RECOGNITION OF KAFALA AND CHILD MARRIAGE IN FAMILY LAW AND MIGRATION LAW: PRIVATE INTERNATIONAL LAW BRIDGING THE GAP?

Leontine Bruijnen





Responsible publisher: Peter Immink

© 2025 Wolters Kluwer Belgium nv/sa Text and data mining are not permitted.

Ragheno Business Park Motstraat 30 2800 Mechelen

Help & Support Center

Motstraat 30 2800 Mechelen Tel.: 015 78 76 00

wkbe.be/klantendienst wkbe.be/serviceclient www.wolterskluwer.be

Besides the exceptions expressly provided by law, no part of this this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior written permission of the publisher.

No part of this publication may be used or stored in any application using artificial intelligence (AI) or similar application, including use for the purpose of training an AI application.

Use of (parts of) the content of this publication for text and data mining is not permitted.

D/2025/2664/211 ISBN: 978-94-03-03997-8 BP/DOCKAFA-BI25001

Table of contents

Preface		V
List of a	abbreviations	XVII
Part I:	Introduction and methodology	1
I.1		3
I.2	Background, problem statement and state of the art	5
I.3	Research objective and central research question	9
I.4	Concepts	10
	I.4.1 Kafala	10
	I.4.2 Child marriage	13
I.5	Importance and impact of the research	16
I.6	Research methods	18
	I.6.1 Traditional legal research	18
	I.6.2 Focus group discussions	19
I.7	The Belgian and German court systems	20
I.8	Delimitations	23
I.9	Structure of the book	24
Part II:	The private international law, family law and migration law	
context	•	27
Chapter	1: Private international law and substantive family law frame-	
	lating to kafala	29
1.1.	Characterisation of kafala	29
1.2.	International PIL framework: the 1996 Hague Child Protection	
	Convention	31
	1.2.1. Background of the 1996 Hague Convention and its	
	relation to the 1993 Hague Adoption Convention	31
	1.2.2. Legal framework under the 1996 Hague Convention	34
	1.2.2.a. Makful lives in the country of origin or country	
	where kafala is established	35
	1.2.2.b. Makful lives in the receiving country (Belgium	
	or Germany) and kafala is established	39
	EU PIL framework: Brussels IIb	41
1.4.	Domestic PIL and family law framework: Belgium	42
	1.4.1. Belgian domestic PIL	43
	1.4.2. Recognition of the legal consequences of a kafala	45
Recognitio	on of kafala and child marriage in family law and migration law	VII

	1.4.3.	Belgian	substantive law	47
		1.4.3.a.	Unofficial guardianship	47
		1.4.3.b.	Adoption	48
	1.4.4.	Belgian	domestic PIL and family law framework:	
		conclud	ing remarks	49
1.5.	Dome	stic PIL	and family law framework: Germany	50
	1.5.1.	Characte	erisation of kafala	50
	1.5.2.	German	domestic PIL	51
	1.5.3.	Recogni	tion of the legal consequences of a kafala	55
	1.5.4.	German	substantive law	57
		1.5.5.a.	Guardianship	57
		1.5.5.b.	Adoption	58
	1.5.5.	German	domestic PIL and family law framework:	
		conclud	ing remarks	60
Chapter	2: Priv	ate inter	national law and substantive family law frame-	
		o child m		61
	_		IL framework: Hague Conventions and the 1951	
		a Conve		61
			vork: Brussels IIb and Rome III	66
2.3.	Dome	stic PIL	and family law framework: Belgium	67
			domestic PIL	67
		_	substantive law	70
		_	l to amend the Code of PIL regarding the	
			ion of foreign child marriages	71
2.4.	Dome	stic PIL	and family law framework: Germany	76
	2.4.1.	Backgro	ound regarding the Law to Combat Child Marriages	76
	2.4.2.	German	substantive law	79
		2.4.2.a.	Legislation before 22 July 2017: spouse be-	
			tween the age of 16 and 18 years	79
		2.4.2.b.	Legislation before 22 July 2017: spouse under	
			the age of 16 years	80
		2.4.2.c.	Legislation before 22 July 2017: consequences	
			of annulment	80
		2.4.2.d.	Legislation after 22 July 2017: spouse between	
			the age of 16 and 18 years	81
		2.4.2.e.	Legislation after 22 July 2017: spouse under the	
			age of 16 years	83
		2.4.2.f.	Legislation after 22 July 2017: parental respon-	
			sibility	85

VIII Wolters Kluwer

	2.4.3.	German domestic PIL	86
		2.4.3.a. General rules on child marriage in EGBGB	86
		2.4.3.b. Some critical remarks regarding the Law to	
		Combat Child Marriages	89
		2.4.3.c. Transitional provision on child marriage in EGBG	B 92
		2.4.3.d. PIL framework regarding the annulment of a	
		child marriage	94
		2.4.3.e. Schematic overview of the legislation before	
		and after the introduction of the Law to Combat	
		Child Marriages	95
	2.4.4.	Judgment of the Constitutional Court on the	
		compatibility of article 13(3)(1) EGBGB with the Basic La	w 98
	2.4.5.	The Law for the Protection of Minors in Foreign Marriages	
Chapter	3: Mis	gration law framework	105
		onisation of migration law at the EU level	105
		ation scenarios relevant to this book	107
	_	ation of mobile EU citizens and their family members	111
	_	Citizenship Directive	111
		Application of the Citizenship Directive when EU	
		citizens return to their country of nationality	121
3.4.	Positi	on of static EU citizens and their family members	123
		Position of static EU citizens as a matter of EU law	123
	3.4.2.	National legal framework for family reunification with a	
		static citizen	126
		3.4.2.a. Migration of a static German national with their	
		family members	127
		3.4.2.b. Migration of a static Belgian national with their	
		family members	128
3.5.	Migra	ation of third-country nationals and their family members	129
	3.5.1.	Family reunification with the nuclear family	131
	3.5.2.	Family reunification with other family members	137
	3.5.3.	Required documents for family reunification	139
	3.5.4.	Family Reunification Directive: concluding remarks	140
3.6.	Migra	ation of persons seeking international protection	141
	3.6.1.	The Common European Asylum System	141
		The Pact on Migration and Asylum	145
	3.6.3.	Migration of persons seeking international protection:	
		concluding remarks	147

TABLE OF CONTENTS

Chapter	4: Factors in context	149
4.1.	The use of private international law	150
	EU principles	153
	4.2.1. The principle of non-discrimination	154
	4.2.2. The right to free movement	155
	4.2.3. Mutual recognition and mutual trust	162
4.3.	Public policy	163
	4.3.1. Public policy under private international law	164
	4.3.2. Codification of public policy in international and EU	
	private international law instruments	167
	4.3.3. Codification of public policy in Belgian private	
	international law	169
	4.3.4. Codification of public policy in German private	
	international law	171
	4.3.5. Public policy under migration law	172
	4.3.5.a. Public policy under the Citizenship Directive	173
	4.3.5.b. Public policy under the Family Reunification	
	Directive	175
	4.3.6. Public policy under private international law versus	
	public policy under migration law	177
4.4.	The best interests of the child	178
	4.4.1. The principle of the best interests of the child	180
	4.4.2. Article 10 CRC: family reunification	185
	4.4.3. Relevant views adopted by the CRC Committee: <i>Y.B.</i>	
	and N.S. v. Belgium	187
	4.4.4. Article 20 CRC: alternative care	191
	4.4.5. Article 21 CRC: adoption	195
	4.4.6. Charter of Fundamental Rights of the European Union	197
	4.4.7. Implementation of the best-interests principle in national	
	legislation	198
	4.4.8. Concluding remarks regarding the best interests of the	
	child	202
4.5.	The right to private and family life	203
	4.5.1. The European Convention on Human Rights and the	
	European Court of Human Rights	203
	4.5.2. Article 8 ECHR: the right to private and family life	205
	4.5.3. ECtHR's application of the right to private and family	
	life to kafala	210
	4.5.3.a. Harroudj v. France	210
	4.5.3.b. Chbihi Loudoudi and others v. Belgium	215

X Wolters Kluwer

	4.5.4.	ECtHR'	s application of the right to private and family	
			hild marriage	222
			Khan v. the United Kingdom	223
			Z.H. and R.H. v. Switzerland: national procedure	
			and reasoning of the ECtHR	224
		4.5.4.c.	Z.H. and R.H. v. Switzerland: concurring opinion	226
			Some observations regarding Z.H. and R.H. v.	
			Switzerland	228
	4.5.5.	Article 7	7 of the Charter: right to private and family life	231
			entation of the right to private and family life in	
		-	legislation	231
	4.5.7.		ling remarks regarding the right to private and	
		family 1		235
4.6.	Princi	ple of leg	gal certainty	236
	4.6.1.	Principl	e of legal certainty	236
			of vested rights	238
	4.6.3.	The prin	nciple of legal certainty: lack of legal basis?	240
Part III	: Case	studies	on kafala	243
Chapter	5: Hoy	w is a kaf	fala recognised for family law purposes?	245
			kafala in Belgium	245
			of private international law	245
	•		Characterisation	246
		_	Application of private international law recogni-	
		•	tion rules	247
		5.1.1.c.	Conversion of a kafala into an adoption	252
			Concluding remarks regarding the use of private	
			international law	267
	5.1.2.	EU prin	ciples	267
			Recognition based on the original kafala	268
			Recognition based on the recognition, non-rec-	
			ognition or conversion of the kafala in other	
			Member State	271
	5.1.3.	Public p	policy	278
			t interests of the child	281
			Establishment and recognition of a kafala	282
			Adoption of a makful	282
			Concluding remarks regarding the best interests	
			of the child	284

TABLE OF CONTENTS

	5.1.5.	The righ	nt to private and family life	284
	5.1.6.	Principle	e of legal certainty	285
5.2.	Case s	study on l	kafala in Germany	288
	5.2.1.	The use	of private international law	288
		5.2.1.a.	Characterisation	288
		5.2.1.b.	Application of private international law recogni-	
			tion rules	293
		5.2.1.c.	Conversion of a kafala into an adoption	295
		5.2.1.d.	Concluding remarks regarding the use of private	
			international law	300
	5.2.2.	EU prin	ciples	300
		Public p		304
			t interests of the chid	306
	5.2.5.	The righ	nt to private and family life	308
	5.2.6.	Principle	e of legal certainty	309
Chapter	6: Hov	v is a kaf	fala recognised for migration law purposes?	313
			kafala in Belgium	313
			of private international law	313
		6.1.1.a.	Characterisation	314
		6.1.1.b.	The incomplete use of private international law	324
		6.1.1.c.	Conversion of a kafala into an adoption	329
		6.1.1.d.	Conversion of a kafala into an unofficial guardianship	330
		611e	Legal consequences of the (non-)recognition of	330
		0.11.1.01	a kafala	331
		6.1.1.f.	The use of private international law: concluding	
			remarks	350
	6.1.2.	EU prin	ciples	350
		Public p		355
			t interests of the child	357
		6.1.4.a.	Direct effect	358
		6.1.4.b.	Assessment of the best interests of the child in	
			migration case law	361
	6.1.5.	The righ	nt to private and family life	365
			The existence of family life	365
			The consequences of the existence of family life	367
	6.1.6.		e of legal certainty	371

XII Wolters Kluwer

6.2.	Case s	tudy on l	kafala in Germany	373
	6.2.1.	The use	of private international law	373
		6.2.1.a.	Characterisation	374
		6.2.1.b.	The use of private international law	375
		6.2.1.c.	Legal consequences of the (non-)recognition of	
			a kafala: visa based on the adoption of the makful	377
		6.2.1.d.	Legal consequences of the (non-)recognition of	
			a kafala: visa based on family reunification	379
		6.2.1.e.	The use of private international law: concluding	
			remarks	382
		EU princ		382
		Public p		382
			interests of the child	382
			t to private and family life	384
	6.2.6.	Principle	e of legal certainty	387
Part IV	Case	studies o	on child marriage	389
Chapter	7: Hov	v is a chil	ld marriage recognised for family law purposes?	391
7.1.	Case s	tudy on o	child marriage in Belgium	391
	7.1.1.	The use	of private international law	391
		7.1.1.a.	The application of the Code of PIL and arti-	
			cle 12 of the 1951 Geneva Convention	392
		7.1.1.b.	The absence of a legalised marriage certificate	399
		7.1.1.c.	Annulment	402
		7.1.1.d.	The use of private international law: concluding	
			remarks	407
		EU princ		407
		Public p	•	409
			interests of the child	414
		_	t to private and family life	416
			e of legal certainty	419
7.2.		-	child marriage in Germany	421
	7.2.1.		of private international law	421
		7.2.1.a.	The application of the EGBGB before the intro-	
			duction of the Law to Combat Child Marriages	422
			Parental responsibility	424
			Divorce versus annulment	427
		7.2.1.d.	The application of the EGBGB after the intro-	
			duction of the Law to Combat Child Marriages	432

	7.2.1.e.	Confirmation of a child marriage under § 1315	
		BGB	436
	7.2.1.f.	Transitional provision of article 229 § 44 EGBGB	437
	7.2.1.g.	The application of article 12 of the 1951 Geneva	
		Convention and the 1902 Hague Convention	441
	7.2.1.h.	The use of private international law: concluding	
		remarks	443
7.2.2.	EU prin	ciples	444
		Influence of the right to free movement on the	
		recognition of a child marriage under domestic	
		private international law	447
	7.2.2.b.	Influence of the right to free movement on the	
		migration law consequences of a child marriage	449
	7.2.2.c.	EU principles: concluding remarks	451
7.2.3.	Public p		451
	-	Public policy and <i>Inlandsbezug</i>	451
		Public policy and German family law	452
		Public policy and the best interests of the child	454
		Public policy and relevant circumstances of the	
		case	457
	7.2.3.e.	Public policy: concluding remarks	458
7.2.4.		t interests of the child	458
		Protecting a child versus respecting a child's	
		autonomy	459
	7.2.4.b.	The principle of the best interests of the child	
		and the individual circumstances of the case	459
	7.2.4.c.	The interests of the children born in a child	
		marriage	462
	7.2.4.d.	The best interests of the child: concluding remarks	462
7.2.5.		at to private and family life	462
	_	e of legal certainty	464
	-	The emergence of a limping legal situation	464
		The interaction between the recognition of a	
		child marriage for family law and migration law	
		purposes	466
	7.2.6.c.	Principle of legal certainty: concluding remarks	468

XIV Wolters Kluwer

469

469

470

473

8.1.1.	c. Legal consequences of the (non-)recognition of	
	a child marriage: family reunification as a spouse	476
8.1.1.	d. Legal consequences of the (non-)recognition of	
	a child marriage: family reunification as a child	477
8.1.1.	e. Legal consequences of the (non-)recognition of	
	a child marriage: unaccompanied minor	479
8.1.1.	f. Legal consequences of the (non-)recognition of	
	a child marriage: international protection	490
8.1.2. EU pr	inciples	496
8.1.2.	a. Intra-EU recognition of a child marriage	497
8.1.2.	b. Intra-EU recognition of guardianship of a mar-	
	ried child	501
8.1.3. Public	policy	503
8.1.4. The b	est interests of the child	509
8.1.4.	a. Influence of the best interests of the child on the	
	migration law consequences of the child marriage	510
8.1.4.	b. Determination of the best interests of the child	
	in case of a child marriage	514
8.1.4.	c. Concluding remarks regarding the best interests	
	of the child	516
8.1.5. The r	ght to private and family life	517
8.1.6. Princi	ple of legal certainty	519
8.2. Case study of	n child marriage in Germany	524
8.2.1. The u	se of private international law	524
8.2.1.	a. The (correct) use of private international law	524
	b. The incomplete use of private international law	529
8.2.1.	c. Legal consequences of the (non-)recognition of	
	a child marriage: family reunification as a spouse	532
8.2.1.	d. Legal consequences of the (non-)recognition	
	of a child marriage: family reunification with a	
	subsidiary protected spouse	536
8.2.1.	e. Legal consequences of the (non-)recognition of	
	a child marriage: family asylum for the spouse	537
8.2.1.	f. Legal consequences of the (non-)recognition of	
	a child marriage: international protection	540
Recognition of kafala and c	nild marriage in family law and migration law	XV

Chapter 8: How is a child marriage recognised for migration law purposes? 469

8.1.1.a. The (correct) use of private international law

8.1.1.b. The incomplete use of private international law

8.1. Case study on child marriage in Belgium

8.1.1. The use of private international law

TABLE OF CONTENTS

	8.2.2. EU principles	542
	8.2.3. Public policy	543
	8.2.4. The best interests of the child	544
	8.2.5. The right to private and family life	545
	8.2.6. Principle of legal certainty	546
Part V:	Conclusions	549
V.1	General conclusion	551
V.2	Conclusions regarding kafala	553
	V.2.1 Use of private international law	553
	V.2.2 EU principles	559
	V.2.3 Public policy	562
	V.2.4 The best interests of the child	562
	V.2.5 The right to private and family life	564
	V.2.6 Principle of legal certainty	565
V.3	Conclusions regarding child marriage	567
	V.3.1 Use of private international law	567
	V.3.2 EU principles	571
	V.3.3 Public policy	574
	V.3.4 The best interests of the child	576
	V.3.5 The right to private and family life	578
	V.3.6 Principle of legal certainty	578
V.4	Proposal for a way forward	579

XVI Wolters Kluwer