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Lingua del documento :

ECLI:EU:C:2019:248

JUDGMENT OF THE COURT (Grand Chamber)

26 March 2019 (*)

(Reference for a preliminary ruling — Citizenship of the European Union — Right of citizens of the Union and their family members to move and reside freely within the territory of the Member States — Directive 2004/38/EC — Family members of a citizen of the Union — Article 2(2)(c) — ‘Direct descendant’ — Child in permanent legal guardianship under the Algerian kafala (provision of care) system — Article 3(2)(a) — Other family members — Article 7 and Article 24(2) of the Charter of Fundamental Rights of the European Union — Family life — Best interests of the child)

In Case C-129/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supreme Court of the United Kingdom, made by decision of 14 February 2018, received at the Court on 19 February 2018, in the proceedings

SM

v

Entry Clearance Officer, UK Visa Section,

in the presence of:

Coram Children’s Legal Centre (CCLC),

AIRE Centre,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, A. Arabadjiev, A. Prechal, M. Vilaras and K. Jürimäe (Rapporteur), Presidents of Chambers, A. Rosas, E. Juhász, M. Ilešič, D. Šváby, C.G. Fernlund, N. Piçarra and L.S. Rossi, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 4 December 2018,

after considering the observations submitted on behalf of:

- SM, by T. Muman and R. de Mello, Barristers, and by L. Tang, Solicitor,
- Coram Children’s Legal Centre (CCLC), by M.S. Gill QC, and by N. Acharya and S. Freeman, Solicitors,
- AIRE Centre, by A. O’Neill QC, D. Chirico and C. Robinson, Barristers, A. Lidbetter, M. Evans, L. Nassif, C. Hall, C. Iacono, A. Thornton, M. Papadouli and A. Tidona, Solicitors, L. Van den Hende, advocaat, and N. Mole, Senior Counsel,
- the United Kingdom Government, by F. Shibli and R. Fadoju, acting as Agents, and by B. Kennelly QC,
- the Belgian Government, by M. Jacobs and L. Van den Broeck, acting as Agents, and by E. Derriks, avocate,
- the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,
- the German Government, by T. Henze and R. Kanitz, acting as Agents,
- the Netherlands Government, by J.M. Hoogveld and M.K. Bulterman, acting as Agents,
- the Polish Government, by B. Majczyna, acting as Agent,
- the European Commission, by E. Montaguti and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 February 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(2)(c) and Articles 27 and 35 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 (OJ 2004 L 158, p. 77, and corrigendum OJ 2004 L 229, p. 35).

2 The request has been made in proceedings between SM, an Algerian national, and the Entry Clearance Officer, UK Visa Section ('the Entry Clearance Officer'), concerning the latter's refusal to grant SM entry clearance for the territory of the United Kingdom as an adopted child of a national of the European Economic Area (EEA).

Legal context

International law

The 1993 Hague Convention

3 The Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, signed at The Hague on 29 May 1993 ('the 1993 Hague Convention'), was ratified or acceded to by all the Member States of the European Union.

4 Pursuant to Article 1(a) and (b) thereof, the purpose of that convention is, inter alia, to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law and to establish a system of cooperation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children.

5 Under Article 2(2) thereof, that convention 'covers only adoptions which create a permanent parent-child relationship'.

The 1996 Hague Convention

6 The Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, signed at The Hague on 19 October 1996 ('the 1996 Hague Convention'), was ratified or acceded to by all the Member States of the European Union.

7 That convention lays down rules intended to improve the protection of children in international situations and to avoid conflicts between the legal systems of the Signatory States in respect of jurisdiction, applicable law, recognition and enforcement of measures for the protection of children.

8 Under Article 3(e) of that convention, measures for the protection of children may deal in particular with 'the placement of the child in a foster family or in institutional care, or the provision of care by *kafala* or an analogous institution'.

9 Article 4(b) of that convention excludes 'decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption' from the scope of that convention.

10 Article 33 of the 1996 Hague Convention lays down the procedure to be followed, both in the child's country of origin and in the host State, for the purposes of the international placement of that child, including in the case of 'the provision of care by *kafala*'.

European Union law

11 Recitals 5, 6 and 31 of Directive 2004/38 are worded as follows:

(5) The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. ...

(6) In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen.

...

(31) This Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union ...'

12 Article 2 of that directive, entitled 'Definitions', provides, in point 2(c) thereof:

'For the purposes of this Directive:

...

(2) "family member" means:

...

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b)'.

13 Article 3 of that directive, entitled 'Beneficiaries', provides:

'1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 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;

...

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.’

14 Article 7(2) of that directive provides:

‘The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).’

15 Article 27 of Directive 2004/38 sets out the general principles relating to restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health.

16 Article 35 of that directive, headed ‘Abuse of rights’, states:

‘Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.’

United Kingdom law

The rules on immigration

17 The Immigration (European Economic Area) Regulations 2006, in the version applicable to the dispute in the main proceedings (‘the 2006 Regulations’), transposed Directive 2004/38 into United Kingdom law.

18 Regulation 7 of the 2006 Regulations provides:

‘(1) Subject to paragraph (2), for the purposes of these Regulations the following persons shall be treated as the family members of another person—

...

(b) direct descendants of his, his spouse or his civil partner who are—

(i) under 21; or

(ii) dependants of his, his spouse or his civil partner ...’

19 Regulation 8 of the 2006 Regulations defines an ‘extended family member’ as follows:

‘(1) In these Regulations “extended family member” means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5).

(2) A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or his civil partner and—

(a) the person is residing in [a country other than the United Kingdom] in which the EEA national also resides and is dependent upon the EEA national or is a member of his household;

(b) the person satisfied the condition in paragraph (a) and is accompanying the EEA national to the United Kingdom or wishes to join him there; or

(c) the person satisfied the condition in paragraph (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household.

...

(6) In these Regulations “relevant EEA national” means, in relation to an extended family member, the EEA national who is or whose spouse or civil partner is the relative of the extended family member for the purpose of paragraph (2), (3) or (4) or the EEA national who is the partner of the extended family member for the purpose of paragraph (5).’

20 According to the information provided by the referring court, under regulation 12(1) of the 2006 Regulations, the Entry Clearance Officer must issue an ‘EEA family permit’ to a ‘family member’ where certain conditions are satisfied. Under regulation 12(2) of those regulations, that Entry Clearance Officer may issue such a permit to an ‘extended family member’ if certain conditions are satisfied or, in any event, if he considers it appropriate to do so.

The rules on adoption

21 Unless the Adoption with a Foreign Element Regulations 2005 have been complied with, the bringing of a child into the United Kingdom for the purposes of his or her adoption in that country or the bringing of a child into the United Kingdom who has already been adopted in another country is punishable under Section 83 of the Adoption and Children Act 2002. Those regulations require, inter alia, a United Kingdom adoption agency to assess the suitability of persons wishing to adopt. However, that requirement does not apply to adoptions under the 1993 Hague Convention, implemented in United Kingdom law by the Adoption (Intercountry Aspects) Act 1999.

22 Section 66(1) of the Adoption and Children Act 2002 lists those adoptions which are recognised by the law of England and Wales as conferring the status of adopted child on a child. *Kafala* (provision of care) is not included in that list.

The dispute in the main proceedings and the questions referred for a preliminary ruling

23 Mr and Ms M are two French nationals who married in the United Kingdom in 2001. They travelled to Algeria in 2009 in order to be assessed as to their suitability to become guardians of a child under the Algerian *kafala* system. Following that assessment, they were deemed ‘suitable’ to take in a child under that system.

24 SM, who was born in Algeria on 27 June 2010, was abandoned by her biological parents at birth.

25 Mr and Ms M applied for guardianship of SM under the Algerian *kafala* system.

26 That application triggered a waiting period of three months, during which SM's biological parents had the possibility of reversing their decision to abandon her, which they failed to do.

27 By act of the President of the tribunal de Boufarik (Boufarik Tribunal, Algeria) of 22 March 2011, SM was placed in the guardianship of Mr and Ms M, who were assigned parental responsibility under Algerian law. Under that act, Mr and Ms M undertook to 'give an Islamic education to the child ..., keep her fit morally and physically, supplying her needs, looking after her teaching, treating her like natural parents, protect her, defend her before judicial instances [and] assume civil liability for detrimental acts'. That act authorises Mr and Ms M to obtain family allowances, subsidies and benefits, to sign any administrative and travel documents, and to travel with SM outside Algeria.

28 By decision of the tribunal de Tizi Ouzou (Tizi Ouzou Tribunal, Algeria) of 3 May 2011, SM's surname, as entered on her birth certificate, was changed to Mr and Ms M's surname.

29 In October 2011, Mr M returned to the United Kingdom, where he has a permanent right of residence, for professional reasons. For her part, Ms M remained in Algeria with SM.

30 In May 2012, SM applied for 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 ground 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 adoption.

31 SM brought an action before the First-tier Tribunal (Immigration and Asylum Chamber) (United Kingdom). That action was dismissed by judgment of 7 October 2013. According to that tribunal, 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, an extended family member or the adopted child of an EEA national within the meaning of the 2006 Regulations.

32 In addition, that tribunal considered that Mr and Ms M had taken steps, in Algeria, to obtain custody of a child under the *kafala* system, having learned that it was easier to obtain custody of a child in that country than in the United Kingdom. That tribunal also noted that the procedure for assessing their suitability to become guardians, at the end of which they were deemed 'suitable' to take in a child under the Algerian *kafala* system, was 'limited'.

33 SM brought an appeal against that judgment before the Upper Tribunal (Immigration and Asylum Chamber) (United Kingdom). By judgment of 14 May 2014, that tribunal ruled in her favour, stating that, although she could not be regarded as a 'family member' of a citizen of the Union within the meaning of regulation 7 of the 2006 Regulations, she was, by contrast, an 'extended family member' of such a citizen within the meaning of regulation 8 thereof.

34 The Entry Clearance Officer brought an appeal against that judgment before the Court of Appeal (England & Wales) (Civil Division) (United Kingdom). By judgment of 4 November 2015, that court upheld the appeal, considering, in particular, that SM was not a 'direct descendant' of a citizen of the Union for the purposes of Article 2(2)(c) of Directive 2004/38, given that she had not been adopted in a form recognised by United Kingdom law. In addition, that court held that SM could not come within the scope of Article 3(2)(a) of that directive as one of the 'other family members' of a citizen of the Union either.

35 SM was granted permission to appeal to the referring court, the Supreme Court of the United Kingdom.

36 According to the referring court, SM must, at the very least, be regarded as one of the ‘other family members’ of a citizen of the Union as referred to in Article 3(2)(a) of Directive 2004/38. That concept is sufficiently broad to cover a child in respect of whom a citizen of the Union has parental responsibility under the law of the child’s country of origin, even if there is no biological or adoptive link between the child and that citizen. SM is a dependent and a member of the household comprising Mr and Ms M in Algeria.

37 However, that court is of the view that Article 3(2)(a) of that directive 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.

38 In that regard, the referring court questions whether a child placed under a guardianship system, such as the Algerian *kafala* system, falls to be described as a ‘direct descendant’ for the purposes of Article 2(2)(c) of Directive 2004/38.

39 According to the referring court, a positive answer to that question could be derived from point 2.1.2 of the communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38 (COM(2009) 313 final), which includes ‘minors in custody of a permanent legal guardian’ in the definition of a ‘direct descendant’.

40 Such an answer could also be supported by the fact that, since there is no reference in Article 2(2)(c) of Directive 2004/38 to the legislation of the Member States, the concept of a ‘direct descendant’ should be interpreted autonomously, uniformly and in line with the objectives of that directive. However, the free movement of citizens of the Union could be hindered if Member States were free to recognise children in the Algerian *kafala* system as direct descendants.

41 Having said that, the referring court also observes that an autonomous interpretation of that concept need not necessarily be broad and that an interpretation whereby a child placed under the Algerian *kafala* system would be regarded as a ‘direct descendant’ could lead to the placing of children in households which, according to the legislation of the host Member State, would not be regarded as suitable for hosting children. Such an interpretation could also give rise to a risk of exploitation, abuse and trafficking of children, which the 1993 Hague Convention seeks to prevent and deter.

42 The referring court therefore questions whether the right of entry to the territory of the host Member State of a citizen of the Union of a child placed under the Algerian *kafala* system may be restricted pursuant to Articles 27 and 35 of Directive 2004/38 where the child is, or where there is a risk that he or she may be, a victim of exploitation, abuse or trafficking. In addition, it questions whether, for the purposes of applying Article 2(2)(c) of that directive, a Member State may verify that the best interests of the child were taken into account when that child was placed in guardianship.

43 In those circumstances, 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(2)(c) 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?

(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?

Consideration of the questions referred

The first question

44 By its first question, the referring court asks, in essence, whether the concept of a ‘direct descendant’ of a citizen of the Union referred to in Article 2(2)(c) of Directive 2004/38 is to be interpreted as including a child who has been placed in the permanent legal guardianship of one or more citizens of the Union under Algerian *kafala*.

45 As a preliminary point, it is apparent from the evidence in the file submitted to the Court that, as the Advocate General noted in points 36 to 38 of his Opinion, under Algerian law *kafala* is where an adult undertakes to assume responsibility for the care, education and protection of a child, in the same way a parent would for their child, and to assume legal guardianship of that child. Unlike adoption, which is prohibited by Algerian law, the placing of a child under *kafala* does not mean that the child becomes the guardian’s heir. In addition, *kafala* comes to an end when the child attains the age of majority and may be revoked at the request of the biological parents or the guardian.

46 All the governments who have filed written observations emphasise that the concept of a ‘direct descendant’ referred to in Article 2(2)(c) of Directive 2004/38 requires there to be a parent-child relationship, either biological or adoptive, between the child and the citizen of the Union. According to those governments, that concept cannot therefore include a child placed under the Algerian *kafala* system, given that that guardianship system does not create such a relationship between the child and its guardian.

47 By contrast, SM, Coram Children’s Legal Centre (CCLC), AIRE Centre and the European Commission are of the view that the concept of a ‘direct descendant’ may include a child in respect of whom a citizen of the Union has assumed permanent legal guardianship, such as Algerian *kafala*. They argue that such an interpretation is necessary, in essence, in order to preserve, in the best interests of that child, the family life which he or she has with his or her guardian.

48 In that regard, it should be borne in mind that, under Article 3(1) thereof, Directive 2004/38 is to apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in Article 2(2) of that directive who accompany or join them.

49 Those family members of the citizen of the Union include, inter alia, under Article 2(2)(c) of Directive 2004/38, his or her ‘direct descendants’ who are under the age of 21 or are dependants.

50 That provision makes no express reference to the law of the Member States for the purpose of determining the meaning and scope of the concept of a ‘direct descendant’. In those circumstances, the need for a uniform application of EU law and the principle of equality require that the terms of

that provision must normally be given an independent and uniform interpretation throughout the European Union (see, to that effect, judgment of 21 December 2011, *Ziolkowski and Szeja*, C-424/10 and C-425/10, EU:C:2011:866, paragraph 32).

51 In addition, Directive 2004/38 does not contain any definition of the concept of a ‘direct descendant’ for the purposes of Article 2(2)(c) thereof. In those circumstances, according to the settled case-law of the Court, in interpreting that provision of EU law, it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part (judgment of 7 October 2010, *Lassal*, C-162/09, EU:C:2010:592, paragraph 49).

52 In that regard, it should be noted that the concept of a ‘direct descendant’ commonly refers to the existence of a direct parent-child relationship connecting the person concerned with another person. Where there is no parent-child relationship between the citizen of the Union and the child concerned, that child cannot be described as a ‘direct descendant’ of that citizen for the purposes of Directive 2004/38.

53 Although that concept primarily focuses on the existence of a biological parent-child relationship, it should nonetheless be borne in mind that, according to settled case-law, the aim of Directive 2004/38 is to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States, which is conferred directly on citizens of the Union by Article 21(1) TFEU, and that one of the objectives of that directive is to strengthen that right (judgments of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135, paragraph 35, and of 5 June 2018, *Coman and Others*, C-673/16, EU:C:2018:385, paragraph 18). In view of those objectives, the provisions of Directive 2004/38, including Article 2(2) thereof, must be construed broadly (see, to that effect, judgments of 16 January 2014, *Reyes*, C-423/12, EU:C:2014:16, paragraph 23, and of 10 July 2014, *Ogieriakhi*, C-244/13, EU:C:2014:2068, paragraph 40).

54 Therefore it must be considered that the concept of a ‘parent-child relationship’ as referred to in paragraph 52 above must be construed broadly, so that it covers any parent-child relationship, whether biological or legal. It follows that the concept of a ‘direct descendant’ of a citizen of the Union referred to in Article 2(2)(c) of Directive 2004/38 must be understood as including both the biological and the adopted child of such a citizen, since it is established that adoption creates a legal parent-child relationship between the child and the citizen of the Union concerned.

55 By contrast, that requirement for a broad interpretation cannot justify an interpretation, such as that which is apparent from point 2.1.2 of Communication COM(2009) 313 final, whereby a child placed in the legal guardianship of a citizen of the Union is included in the definition of a ‘direct descendant’ for the purposes of Article 2(2)(c) of Directive 2004/38.

56 Given that the placing of a child under the Algerian *kafala* system does not create a parent-child relationship between the child and its guardian, a child, such as SM, who is placed in the legal guardianship of citizens of the Union under that system cannot be regarded as a ‘direct descendant’ of a citizen of the Union for the purposes of Article 2(2)(c) of Directive 2004/38.

57 That being said, such a child does fall, as was emphasised by the referring court, under the definition of one of the ‘other family members’ referred to in Article 3(2)(a) of Directive 2004/38.

58 Under that provision, Member States are, in accordance with their national legislation, to facilitate entry and residence for ‘any other family members ... 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’.

59 The words used in that provision are thus capable of covering the situation of a child who has been placed with citizens of the Union under a legal guardianship system such as Algerian *kafala* and in respect of whom those citizens assume responsibility for its care, education and protection, in accordance with an undertaking entered into on the basis of the law of the child's country of origin.

60 As follows from recital 6 of Directive 2004/38, the objective of Article 3(2)(a) thereof is to 'maintain the unity of the family in a broader sense' by facilitating entry and residence for persons who are not included in the definition of 'family member' of a Union citizen contained in Article 2(2) of that directive but who nevertheless maintain close and stable family ties with a Union citizen on account of specific factual circumstances, such as economic dependence, being a member of the household or serious health grounds (judgment of 5 September 2012, *Rahman and Others*, C-83/11, EU:C:2012:519, paragraph 32).

61 According to the case-law of the Court, Article 3(2) of Directive 2004/38 imposes an obligation on the Member States to confer a certain advantage on applications submitted by the third-country nationals referred to in that article, compared with applications for entry and residence of other third-country nationals (see, to that effect, judgments of 5 September 2012, *Rahman and Others*, C-83/11, EU:C:2012:519, paragraph 21, and of 12 July 2018, *Banger*, C-89/17, EU:C:2018:570, paragraph 31).

62 Thus, the Member States must, in accordance with that provision, make it possible for the persons envisaged therein to obtain a decision on their application that is founded on an extensive examination of their personal circumstances, taking account of the various factors that may be relevant, and, in the event of refusal, is justified by reasons (see, to that effect, judgments of 5 September 2012, *Rahman and Others*, C-83/11, EU:C:2012:519, paragraphs 22 and 23, and of 12 July 2018, *Banger*, C-89/17, EU:C:2018:570, paragraphs 38 and 39).

63 It is true that each Member State has a wide discretion as regards the selection of the factors to be taken into account, provided that their legislation contains criteria which are consistent with the normal meaning of the term 'facilitate' used in Article 3(2) of Directive 2004/38 and which do not deprive that provision of its effectiveness (see, to that effect, judgments of 5 September 2012, *Rahman and Others*, C-83/11, EU:C:2012:519, paragraph 24, and of 12 July 2018, *Banger*, C-89/17, EU:C:2018:570, paragraph 40).

64 However, that discretion must, having regard to recital 31 of Directive 2004/38, be exercised in the light of and in line with the provisions of the Charter of Fundamental Rights of the European Union ('the Charter') (see, by analogy, judgment of 6 December 2012, *O and Others*, C-356/11 and C-357/11, EU:C:2012:776, paragraphs 79 and 80 and the case-law cited).

65 In that regard, Article 7 of the Charter recognises the right to respect for private and family life. As is apparent from the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17), in accordance with Article 52(3) of the Charter, the rights guaranteed by Article 7 thereof have the same meaning and the same scope as those guaranteed by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (see, to that effect, judgments of 5 October 2010, *McB.*, C-400/10 PPU, EU:C:2010:582, paragraph 53, and of 5 June 2018, *Coman and Others*, C-673/16, EU:C:2018:385, paragraph 49).

66 It is apparent from the case-law of the European Court of Human Rights that the actual relationship which a child placed under the *kafala* system maintains with its guardian may fall under the definition of family life, having regard to the time spent living together, the quality of the

relationship, and the role which the adult assumes in respect of the child (see, to that effect, ECtHR, 16 December 2014, *Chbihi Loudoudi and Others v. Belgium*, CE:ECHR:2014:1216JUD005226510, § 78). According to that case-law, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms protects the individual against arbitrary action by the public authorities and requires those authorities, where the existence of a family tie has been established, to enable that tie to be developed and to establish legal safeguards that render possible the child's integration in his family (see, to that effect, ECtHR, 4 October 2012, *Harroudj v. France*, CE:ECHR:2012:1004JUD004363109, § 40 and 41, and ECtHR, 16 December 2014, *Chbihi Loudoudi and Others v. Belgium*, CE:ECHR:2014:1216JUD005226510, § 88 and 89).

67 Article 7 of the Charter must, moreover, be read in conjunction with the obligation to take into consideration the best interests of the child, which are recognised in Article 24(2) thereof (see, to that effect, judgments of 27 June 2006, *Parliament v Council*, C-540/03, EU:C:2006:429, paragraph 58; of 23 December 2009, *Detiček*, C-403/09 PPU, EU:C:2009:810, paragraph 54; and of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354, paragraph 70).

68 Accordingly, in order to comply with those provisions when exercising their discretion, it is for the competent national authorities, when implementing the obligation to facilitate entry and residence for the other family members laid down in Article 3(2)(a) of Directive 2004/38, to make a balanced and reasonable assessment of all the current and relevant circumstances of the case, taking account of all the interests in play and, in particular, of the best interests of the child concerned (see, by analogy, judgments of 6 December 2012, *O and Others*, C-356/11 and C-357/11, EU:C:2012:776, paragraph 81; of 13 September 2016, *Rendón Marín*, C-165/14, EU:C:2016:675, paragraph 85; and of 13 September 2016, *CS*, C-304/14, EU:C:2016:674, paragraph 41).

69 That assessment must take into consideration, inter alia, the age at which the child was placed under the Algerian *kafala* system, whether the child has lived with its guardians since its placement under that system, the closeness of the personal relationship 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.

70 In the context of that assessment, it is also necessary to take account of possible tangible and personal risks that the child concerned will be the victim of abuse, exploitation or trafficking. Such risks cannot, however, be assumed in the light of the fact that the procedure for placement under the Algerian *kafala* system is based on an assessment of the suitability of the adult and of the interests of the child which is less extensive than the procedure carried out in the host Member State for the purposes of an adoption or the placement of a child or in the light of the fact that the procedure provided for in the 1996 Hague Convention has not been applied because that convention was not ratified by the third country concerned. Such facts must, on the contrary, be weighed against the other relevant elements of fact, such as those set out in paragraph 69 above.

71 In the event that it is established, following the assessment of the elements referred to in paragraphs 69 and 70 above, that the child placed under the Algerian *kafala* system and its guardians, who are citizens of the Union, are called to lead a genuine family life and that that child is dependent on its guardians, the requirements relating to the fundamental right to respect for family life, combined with the obligation to take account of the best interests of the child, demand, in principle, that that child be granted a right of entry and residence as one of the other family members of the citizens of the Union for the purposes of Article 3(2)(a) of Directive 2004/38, read in the light of Article 7 and Article 24(2) of the Charter, in order to enable the child to live with its guardians in their host Member State.

72 This applies a fortiori where, as a result of a refusal to grant the child placed under the Algerian *kafala* system a right of entry and residence in the host Member State of its guardians, who are citizens of the Union, those guardians are in fact prevented from living together in that Member State because one of them is required to remain, with the child, in that child's third country of origin in order to care for the child.

73 In the light of all of the foregoing, the answer to the first question referred is as follows:

- the concept of a 'direct descendant' of a citizen of the Union referred to in Article 2(2)(c) of Directive 2004/38 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 pursuant to Article 3(2)(a) of that directive, read in the light of Article 7 and Article 24(2) of the Charter, 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 that child is dependent on its guardian, the requirements relating to the fundamental right to respect for family life, combined with the obligation to take account of the best interests of the child, demand, in principle, that that child be granted a right of entry and residence in order to enable it to live with its guardian in his or her host Member State.

The second question

74 By its second question, the referring court seeks, in essence, to ascertain whether Articles 27 and 35 of Directive 2004/38 are to be interpreted as meaning that, in the event that there is a risk that a child placed under the Algerian *kafala* system may be subject to abuse, exploitation or trafficking, that child may be refused the right of entry or residence as a family member of a citizen of the Union in that citizen's host Member State.

75 It is apparent from the request for a preliminary ruling in the present case that that question is raised in the event that a child, such as SM, placed in the legal guardianship of a citizen of the Union under Algerian *kafala* falls under the definition of a 'direct descendant' of that citizen for the purposes of Article 2(2)(c) of Directive 2004/38, which in principle provides it with an automatic right of entry and residence in that citizen's host Member State under Article 7(2) of that directive. However, it follows from the answer to the first question that such a child cannot fall under that definition.

76 In those circumstances, there is no need to answer the second question put by the referring court.

The third question

77 In the light of the answer to the first question, there is no need to answer the third question.

Costs

78 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

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.

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 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 that child is dependent on its guardian, the requirements relating to the fundamental right to respect for family life, combined with the obligation to take account of the best interests of the child, demand, in principle, that that child be granted a right of entry and residence in order to enable it to live with its guardian in his or her host Member State.

Lenaerts

Silva de Lapuerta

Arabadjiev

Prechal

Vilaras

Jürimäe

Rosas

Juhász

Ilešič

Šváby

Fernlund

Piçarra

Rossi

Delivered in open court in Luxembourg on 26 March 2019.

A. Calot Escobar

K. Lenaerts

Registrar

President

* Language of the case: English.
