

RECHTSLEER/DOCTRINE

Sarah Den Haese and Hester Kroeze (Ghent University) – The ‘Right’ of a Child Placed under *Kafala* Care to Reside within the EU with his Guardian(s): The Emergence of a European Family Law? Case note to *SM v. Entry Clearance Officer, UK Visa Section (C-129/18)*

I. Introduction

1. The present case note examines the implications of the CJEU case *SM v. Entry Clearance Officer, UK Visa Section*.¹ *SM* concerns the question whether a child placed in *kafala* care can be regarded as a family member under European law for the purpose of family reunification in the context of free movement rights under Directive 2004/38.² *Kafala* is a child protection measure and the recognition of a *kafala* agreement is governed by the 1996 Hague Child Protection Convention.³ Algeria is not a Contracting Party to this Convention. Consequently, the recognition of *kafala* agreements from Algeria is dealt with by domestic private international law rules. Neither the 1996 Hague Child Protection Convention, nor the domestic private international law rules, however, deal with the consequences in terms of residence rights, which impact the right of EU citizens and their family members to move and reside freely within the EU. A tension thus exists between the interest of the State to determine which personal status it recognizes under private international law and the rights it attaches to this recognition, and the interest of the EU to ensure the effectiveness of EU free movement rights. The judgment of the CJEU in *SM* illustrates this tension, as well as the difficulty to appropriately assess which approach is best to guarantee the interest and protection of the child placed under *kafala*. After having clarified the notion of *kafala* (2), the facts of *SM* (3) and the preliminary questions (4), this case note discusses the reasoning of the Advocate General (5) and the European Court of Justice (6). The analysis focuses on the impact of the CJEU’s judgment in *SM* on the competence of the EU’s Member State to decide on the recognition of personal status obtained abroad, and the role of fundamental rights protection in the development towards a European family law (7). Both private international law and European law are taken aboard in this analysis.

II. Kafala: a child protection measure

2. *Kafala* is a type of long-term legal guardianship under Islamic law with the aim of protecting children, who are either abandoned or whose parents are unable to care for him/her/*.⁴ In the Algerian Family Code (Articles 116-125), “*kafala is defined as a legal act by virtue of which the kafil undertakes*

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¹ CJEU 26 March 2019, C-129/18, ECLI:EU:C:2019:248, *SM*.

² Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

³ Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (‘1996 Hague Child Protection Convention’), entry into force 1 January 2002 (see: <https://www.hcch.net/en/instruments/conventions>).

⁴ C. Schuin, “What about the makfuls? *Kafala*, the Family Reunification Directive and Children’s Rights”, <https://leidenlawblog.nl/articles>, Article posted on 11 July 2019.

to provide maintenance, education and protection for the *makfoul* as a father would do for his child”⁵. *Kafala* is agreed before a judge or a notary⁶ and always takes into account the child’s best interests. Only Muslims can be granted *kafala*.⁷ *Kafala* cannot simply be equated to adoption, which in most Islamic Countries is prohibited by law,⁸ because under Islamic law, the (legal) relationship between a child and his/her/* parents can never be ruptured.⁹ Since *kafala* does not create a relationship of filiation¹⁰, it does not award the child with a right to automatically inherit from the *kafil*¹¹. The *kafil* may, however, transfer assets to the child either by gift or legacy but the transfer can never exceed one third of their estate.¹² *Kafala* comes to an end when the child attains the age of majority and may be revoked earlier at the request of the biological parents or the guardian.¹³ In the *Harroudj v. France*¹⁴ case and *Loudoudi v. Belgium*¹⁵ case, the ECtHR made it very clear that although the relationship between a child placed in *kafala* care and the person(s) acting as the child’s parent(s) falls under the notion ‘family life’, Member States of the Council of Europe are under no obligation to convert *kafala* into a (full or simple) adoption.

3. An argument not to recognize *kafala* in Western States is that the requirements to obtain custody in the *kafala* system are more lenient than those that apply to adoption.¹⁶ However, due to the fact that the EU and its Member States have the international obligation to protect the rights of children under the Convention on the Rights of the Child (‘CRC’)¹⁷ and the 1996 Hague Child Protection Convention¹⁸, which include *kafala* as a child protection measure, Member States have to award

⁵ M. Guénon, “Algeria” in N. Yassari, L.-M. Möller and M.-C. Najm (eds.), *Filiation and the Protection of Parentless Children. Towards a Social Definition of the Family in Muslim Jurisdictions*, The Hague, Springer, 2019 (45) 58. The person or family taking care of the child is called the *kafil*, while the child in need of protection is known under the notion *makfoul*.

⁶ Article 117 of the Algerian Family Code (Opinion of Advocate-General (A-G) Campos Sánchez-Boordona of 26 February 2019, in C-129/18, ECLI:EU:C:2019:140, SM, § 18).

⁷ Article 118 of the Algerian Family Code (Opinion of A-G Campos Sánchez-Boordona of 26 February 2019, in C-129/18, ECLI:EU:C:2019:140, SM, § 18).

⁸ Adoption is explicitly prohibit in Algeria, Bahrain, Egypt, Jordan, Kuwait, Morocco and Yemen. Tunisia is the only Arab country that explicitly allows adoption. See Law No. 27 of 1958 on Public Guardianship, Kafala and Adoption, *Tunisian Official Gazette* 7 March 1958 and S. B. Achour, “Tunisia” in N. Yassari, L.-M. Möller and M.-C. Najm (eds.), *Filiation and the Protection of Parentless Children. Towards a Social Definition of the Family in Muslim Jurisdictions*, The Hague, Springer, 2019 (325) 339-340. Some countries, such as Indonesia and Malaysia, allow adoption for non-Muslims. India and Sri Lanka also permit adoption for Muslims. Other countries are silent in statutory law on the matter of adoption, such as Afghanistan, Iraq, Iran, Oman, Pakistan, Qatar, Syria, United Arab Emirates and Qatar. See N. Yassari, “Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law”, *American Journal of Comparative Law* 2015, Vol. 63, No. 4, (927) 943-944.

⁹ S. Corneloup, B. Heiderhoff, C. Honorati, F. Jault-Seseke, T. Kruger, C. Rupp, H. van Loon and J. Verhellen, “Children On The Move: A Private International Law Perspective”, *Tijdschrift@ipr.be* 2017, No. 2, (69) 98 (<http://www.europarl.europa.eu/studies>); U. Assim and J. Sloth-Nielsen, “Islamic kafalah as an alternative care option for children deprived of a family environment”, *African Human Rights Law Journal* 2014, (322) 329-330. The prohibition to adopt stems from a story about the prophet Mohamed who once had an adopted son. Mohammed, however, got attracted to the wife of his adopted son. The latter divorced his wife in favour of his father. To avoid controversy, the concept of adoption as understood in Western laws was abolished. See U. Assim and J. Sloth-Nielsen, “Islamic kafalah as an alternative care option for children deprived of a family environment”, *African Human Rights Law Journal* 2014, (322) 326-327 and 329-330.

¹⁰ Article 120 of the Algerian Family Code; Opinion of A-G Campos Sánchez-Boordona of 26 February 2019, in C-129/18, ECLI:EU:C:2019:140, SM, § 18 and § 36. For *kafala* in Morocco: see H. Englert and J. Verhellen, “Rapport Belge” in M.-C. Foublets (ed.), *Le Code Marocain de la Famille en Europe. Bilan comparé de dix ans d’application*, Brussels, la Chartre, 2016, (257) 331.

¹¹ Opinion of A-G Campos Sánchez-Boordona of 26 February 2019, in C-129/18, ECLI:EU:C:2019:140, SM, § 37.

¹² Article 123 of the Algerian Family Code. For more information: M. Guénon, “Algeria” in N. Yassari, L.-M. Möller and M.-C. Najm (eds.), *Filiation and the Protection of Parentless Children. Towards a Social Definition of the Family in Muslim Jurisdictions*, The Hague, Springer, 2019 (45) 59.

¹³ Opinion of A-G Campos Sánchez-Boordona of 26 February 2019, in C-129/18, ECLI:EU:C:2019:140, SM, § 38 and CJEU 26 March 2019, C-129/18, ECLI:EU:C:2019:248, SM, § 45.

¹⁴ ECtHR 4 October 2012, No. 43631/09, *Harroudj v. France*.

¹⁵ ECtHR 16 December 2014, No. 52265/10, *Chbihi Loudoudi and Others v. Belgium*.

¹⁶ CJEU 26 March 2019, C-129/18, ECLI:EU:C:2019:248, SM, § 32 and Opinion of A-G Campos Sánchez-Boordona of 26 February 2019, in C-129/18, ECLI:EU:C:2019:140, SM, § 19.

¹⁷ Article 20 of the Convention on the Rights of the Child.

¹⁸ Article 3, e) of the 1996 Hague Child Protection Convention.

children placed under *kafala* care the rights required to live the life with the people most capable to take up the social role of parents. In *SM*, the CJEU made clear that under certain circumstances this obligation entails the right of children placed under *kafala* care to enter the European Union and reside with their *kafil(s)* in a European Member State.

III. Facts of the case

4. The case concerned the request of SM, an Algerian national born in June 2010 in Algeria, to be granted a right to enter and reside in the United Kingdom with Mr. and Mrs. M. who she regards as her parents. The couple got married in the United Kingdom. They could not conceive naturally and were not eligible for adoption. When they learned that it was easier to obtain custody of a child under the *kafala* system than it was to adopt in the UK, the couple travelled to Algeria to become eligible for this type of guardianship. After being assessed as suitable to become guardians under the *kafala* system, Mr. and Mrs. M. became the guardians of the three months old SM, who had been abandoned by birth. A few months later, an Algerian judge granted them legal custody over the child. Since then Mr. and Mrs. M. are authorised in Algeria to get family allowances, subsidies and indemnities duly claimable, to sign all administrative and travel documents, and to travel with SM outside Algeria. It was also decided by the court that SM's surname, as it appeared on her birth certificate, had to be changed to that of Mr. and Mrs. M.¹⁹

5. Due to professional obligations, Mr. M. left Algeria in October 2011 and returned to the United Kingdom, where he had a permanent right of residence. His wife, Mrs. M., remained in Algeria with SM. In 2012, SM applied for an entry clearance as the adopted child of a European Economic Area-national. The competent British Entry Clearance Officer declined her request on the basis that Algerian *kafala* could not be recognized as an adoption in the United Kingdom. SM and her guardians disputed the decision of the Entry Clearance Officer and her case was eventually brought before the United Kingdom Supreme Court. Prior to this, the Court of Appeal ruled that SM could not be regarded as a 'direct descendant' of Mr. and Mrs. M. within the meaning of Article 2(2)(c) of Directive 2004/38/EC. SM could, however, according to the Court of Appeal, fall within the notion of 'any other family member' within the meaning of Article 3(2)(a) of Directive 2004/38/EC. To determine whether the Court of Appeal was correct in his judgment, the Supreme Court deemed it necessary to ask the CJEU for advice regarding the meaning of the notions 'family member' and 'any other family member' mentioned in Directive 2004/38/EC.²⁰

IV. Preliminary questions

6. The question of the referring court was not primarily about the applicability of EU law, but about the qualification under EU law. The Commission Communication on the application of Directive 2004/38 includes 'minors in custody of a permanent legal guardian' in the definition of a 'direct descendant'²¹, but the conditions to qualify as a guardian under the *kafala* system are less strict than the conditions that apply to adoption in the UK. This difference could lead to "*the placing of children in households which, according to the legislation of the host Member State, would not be regarded as suitable for hosting children*". This situation bears a risk of exploitation, abuse and trafficking of children, "*which the 1993 Hague Convention seeks to prevent and deter*".²²

¹⁹ Opinion of A-G Campos Sánchez-Boordona of 26 February 2019, in C-129/18, ECLI:EU:C:2019:140, *SM*, §§ 1, 19 and CJEU 26 March 2019, C-129/18, ECLI:EU:C:2019:248, *SM*, §§ 23-28.

²⁰ Opinion of A-G Campos Sánchez-Boordona of 26 February 2019, in C-129/18, ECLI:EU:C:2019:140, *SM*, §§ 19-24 and CJEU 26 March 2019, C-129/18, ECLI:EU:C:2019:248, *SM*, §§ 23-35.

²¹ Commission Communication COM(2009) 313 final, point 2.1.2.

²² CJEU 26 March 2019, C-129/18, ECLI:EU:C:2019:248, *SM*, §§ 31-32 and 41-42. Citations from § 41.

7. The first question in *SM* is therefore whether a child placed under the *kafala* system, in a country which is not a member of the 1996 Hague Child Protection Convention, has the right to enter and reside in an EU Member State as a direct descendant within the meaning of Article 2(2)(c) of Directive 2004/38 with the person(s) who were awarded guardianship over the child and who have the nationality of an EU Member State after having exercised their right to free movement within the EU. Secondly, the referring court asked whether it can invoke Articles 27 and 35 of Directive 2004/38 to deny entry to such children if they are the victims of exploitation, abuse or trafficking or are at risk of such. Lastly, the Supreme Court of the UK posed a question with regard to the child's best interests. Are Member States entitled to examine whether the procedure for placing the child under *kafala* gave sufficient consideration to the best interests of that child?

8. The phrasing of these questions makes it clear that there is no easy answer. To determine the right of a child placed under *kafala* to reside in the European Union requires knowledge of migration law, private international law, human rights law (including children's rights) and European Union law.

V. Opinion of the Advocate General Campos Sánchez-Bordona

5.1 *Kafala cannot be considered a form of adoption*

9. The Advocate General started his answer to the first preliminary question by examining whether the notion of 'direct descendant' in Article 2(2)(c) of Directive 2004/38/EC includes a child who has been permanently placed under *kafala* care with a Union citizen²³, which should be given an autonomous and uniform interpretation.²⁴

10. In the Advocate General's opinion, there is no doubt that the concept of direct descendants used in Directive 2004/38/EC includes both biological and adoptive children. Like natural filiation, adoption establishes a legal relationship of filiation between the (adopted) child and his or her (adoptive) parents.²⁵ *Kafala*, however, cannot be considered a form of adoption. Not only is *kafala* a temporary rather than a permanent institution²⁶, more importantly, it does not create a legal relationship of filiation between the *makfoul* and the *kafil* (cf. *supra*). As a result, *kafala* and adoption differ fundamentally. The conclusion that *kafala* and adoption are two different institutions can also be deduced from analysing the CRC, the 1993 Hague Child Adoption Convention²⁷ and the 1996 Hague Child Protection Convention. While Article 20 CRC shows that *kafala* – like adoption – is a child protection measure, the 1993 and 1996 Hague Conventions clearly demonstrate that the institution of adoption requires the establishment of a legal parent-child relationship between and the child and the (adoptive) parent(s). If *kafala* were to be equated with adoption, it might be used to circumvent the protective mechanisms that apply to safeguard the best interests of the child in adoption cases, as formulated in the 1993 Hague Child Adoption Convention.²⁸

5.2 *Right to respect for family life and best interests of the child*

11. Even though *kafala* cannot be considered a form of adoption, children placed under *kafala* care do benefit from the right to respect for family life and the right to have their best interests taken

²³ Opinion of A-G Campos Sánchez-Bordona of 26 February 2019, in C-129/18, ECLI:EU:C:2019:140, *SM*, § 32.

²⁴ Opinion of A-G Campos Sánchez-Bordona of 26 February 2019, in C-129/18, ECLI:EU:C:2019:140, *SM*, §§ 58-61.

²⁵ Opinion of A-G Campos Sánchez-Bordona of 26 February 2019, in C-129/18, ECLI:EU:C:2019:140, *SM*, § 70.

²⁶ *Kafala* only lasts until the child reaches the age of majority. The legal relationship of filiation created by natural filiation and adoption, including simple adoption, persists even after the child has attained the age of majority. Opinion of A-G Campos Sánchez-Bordona of 26 February 2019, in C-129/18, ECLI:EU:C:2019:140, *SM*, § 80.

²⁷ Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption ('1993 Hague Child Adoption Convention'), entry into force 1 May 1995 (see: <https://www.hcch.net/en/instruments/conventions>).

²⁸ Opinion of A-G Campos Sánchez-Bordona of 26 February 2019, in C-129/18, ECLI:EU:C:2019:140, *SM*, § 84.

as a primary consideration.²⁹ The case law of the ECtHR³⁰ makes it clear that the relationship between a child placed under *kafala* care and the person(s) acting as the child's parent(s) falls under the notion 'family life'. As a result, Member States of the Council of Europe have the positive obligation to enable the development of the family ties of the *makfoul* and the *kafil(s)*. As already pointed out, this does not entail the obligation on Member States of the Council of Europe to convert *kafala* into a (full or simple) adoption. Consequently, a child placed under *kafala* care cannot be considered a 'direct descendant'³¹ but falls within the scope of 'other family members'³². According to the Advocate-General, Article 3(2)(a), which facilitates the entry and residence of other family members of the Union citizen after an extensive examination of the personal circumstances, fulfils the positive obligation of the Member States to protect and enable the family life of *makfouls* and *kafils*. Although the automatic attribution of the right to enter and reside within the EU enshrined in Article 2(2) of Directive 2004/38/EC poses fewer difficulties, the application of Article 3(2) of the Directive does not prevent the child from obtaining actual legal protection of his/her/* family life.³³ This conclusion corresponds with the *Loudoudi* case, in which the ECtHR explicitly stated that Article 8 ECHR cannot be interpreted as guaranteeing the right to a particular residence permit.³⁴

12. When examining Article 3(2)(a) of Directive 2004/38/EC, attention must also go to the child's right to have his/her/* best interests taken as a primary consideration. Due to the fact that Algeria is neither a Member State of the EU, nor a Contracting Party of the 1996 Hague Child Protection Convention, the Advocate General was of the opinion that Article 3(2) of Directive 2004/38/EC provides the best guarantees to ensure the effective protection of the child within the European Union.

5.3 Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health

13. The Advocate General also examined whether Articles 27 and 35 of Directive 2004/38/EC can be invoked to deny access to children placed under *kafala* care if they are the victims or at risk of exploitation, abuse or trafficking. Since children placed under *kafala* care must be regarded 'other family members' within the meaning of Article 3(2) of Directive 2004/38/EC, Article(s) 27 and/or 35 of the Directive apply as well. If the receiving Member State suspects child trafficking, (sexual) exploitation or abuse, forced labour, ... nothing prevents the Member State to invoke Article(s) 27 and/or 35 of the Directive. In the present case, however, no such indications are present.³⁵

VI. Judgment of the CJEU (Grand Chamber)

14. As the Advocate-General, the CJEU reiterated that a uniform application of EU law and the principle of equality require that the scope of the concept of a 'direct descendant' (included in Article 2(2)(c) of Directive 2004/38) is given an independent and uniform interpretation throughout all the Member States³⁶, and should be understood as "*any parent-child relationship, whether biological or legal*".³⁷ This definition includes the adopted child, because adoption creates a legal parent-child

²⁹ Article 8 of the European Convention on Human Rights ('ECHR') and Article 7 and 24(2) of the Charter of Fundamental Rights of the European Union ('Charter').

³⁰ ECtHR 4 October 2012, No. 43631/09, *Harroudj v. France* and ECtHR 16 December 2014, No. 52265/10, *Chbihi Loudoudi and Others v. Belgium*.

³¹ Article 2(2)(c) of Directive 2004/38.

³² Article 3(2)(a) of Directive 2004/38.

³³ Opinion of Advocate General Campos Sánchez-Boordona of 26 February 2019, in C-129/18, ECLI:EU:C:2019:140, *SM*, §§ 25 and 91-97.

³⁴ ECtHR 16 December 2014, No. 52265/10, *Chbihi Loudoudi and Others v. Belgium*, §135.

³⁵ Opinion of Advocate General Campos Sánchez-Boordona of 26 February 2019, in C-129/18, ECLI:EU:C:2019:140, *SM*, §§ 109-117.

³⁶ CJEU 26 March 2019, C-129/18, ECLI:EU:C:2019:248, *SM*, § 50.

³⁷ CJEU 26 March 2019, C-129/18, ECLI:EU:C:2019:248, *SM*, §§ 50-54, citation from § 54.

relationship. Despite the contrary assumption in point 2.1.2 of the Commission Communication³⁸, a parent-child relationship cannot be extended to include children who are placed under a legal guardianship, such as *kafala*, but they do enjoy protection as ‘other family members’ referred to in Article 3(2)(a) of Directive 2004/38.³⁹ The objective of Article 3(2)(a) is “to ‘maintain the unity of the family in a broader sense’ by facilitating entry and residence for persons who are not included in the definition of ‘family members’ of a Union citizen contained in Article 2(2) of Directive 2004/38 but who nevertheless maintain close and stable family ties with a Union citizen on account of specific factual circumstances”.⁴⁰ It is for each Member State to define the conditions under which residence may be granted, but this “discretion must, having regard to recital 31 of Directive 2004/38, be exercised in the light of and in line with the provisions of the Charter of Fundamental Rights of the European Union”.⁴¹ Especially Article 7 of the Charter regarding the protection of family life should be taken into account, which should have the same meaning and scope as Article 8 ECHR.⁴²

15. The protection of Article 8 ECHR includes children placed under *kafala* care and their guardians “having regard to the time spent living together, the quality of the relationship, and the role which the adult assumes in respect of the child.”⁴³ Read in conjunction with the obligation to take account of the best interests of the child (Article 24(2) of the Charter), the Member State should make a balanced and reasonable assessment of all the current and relevant circumstances of the case. “That assessment must take into consideration, *inter alia*, the age at which the child was placed under the Algerian *kafala* system, whether the child has lived with its guardians since its placement under that system, the closeness of the personal relationship which has developed between the child and its guardians and the extent to which the child is dependent on its guardians, inasmuch as they assume parental responsibility and legal and financial responsibility for the child.”⁴⁴ The CJEU also addressed the concerns of the national court regarding the risk of abuse, exploitation and trafficking, and considered that these risks should be taken into account in the context of the assessment of all the relevant circumstances of the case. In this assessment, it may not be assumed that such risks exist merely because the suitability assessment for *kafala* is less extensive than for adoptions, or because the procedure in the 1996 Hague Child Protection Convention has not been applied by a country which did not ratify this Convention. “Such facts must, on the contrary, be weighed against the other relevant elements of” the case.⁴⁵ The CJEU refrained from answering the second preliminary question about the possibility to apply Articles 27 and 35 of the Charter to limit rights in situations of exploitation or abuse, because according to the CJEU this question applies to the situation in which legal guardianship under *kafala* would qualify a child as a direct descendant, which was answered in the negative.⁴⁶

16. The CJEU thus ruled that when the assessment as it is formulated in this judgment leads to the conclusion that if a child placed under *kafala* and its guardians, who are EU citizens, “lead a genuine family life and that that child is dependent on its guardians”, it falls within the scope of Article 3(2)(a) of Directive 2004/38. Read in the light of Articles 7 and 24(2) of the Charter, this child should “in

³⁸ Commission Communication COM(2009) 313 final, point 2.1.2.

³⁹ CJEU 26 March 2019, C-129/18, ECLI:EU:C:2019:248, SM, §§ 55-59.

⁴⁰ CJEU 26 March 2019, C-129/18, ECLI:EU:C:2019:248, SM, § 60 with reference to recital 6 of Directive 2004/38 and CJEU 5 September 2012, C-83/11, ECLI:EU:C:2012:519, *Rahman and Others*, § 32.

⁴¹ CJEU 26 March 2019, C-129/18, ECLI:EU:C:2019:248, SM, §§ 61-64, with reference to CJEU 5 September 2012, C-83/11, ECLI:EU:C:2012:519, *Rahman and Others*, §§ 21-24; CJEU 12 July 2018, C-89/17, ECLI:EU:C:2018:570, *Banger*, §§ 31 and 38-40; CJEU 6 December 2012, C-356/11 and C-357/11, ECLI:EU:C:2012:776, *O. and Others*, §§ 79-80.

⁴² CJEU 26 March 2019, C-129/18, ECLI:EU:C:2019:248, SM, § 65. See Article 52(3) of the Charter.

⁴³ CJEU 26 March 2019, C-129/18, ECLI:EU:C:2019:248, SM, § 66, with reference to ECtHR 4 October 2012, No. 43631/09, *Harroudj v. France* and ECtHR 16 December 2014, No. 52265/10, *Chbihi Loudoudi and Others v. Belgium*.

⁴⁴ CJEU 26 March 2019, C-129/18, ECLI:EU:C:2019:248, SM, §§ 67-69. Citation comes from § 69. Among others reference to CJEU 10 May 2017, C-133/15, ECLI:EU:C:2017:354, *Chavez-Vilchez*, § 70; CJEU 6 December 2012, C-356/11 and C-357/11, ECLI:EU:C:2012:776, *O. and Others*, § 81; CJEU 13 September 2016, C-165/14, ECLI:EU:C:2016:675, *Rendón Marín*, § 85; CJEU 13 September 2016, C-304/14, ECLI:EU:C:2016:674, CS, § 41.

⁴⁵ CJEU 26 March 2019, C-129/18, ECLI:EU:C:2019:248, SM, § 70.

⁴⁶ CJEU 26 March 2019, C-129/18, ECLI:EU:C:2019:248, SM, §§ 74-76.

principle [...] be granted a right of entry and residence” in the host Member State where his guardians live. In this assessment it should also be taken into account that his “guardians are in fact prevented from living together in that Member State because one of them is required to remain, with the child, in that child’s third country of origin in order to care for the child”⁴⁷.

VII. Impact of SM v. Entry Clearance Officer, UK Visa Section

7.1 *The emergence of a European family law?*

17. The recognition of a (change in) personal status obtained abroad traditionally belongs to the field of private international law. Depending on the matter (marriage, divorce, filiation, adoption, child protection mechanisms, ...), the rules regarding recognition are enshrined in international conventions, European Union regulations and/or domestic law. Following the decision of the ECtHR in *Loudoudi* and of the CJEU in *MS, kafala* cannot be regarded as a (form of) adoption but must be considered an independent child protection mechanism. Most child protection mechanisms, with the exception of adoption⁴⁸, are regulated by the 1996 Hague Child Protection Convention. The latter has 52 States Contracting States.⁴⁹ Algeria is not a Contracting Party. As a result, *kafala* agreements pronounced in Algeria do not fall within the scope of the 1996 Hague Child Protection Convention. Due to the absence of European Union regulations, the recognition of *kafala* agreements from Algeria are dealt with by domestic private international law rules. Most EU Member States, however, do not know the institution of *kafala* and have no specific domestic regulations in place. As a consequence, characterization difficulties arise. In Belgium, for example, we see that *kafala* is sometimes converted into foster care⁵⁰, but *kafala* agreements can also be recognized as such. If the *kafala* agreement is contracted by a notary, the receiving authorities in Belgium are forced to conduct a profound examination of the content of the foreign document (‘conflict of laws test’) bearing in mind the rules regarding evasion of law and the public policy exception.⁵¹ If the *kafala* agreement is pronounced by a judge, the Belgian authorities can recognize the judgment after having established that none of the grounds for refusal mentioned in Article 25 of the Belgian Code of Private International Law are present.⁵² The problem with the recognition of a *kafala* agreement as a self-standing legal institution is that the legal consequences in Belgium are unclear.

18. In an EU context, *SM* could potentially remedy some of these issues through the emergence of an obligation to recognize certain relationships for the purposes of EU law. In *SM*, and earlier in *Coman*, the CJEU does so by defining which relationships are eligible for granting a residence right under EU law and therefore should be recognized by the Member States in an EU law context. This case law further limits the competence of the Member States which in principle decide autonomously which relations they recognize and under which conditions they do so. This was already limited as a result of the family reunification rights that are attached to the exercise of free movement by EU citizens.⁵³ *SM* prescribes that Member States should acknowledge the family life that exists between EU citizens and the children over which they have legal guardianship on the basis of the *kafala* system, regardless of their national qualification of *kafala* and whether they in principle recognize the legality

⁴⁷ CJEU 26 March 2019, C-129/18, ECLI:EU:C:2019:248, *SM*, §§ 71-72. Emphasis added by the authors.

⁴⁸ Article 4, b) of the 1996 Hague Child Protection Convention.

⁴⁹ <https://www.hcch.net/en/instruments/conventions/status-table/?cid=70> (last consulted on 21 October 2019).

⁵⁰ S. Corneloup, B. Heiderhoff, C. Honorati, F. Jault-Seseke, T. Kruger, C. Rupp, H. van Loon and J. Verhellen, “Children On The Move: A Private International Law Perspective”, *Tijdschrift@ipr.be* 2017, No. 2, (69) 98 (the study is also available at: <http://www.europarl.europa.eu/studies>) and H. Englert and J. Verhellen, “Rapport Belge” in M.-C. Foublets (ed.), *Le Code Marocain de la Famille en Europe. Bilan comparé de dix ans d’application*, Brussels, la Chartre, 2016, (257) 331-332.

⁵¹ Article 27 of the Belgian Code of Private International Law.

⁵² H. Englert and J. Verhellen, “Rapport Belge” in M.-C. Foublets (ed.), *Le Code Marocain de la Famille en Europe. Bilan comparé de dix ans d’application*, Brussels, la Chartre, 2016, (257) 331.

⁵³ C. Berneri, *Family Reunification in the EU: The Movement and Residence Rights of Third Country National Family Members of EU Citizens*, Oxford, Bloomsbury Publishing, 2017, 3.

of this legal institution or not.⁵⁴ In *Coman*, similarly, the CJEU decided that in a free movement context same-sex relationships should be treated in the same way as heterosexual relationships. This implies that the exercise of free movement by an EU citizen requires the host Member State to grant a residence right to his/her/* third-country national partner of the same gender, regardless of any national qualification of gay marriage, and even when national constitutional law prohibits the union between two people of the same sex.⁵⁵

19. To substantiate its reasoning, the CJEU builds on case law of the ECtHR on the interpretation of family life under Article 8 ECHR. As was pointed out before (cf. *supra*), the ECtHR decided in *Loudoudi* that the relationship between a child that is placed under *kafala* and his legal guardians can be regarded as family life that is protected by Article 8 ECHR, if the assessment of the relevant facts and circumstances of the case indicates the existence thereof.⁵⁶ If this family life exists, this creates the negative obligation for Member States to refrain from arbitrary intervention, and a positive obligation to enable the development of family ties and the integration of the child in his family.⁵⁷ The ECtHR does not impose an obligation on the Member States to put *kafala* on the same level as adoption, nor does it require the State to provide a residence right to the child.⁵⁸ The CJEU, on the other hand, concluded that when family life exists, a child ‘in principle’ should be granted a residence rights under Article 3(2)(a) of Directive 2004/38.⁵⁹ A similar reasoning was followed in *Coman*, where the CJEU reiterated that family reunification rights under Directive 2004/38 should be interpreted and applied in accordance with the right to family life laid down in Article 7 of the Charter and Article 8 ECHR.⁶⁰ It observed that same-sex relationships are protected by Article 8 ECHR⁶¹ and concluded that family life, and more particularly the interpretation of a ‘spouse’ in an EU context should be the same as for the ECtHR. Therefore, same-sex relationships should enjoy the same protection as heterosexual relationships.⁶²

20. Following the reasoning of the CJEU in these two cases, it is argued that all (family) relationships of an EU citizen who exercised his/her/* right to free movement that are protected under Article 8 ECHR can be eligible for family reunification under EU law. This eligibility follows either from a broad interpretation of relationships protected by Article 2(2) of Directive 2004/38 (*Coman*), or by applying the category of ‘other family members’ whose entry and residence should be facilitated according to Article 3(2) of Directive 2004/38 (*SM*). If so, this might be seen as the construction of a European family law that is shaped by the CJEU on the basis of the case law of the ECtHR, for the purpose of the application of EU free movement law.

⁵⁴ CJEU 26 March 2019, C-129/18, ECLI:EU:C:2019:248, *SM*.

⁵⁵ CJEU 5 June 2018, C-673/16, ECLI:EU:C:2018:385, *Coman*; Rijpma, J. J. (2019). You Gotta Let Love Move, ECJ 5 June 2018, Case C-673/16, *Coman*, Hamilton, Accept v Inspectoratul General pentru Imigrări. *European Constitutional Law Review*, 1-16; Tryfonidou, A. (2019). The EU Top Court Rules that Married Same-Sex Couples Can Move Freely Between EU Member States as “Spouses”: Case C-673/16, Relu Adrian Coman, Robert Clabourn Hamilton, Asociația Accept v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne. *Feminist Legal Studies*, 1-11; H. Kroeze and B. Safradin, “Een overwinning voor vrij verkeersrechten van regenboogfamilies in Europa: het langverwachte *Coman* arrest”, *Nederlands Tijdschrift voor Europees Recht*, 2019, No. 1-2, 51-59.

⁵⁶ ECtHR 16 December 2014, No. 52265/10, *Chbihi Loudoudi and Others v. Belgium*, § 78.

⁵⁷ CJEU 26 March 2019, C-129/18, ECLI:EU:C:2019:248, *SM*, § 66; ECtHR 4 October 2012, No. 43631/09, *Harroudj v. France*, §§ 40-41 and ECtHR 16 December 2014, No. 52265/10, *Chbihi Loudoudi and Others v. Belgium*, §§ 88-89.

⁵⁸ This is in accordance with established case law, e.g. ECtHR 28 May 1985, No. 9214/80, 9473/81 and 9474/81, *Abdulaziz, Cabales and Balkandali v United Kingdom*, § 68; ECtHR 31 January 2006, No. 50435/99, *Rodrigues da Silva and Hoogkamer v Netherlands*, § 39 and ECtHR 3 October 2014, No. 12738/10, *Jeunesse v Netherlands* § 107.

⁵⁹ CJEU 26 March 2019, C-129/18, ECLI:EU:C:2019:248, *SM*, § 71.

⁶⁰ Again, following Article 52(3) of the Charter.

⁶¹ With reference to ECtHR 7 November 2013, No. 29381/09 and 32684/09, *Vallianatos and Others v. Greece*, § 73 (CE:ECHR:2013:1107JUD002938109); ECtHR 14 December 2017, No. 26431/12, 26742/12, 44057/12, and 60088/12, *Orlandi and Others v. Italy*, § 143 (CE:ECHR:2017:1214JUD002643112).

⁶² CJEU 5 June 2018, C-673/16, ECLI:EU:C:2018:385, *Coman*, §§ 48-51.

21. Before the *SM* judgment, *kafala* agreements could be recognized under private international law (recognition of personal status under civil law), but this recognition was not necessarily accompanied by the conferral of a residence right in the State of the child's guardians.⁶³ This principle was confirmed by the *Loudoudi* case, which made it clear that children placed under *kafala* care are not automatically entitled to a residence right in the State of their *kafil* (cf. *supra*). The *SM* judgment alters this situation for the EU. Since children placed under *kafala* care have to be regarded as 'other family members' within the meaning of Article 3(2) of Directive 2004/38, these children are in principle entitled to reside in the Member State of their *kafil* who exercised his/her/* right to move freely within the EU, provided that genuine family life is established.

7.2 Introduction of a new recognition mechanism?

22. Immigration authorities often – if not always – require proof of kinship when confronted with a request for family reunification. Kinship can be proven by handing over a marriage certificate, birth certificate, adoption order, *kafala* agreement, foster care arrangement, etc. The recognition of these documents traditionally belongs to the field of private international law. After having examined the authenticity of the document (is the document real, not falsified?), the formal and substantive validity will be checked (what about the content of the document?). In *SM*, the role of private international law in this procedure is neglected. Instead, the validity of the relationship between the applicants is considered to be a matter of human rights law: the right to respect for private life (Article 8 ECHR) and the right of the child to have his/her/* best interests taken into account (Article 3 CRC) turn out to be crucial for the CJEU.

23. The CJEU made it clear that relationships falling within the notion of Article 8 ECHR are eligible for family reunification (cf. *supra*). It follows from the case law of the ECtHR that “*the existence or non-existence of ‘family life’ is essentially a question of fact depending upon the real existence in practice of close personal ties*”⁶⁴. Effective personal ties are decisive for the existence of a *de facto* family life between an adult and a child without the presence of biological ties or a recognized legal relationship.⁶⁵ If EU law follows this definition of family life, family reunification in a free movement context requires the host Member State of the EU citizen to determine whether the applicants lead a genuine family life.⁶⁶ In the case of *kafala*, the existence of a *de facto* family life will not be difficult to prove. First, a foreign authority (a judge or notary) has awarded the *kafils* parental authority making the child dependent on his/her/* *kafil(s)*.⁶⁷ Second, and more important, the *kafil(s)* often already exercised this parental authority (in the country of origin or the receiving State) and formed a family with the *makfoul* with the intention of continuing their life together. The impact of this approach on private international law competence of Member States to decide on the recognition of foreign documents is not clear. Does this competence remain intact? Can a fault in the documents be remedied by proving genuine family life? Or does the recognition of documents add to the evidence for the existence in family life? In that case, the impact of the CJEU case law on Member State competence to recognize family relationships established abroad may be tempered by their discretion to accept foreign documents or not.

⁶³ S. Corneloup, B. Heiderhoff, C. Honorati, F. Jault-Seseke, T. Kruger, C. Rupp, H. van Loon and J. Verhellen, “Children On The Move: A Private International Law Perspective”, *Tijdschrift@ipr.be* 2017, No. 2, (69) 98 (the study is also available at: <http://www.europarl.europa.eu/studies>).

⁶⁴ ECtHR 12 July 2001, No. 25702/94, *K. and T. v. Finland*, § 150.

⁶⁵ ECtHR 28 June 2007, No. 76240/01, *Wagner and J.M.W.L. v. Luxembourg*, § 117; ECtHR 20 May 2010, No. 16318/07, *Moretti and Benedetti v. Italy*, §§ 48-52; ECtHR 17 January 2012, No. 1598/06, *Kopf and Liberda v. Austria*, § 37 and ECtHR 16 July 2015, No. 39438/13, *Nazarenko v. Russia*, § 57.

⁶⁶ CJEU 26 March 2019, C-129/18, ECLI:EU:C:2019:248, *SM*, §§ 73 and 78.

⁶⁷ See also J. Malingreau, “International Kafala: A Right for the Child to enter and Stay in the EU Member States?”, *European Journal of Law Reform* 2014, Vol. 16, No. 2, (401) 411.

7.3 The role of the best interests of the child

24. Another element that is relevant in the recognition of a *kafala* relationship, is the obligation to take account of the best interests of the child, which derives from Article 3 CRC and Article 24(2) of the Charter. The child's best interests-principle requires that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. The Advocate General Campos Sánchez-Bordona made it clear that in *kafala* proceedings this principle requires that the issuing and the receiving State cooperate in determining whether the placement serves the best interests of the child. The obligation to cooperate also follows from Article 29 et seq. of the 1996 Hague Child Protection Convention. The failure to respect the obligation to cooperation in international child protection cases gives ground to deny recognition of the child protection measure pronounced abroad.⁶⁸

In the event that no administrative cooperation took place before the *kafala* agreement was made⁶⁹, an examination of the child's best interests can also be conducted at the time recognition of the agreement is sought. Recognizing a foreign judicial decision or authentic instrument contravening the child's best interests would lead to a violation of international public policy and cannot be accepted. Therefore, regardless of whether a common cooperation framework as in the 1996 Hague Child Protection Convention applies, Article 3 CRC and Article 24(2) of the Charter always require that the child's best interest is examined in collaboration with the issuing State of the *kafala* protection measure in question.

25. In the *SM* judgment, the CJEU recognizes the importance of the best interests of the child. The assessment of the interests of the child is not based on Article 3 CRC, but the CJEU does take account of Article 24(2) of Charter, which entails the same obligation applicable to any procedure that involves a child.

7.4 Definition of family members eligible for family reunification under EU law

26. Originally, the beneficiaries 'any other family members' that are included in the personal scope of Directive 2004/38 (Article 3(2)) were understood as family members who do not belong to the 'core' family but still retain close and stable family ties to a Union citizen.⁷⁰ *SM* includes children placed under *kafala* care in this definition, which expands its scope beyond legal bonds between family members, and recognizes the Union citizen's responsibility for the care, education and protection of a person being a member of the household.⁷¹ This reasoning potentially opens up the category of 'other family members' "to a range of relations characterized by household membership and reciprocal responsibilities [...] broader than [family] in textual definitions and traditional conceptions"⁷². The approach of the CJEU thus relies on a modern, flexible and pragmatic idea of family that is not necessarily only defined by biological and legal relationships, but also by other factual and affective bonds that may exist, for instance in a situation of cohabitation in which a common household is maintained.

⁶⁸ Article 23, f of the 1996 Hague Child Protection Convention.

⁶⁹ Because the 1996 Hague Child Protection Convention does not apply; or because the contracting State(s) has not appointed a body competent to handle the requests for cooperation – which is (unfortunately) the case in Belgium.

⁷⁰ Article 3(2)(a) of Directive 2004/38; CJEU 26 March 2019, C-129/18, ECLI:EU:C:2019:248, *SM*, § 60; CJEU 5 September 2012, C-83/11, ECLI:EU:C:2012:519, *Rahman and Others*.

⁷¹ CJEU 26 March 2019, C-129/18, ECLI:EU:C:2019:248, *SM*, § 59.

⁷² F. Strumia, "The Family in EU Law After the *SM* Ruling: Variable Geometry and Conditional Deference", *European Papers* 2019, Vol. 4, No. 1, (389) 390-391.

27. In Belgian case law, an issue was raised that is related to the question on the outer limits of this flexible interpretation of the scope of family reunification under EU law. The cases concerned the question whether residence rights for the partner with whom the EU citizen maintains a ‘durable relationship’ (Article 3(2)(b) of Directive 2004/38) is only available for ‘affective’ durable relationships.⁷³ The text of Directive 2004/38 does not mention the need for the durable relationship to be affective in nature. Following the CJEU’s case law in *Metock*⁷⁴, it may therefore be argued that this is not a requirement for its applicability. This means that potentially anyone whom the EU citizen claims to have durable relationship with could be eligible for a residence right on these grounds, and in the light of *Coman*, these relationships are not limited by gender either (cf. *supra*).⁷⁵ Thus here as well a societal development towards more fluid forms of relationships may be accommodated by EU law through potential eligibility of these relationships for family reunification.⁷⁶

28. An analogy can be drawn with a case that concerns family reunification on the basis of Article 20 TFEU rather than Article 21 TFEU, such as in *SM* and *Coman*.⁷⁷ Article 20 TFEU predominantly acknowledges residence rights derived to the biological or legal parents of children with the nationality of an EU Member State.⁷⁸ In the case of *O. and Others*, however, to which the CJEU also refers in *SM*⁷⁹, the CJEU inquired the possibility to acknowledge a residence right to the stepparent of a child with Swedish citizenship, without a biological or legal relationship between them. In this case, the CJEU concluded that the departure of the stepparent would not deprive the child of the genuine enjoyment of the substance his rights as an EU citizen, so no residence right was conferred.⁸⁰ The precedent nevertheless implies that it is possible for non-related family members of EU citizens to derive a residence right from Article 20 TFEU as well.⁸¹ *SM* and *Coman* fit perfectly in this line.

29. Considering these developments, the potential scope of family reunification with EU citizens is quite broad. Nevertheless, the reasoning of the CJEU to acknowledge this protection is consistent and coherent. In *Ruiz Zambrano*, it considered that the refusal of a residence permit to the Colombian father of Belgian children would deprive those children of the genuine enjoyment of the substance of rights which they enjoy by virtue of being an EU citizen.⁸² Otherwise, the child – who is a citizen of the Union – is forced “to leave not only the territory of the Member State of which he is a national but also

⁷³ H. Kroeze, “De zin van het gezinsleven: gezinshereniging op grond van een ‘duurzame relatie’ en de implicaties van rechtsmisbruik”, *Tijdschrift voor Vreemdelingenrecht* 2019, No. 3, 258-267 – A commentary on national case law of the Belgian Raad voor Vreemdelingenbetwistingen. Cases of 15 February 2018, no. 199.781; 24 August 2017, no. 190.896; 21 August 2018, no. 207.913.

⁷⁴ CJEU 25 July 2008, C-127/08, ECLI:EU:C:2008:449, *Metock*.

⁷⁵ CJEU 5 June 2018, C-673/16, ECLI:EU:C:2018:385, *Coman*.

⁷⁶ H. Kroeze, “De zin van het gezinsleven: gezinshereniging op grond van een ‘duurzame relatie’ en de implicaties van rechtsmisbruik”, *Tijdschrift voor Vreemdelingenrecht* 2019, No. 3, 258-267.

⁷⁷ They are two tranches of a two-step system of family reunification rights under EU law. See S. Adam and P. van Elsuwege, “Citizenship Rights and the Federal Balance between the European Union and its Member States: Comment on Dereci”, *European Law Revue* 2012, Vol. 37, No. 2, (176) 180-181; R. O’Gorman, “Ruiz-Zambrano, McCarthy and the Purely Internal Rule”, *Irish Jurist* 2011, Vol. 46, (221) 225-226; H. Kroeze, “The Substance of Rights – New Pieces of the *Ruiz Zambrano* Puzzle”, *European Law Review* 2019, Vol. 44, No. 2, (238) 240-242 and M. Haag, “Case C-133/15 Chávez-Vilchez and Others – Taking EU Children’s Rights Seriously”, *European Law Blog*, <https://europeanlawblog.eu/2017/05/30/case-c-13315-chavez-vilchez-and-others-taking-eu-childrens-rights-seriously/>, Article posted on 30 May 2017.

⁷⁸ CJEU 9 May 2018, C-82/16 ECLI:EU:C:2018:308, *KA*, § 65 ; H. Kroeze, “The Substance of Rights – New Pieces of the *Ruiz Zambrano* Puzzle”, *European Law Review* 2019, Vol. 44, No. 2, 240-242.

⁷⁹ CJEU 26 March 2019, C-129/18, ECLI:EU:C:2019:248, *SM*, §§ 64 and 68.

⁸⁰ CJEU 6 December 2012, C-356/11 and C-357/11, ECLI:EU:C:2012:776, *O. and Others*.

⁸¹ Also see CJEU 8 May 2018, C-82/16, ECLI:EU:C:2018:308, *KA*, § 65 in which the Court confirms that relationships between adults can exceptionally also qualify as a relationship of dependency that gives rise to a residence right derived from Article 20 TFEU. It depends on the meaning of family life who qualifies for that residence title. Possibly even friends who cohabit together as a family and who qualify under family life as defined by the European Court of Human Rights would then be entitled to a residence right under Article 21 or 20 TFEU. See H. Kroeze, “De zin van het gezinsleven: gezinshereniging op grond van een ‘duurzame relatie’ en de implicaties van rechtsmisbruik”, *Tijdschrift voor Vreemdelingenrecht* 2019, No. 3, 258-267.

⁸² CJEU 8 March 2011, C-34/09, ECLI:EU:C:2011:124, *Ruiz Zambrano*, § 42.

the territory of the Union as a whole".⁸³ In *SM*, the CJEU applies the same reasoning. At the end of the judgment, it envisions the conferral of a residence right to the extended family member – in casu the child placed under *kafala* – when the refusal of this residence permit would prevent the guardians of the child to live together in their Member State of residence “because one of them is required to remain, with the child, in that child’s third country of origin in order to care for the child”.⁸⁴ *SM* thus exactly mirrors *Ruiz Zambrano*. Where in *Ruiz Zambrano* the possibility of the child to reside on the territory of the European Union was in question, in *SM* the possibility of the legal guardian to reside on the territory of the European Union is protected.

30. The CJEU thus demonstrates a strong sense of territoriality, which contrasts the case law of the ECtHR. Protection by Article 8 ECHR does not impose a general obligation on the Member States of the Council of Europe to respect the preference of a family for a country to exercise their family life there.⁸⁵ Protection of EU law, on the other hand, explicitly *does* protect residence rights of EU citizens on the territory of the Union, *and* to exercise family life there.⁸⁶ If the continuation of that residence right requires the acknowledgment of residence rights to family members as well, that is a collateral, but inevitable consequence of the importance of the possibility to reside on EU territory as an EU citizen. EU citizenship is therefore also contextualized as “*the right not to be removed from the territory of the Union*”⁸⁷, which seems to be a very narrow understanding of citizenship.

7.5 Convergence in family reunification?

31. Another parallel between family reunification derived from Article 21 TFEU and Article 20 TFEU respectively lies therein that the CJEU has become very specific concerning the criteria that need to be taken into account in the assessment of whether a residence right should be acknowledged. It follows from *SM* that for the application of Article 21 TFEU and/or the pertaining Directive 2004/38, the existence of family life is decisive. To derive rights from Article 20 TFEU, on the other hand, dependency between the EU citizen and the third-country national is the applicable criterion. In both cases, the CJEU is very specific about the factors that should be taken into account for these assessments. In *SM*, the CJEU considered that the Member State

*“must take into consideration, inter alia, the age at which the child was placed under the Algerian kafala system, whether the child has lived with its guardians since its placement under that system, the closeness of the personal relationship which has developed between the child and its guardians and the extent to which the child is dependent on its guardians, inasmuch as they assume parental responsibility and legal and financial responsibility for the child”*⁸⁸.

In *Chavez-Vilchez*, on the other hand, which concerns the acknowledgment of a residence right on the basis of Article 20 TFEU, the CJEU considered that the Member State should assess whether

“such a relationship of dependency [exists] ... In reaching such a conclusion, account must be taken, in the best interests of the child concerned, of all the specific circumstances, including the age of the child, the child’s physical and emotional development, the extent of his emotional

⁸³ CJEU 8 March 2011, C-34/09, ECLI:EU:C:2011:124, *Ruiz Zambrano*, § 44; CJEU 15 November 2011, C-256/11, ECLI:EU:C:2011:734, *Dereci*, § 66.

⁸⁴ CJEU 26 March 2019, C-129/18, ECLI:EU:C:2019:248, *SM*, § 72.

⁸⁵ ECtHR 28 May 1985, No. 9214/80, 9473/81 and 9474/81, *Abdulaziz, Cabales and Balkandali v United Kingdom*, § 68; ECtHR 31 January 2006, No. 50435/99, *Rodrigues da Silva and Hoogkamer v Netherlands* § 39 and ECtHR 3 October 2014, No. 12738/10, *Jeunesse v Netherlands* § 107.

⁸⁶ CJEU 25 July 2008, C-127/08, ECLI:EU:C:2008:449, *Metock*.

⁸⁷ P.J. Neuvonen, “EU citizenship and its ‘very specific’ essence: Rendón Marin and CS”, *Common Market Law Review* 2017, Vol. 54, No. 4, (1201) 1202.

⁸⁸ CJEU 26 March 2019, C-129/18, ECLI:EU:C:2019:248, *SM*, § 69.

ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for that child's equilibrium.”⁸⁹

Despite some differences that self-evidently exist due to the different criteria that are used for both entitlements to family reunification, the similarities are quite striking.

<i>SM</i>	<i>Chavez-Vilchez</i>
Age of the child	Age of the child
Closeness of the personal relationship	Emotional ties with both parents
Child is dependent on its guardians	Whether a relationship of dependency exists
Parental, legal and financial responsibility	Legal, financial and emotional dependency
The interests of the child	The interests of the child

It is thus argued that the criteria to qualify under the two tranches of family reunification derived from Article 21 and 20 TFEU respectively, are converging.

VIII. Conclusion

32. The increase in international relations and families has confronted EU Member States with the system of *kafala*. Due to its unknown nature, problems sometimes occur when the people who were granted parental responsibility (*'kafils'*) want to rely on EU law for family reunification with 'their' child (*'makfoul'*) in the Member State where they exercise their free movement rights. It follows from the rules of private international law that it is up to the Member States to decide how family relations established abroad are recognized in the national legal order. In doing so, they must respect human rights law.

33. The case law of the ECtHR makes it clear that the relationship between the *makfoul* and the *kafil(s)* can be regarded as family life that is protected by Article 8 ECHR, if the assessment of the relevant facts and circumstances of the case indicate the existence thereof. If it has been established that family life exists, States are under the obligation to enable the development of family ties and the integration of the child in his/her/* family.⁹⁰ The ECtHR does not go as far as imposing an obligation on the contracting States to put a *kafala* agreement on the same level as adoption, nor does it require of its States to provide a particular residence permit to the child. As a consequence, children placed under *kafala* must rely on national legislation for family reunification. If this legislation does not provide for family reunification with children placed under *kafala* care, they may face a long legal battle before being granted any form of recognition and a right to reside within the EU can be expected.

34. The judgment of the CJEU in *SM* contrasts the case law of the ECtHR and complements it as well. The ECtHR departs from the competence of States to decide on the entry and access of non-nationals on their territory. Therefore, if family life can be exercised in another country, the refusal of family reunification does not constitute an unlawful interference with the right to family life.⁹¹ The CJEU, on the other hand, puts an emphasis on the right of EU citizens to reside on EU territory. Therefore, in contrast to the ECtHR, it does *not* consider the possibility of leaving EU territory to exercise rights outside of the EU. This ratio led to the judgment in *SM*. If genuine family life exists

⁸⁹ Among others reference to CJEU 10 May 2017, C-133/15, ECLI :EU:C:2017:354, *Chavez-Vilchez*, § 71.

⁹⁰ ECtHR 4 October 2012, No. 43631/09, *Harroudj v. France* and ECtHR 16 December 2014, No. 52265/10, *Chbihi Loudoudi and Others v. Belgium*.

⁹¹ ECtHR 28 May 1985, No. 9214/80, 9473/81 and 9474/81, *Abdulaziz, Cabales and Balkandali v United Kingdom*, § 68; ECtHR 31 January 2006, No. 50435/99, *Rodrigues da Silva and Hoogkamer v Netherlands* § 39 and ECtHR 3 October 2014, No. 12738/10, *Jeunesse v Netherlands* § 107.

between the *kafil(s)* and the *makfoul*, family reunification with a child placed under *kafala* care is possible under Article 3(2) of Directive 2004/38. To substantiate the expansion of the scope of family reunification under EU law for children placed under *kafala*, the CJEU strongly relies on the case law of the ECtHR, which indicates the emergence of a European family law that is shaped by the CJEU on the basis of the case law of the ECtHR, for the purpose of the application of EU law free movement rights. As a result, the personal scope of family reunification under EU law is potentially significantly broadened to also include non-blood related (family) relationships. This development reflects the significance the CJEU attaches to possibility to exercise family life within the meaning of Article 8 ECHR and 7 of the Charter without affecting the right to reside on the territory of the Member States. A broad definition of the right to family reunification is necessary to realize the effectiveness of this right to reside in the EU.

35. *SM* solves an important issue. By taking the right to family life as a starting point to define the scope of family reunification under Article 3(2) TFEU, *SM* potentially overcomes discrepancies between Member States in the relationships they recognize under private international law for the purpose of family reunification. The approach does justice to the obligation of Member States to take due account of the best interests of the child in all decisions, and is well received from the perspective of human rights protection, but it does not tackle all problems concerning *kafala*. The main limitation lies in the fact that the *SM* case only offers a solution in the event that the *kafil(s)* has/have used their right to move freely within the EU. In the event that the person seeking family reunification is a third country national or an EU-citizen who has not used the right to move freely, the reasoning set out by the CJEU cannot be invoked. As a result, some families will have to continue their fight to be granted a right to reside within the EU.