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Case Note 2018/3

Communication 12/2017: Y.B. and N.S. v Belgium

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Subject matter: The refusal of a humanitarian visa to a child who was entrusted to a Belgian-Moroccan couple in the context of a *kafala*

CRC Provisions: art. 2, art. 3, art. 10, art. 12 and art. 20

CRC OP3 Provisions: art. 7(e), art. 7(f)

Other relevant communications: N/A

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(I) Outline of the Substantive Issues

The communication was brought by Y.B. (a Belgian national) and N.S. (a dual Belgian and Moroccan national), legally represented by counsel, against Belgium on behalf of C.E. (a Moroccan national born on 21 April 2011). The claimants Y.B. and N.S. reside in Belgium and have been providing accommodation to C.E. in the context of a *kafala*. C.E. was born in Marrakesh from an unknown father and abandoned by the mother at birth, as attested by a judgment of the First Instance Court of Marrakesh issued on 19 August 2011. On 22 September 2011, the First Instance Court of Marrakesh designated the claimants as the legal guardians of C.E. in the context of a *kafala* as an abandoned minor, having undertaken necessary inquiries to ascertain that they possessed the requisite "material and social qualities." (para 2.2) The claimants were also granted authorization to travel outside of Morocco with C.E. Under Moroccan law, *kafala* is recognized as a form of alternative care and permits a Muslim couple or a Muslim woman to care for, ensure protection, education and provide for an abandoned child as a parent would do for his/her biological child, but this does not give the right of succession or the right to a legal parental relationship. (para 2.3)

Because *kafala* does not create a parental relationship, the claimants were unable to introduce a long stay visa application on the basis of family reunification. On 21 December 2011, they introduced an application to enter and reside in Belgium for humanitarian reasons on the basis of Article 9 of the Law of 15 December 1980 concerning access to the territory, stay, establishment and removal of foreigners. In the application they specified that C.E. was an abandoned child who had been entrusted to them, presented certificates of good conduct and assurances on their financial capacity. The visa application was rejected on 27 November 2012 by the Office of Foreigners on the basis that a *kafala* was not an adoption and did not confer any right of residence, that the applicants had not asked for the *kafala* to be recognized and that an application for an authorization of residence for humanitarian reasons could not substitute for an adoption application. The applicants introduced an appeal to the visa refusal decision, which led to it being overturned. Afterwards, the claimants contacted the Office of Foreigners on several occasions for a new decision without being able to receive a response. In the meanwhile, the claimants had also tried to obtain a short stay visa for the child in 2014 and 2015, which was rejected in both cases. On 19 July 2016, the Office of Foreigners issued a new decision that refused the visa on the basis *inter alia* of the following:

- *Kafala* did not give rise to a right of residence in Belgium because it did not create family ties with the child and that the humanitarian criteria had not been fulfilled: although the mother had abandoned the child, she was still alive and there was no proof that other members of the family up to third degree could not care for the child,
- The applicants could support the education of the child without the child leaving the country of origin, culture and family.

The claimants introduced another appeal to the new decision on 25 October 2016, which was still pending at the time that the claimants introduced their communication to the CRC Committee. The claimants noted that the while the decision of the Office of Foreigners could be appealed, the appeals body did not have the competence to take a decision in lieu of the one it annulled. (para 2.8) The second visa refusal decision was also later overturned on 26 April 2018. In the meanwhile, the female claimant had taken up primary residence in Morocco and was living with C.E., traveling to Belgium two or three times per year and her husband lived in Belgium primarily but was visiting Morocco for two to three months every year to be with his family.

The communication alleged that the Belgian State violated the rights of C.E. under Articles 2, 3, 10, 12 and 20 CRC. The claimants noted that although *kafala* is recognized as a protection measure for children under the 1996 Hague Convention on Parental Responsibility, to which Belgium is party, the claimants' various attempts to unite with the child in Belgium had been derailed. The claimants contended that C.E. experienced discrimination as a child having the nationality of a third country that recognizes a different institution of adoption; the child's best interests had not been considered; and although the child was too young to be heard, the State had an obligation to ensure the child's proper representation; and that art. 20 CRC should be read to include *kafala*.

Belgium expressed the view that the communication should be considered inadmissible for failing to exhaust domestic remedies, since the appeal process of the second refusal decision had been pending at the time of the communication and was considered an effective remedy by Belgium. On the substance, Belgium alleged that adoption and *kafala* were two different institutions; *kafala* being an institution that ends when the child is no longer a minor and one which does not create a parental relationship. Belgium also alleged that the claimants had not respected the conditions set in the civil code that allows for the recognition of a *kafala* and also questioned whether the procedures

followed in Morocco in instituting the *kafala* had been conducted in the best interests of the child in question.

(II) Procedural Issues

Not applicable

(III) Findings

The CRC Committee found the complaint to be admissible because the appeals mechanism available was not an effective remedy as it could not go beyond overturning the decision of the Office of Foreigners and did not have decision-making power. By already having used the appeals mechanism twice, the claimants were considered to have exhausted domestic remedies. The Committee then went on to examine the alleged violations of arts. 2, 3, 12 and 10 of the CRC, excluding art. 20 from examination because the claimants had failed to adequately motivate their allegations.

The CRC Committee concluded that there had been violations of arts. 3, 10 and 12 CRC but did not consider it necessary to examine whether the same facts constituted a violation of art. 2 (non-discrimination).

With respect to art. 3 (best interests of the child), the CRC Committee found that the reasons given by the Belgian State in its refusal of a long-term visa to be of a general nature and that they failed to examine the particular situation of C.E. The Committee also found Belgium's implication that C.E. could be cared for by her biological family to be unrealistic and uncorroborated by the fact of her specific circumstances as a child born of an unknown father and abandoned at birth by her biological mother.

With respect to art. 12 (child's right to express views and have the taken into account), the CRC Committee noted that although C.E. had been considered too young by Belgium to voice her opinion and that Belgian authorities believed her opinion to be of no relevance in the visa proceedings, she was five years old and, in line with her best interests, should have been given a say in the process that had long-lasting repercussions for her life and education.

With respect to art. 10 (family reunification), the CRC Committee found Belgium had failed to take into consideration the relationship and the *de facto* family ties forged by the claimants and C.E. since 2011, to the effect that one of the claimants had been living with and caring for C.E. almost since her birth. In the seven years that elapsed, Belgium had failed to treat the family reunification request of the claimants "in a positive, humane and expeditious manner" as required by art. 10 CRC.

The CRC Committee declared that the Belgian State was obligated to re-examine the visa application of C.E. urgently and in a positive manner, ensuring the child's best interests to be a primary consideration and that the voice of C.E. was heard. In addition, the Committee noted that Belgium should take into consideration the family ties forged *de facto* between the claimants and the child. Finally, the Belgian State was deemed to also have an obligation to take all necessary measures to prevent similar violations from recurring. The CRC Committee ordered Belgium to present to the Committee the measures taken to implement the decision within 180 days and also to include information on these measures in its reporting to the Committee under art. 44 CRC.

(IV) Commentary

The CRC Committee assessed the communication largely in line with its interpretation of arts. 3 and 12 as set out General Comments 14 (on the best interests of the child) and 12 (on the right to be

heard), respectively. In the context of art. 3, the Committee underscored the State obligation to undertake a best interests assessment on a case-by-case basis, focusing on the specific situation of a given child or children. (GC 14, para. 32) On the right to be heard, the Committee reiterated its view that there was no minimum age threshold for the rights under art. 12 and the fact of young age or situation of vulnerability did not negate a child's rights to be heard and to express his or her opinions, which had to be evaluated on an individual basis in matters concerning the child. (GC 12, para. 21) It thereby seems to reconfirm, albeit implicitly, the 'significant relationship between the right to be heard and the best interests of the child': 'there can be no correct application of article 3 if the components of article 12 are not respected.' (Joint GC No. 3/22, para. 37) It is also noteworthy that the Committee explicitly considered a five year-old child capable of forming and expressing an opinion on living permanently with the claimants in Belgium as a family.

The issue of family reunification is where the CRC Committee has made the most significant overture. The Committee noted that although art. 10 CRC does not oblige a State Party to recognize as a general rule the family reunification rights of children who are under a *kafala* regime, the term "family" had to be interpreted in a broader manner to comprise not only biological parents but adoptive parents or those caring for the child (in line with GC 14, para. 59 and Joint GC No. 23/4, para. 27), also in terms of family reunification in migration issues. Again, the Committee referred to the particular situation of C.E. and the claimants, who had formed effective family ties *de facto* over the seven years period in the context of a *kafala*.

The litmus test of children's rights law lies in its ability to ensure human dignity in the context of highly sensitive and politicized policy areas like that of migration. Most States of destination, including Belgium, seek to discourage immigration (apart from economically beneficial immigration, such as to address labour shortages). They are suspicious about the use of legal arrangements such as *kafala* that are seemingly used to circumvent restrictive immigration policies. Hence the emphasis on the sovereignty of States and on regular and orderly migration (see the Global Compact for Safe, Orderly and Regular Migration, Final Draft 11 July 2018, paras 7 and 15) The CRC Committee takes a rights-based approach to migration: it puts children and their human rights first. This different starting point translates into different priorities. The Committee is primarily concerned with the negative impact of migration procedures on children's well-being. In particular, it is acutely aware of the negative impact an insecure and precarious migration status has; it has therefore recommended 'that States ensure that there are clear and accessible status determination procedures for children to regularize their status on various grounds (such as length of residence).' (Joint GC No. 4/23, para. 18) It has equally advocated for the facilitation (rather than obstruction) of family reunification as part of respect of family life (Joint GC No. 4/23, paras 32-38). Furthermore, it has stated that '[c]onsiderations such as those relating to general migration control cannot override best-interests considerations'. (Joint GC No. 4/23, para. 33)

Does the CRC Committee push the legal boundaries too far? Or do the human rights of children trump migration law? Support for putting children's human rights first, and migration status second, can certainly be found in the case-law of the European Court of Human Rights (ECtHR). That Court has submitted that the child's extreme vulnerability is decisive and 'takes precedence over considerations relating to the […] status [of the] illegal immigrant.' (ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 12 October 2006, para. 55) In the Court's view, young age increases vulnerability. In the present case, the child C.E. is of a fairly young age. Admittedly, the Court has prioritized children's rights over migration status in the assessment of detention in light of the prohibition of torture, but it has shown a growing awareness for the implications of migration detention (also when parents and children are kept together) for family life too (*Popov v. France*, 19

January 2012). The ECtHR has also dealt with the legal arrangement of *kafala*. In *Chbihi Loudoudi v. Belgium*, it examined whether the refusal to allow for the adoption of a child whom the applicants took care of under *kafala* was in violation of the right to family life. The Court did not challenge the procedural grounds on the basis of which the Belgian judicial authorities had refused the adoption, but submitted that the best interests of the child is a component of respect for family life. It therefore examined whether the best interests of the child had been the primary consideration in the Belgian judicial authorities' assessment of the adoption request. The ECtHR held that the right to respect for family life had not been violated, since the Belgian judicial authorities could rightly conclude that the best interests of the child require one and the same affiliation (whereas *kafala* maintains the affiliation with the biological family). The Court emphasized two additional elements in its assessment of the adoption refusal on the basis of *kafala*. First, under Belgian law, another option existed to legally protect family life of the *khafils* and the child. Second, except for a relative uncertainty about her right to stay, no obstacle to enjoy their right to family life and to live together like other families had been identified. It could be argued, *a contrario*, that in cases such as the one dealt with by the CRC Committee, where the enjoyment of family life is not possible, that the best interests assessment would lead to a different result. The CRC Committee has in fact noted in Joint GC 4/23 that children should be guaranteed *inter alia* 'the right to … [a]ccess to the territory, regardless of the documentation they have or lack, and to be referred to authorities in charge of evaluating their needs in terms of protection of their rights, ensuring their procedural safeguards' in the assessment and determination of their best interests (para. 17).

The ECtHR also examined whether the uncertain residence status of the child had violated the right to respect for private life of the child. The majority (of four out of seven judges in total) did not find a violation. It emphasized that the right to respect for private life cannot be interpreted as guaranteeing a particular residence status. The choice as to which residence status is granted falls within the sovereignty of the State, as long as it allows the child to reside on the territory and to exercise freely her right to respect for private life and family life (para. 135). The minority of three (out of seven) judges came to the opposite conclusion: they argued that when a family tie with a child had been established, the State was under an obligation to allow that tie to develop and to offer legal protection so that the child could be integrated in the family. They also stressed how the impossibility to regularize her stay posed daily problems. The minority therefore concluded that the right to respect for family life had been violated.

From a broader perspective, States are within their sovereign rights to regulate migration but they do not have free reign with respect to how they deal with migration requests involving children's reunification with their families. Art. 10 CRC places an obligation on States parties to to treat requests for family reunification 'in a positive, humane and expeditious manner'. Thus, when migration policies and rules are applied to specific applications of family reunification involving children, they ought to be done in such a way that respects this obligation. The expeditious treatment of requests is important from a dual perspective: firstly, so that children do not spend long periods of time separated from their parents and secondly, so that their integration into their new country is facilitated. In this respect, it is important to note, for instance, that the EU Directive on the Right to Family Reunification for third country nationals allows for EU Member States to limit the right to family reunification of 'children over the age of 12, whose primary residence is not with the sponsor [of family reunification, residing lawfully in the territory of an EU Member State]' based on 'children's capacity for integration at early ages'. (Art. 12) In addition, in alternative forms of family creation such as *kafala*, States may have a legitimate concern that the lapse of time between the taking of a child into a *kafala* arrangement and their migration may invite the abuse of that

institution in the context of migration. In this respect, the *Y.B. and N.S. v. Belgium* case is illustrative of the pivotal role of an individualized assessment of best interests considerations. As the CRC Committee notes, the individual case of C.E. as a five year old child abandoned at birth, placed into *kafala* in a country where adoptions are not allowed and who has formed a strong attachment with the claimants and has been residing with the female claimant in a family setting, should give rise to the expeditious and positive reconsideration of her residence application in a manner that respects and gives a primary consideration to her best interests.

In its reasoning, the CRC Committee also clarified its role in the Communications procedure: the Committee was not in the position to substitute for the national authorities of Belgium in interpreting domestic law and in appraising the facts of the case but had the task to 'verify the absence of arbitrariness or denial of justice in the consideration of the authorities, and to ensure that the best interests of the child had been a primary consideration in this appraisal'. (para. 8.4) It found that the reasoning in the case at hand remained of a general nature, and that the Belgian authorities had failed to examine the concrete situation. This emphasis on the rule of law and due process can also be found in the Global Compact for Safe, Orderly and Regular Migration: 'The Global Compact recognizes that respect for the rule of law, due process and access to justice are fundamental to all aspects of migration governance.' (para. 15; compare the emphasis on due process and access to justice in Joint GC no. 23/4, paras 14-17)

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