

**GLOSS TO THE JUDGEMENT OF THE COURT OF JUSTICE
OF THE EUROPEAN UNION IN CASE C 129/18,
SM *VERSUS* ENTRY CLEARANCE OFFICER, UK VISA SECTION¹**

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ABSTRACT

The right of family members of Union citizens to live with them in the host Member State has always been considered essential for an effective freedom of movement of citizens. However, the provisions of Directive 2004/38/EC² contain a different description of the scope of authority of Union citizens family member, taking advantage of the freedom of movement of persons as to the possibility of accompanying or joining EU citizens taking advantage of the freedom of movement of persons, depending on whether they belong to the circle of “closer” or “distant” family members. This issue acquires particular significance in the context of family members who are not citizens of any Member State of the Union. For individuals belonging to the circle of “closer” family members, the EU legislator grants the subjective right to accompany or join a Union citizen exercising the right of the freedom of movement of persons. In the latter case, the legislator only obliges the host Member States to facilitate entry and residence for such individuals in accordance with their national legislation. The glossed judgment, by

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¹ Judgment of the Court of Justice of the European Union of 26 March 2019, C 129/18, *SM versus* Entry Clearance Officer, UK Visa Section, OJ C 134 of 16th April 2018; hereinafter: judgment C 129/18.

² Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [Text with EEA relevance], OJ L 156 of 30 April 2004; hereinafter: Directive 2004/38/EC.

determining the status of individuals under legal guardianship within the framework of the Algerian *kafala* system as a “distant” family member of a Union citizen, clearly touches upon a significant issue in the context of the Union’s freedom of movement of persons.

Key words: family members, *kafala*, free movement of persons, citizenship of the European Union, direct descendants

THESIS:

1. The concept of a “direct descendant” of a citizen of the Union referred to in Article 2(2)(c) of Directive 2004/38/EC of the European Parliament, and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC, and 93/96/EEC must be interpreted as not including a child who has been placed in the permanent legal guardianship of a citizen of the Union under the Algerian *kafala* system, because that placement does not create any parent-child relationship between them.

2. It is for the competent national authorities to facilitate the entry and residence of such a child as one of the other family members of a citizen of the Union pursuant to Article 3(2)(a) of that directive, read in the light of Article 7 and Article 24(2) of the Charter of Fundamental Rights of the European Union, by carrying out a balanced and reasonable assessment of all the current and relevant circumstances of the case which takes account of the various interests in play, and, in particular, of the best interests of the child concerned. In the event that it is established, following that assessment, that the child and its guardian, who is a citizen of the Union, are called to lead a genuine family life and that the child is dependent on its guardian, the requirements relating to the fundamental right to respect-family life, combined with the obligation to take account of the best interests of the child, demand, in principle, that child is granted a right of entry and residence in order to enable it to live with its guardian in his or her host member state.

1. INTRODUCTION

The glossed judgment was issued in response to the questions referred for a preliminary ruling addressed to the Court of Justice of the European Union³ by the Supreme Court of the United Kingdom in the proceedings *SM versus* Entry Clearance Officer, UK Visa Section. The interpretation by the Court of Justice referred to the provisions of Article 2(2)(c) and Article 3(2)(a) of Directive 2004/38/EC, which define specific categories of family members of European Union citizens. Whether a person pertains to the circle of “closer”, or “distant” family members⁴, determines the scope of his or her rights as to the possibility of accompanying or joining a Union citizen exercising the right of the freedom of movement of persons. This issue acquires particular significance in the context of family members who are not citizens of any Member State of the Union.

In accordance with Article 2(2) of Directive 2004/38/EC, the status of a family member of a Union citizen, in addition to a spouse, partner with whom the Union citizen has contracted a registered partnership⁵ and dependent direct relative in the ascending line⁶, is also held by direct descendants who are under the age of 21 or are dependants, or those of the spouse or partner with whom a Union citizen has contracted a registered partnership. They have the right of free movement and residence on the basis of their status as family members of Union citizens⁷. Their

³ Hereinafter: the Court of Justice.

⁴ In the literature on the subject, the division of family members of a Union citizens into “closer” and “distant” is proposed by Dominika E. Harasimiuk, *Skuteczne korzystanie z prawa pobytu przez obywateli UE i członków ich rodzin* [Effectively exercising the right of residence by UE citizens and their family members], *Ius Novum* 1(2016): 65.

⁵ Pursuant to Article 2(2)(b) of Directive 2004/38/EC, a family member is the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage, and in accordance with the conditions laid down in the relevant legislation of the host Member State.

⁶ In accordance with Article 2(2)(d) of Directive 2004/38/EC, family members are also the dependent direct relatives in the ascending line and those of the spouse or partner with whom the Union citizen has contracted a registered partnership.

⁷ Jolanta Bucińska, *Status prawny członka rodziny obywatela Unii Europejskiej* [The legal status of a family member of a European Union citizen], *Roczniki Nauk Prawnych* 2(2009): 66.

rights are acquired automatically and are equal to the rights of Union citizens⁸.

Also, pursuant to Article 3(2) of Directive 2004/38/EC, the host Member States are obliged, in accordance with their national legislation, to facilitate entry and residence of any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 of this Directive who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen, as well as the partner with whom the Union citizen has a durable relationship, duly attested.

The family members indicated in Article 3(2)(a) do not enjoy directly the right, established in Directive 2004/38, to accompany or join the EU citizen⁹. The rights of “distant” family members of a Union citizen only involve the obligation of Member States to facilitate their entry and residence as per their national legislation¹⁰. However, the provisions of Directive 2004/38/WE do not specify how the Member States realise the obligation to facilitate entry and residence, at the same time leaving the Member States freedom in this field. Whereas, the Court of Justice decided that in the case of “distant” family members this obligation demands to treat their application more “favourably” than entry and stay applications of all other third-country nationals¹¹. This means that they have no subjective right to entry and residence in the territory of a Member State. The rights vested in them in relation to such a Member State are only procedural safeguards connected with the possibility of appealing to the court against a negative

⁸ Dominika E. Harasimiuk, *Skuteczne korzystanie...*, 65.

⁹ Valeria Di Comite, *New Trends Concerning the Right of Residence of Familiars of EU Citizens*, *Cogito. Multidisciplinary Research Journal* 3(2016): 27.

¹⁰ Francesca Strumia, *The family in EU Law After SM Ruling: Variable Geometry and Conditional Deference*, *European Papers* 1(2019): 391.

¹¹ Judgment of the Court (Grand Chamber) of 5 September 2012, C 83/11, *Secretary of State for the Home Department v. Muhammad Sazzadur Rahman and Others*, ECLI:EU:C:2012:519.

decision¹². The conclusion expressed in the literature on the subject that the rights of family members covered by the scope of Article 3(2) of Directive 2004/38/EC are considerably smaller than those applicable to “closer” family members is therefore justified¹³.

2. THE FACTS OF THE CASE

The basis for the issue by the Court of Justice of the glossed judgment was the situation of spouses M., French citizens, who are guardians of the plaintiff in the main proceedings, under the Algerian *kafala* system. Mr M. is a French citizen of Algerian descent who has a permanent residence in the United Kingdom. Mrs M. is a French citizen by birth. The couple married in the United Kingdom in 2001 and cannot have children of their own. In 2009 the spouses M. travelled to Algeria in order to be assessed as to their suitability to become guardians of a child under the Algerian *kafala* system. They were assessed positively, and as a result they were declared “suitable” to adopt a child under that system. The plaintiff SM. is a minor citizen of Algeria who was abandoned by her biological parents at birth. By force of the act issued on 22nd March 2011 by the President of the Court in Bufariku (Algeria), SM. was placed under the guardianship of the spouses M., who were assigned parental responsibility under Algerian law. In October 2011, Mr M. returned to the United Kingdom for professional reasons, where he has a permanent right of residence¹⁴. For her part, Ms M. remained in Algeria with SM. After that SM. applied for

¹² Magdalena Gniadzik, *Ewolucja statusu obywateli Unii wobec państwa przyjmującego i państwa pochodzenia w świetle orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej* [The evolution of the status of Union citizens in relation to the host country and country of origin in the context of the case law of the Court of Justice of the European Union], Warsaw: C.H. Beck, 2018 direct access via System Informacji Prawnej Legalis [date of access: 12.02.2020).

¹³ Dominika E. Harasimiuk, *Skuteczne korzystanie...*, 69.

¹⁴ It is worth stressing that the cost to Britain of mass immigration is £16.8 billion every year, whereby for migrants from outside the EEA, the bill was £15.6 billion. On the expenditure for migrants in the United Kingdom see more: <https://migrationobservatory.ox.ac.uk/resources/>.

entry clearance for the United Kingdom as the adopted child of an EEA national. Her application was refused by the Entry Clearance Officer on the grounds that guardianship under the Algerian *kafala* system was not recognised as an adoption under United Kingdom law and that no application had been made for intercountry adoption¹⁵. The action brought by SM. against this decision was dismissed by the First-tier Tribunal (Immigration and Asylum Chamber). In specifying the grounds for its decision, the Tribunal argued that SM. did not satisfy the conditions to be regarded as an adopted child under the United Kingdom rules on immigration or as a family member, extended family member or the adopted child of an EEA national within the meaning of the 2006 Regulations on immigration. The position of the First-tier Tribunal (Immigration and Asylum Chamber) was upheld by the Upper Tribunal to the extent that it concerned the lack of grounds to consider SM. a “family member”. That court argued, however, that in that situation, SM. should be treated as an “extended family member” as provided for in Article 8 of the Regulations on migration. As a result of the appeal made by the Entry Clearance Officer, the Court of Appeal considered that SM. was not a “direct descendant” of a citizen of the Union for the purposes of Article 2(2c) of Directive 2004/38/EC, given that she had not been adopted in a form recognised by United Kingdom law. The Court of Appeal also concluded that SM. could not come within the scope of Article 3(2a) of that directive as one of the “other family members” of a citizen of the Union either.

According to the Supreme Court of the United Kingdom, before which the plaintiff eventually pursued her rights to obtain permission to enter the United Kingdom, SM. must, at the very least, be regarded as one of the “other family members”. However, that court was of the view that Article 3(2)(a) of Directive 2004/38/EC applies only if SM. does not have the right to enter the United Kingdom as a “direct descendant” of a citizen of the Union as referred to in Article 2(2)(c) thereof.

¹⁵ An interesting review of case-law on the free movement of persons, the immigration and asylum law in the United Kingdom was presented by Sadat Sayeed, David Neale, *Immigration and Asylum Case Law in 2018 (Part 2): Developments in Free Movement, Economic Migration, Nationality and Statelessness*, *Judicial Review* 24:2(2019): 93–106, DOI: 10.1080/10854681.2019.162228.

3. REQUESTS FOR A PRELIMINARY RULING

Due to this, the Supreme Court of the United Kingdom decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

1. “Is a child who is in the permanent legal guardianship of a Union citizen or citizens, under *kafala* or some equivalent arrangement provided for in the law of his or her country of origin, a ‘direct descendant’ within the meaning of Article 2(2c) of Directive 2004/38?”
2. Can other provisions in the Directive, in particular Articles 27 and 35, be interpreted so as to deny entry to such children if they are the victims of exploitation, abuse or trafficking or are at risk of such?¹⁶
3. Is a Member State entitled to enquire, before recognising a child who is not the consanguineous descendant of [a citizen of the Union] as a direct descendant under Article 2(2)(c), into whether the procedure for placing the child in the guardianship or custody of that [citizen of the Union] was such as to give sufficient consideration to the best interests of that child?”.

4. THE ASSESSMENT OF THE COURT’S OF JUSTICE POSITION

In the context of the relevant elements of fact in case C 129/18, the position of the Court of Justice to the extent in which it concluded that the specific nature of the relationship established under the Algerian *kafala* system between the child and its guardian does not provide grounds to consider the former as a direct descendant as referred to in Article 2(2)(c) of Directive 2004/38/EC, should be assessed negatively.

Article 2(2)(c) of Directive 2004/38/EC does not directly specify who should be granted the status of a direct descendant, but only indicates which

¹⁶ Distress highlighted by a national court, such as becoming a victim of abuse or human trafficking, or exposure to such a risk is an issue which is significant not only in the context of guardianship of a child under the *kafala* system, but also in the context of adoption, in particular international adoption.

conditions (age, dependence) should be met by a person to be considered as such. By custom, it is assumed that a descendant is a person directly related to a person from a previous generation. As a consequence, not only children, but also grandchildren, great grandchildren etc. are considered descendants. This interpretation is also referred to by the Court of Justice of the European Union in its judgment of 26th March 2019¹⁷. It seems, however, that the precise modifier “direct” used in Article 2(2)(c) of Directive 2004/38/EC demands that we refer not only to lineal kinship, but also to the degree of kinship. This means that, in accordance with Article 2(2)(c) of Directive 2004/38/EC, family members of Union citizens include their children and those of the spouse or partner with whom the Union citizen has contracted a registered partnership. As unequivocally confirmed by the Court of Justice in its judgment, a child adopted by a Union citizen or his or her spouse or partner should be considered in the same manner¹⁸.

Bearing in mind the essence of adoption, this conclusion should be considered correct. The purpose of adoption is to accept a child into one’s family and create better conditions for both its mental and physical development than it had in its previous environment. The rights and responsibilities that arise between the adopted and the adoptive parent are the same as for the relationship between a child and its birth parents¹⁹. This means that adoption creates a legal “parent-child relationship” between the adoptive parent and the child.

Furthermore, as indicated by the communication from the Commission of 2009 on better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States²⁰, also foster children and foster parents having temporary custody of the child may

¹⁷ Recital 52 of the judgment C129/18.

¹⁸ Recital 54 of the judgment C129/18.

¹⁹ Helena Ciepła, In: *Kodeks rodzinny i opiekuńczy. Komentarz* [The Family and Guardianship Code. Comments], K. Piasecki, ed., Warsaw: C.H. Beck, 2011, 832.

²⁰ Communication from the Commission to the European Parliament and the Council of 2 July 2009 on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2009)313 final.

claim the rights vested in them pursuant to the Directive, depending on the strength of the relationship in a given case.

The Koran clearly prohibits adoption within the meaning adopted by the legal systems of European states²¹. In Islamic states there are different forms of guardianship of a child, which include: *tabanni*, *kafala* and *wisayeb*²². The regulations concerning these forms of guardianship of a child are not identical across different Islamic states.

It is indicated in the literature on the subject that *kafala* has a function similar to adoption, while preserving the principles pertaining to Islamic culture²³. It is also indicated that it does not result in such a strong relationship between the child and the guardian's family as adoption does²⁴. In principle, guardianship under the *kafala* system does not lead to the acquisition of rights of children considered legitimate, including rights to inheritance, and is not an obstacle in contracting a marriage. In this context, the lack of grounds to consider *kafala* as equal to adoption should be seen as obvious²⁵.

In the analysed matter, the Court of Justice failed to analyse the circumstance that the minor SM. was abandoned by her birth parents, as well as the fact that under a judgment of the Algerian court, the plaintiff has borne the name of the spouses M. since 2011. Furthermore, the spouses M. undertook to give an Islamic education to the child, keep her fit morally

²¹ Wiesław Bar, Pochodzenie dziecka i władza rodzicielska w prawie rodzinnym państw islamskich [Parentage and parental responsibility in the family laws of Islamic countries], *Studia z Prawa Wyznaniowego* 7(2004): 224.

²² More on the forms of child guardianship in Islam e.g. in Nadjma Yassari, Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law, *American Journal of Comparative Law* 4(2015): 927–962.

²³ Wiesław Bar, Pochodzenie dziecka..., 224.

²⁴ Anna Ślęzak, Adopcja w świetle regulacji prawa muzułmańskiego a zachodnie rozumienie tej instytucji [Adoption in the context of the regulations of Islamic law vs. the Western understanding], In: *Zachód a świat islamu – Zrozumieć innego* [The West and Islam. Understanding the Other], Izabela Kończak, Marta Woźniak, ed., Łódź: Katedra Bliskiego Wschodu i Północnej Afryki Uniwersytetu Łódzkiego, 2012, 132.

²⁵ *To kafala*, as a form of guardianship of a child, Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption cannot be applied. In accordance with its Article 2(2) regards only to those adoptions which create “parent-child relationship” between the parent and the child.

and physically, supplying her needs, looking after her teaching, treating her like natural parents, protecting her, defending her before judicial instances, [and] assuming civil liability for detrimental acts. They are also entitled to obtain family allowances, subsidies and benefits, to sign any administrative and travel documents, and to travel with SM. outside Algeria. As Advocate General noticed in his opinion of 26 February 2019, the present case has nothing to do with the private *kafala*, which does not have strict principles, administered in front of *adul* (notary), but with judicial *kafala*, which is established and approved by the competent court, through the participation of the prosecutor, after prior affirmation of minor desertion²⁶.

The scope of rights and obligations of the spouses M. is therefore identical to the scope of parental responsibility in European states. Through an Algerian *kafāla* arrangement, the *kāfil* will become not only the custodian of the *makfūl*, but also her legal guardian (*wali*)²⁷. The spouses M. perform the same functions in relation to the plaintiff as should be performed by her biological parents. It is clear that a relationship characteristic of a family has been established and is being developed between spouses M. and the plaintiff. These persons are emotionally close, support each other in difficult moments, care about each other and share the joys and challenges of everyday life. Such behaviour is a consequence of living and spending time together. Such efforts are characteristic of the social entity that is family, even though in the circumstances of the case they do not result in the establishment of a parent-child relationship.

In the context of the relevant elements of fact such as in the analysed case, due to the specific nature of the forms of guardianship of a child functioning in Islamic culture, it seems that a child under guardianship under the *kafala* system may be considered a direct descendant. However, that assessment should not be automatic, but it must take into consideration, in every case, whether the child has lived with its guardians since its placement under that system, the closeness of the personal relationship

²⁶ Recital 39 of the opinion of Advocate General Campos Sánchez-Bordona delivered on 26 February 2019 in case C-129/18; <http://curia.europa.eu/juris/document/document.jsf?jsessionid=7CDF92C9F8B970FFBA8A3A867A5CD915?text=&docid=211051&page-Index=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=969259> [date of access: 4.04.2020].

²⁷ Nadjma Yassari, *Adding by Choice...*, 952.

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.

In considering the case, the Court of Justice completely disregarded the fact that granting the plaintiff only the status of a “distant” family member of a Union citizen, may lead to a situation in which a citizen of a Member State will be forced to choose between the possibility of living in the territory of the European Union and being a guardian of a child, leading a family life. Being forced to make such choices may in turn lead to discrediting the essence of Union citizenship²⁸. It cannot be omitted, therefore, that giving SM. the status of “distant” family member, and thus accepting the possibility of refusal of granting the permission to entry and reside in the United Kingdom, can prevent the marriage from taking advantage of freedom of movement of citizens, which is the fundamental right of Union citizens²⁹.

5. CONCLUSIONS

In conclusion, it should be stated that the glossed judgment is an attempt at reconciling the interests of Member States with those of individuals in the context of the current migration crisis. Although the position of the Court of Justice on case C 129/18 might be considered coherent with the previous rulings of the Court of Justice of the European Union regarding guardianship of a child under the *kafala*³⁰ system, given the circumstances of the analysed case, it should be assessed as too conservative.

²⁸ Compare e.g.: judgment of the Court of Justice of 8 March 2009, C-34/09, Gerardo Ruiz Zambrano *versus* Office national de l'emploi [ONEm], OJ C 2011.130.2/1.

²⁹ Mark A.M. Klaassen, Annotatiebij HvJ 26 maart 2019, Zaak C-129/18 (SM), AB Rechtspraak Bestuursrecht, 30(2019): 4; <https://openaccess.leidenuniv.nl/handle/1887/82817> [date of access: 4.04.2020].

³⁰ The issue of guardianship of a child under the *kafala* system has already been the subject of consideration by the European Court of Human Rights in the following matters: the judgment of 4 October 2012, Harroudj *versus* France, CE:ECHR:2012:-1004JUD004363109 and judgment of 16 December 2014, Chbihi Loudoudi and Others *versus* Belgium, CE:ECHR:2014:1216JUD005226510.

It may be assumed with a high degree of probability that if the subject of the questions referred for a preliminary ruling were the situation of a child under a foster relationship, which is known to the systems of European states, the position of the Court of Justice would be different.

Due to all these reasons, the glossed judgement should be assessed negatively.

REFERENCES

- Bar, Wiesław, 2004, Pochodzenie dziecka i władza rodzicielska w prawie rodzinnym państw islamskich, *Studia z Prawa Wyznaniowego*, No. 7: 221–232.
- Bucińska, Jolanta, 2009, Status prawny członka rodziny obywatela Unii Europejskiej, *Zeszyty Nauk Prawnych*, no 2: 57–74.
- Di Comite, Valeria, 2016, New Trends Concerning the Right of Residence of Familiars of EU Citizens, *Cogito. Multidisciplinary Research Journal*, No. 3: 21–36.
- Gniadzik, Magdalena, 2018, Ewolucja statusu obywateli Unii wobec państwa przyjmującego i państwa pochodzenia w świetle orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej, Warsaw: C.H. Beck.
- Harasimiuk, Dominika E., 2016, Skuteczne korzystanie z prawa pobytu przez obywateli UE i członków ich rodzin, *Ius Novum*, No. 1: 63–78.
- Klaassen, Mark A.M., 2019, Annotatiebij HvJ 26 maart 2019, Zaak C-129/18 (SM), *AB RechtspraakBestuursrecht*, 30: 1–5; <https://openaccess.leidenuniv.nl/handle/1887/82817>.
- Piasecki, K., ed., 2011, *Kodeks rodzinny i opiekuńczy. Komentarz*, Warsaw: C.H. Beck.
- Sayed Sadat, Neale David, 2019, Immigration and Asylum Case Law in 2018 (Part 2): Developments in Free Movement, Economic Migration, Nationality and Statelessness, *Judicial Review*, No. 24:2: 93–106, DOI: 10.1080/10854681.2019.162228.
- Strumia, Francesca, 2019, The Family in EU Law After SM Ruling: Variable Geometry and Conditional Deference, *European Papers*, No. 1: 389–393.
- Ślęzak, Anna, 2012, Adopcja w świetle regulacji prawa muzułmańskiego a zachodnie rozumienie tej instytucji, In: *Zachód a świat islamu – Zrozumieć innego*, Izabela Kończak, Magdalena Woźniak, ed., 132–137, Łódź: Katedra Bliskiego Wschodu i Północnej Afryki Uniwersytetu Łódzkiego.
- Yassari, Nadjma, 2015, Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law, *American Journal of Comparative Law*, No. 4: 927–962.