

**SATELLITE SEMINAR
JEAN MONNET CHAIR
EUROPEAN MIGRATION
STUDIES**

DREUFARE

*Drivers of European Family
Reunification*

**March
17**

**IL DIRITTO DI FAMIGLIA NEI PAESI DEL MEDITERRANEO O ARABI ED EFFETTI
SUI RICONGIUNGIMENTI FAMILIARI**

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Codes of personal status or Family codes

- 1. pioneering laws (1917 Ottoman Empire, 1920 Egypt)
- 2. national codes (Jordan 1951, 1976; Syria 1953; Iraq 1959; Morocco 1957-1958; Tunisia 1959)
- Socialist codes (South Yemen 1974; Somalia 1975)
- Islamic awakening (Algeria, Lybia, Kuwayt 1984; North Yemen 1978)
- Standstill (with the exception of Sudan 1991 and some amendments to the existing codes Morocco and Tunisia)
- XXI secolo: (Egypt 2000, Mauritania 2001, Morocco 2004, Algeria e UAE 2005)

polygamy

Directive 2003/86

Article 4. 1. The Member States shall authorise the entry and residence, pursuant to this Directive (...) of the following family members:

(a) the sponsor's spouse;

(...)

In the event of a polygamous marriage, where the sponsor already has a spouse living with him in the territory of a Member State, the Member State concerned shall not authorise the family reunification of a further spouse.

By way of derogation from paragraph 1(c), Member States may limit the family reunification of minor children of a further spouse and the sponsor.

polygamy

art. 29 comma primo ter d.lgs. 286 del 1998 (Testo unico dell'immigrazione)

The reunification of family members is not permitted when the family member whose reunification is sought is married to a foreign national residing legally with another spouse in the national territory.

SUPREMA CORTE DI CASSAZIONE

SEZIONE VI – 1 CIVILE

Ordinanza 14 dicembre 2012 – 28 febbraio 2013, n. 4984

A Moroccan national requests an entry visa in favour of his mother. The woman was married to the applicant's father who is staying in Italy and has requested for recognition of his right to family reunification in favour of another wife. Because of the situation of polygamy that would arise with the entry and residence in Italy of the applicant's mother, the Consulate of Casablanca refused to grant a visa.

The prohibition (art. 29 comma primo ter d.lgs. 286 del 1998) applies to all the applications for family reunification, and does not distinguish the origin of the application. On the contrary **it aims to avoid the emergence in our system of a condition of polygamy**, contrary to our public order, including constitutional order.

It is not necessary for the Administration to prove that the applicant acted on behalf of his or her parent because **the prohibition of polygamy** is not conditioned by factual conditions such as cohabitation or dependent living, but **operates in itself and lasts until the legal termination of one of the marital ties**

kafāla

Morocco - L. n. 15/01

Art. 2. The kafala of an abandoned child, within the meaning of this law, is the commitment to take responsibility for the protection, education and maintenance of an abandoned child as a father would for his child.

Kafala does not give any right to filiation or inheritance.

kafāla

- **Convention on the Rights of the Child (1989)**

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

(...)

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children.

kafāla

Hague Convention of 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children

Article 3

The measures referred to in Article 1 may deal in particular with -

(...)

e) the placement of the child in a foster family or in institutional care, or the **provision of care by kafala** or an analogous institution;

kafāla

C. cass. 7472/2008: the kafala creates a bond that justifies family reunification.

C. cass. 21108/2013: The authorization to enter the national territory, for family reunification, requested in the interest of a minor non-EU citizen **in the care of an Italian citizen** residing in Italy by a kafalah order issued by a foreign judge may not be refused if the minor is dependent on or lives in the country of origin with the Italian citizen or if serious health reasons require that he be personally assisted by the latter

kafāla

- The Hague Convention **is ratified** by the Law No. 101 of 18 June 2015
- In passing the law, the Parliament deleted the **implementation rules** relating to kafāla that had been approved in the first reading by the Chamber of Deputies (A.C. n.1589 B)
- The recognition of kafala measures is no longer automatic, but is subject to a procedure of consultation between States, to be carried out before the kafala is pronounced abroad (only Morocco ratified the Hague convention)

Notarial kafāla (established by adoul)

C. cass. 11/11/2020, n. 25310

The possibility of allowing the minor's entry into Italy and his reunification with his kafil cannot be excluded on the basis of the nature and purpose of the negotiated kafala, but must be assessed on a case-by-case basis

CJEU C 129/18 (*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*)

The concept of a “direct descendant” of a citizen of the Union (Article 2(2)(c) of Directive 2004/38/EC) 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.

However, 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, 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.

kafāla

C. cass. n. 22734/2021) quashed a decision of the Court of Appeal of Rome that had convicted a woman for aiding the illegal immigration of a girl by means of a forged identity document.

The Court of Cassation noted that the **appellate judges had failed to consider the kafala relationship existing between the woman and the girl and to assess if that relationship can be equated to a family relationship.**

This assessment is relevant because, according to consistent case-law, if foreigners enter Italy illegally with their children, they do not commit the offence of aiding illegal immigration.