *kafalah* is reserved to anyone under the age of eighteen who is abandoned, orphaned or whose parents are impaired in exercising their parenthood.[24]

Kafalah may be given to Muslim couples or even to a Muslim woman, provided they are mature and capable of financially supporting the child.[25] To place a child in a *kafalah* arrangement, several administrative procedures must be completed. This is especially true in the case of abandoned children. According to Moroccan law, an abandoned child is under the guardianship of the Judge of Minors Affairs, even after a *kafalah* placement has been made. Once the child is legally declared as abandoned, the interested parties must submit an application to the judge for the *kafalah* proceeding to start. The judicial decision is to take into account the applicants' suitability. Nonetheless, the judge has extensive freedom in choosing the approach to be adopted in each specific case. If the applicants are given the right of *kafalah*, the decision is noted in the registrar's ledgers.

As noted above, the *kafalah* placement ends when the child reaches legal adulthood. Nevertheless, it must be noted that other grounds for termination of this kind of relationship exist, and include: the death of the child; the death of the *kafalah* parents; and the parents' failure to provide for the child in accordance with the *kafalah* entrustment. If the *kafalah* parents divorce, *kafalah* care is not terminated. The child is placed with one of his/her *kafalah* parents and specific custody rules established

[23] L. Buskens, 'Sharia and national law in Morocco', in J. M. Otto ed, *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden: Leiden University Press, 2010), 113-134.

[24] M. Sayed, n 13 above, 514.

[25] Ibid.

by family law are applied.

Kafalah is internationally recognized as an instrument of protection. Among the international conventions is the UN Convention on the Rights of the Child, adopted in New York on 20 November 1989.[26] Art 20 of this Convention emphasizes the importance of Contracting States' providing protection for minors deprived of their family environment. Such protection includes several institutions, among which *kafalah* is expressly listed.

Within the Hague Conference for Private International Law, two forms of protection of children are provided. The first is the 1993 Hague Convention on the Protection of Children and Co-operation in respect of Inter-country Adoption. This Convention covers only adoptions. However, Egypt has suggested that a new paragraph be added to the Convention to include *kafalah* as an Islamic form of protection of children. This led to negotiations that resulted in provisions in the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children. The 1996 Convention has a wide scope of application. Its object is 'to protect the person or the property of the child by providing rules on jurisdiction, applicable law to parental responsibility, rules on recognition and enforcement and the establishment of co-operation between authorities of the contracting states in order to achieve the purposes of the Convention'.[27] Within this scope, the Islamic *kafalah* guardianship system found place thanks to the Moroccan delegation's efforts to include *kafalah* within the Convention.

As for Italy, in June 2014, a bill submitted to the Parliament defined Islamic *kafalah* as the custody of or the provision of legal assistance to a child.[28] However, it was only in March 2015, upon invitation of the Court of Cassation, that the Italian Senate approved the Bill to ratify the Hague Convention. Nevertheless, in light of 'delicate questions of compatibility'[29] between the Italian legal system and the Islamic *kafalah* system, Italy has decided to take some time to further mediate the rules for internal adjustment.

III. *Kafalah* and Italian Case Law: Tradition and Innovation

[26] The Convention was enforced in Italy by means of legge 27 May 1991 no 1761.

[27] M. Sayed, n 13 above, 518.

[28] On this matter, see C. Peraro, 'Il riconoscimento degli effetti della kafalah: una questione non ancora risolta' *Rivista di diritto internazionale privato e processuale*, 541-566 (2015).

[29] Rapporteur: Rosanna Filippin (PD).

In 2005, the Court of Cassation began to shed light on the main features of the institution of *kafalah*. Since then, the Court of Cassation has addressed the issue on several occasions before it handed down Judgment 16 September 2013 no 21108.[30] At the same time, some indications came from the European Court of Human Rights, in *Harroudj* v *France*[31] and in *Chibhi Loudoudi and Others* v *Belgium*.[32]

In 2005, the Court of Cassation ruled that the Italian couple entrusted with a Moroccan minor by virtue of *kafalah* was not allowed to challenge the adoptability decree granted by the court for minors, because *kafalah* as an institution had no legal standing in Italy. Indeed, the Court of Cassation asserted that even if *kafalah*, unlike adoption, granted the *kafil* both the power and the duty to take custody of a minor by providing him or her with care, assistance and education, it did not imply any form of legal tutorship and representation.

The absence of compatibility between *kafalah* and adoption has been confirmed on several occasions by the Court of Cassation. When asked to issue a ruling on the possibility of granting an entry visa, for the purposes of family reunification, to Moroccan minors taken under *kafalah* by Moroccan citizens residing in Italy, the Court stressed the need to grant priority to the principle of the best interests of the child, when balancing the various interests at stake, to find the interpretation of immigration law that was compatible with the Constitution.[33] In this respect, it was noted that the potential risks deriving from attempts to avoid immigration law could be averted by applying internal controls before the residence permit for family reasons was released. Therefore, according to the Court of Cassation, to deny the possibility of family reunification to foreign minors under *kafalah* was contrary to the principle of equality, as it discriminated against children from Muslim countries. Furthermore, the

[30] Corte di Cassazione 4 November 2005 no 21395, *Rivista di diritto internazionale privato e processuale*, 799 (2006); Corte di Cassazione 20 March 2008 no 7472 n 6 above; Corte di Cassazione 2 July 2008 no 18174, *Famiglia persone e successioni*, 891 (2008); Corte di Cassazione 17 July 2008 no 19734, *Famiglia e diritto*, 675 (2008). For further details see: Corte di Cassazione 2 February 2015 no 1843 with a note by M. Di Masi, 'La Cassazione apre alla *kafalah* negoziale per garantire in concreto il *best interest of the child*' *La nuova giurisprudenza civile commentata,* 707-724 (2015).

[31] Eur. Court H.R., *Harroudj* v *France*, Judgment of 4 October 2012, available at http://hudoc.echr.coe.int/eng?i=001-113819 (last visisted 24 May 2016). On the case, see the note by S.Bollée, 'La conformité à la Convention européenne des droits de l'homme de l'interdiction d'adopter un enfant recueilli en kafala' *Revue trimestrielle des droits de l'homme*, 717 (2013).

[32] Eur. Court H.R., *Chbihi Loudoudi and Others* v *Belgium,* Judgment of 16 December 2014, available at http://www.echr.coe.int/Documents/CLIN_2014_12_180_ENG.pdf (last visited 24 May 2016).

[33] Art 29 of decreto legislativo 25 July 1998 no 286.

Court emphasized that similarities prevailed over differences, when comparing the foster care regulated by domestic law and the Islamic *kafalah*.[34] This allowed the Court of Cassation to extend, to Muslim children under *kafalah* proceedings, the application of Art 29, para 2, of decreto legislativo 25 July 1998 no 286, Title IV of which provides for the protection of both families and minors coming from foreign countries.

A different perspective has emerged regarding claims for entry visas for the purpose of family reunification made on behalf of foreign minors that had been entrusted to Italian citizens residing in Italy under *kafalah*. This judicial perspective operated on the basis of the principle that the internal rules on visas for family reunification, in this case regarding foreign minors under *kafalah*, applied only to foreigners.[35] According to the Court of Cassation, the safeguard clause that enabled the application of the most favourable norm did not require extension of those rules to Italian citizens residing in Italy. Indeed, Art 23 of decreto legislativo 6 February 2007 no 30 (previously Art 28 of decreto legislativo 25 July 1998 no 286) concerned only how family reunification was to be handled; it did not address the category of relatives towards whom the legislative measure was deemed applicable. This category is described in Art 2, *lett*. b), referred to by both Art 1, *lett*. a), and Art 3, para 1, of decreto legislativo 6 February 2007 no 30.[36] The definition enshrined in Art 2 has been extended by Art 3, para 2, *lett*. a), to include any other relative:

- who is a dependent of a citizen of the European Union;
- lives with the European citizen within the country of origin;
- requires assistance for serious health problems.

According to the Court of Cassation, this meant that the debated category included minors who had been adopted or who were involved in adoption proceedings in accordance with international adoption law.[37]

[34] These are both temporary measures intended to protect minors in need; however, neither touches upon the civil status of the minor in question. See Corte di Cassazione, n 1 above.

[35] The issue is addressed by decreto legislativo 6 February 2007 no 30 by means of the reference made by Art 28 para 2 of decreto legislativo 25 July 1998 no 286, which in turn refers to the Decreto del Presidente della Repubblica 30 December 1965 no 1656. This was abrogated in 2002 by Art 15 of the Decreto del Presidente della Repubblica 18 January 2002 no 54, subsequently abrogated, in 2007, by Art 25 of decreto legislativo 6 February 2007 no 30.

[36] Decreto legislativo 6 February 2007 no 30. The category of relatives includes direct descendants under the age of twenty-one or who are dependents, or those direct descendants of the spouse or of the partner having entered into a registered union equivalent to marriage.

[37] Legge 4 May 1983 no 184.

The same reasons justifying the family reunification of a minor entrusted under *kafalah* to a foreign citizen residing in Italy could not avail. Therefore, it was stated that Italian citizens who decide to take charge of an abandoned child had no choice but to refer to international adoption, in accordance with legge 4 May 1983 no 184 (and subsequent amendments).[38]

Two principles emerged from the case. The first underscored that the interest of the child must prevail over any other conflicting principle. This was clearly expressed at the international level, as well as at regional and national levels. This principle found place within the Italian Constitution[39] and was also to be applied in the field of domestic regulation of immigration.[40] Furthermore, it was noted that it was always necessary to adopt an interpretation based on the Constitution when dealing with the so-called 'primary rules', ie all legal norms within the hierarchy of the sources of law.

Some issues must be contextualized within the rationale of the Italian Court of Cassation. Decreto legislativo 6 February 2007 no 30 was to be applied to Italian citizens seeking to be reunited with a minor entrusted by means of *kafalah*.[41] The Court emphasized that the legal definition of 'foreign relative' on the basis of which an Italian citizen was entitled to request family reunification could not be applied in an analogous manner. Nevertheless, there were no norms that prevented interpreting the norm extensively (Arts 2 and 3 of decreto legislativo 6 February 2007 no 30), especially when this would be the only interpretation that could guarantee the observance of both Italian constitutional principles and the supranational values. Indeed, the interpretation of Art 3, para 2, *lett*. a), of the aforementioned legislative decree in terms of including foreign minors under *kafalah* within the category of relatives conforms with a Communication made by the European Commission to the European Parliament and Council on 2 July 2009, to guide European States in applying Directive 2004/38/EC.[42] The Court of Cassation noted that any other interpretation

[38] For further details on the role of adoption in a wider cultural context, see C.E. Tuo, 'Riconoscimento degli effetti delle adozioni straniere e rispetto delle diversità culturali' *Rivista di diritto internazionale privato e processuale*, 43-80 (2014).

[39] Arts 2 and 30 of the Italian Constitution.

[40] Art 28 para 3 of decreto legislativo 25 July 1998 no 286.

[41] Art 28 para 2 of decreto legislativo 25 July 1998 no 286 makes reference to decreto legislativo 6 February 2007 no 30. Furthermore, the application of the most favourable norms, prescribed by Art 23 of decreto legislativo 6 February 2007 no 30 prevents the application of Art 29 para 2 of decreto legislativo 25 July 1998 no 286, which is limited to requests for family reunification made by foreign citizens.

[42] See 'Guida agli aspetti di difficile trasposizione ed applicazione della direttiva 2004/38/CE', available at http://www.meltingpot.org/IMG/pdf/linee_guida_UE_1__doc.pdf (last visited 24 May 2016).

of that norm would result in breaching both the Constitution and the principle of the best interests of the child. Moreover, the norm itself did not allow for a different interpretation. Indeed, the court stressed that the category of relatives was not based on parental ties. Furthermore, the argument according to which giving relevance to a request that was potentially meant to either avoid or violate domestic rules concerning international adoption was contrary to internal public policy was denied, on the grounds that it was a measure intended only indirectly to produce legal effects within the Italian system. According to the Court of Cassation, *kafalah* does not produce the same effects as adoption; indeed, it does not even produce similar effects. The Court asserted that the guardianship system of *kafalah* has no effect other than the affective and material care of the minor. Accordingly, it was stated by the Court of Cassation that an Italian citizen residing in Italy may seek family reunification in three cases: if the minor is dependent on the requesting Italian citizen; if the minor lives with the Italian citizen in the country of origin; and when serious health reasons require the Italian citizen to personally assist the minor.

The impact of European principles on the '*kafalah*' issue must not be underestimated. This much is clear from the rulings given in *Harroudj* v *France*[43] and in *Chibhi Loudoudi and Others* v *Belgium*.[44] On those occasions, the European Court of Human Rights addressed the relationship between national laws and Arts 8 (right to respect for private and family life) and 14 (prohibition of discrimination) of the European Convention on Human Rights. The question at issue was the rejection, by the French and Belgian courts, of a request to adopt a foreign child entrusted by means of *kafalah*. What emerges from the aforementioned European decisions is that Art 8 is to be interpreted in terms of recognizing 'a margin of appreciation' to the States, to enable them to balance the rights of the individual and the interests of society as a whole.[45]

Judgment no 21108 handed down by the Court of Cassation on 16 September 2013 launches a new judicial course, laying the foundations for both understanding and accepting a different legal and cultural institution. This course was confirmed two years later by a new ruling: Judgment 2 February 2015 no 1843.

[43] n 31 above.

[44] n 32 above.

[45] F. Di Pietro, 'La kafalah Islamica e le sue applicazioni alla luce della giurisprudenza della Corte Europea dei diritti dell'uomo' *Ordine Internazionale e Diritti umani*, 91-99 (2016).

IV. Confirming *Kafalah*: A New Case for the Court of Cassation

The principles leading the Court of Cassation to the 2013 ruling on *kafalah* continued to inspire the Court of Cassation in subsequent cases.[46] In 2015, the First (Civil) Division of the Court of Cassation was asked to decide a case on the recognition of a measure approving a *kafalah* agreement.[47] The measure had been issued by a Moroccan notary court. The Court of Cassation was called upon to rule on both the petition of the Italian Ministry of Foreign Affairs (in particular, the Italian Consulate in Casablanca) against an Italian citizen of Moroccan origin, and the petition made by that same Italian citizen against the Italian Ministry of Foreign Affairs, with reference to Judgment no 132 issued by the Court of Appeal in Brescia on 16 February 2012.[48]

In January 2011, the Italian citizen applied to the Court of Appeal for recognition, under Art 65 and following provisions of legge 31 May 1995 no 218, of a *kafalah* agreement approved by the notary court of first degree of Khouribga in Morocco.

The claimant was born in Morocco, but had been living and working in Italy for over twenty years. His family was composed of his wife, who was also born in Morocco, and their son. Both the husband and the wife had obtained Italian citizenship. The husband had a permanent job and the family was well integrated within the local society. The claimant had a brother who lived in Morocco, with his wife and their two sons, in a precarious economic situation. Given the favourable economic situation of the Italian family, the two families decided to establish a *kafalah* agreement. The agreement provided that the Italian citizen would take charge of his brother's sons. Since the *kafalah* agreement had to be approved by the competent court under Moroccan law, in April 2005, the Khouribga court approved the *kafalah* agreement, with the consent of both of the children's parents and of the uncle. On this basis, the Moroccan authorities issued the relevant measure according to which the two minors were allowed to expatriate and reach their uncle in Italy, where they would finish their studies and start to work. However, when the Italian citizen applied to the Italian Consulate in Casablanca for their entry visa, the Italian authority refused to issue the entry visa for family reunification, on the grounds that the minors did not fall within the category

[46] Corte di Cassazione 2 February 2015 no 1843, n 30 above. See M. Di Masi, n 30 above, 707-724.

[47] This was a consensual *kafalah*. For further details on Moroccan *kafalah*, see M. Sayed, n 13 above, 514-515. See also A. Cilardo, n 7 above, 245-251.

[48] Corte d'Appello di Brescia 16 February 2012 no 132 (unpublished). See M. Di Masi, n 30 above, 708.

of relatives. They were thus not entitled to family reunification under Art 2, para 1, *lett*. b), of decreto legislativo 6 February 2007 no 30.

The Brescia Court of Appeal set a date for the interested parties to appear before the court.

The Ministry of Foreign Affairs argued that the petition was inadmissible. It was noted that the Italian citizen held no interest in obtaining the recognition of the *kafalah* order, because issuance of the entry visa to the minors could not be based on *kafalah*. The well-known *Testo Unico sull'Immigrazione* (decreto legislativo 25 July 1998 no 286) was considered inapplicable: Art 29, addressing the relevance of *kafalah* for family reunification, provided that an Italian citizen entrusted with a non-European child under *kafalah* could not seek family reunification.[49] The Ministry stated that in such cases, only foreign citizens could seek family reunification.

The request was granted by the Court of Appeal under Art 2, para 1, *lett*. b) no 3, and Art 3, para 2, *lett*. a), of decreto legislativo 6 February 2007 no 30. These rules allowed the inclusion – within the category of relatives entitled to family reunification – minors who are wards of the claimant and minors living with the claimant and having a parental bond or family bonds with the claimant. The Court of Appeal stressed that the *kafalah* agreement was consistent with the Italian rules on foster care and adoption of minors.[50] These rules did not require a judicial or administrative enforcement measure, if parental control was present. [51]

The Ministry of Foreign Affairs appealed to the Court of Cassation, leading the claimant to file a counter-appeal. While the latter was based on the fact that the Court of Appeal had not ruled on the costs of the proceedings, the Ministry of Foreign Affairs appealed the judgment on five grounds.

As for the first ground, the Ministry of Foreign Affairs argued that the

[49] For a more comprehensive picture of the legal scholarship on matters of *kafalah* and family reunification, see A. Venchiarutti, 'No al ricongiungimento familiare del minore affidato con kafalah: i richiedenti sono cittadini italiani' *Diritto di famiglia e delle persone*, 1621-1639 (2010). See also M. Orlandi, 'La Kafala islamica e la sua riconoscibilità quale adozione' *Diritto di famiglia e delle persone*, 635 (2005).

[50] T. Tomeo, 'La Kafala' *Comparazione e diritto civile*, (2013), available at http://www.comparazionedirittocivile.it/prova/files/ncr_tomeo_kafala.pdf (last visited 24 May 2016).

[51] For a more detailed investigation of *kafalah* and Western law, see R. Senigaglia, 'Il significato del diritto al ricongiungimento familiare nel rapporto tra ordinamenti di diversa tradizione. I casi della poligamia e della «kafala» di diritto islamico' *Europa e diritto privato*, 533-575 (2014). See also M. Della Rocca, 'La kafalah non è né adozione né affidamento preadottivo. Fuori luogo il richiamo all'articolo 42, comma 2, L. n 218/1995' *Corriere Giuridico*, 199-203 (2012).

judge was not to apply Art 67 of decreto legislativo 25 July 1998 no 286. The Ministry held that it was a case of adoption, and thus the Court of Appeal should have applied Art 41 para 2, on the recognition of foreign adoption orders. According to this provision, in the context of the adoption of minors, special laws must be applied. Consequently, the correct procedure was that established by legge 31 December 1998 no 476, on international adoption. The Ministry stressed that the request for recognition of the judicial measure approving the *kafalah* agreement was not admissible because the judge did not possess the requisite jurisdiction. Furthermore, the request had to be rejected because an Italian citizen wishing to include an abandoned foreign child within his family had no choice than to refer to international adoption law, since the Italian legal system recognized neither international foster care nor the *kafalah* system of guardianship.[52]

The Court of Cassation ruled out the first ground of appeal for lack of legal basis, to the extent that it excluded the applicability of Art 67 of decreto legislativo 25 July 1998 no 286 and required the application of international adoption law. Referring to Judgment no 1155 of 23 January 2004 by the First (Civil) Section of the Court of Cassation, the Ministry emphasized that decreto legislativo 25 July 1998 no 286, in so far as it abrogated Art 796 and following articles of the Civil Code and replaced these provisions with an automatic recognition of foreign rulings, provided, at Art 41, for the application of the special laws on adoption. Therefore, this implied the applicability of legge 31 December 1998 no 476 enforcing the 1993 Hague Convention, which had amended international adoption law. Therefore, this had introduced, by means of legge 4 May 1983 no 184, a well-articulated procedure that conferred the relevant powers upon the Juvenile Court, and provided that the international adoption of children from States that had ratified the Convention could only occur in accordance with the procedures and under the effects of the aforementioned law. This was confirmed by a further reference to *ordinanza* 11 March 2006 no 5376, which had been issued by the First Division of the Court of Cassation.

According to the Court of Cassation, both references were irrelevant. The judge stated that, in light of the original purpose of the institution of *kafalah* within Islamic states to address the Islamic ban on adoption, the application of international adoption law instead of provisions of private international law (decreto legislativo 25 July 1998 no 286) meant denying

[52] A. Venchiarutti, 'La kafala al cospetto dell'ordinamento italiano', in M. Papa, G. M. Piccinelli and D. Scolart eds, *Il Libro e la bilancia: studi in memoria di Francesco Castro* (Napoli: Edizioni Scientifiche Italiane, 2011), 1131-1142.

the significance of this particular institution within Muslim countries.[53] Art 41 of the *Testo Unico sull'Immigrazione* could not be interpreted, and was not to be interpreted, as a norm seeking to prevent the recognition of any other institution having the purpose of protecting minors. Rather, Art 41 was intended to emphasize the peculiar features of international adoption as a consequence of the involvement of two different countries: the country of origin and the receiving country. Therefore, the entire process was to be carried out in accordance with the internationally established standards of the 1993 Hague Convention. Furthermore, and most importantly, denying the claim's inadmissibility due to an absence of interest on part of the claimant called into question the case law of the Court of Cassation, and, more specifically, the principle of law established by Judgment 16 September 2013 no 21108. On that occasion, as previously noted, the Joint Divisions stressed that the argument according to which Italian citizens who wished to include an abandoned foreign child within their families had no means other than international adoption, under legge 4 May 1983 no 184, could not be supported. This was because the Court of Cassation, in its previous decisions, had shed light on two principles. The first was the best interests of the child, which was determined on multiple levels – from the national to the international. The second was the principle of the constitutionally compatible interpretation of the aforementioned primary legislation. Therefore, denying the Italian citizen the possibility to obtain reunification with a foreign minor taken in charge under *kafalah*, on the sole basis of a strict interpretation of decreto legislativo 6 February 2007 no 30, was contrary to the principle of equality. Specifically, this led to differences in the treatment of both minors from Muslim countries who needed protection and Italian citizens. Indeed, while foreign citizens were entitled to reunification with Muslim minors under *kafalah*, Italian citizens, being allowed only adoption, were deprived of a fundamental tool to provide care and protection to foreign children coming from Muslim states.[54]

The Ministry's second argument was dismissed on the grounds that the *kafalah* measure could not be approved in Italy because it was contrary to national public policy, as clearly shown in the provisions on adoption. As stated above, adoption was not regulated by private international law. Furthermore, no substantial differences could be noted, if *kafalah* was

[53] V.M. Donini and D. Scolart, *La* sharì'a *e il mondo contemporaneo* (Roma: Carocci, 2015). For further details on *shari'a* and its relationship with the contemporary world, see also J.M. Otto ed, *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden: Leiden University Press, 2010).

[54] On this matter, see G. Pizzolante, 'La kafalah islamica e il suo riconoscimento nell'ordinamento italiano' *Rivista di diritto internazionale privato e processuale*, 947 (2007).

assimilated to foster care rather than to adoption: Art 35, para 6, *lett*. d), of legge 4 May 1983 no 184 concerned both the adoption and the foster care of foreign children, which could not be registered unless they occurred under a central authority or an authorized body.

According to the Ministry of Foreign Affairs, in these cases, the requirements provided by decreto legislativo 25 July 1998 no 286 could not be applied. The *kafalah* agreement had been approved by a notary court that applied Islamic law, and not a court for juvenile affairs that applied Italian law. Furthermore, *kafalah* was deemed to be contrary to national public policy because those citizens who wished to include a foreign minor within their families should apply the means provided by legge 4 May 1983 no 184, the only law intended to integrate public policy. Thus, *kafalah* could not be enforced in Italy because – according to the Court – this placed the minor within the receiving family in a detrimental position.

The Court of Cassation stressed that the Ministry had failed to take into account the singularities of *kafalah* as an institution originating in the Islamic world. Indeed, referring to international adoption law, for Italian citizens to receive a foreign minor within their families contradicted the Court of Cassation's 2013 ruling: to verify whether *kafalah* enables the theoretical and the practical achievement of the best interests of the child, in a cultural and legal context other than the Italian socio-legal framework and in which adoption is not permitted.

According to the Court of Cassation, the Ministry's argument was at odds with the fact that Italy had joined several international conventions, such as the New York Convention and the 1996 Hague Convention, which both recognized *kafalah* as a tool through which to protect minors.[55] As a Member State, Italy was to comply with the Conventions, even though the Hague Convention had yet to be ratified. A different approach would contrast with the instruments adopted by international law to standardize and harmonize national laws, and ensuring judicial cooperation in a broader European context.

The Court of Cassation noted that, in terms of judicial activity, the *kafalah* system had to be examined by elucidating the reasons for its existence as well as its context, recalling that public control was in any case exerted on this form of guardianship.[56] Such public control could be

[55] For further details on the application of Islamic family law within the Italian legal system, see C. Campiglio, 'Il diritto di famiglia islamico nella prassi italiana' *Rivista di diritto processuale italiano e comparato*, 43-76 (2008).

[56] R. Duca, 'Family Reunification: the case of Muslim Migrant Children in Europe' *Athens Journal of Social Science*, 114 (2014): 'Once *kafala* is allowed, the public competent authority keeps the right and the duty of surveillance and checks the evolution of the

entrusted to either a judicial authority or an administrative authority, and both could exercise their power in different ways during the various stages of the *kafalah* relationship. The Court of Cassation declared that it would be pointless to discriminate *kafalah* on the basis of the notary court's role in the case brought to its attention: its power to check was meant to protect minors and fulfil their interest, examining whether the *kafil* met the requirements for starting the *kafalah* relationship. In this particular respect, the Court declared that international conventions did not deprive States of the power to decide the type of authority that was to exercise public control.

As for Moroccan *kafalah* and its relationship with national public policy, the Court of Cassation maintained that there was no difference between judicial *kafalah* and consensual *kafalah*, because there could be no conflict with public policy when the parents of a minors, aware of their incapability to offer the best moral and material assistance, decide to entrust other members of their family with assisting, caring for and protecting their children.[57] Nonetheless, according to the Court, the principle of reciprocity could not be applied to matters concerning the protection of minors, on the grounds that differences in legislation between States are the expression of cultural singularities that should be respected. Thus, states retain sovereign power on this matter, even if they are called upon to cooperate to achieve the best interests of the child at the international level.

On the third ground of appeal, the Ministry noted that the Court of Appeal had included, among the relatives, a foreign minor who had been entrusted by means of *kafalah* to an Italian citizen living in Italy. This was in contrast with decreto legislativo 6 February 2007 no 30. Indeed, the foreign minor was not a direct descendent of the Italian citizen; he had not been adopted by the Italian citizen; he was not affiliated to the Italian citizen and he did not live with the Italian citizen in Italy or in his or her country of origin. *Kafalah* had to be considered an institution of Islamic law without any legal effects within the Italian system, which provided binding principles to include foreign minors within the domestic system. Applying principles of Islamic law to an Italian citizen implied granting Islamic law a superior role as a source of law than the national law referring to the international adoption procedure. Therefore, Italian

child's integration in the extended family and in the event of *kafil*'s transfer of residence abroad it must authorize *makful's* transfer'.

[57] On the distinction between judicial *kafalah* and consensual *kafalah*, see M. Di Masi, n 30 above, 719, quoting M. Della Rocca, 'Uscio aperto, con porte socchiuse, per l'affidamento del minore mediante *kafalah* al cittadino italiano o europeo' *Corriere giuridico*, 1497 (2013). See also Corte Suprema di Cassazione, Ufficio del Massimario e del Ruolo, n 12 above, 2-3.

Muslims could elude Italian adoption law, and, by contrast, this law ended up being restrictive for other religious individuals. This could lead to negative consequences in terms of discrimination.

In dealing with this ground for appeal, the Court of Cassation insisted upon what had been stated in response to the other grounds: international adoption law was not to be favoured over *kafalah* law on the grounds that *kafalah* is not an Italian legal institution. If it was capable of offering assistance and care to minors, *kafalah* had to be recognized. Furthermore, according to the Court of Cassation, the Court of Appeal had not been asked to interpret Arts 2 and 3 of decreto legislativo 6 February 2007 no 30, as it had evaluated the relationship between the Italian citizens and the two minors. Indeed, in 2013, the Court had ruled that the foreign minor given to an Italian citizen under *kafalah* was to be considered within the category of 'other relatives' under Art 3, para 3, *lett*. a) of decreto legislativo 6 February 2007 no 30. Accordingly, in certain well-defined circumstances, Italian citizens could seek family reunification. The Court reaffirmed the fundamental principles at the heart of the 2013 judgement: the minor's fundamental right to family unity; the role of *kafalah* as a tool to provide material and affective care to minors, without producing the same legal effects as adoption; the absence of any form of religious discrimination, providing Muslim individuals with the opportunity to assure protection to minors in accordance with their faith; and the need to allow Italian citizens to benefit from the full rights of the Italian legal system.[58] Furthermore, the fact that Moroccan law required that only couples of Islamic faith and married for at least three years could be entrusted with a minor by *kafalah* was considered irrelevant.[59] In particular, this was irrelevant in terms of discrimination and in terms of potential conflict with the principle of secularism, on the grounds that the Italian court needed only examine a legal measure that had been adopted and approved in Morocco – and Morocco, as Italy, was party to the Hague Convention, which grants minors protection in accordance with the religious convictions of the individuals involved and strives to provide protection beyond national boundaries.

On the fourth ground for appeal, the Ministry of Foreign Affairs argued that the Moroccan *kafalah* agreement was not consistent with the *kafalah* pattern acknowledged by the New York Convention, because the minor had not been abandoned. This was considered to be a very important requirement in deciding whether the minor could leave his or her parents. Thus, the Court of Appeal had failed to assess the minor's best interests.

[58] See Corte di Cassazione, n 1 above.
[59] On this *kafalah* requirement, see Corte Suprema di Cassazione, n 12 above, 3.

The Court of Cassation confirmed that the Convention refers to *kafalah* operating in situations of abandonment, or when the minor lives in extreme hardship within his or her family.[60] Consequently, the Moroccan *kafalah* was not inconsistent with the provisions of the New York Convention.[61] Indeed, for the *kafalah* institution to be legitimate, the Court of Cassation suggested comparing it with the fundamental principles of the Convention, in particular with the principle of the best interests of the child. Thus, it was necessary to take into consideration how the principle was enforced in each case. Moreover, this principle was to be balanced with the minor's right to live and grow up in his family. Such a perspective appeared to be consistent with consensual *kafalah*, a prerequisite of which is an unsuitable or difficult family context, rather than the abandonment of the minor. This did not appear to contradict the fundamental principles of the New York Convention. This Convention, as well as the European Convention on Human Rights (ECHR) and the Hague Convention, provide for cooperation between States on matters of child protection, to reach a shared decision in accordance with the principle of the best interests of the child.

On the fifth ground for appeal, the Ministry stated that the Court of Appeal had registered the existence of a consensual agreement that met all relevant requirements, and was thus equivalent to public *kafalah*. This was deemed to contrast with Moroccan law, which established specific conditions for ascertaining the abandonment of the child and the parents' unfitness to be entrusted with the minor under *kafalah*. Nevertheless, according to the Court of Cassation, this argument was unfounded. The Court of Appeal had ascertained the knowing participation of the Moroccan family to the *kafalah* agreement on the grounds of its precarious economic situation and the need for the Italian family's continuous involvement in supporting the minors. Even transferring the children to Italy was consistent with their best interests.[62] Indeed, the *kafalah* system does not necessarily imply that the person taken into *kafalah* should live with those who provide the *kafalah*. The Court of Appeal had described in detail how the two families had engaged in the *kafalah* relationship. The Court of Appeal had taken into account a series of elements, such as the suitability of the Italian family to provide the minors with care and assistance; the Moroccan family's consent; the existence of a young cousin in the Italian family; the fact that all the members of the Italian family held Italian citizenship; the receiving

[60] See M. di Masi, n 30 above, 715-716. See also T. Tomeo, n 50 above, 1-13.
[61] M. Sayed, n 13 above, 514. See also T. Tomeo, n 50 above, 8.
[62] R. Duca, n 56 above, 114.

family's full integration within Italian society; and the Moroccan authority's examination of how the relationship had evolved, and its verification of the pros and cons of a temporary transfer of the minors far from their family of origin. Thus, the Court of Appeal maintained that the best interests of the child required recognition of the *kafalah* agreement and allow them to live in Italy.[63]

The appeal was to be dismissed, while the counter-appeal was to be upheld. It was confirmed that the Court of Appeal had not issued a decision on costs. Moreover, judicial conflicts on a matter in which there were no specific rules or recent case law made it necessary to rule on the costs of the proceedings before both the Court of Appeal and the Court of Cassation.

V. Conclusion

When dealing with the 'Islamic' system of *kafalah* guardianship, the Court of Cassation draws on a series of principles. The reasoning is essentially based on a dual awareness: on one hand, prioritizing the best interests of the child, and on the other, avoiding any discrimination against children from Muslim countries, where *kafalah* constitutes an extremely important form of protection of abandoned children. According to the Court, completely excluding Italian citizens from the range of subjects entitled to achieve reunification with foreign children under *kafalah* would be not compatible with Italian constitutional values. Furthermore, it would not be consistent with European legislation and international conventions having the purpose of protecting minors beyond state borders. Moreover, the Court of Cassation emphasizes that foster care, as addressed in Italian legislation, has several similarities with the *kafalah* system, an observation that played a very important role in clearing the way for accepting *kafalah* within Italian society.

On matters of *kafalah* and family reunification, the new judicial perspective introduced by the Court of Cassation in Judgment 16 September 2013 no 21108 has been confirmed by the First (Civil) Division of the Court of Cassation in a new ruling of 2015. This new stance demonstrates a great change occurring within Italian society in recent years, in both legal and cultural spheres. Indeed, the Court of Cassation was led to bring about this change on the basis of the strength of principles such as the best interests of the child and non-discrimination, together with the need to apply these principles in a manner that is more consistent

[63] M. di Masi, n 30 above, 716-717.

with societal developments. In an increasingly globalized world, where there is far less distance between individuals, and where groups with different cultural and legal values live with one another, society is becoming aware of the need to face and accept diversity. Accordingly, judges and lawmakers must adapt the law to a fast-changing society, so that people can learn to live with each other, respecting cultures and rights and in compliance with universal fundamental principles.