Moroccan Supreme Court on the HCCH 1996 Child Protection Convention

Among all Arab and Muslim-majority countries, Morocco stands out as the only State to have ratified seven (7) HCCH Conventions. This number of ratifications, comparable to that of other prominent countries such as United States or Japan, speaks volumes about Morocco's commitment to being an integral part of the global network of jurisdictions benefiting from the work of the HCCH on the harmonisation of private international and fostering mutual legal cooperation. The decisions of the Moroccan Supreme Court also reflect these efforts as the Court has shown its willingness to oversight the proper application of the HCCH Conventions (on the application of the 1980 HCCH Convention, see here). The Supreme Court Ruling No. 71 of 7 February 2023 briefly commented on here is another notable example related to the application of the 1996 HCCH Child Protection Convention. The case is also particularly interesting because it concerns the establishment of a *kafala* under Moroccan law for the purpose of relocating the child in another Contracting State (France *in casu*).

The case

The petitioner, a single woman living and working in France (seemingly Moroccan but it is not clear whether she has dual citizenship status), submitted a petition on 31 January 2020 to the Family Division of the First Instance Court (hereafter 'FIC') of Taroudant, in which she expressed her intention to undertake guardianship of an abandoned child (A) – born on 13 May 2019 – by means of *kafala*. The FIC approved the petition by a decree issued on 12 March 2020. Subsequently, the Public Prosecutor filed an appeal against the FIC's decree with the Court of Appeal of Agadir. On 20 January 2021, the Court of Appeal decided to overturn the FIC's decree with remand on the ground that the FIC had failed to comply with the rules laid down in article 33 of the 1996 HCCH Child Protection Convention, in particular the obligatory consultation in case of cross-border placement of the child.

The petitioner appealed to the Supreme Court arguing that:

1) The petitioner satisfied all the stipulated requirements under Moroccan law for the *kafala* of an abandoned child (notably the Law No. 15.01 of 13 June 2002 on the *kafala* of abandoned children, in particular article 9);

2) The Public Prosecutor failed to invoke the 1996 HCCH Convention during the proceedings before the FIC;

3) While article 33 might be applicable to countries such as Belgium and Germany, where *kafala* is not recognized, the situation differs in France, making the application of article 33 irrelevant in this context;

4) the Moroccan legislature, through the Law of 2002, has established the procedure for monitoring the well-being of children placed under *kafala* abroad, along with the ensuring the fulfilment of the caregiver's o obligations. Additionally, the 2002 Law on *kafala* was adopted within an international context dedicated to the protection of children, as reflected in the ratification by Morocco in 1993 of UN Child Convention of 1989.

The Ruling

The Supreme Court dismissed the appeal by ruling as follows:

"Pursuant to article 33 of the HCCH 1996 Child Protection Convention – ratified by Morocco on 22 January 2003 […]:

(1) If an authority having jurisdiction under Articles 5 to 10 contemplates the placement of the child in a foster family or institutional care, or the provision of care by *kafala* or an analogous institution, and if such placement or such provision of care is to take place in another Contracting State, it shall first consult with the Central Authority or other competent authority of the latter State. To that effect it shall transmit a report on the child together with the reasons for the proposed placement or provision of care.

(2) The decision on the placement or provision of care may be made in the requesting State only if the Central Authority or other competent authority of the requested State has consented to the placement or provision of care, taking into account the child's best interests.

Therefore, since, according to the Constitution, the provisions of the [HCCH] Convention take precedence over the provisions of domestic law, including Law No. 15. 01 […], the Court of Appeal provided a sound justification for its decision when it relied on [Article 33] [which] mandates prior consultation with the central authority or other competent authority in France where the appellant resides and works, and considered that the failure of the FIC's decree to comply with the requirements of [Article 33] constituted a violation of the law leading to its decision to overturn the *kafala* decree".

Comment

The case is particularly important because, to the author's knowledge, it is the first Supreme Court's decision to apply the 1996 HCCH Child Protection Convention since its ratification by Morocco in 2002 (Royal Decree [Dhahir] of 22 January 2003 published in the Official Gazette of 15 May 2003). The Convention is often given as an example of successful accommodation of religious law in cross-border situations, since it not only specifically mentions *kafala* as a measure of protection of children, but also it "makes it possible for children from countries within the Islamic tradition to be placed in family care in Europe, for example, under controlled circumstances. (H van Loon, "The Accommodation of Religious Laws in Cross-Border Situations: The Contribution of the Hague Conference on Private International Law", *Cuadernos de Derecho Transnacional* (2010) Vol. 2(1) p. 264).

In this regard, article 33 of the Convention plays a central role as it establishes a specific procedure for an obligatory prior consultation between the authorities of the State of origin and the authorities of the receiving State, the failure of which is sanctioned by refusal to recognise the *kafala* decree (Explanatory Report, para. 143, p. 593). The Practical Handbook on the Operation of the HCCH 1996 Child Protection Convention qualifies the rules under article 33 as "*strict* rules which *must be complied* with before th[e] placement [of the child in a foster family or institutional care, or the provision of care by *kafala* or an analogous institution] can be put into effect" (para. 13.33, p. 151. Emphasis added).

In the case commented here, the Supreme Court meticulously adhered to the

aforementioned guidelines. Firstly, the Court stood by its case law underscoring the primacy of international conventions, and in particular the HCCH Conventions, over domestic law (see e.g., Ruling No. 283 of 2 June 2015 (Case No. 443/2/1/2014), Ruling No. 303 of 28 July 2020 (Case No. 629/2/2/2018), both dealing with the HCCH 1980 Child Abduction Convention. On these cases, see here). Secondly, the Supreme Court upheld the Court of Appeal's decision, asserting that the failure to use the procedure under article 33 of the 1996 HCCH Child Protection Convention warranted the overturning of the FIC's *kafala* decree.

This aspect of the ruling holds particular significance as lower courts have not always consistently demonstrated sufficient awareness of Morocco's obligations under the1996 HCCH Conventions. Indeed, some lower court decisions show that, sometimes, *kafala* decrees involving cross-border relocation of the child have been issued without mentioning or referring to the 1996 HCCH Convention (see *e.g.* Meknes Court of Appeal, Ruling No. 87 of 14 January 2013 granting *kafala* of a child to a Franco-Moroccan couple and allowing the couple to take the child out of Morocco. See also, the decision of Antwerp Court of Appeal of 16 May 2016 recognizing and declaring enforceable under Belgian domestic law a Moroccan *kafala* decree despite the fact that the procedure mandated by article 33 was not used in the State of origin). Moreover, Moroccan lower court decisions further indicate that the courts' main concern has often centred around whether the child's Islamic education and belief would be affected by the relocation of the child abroad (e.g. Meknes Court of Appeal, Ruling No. 87 of 14 January 2013 (*ibid*); *idem*, Ruling No. 19 of 7 January 2013 granting *kafala* of a Moroccan child to an American couple of Pakistani origins. On this issue in general, see Katherine E. Hoffman, "Morocco" *in* N. Yassari et al. (eds.), *Filiation and Protection of Parentless Children* (T.M.C. Asser, 2019) pp. 245ff).

Therefore, in deciding as it did, the Supreme Court emphasises the importance of respecting the procedure prescribed by article 33 before issuing a *kafala* decree involving cross-border placement. Compliance with this procedure ensures the recognition and enforcement of *kafala* decrees in all other Contracting States, thereby safeguarding the best interests of the child (The Practical Handbook, para. 13.33, p. 151).