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Surrogacy in the recent 'multilevel' case law

Maria Caterina Baruffi

Abstract

The paper examines the decision of the Italian Supreme Court in plenary session on 8 May 2019 in which it dealt with the issue of surrogacy, with particular regard to the notion of international public policy. The Court concluded that the ban on surrogacy constitutes a principle of public order aimed at protecting fundamental values, such as the surrogate mother's human dignity. This decision is consistent with the advisory opinion given in April 2019 by the European Court of Human Rights, upon request of the French Supreme Court in the context of the *Mennesson* case, that stated that each State has discretion to determine the modalities by which it guarantees the recognition of the parent–child relationship, including the possibility to adopt. Nonetheless, the difficulties in the application of public policy are apparent and the situations that it may bring about are equally complex, for instance, as a result of genetic ties being established with different persons. New solutions are, therefore, proposed, also in light of the most recent French case law.

Surrogacy in the recent 'multilevel' case law

Maria Caterina Baruffi*

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1. Scope of the inquiry: the Italian background.

This paper addresses the private international law issues that surrogacy raises, with specific reference to the advisory opinion rendered by the European Court of Human Rights on 9 April 2019 and the decision of the Italian Court of Cassation of 8 May 2019.

In Italy, the legal basis for surrogacy is set out in the Law of 19 February 2004, no. 40, regulating medically assisted procreation[1]. In particular, surrogacy practices are punishable pursuant to Article 12, paragraph 6, by a term of imprisonment of three months to two years and by a fine ranging from 600,000 to one million euros for whomever, in any form, performs, organises or advertises surrogacy. As a result, Italian couples living permanently in Italy are increasingly travelling to other countries, particularly outside the European Union, where surrogacy is permitted, with the sole aim of circumventing internal legislation. This is the so-called 'reproductive tourism'[2]. In an attempt to counter the phenomenon, on 25 January 2019, during the eighteenth legislature, Bill no. 1024[3] was submitted to the Senate. Article 3

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[1] Law of 19 February 2004, no. 40, 'Norme in materia di procreazione medicalmente assistita'. Article 9(2) sets forth the primacy of the rule according to which the birthing woman shall be considered as the mother by preventing the mother of the child born via surrogacy from opting to remain anonymous. This piece of legislation has been subject to several judicial decisions rendered by both the Italian Constitutional Court and the European Court of Human Rights (see *infra*, footnote 5).

[2] See C. FENTON-GLYNN, *Creating International Families: Private International Law and the Industry of Parenthood*, in *International and National Perspective on Child and Family Law. Essays in Honour on Nigel Lowe*, edited by G. Douglas et al., Cambridge 2018, pp. 167-178.

[3] Atto Senato n. 1024, XVIII Legislatura, 'Disposizioni contro il turismo riproduttivo'.

of the Bill imposes a prohibition on the civil registrar to enter into the civil status records those birth certificates that show as parents of the child two same-sex persons or more than two persons, even if of different sex. In order to achieve this objective, the Criminal Code will be amended, making the offences provided for in Law no. 40 of 2004 punishable, even if committed abroad, and increasing the penalties provided therein. However, it should be mentioned that there is also an advocacy in Italy in the opposite direction[4].

This prohibition against surrogacy has not yet been amended, notwithstanding subsequent decisions rendered by the Italian Constitutional Court in which a number of provisions of Law no. 40 were declared unconstitutional[5].

The case is different for a couple who are both Italian citizens and who had recourse to surrogacy in the place where they permanently lived and, only afterwards, decided to move to Italy and ask for the recognition of foreign court orders obtained abroad relating to parental responsibility or the transcription of the foreign birth certificate[6]. This is not part of reproductive tourism and the degree of disvalue is lower[7].

In the context of transnational surrogacy, however, the need to protect children's rights is becoming a prevailing issue in the balance with other sensitive interests. Hence, in cases where surrogacy arrangements have been made and performed abroad, it is unclear whether fundamental principles pertaining to the Italian public order—or public policy—still limit the recognition of foreign certificates and decisions. An answer to this question has been provided by the Constitutional Court in a ruling regarding Article 263 of the Italian Civil Code. This provision establishes that the recognition of a child can be challenged on grounds of truthfulness (*difetto di veridicità*), without specifying that this challenge can only be upheld if it is considered in the best interests of the child. In cases concerning surrogacy-born children, this additional condition could facilitate the recognition of the family status. The object of the judgment was not the verification of the constitutional legitimacy of the prohibition of surrogacy and its absoluteness, but rather its compatibility with Articles 2, 3, 30, 31 and 117 of the Constitution

[4] See the websites www.associazionelucacoscioni.it; and www.articolo29.it.

[5] Article 4(3) of Law no. 40/2004 that prohibited heterologous forms of medically assisted procreation (Constitutional Court, 9 April 2014, no. 162); Articles 13(3)(b) and 13(4) that imposed criminal liability for the doctor who implanted into the uterus only healthy embryos or those being healthy carriers of genetic diseases (Constitutional Court, 11 November 2015, no. 229); and Article 14(2)-(3) insofar as it established a limit in embryo production and prevented cryoconservation (Constitutional Court, 8 May 2009, no. 151).

[6] The same would apply in another country where surrogacy is equally prohibited as in Italy. For instance, this would be the case of a couple of French citizens who, after having recourse to surrogacy in the foreign country where they habitually reside, relocate to France and ask for the recognition of the parent-child relationship lawfully established abroad.

[7] For an EU-oriented reading, see C. CAMPIGLIO, *Valori fondamentali dell'ordinamento interno e scelte di cura transfrontaliere*, in *Riv. dir. int priv. proc.*, 2016, pp. 371-412, who notes that the possibilities offered by EU and international law weaken the sanctioning capacity of the State against the circumvention of national bans (p. 410 f.).

governing appeals against the recognition of a minor child for lack of truthfulness pursuant to Article 263 of the Civil Code in so far as it does not allow the child's interest to be taken into account. The Court, however, despite excluding that the assessment of the consistency between the family status and the act of procreation amounts to an unconditional value from a constitutional law perspective, reiterated the high degree of disapproval that the domestic legal order attaches to surrogacy practices (as they are indeed subject to criminal penalty)[8]. Therefore, the current wording of Article 263 was not deemed contrary to the Italian Constitution.

The key element is that a balance must be struck between the ascertainment of the biological origin of the child (an essential element of his/her personal identity) and his/her best interests.

2. The relevant decisions.

The factual background of the decisions of both the European Court of Human Rights and the Italian Court of Cassation involved surrogacy arrangements: in the former, it was a heterosexual couple that had recourse to this practice, while in the latter it was a same-sex couple. This clarification is also useful to understand the different contexts in which the two Courts were called upon to rule. In the Italian case, a request for recognition of two foreign orders was submitted, the second of which attributed parental responsibility to the member of the couple who was not genetically bound to the children, pursuant to Articles 64 *et seq.* of Law of 31 May 1995, no. 218 (the Italian Private International Law Act, hereinafter Italian PIL Act)[9].

In cases of recognition of foreign decisions, reference is made to Article 65 of the Italian PIL Act, a special rule which cannot be invoked for birth certificates drawn up without judicial review[10]. The general rule is set out in Article 64 which is to be used alternatively to Article 65. According to the special rule (Article 65), foreign decisions relating to family relationships issued by the authorities of the State the law of which is pinpointed by the rules of the same PIL Act (that is, Article 33) can have effect provided that such measures are not contrary to public policy. The use of Article 65 makes it easier to

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[8] Constitutional Court, 18 December 2017, no. 272, para 4.3 of the legal reasoning. See F. ANGELINI, *Bilanciare insieme verità di parto e interesse del minore. La Corte costituzionale in materia di maternità surrogata mostra al giudice come non buttare il bambino con l'acqua sporca*, in *Costituzionalismo.it*, 2018, pp. 149-177; G. MATUCCI, *La dissoluzione del paradigma della verità della filiazione innanzi all'interesse concreto del minore (Nota a sent. Corte cost., 18 dicembre 2017, n. 272)*, in *Forum di Quaderni costituzionali*, 15 febbraio 2018, pp. 1-14; G. BARCELLONA, *La Corte e il peccato originale: quando le colpe dei padri ricadono sui figli. Brevi note a margine di Corte cost. 272 del 2017*, in *Forum di Quaderni costituzionali*, 9 marzo 2018, p. 1-7. With regard to the approach to be taken when balancing the conflicting interests at stake and the specific elements to consider, see E. OLIVITO, *Di alcuni fraintendimenti intorno alla maternità surrogata. Il giudice soggetto alla legge e l'interpretazione para-costituzionale*, in *Rivista AIC*, 2018, no. 2, at p. 13 ff.

[9] Law of 31 May 1995, no. 218, 'Riforma del sistema italiano di diritto internazionale privato'.

[10] R. CLERICI, *Stato di filiazione e diritto internazionale privato,* Sez. I*, La filiazione nel diritto internazionale privato*, in *Trattato di diritto di famiglia*, diretto da G. Bonilini, vol. IV, *La filiazione e l'adozione*, Milano 2016, pp. 3761-3799, p. 3783 ff.

recognise such measures as opposed to the general rule in Article 64. The existence of the two disciplines, the general one *ex* Article 64 and the special *ex* Article 65, may lead to conflict between foreign decisions of different tenor with possible incompatible indications. This issue can be resolved by safeguarding the effectiveness of the judicial measure that best responds to 'positive' parameters of public policy, internationally protected and necessarily related to the 'uniqueness' of that person's legal regime in space, in particular if the rights of the person are at stake[11]. Both provisions state the requirement that they not be contrary to public policy.

With regard to non-contentious jurisdiction, Article 66 of the Italian PIL Act is the relevant provision. If the request to enter into the civil status records is refused by the registrar for failure to meet the requirements for recognition under that rule, the competent court seized by the person concerned shall decide on the recognition (Article 67). For instance, in one of the first cases that arose in Italy, the Court of Appeal of Bari on 25 February 2009 found no violation of public policy in order to meet the requirements of Articles 64 and 65. The Court ordered the competent municipality to provide for the necessary formalities by means of the entry of the parental orders adopted by the English judicial authority into the civil status records in order to show the maternity of the children concerned[12].

Conversely, in the case that gave rise to the 9 April 2019 ruling of the Strasbourg Court, the application concerned the recognition of a foreign birth certificate that established the parent–child relationship between the intended parents and the children with whom the intended mother had no genetic or biological link. This raised an issue of recognition—which would consequently affect entry into the civil registers—of the birth certificate legally established abroad containing untrue statements on the grounds of a violation of public policy. In this case, the public policy exception did not apply by virtue of the Italian PIL Act (namely, Article 65), but rather pursuant to Articles 18 and 19 of the Presidential Decree of 3 November 2000, no. 396, concerning civil status records[13], as amended by Legislative Decree of 19 January 2017, no. 5, taking into account the introduction of civil partnerships in

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[11] See F. SALERNO, *I diritti fondamentali della persona straniera nel diritto internazionale privato: una proposta metodologica*, in *I diritti delle famiglie migranti fra integrazione e tutela delle diversità*, a cura di A. Annoni, P. Mori, Torino 2015, pp. 129-160, at p. 153 f. See S. TONOLO, Status filiationis *da maternità surrogata e adozione da parte del genitore «intenzionale»: i limiti nella formula dell'adattamento*, in *Riv. dir. int.*, 2019, pp. 1151-1157, at p. 1153.

[12] *Int'lis,* 2010, no. 1, p. 20, commented by M.C. BARUFFI, *Maternità surrogata e questioni di* status *nella giurisprudenza italiana ed europea.*

[13] Presidential Decree of 3 November 2000, no. 396, 'Regolamento per la revisione e la semplificazione dell'ordinamento dello stato civile, a norma dell'art. 2, co. 12, legge 15 maggio 1997, n. 127'. On the importance of certificates of civil status issued abroad, see R. CAFARI PANICO, *Lo stato civile e il diritto internazionale privato*, Padova 1992; and more recently, S. TONOLO, *La trascrizione degli atti di nascita derivanti da maternità surrogata: ordine pubblico e interesse del minore*, in *Riv. dir. int priv. proc.*, 2014, pp. 81-104, at p. 83 ff., also with regard to the differences between Articles 18 and 19 of the Presidential Decree no. 396/2000 in cases concerning surrogacy, at p. 87 ff.; F. SALERNO, *The identity and continuity of personal status in contemporary private international law*, in *Recueil des Cours*, XX, 2019, p. 172 ff.

the domestic legal order[14]. More precisely, according to Article 19(2) of the Presidential Decree no. 396/2000, the registration of foreign certificates in the civil status records of the place of residence is not allowed if they are contrary to public policy. It follows that Italy, as with all the other Member States, shall have exclusive competence[15] to decide whether a personal status lawfully created abroad may be entered into the domestic records. This applies in cases where the persons involved are foreign nationals and at least one of them resides in Italy, as well as in cases where an Italian national and a foreign national are involved, and provided that the fundamental rights protected by the European Union (such as the right to free movement and to non-discrimination) are not infringed.

Both the PIL Act and the civil status legislation require that the measure or act under consideration is not contrary to public policy; between these two regimes, the content of this exception does not change.

3. The public policy.

The public policy exception, operating *a posteriori*, has traditionally been understood as a limit to diversity with a view to preserving the cornerstone of the ethical, social and economic structure of the national community, which also includes the protection of the fundamental rights of individuals[16].

The Italian PIL Act resolved the long-standing internal debate on the unified character of the notions of domestic and international public policy, which in the past were often distinguished on the ground that the non-derogation to (or rather to certain) Italian rules can be based on more or less stringent requirements, so that it can apply either generally—i.e., also in relation to cases that are not entirely domestic—or only in relation to purely internal situations. In other words, various Italian legal provisions, even though they cannot be deviated from by way of agreement and are therefore mandatory in purely internal situations (so-called domestic public policy), may well give way to the application of a foreign law or the recognition of a foreign judgment without bearing any unacceptable consequences in

[14] Legislative Decree of 19 January 2017, no. 5, 'Adeguamento delle disposizioni dell'ordinamento dello stato civile in materia di iscrizioni, trascrizioni e annotazioni, nonché modificazioni e integrazioni normative per la regolamentazione delle unioni civili, ai sensi dell'art. 1, co. 28, lettere a) e c), della legge 20 maggio 2016, n. 76, che disciplina le unioni civili tra persone dello stesso sesso e le convivenze'.

[15] See Court of Justice, judgment of 1 April 2008, case C-267/06, *Tadao Maruko*, ECLI:EU:C:2008:179: «civil status and the benefits flowing therefrom are matters which fall within the competence of the Member States and Community law does not detract from that competence. However (…) in the exercise of that competence the Member States must comply with Community law and, in particular, with the provisions relating to the principle of non-discrimination» (para 59). See also Court of Justice, judgment of 12 May 2011, case C-391/09, *Runevič-Vardyn*, ECLI:EU:C:2011:291: «certificates issued by the competent authorities of the Member States of origin do not come within the scope of European Union law and correspond to a purely internal situation» (para 58).

[16] On the relevance of foreign civil status records, see R. CAFARI PANICO, *Lo stato civile e il diritto internazionale privato*, cited above; and, more recently, S. TONOLO, *La trascrizione degli atti di nascita*, cited above, at p. 83 f., also for an examination of the differences between Articles 18 and 19 of Presidential Decree no. 396/2000 with regard to surrogacy (p. 87 ff.).

the domestic legal order. It follows that the concept of domestic public policy, comprised of those rules of the legal system which are mandatory for individuals, is broader and includes as well international public policy[17], that is, the set of ethical, economic, political and social principles that determine the essential characteristics of national legal institutions according to the different historical backgrounds.

In recent times, the exception at issue has been downplayed by requiring a substantial clash with the fundamental values of the domestic legal order. This implies, for example, that the effects of the recognition of a foreign decision be manifestly contrary to the founding values of our system, within which the rules and principles deriving from international law (both general and conventional law), and especially from EU law, converge[18]. In addition, EU membership has an impact on the notion of public policy insofar as certain fundamental values are shared and, when necessary, limitations on national sovereignty are imposed. More precisely, public policy concerns rules and values that are so essential to the EU Member States that they cannot be derogated, as their derogation would be unacceptable to any legal order based on the rule of free and democratic law[19]. The EU Treaties, however, do not regulate international public policy. Its application, by its very nature, tends to be scaled down in intra-EU cases and limited to situations involving third countries in which the Member States retain their sovereignty, albeit increasingly reduced as a result of the extension of the EU's competences. Furthermore, it is worth noting that even when Member States maintain their exclusive competence, as the case concerns purely internal situations, should the exercise of such competence affect situations of EU relevance, States must, in any case, comply with EU law, as well as its general principles, primarily that of sincere cooperation[20].

Moreover, attention has been paid in recent times to the need to take into account the principle of the best interests of the child, enshrined in the 1989 New York Convention on the Rights of the Child[21], as required by Article 23 of Regulation 2201/2003[22] and The Hague Convention of 19 October 1996[23]. If the best interests of the child should indeed prevail over any other consideration, it is not sufficient that the recognition has effects which are manifestly contrary to the fundamental principles of

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[17] F. MOSCONI, C. CAMPIGLIO, *Diritto internazionale privato e processuale. I. Parte generale e obbligazioni*, 8ª ed., Milano 2017, p. 259.

[18] See Court of Cassation, 15 June 2017, no. 14878.

[19] For a detailed analysis, see R. CAFARI PANICO, *Identità nazionale e identità personale*, in *Cittadinanza, cittadinanze e nuovi* status*: profili internazionalprivatistici ed europei e sviluppi nazionali*. Convegno interinale SIDI, Salerno, 18-19 gennaio 2018, a cura di A. Di Stasi, Napoli 2018, pp. 215–239, at p. 226.

[20] *Ibid*., p. 224 ff.

[21] Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. Italy has ratified it by Law of 27 May 1991, no. 176.

[22] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338 of 23 December 2003.

[23] Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. In Italy, it was ratified by Law of 18 June 2015, no. 101, and entered into force in Italy on 1 January 2016.

the requested State. The court must additionally take into account the best interests of the child, which shall take precedence over any other interest involved. This principle thus serves as a counter-limit that allows the court wider discretion and requires a further balancing between the need for consistency of the domestic system of the State that has been requested to recognise a foreign decision, which would lead to non-recognition of parentage, and the need to fulfil the best interests of the child, which would favour the recognition[24]. Consequently, the effects of the public policy exception are mitigated, also in order to avoid 'limping' situations where the parent–child relationship is not recognised in each of the legal systems involved. However, such a solution does not always seem appropriate, given that a genuine interpretation of the best interests of the child could lead to opposite outcomes, similar to those which would be achieved in the event that such a limit is operating. Indeed, this may lead to denial of the continuity of the family status in situations in which public policy does not come into play due to the principle of mutual recognition[25].

The existence of internationally shared values has been relied upon in Italian case law in order to mitigate the applicability of the public policy exception, depending on the intensity of the elements connecting the situation considered with the domestic order[26]. Actually, the link that exists between the case and our legal system is certainly one of the elements that should be taken into account to mitigate the effect of public policy, but it is not the crucial aspect.

National courts and, in the first place, civil registrars[27], are, therefore, faced with a particularly burdensome task due to the growing importance of the 'counter-limit' of the child's best interests, which may render the public policy exception practically ineffective.

4. The decision of the Italian Supreme Court of 8 May 2019.

[24] C. CAMPIGLIO, F. MOSCONI, voce *Giurisdizione e riconoscimento di sentenze in materia matrimoniale e di responsabilità genitoriale*, in *Digesto. Discipline pubblicistiche*, Agg., 2005, pp. 336-359, at p. 358.

[25] For further comments, see M.C. BARUFFI, *Diritto internazionale privato e tutela degli* status *acquisiti all'estero. Le incertezze della Corte di Cassazione con riguardo alla maternità surrogata*, in *Cittadinanza, cittadinanze e nuovi* status, cited above, pp. 161-170, at p. 169 f.

[26] See, for all, S. TONOLO, *La trascrizione degli atti di nascita*, cited above, p. 89, in which it is stated that for foreign minors the so-called public policy of proximity should operate, which generally involves a mitigation of the exception in question, applicable only in cases of significant connection with the forum. See also O. FERACI, *L'ordine pubblico nel diritto dell'Unione europea*, Milano 2012, p. 12 ff.; and R. BARATTA, *Diritti fondamentali e riconoscimento dello* status filii *in casi di maternità surrogata: la primazia degli interessi del minore,* in *Dir. umani dir. int.,* 2016, pp. 309-334, at p. 316; R. BARATTA, *Recognition of Foreign Personal and Family Status: A Rights Based Perspective*, in *Riv. dir. int. priv. proc.*, 2016, pp. 413-444.

[27] See R. CALVIGIONI, *Il diritto internazionale privato applicato allo stato civile. Quadro giuridico e soluzioni operative*, Rimini 2019, p. 28 ff. and p. 391 ff.

In 2017, the Court of Appeal of Trento recognised the partners of a same-sex couple as co-parents,[28] following, in particular, the approach taken by the Court of Cassation in its decision of 30 September 2016[29]. In that case, it was held that international public policy refers to the fundamental human rights that are common to the various legal systems and that enjoy the highest ranking among the legal sources, as inferred from the Constitution and, *where compatible with it*[30], from the EU Treaties, the EU Charter of Fundamental Rights and the European Convention on Human Rights (ECHR)[31]. As a result, the Supreme Court of Cassation in its 2016 decision took an innovative stance and clarified that the concept of public policy encompasses only those essential principles that cannot be modified (or, in the wording of the Court, that cannot be subverted) by the legislature. Therefore, it fell outside the Court's competence to verify whether the issuance of the foreign decision according to a law that is not consistent with our rules, or is even prohibited by them (even if those rules are mandatory but could still be modified by the domestic legislature), was consistent with public policy, the only relevant limit being the essential values of the legal order. According to the Supreme Court, in fact, the contents of public policy must be found exclusively in the supreme and/or fundamental principles of our Constitutional Charter, that is, those principles which could not be subverted by the legislature[32]. It follows that the foreign law is not contrary to the public policy just because it has a different content from that of Italian law or if there is no domestic law, but even when the case would be prohibited under the domestic law, as the Supreme Court later stated[33]. This approach of 'constitutionalising' public policy[34] has allowed the Court to hold that a Spanish birth certificate could be recognised in our legal order whereby two women, both linked to the child (one being the egg-donor, the other having given birth to the child), were considered as mothers. This was because the rule according to which only the birthing woman is considered as the mother does not qualify as a fundamental principle having constitutional rank and, therefore, it cannot be included in the notion of public policy[35]. Similarly, the Court of Appeal of Trento stated that, although the child's interest in being recognised in the legal parent–child relationship is not

[28] Court of Appeal of Trento, 23 February 2017 (order), in *Famiglia e diritto,* 2017, pp. 669-679, p. 672, commented by M.C. BARUFFI, *Co-genitorialità* same sex *e minori nati con maternità surrogata*, in *Famiglia e diritto*, 2017, p. 6 ff.

[29] Court of Cassation, 30 September 2016, no. 19599.

[30] *Ibid.*, para 7 (italics added).

[31] *Ibid.*

[32] *Ibid.* The reference of public policy to the fundamental principles of the Constitution underlines its 'positive' function and makes the intensity of the connection of the case with the forum indifferent: F. SALERNO, *La costituzionalizzazione dell'ordine pubblico internazionale*, in *Riv. dir. int. prov. proc.*, 2018, pp. 259-291, p. 278 and p. 282 ff.

[33] Court of Cassation, 15 June 2017, no. 14878, cited above.

[34] F. SALERNO, *La costituzionalizzazione*, cited above.

[35] Court of Cassation, 30 September 2016, no. 19599, cited above, para 11. Similarly, Court of Cassation, 15 June 2017, no. 14878 cited above.

unconditional, it could only give way vis-à-vis other interests and values having constitutional relevance and binding on the legislature.

Following the appeal of the order of the Court of Appeal of Trento, the First Chamber of the Court of Cassation[36] appropriately referred the case to the plenary session, which were thus called upon to clarify, as far as it is relevant here[37], the concept of public policy, taking into account the decision of the First Chamber of 2016, no. 19599, cited above, and reassessing the Court's previous decisions on this matter[38]. The starting point of the reasoning is the apparently different interpretations (and, therefore, different applications) of the concept of public policy in two cases concerning completely different issues, namely medically assisted procreation in decision no. 19599 of 2016 and punitive damages in the judgment issued by the Plenary session on 5 July 2017, no. 16601[39]. In the latter, the Supreme Court had considered that foreign decisions awarding punitive damages could be recognised in our legal order, on the ground that punitive damages, although unknown in our legal system, are not manifestly contrary to its values and rules, including ordinary legislation[40]. With the praiseworthy intention of construing public policy as a unitary concept, the Court considered that the ordinary laws should also be taken into account and attributed a primary role to the interpretation carried out by the courts that pinpointed from those rules the fundamental principles included under the public policy exception. The clarification that the ordinary legislation is relevant in this regard as a tool for the implementation of the values enshrined in the Constitution does not diminish the importance of this latter instrument, and it could not be otherwise, since the Constitution is the standard for reviewing the legality of all domestic law provisions. On the contrary, it seems less convincing to hold that, in all the previous decisions, the compatibility with the ordinary legislation had been taken into account in the assessment of the case for the purposes of interpreting the legal institution under consideration, since it was precisely on the basis of decision no. 19599 of 2016 of the Supreme Court and the limited relevance of the Constitution—as well as the international legal sources—that the Court of Appeal of Trento had excluded the relevance of public

[36] Court of Cassation, 22 February 2018, no. 4382 (interlocutory order). See M.C. BARUFFI, *Diritto internazionale privato e tutela degli* status, cited above, pp. 161-170; A. DI BLASE, *Riconoscimento della filiazione da procreazione medicalmente assistita: problemi di diritto internazionale privato,* in *Riv. dir. int. priv. proc.*, 2018, pp. 839–869, at p. 856, does not share the approach of the order which does not consider the aspect of *favor filiationis* in our system to be balanced with other relevant values.

[37] The Supreme Court of Cassation first addressed the question of the legal standing of the Mayor, as registrar, of the Ministry of the Interior and of the Attorney General at the Court of Appeal (paras 9–12 of the reasons for the decision).

[38] Reasons for the decision, para. 12, see in particular para. 12.1.

[39] M.C. BARUFFI, *International surrogacy arrangements test the public policy exceptions: an Italian perspective*, in *Yearbook Private Int. L.*, 2017/2018, pp. 295-312, at p. 310.

[40] In this sense, Court of Cassation, plenary session, judgment of 5 July 2017, no. 16601, para 6: such a foreign decision, containing institutions unknown to us even if not hindered by European discipline, must measure itself against the scope of the Constitution and those laws which, like sensitive ribs, fibres of the sensory apparatus and vital parts of an organism, reverse the constitutional order.

policy in the present case. Actually, on this aspect, the Supreme Court reiterates what was already pointed out in the literature[41], namely the lack of adequate reasoning in the application of the 2016 decision of the Court of Cassation. The reproductive technique to which the couples had resorted is also different, since one refers to surrogacy arrangements only in the case of a male same-sex couple[42].

In the judgment under consideration, the Court makes it clear that *international* public policy comprises those founding values of the legal order at a given historical moment[43]. These can be found in the Constitution, in international legal instruments (such as, first and foremost, but only by way of example, the EU Treaties, the EU Charter of Fundamental Rights and the ECHR) and in ordinary legislation which codifies those fundamental principles in the legal institutions, as well as in the interpretations provided by constitutional and ordinary case law[44], shaping that law in action which cannot be ignored[45]. On the contrary, in the Court's view, the ordinary legislation and its interpretation contribute to give full meaning to the fundamental principles of the system[46]. The result is a widening of the range of legal sources from which these fundamental principles can be inferred. Ordinary legislation can also be considered in this regard whenever it expresses fundamental values in accordance with the principles of the Constitution[47], as can international instruments which, on the one hand, serve as complementary sources with respect to the Constitution and, on the other hand, serve as an interpretative tool of the principles contained in the national laws.

As a result of the 'new' interpretation of public policy, different considerations were made with regard to the recognition of the foreign decision establishing the legal parent-child relationship of two fathers with children born through surrogacy.

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[41] C. HONORATI, *Maternità surrogata,* status *familiari e ruolo del diritto internazionale privato*, in *Cittadinanza, cittadinanze e nuovi* status, cited above, pp. 137-160, at p. 145. This was a case of recourse to surrogacy in which the Court of Appeal of Trento extended the scope of the decision of the Court of Cassation to a case other than heterologous filiation, on which the Supreme Court had ruled. Such an extension would have required an adequate reasoning, which is not found in the decision, given the difference between the two techniques used. For these reasons' it is possible to doubt the soundness of the choices made by the lower court which, in order to achieve the result of guaranteeing a continuity of relations to the child, 'omits' to clarify the legal reasons which led to that result.

[42] The Court analyses the different type of penalty in Law no. 40 of 2014 that accompanies the recourse to surrogacy—criminal— from the one provided for same-sex couples who resort to heterologous fertilisation—administrative—, demonstrating the lower value associated with the latter (reasons for the decision, para. 13).

[43] Reasons for the decision, paras. 12.2 and 12.3.

[44] *Ibid.*, para 12. 3.

[45] *Ibid.*, para 12.2.

[46] *Ibid.*, para 12.2. M.C. VENUTI, *Le sezioni unite e l'omopaternità: lo strabico bilanciamento tra il* best interest of the child *e gli interessi sottesi al divieto di gestazione per altri*, in *GenIUS*, 2019, no. 2, pp. 1-17, at p. 5 ff., expressed critical considerations towards this reasoning because the role of primary law should be reduced in a general way since it does not necessarily conform to constitutional principles that are the result of 'policy of law' choices made by the legislature.

[47] In this sense, also O. FERACI, *La nozione di ordine pubblico alla luce della sentenza della Corte di Cassazione (sez. un. civ) n. 12193/2019: tra «costituzionalizzazione attenuata» e bilanciamento con il principio del superiore interesse del minore*, in *Riv. dir. int.*, 2019, p. 1144.

First, the Supreme Court established that the case at issue was different from those of decision no. 19599 of 2016 concerning heterologous fertilisation and judgment no. 14878 concerning the amendment of a birth certificate formed abroad and entered into the Italian civil status records due to the modification of the foreign deed by the foreign civil registrar[48].

Next, the Court attributed precedential value to its decision issued in 2014[49] in which it had considered surrogacy as contrary to public policy and, consequently, held that a child born through surrogacy be deemed in a state of abandonment due to the lack of any biological ties to the intended parents. In this judgment, the Court considered surrogacy to be contrary to (international) public policy on the ground that it is detrimental to the human dignity of the pregnant woman and the institution of adoption. Furthermore, it specified that the prohibition provided in our legal system could not be considered contrary to the best interests of the child, guaranteed by all international instruments on child protection, as it is an expression of a reasonable choice of the legislature, within the boundaries of its discretion. Similarly, in the present case, the Court specified that the prohibition of surrogacy constitutes a principle of public policy, since it is intended to protect fundamental values, such as the human dignity of the pregnant woman[50] who must be protected against the risk of commodification of her body, as well as the legal institution of adoption, for which the legislature had already balanced the conflicting interests of the wish to become parents and the protection of the rights of the parties involved. Both values must be considered to take precedence over the best interests of the child in the context of a balancing carried out directly by the legislature, without any possibility for a court to provide a different assessment[51].

This conclusion is substantially different from that reached by the Court of Appeal of Trento, according to which the prohibition laid down in Article 12 could not be regarded as a principle of public policy, but rather as the compromise solution (equilibrium point is the wording used by the Court) reached by the legislature for the purposes of protecting the various interests involved, which was not capable of overriding the only true fundamental principle in the matter, namely the interest of the child in the establishment of the legal parent–child relationship lawfully acquired abroad. In order to rebut this claim, the plenary session of the Supreme Court recalled not only its own case law but also that of the

[48] Reasons for the decision, para. 13.

[49] Court of Cassation, 11 November 2014, no. 24001; M.C. BARUFFI, *La maternità surrogata nel diritto internazionale privato*, in *Integrazione europea e sovrannazionalità*, a cura di G. Caggiano Bari 2018, p. 290 f.

[50] According to G. LUCCIOLI, the Supreme Court in plenary session, considering human dignity as the backbone of the juridical system, has given the concept an absolute, objective and inalienable value that concerns every human being, with the consequence that surrogacy is detrimental to the dignity of all women and not only of the pregnant woman (*Dalle sezioni unite un punto fermo in materia di maternità surrogata*, in *Foro italiano*, 2019, I, cc. 4027-4034, at c. 4029).

[51] Reasons for the decision, para. 13.4. This need had already been put forward in the literature: C. HONORATI, *Maternità surrogata*, cited above, spec. p. 151 ff., also for the literature cited therein.

Constitutional Court regarding the compatibility of various aspects of Law no. 40 of 2004 with the Constitution.

As a result of the impossibility of resorting to surrogacy arrangements and achieving recognition of a parent–child relationship with the member of the couple not having biological or genetic ties with the child on the basis of the facts as established in the foreign decision, the Supreme Court identifies the institution of adoption pursuant to Article 44, paragraph 1, letter *d* of Law no. 184 of 1983[52] as the proper legal tool to ensure the best interests of the child to the continuity of family status and the underlying rights. This provision indeed provides for the possibility of adopting a child, even without the declaration of the state of adoptability, in cases of impossibility of pre-adoptive custody. The interpretation given in recent years[53] by the Supreme Court of Cassation to this condition has been aimed at including not only situations of *de facto* abandonment (resulting from an actual situation of abandonment of the child) but also those legal situations consisting of the impossibility of pre-adoptive foster care. It represents a provision having a gap-filling function in order to guarantee the continuity of family status as well as the interest of the child in maintaining the relationships developed with those persons who have always provided care, even though they did not have any biological ties with the child. In so doing, the Court of Cassation pointed out the reasoning that lower courts (so far adopting different interpretations) must follow in order to safeguard the child's interest in maintaining the relationships already established within the family of the genetic parent, given that under the law a mere 'consent' is not sufficient to ground a natural parent–child relationship[54].

5. The Advisory Opinion of the European Court of Human Rights of 9 April 2019.

For those jurisdictions that prohibit surrogacy arrangements, such as France, Germany or Italy, the existence of genetic or biological ties has thus far been the key element for the purposes of the recognition of the legal parent–child relationship with regard to children born through this reproductive technique. It is within the States' legislative discretion whether or not to allow this practice and, consequently, whether or not to allow the entry into the civil status records of foreign birth certificates referring to the parent who has no biological ties with the child. Nonetheless, States are required to make available to this parent the legal instruments, other than the entry into the civil status records, that make it possible to give prominence to the 'factual' parent-child relationship[55] established with the non-biological parent. This is, in fact, the scope of the first advisory opinion delivered by the European Court

[52] Law 4 May 1983, no. 184, 'Diritto del minore ad una famiglia'.

[53] See, for all, Court of Cassation, 22 June 2016, no. 12962.

[54] Court of Agrigento, decree of 15 May 2019, in application of the decision of the Plenary session of 8 May 2019 under examination.

[55] Reasons for the decision, para. 13.4.

of Human Rights on 10 April 2019 after the entry into force of Protocol no. 16[56], following the request of the French Supreme Court in the *Mennesson* case. The French proceedings originated from an application for a review[57] of the decision rendered in 2010 by the Court of Appeal of Paris, which ruled against the recognition of the legal parent-child relationship between children born abroad through surrogacy and the intended mother (wife of the biological father).

In 2014, the European Court of Human Rights was called upon to rule in the same case[58], following the refusal by the French registrar to enter into the civil status records the birth certificate, drawn up abroad in accordance with the local law, of a child born in the United States through surrogacy. The Court issued its first decision on the matter that still has precedential value and is followed by the national courts, including the Italian Court of Cassation, according to which it is not possible to refuse the entry of the birth certificate into the civil status records with regard to the parent with whom the child has a genetic or biological link. Otherwise, the State would infringe on Article 8 of the European Convention, specifically the right to private life. With regard to the intended parents, the European Court considered that the balance struck by the French Supreme Court between their right to private life and the interests of the State was correct. In this context, the State maintains a wide margin of appreciation

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[56] Protocol no. 16 to the ECHR of 2 October 2013, which entered into force on 1 August 2018 following the tenth necessary ratification, which was referred to by France, the first country to benefit from it, is not yet in force in our country. According to the Protocol, the highest courts of a Contracting State to the Convention may ask the Grand Chamber for an advisory—and, therefore, non-binding (Article 5)—opinion on questions of principle concerning the interpretation or application of a rule of the Convention or Protocols Article 1(1)(c). The European Court made interesting observations on the role of this procedure when it issued its first advisory opinion on 10 April 2019: avis consultatif, P16-2018-001, Preliminary considerations, para. 25 f. The mechanism thus introduced comes close to the reference for a preliminary ruling provided for, within the European Union, by Article 267 TFEU, the purpose of which is also to strengthen the dialogue with national courts and the application of the Convention (advisory opinion cited above, para. 25), although there are significant differences, first and foremost the different binding nature of the opinions delivered. On the opinion see, also for the literature indicated therein, A. MARGARIA, *Parenthood and Cross-Border Surrogacy: What Is 'New'? The ECtHR's First Advisory Opinion*, in *Medical Law Review*, 2020, pp. 1-14; G. ASTA, *La funzione consultiva delle corti regionali dei diritti umani,* Napoli 2019, p. 229 ff. and p. 255 ff.; K. LEMMENS, *Protocol No 16 to the ECHR: Managing Blacklog through Complex Judicial Dialogue?*, in *Eur. Constitutional L. Rev.*, 2019, pp. 691-713; M. SARZO, *La nuova procedura consultiva prevista dal Protocollo n. 16 alla luce del parere della Corte europea dei diritti dell'uomo in materia di surrogazione di maternità,* in *Riv. dir. int.*, 2019, pp. 1158-1168, p. 1163 ff.

[57] As a result of Law no 2016-1547 of 18 November 2016 on the modernisation of justice in the 21st century, it is possible in France to request the review of a final civil decision on the status of persons following a judgment by the European Court of Justice condemning them for violation of the ECHR or its protocols when such a decision may have negative consequences for the parties concerned that not even the just satisfaction granted under Article 41 of the Convention could bring to an end.

[58] European Court of Human Rights, 26 June 2014, application no 65192/11, *Mennesson* v *France*, in *Recueil of arrêts et décisions*, 2014-III, p. 219 ff. See R. BLAUWHOFF, L. FROHN, *International Commercial Surrogacy Arrangements: The Interests of the Child as a Concern of Both Human Rights and Private International Law*, in *Fundamental Rights in International and European Law. Public and Private Law Perspectives*, edited by C. Paulussen et al., The Hague 2016, pp. 211-241, at p. 219 ff. For a reconstruction of the entire judicial case, see L. BRUNET, Affaire Mennesson: *epilogue*, in *Actualité juridique. Famille*, 2019, p. 481.

as to whether or not to allow surrogacy arrangements and to the subsequent possibility to recognise the legal parent–child relationship between children born abroad and the intended parents.

While the European Court has clarified the possibility of entering the birth certificate lawfully drawn up abroad into the civil status records in order to establish the parent-child relationship between a child born through surrogacy and the genetic parent (usually the father), doubts remain as to the situation of the non-biological/genetic parent (the mother in heterosexual couples). Since there is no obligation upon the State to grant the entry into the civil status records of the birth certificate establishing the intended mother as the legal mother, it is necessary to verify whether it is possible to recognise a parent–child relationship between her and the child.

Five years after the first *Mennesson* ruling, it is precisely on this issue that the European Court was called upon to rule by the French Supreme Court, in order to clarify the applicability of the previous decision with regard to the position of the intended mother, who had no biological or genetic ties with the children but is married to their biological father. In such circumstances, under French law, it is not possible to recognise the foreign birth certificate which, although lawfully drawn up abroad, contains false statements. Nonetheless, the legal institution of adoption could be referred to in a similar situation[59]. The question, therefore, became to ascertain whether the State exceeded the margin of appreciation conferred by Article 8 ECHR insofar as it granted the entry of the foreign birth certificate into the civil status records only with regard to the biological parent, in this case the father[60]. Should the answer be in the positive, the Court of Cassation further asked whether, in such a situation, the State that allowed the establishment of the parent-child relationship with the non-biological parent by means of the adoption of her husband's biological son infringed Article 8 of the European Convention. The Court of Cassation also raised the question of whether, for the purposes of recognition of the parent-child relationship in question, it is necessary to make a distinction between cases in which the child is conceived by having recourse to the genetic heritage of the intended mother[61].

In its advisory opinion, the European Court did not depart from the 2014 *Mennesson* decision, reiterating that, in such a case, the only person who would run the risk of his/her right to private life

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[59] For an analysis of the case law, cfr. S. BOLLÉE, *L'ouverture de l'adoption à la mère d'intention d'un efant issu d'une gestation pour autri*, in *Rev. critique DIP*, 2018, pp. 143-149.

[60] In the present case, it was a heterosexual couple, but the Court's reasoning could also extend to same-sex parents whose partnership is registered, as in the case before the plenary session of the Italian Supreme Court.

[61] The Strasbourg Court, however, defined the scope of its opinion only with regard to cases where the intended mother was not involved in the biological relationship because that was the case in the internal proceedings (paras 28–29). This position was criticised on the grounds that the Protocol does not require the Court to confine itself strictly to the case in question since the scope of the opinion could also be useful for the resolution of similar cases: L. POLI, *Il primo (timido) parere consultivo della Corte europea dei diritti umani: ancora tante questioni aperte sulla gestazione per altri*, in *Dir. umani dir. int.*, 2019, pp. 418-426, at p. 423. In fact, the reason for the choice made by the Court could depend on the wish not to go into the first opinion on a particularly sensitive subject, limiting its scope as much as possible.

being infringed is the child and not the intended mother[62]. While focusing its attention solely on the interests of the children involved, the Court stressed the need to establish a parent-child relationship link with the intended mother in order to prevent negative consequences for the children, which might arise with respect to their identity[63]. In the Court's view, the best interests of the child cannot be reconciled with a general impossibility of obtaining recognition of the parent-child relationship between the child and the intended mother. In such situations, the margin of appreciation for the State is weakened and the best interests of the child are paramount. However, how the parent-child relationship with the non-biological mother is established or recognised can significantly vary among the 43 Contracting States involved in a comparative study carried out by the Court, with the exception of France[64]. It follows that the right to private life protected by Article 8 ECHR requires the State to provide for the possibility of obtaining recognition of the parent-child relationship between a child born through surrogacy and the intended mother, referred to as the legal mother in the birth certificate lawfully drawn up abroad. However, it is up to the State, by virtue of its margin of appreciation, to determine the means by which that recognition can be guaranteed. The entry of the foreign birth certificate into the civil status records is among those possibilities, but also adoption may serve this purpose, as there is no obligation upon the State to recognise the parent-child relationship *ab initio*, i.e. since the birth of the child. Rather, the actual assessment of best interests of the child requires that relationship to be recognised «*au plus tard lorsq'il s'est concrétisé*»[65]. According to the Court, the essential aspect is that the States, when designating the required arrangements within their margins of appreciation, ensure effectiveness and allow a decision to be taken rapidly so that the situation of legal uncertainty is reduced. Furthermore, account must be taken of the assessment *in concreto* of the child's interests, and the recognition of the family status must be established at the latest when the mother–child relationship has become a practical reality, to be understood as the suitability to establish a legal relationship granting the family status.[66] In the Court's view, it is ultimately for the national courts to carry out the burdensome task of ascertaining when the link between the child and the mother has become a reality, also in light of the conditions required at the national level to apply for adoption. The risk is that there will be a sort of *forum* shopping, that is, a rush to the registrar's office, however available, as can be seen today in transcription, despite the prohibition sanctioned by the

[62] Therefore, aspects of the protection of the right to family life (Article 8(1) ECHR) of parents and children, and of the right to private life of the intended parents, are excluded from the European Court's investigation: Advisory opinion, cited above, para. 30 ff.

[63] Advisory opinion, cited above, which mentions access to the nationality of the mother; the possible stay in the country of residence of the mother; the rights of inheritance and maintenance vis-à-vis the mother; and the possible lack of protection in the event of refusal or inability of the mother to take care of the child. On the influence of EU law on the system of private international law, see R. CAFARI PANICO, *Identità nazionale e identità personale*, cited above, p. 224 ff.

[64] Advisory opinion, paras. 22-24.

[65] Advisory opinion, paras. 52-54.

[66] Advisory opinion, paras. 54-55.

Supreme Court in plenary session, in order to consolidate the situation over time and make it irreversible in the name of the best interests of the child.

6. The French case law after *Mennesson*.

Since, to date, there is no common standard among European States in relation to surrogacy arrangements, despite the efforts being made at the international level[67], it is expected that the European Court of Human Rights and the national courts will still play a decisive role in protecting children's rights. Nevertheless, and precisely because of the heterogeneity of the regulatory framework, it does not seem feasible to delegate to the judiciary the resolution of such sensitive cases, which would require a uniform standard of protection of children's rights, in light of their best interests assessed in practice. For the purposes of this assessment, the protection of the interests of intended parents should be substantially irrelevant or, in any case, only supplementary, given that, in order to satisfy their perhaps even legitimate wish for parenthood, they neglect the consequences that a non-regulated spreading of surrogacy arrangements may have for the weaker parties, identified as the surrogates. Above all, the weaker parties are the children, who become the unaware and unintentional victims of the consequences deriving from the infringement, by the intended parents, of the legislative prohibition on surrogacy[68]. Only a careful legislative choice aimed at ensuring the functioning of the legal institutions provided at the national level, such as adoption, and the effectiveness of the rules could respond to the need to protect the fundamental rights, first and foremost, the continuity of family relationships and identity of children born through surrogacy in a country where it is permitted.

The French approach, however, has been different. Following the advisory opinion of the European Court, the French Court of Cassation[69], taking into account the child's best interests, unexpectedly allowed the entry into the civil status records of the foreign birth certificate, also in relation to the intended mother, because an adoption procedure—which should be preferred in such a situation, thus entrusting the court with the task of verifying the child's situation on a case-by-case basis[70]—would not have guaranteed the child's right to private life, as the required proceedings would have been

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[67] See M.C. BARUFFI, *International surrogacy arrangements*, cited above, p. 310; R. BLAUWHOFF, L. FROHN, *International Commercial Surrogacy Arrangements*, cited above, p. 234 ff.

[68] For an analysis of the rights of the various parties involved, see R. BLAUWHOFF, L. FROHN, *International Commercial Surrogacy Arrangements*, cited above, p. 228 ff.

[69] French Court of Cassation, Plenary session, 4 October 2019, no. 10-19.053, ECLI:FR:CCASS:2019:AP00648, commented by J. HOUSSIER, *L'affaire Mennesson ou la victoire du fait sur le droit,* in *AJ Famille,* 2019, pp. 592-594; A. SERIAUX, *Maternités de substitution: grandeur et décadence de deux principes d'ordre public,* in *Droit de la famille,* 2019, pp. 21-24.

[70] *Ibid.*, para 16.

excessively long[71]. In the Court's view, after more than fifteen years of legal disputes, in the absence of legal instruments allowing the establishment of the parent-child relationship and protection of the child's right to private life espoused in Article 8(2) ECHR[72], the only viable solution was the recognition of the foreign birth certificate that also indicated the intended mother as the legal mother of the children, thus granting its entry into the civil status registers. This approach appears to duly respect the rights of the children concerned but is also particularly 'aggressive' and goes beyond the requirements set out in the European Court's advisory opinion, thus paving the way for other similar requests. Perhaps the clarifications made by the Court of Cassation with regard to the long period of time spent in the courtrooms is intended to avoid such a risk, contributing to speed up the proceedings.

However, the French Court of Cassation went further and, a few months after its *Mennesson* decision, extended its innovative scope to a case where the birth certificate, the recognition of which was requested, indicated the biological father and his husband as «*parent de l'enfant*». It held that the solution could not be different in this case just because the intended parent indicated in the birth certificate was a man[73]. The conditions required by the French Court are, indeed, that the certificate in question must be lawfully drawn up abroad and not affected by fraud.

Maybe it is precisely in order to curb this sudden change in the approach of the Supreme Court that the French Senate has introduced further changes to the proposed amendment to the Bioethics Act[74], clarifying that the intended mother (or father, in the case in which two father are mentioned) has no right to a parent-child relationship[75] and, consequently, to the entry of the birth certificate into the civil status records or the recognition of court orders relating to children, either French or foreign, born abroad through surrogacy[76]. This demonstrates, once again, the difficulties in reaching a definitive

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[71] The Court also held that not even the legal presumption of the filiation (*possession d'etat*) provided for by Article 311-1 of the French Civil Code could adequately guarantee the legal certainty of such a link since it could be subject to challenge under Article 335 of the Civil Code.

[72] Cour de cassation, 4 octobre 2019, cited above, para. 19.

[73] French Court of Cassation, First civil chamber, 18 December 2019, no. 18-12.327, para. 9, ECLI:FR:CCASS:2019:C101112.

[74] On 24 July 2019, a draft law on bioethics was presented to the Council of Ministers, transmitted on 5 February 2020 to the National Assembly (no 2658, 2187, 2243 et T.A. 343): see J-R BINET, *Bioétique: un projet de ropture*, in *Droit de la famille,* 2019, pp. 10-14.

[75] Proposal for a new Article 310 A of the Civil Code containing «[n]ul n'a de droit a l'en*fant*» (see Article 1 A of the bill).

[76] Proposal for the inclusion of a new Article 47-1 in the Civil Code: «[t]out acte de l'état civil ou jugement étranger, à l'exception des jugements d'adoption, établissant la filiation d'un enfant né à l'issue d'une convention de gestation pour le compte d'autrui ne peut être transcrit sur les registres en ce qu'il mentionne comme mère une femme autre que celle qui a accouché ou lorsqu'il mentionne deux pères.

Les dispositions du premier alinéa ne font pas obstacle à la transcription partielle de cet acte ou de ce jugement, ni à l'établissement d'un second lien de filiation dans les conditions du titre VIII du présent livre si celles-ci sont réunies».

solution in the matter of surrogacy that meets all the different needs and interests at stake.[77] These difficulties are also apparent in the change of approach by the European Parliament in the Annual Report on Human Rights and Democracy in the World in 2017 and in the EU's policy on the matter[78], in which the strict approach advocated only a few years earlier in condemning surrogacy is abandoned[79] in favour of a simple call for the introduction of clear principles and legal instruments to address human rights violations related to surrogate pregnancy[80].

7. A comparison between the Italian Supreme Court and the European Court of Human Rights.

The solution proposed by the European Court seems similar to that of the Italian Court of Cassation of 8 May 2019, albeit with significant differences in the respective backgrounds and consequences. The Strasbourg Court limited its reasoning to assessing whether the French legislation, which does allow the entry of the foreign birth certificate into the civil status records but only with regard to the genetic parent, could constitute an infringement of the right to private life of a child born through surrogacy, even when the non-biological parent, who is married to the biological parent, may still adopt the child. This ruling could be regarded as an '*actio finium regundorum*' in relation to its 2014 *Mennesson* judgment, in which it had already addressed the question of the effects to be attributed to such a birth certificate whenever the national legislation prohibits surrogacy (as in Italy). Assuming that the prohibition of surrogacy under the French law is lawful, the Strasbourg Court, when considering the child's situation, did not rule out the possibility that the State may allow the entry into the civil status records of the foreign birth certificate that indicates the biological father and the intended mother as parents of the child born through surrogacy. This decision, however, falls within the margin of appreciation of each State, which may well decide whether or not to allow such a possibility. Should it not be permitted, the State must further provide appropriate means in order to recognise the legal parent–child relationship between the child and the intended parent in the manner indicated by the Court itself and illustrated above.

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[77] The case decided by the French Court of Cassation, 12 September 2019, n. 18-20.472, ECLI:FR:CCASS:2019:C100758, is emblematic of the difficulties that may be encountered. The facts of the case are described as «rocambolesque» by H. FULCHIRON (*Verité biologique, prohibition de la GPA, fraude à adoption and intérêtde l'enfant: comment trouver un juste équilibre?*, in *Droit de la famille*, 2019, 24, no. 11, p. 27 ff.): two couples fight each other having both made an agreement with the same surrogate mother for the same minor.

[78] European Parliament resolution of 12 December 2018 on the Annual Report on Human Rights and Democracy in the World 2017 and the European Union's policy on the matter (2018/2098(INI)), P8_TA(2018)0515, para. 48.

[79] European Parliament resolution of 17 December 2015 on the Annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter (2015/2229(INI)), P8_TA(2015)0470, para. 115.

[80] European Parliament resolution of 12 December 2018, cited above, para. 48.

The Italian Supreme Court, in its decision of 8 May 2019, in which it ruled on an application for recognition of a foreign decision attributing parental responsibility to the registered partner of the children's biological father, has verified whether such a recognition may be contrary to public policy. To this end, the Court clarified the content of this notion in an appropriate manner: it is no longer limited to the values enshrined in the Constitution or in international instruments protecting human rights. The Court also reiterated the legislative choice made in Law no. 40 of 2004, namely the disapproval that our legal order attaches to surrogacy practices. On the contrary, the gender issue does not come into play in the reasoning of the Supreme Court, which rather opts for construing this principle for the purposes of being a guidance for future cases, as is demonstrated by the broad references to its ruling no. 24001 of 2014 instead of same-sex parenthood (male or female). On the assumption of the cross-cutting nature of public policy, the Supreme Court considers it as a unitary concept: it concerns all areas of law, from punitive damages to filiation, even if it is obvious that, in the latter field, public policy becomes the decisive element. The international instruments protecting human rights, first and foremost the ECHR, play a fundamental role in providing guidance so that the founding principles of our legal system are both influenced by these values and, so to speak, guided by them. It follows that the principles of the ECHR as they have been interpreted are also used as a standard for reviewing compliance with the same ECHR of the domestic rules. In this regard, great importance is attached to the clarification made by the Supreme Court of Cassation with regard to international public policy, which, despite the wording, encompasses the founding values of the legal order, including the principles found in the supranational legal instruments. On the contrary, no account must be taken of the domestic public policy, that is, the limit to party autonomy[81].

The ruling of the Court of Cassation, which is therefore to be welcomed in all these respects, nonetheless leaves a number of unresolved questions.

First of all, it is necessary to determine what impact the opinion of the European Court of Human Rights could have on the Italian legal system in reference to cases of heterosexual parents in which only one of them has genetic or biological ties with the child. The answer may vary according to the nationality of the persons involved. In cases of children or intended parents who are also citizens of the foreign State where the birth certificate was validly drawn up, the recognition of the foreign decision pursuant to Article 65 of the Italian PIL Act, and the subsequent entry of the birth certificate into the civil status records according to Article 18 of the Decree of the President of the Republic no. 396 of 2000, can ensure compliance with all the conditions set out in the opinion of the European Court of Human Rights.

[81] In this sense, see M.N. SHÚILLEABHÁIN, *Surrogacy, System Shopping, and Article 8 of the European Convention on Human Rights*, in *International Journal of Law, Policy and The Family*, 2019, pp. 104-122, at p. 105.

Conversely, where the persons involved are only Italian nationals[82], the intended mother[83] should resort to the specific form of adoption that does not require the previous declaration of the state of adoptability, which could not be issued because the child is not in a state of abandonment, provided that the child is also the adoptive child of the other spouse pursuant to Article 44, paragraph 1, letter *b* of Law no. 184 of 1983. For this form of adoption, however, doubts remain as to its appropriateness with regard to the requirements underlying the filiation[84], particularly the length of the procedure and the fact that it does not establish a proper relationship of adoption. Above all, this solution does not appear to fully meet the requirements set out by the European Court, which stressed that, whatever the means envisaged at the national level, there is a need to establish the legal parent–child relationship according to a procedure of reasonable length. In addition, since the adoption would be available only to the parent's spouse, it would run the risk of inconsistencies in the approach of the national courts[85] and, lastly, it would not even establish a full adoption. The doubts here expressed about the functioning of this specific form of adoption in our legal system concern, more generally, the institution of adoption itself, which often discourages potential parents from even embarking on a long, complex and uncertain path. Similar considerations can be made with regard to intercountry adoption, also governed by Law no. 184 of 1983, which requires a long period abroad for aspiring adoptive parents. It therefore seems possible to conclude that adoption is not an alternative means to surrogacy arrangements in our legal system.

Second, it should be noted that in both decisions under consideration, the Courts dealt with cases where at least one of the partners was the biological parent of the child. Greater difficulties would arise in cases where both intended parents have no such link, as happened in the *Paradiso and Campanelli* case and in the case decided by the Italian Supreme Court in 2014. Indeed, the very lack of biological ties led the Court to declare that the child was in a state of abandonment, and this resulted in the child being put up for adoption. While the arguments put forward by the *Grande Chambre* of the European Court of Human Rights in February 2017 in *Paradiso and Campanelli* seem to be convincing, it is nonetheless fair to ask what could happen to the child in the timeframe between his/her removal from the family in which he/she has been placed since birth and his/her placement with a new family. Although the intended parents have violated the prohibition laid down by law, even going abroad to follow their wish for

[82] The situation is no different for those jurisdictions in which surrogacy is not allowed and the problem of recognition of the foreign birth certificate arises.

[83] A similar solution is envisaged for the intended parent in same-sex male couples.

[84] This is all the more so when it comes to same-sex couples who resort letter *d of* the rule at stake: A. DI BLASE, *Il riconoscimento della genitorialità a favore del genitore non biologico nel parere della Corte europea dei diritti dell'uomo del 10 aprile 2019*, in *SIDIBlog*, 16 May 2019, who considers that it provides greater guarantees for the child, and is, therefore, better suited to his/her best interests and the implementation of the parenting project through medically assisted procreation the registration of the *status of* child on the basis of the certification acquired abroad.

[85] It should be recalled that some lower courts still refrain from referring to the specific form of adoption referred to in subparagraph *d* of the rule in question. For a review, see M. GATTUSO, *Certezza e tempi "breves que possible" per trascrizioni e adozione in casi particolari dopo il parere Cedu 10/4/2019*, in *www.articolo29.it*, 6 May 2019.

parenthood, this does not mean that this 'criminal' capacity must necessarily affect the child, nor does it indicate that the intended parents are unfit. And one must also consider the fact that the child in the above-mentioned period of time should be placed in an institution, and the problems that may consequently arise.

Finally, the situation that, until a few years ago, seemed unimaginable, but which today, thanks to the continuous evolution of science, has become a reality, namely the possibility that two people of the same sex both transmit their genetic heritage to the child, needs to be considered. More and more frequently, registrars find themselves having to decide whether to comply with the request for transcription of the foreign court order that acknowledges the parental responsibility of both members of the couple as genetic parents. This has so far happened for male homosexual couples, but nothing excludes it from happening with heterosexual couples, with the only difference that the unborn child, instead of having two 'fathers' and possibly a mother, will have two 'mothers' and a father. According to the decisions of the European Court of Human Rights and of the Italian Court of Cassation, if there is a genetic link between the minors and the intended parent, the entry into the civil status records of the birth certificate should take place, thus effectively rendering the ban on resorting to surrogate motherhood ineffective for those who take advantage of this possibility. The solution to the problem must, therefore, be sought elsewhere, perhaps following the example offered by the more 'open' and innovative orientation of the French Court of Cassation, expressed in rulings at the end of 2019, which—at least—avoid discrimination based not only on gender but also on the financial resources of those who can access techniques that employ new technologies.

8. Concluding remarks.

It is true that some countries still do not consider the regulation of surrogacy arrangements in their respective legal systems, but, at the same time, it should also be mentioned that the trend seems to have recently evolved in the opposite direction, as a consequence of the continuous and progressive change in the social context. One should consider the example of Great Britain. More than half of the couples wishing to have recourse to surrogacy go abroad, with the resulting problems, due to the lack of harmonised international legislation on cross-border surrogacy or on the recognition of birth certificates lawfully drawn up abroad. As a result, a legislative reform[86] is under consideration that would modernise the current[87] legislation which, as is well known, allows recourse only to non-commercial surrogacy; that is, without provision for compensation for the surrogate mother and only in the case of proven

[86] See S. WILLIAMS, E. WILLIAMS, *Supply, security and safeguards: how surrogacy law must improve*, in *International Family Law Journal*, 2019, pp. 190-191.

[87] These are the *Surrogacy Arrangements Act 1985*, together with the *Human Fertilisation and Embryology Act 2008*.

impossibility of the intended mother to carry on the pregnancy. In addition, the current legislation only allows the intended parents to establish the legal parent-child relationship after the birth of the child and an application to a judicial authority. Until that moment, they are precluded from making any decisions in the best interests of the child, thus creating a disconnection between legal and social reality that may last until the end of the proceedings. Finally, the difficulty of monitoring the arrangements, as well as the lack of clarity regarding possible money transfers, makes it hard to implement the legislation in practice. For these reasons, the new piece of legislation should provide for the acknowledgment of the intended parents as the child's legal parents from the moment of birth, specific rules for agreements concluded between the parties and the recognition on a bilateral basis of agreements concluded abroad, thus ensuring legal certainty and the protection of the child's rights[88]. Moreover, the possibility of paying a certain amount of money to the surrogate is no longer interpreted negatively as consideration for the purchase and sale of the child but rather positively, since it may prevent the intended parents from having recourse to surrogacy abroad «with less regulation and tight enforceability», thus allowing «the whole process in England, where parliament and the courts can regulate the safeguards and processes».[89]

The English proposal for recognition on a bilateral basis could be useful to overcome the problems arising in cases of birth certificates drawn up in countries where the rights of the pregnant woman are not guaranteed and where human trafficking or trafficking in human organs is also possible. However, this requires the possibility of having recourse to surrogacy arrangements, at least abroad. Instead of a general recognition of foreign birth certificates, with the limit of the public policy exception, each country could draw up *white-* and *blacklists*, including in them those countries in which it is or is not possible to obtain the recognition of their birth certificates. In this way, the recourse to surrogacy arrangements would be correctly regulated at the outset, without having to subsequently face and solve the problem with possible prejudice to those children's rights protected by the ECHR and, necessarily, on a case-by-case basis, thus overloading courtrooms with proceedings that would require uniform solutions provided in advance. This would avoid not only regulatory anarchy and legal chaos[90] but also different approaches taken by the civil status registrars of the different municipalities.

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[88] For more information on the status of the procedure, see www.lawcom.gov.uk.

[89] See S. WILLIAMS, E. WILLIAMS, *Supply, security and safeguards*, cited above, p. 193. In particular, they state that «[t]he welfare of the child is paramount: that is the key public policy today. This is the overriding consideration for any judge. It is not in the child's best interest to be born abroad, potentially in poorer conditions than in the UK, and away from the intended parents, one of whom at least will probably be genetically related to the child» (*ibidem*).

[90] G. KESSLER, *La distinction du parent et du géniteur: propositiions pour une nouvelle approche de la filiation*, in *Rev. trim. droit civil*, 2019, pp. 519-551, at p. 521.

Kafala in the *SM* judgment of the Court of Justice and the Italian perspective

Cinzia Peraro

Abstract

The family reunification of European citizens with a foreign minor placed with them under *kafala* has been addressed in a recent judgment of the Grand Chamber of the EU Court of Justice involving the notion of direct descendant pursuant to Article 2(2)(c) of Directive 2004/38 on the free movement of Union citizens and their family members. The Court held that a minor under *kafala* is not a direct descendant but is granted the status of «other family member» pursuant to Article 3(2)(a). The ruling is significant for the Italian legal system, where the national courts have dealt with the issue of the recognition of this Islamic institution in various situations, and their interpretation appears to be in line with the CJEU judgment, although some doubts could arise as regards the difference in treatment between Italian citizens and third country nationals.

Kafala in the *SM* judgment of the Court of Justice and the Italian perspective

Cinzia Peraro*

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1. Introduction.

By a reference for a preliminary ruling from the Supreme Court of the United Kingdom[1], the Court of Justice was called upon to interpret the concept of «direct descendant» within the meaning of Article 2(2)(c) of Directive 2004/38 on the freedom of movement for European citizens and their family members[2], in order to establish whether it was possible for the UK authorities to grant an entry visa to an Algerian child who had been placed under *kafala* with a French couple married in the United Kingdom, where the husband has a permanent right of residence.

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[1] Reference for a preliminary ruling made by the decision of 14 February 2018 of the Supreme Court of the United Kingdom, received at the Court on 19 February 2018, case C-129/18, *SM* v *Entry Clearance Officer, UK Visa Section*; see also the order of 14 March 2018, by which the President of the Court of Justice dismissed the application for accelerated procedure, EU:C:2018:191.

[2] 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, in *OJ* L 158 of 30 April 2004, pp. 77-123. For a general overview on family reunification in Directive 2004/38 and Directive 2003/86 (of 22 September 2003 on the right to family reunification, in *OJ* L 251 of 3 October 2003, pp. 12-18), see A. LANG, *Kafala and family reunification of third-country nationals*, in E. BERGAMINI, C. RAGNI (eds.) *Fundamental rights and best interests of the child in transnational families*, Cambridge 2019, pp. 97-113, at p. 101 ff.

The Grand Chamber of the Court of Justice delivered its judgment on 26 March 2019[3], in which it upheld the Advocate General's opinion[4] according to which a child placed under the *kafala* system cannot be defined as direct descendant. At the same time, it emphasised the role of the competent national authorities under Article 3(2) of Directive 2004/38 to facilitate the entry of family members of European citizens, including minors with this status, giving priority to their best interests.

The question referred to the European Court is not new for the Italian courts, which have addressed the issue of recognition of *kafala* not only in relation to family reunification, but also in other cases involving *inter alia* applications for adoption or parental leave where the *kafala* measure was asked to be considered as a prerequisite for the respective application. Overall, the Italian case law considers the regime created on the basis of this Islamic institution in a uniform manner, holding that it cannot be compared with adoption, but is more similar to foster care.

The Grand Chamber's ruling is therefore significant for the Italian legal system, where the approach of the Italian courts is apparently consistent with the *SM* judgment. However, it does leave some doubts concerning the difference in treatment between Italian citizens and third country nationals when seeking family reunification with a foreign minor.

2. *Kafala* in the international and European legal framework.

Kafala is an institution, widespread in Islamic countries, under which a married couple or unmarried persons (*kafil*) may take care of orphaned or otherwise abandoned children (*makful*) until they come of age. Its effects are determined according to the legislation of the country where the measure is adopted, or the act is concluded. By virtue of this relationship, no legally binding link is established with the family receiving the child and the powers of representation or protection remain with the competent

[3] Court of Justice, Grand Chamber, judgment of 26 March 2019, Case C-129/18, *SM* v *Entry Clearance Officer, UK Visa Section [SM (Enfant placé sous kafala algérienne)]*, EU:C:2019:248 (hereinafter «*SM* case»). For some comments see P. HAMMJE, *Reconnaissance d'une kafala au titre d'une vie familiale effective avec un citoyen européen aux fins d'octroi d'un droit de séjour dérivé*, in *Rev. crit. droit int. privé*, 2019, pp. 768-785; I.E. LÁZARO GONZÁLEZ, *«Kafala» y vida familiar desde el derecho de extranjería. A propósito de la sentencia del tribunal de Justicia (Gran Sala) de 26 de marzo de 2019*, in *Rev. electrónica estudios int.*, 2019, n. 37, pp. 32-38; N. MARCHAL ESCALONA, *La kafala, ciudadanía de la unión y los derechos fundamentales del menor: de Estrasburgo a Luxemburgo*, in *La Ley Unión Europea*, 2019, n. 71; F. MONÉGER, *Kafala: CJUE, gr. ch. 26 mars 2019, aff. C-129/18, SM c Entry Clearance Officer, UK Visa Section*, in *Journal droit int.*, 2019, pp. 1224-1231; M. ORLANDI, *La libera circolazione delle persone nell'Unione europea e la* kafala *di diritto islamico*, in *Dir. succ. fam.*, 2019, pp. 575-593; L. PANELLA, *Il riconoscimento della kafalah islamica nella giurisprudenza delle corti sovranazionali europee e nella giurisprudenza italiana*, in *Liber amicorum Angelo Davì*, Napoli 2019, pp. 573-596, at p. 583 ff.; G. PASCALE, *Ricongiungimento familiare, diritti fondamentali e* kafala *islamica nella sentenza* M.S. *della Corte di giustizia dell'Unione europea*, in *Studi intergr. eur.*, 2019, pp. 795-808; C. PERARO, *L'istituto della kafala quale presupposto per il ricongiungimento familiare con il cittadino europeo: la sentenza della Corte di giustizia nel caso* SM *c.* Entry Clearance Officer, in *Riv. dir. int. priv. proc.*, 2019, pp. 319-348; A. RIGAUX, *Droit de séjour dérivé des ressortissants d'États tiers*, in *Europe*, 2019, n. 5, comm. 184; F. STRUMIA, *The Family in EU Law After the SM Ruling: Variable Geometry and Conditional Deference*, in *Eur. Papers*, 2019, pp. 389-393.

[4] Advocate General Campos Sánchez-Bordona, opinion of 26 February 2019, case C-129/18, *SM* v *Entry Clearance Officer, UK Visa Section*, EU:C:2019:140.

public authorities of the country of origin[5]. This protective measure may be granted by agreement between the parties (private or consensual *kafala*), which may then be approved by the competent authority, or by a court order (judicial *kafala*) or notarised instrument. The specific status of the measure (agreement, order or instrument) is significant in terms of both its classification and recognition under the legal system of the hosting country, since it could give rise to difficulties as to its compatibility with the public policy of that country[6].

Kafala is specified as one of the measures for ensuring the protection of and care for abandoned children under the 1989 New York Convention on the Rights of the Child[7] and the 1996 Hague Convention on parental responsibility and protection of children[8], by which all Member States of the European Union are bound. In particular, Article 20(3) of the 1989 New York Convention refers to *kafala* under Islamic law as one of the legal instruments for ensuring alternative care. This is in addition to foster placement, adoption or placement in suitable institutions for the care of children, which must be adopted taking into account the need to ensure continuity in the child's education and to respect his or her ethnic, religious, cultural and linguistic origin[9]. In the 1996 Hague Convention, the provision of

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[5] In accordance with the Koranic prohibition of adoption and in keeping of the precept that obliges every Muslim to help a person in need. On this institution, see International Social Service, *Kafalah. Preliminary analysis of national and cross-border practices*, 2020, and, *inter alia*, A. BORRONI, *La kafalah: uno studio di diritto comparato*, in *Dir. e religioni*, 2019, pp. 221-260; O. FERACI, *La protezione dello status del minore attraverso le frontiere*, in AUTORITÀ GARANTE PER L'INFANZIA E L'ADOLESCENZA, *La Convenzione delle Nazioni Unite sui diritti dell'infanzia e dell'adolescenza: conquiste e prospettive a 30 anni dall'adozione*, Roma 2019, pp. 386-413, at p. 411 ff.; A. PASTENA, *Kafalah in International and European Conventions*, in *Annuario dir. comp. e studi legisl.*, 2019, pp. 963-986; C. PERARO, *L'istituto della kafala*, cited above, at p. 327 ff.; P. VIRGADAMO, *La* kafalah *tra ordine pubblico, miglior interesse del minore e tutela integrale della persona*, in *Dir. succ. fam.*, 2019, pp. 247-269; M. BAKTASH, *I giudici italiani alla prova con l'istituto della* kafalah, in *Fam. dir.*, 2018, pp. 300-312, at p. 301 ff.; G. CARAPEZZA FIGLIA, *Tutela del minore migrante ed ermeneutica del controllo*, in *Dir. fam. pers.*, 2018, pp. 223-244, at p. 239 ss.; M. ORLANDI, *L'entrata in vigore della Convenzione de L'Aja ed il riconoscimento dei provvedimenti di* kafala, in *Dir. succ. fam.*, 2017, pp. 865-893, at p. 875 ff.; S. ARMELLINI, *Qualificazione e istituti del diritto di famiglia sconosciuti*, in A. CAGNAZZO, F. PREITE, V. TAGLIAFERRI (eds.), *Il nuovo diritto di famiglia. Profili sostanziali, processuali e notarili. IV. Tematiche di interesse notarile. Profili internazionalprivatistici*, Milano 2015, pp. 743-797, at p. 794 ff.; C. PERARO, *Il riconoscimento degli effetti della* kafalah: *una questione non ancora risolta*, in *Riv. dir. int. priv. proc.*, 2015, pp. 541-566, at p. 541 ff.; A. LANG, *Considerazioni su* kafalah, *ricongiungimento familiare e diritto dell'Unione europea*, in *Dir. imm. citt.*, 2011, pp. 52-71, at p. 53 ff. On the notion of *kafala*, see also *Practical Handbook on the Operation of the 1996 Hague Child Protection Convention*, 2014, at pp. 29 and 146; as well as P. LAGARDE, *Explanatory Report on the 1996 Hague Child Protection Convention*, 1998, at p. 547; for the Italian version of the Report, see F. ALBANO (a cura di), *La Convenzione dell'Aja del 1996, Prontuario per l'operatore giuridico*, Roma 2018.

[6] As regards the Italian legal order, see M.C. BARUFFI, *La circolazione degli* status *acquisiti all'estero e il loro riconoscimento*, in *Riv. AIAF*, 2016, pp. 63-85, at p. 74; C. PERARO, *Il riconoscimento*, cited above, pp. 546-547; R. GELLI, *Il ricongiungimento del minore in kafalah al cittadino italiano: la svolta delle sezioni unite*, in *Fam. dir.*, 2014, pp. 122-133, at p. 128; R. CLERICI, *La compatibilità del diritto di famiglia mussulmano con l'ordine pubblico internazionale*, in *Fam. dir.*, 2009, pp. 197-211, at p. 208.

[7] Convention on the Rights of the Child adopted and opened for signature, ratification and accession by UN General Assembly resolution 44/25 of 20 November 1989.

[8] Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

[9] On this Article, see C. BERNASCONI, P. LORTIE, *La CRC e i lavori della Conferenza dell'Aja di diritto internazionale privato nel settore della protezione delle persone di minore età*, in *La Convenzione delle Nazioni Unite sui diritti dell'infanzia e dell'adolescenza*, cited above, pp. 107-131, at p. 121 ff.

care by *kafala* is one of the measures provided for in Article 3(e)[10]. It must be noted the Contracting States to this latter Convention also include some countries of Islamic origin, such as Morocco, which has not in fact acceded to the Convention of 29 May 1993 on the protection of children and co-operation in respect of intercountry adoption since it does not recognise adoption under its own law on the grounds that it runs contrary to the principles of Islamic law[11]. Algeria, as the country of origin of the child involved in the *SM* case, is not a party to either of the two Conventions.

As regards the recognition of *kafala*, Article 23 of the 1996 Hague Convention ensures that protection measures are fully recognised by operation of law and requires States to recognise the effects of the foreign institution as provided for in the country of origin. It follows that *kafala* cannot be regarded as equivalent to adoption, which does not in fact fall within its scope. Moreover, according to the procedure outlined in Article 33, the authority of the country of origin must consult the Central Authority or other competent authority of the country of destination, where the child's new habitual residence will be located, before issuing a *kafala* order in favour of the applicants living in the receiving State[12].

Within the European framework, there are no specific provisions governing *kafala*. The Union does not have any competence in matters of personal status and family law. However, the Union shares competence with the Member States in the field of judicial cooperation in civil matters in order to regulate cases with cross-border implications pursuant to Article 81 TFEU, which provides for special legislative procedures under family law and, in particular, the adoption of acts by the Council by unanimity. The measures adopted in that context include Regulation No 2201/2003 (Brussels IIa) on parental responsibility[13], whose Article 1 does not however mention *kafala* as one of the measures falling within its scope, alongside protection, care, other similar institutions and the placement of the child in a foster family or institution[14]. With specific regard to the 1996 Hague Convention, by Decisions adopted in 2002

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[10] See the French version which reads "*recueil légal par kafala*" and in the Italian version "*assistenza legale tramite kafala*".

[11] See A. BORRÁS, *The protection of the rights of children and the recognition of* kafala, in THE PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *A commitment to private international law. Essays in honour of Hans van Loon*, Cambridge-Antwerp-Portland 2013, pp. 77-87, at p. 80 ff. On the relationship between the 1993 and 1996 Hague Conventions and *kafala*, see H. VAN LOON, *Respecting children's dignity under private international and migration law*, in *Plurality and Diversity of Family Relations in Europe*, edited by K. BOELE-WOELKI, D. MARTINY, Cambridge 2019, pp. 47-58, at p. 55 ff. On the conversion of *kafala* into adoption pursuant to Article 27(1) of the 1993 Hague Convention, see F. SALERNO, *The Identity and Continuity of Personal Status in Contemporary Private International Law*, in *Collected Courses of The Hague Academy of International Law - Recueil des cours*, 2019, vol. 395, pp. 9-198, at p. 195 f.

[12] On the procedure and, in general, on the recognition of *kafala* under the 1996 Hague Convention, see A. LANG, *Kafala and family reunification*, cited above, p. 99 f.; M. ORLANDI, *L'entrata in vigore della Convenzione de* L'Aja, cited above, pp. 880-882 and 890.

[13] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, in *OJ* L 338 of 23 December 2003, pp. 1-29.

[14] The regulation of this institution is therefore left to the Member States individually, which are not required to enact specific legislation in this area. Nevertheless, the provisions of Regulation No 2201/2003 could

and 2008[15], the Council authorised the EU Member States to sign and ratify the Convention in the interest of the then Community. This is because, whilst the latter could not be a Contracting Party, it still had exclusive competence over certain aspects governed by that Convention[16].

Therefore, although there are no EU rules governing *kafala*, thanks to the applicable international conventions, the Islamic institution deserves protection and should be considered as one of the arrangements for providing care to minors that must be recognised under the European legal order.

3. The *SM* case before the Court of Justice.

The institution of *kafala* was brought to the attention of the Court of Justice for the first time within a question concerning the interpretation of Directive 2004/38, on the right of EU citizens and their family members to move and reside freely within the Member States, and the possibility to recognise a child placed under *kafala* as a direct descendant of the European citizens involved.

By a reference for a preliminary ruling made on 19 February 2018[17], the Supreme Court of the United Kingdom asked the Court of Justice to interpret Article 2(2)(c) of Directive 2004/38 in order to determine whether the concept of «direct descendant» could also include an Algerian minor, SM, who had been placed under *kafala* pursuant to a court order from her country of origin with a married couple, both French nationals (the husband having Algerian origin), who were assigned parental responsibility under Algerian law. They took care of the child and treated her as their natural daughter. In October 2011, the husband returned to the United Kingdom, where he and his wife married in 2001 and where he has a permanent right of residence, while the wife remained in Algeria with the child. In May 2012, SM applied for entry clearance for the United Kingdom as the adopted child of a «citizen of the European Economic Area»[18]. However, this application was rejected by the competent Entry Clearance Officer on

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be read in the light of the 1996 Hague Convention and, where a *kafala* is recognised in a Member State, its effects could then circulate throughout the EU under the Regulation, since it includes within its scope measures of protection, foster care and other analogous institutions: see the opinion in *SM* case cit., points 55-57.

[15] Council Decision of 19 December 2002 authorising the Member States, in the interest of the Community, to sign the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children (in *OJ* L 48 of 21 February 2003, pp. 1-2) and Council Decision of 5 June 2008 authorising certain Member States to ratify, or accede to, in the interest of the European Community, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children and authorising certain Member States to make a declaration on the application of the relevant internal rules of Community law (in *OJ* L 151 of 11 June 2008, pp. 36-48).

[16] See A. LANG, *Kafala and family reunification*, cited above, p. 97 f.; M.C. BARUFFI, *La convenzione dell'Aja del 1996 sulla tutela dei minori nell'ordinamento italiano*, in *Riv. dir. int. priv. proc.*, 2016, pp. 976-1019, at p. 978 ff.; C. PERARO, *Il riconoscimento*, cited above, pp. 561-562.

[17] For a description of the facts, see the order, judgment and opinion in the *SM* case, cit.

[18] As written by the referring judge.

the grounds that the guardianship under the Algerian *kafala* system was not recognised as an adoption according to English law.

SM first brought an action before the First-tier Tribunal (Immigration and Asylum Chamber), which confirmed the refusal, and then before the Upper Tribunal (Immigration and Asylum Chamber), which upheld the appeal and ruled that the minor was an «extended family member» of the European citizen under the UK immigration legislation − Article 8 of the 2006 Immigration (European Economic Area) Regulation −. The Entry Clearance Officer appealed against this decision to the Court of Appeal (England & Wales) (Civil Decision), which ruled that a child placed under *kafala* could not fall within the definition of «direct descendant» under Article 2(2)(c) of Directive 2004/38 or within the concept of «any other family members» pursuant to Article 3(2)(a). SM then appealed the judgment of the Court of Appeal to the Supreme Court of the United Kingdom, which stayed the proceedings and referred to the Court of Justice, for a preliminary ruling, questions of interpretation concerning (i) the classification of a child placed under *kafala* for the purposes of family reunification with a European citizen as a «direct descendant» under Article 2(2)(c) of Directive 2004/38[19], (ii) the possibility of refusing entry to such a child on the basis of Articles 27 and 35 of that Directive if she is a victim of or at risk of exploitation, abuse or trafficking in human beings, and (iii) the possibility for the requested State to enquire into whether the procedure for placing the child in the guardianship or custody of the EU citizen involved was such as to give sufficient consideration to the best interests of that child.

By a judgment of 26 March 2019, the Grand Chamber of the Court of Justice held that Article 3(2)(a) of Directive 2004/38 on family reunification with «any other family members» applies to the present case. The Court's arguments in principle reflect those of the Advocate General. These were based, first of all, on the absence of any parental relationship that could justify a finding that the child under the *kafala* system can be regarded as a direct descendant. They also ascertained the existence of a family relationship that can in any case be covered by Article 3 of that Directive, taking into account Articles 7 and 24 of the EU Charter of Fundamental Rights. In the decision of the Court of Justice, no emphasis is given to the international sources that refer to *kafala* as one of the protection measures for children. This is in contrast with the Advocate General's view, although its opinion did not suggest that, based on the international conventions, the notion of family member should be extended so as to classify a child under *kafala* as a direct descendant.

3.1. The notion of "direct descendant".

[19] On the categories of beneficiaries, see V. DI COMITE, *Ricongiungimento familiare e diritto di soggiorno dei familiari di cittadini dell'Unione alla luce del superiore interesse del minore*, in *Studi integr. eur.*, 2018, pp. 165-178; R. PALLADINO, *Il ricongiungimento familiare nell'ordinamento europeo*, Bari 2012, p. 60 ff.

In relation to the first question concerning the meaning of Article 2(2)(c) of Directive 2004/38, the European Court examined the legal status of the child under *kafala* and assessed whether she could be defined as «direct descendant under the age of 21» who, according to the Directive, would automatically enjoy a derived right of entry and residence.

It first ascertained the *kafala* regime applicable to SM, along with the nature and characteristics of that institution according to the applicable legislation of her country of origin (Algeria)[20]. Then, in view of the Member States' exclusive competence over matters pertaining to family and parental relationships, and absent any specific definition of direct descendants in the text of the Directive, the Court of Justice found it necessary to qualify the institution of *kafala* for the purposes of the Directive. In line with its case law, it stressed that the context, purpose and nature of the provisions must be considered when analysing and interpreting European legislation, also in order to give a proper and autonomous meaning to European Union law (which must be applied uniformly in all Member States) unless national legislation is expressly referred to[21]. In that regard, the Court observed 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»[22]. The EU Court added that, in order to pursue the objectives of the Directive, a broad interpretation of the parent-child relationship must be adopted and biological parent-child relationships must be considered in the same way as legal parent-child relationships, so that «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»[23].

However, the possibility of including minors placed in legal guardianship under the category of direct descendant is excluded. Consequently, in the Court's view, the Commission's interpretation provided in the guidance on the application of Directive 2004/38 cannot be justified[24]. With regard to the concept of direct descendants («family members in direct line»), the Commission indeed stated that «[w]ithout prejudice to issues related to recognition of decisions of national authorities», this concept «extends to adoptive relationships or minors in custody of a permanent legal guardian. Foster children

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[20] Judgment in *SM* case, cited above, point 45.

[21] *Ivi*, points 50-51; see also the opinion in *SM* case, cited above, points 58-66, where the Advocate General refers to the *Coman* judgment on the neutral concept of «spouse» (see Court of Justice, Grand Chamber, judgment of 5 June 2018, Case C-673/16); and Advocate General Mengozzi, opinion of 6 November 2013, Case C-423/12, *Reyes* v *Migrationsverket*, EU:C:2013:719, point 55.

[22] Judgment in *SM* case, cited above, point 52.

[23] *Ivi*, points 53-54.

[24] *Ivi*, point 55. See Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of 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, COM(2009)313 final of 2 July 2009 (hereinafter «Commission Guidelines»).

and foster parents who have temporary custody may have rights under the Directive, depending upon the strength of the ties in the particular case»[25], without any limitation as to the degree of relatedness, since the status of family member must be demonstrated, and the best interests of the child be taken into account. In this respect, the Court of Justice noted that *kafala* does not create a parent-child relationship between the minor and the guardian[26].

Nevertheless, it would not appear that any similarity between *kafala* and other protective measures can be ruled out for two reasons. From a general point of view, *kafala* is - like the other institutions - a measure of protection for minors in need; more specifically, it establishes a regime that can be considered to be similar to status as a child in a legal sense. This approach is based on a broad interpretation of the parent-child relationship, which requires a case-by-case assessment of the factual circumstances as well as the best interests of the child, in line with the Commission's Guidelines.

An extension of the category of direct descendant was rejected by the Advocate General in his opinion[27]. Recalling the Commission's explanation cited above, he examined the circumstances of the child under *kafala*, first, with reference to the adoptive relationship, rejecting any equivalence between this and *kafala*, and secondly with regard to the category of «custody of a permanent legal guardian». In this respect, the Advocate General stated that to regard adopted minors as being equivalent to those minors under the care or custody of a legal guardian would not be consistent with the interpretation of Article 2(2)(c) of Directive 2004/38[28]. In fact, he considered that «being in 'custody of a permanent legal guardian' does not mean that the child in custody becomes a direct descendant (by adoption) of the guardian»[29], because such a relationship is not comparable to a parent-child relationship, whether biological or adoptive, which establishes a permanent link and can, moreover, coexist with guardianship[30]. *A fortiori* also the *kafala* measure could not establish a direct relationship, since it is not permanent in nature and does not create any parent-child ties.[31] It follows that «the concept of 'direct descendant' cannot be extended beyond adoptive children to include those in the legal custody of guardians»[32].

3.2. Possible broader interpretation of "direct descendent" by reference to international instruments.

[25] Commission Guidelines, para. 2.1.2. In relation to the adopted children, the Commission observes that «[a]doptive children are fully protected by Article 8 of the ECHR (ECtHR cases *X* v *Belgium* and *Netherlands* (10 July 19750, *X* v *France* (5 October 1982) as well *as X, Y and Z* v. *UK* (22 April 1997))» (see note 13).

[26] Judgment in *SM* case, cited above, point 56.

[27] Opinion in *SM* case, cited above, point 76 ff.

[28] *Ivi*, point 77.

[29] *Ivi*, point 78.

[30] *Ivi*, point 79.

[31] *Ivi*, points 80-82.

[32] *Ivi*, point 88.

Against this background, a different conclusion based on a broad interpretation of the relationship created by *kafala*, thereby finding it to be equivalent to a parent-child relationship, could be reached by reference to the international conventions that include *kafala* within their scope, alongside the aforementioned protection measures, i.e. adoption, foster care, guardianship, placement in a family or institution or other equivalent measures. It could admittedly be argued that the juxtaposition (within the text of the relevant provisions) of the Islamic measure with the other protective institutions could lead to the acknowledgment of the existence of differences between them, as is the case between adoption, custody and guardianship. However, its inclusion might constitute acknowledgement that *kafala* falls into the broad category of child protective measures. Thus, given that these measures can establish a family relationship, it could be concluded that also *kafala* can be classified as a valid prerequisite for the establishment of a family relationship in the same manner as the other measures envisaged[33].

With particular reference to the scope of the 1996 Hague Convention, to which all EU Member States are parties, the provision of care by *kafala* is mentioned in Article 3(e) after the measure of placement in a host family or institution. It follows that, even at European level, *kafala* should qualify as a measure of protection that establishes a family tie, albeit with its own characteristics, which differ from the characteristics of the institutions we are more familiar with. The inclusion of *kafala* in the 1996 Hague Convention, which lists measures that generally create a family relationship (although not only in a biological sense), shows that it is not equivalent to adoption, which is indeed the primary focus of the 1993 Hague Convention on intercountry adoption[34]. On the basis of these considerations, considering *kafala* to be equivalent to the measures of protection falling under the 1996 Hague Convention could imply that it also establishes a family relationship that must be safeguarded, thus meaning that the status of a child under *kafala* is similar - but not identical - to that of a child in the direct line, even though it is not a biological or adoptive child.

As mentioned above, the Court of Justice did not take into consideration the international instruments or the inclusion of *kafala* among the protective measures recognised therein. This was in contrast with the Advocate General, who considered that an analysis of the international instruments does not in any case result in a different interpretation of the category of direct descendant, since those

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[33] On the interaction between the1996 Hague Convention, private international law and migration law, and the need for Member States to be «aware of the fact that the *kafala*, although unknown in their own legal system, creates certain rights for migrant children», see S. CORNELOUP, B. HEIDERHOFF, C. HONORATI, F. JAULT-SESEKE, T. KRUGER, C. RUPP, H. VAN LOON, J. VERHELLEN, *Private International Law in a Context of Increasing International Mobility: Challenges and Potential*, Study PE 583.157, June 2017, at p. 24 f., and *Children On the Move: A Private International Law Perspective*, Study PE 583.158, June 2017, at p. 36 f.

[34] On the exclusion of *kafala* from the 1993 Hague Convention, see H. VAN LOON, *Report on Intercountry Adoption*, Preliminary Document No 1 of April 1990, at p. 27; and A. BORRÁS, *The protection of the rights of children*, cited above, at p. 78 f.

conventions do not imply any equivalence among the measures listed therein[35]. Moreover, the Advocate General argued that «the rigorous mechanisms for oversight of international adoptions provided for in the 1993 Hague Convention in order to safeguard the best interests of the child could easily be circumvented if a form of guardianship which, precisely because it does not have the same effects as adoption, is preceded by a national procedure which does not have the same guarantees (or which even, in the case of *kafala*, takes place before an *adul*, or notary, with no requirement for the involvement of the public authorities) were to be accepted as adoption»[36]. In actual fact, however, a form of control is still established for the purposes of granting the right of entry under Directive 2004/38 where the members of the family referred to in Article 2 are concerned, although it is "weaker" than the extensive examination required for the category under Article 3 of the same Directive.

3.3. The need to protect family life and child's best interests.

In the view of the Advocate General, the interpretation that a child under the *kafala* system cannot be regarded as a direct descendant also does not conflict with the need to protect family life created on the basis of *kafala*, as guaranteed by the European Court of Human Rights[37], or with the necessary overriding consideration of the child's best interests[38]. In fact, in his view, not to consider a child under *kafala* as a direct descendant does not mean not recognising the existence of a family relationship. Such family tie is indeed protected under Article 8 ECHR, which does not, however, impose an obligation on States to classify *kafala* as adoption, and thus to include the child within the category of direct descendants. Family relationship also finds protection under Article 3 of Directive 2004/38, provided that the conditions laid down therein are met[39], since this provision would enable the child to obtain effective legal protection[40] and be recognised as a "non-descendant" family member. Namely, as mentioned above, pursuant to this Article 3, a child under *kafala* would not enjoy an automatic right of entry. Only Article 2 in fact acknowledges a privileged status for core family members and would therefore more effectively protect the child's right to a family life and his or her best interests.

In favour of a broad interpretation of the concept of direct descendants, it could also be noted that, on the basis of the case law of the Court of Justice concerning the legislation preceding Directive 2004/38, the children of one spouse or partner were included within the category of direct descendants for the purposes of Article 2(2)(c) of that Directive. In this way, relevance was given to a *de facto* relationship, since the existence of a legal relationship between one spouse and the children of the other

[35] Opinion in *SM* case, cited above, points 82-83.
[36] *Ivi*, point 84.
[37] *Ivi*, points 95-97.
[38] *Ivi*, points 98-105.
[39] *Ivi*, points 106-108.
[40] *Ivi*, point 94.

spouse was not considered to be necessary[41]. Thus, assuming that the regime created by *kafala*, whether resulting from a consensual or a judicial act, also has legal relevance, the existence of a family relationship between the fostering citizens and the minor entrusted to them through *kafala* could be ascertained. However, no such suggestions may be found in the opinion of the Advocate General or in the judgment of the Grand Chamber of the Court of Justice, which held that Article 2(2)(c) was not applicable, whilst by contrast affirming the applicability of Article 3(2)(a).

3.4. Defining "any other family members".

Article 3(2)(a) consists in a residual clause, which imposes an obligation on the Member States to facilitate[42] 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, or where serious health grounds strictly require the personal care of the family member by the Union citizen»[43]. According to the Court of Justice, this category of family members includes various situations that do not fall within the definitions provided for under Article 2(2) of the Directive[44]. In order to pursue the aim of the Directive, as set out in recital 6, namely of preserving the unity of the family in the broad sense, irrespective of the nationality of the individuals concerned[45], the circumstances of persons who cannot be covered by the definition of family members under Article 2 of the Directive must be subject to an in-depth examination, on the basis of Article 3. This examination must be carried out by the requested Member State in accordance with its own legislation, taking into account the relationship with the European citizen involved and any useful circumstances, including the applicant's dependence on the latter[46]. In fact, according to this Article, certain conditions must be met, i.e. the family

[41] See Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2001)257 final of 23 May 2001, in *OJ* C 270E of 25 September 2001, pp. 150-160, where, in relation to Article 2, which was then amended before the Directive was adopted, it is stated that a single and broad notion of «family member» should be embraced.

[42] This obligation to facilitate consists of 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 the judgment in *SM* case, cited above, point 61.

[43] Commission Guidelines, cited above, para 2.1.1. This also includes the partner with whom the European citizen has a *de facto* stable relationship. For comments on this Article, see E. GUILD, S. PEERS, J. TOMKIN, *The EU Citizenship Directive. A Commentary*, 2nd ed., Oxford 2019, p. 77 ff.; V. DI COMITE, *Ricongiungimento* familiare, cited above, p. 171 ff.; R. PALLADINO, *Il ricongiungimento familiare*, cited above, p. 62 ff.; and the opinion in *SM* case, cit., points 25, 68-69.

[44] Judgment in *SM* case, cited above, point 60; see also Court of Justice, Grand Chamber, judgment of 5 September 2012, case C-83/11, *Secretary of State for the Home Department* v *Rahman and Others*, EU:C:2012:519, point 32.

[45] The fundamental objective pursued by the Directive is not family reunification, but the primary and individual right of European citizens to move and reside freely in EU countries: see R. PALLADINO, *Il ricongiungimento familiare*, cited above, p. 61.

[46] See recital 6 and Article 3(2)(2) of Directive 2004/38.

member must be dependent of and must live with or receive assistance due to serious health grounds from the European citizen. A family member of a European citizen is considered to be dependent on the latter when there is a real situation of dependence resulting from a state of need for material support to meet his essential needs in the State of origin, having regard to the time when the application for reunification is made[47]. The material support of the family member guaranteed by the European citizen, which does not, however, imply the existence of a right to maintenance[48], must be assessed taking into account the personal circumstances of the person concerned, such as age, professional qualifications, health and the fact that the family member's financial means allow the person concerned to reach the minimum level of subsistence in the country of origin[49].

The examination must not cover the duration of dependency or the amount; however, the family member must actually be dependent and his or her situation must be of a structural nature. In this regard, a simple commitment by the EU citizen to support the family member concerned is not sufficient to establish financial or material dependency, and the dependant family member must submit documentary evidence of his or her status as a dependant, which must be issued by the competent authorities of the country of origin, as set out in Article 10. Such proof may be provided by any appropriate means, as has been confirmed by the Court of Justice[50].

In the light of these considerations, it seems possible to conclude that, as is the case in relation to direct descendants, a *de facto* relationship is taken into account also for extended family members. This means that a situation which can be demonstrated an economic and material support, instead of a direct or legal relationship[51], can fall within the meaning of "family member" referring to a broad definition of the same concept in order to pursue the objectives of Directive 2004/38. This interpretation could

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[47] Court of Justice, judgment of 18 June 1987, case 316/85, *Lebon*, EU:C:1987:302, point 16 ff.; Court of Justice, judgment of 16 January 2014, case C-423/12, *Reyes* v *Commission*, EU:C:2014:16, points 20 ff. On this case law, see C. BERNERI, *Family reunification in the EU*, Oxford-Portland, Oregon 2017, p. 68 ff.

[48] Commission Guidelines, cited above, para 2.1.4; judgment in *Lebon* case, cited above, point 21; Court of Justice, Grand Chamber, judgment of 9 January 2007, case C-1/05, *Jia* v *Migrationsverket*, EU:C:2007:1, points 36-37.

[49] Judgment in *SM* case, cited above, point 62; judgment in *Jia* case, cited above, point 37; judgment in *Rahman* case, cited above, points 20-23, 33; Advocate General Geelhoed, opinion of 27 April 2006, case C-1/05, *Jia*, EU:C:2006:258, point 96. With reference to the concept of direct descendants aged 21 years or over, and dependent, see the judgment in *Reyes* case, cited above, point 30.

[50] Judgment in *Jia* case, cited above, point 41. See also Commission Guidelines, cited above, para. 2.1.4.

[51] See P. HAMMJE, *Reconnaissance d'une kafala*, cited above, p. 779 ff. On the relevance of the existence of a family relationship, but not from a legal perspective, see E. PATAUT, *Citoyenneté de l'Union européenne. Quand la Cour s'empare de l'effectivité*, in *Rev. trim. droit eur.*, 2019, pp. 709-729, at p. 717 ff., where the author examines the *SM* case and the judgment of the Court of Justice of 12 July 2018, case C-89/17, *Secretary of State for the Home Department* v *Rozanne Banger*, EU:C:2018:570, stressing that both cases «confirment, en effet, l'orientation de la Cour, favorable à une protection des liens familiaux d'affection et de dépendance, au-delà des considérations strictment juridiques» (p. 718) and that «l'essentiel ici est la relative indifférence de la Cour aux réalités juridiques» (p. 719).

therefore support a broad definition of the concept of family member in order to pursue the objectives of Directive 2004/38.

In any case, Article 3 gives Member States a margin of appreciation in setting the criteria for deciding whether to grant rights under the Directive to other dependent family members. However, their freedom is not unlimited. As is stated under recital 6 of the Directive, in order to preserve the unity of the family in the broad sense, the assessment must be carried out having regard to the individual right of free movement and residence of the European citizen and must be based on criteria laid down in the legislation of the country concerned «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»[52]. As the Court of Justice pointed out in its judgment, the margin of discretion must be exercised having due respect for fundamental rights, including Article 7 of the Charter on the right to respect for private and family life, taking into account the interpretation of the European Court of Human Rights concerning the corresponding Article 8 ECHR[53]. Article 7 must then be read in conjunction with Article 24(2) of the Charter, which requires the best interests of the child to be of a primary consideration[54]. Accordingly, the Court of Justice stated that the competent national authorities must, «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, (…) 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»[55]. With regard to the case at issue, it is specified that the factors to be taken into consideration are the age at which the child was entrusted through *kafala*, the existence of a common life between her and the foster parents, the closeness of the personal relationship and the level of dependence of the former on the latter[56].

Also within the context of the assessment that must be made by the States under Article 3 of the Directive, the Court of Justice added that they must take account of any risk of abuse, exploitation or trafficking to which the child concerned might be exposed[57]. In any event, according to the Court, such risks cannot be presumed simply because the placement under *kafala* did not take place in accordance with the procedure laid down in the 1996 Hague Convention, since the country of origin of the child concerned (Algeria) is a non-contracting third State, specifying that «[s]uch facts must, on the contrary, be weighed against the other relevant elements of fact»[58].

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[52] Judgment in *SM* case, cited above, point 63; judgment in *Rahman* case, cited above, point 24.
[53] Judgment in *SM* case, cited above, points 64 to 66.
[54] *Ivi*, point 67.
[55] *Ivi*, point 68.
[56] *Ivi*, point 69.
[57] *Ivi*, point 70.
[58] *Ibidem.*

The Court thus concluded that were the examination to establish both a «genuine family life» between the European citizens and the child placed under Algerian *kafala* and also that the child was dependent on the former, then «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»[59]. This is all the more true if, due to a refusal to grant an entry visa to the child under *kafala*, the European citizens with whom such a child has been placed are *de facto* prevented from leading a common life in the host State because one of them would be forced to remain in his or her country of origin[60], thus hindering his or her fundamental freedom of movement and residence.

In the light of the foregoing, the relationship established under *kafala*, having regard to the specific circumstances, deserves protection for the purposes of the Directive, in particular on the basis of Article 3(2)(a). This is because a child under *kafala* is a dependent family member of the foster parents and lives with them, which could therefore justify a derived (facilitated but not automatic) right of entry for that child, giving due consideration to the right to family unity and the child's best interests. This finding was indeed pre-empted by the Supreme Court of the United Kingdom, which did not raise any doubts in that regard, but rather held that the courts are obliged to facilitate the entry of European citizens' family members in order to guarantee and give effect to their right of free movement[61].

3.5. Questions not addressed by the Court of Justice.

By the second question referred for interpretation, the national court asked whether, on the basis of Articles 27 and 35 of Directive 2004/38, children placed under *kafala* could be refused entry if it was established that they were victims of or at risk of exploitation, abuse or trafficking in human beings. Such situations are not specifically mentioned in the Directive but may be considered under Article 27 as grounds for refusal due to a violation of public policy, public security or public health. Moreover, according to Article 35, the hosting State has the power to take steps to reject the request if the case constitutes an abuse of a right or fraud[62]. This implies authority to control the circumstances of the case,

[59] *Ivi*, point 71 (emphasis added).

[60] *Ivi*, point 72. See also P. HAMMJE, *Reconnaissance d'une kafala*, cited above, p. 782 ff.

[61] Opinion in *SM* case, cited above, point 68. On this issue, see L. PANELLA, *Il riconoscimento della kafalah*, cited above, p. 589 f., who states that, for the purpose of guaranteeing the *effet utile* of EU law, especially in relation to freedom of movement and the protection of fundamental rights, the Court of Justice was able to intervene in a substantive area – family law – that is under national sovereignty.

[62] «Fraud may be defined as deliberate deception or contrivance made to obtain the right of free movement and residence under the Directive. In the context of the Directive, fraud is likely to be limited to forgery of documents or false representation of a material fact concerning the conditions attached to the right of residence»;

including an examination of the documentary evidence attesting the family relationship in order to establish whether the rights of the child, as guaranteed by the Charter (Article 24), have been violated, and whether the protective measure was adopted by the authorities of the country of origin in accordance with the best interests of the child. Consequently, States may refuse entry where the specific circumstances involve a violation of fundamental rights or the best interests of the child. As the Advocate General pointed out, there was nothing in the description of the facts in the *SM* case that justified a refusal of entry or that proved any abuse or fraud, with the result that Articles 27 and 35 of the Directive were not applicable[63]. The Court of Justice did not however answer the second question, since it noted that this question had been raised by the referring judge only with reference to a scenario in which the minor placed under Algerian *kafala* was classified as a direct descendant, and such a scenario was precluded by the answer to the first question[64].

Finally, the last question concerned the compatibility with the best interests of the child of the procedure under which that child was placed in guardianship or custody, which should be considered before assessing the classification of that child as a direct descendant within the meaning of Article 2(2)(c) of Directive 2004/38. The UK Supreme Court raised the question by referring to measures of guardianship or custody, without making any precise reference to *kafala*, thereby suggesting that the conformity control would be relevant only in the cases mentioned, and therefore only if the child under *kafala* were considered in the same way as a direct descendant[65]. No other justification to this question could be identified, since it is only if a broad interpretation of the parent-child relationship (including family situations established on the basis of *kafala*) were to be accepted that any kind of assessment under Article 2 of the Directive could be ruled out[66], with the beneficiary thus enjoying an automatic right of entry. The Court of Justice did not provide an answer to this question because it rejected the possibility of such a broad interpretation[67].

In any case, even in the scenarios referred to in Article 2 of the Directive, an assessment of compatibility with the best interests of the child on the basis of Articles 27 and 35 of the same Directive, concerning the grounds for refusal and the risk of abuse or fraud, could prove to be appropriate. On the other hand, if the child placed under *kafala* were to be considered under the category of extended family

«abuse may be defined as an artificial conduct entered into solely with the purpose of obtaining the right of free movement and residence under Community law which, albeit formally observing of the conditions laid down by Community rules, does not comply with the purpose of those rules»: see Commission Guidelines, cited above, para. 4.

63 Opinion in *SM* case, cited above, points 109-117.

64 Judgment in *SM* case, cited above, points 74-76.

65 Opinion in *SM* case, cited above, point 119.

66 *Ivi*, point 120.

67 Judgment in *SM* case, cited above, point 77.

members pursuant to Article 3, the assessment of respect for his or her best interests would already be included within the extensive examination carried out by the State[68].

4. The recognition of *kafala* in Italy.

The ruling of the Court of Justice is significant for the Italian legal system, where national courts addressed the provision of care by *kafala* not only related to requests for family reunification, whether made by Italian or third country nationals, but also with regard to other issues, such as adoption and parental leave. Overall, a common approach results within the Italian case law, which will be examined below, according to which the Islamic institution is not equivalent to adoption but is rather similar to foster care. Such interpretation is thus in line with the *SM* judgment, even if some doubts remain as to the compatibility of *kafala* with public policy and about the equal treatment between Italians and foreign nationals in relation to family reunification.

As regards the applicable legal framework, Italy ratified the 1996 Hague Convention by Law no. 101 of 18 June 2015[69], which entered into force on 1 January 2016, according to which the Central Authority is the Presidency of the Council of Ministers. Doubts still remain as to the legal status of a child placed under *kafala* entering Italy, since Law 101/2015 did not specifically regulate this institution. This is in contrast to the position under the draft bill (no. 1552), which regulated, among others, situations involving the provision of legal assistance under *kafala* to children, whether abandoned or not, the powers of foster parents and the status of the child, resulting in a measure of protection different from adoption or foster care. These proposed provisions have now been incorporated into draft bill no. 1552 *bis*[70], which has been pending before Parliament since July 2015[71].

In respect of *kafala* measures adopted before 1 January 2016[72], as well as measures adopted by countries that are not contracting parties to the Convention, Law no. 218 of 30 May 1995 on the reform

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[68] Opinion in *SM* case, cited above, points 121-122.

[69] Law no. 101 of 18 June 2015, "Ratification and implementation of The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children (adopted on 19 October 1996)", in *Gazzetta Ufficiale* 157 of 9 July 2015, in force from 1 January 2016.

[70] "Rules for the adaptation of the internal legal order to The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children (adopted on 19 October 1996)".

[71] On the path to ratification see, *inter alia*, G. CAROBENE, *Identità religiose e modelli di protezione dei minori. La kafala islamica*, Napoli 2017, p. 2215 ff.; M.C. BARUFFI, *La convenzione dell'Aja*, cited above, p. 977 ff. and 1017 ff.; C. PERARO, *Il riconoscimento*, cited above, p. 557 ff.

[72] It should be noted that, as regards the applicability *ratione temporis* of the Convention, the provisions intended to bring Italian law into line with the Convention, as contained in the original version of draft law n. 1552, provided for the applicability of the Convention to any proceedings launched on or after the date of its entry into force (Article 14). This provision was not included in the text of the adopted Law 101/2015.

of the Italian system of private international law applies[73]. In particular, Article 42 of this Law sets out the connecting factors for determining jurisdiction and applicable law on matters related to children protection, whilst Articles 64 ff. govern the recognition of foreign measures[74].

4.1. Family reunification in Italy based on *kafala*.

The issue concerning the classification of *kafala* according to the categories of Italian law (which implies the possibility of comparing *kafala* to the Italian institutions of foster care or adoption, or to a related measure, such as pre-adoptive foster care) has been addressed within the literature and case law in different contexts. Italian case law has developed mainly in relation to applications for family reunification made in Italy by Italian nationals or nationals of another EU Member State as well as by third country nationals. It dates back to the period before the entry into force in Italy of the 1996 Hague Convention on 1 January 2016[75]. Whilst the Convention has indeed helped to limit proceedings concerning the refusal of applications for entry[76], it has not however provided any answer to the question of the legal nature of the institution, which must be resolved before tackling the main request.

In most cases related to the applications made by foreign nationals of third countries, *kafala* has been considered to be similar to a measure for the protection of minors provided for by Italian law, i.e. adoption, custody or guardianship, when deciding whether to grant family reunification[77]. In this regard, it should be noted that, pursuant to Article 29, paragraph 2 of Legislative Decree no. 286 of 25 July 1998 (Consolidated Immigration Act)[78], minors adopted, fostered or under guardianship are considered as

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[73] Law no. 218 of 30 May 1995, in *Gazzetta Ufficiale* no. 128 of 3 June 1995, *suppl. ord.* no. 68, as further amended.

[74] It should be noted that Article 41, on foreign adoption measures or measures instrumental to foreign adoption, i.e. those in which the essential features of Italian adoption are recognisable, does not apply. Moreover, according to Article 42, the 1961 Hague Convention applies in any case to measures concerning the protection of minors. The 1961 Convention was not replaced – as regards this provision – by the 1996 Convention: on this failure see A. CANNONE, *Tendenze legeforiste nelle recenti modifiche delle norme di diritto internazionale privato italiano in materia di filiazione e di rapporti tra genitori e figli: alcune riflessioni*, in *Riv. dir. int. priv. proc.*, 2019, pp. 5-24, at p. 21 ff.; C. CAMPIGLIO, *Legge di diritto internazionale privato e regolamenti europei: tecniche di integrazione*, in C. CAMPIGLIO (ed.) *Un nuovo diritto internazionale privato*, Milano 2019, pp. 161-189, at p. 185; M.C. BARUFFI, *Uno spazio di libertà, sicurezza e giustizia a misura di minori: la sfida (in)compiuta dell'Unione europea nei casi di sottrazione internazionale*, in *Freedom, Security & Justice: Eur. Legal Studies*, 2017, pp. 2-25, at p. 23 f.; R. CLERICI, *Quale futuro per le norme della legge di riforma relative allo statuto personale*, in *Riv. dir. int. priv. proc.*, 2015, pp. 755-768, at p. 764 f.

[75] In general, on the Italian case law, see also A. LANG, *Kafala and family reunification*, cited above, p. 106 ff.; L. PANELLA, *Il riconoscimento della kafalah*, cited above, p. 590 ff.; P. VIRGADAMO, *La* kafalah *tra ordine pubblico*, cited above, p. 251 ff.; L. OLIVERO, *La reception de la kafala algerienne dans l'ordre juridique italien*, in *Les Cahiers du LADREN*, 2018, n. 1, pp. 256-268.

[76] See further M. ORLANDI, *L'entrata in vigore della Convenzione de L'Aja*, cited above, p. 884.

[77] For comments, see O. LOPES PEGNA, *La determinazione dello* status *familiare nella disciplina del ricongiungimento*, in *Il nuovo diritto di famiglia*, cited above, pp. 853-870, at p. 867 ff.

[78] Legislative Decree no. 286 of 25 July 1998, "Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero", in *Gazzetta Ufficiale* no. 191 of 18 August 1998, *suppl. ord.* no. 139, as amended by Decree Law no. 5 of 8 January 2007, "Implementation of Directive 2003/86/EC on the right to family reunification", in *Gazzetta Ufficiale* no. 25 of 31 January 2007, as further amended.

(«direct») children in a legal sense. It follows that, although *kafala* does not (strictly speaking) fall under any of these categories, it does create a family relationship similar to those, on the basis of which family reunification can be granted. It has been stated that the decision on family reunification does not in fact imply the attribution to *kafala* of the effects of a specific measure known within the Italian system, being it sufficient that *kafala* is generically comparable to the family ties that consist in the prerequisite for the reunification[79].

The Italian Court of Cassation (or Supreme Court) confirmed this approach with a series of rulings in 2008, in which it recognised the possibility to grant entry visas to minors placed under *kafala* on the basis of a constitutionally informed interpretation of Article 29 of the Consolidated Immigration Act. It argued that, by virtue of the principle of equality, protection should be granted to minors coming from countries where *kafala* is the only permitted measure of care. In order to establish whether the prerequisite for family reunification is met, the Supreme Court held that *kafala* (granted by a judicial act) was similar to foster care, since they presented common features, and only a few differences, as neither institution has legitimising effects, and neither affects the civil status of the child, unlike adoption[80].

In cases involving Italian or European citizens, the special rules on international adoptions laid down by Law no. 184 of 4 May 1983 were deemed to be applicable to requests for an entry visa for foreign children under *kafala*[81]. In 2010, the Supreme Court[82] in fact rejected a claim made by an Italian citizen (of Moroccan origin) holding that *kafala* (concluded by an agreement) was not an admissible precondition for reunification on the basis of Article 2(1)(b)(n. 3) and Article 3(2)(a) of Legislative Decree no. 30 of 6 February 2007 implementing Directive 2004/38[83]. The Court held that the notion of family

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[79] See Court of Appeal of Turin, order of 28 June 2007; Court of Biella, decision of 26 April 2007; Court of Appeal of Bari, order of 16 April 2004; commented by M. BAKTASH, *I giudici italiani*, cited above, p. 305 ff.

[80] Court of Cassation, judgment no. 7472 of 20 March 2008; see also Court of Cassation, judgments no. 18174 of 2 July 2008 and no. 19734 of 17 July 2008. For comments, see M. BAKTASH, *I giudici* italiani, cited above, p. 308; G. CAROBENE, *Identità religiose e modelli di protezione dei minori*, cited above, p. 203 ff.; M. ORLANDI, *L'entrata in vigore della Convenzione de L'Aja*, cited above, pp. 877 and 883; A. LANG, *Considerazioni su* kafalah, cited above, p. 52 ff.; M. IUS, Kafala: *stato civile del minore straniero*, in *Stato civ. it.,* 2008, no. 6, pp. 410-414, at p. 412 ff.

[81] "Right of the child to a family", in *Gazzetta Ufficiale* no. 133 of 17 May 1983, *suppl. ord.* and subsequent amendments.

[82] Court of Cassation, judgment no. 4868 of 1 March 2010, commented by M. BAKTASH, *I giudici* italiani, cited above, p. 308 ff.; G. CAROBENE, *Identità religiose e modelli di protezione dei minori*, cited above, p. 205 ff.; C. PERARO, *Il* riconoscimento, cited above, p. 545; A. LANG, *Considerazioni su* kafalah, cited above, p. 66 ff.; C.M. ARDITA, P. NIGLIO, *Riflessioni sull'istituto della Kafalah nell'ordinamento italiano: tra antinomie giurisprudenziali e inerzia legislativa*, in *Stato civ. It.,* 2010, no. 10, pp. 15-24, at p. 21 ff. See also Court of Appeal of Rome, order of 31 January 2011. *Contra*, Court of Appeal of Ancona, decision no. 434 of 16 November 2011, where the *kafala* was concluded on the basis of a commitment signed by the Italian spouses with the State of origin of the minor, and such a form of public control was considered to be relevant for the purpose of verifying the conformity of the measure with the best interests of the child (see G. CAROBENE, *Identità religiose e modelli di protezione dei* minori, cited above, p. 208).

[83] Legislative Decree no. 30 of 6 February 2007, "Implementation 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

member referred to in Legislative Decree 30/2007 could also include adopted children or children pending adoption who enter Italy and acquire the status of minors in family foster care pursuant to Title III of Law 184/1983. On the contrary, children who are not direct descendants and who have no parental blood ties but are nonetheless dependent on the citizen to whom they have been entrusted according to the legislation of their country of origin cannot be classified as family members under that Legislative Decree. Indeed, the Court argued that a relationship based on *kafala* did not imply the establishment of a family relationship within the meaning of Directive 2004/38 (and hence also within the meaning of Legislative Decree 30/2007). Consequently, it clarified that the Italian citizen could seek reunification with (or rather, could seek the inclusion in his or her family of) a foreign minor under *kafala* only according to the regime provided for by Law 184/1983 on international adoptions, which is the only way of incorporating a foreign minor into the family available to Italians.

Moreover, the applicability of Article 28, paragraph 2 of Legislative Decree 286/1998 (Consolidated Immigration Act), which allows for the provisions of the Decree to be extended to foreign family members of Italian or European citizens where they are more favourable than those of Legislative Decree 30/2007, was therefore excluded. It follows that also Article 29, paragraph 2 of the Consolidated Immigration Act, which considers minors who have been adopted or fostered or who are under guardianship to be equivalent to («direct») children, was not applicable. Such an exclusion however resulted in reverse discrimination[84], i.e. in unequal treatment to the detriment of Italian citizens compared to foreigners. This is because an Italian citizen would be suspected of circumventing the Italian legislation that provides for international adoption as the only way of incorporating a foreign minor into an Italian family. Furthermore, the refusal to grant entry to a child placed under *kafala* with an Italian citizen could violate the child's best interests to preserve the family unity that was validly established in his or her country of origin.

In 2013, the Joint Divisions of the Court of Cassation addressed a question concerning the family reunification of an Italian citizen and a foreign child placed under *kafala*, reversing the previous approach based on the above observations[85]. Indeed, it held that Legislative Decree 30/2007 (implementing Directive 2004/38) was also applicable to Italian citizens, due to the reference to the more favourable provisions included in Article 28, paragraph 2 of the Consolidated Immigration Act[86], and went on to

members to move and reside freely within the territory of the Member States", in *Gazzetta Ufficiale* no. 72 of 27 March 2007.

[84] G. CARAPEZZA FIGLIA, *Tutela del minore migrante*, cited above, p. 241 ff.

[85] Court of Cassation, Joint Divisions, judgment no. 21108 of 16 September 2013.

[86] According to the Court of Cassation, the family reunification of a non-EU minor with the Italian citizen to whom he/she has been entrusted by *kafala* is governed by Legislative Decree 30/2007, because (i) this legislation is referred to in Article 28, paragraph 2 of the Consolidated Immigration Act (this provision in fact refers to Presidential Decree no. 1656 of 1965, repealed by Presidential Decree no. 54 of 2002 and subsequently by Legislative Decree 30/2007) and (ii) the applicability of the more favourable provisions set forth in the same Article

classify the child placed under *kafala* as an «other family member». The Court of Cassation argued that there was no risk of the circumvention of the Italian legislation on international adoptions in cases involving judicial *kafala* because the right of the Italian citizen to bring the child placed under *kafala* in the country of origin was not contrary to (domestic) public policy[87]. The Joint Divisions thus concluded that it was possible to issue an entry visa for family reunification to a third-country national child who had been entrusted to an Italian citizen residing in Italy under a judicial *kafala* order[88]. Such consent to entry could only be granted upon condition that the child is dependent on or living in the country of origin with the foster parent, or if the foster parent assists the child due to serious health grounds, pursuant to Article 3(2)(a) of Directive 2004/38 (which corresponds to the same article of Legislative Decree 30/2007). Moreover, the Court specified that, in any case, family reunification can only be permitted where the protection measure does not perform any functions similar to adoption, since *kafala* is not comparable to it. Indeed, it stressed that *kafala* does not establish a parent-child relationship based on biological reality, or even on the legal reality of legitimising adoption, with the result that the child cannot be regarded as a «direct descendant». Nevertheless, by virtue of the principle of the prevalence of the child's best interests, there is nothing to prevent the child from being included in the category of «other family members» under Article 3(2)(a) of Directive 2004/38 (same Article of Legislative Decree 30/2007).

It follows that, according to the Joint Divisions, in the event that an Italian citizen requests family reunification with a foreign minor entrusted to him or her under *kafala*, Article 29, paragraph 2 of the Consolidated Immigration Act, concerning the equivalence of the children who have been adopted, fostered or placed under guardianship, with legal children does not apply. However, the extension of that

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as well as Article 23 of Legislative Decree 30/2007 cannot in any case result in the application of Article 29, paragraph 2 of the Consolidated Immigration Act (on the equivalence of children who have been adopted or fostered or who are under guardianship with legal children) as it applies exclusively to reunifications involving third-country nationals.

[87] The Joint Divisions drew a distinction between domestic and international public policy, asserting that there may be incompatibility with national public policy when recognising the effects of foreign judgments or acts within Italian law; however, there can be no incompatibility whenever the foreign measure is not intended to result directly in any legal effects within the national system, but only to constitute a *de facto* requirement for a domestic administrative decision concerning family reunification. The Court went on to state that *kafala* cannot under any circumstances give rise to any effects that conflict with international public policy because this Islamic institution is expressly provided for as a valid child protection measure under international instruments. On this issue, see G. CARAPEZZA FIGLIA, *Tutela del minore migrante*, cited above, p. 242 ff.; G. CAROBENE, *Identità religiose e modelli di protezione dei minori*, cited above, p. 210 ff.; C. PERARO, *Il riconoscimento*, cited above, p. 546 ff.

[88] In this regard, the Joint Divisions observed that a further prerequisite for the grant of family reunification could be based on the principle of the protection of the best interests of the child. On this basis, the provision of care by *kafala* concluded by agreement between the parties should not have any effect, even if it has subsequently been approved by the competent authority, and should also be excluded as a *de facto* precondition for the administrative decision on reunification under Italian law, because the eligibility of the foster parent has not been verified by the competent judicial or public authority that is entrusted with responsibility for the child's care according to its national legislation.

Article to applications made by Italian citizens could be based on the reference to the more favourable provisions of the Consolidated Immigration Act made in its Article 28, paragraph 2. Consequently, the principle of equality between Italian citizens and foreigners seeking family reunification with a foreign minor under *kafala* would be respected; conversely, that principle would be violated if only foreign citizens were automatically eligible for reunification with a foreign child[89].

In other words, although the application of European law guarantees family reunification between an Italian citizen and a child under *kafala*, whose entry is in any case subject to the conditions laid down by Article 3 of Directive 2004/38, differences in treatment still remain between foreign and Italian citizens. This is because the latter cannot secure an automatic right of entry for a foreign minor entrusted to them by *kafala*[90]. Moreover, the application of the more favourable national provisions to the foreign family members of Italian nationals could be based on Article 37 of Directive 2004/38, which states that «[t]he provisions of this Directive shall not affect any laws, regulations or administrative provisions laid down by a Member State which would be more favourable to the persons covered by this Directive». In turn, Article 23 of Legislative Decree 30/2007, which implements that European provision, stipulates that the provisions of the Legislative Decree apply if they are more favourable than other relevant legislation. Both Articles seek to ensure the application of whichever of the two sets of rules is in fact more favourable in order to ensure the child's best interests. Based on these combined provisions (national and European), Article 28, paragraph 2 of the Consolidated Immigration Act, and thus also its

[89] Ruling on the basis of the principle of equality, the Joint Divisions rejected the former approach according to which Law 184/1983 on international adoptions necessarily applies to family reunification requested by Italian citizens, having found that such a request would not have been consistent with domestic public policy. Instead, the Joint Divisions found in favour of the applicability of Legislative Decree 30/2007 and recognised the (facilitated, but not automatic) right of entry in favour of a foreign child placed under *kafala*, who must be included within the category of «other family members» of the Italian citizen, and not as a direct descendant.

[90] Any other interpretation, which would be more favourable for the child under *kafala* in recognising an automatic right of entry, could be based on the need to protect the fundamental rights of European citizens, the best interests of the child, family unity and the principle of continuity of personal status, as guaranteed by Articles 7 and 24 of the Charter of Fundamental Rights of the European Union, as well as in the case law of the European Court of Human Rights. See the ECHR judgment of 4 October 2012, case no. 43631/09, *Harroudij* v *France*, in which the Court held that the French rule of private international law, Article 370-3(2) of the Civil Code, that prohibits adoption when the national law of the child forbids it, does not violate Article 8 ECHR; and S. MARINO, *Il diritto all'identità personale e la libera circolazione delle persone nell'Unione europea*, in *Riv. dir. int.*, 2016, pp. 797-825, at p. 801, where the author observes that the court considered continuity of name as an element strictly related to the status of the person and that, in the specific case, according to the law applicable to *kafala* this institution does not change the particulars of the child concerned, which had in fact been recognised in France. On French case law, see F. MONÉGER, *Kafala*, cited above, p. 1227, where the author states that the *Cour de Cassation* permitted the adoption of the child under *kafala* who later became a French citizen, as subsequently ordered by the ministerial decision of 22 October 2014. On the continuity of status and respect for cultural identity, see Y. NISHITANI, *Identité Culturelle en Droit International Privé de la Famille*, in *Collected Courses of The Hague Academy of International Law - Recueil des cours*, 2019, vol. 401, pp. 127-450, at p. 185 ff. and 279 ff.; C. RAGNI, *Art. 41 Legge 31 maggio 1995, n. 218*, in *Commentario breve al diritto della famiglia*, diretto da A. ZACCARIA, 3rd ed., Milano 2016, pp. 2501-2506, at p. 2504; and on the link between fundamental rights and family institutions, see S. TONOLO, *La famiglia transnazionale fra diritti di cittadinanza e diritti degli stranieri*, in S. AMADEO, F. SPITALERI (eds.), *Le garanzie fondamentali dell'immigrato in Europa*, Torino 2015, pp. 117-161, at p. 142 f.

Article 29, paragraph 2, could be applied also to an Italian citizen requesting family reunification with a foreign child under *kafala*.

In line with the ruling of the Joint Divisions, a subsequent 2014 judgment of the Supreme Court addressed the issue of the family reunification of Italian spouses with a Moroccan minor entrusted to them under a judicial *kafala*[91]. Article 29, paragraph 2 of the Consolidated Immigration Act was not applicable because no foreign applicants were involved. Therefore, Legislative Decree 30/2007 was deemed to be applicable, and the Court adopted a broad interpretation of the notion of «other family members» under Article 3(2)(a). It held that the family relationship need not be strictly parental, and that primary consideration should be given to the child's best interests, provided that the *kafala* measure is public in nature and the child is dependent or cohabiting in the country of origin with the Italian citizens in question.

Again in 2015 the Court of Cassation was requested to recognise the effects of *kafala* for the purposes of family reunification and confirmed that also a *kafala* concluded by agreement, and subsequently approved by the competent court of the place of origin of the child, could be deemed to constitute a valid basis for family reunification, since the constitutive act was controlled by the public authority, which verified its conformity with the best interests of the child[92]. The Court then reaffirmed that, according to Legislative Decree 30/2007, a child entrusted by *kafala* may be considered as an «other family member» and benefit from the (facilitated) right of entry, taking account of the nature and characteristics of the foreign institution, as well as the best interests of the minor in question[93]. Conversely, the possibility of applying the more favourable provision under Article 29, paragraph 2 of the Consolidated Immigration Act was not assessed. It follows that the approach developed thus far on the exclusive application of Article 29 to foreign citizens has been endorsed. Finally, the Supreme Court specified that the recognition of the foreign measure of approval of consensual *kafala* should in any case be based on Article 66 ff. of Law 218/1995 (on private international law)[94], and not on the special regime of international adoptions.

The nature of the *kafala* measure was then addressed in 2017 by the Supreme Court when examining a "private" *kafala* concluded by an Italian citizen under an agreement, which was subsequently approved by the competent authority of the State of origin of the child (Morocco)[95]. The Court argued

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[91] Court of Cassation, judgment no. 11404 of 22 May 2014.

[92] Court of Cassation, judgment no. 1843 of 2 February 2015.

[93] See G. CAROBENE, *Identità religiose e modelli di protezione dei minori*, cited above, p. 213 ff.; C. RAGNI, *Art. 41 Legge 31 maggio 1995, n. 218*, cited above, p. 2504.

[94] These articles provide for the special regime for the automatic recognition of foreign measures in specific cases falling within «*volontaria giurisidizione*» where a recognition procedure is not necessary provided that certain conditions are met.

[95] Court of Cassation, judgment no. 28154 of 24 November 2017. For comments, see M. CIRESE, *Anche la Kafalah convenzionale è istituto di protezione familiar conforme all'interesse del minore*, in *Il Familiarista.it*, 8 February 2018.

that this act could also be regarded as a valid basis for the grant of an entry visa for the purpose of family reunification to the child concerned. It held that, since there was a relationship of care between the foster parent and the child, albeit based on an agreement, respect for the child's best interests had been ensured through its subsequent approval by the competent authority of the place of origin. In line with the established interpretation on the inclusion of a child entrusted under *kafala* in the category of «any other family member» referred to in Article 3(2)(a) of Legislative Decree 30/2007, the Court concluded that the child in question could benefit from a right of entry, albeit not automatically, but following an extensive examination of the circumstances, on the basis of the said provision (which corresponds to Article 3(2)(a) of Directive 2004/38)[96].

The development of the judicial approach within the context of family reunification was based on a constitutionally oriented interpretation of national law, whilst also implementing the Directive on the free movement with a view to protecting migrant minors, balancing the State's interest in control of its borders against the rights of foreigners. Such an approach implied a weakening of the public policy exception where a minor is involved, giving priority to his or her best interests and the right to preserve family unity[97].

4.2. Other applications before the Italian courts based on *kafala*.

The Italian courts addressed the issue of the nature of *kafala* also in relation to applications to adopt children previously placed with the applicants under the Islamic institution. Whilst the solutions provided initially diverged, they were subsequently harmonised by the Joint Divisions ruling from 2013 mentioned above, which held that *kafala* was consistent with public policy and could be deemed to be equivalent to the Italian institution of foster care[98].

In a decision of 2005[99], the Court of Cassation implicitly stated that *kafala* was not equivalent to adoption, or even to pre-adoptive foster care, because the citizens entrusted under *kafala* do not have authority to represent the child, which instead remained under the competent authority of his/her country of origin. In this case, from a procedural point of view, the foster parents were not deemed to have any standing to lodge an objection against the declaration made by the Juvenile Court that the child was eligible for adoption.

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[96] This approach has been recently confirmed by the Court of Cassation, judgment no. 25310 of 11 November 2020, where the Pakistani mother entrusted the minor directly to his older brother through a private act of custody based on a notarial power of attorney.

[97] G. CARAPEZZA FIGLIA, *Tutela del minore migrante*, cited above, p. 229.

[98] On this issue see C. CAMPIGLIO, *Il diritto di famiglia islamico nella prassi italiana*, in *Riv. dir. int. priv. proc.*, 2008, pp. 43-76, at p. 70 ff.

[99] Court of Cassation, judgment no. 21395 of 4 November 2005, commented by M. BAKTASH, *I giudici italiani*, cited above, p. 307 f.; G. CAROBENE, *Identità religiose e modelli di protezione dei minori*, cited above, p. 202 f.

Previously, in 2002, the Juvenile Court of Trento[100] held that it was not possible to order the full adoption or the placement in pre-adoptive foster care of a child entrusted under *kafala* to an Italian couple; nevertheless, taking into account the specific situation, it suggested that the measure of «adoption in particular cases» provided for under Article 44(d) of Law 184/1983 might be applicable[101]. In a similar case, the Juvenile Court of Rome held that a declaration of adoption could be issued in particular cases[102]. Moreover, in 2011, the Supreme Court confirmed the similarity between *kafala* and adoption by stating that in order to recognise the foreign measure Article 41(2) of Law 218/1995, which refers to the special regime on intercountry adoptions under Law 184/1983, was applicable[103]. However, such approaches led to the conclusion that *kafala* is similar to adoption, which is not consistent with the Islamic prohibition.

This last finding was supported by the Juvenile Court of Brescia in 2013, which ruled that simple (non-legitimising) adoption could not be ordered because *kafala* is not similar to this institution, but rather to foster care, in line with the 2013 ruling of the Joint Chambers examined above. It also held that Article 66 of Law 218/1995 was applicable for the purposes of recognising the foreign act as a measure of non-contentious jurisdiction (*volontaria giurisdizione*)[104]. This provision, along with Article 23 of the 1996 Hague Convention, was also recalled by the Juvenile Court of Bologna in 2019 in upholding the automatic recognition of the Moroccan *kafala* measure and dismissing the application for the change of the child's surname on the ground that it did not have any power to change the child's surname, which was to be determined by the competent Moroccan authority[105].

According to the approach developed so far, the application of the rules on intercountry adoption would affect the nature and characteristics of *kafala* as provided for under the legal systems of origin. This was further asserted by the Court of Cassation in 2015, when it held that *kafala* does not create a pre-adoptive or foster care relationship giving rise to a full (legitimising) parent-child relationship, due to the prohibition on adoption common to the legal systems inspired by the Koran[106].

In 2017 the Supreme Court considered a complex case involving a Moroccan child who had been entrusted under *kafala* to two Moroccan spouses by a decision issued by the Court of First Instance of Rabat. This decision was subsequently recognised in Italy by the Court of Appeal of Cagliari, where they

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[100] Court of Trento, orders of 11 March 2002 and 10 September 2002. For comments see G. CAROBENE, *Identità religiose e modelli di protezione dei minori*, cited above, p. 194 ff.

[101] Whenever the conditions for the ordinary regime of adoption are not met, by virtue of Article 44(d) adoption can be declared where pre-adoptive custody is not possible.

[102] Juvenile Court of Rome, decision no. 621 of 9 May 2011, which was issued while the dispute leading to the 2013 ruling was pending before the Joint Divisions.

[103] Court of Cassation, judgment no. 19450 of 23 September 2011.

[104] Juvenile Court of Brescia, decision no. 226 of 23 December 2013, commented by C. PERARO, *Il riconoscimento*, cited above.

[105] Juvenile Court of Bologna, decision of 14 March 2019, commented by M. POLI, *Abbandonare la strada vecchia per quella nuova: l'efficiacia dei provvedimenti di* kafalah *a seguito dell'entrata in vigore della Convenzione dell'Aja del 1996*, in *Dir. fam. pers.*, 2019, pp. 1198-1209.

[106] Court of Cassation, judgment no. 6134 of 26 March 2015.

lived. However, the child was also placed with an Italian couple within the parallel adoption proceedings pending before the Juvenile Court of Cagliari[107]. The Italian couple asked to intervene in those proceedings concerning the recognition of the Moroccan *kafala* order before the Court of Appeal, but were not allowed to. This refusal was then confirmed by the Supreme Court, which held that status of foster parent conferred by the Italian adoption order does not entail the grant of procedural representation authority for the child in proceedings other than those relating to adoption.

Within the Italian case law, *kafala* has also been examined in other contexts. For instance, in 2017 the Court of Bergamo considered the recognition of *kafala* when assessing an appeal by a foster mother against a refusal by the Italian Institute for Social Security (INPS) to grant maternity leave[108]. The Institute justified the refusal on the grounds that *kafala* was not comparable to the custody measure under national law. In accordance with Article 65 of Law 218/1995, the Court of Bergamo recognised the effects of the foreign *kafala* measure, which was stipulated in the presence of notaries and subsequently approved by the court at the place of origin (Casablanca, Morocco). It also held that, due to its public nature, the measure was not contrary to (international) public policy. In line with the previous case law on family reunification, the Court of Bergamo then argued that *kafala* was equivalent to foster care, with the result that the refusal by the INPS was inappropriate and the foster mother had the right to take maternity leave[109].

In a case concerning the recognition of a *kafala* order issued by an Algerian court in 2016, the Court of Mantua acknowledged its «full and direct effectiveness» in the Italian legal system on the basis of Articles 65 and 66 of Law 218/1995 and also in light of the international conventions and the approach followed within the case law[110]. Consequently, the Court rejected the application seeking the appointment of a guardian for the foreign child, since in the event of *kafala* legal guardianship is vested in the *kafil* in accordance with the act of foster care and the applicable Algerian legislation[111].

A common classification of *kafala* is apparent from the analysis of the case law concerning the recognition of its legal effects in Italy within various contexts. Since *kafala* creates a family relationship that is not comparable under any circumstances to full adoption, and is indeed more similar to foster

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[107] Court of Cassation, order no. 29120 of 5 December 2017.

[108] Court of Bergamo, Labour Section, decision of 20 January 2017. Similarly, in relation to the Spanish system, see TSJ Cataluña, Sala de lo Social, Sentencia 3364/2019, 26 Jun. Rec. 1960/2019, that granted the «prestación por maternidad» because of the «equiparación de la kafala marroquí al acogimiento familiar» (in *Diario LA LEY*, no 9502, de 21 de octubre de 2019).

[109] In this case moreover, the INPS objected that the Italian central authority had not been consulted under Article 33 of the 1996 Hague Convention. However, as was noted by the Court of Bergamo, the Convention entered into force on 1 January 2016, i.e. after the facts to which the main proceedings related and was therefore not applicable.

[110] Court of Mantua (tutelary judge), order of 10 May 2018.

[111] On this issue, see R. GELLI, *Rappresentanza e cura del minore sottoposto a* kafalah *tra funzioni del* kafil *ed esclusione della tutela*, in *Fam. dir.*, 2019, pp. 43-47, at p. 46 f.

care, the Islamic measure can in any case be deemed to constitute a valid prerequisite for specific requests (e.g. family reunification, adoption, parental leave). This means that *kafala* must be fully accepted due to its inclusion within measures of children protection in international instruments and its aim of pursing the best interests of the child in places where this is the only available solution.

5. Concluding remarks.

The judgment of the Grand Chamber of the Court of Justice established the applicability of Article 3(2)(a) of Directive 2004/38 as regards the status of an underage third-country national who is placed under *kafala* with European citizens for the purpose of granting him/her an entry visa for family reunification. The Court of Justice also stressed the role of the competent national authorities, where there is genuine family life, to facilitate the entry of the foreign member and to carry out an examination of the case, taking account of the fundamental rights and the best interests of the child concerned[112]. Therefore, within the main proceedings, the English courts were required to apply Article 3(2)(a) of Directive 2004/38 and to examine the specific circumstances, which, as described in the opinion of the Advocate General and in the judgment, appear to require the grant of a right of entry to the child, who has been in Algeria since 2011 with only her foster mother pending the outcome of the proceedings.

The European Court ruling confirms the Italian approach that has developed first in relation to family reunification, having then been subsequently applied to other situations in which *kafala* was to be regarded as a precondition for the main request. However, some difficulties in the application of the Italian legislation still remain due the potential discrimination that may result from the reference in Article 28, paragraph 2 of the Italian Consolidated Immigration Act to the more favourable provisions. Indeed, Article 29, paragraph 2 of the Act provides for that children who have been adopted or fostered or who are under guardianship are equivalent to "legal" children. However, this Article only applies to requests for family reunification submitted by third-country nationals. Accordingly, minors placed under *kafala* with foreign nationals living in Italy would enjoy an automatic right of entry, unlike those entrusted to Italian or European citizens, because they are regarded as «other family members» under the applicable legislation (Article 3(2)(a) of Legislative Decree 30/2007 and of Directive 2004/38), as now interpreted by the Grand Chamber of the Court of Justice in the *SM* case.

A further reference for a preliminary ruling might therefore be useful in order to ascertain the compatibility of any national legislation (such as that applicable in Italy) that embraces a concept of descendant (including children who have been adopted or fostered or who are under guardianship) other

[112] See E. PATAUT, *Citoyenneté*, cited above, p. 722, where it is observed that «la protection du droit de l'Union européenne ne dépend pas de la validité du lien familial mais bien, dans la lignée de la Cour européenne des droits de l'homme, de sa réalité. En ce sens (…) la Cour fait bien preuve d'un pragmatisme libéral fondé sur la réalité des liens d'affection».

than that laid down in Directive 2004/38, insofar as it is considered to be more favourable for the child. Similarly, questions could also be raised concerning family matters other than reunification in order to verify whether the interpretation adopted in the *SM* case concerning the status of the child under *kafala* as an extended family member could be applied in different areas with a view to protecting fundamental rights and guarantying the effectiveness of Union law without any discrimination[113].

[113] See also P. HAMMJE, *Reconnaissance d'une kafala*, cited above, p. 785, where the author argues that «mais rien n'interdit de penser qu'elle pourrait à l'avenir se prolonger sur d'autres terrains, interrogeant alors sur sa confrontation avec les filiations juridiques».

Diritto al nome e libera circolazione delle persone

Sandra Winkler

Abstract

La circolazione delle persone nello spazio comune europeo può essere realmente libera soltanto se ciò implichi la tutela della persona in tutte le sue declinazioni in occasione di ogni suo movimento transfrontaliero. Tra i molti aspetti che si potrebbero trattare s'è scelto di riflettere sull'importanza della tutela del diritto al nome. Dapprima s'è tentato di ricostruire un quadro normativo sovranazionale combinandolo ad alcune riflessioni di natura comparatistica; mentre nel prosieguo è stato ricostruito il percorso giurisprudenziale seguito dalle Corti europee, in particolare dalla Corte di giustizia dell'UE, comparandone le soluzioni con quelle prospettate dalla Corte dei diritti dell'uomo. In conclusione s'è riflettuto sull'incidenza di questo percorso sul processo di europeizzazione del diritto della persona, come anche del diritto della famiglia.

Diritto al nome e libera circolazione delle persone

Sandra Winkler*

SOMMARIO: 1. Il nome, lo *status* personale e la circolazione delle persone. – 2. Le fonti sovranazionali in materia di diritto al nome. – 3. Le fonti nazionali: spunti comparatistici sulle diverse soluzioni europee. – 4. La giurisprudenza delle Corti europee.

1. Il nome, lo *status* personale e la circolazione delle persone.

Chi circola da uno stato all'altro dell'Unione ha la necessità di vedere riconosciuto e tutelato il proprio *status* personale e familiare anche al di fuori del paese d'origine. Il diritto al nome è uno degli elementi di cui si compone lo *status* personale ed è forte espressione dell'identità di qualsiasi soggetto. Esso si trova ad un crocevia tra il diritto privato ed il diritto pubblico, ma anche tra diritto interno e diritto dell'Unione europea[1]; per questo motivo è importante rapportare il diritto al nome alla circolazione delle persone. A sua volta, la circolazione delle persone sovente è collegata a vicende familiari: molto spesso chi circola, non circola da solo ma con la sua famiglia o per riunirsi alla sua famiglia o, ancora, per creare una nuova famiglia[2].

Le famiglie che presentano elementi di transnazionalità sono sempre più numerose. Sia che l'intero nucleo familiare di una medesima nazionalità si sposti da un paese all'altro, sia che esso sia composto di familiari di nazionalità diverse, è in ogni caso necessario tutelare lo *status* personale (come anche quello familiare) del singolo[3]. Dalla tutela dello *status* della persona deriva la possibilità di godere in uno Stato membro diverso da quello di origine di tutta una serie di libertà individuali e di diritti sociali che altrimenti non potrebbero sorgere. Di qui la considerazione che l'argomento trattato non si esaurisce in una semplice analisi fine a sé della normativa e della prassi giurisprudenziale, ma offre l'occasione per

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1 A.M. GROSS, *Rights and Normalization: a critical study of European human rights on the choice and change of names*, in *Harvard Human Rights Journal*, 1996, vol. 9, pp. 269-284.

2 Per un approfondimento sul processo di europeizzazione del diritto di famiglia si rimanda a S. WINKLER, *Il diritto di famiglia*, in *Temi e Istituti di Diritto Privato dell'Unione Europea*, a cura di G.A. Benacchio, F. Casucci, Torino 2017, p. 293 ss. Si veda anche A. PERA, *Il diritto di famiglia in Europa. Plurimi e simili o plurimi e diversi*, Torino 2012; E. BERGAMINI, *La famiglia nel diritto dell'Unione europea*, Milano 2012.

3 Per una ricostruzione tassonomica delle formazioni familiari nell'UE si invita a consultare https://www.euro-family.eu/atlas.

riflettere circa il reale e concreto significato del diritto alla libera circolazione ed al soggiorno delle persone nello spazio comune europeo.

Non è un caso che il processo di europeizzazione del diritto di famiglia abbia preso le mosse, soprattutto nella giurisprudenza europea, proprio da questo aspetto della libera circolazione delle persone[4]. Se è vero che la disciplina giuridica del diritto al nome è di competenza esclusiva delle singole legislazioni nazionali, altrettanto vero è che sempre di più occorre prestare attenzione affinché le discipline nazionali, spesso diverse tra loro, non pregiudichino le libertà fondamentali dei cittadini europei garantite dal diritto dell'Unione europea.

L'esigenza di tutela dello *status* personale è particolarmente evidente quando si prendono in considerazione soggetti che, nella propria vita personale e/o familiare, si devono misurare con uno o più elementi di transnazionalità che li riguardano[5].

Nel dare soluzione concreta ai tanti problemi che si intrecciano tra la libera circolazione delle persone e il diritto al nome e all'identità personale, la giurisprudenza della Corte di giustizia ha svolto un ruolo fondamentale e, forse, più rilevante di quello svolto dalla legislazione europea di diritto derivato. Soprattutto nell'ambito dei procedimenti di rinvio pregiudiziale molti traguardi sono stati raggiunti proprio attraverso l'affermazione (e la conseguente tutela) sul piano europeo di posizioni soggettive individuali utilizzando le numerose disposizioni del TFUE in materia di discriminazione e di cittadinanza dell'Unione prima ancora che la Carta dei diritti fondamentali dell'Unione europea divenisse una vera e propria fonte di diritto.

Prima di procedere oltre nell'analisi, occorre tuttavia dare rapidamente conto del contenuto del diritto al nome[6]. Già si diceva che il nome esprime l'identità del suo titolare, espandendola nell'ambito sociale[7]. La varietà di funzioni del nome porta ad individuare due sue dimensioni: una personale ed una sociale. Nella sua dimensione personale, il diritto al nome rappresenta il diritto di ogni consociato di autodeterminarsi. Ciascuno può scegliere il nome che meglio esprime la sua identità; pertanto tale funzione risulta collegata alla sfera dei diritti della personalità del soggetto. Ancora, va ricordato che il nome funge da collegamento del singolo con determinate comunità familiari nel rispetto dell'unità familiare, rendendole riconoscibili nella società. Numerosi fattori contribuiscono a preservare tale equilibrio: per comprenderlo meglio si consideri che l'identità personale è una combinazione complessa di fattori differenti, i quali contribuiscono a creare l'unicità di ogni individuo. Come si afferma in dottrina,

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[4] Sul punto si veda D. HENRICH, *La famiglia ed il diritto di famiglia in trasformazione*, in *Il ruolo della civilistica italiana nel processo di costruzione della nuova Europa*, a cura di V. Scalisi, Milano 2007, p. 447 ss.

[5] Sull'incidenza del diritto dell'Unione europea nella materia degli *status* personali e familiari, v. *amplius* C. CAMARDI, *La ridefinizione dello* status *della persona*, in *Le «libertà fondamentali» dell'Unione europea e il diritto privato*, a cura di F. Mezzanotte, Roma 2016, pp. 97-120.

[6] Per un'ampia analisi si veda G. VIGGIANI, *Nomen Omen, Il diritto al nome tra Stato e persona in Italia*, Milano 2016.

[7] S. WINKLER, *Il diritto di famiglia*, cit., p. 313.

essa è composta di una dimensione fisica e di una dimensione "ideale" della persona[8]. La caratteristica fondamentale dell'identità della persona è, generalmente, l'esclusività; eppure vi è una parte di questa identità che non è esclusiva dato che alcuni fattori esterni possono avere un impatto considerevole sull'equazione tra identità individuale e identità della persona. Ad esempio, il nome, che rappresenta l'aspetto più rilevante dell'identità del singolo, viene condiviso con altri soggetti appartenenti alla stessa comunità familiare[9]. Pertanto, appare piuttosto evidente come il nome si collochi nel mezzo tra l'espressione dell'identità individuale e la prova dell'appartenenza ad una famiglia. In tale contesto, la disciplina giuridica del nome deve dare conto della necessità di bilanciarne le funzioni, garantendone l'esercizio da parte del suo titolare nel rispetto degli altri suoi diritti, quali il diritto all'autodeterminazione, il diritto al rispetto della vita familiare, il diritto all'eguaglianza tra uomini e donne, il diritto all'esercizio della responsabilità parentale (in particolare il diritto di scelta del nome personale da attribuire al proprio figlio) ed il diritto alla conoscenza delle proprie origini[10].

Normalmente, la persona sviluppa la propria personalità vivendo insieme ad altre persone, che compongono il suo nucleo familiare. Ciò significa che l'espressione dell'identità di un soggetto (il nome personale, appunto) è strettamente collegata anche allo *status* familiare. Ogniqualvolta il diritto al nome è collegato a vicende familiari vi sono più soggetti coinvolti, i cui diritti individuali vanno a loro volta protetti nel rispetto di un equo bilanciamento tra gli interessi di tutti i familiari.

Inoltre, ogniqualvolta il diritto al nome è collegato a vicende familiari, esso può anche variare in ragione del cambiamento dello *status* familiare. La scelta ed il cambiamento del nome possono dipendere, ad esempio, da istituti giuridici quali la filiazione, l'adozione, il matrimonio od il divorzio. Come si diceva in precedenza, è importante proteggere il diritto al nome e garantirne la stabilità al fine di realizzare l'espressione dell'identità individuale nel contesto sociale.

Nella dimensione sociale, invece, la rilevanza del diritto al nome emerge nel rapporto tra l'identità del singolo e la società. Quest'ultima si realizza nella funzione pubblica d'identificazione dei cittadini e di registrazione degli atti che li riguardano.

La tutela giuridica che va garantita al nome deve tenere conto di queste diverse funzioni, le quali alle volte sembrano collidere tra loro. La dimensione personale (interna) del nome, in quanto consente ad ogni consociato di scegliere il nome che meglio esprime la sua identità a prescindere dall'opportunità di ricollegarsi ad un ambito familiare o a una realtà sociale, pare talvolta non trovarsi in armonia con la dimensione sociale (esterna), il cui compito è rendere più agile l'identificazione del soggetto. Spesso,

[8] Si veda sul tema M. TRIMARCHI, *Diritto all'identità e cognome della famiglia*, in *Jus Civile*, 2013, n. 1, pp. 34-45.

[9] S. WINKLER, *The Right to a Name between the Personal Identity and the Belonging to a Family*, in *SGEM Conference on Political Sciences, Law, Finance, Economics & Tourism, Conference proceedings, Political Sciences, Law*, I, 2014, pp. 885-892, spec. p. 887.

[10] M. TRIMARCHI, *Diritto all'identità*, cit. p. 36.

dunque, si pongono in antitesi identità ed identificazione del singolo, tralasciando di considerare che si tratta di due aspetti complementari, anziché antitetici, del diritto al nome[11]. È dunque di fondamentale importanza mantenere un equilibrio tra l'identità e l'identificazione.

Tuttavia, ciò non significa che il nome sia immutabile: i cambiamenti spesso dipendono da mutamenti nella vita familiare del soggetto. Altre volte, invece, in ragione della circolazione del soggetto il nome può subire cambiamenti che possono comportare variazioni che compromettono la funzione sociale del nome, scollegandone il titolare da un determinato contesto di appartenenza ad una comunità oppure di identità etnica; altre volte ancora il diritto al nome trova delle limitazioni negli interessi collettivi, quali il diritto a proteggere una lingua od un alfabeto[12].

L'esigenza di offrire una tutela che tenga conto di queste diverse funzioni del nome è particolarmente avvertita dai giudici di Lussemburgo, perché in presenza di elementi di transnazionalità aumenta il rischio che tali funzioni collidano.

Molte sentenze della Corte di giustizia in materia di diritto al nome riguardano, infatti, problemi relativi alla tutela di tale diritto nell'ambito di famiglie *cross-borders*. Come si vedrà nel dettaglio più avanti, tali questioni portano i giudici della Corte di giustizia ad interrogarsi sul rapporto tra l'esigenza della certezza del nome, attribuito secondo le singole norme nazionali di ciascun paese, ed i numerosi diritti che trovano espressione in ragione della scelta o della variazione del nome, che sovente derivano dal mutamento dello *status* familiare. Tutto ciò va poi contemperato con l'esigenza della tutela delle libertà fondamentali che nel diritto primario dell'UE sono garantite a tutti i cittadini europei. In questo lavoro sarà di centrale interesse analizzare la giurisprudenza della Corte di giustizia; nondimeno, occorre ricordare che, sul piano europeo, l'affermazione del diritto al nome quale libertà fondamentale dell'individuo è passata anche dalla Corte di Strasburgo, la quale però non sempre ha avuto a che fare con soggetti che circolassero al di fuori del loro paese di origine. Si vedrà nel prosieguo come e per quale ragione l'operato delle due Corti si differenzi.

2. Le fonti sovranazionali in materia di diritto al nome.

Vi sono numerose fonti sovranazionali in materia di diritto al nome. Tratteggiando in primo luogo il quadro di riferimento internazionale, occorre menzionare l'art. 24 del Patto internazionale sui diritti civili e politici che stabilisce che ogni bambino debba essere iscritto nei registri dello stato civile subito dopo la nascita e che debba portare un nome. Ancora, l'art. 16, lettera g) della Convenzione ONU del 18

[11] Sul punto si rimanda a S. WINKLER, *The Right to a Name*, cit. V. *amplius* S. RODOTÀ, *Il diritto di avere diritti*, Bari 2012, p. 300.

[12] Corte giust., 12 maggio 2011, causa C-391/09, *Runevič-Vardyn and Wardyn*, EU:C:2011:291; Corte Edu, 7 dicembre 2004, ricorso n. 71074/01, *Mentzen alias Mencena* c. *Lettonia*; Corte Edu, 25 novembre 1994, ricorso n. 18131/91, *Stjerna* c. *Finlandia*. V. *infra* nel dettaglio.

dicembre 1979 sull'eliminazione di tutte le forme di discriminazione nei confronti della donna riconosce espressamente «gli stessi diritti personali al marito e alla moglie, compresa la scelta del cognome, di una professione o di una occupazione». Una formulazione molto simile, se non identica, a quella dell'art. 24 del Patto internazionale sui diritti civili e politici, si ritrova anche nell'art. 7 della Convenzione ONU del 20 novembre 1989 sui diritti del fanciullo[13]. Al successivo art. 8 della stessa Convenzione viene poi disposto il dovere degli stati di «rispettare il diritto del fanciullo a preservare la propria identità, ivi compresa la sua nazionalità, il suo nome e le sue relazioni familiari (...)».

La più importante fonte, perlomeno nel continente europeo, è sicuramente la Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali. Il diritto al nome trova indiretta tutela all'art. 8 della CEDU (*Diritto al rispetto della vita privata e familiare*). Come evidenziato dalla dottrina e dagli stessi giudici di Strasburgo «l'articolo 8 della Convenzione non contiene alcuna disposizione esplicita in materia di cognome ma, in quanto mezzo determinante di identificazione personale e di ricongiungimento ad una famiglia, ciò non di meno il cognome di una persona ha a che fare con la vita privata e familiare di questa»[14].

Da questa prima rapida lettura combinata delle fonti internazionali richiamate emerge chiaramente che nell'ordinamento internazionale il diritto al nome è riconosciuto alla stregua di un diritto fondamentale della persona.

Al fine di riflettere sulla tutela del diritto al nome nella libera circolazione delle persone nello spazio europeo è di centrale importanza richiamare anche le norme del diritto dell'Unione europea. Negli ultimi anni si assiste ad una crescente e continua attenzione delle istituzioni europee nei confronti dello *status* personale dei cittadini europei, che non può prescindere da una tutela transnazionale del nome personale[15]. Come si ricordava in precedenza, significativo è l'apporto della Corte di giustizia, che nell'interpretare le norme dei Trattati detta degli orientamenti costanti sullo *status nominis*.

Le disposizioni di diritto primario che vengono in rilievo rispetto al nome sono contenute nella Carta dei diritti fondamentali dell'Unione europea e nel TFUE. L'art. 7 della Carta al pari dell'art. 8 della CEDU, riconosce quale diritto fondamentale la protezione della vita personale e familiare di ciascun individuo, annoverando, benché non espressamente, tra le manifestazioni di tale diritto anche il diritto al nome. Vanno altresì ricordati gli artt. 18-21 del TFUE che non riguardano il diritto al nome, ma sono ad esso strettamente collegati qualora i soggetti circolino da uno stato all'altro, visto che trattano della non discriminazione, della libertà di circolazione e della cittadinanza dell'Unione. Le norme del diritto

[13] S. WINKLER, *Sull'attribuzione del cognome paterno nella recente sentenza della Corte europea dei diritti dell'uomo*, in *Nuova giur. civ. comm.*, 2014, pp. 520-528.

[14] Corte Edu, 7 gennaio 2014, ricorso n. 77/07, *Cusan e Fazzo c. Italia.*

[15] Per un'accurata analisi del diritto al nome si rimanda a L. TOMASI, *Il diritto al nome tra libertà di circolazione e diritti fondamentali*, in *Diritto al nome e all'identità personale nell'ordinamento europeo*, a cura di C. Honorati, Milano 2010, p. 111 ss.

primario appena richiamate sono, appunto, al centro delle argomentazioni della Corte di giustizia volte a rinvenire quell'equilibrio, spesso precario, tra le diverse funzioni del nome, di cui si diceva già in precedenza[16].

3. Le fonti nazionali: spunti comparatistici sulle diverse soluzioni europee.

La disciplina giuridica relativa al diritto al nome rientra nella competenza legislativa esclusiva di ciascuno Stato membro dell'Unione. Fino ad ora, parlando del nome non s'è fatta una precisa distinzione tra prenome e cognome che unitamente vanno a comporre il nome di una persona. Benché le questioni che possono sorgere ed eventualmente comportare una violazione del diritto al nome possano riguardare tanto il prenome, quanto il cognome, più frequenti sono i casi in cui l'esigenza di protezione di tale diritto è correlata al cognome della persona. Di ciò si darà conto anche nel prosieguo.

Ogni ordinamento dispone di proprie regole interne che disciplinano gli aspetti sia privatistici sia pubblicistici del diritto al nome. Non essendo possibile illustrare le singole soluzioni normative adottate nei vari paesi, si evidenzieranno alcune diversità di disciplina per sottolineare come tali differenze rischino di frenare la piena realizzazione del diritto alla libera circolazione e soggiorno in uno Stato membro diverso da quello di origine riconosciuto ai cittadini europei. Si darà pertanto conto di alcuni esempi di diversità di disciplina che, se trasposti sul piano transnazionale, rischiano di compromettere la certezza dello *status* personale degli individui[17].

Tra i molti ordinamenti giuridici che si sarebbero potuti affiancare a quello italiano in questo accenno a soluzioni nazionali in materia di diritto al nome, s'è scelto di individuare un paese per ciascuno dei principali modelli di disciplina esistenti in Europa. Due sono i modelli più frequenti e cioè quello che individua un cognome comune della famiglia (e qui s'è preso ad esempio il diritto tedesco) e quello che prevede l'attribuzione di cognomi plurimi (ad esempio il diritto spagnolo). A questi modelli se ne aggiungono altri. Il primo è quello che lascia ampi margini di libertà nella scelta del cognome: qui s'è scelto di fare menzione del diritto francese e di quello croato, volendo appositamente accostare ordinamenti diversi, la cui tradizione giuridica, soprattutto quanto alla storia recente, è piuttosto distante.

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[16] Quanto invece al diritto derivato, al momento, benché in dottrina si sia concretamente manifestata la preoccupazione per la carenza di soluzioni giuridiche adeguate ed unitarie, non vi sono regolamenti e/o direttive che disciplino la materia. Vi fu in realtà un tentativo di proporre un regolamento che regolasse uniformemente la materia, il quale tuttavia non ha – perlomeno ad oggi – avuto seguito. Si rimanda agli autori della proposta, A. DUTTA, R. FRANK, R. FREITAG, T. HELMS, K. KRÖMER, W. PINTENS, *Ein Name in ganz Europa – Entwurfeiner Europäischen Verordnung über das Internationale Namensrecht*, in *StAZ Das Standesamt*, 2014, n. 2, pp. 33-44. Si veda anche in inglese: WORKING GROUP OF THE FEDERAL ASSOCIATION OF GERMAN CIVIL STATUS REGISTRARS, *One name throughout Europe – draft for a European Regulation on the Law applicable to Names*, in *Yearbook of Private International Law*, 2013/2014, pp. 31-37.

[17] Per un'accurata ed onnicomprensiva ricostruzione della disciplina del diritto in chiave comparatistica si v. G. AUTORINO STANZIONE, *Attribuzione e trasmissione del cognome. Profili comparatistici*, in *www.comparazionedirittocivile.it*, 2010, n. 1, p. 1 ss.

Il secondo, all'opposto, è un modello che risulta essere piuttosto rigido. Posto che quest'ultimo è il modello presente nell'ordinamento italiano, proprio da qui si inizierà.

Nel rispetto della gerarchia delle fonti, l'analisi parte dalle previsioni costituzionali. È pacifico – ed anche in linea con le fonti internazionali e sovranazionali – che nei singoli ordinamenti nazionali vi sia almeno una disposizione che annoveri, direttamente od indirettamente il diritto al nome tra i diritti fondamentali della persona.

Così è nella Costituzione italiana: benché il diritto al nome non trovi espressa menzione, è evidente che esso rientri tra i diritti inviolabili dell'uomo di cui all'art. 2 della Carta[18]. Lo stesso lo si può concludere anche andando a leggere la Costituzione spagnola, la quale nell'offrire un copioso decalogo di diritti inviolabili, pur non menzionando esplicitamente il diritto al nome, all'art. 18 fa espresso riferimento alla tutela della personalità del soggetto[19]. Ancora, si pensi alla *Grundgesetz* (Legge fondamentale) tedesca dove all'art. 2, comma 1, viene sancito il diritto allo sviluppo della personalità di ogni persona[20]. Così è anche nella Costituzione croata, la quale all'art. 35 stabilisce che ciascuno ha diritto alla protezione della propria vita privata e familiare, comprensiva appunto della tutela della personalità e per quanto ivi interessa, del diritto al nome[21]. Con riferimento all'ordinamento francese il richiamo è alla Dichiarazione dei diritti dell'Uomo e del Cittadino, la quale costituisce il preambolo della Costituzione francese del 1971 oltre che il fondamento giuridico delle costituzioni delle democrazie occidentali[22].

Al di là delle norme di principio sancite a livello costituzionale, gli ostacoli al riconoscimento dello *status* personale derivano dalla divergenza tra normative civilistiche degli Stati membri, sia per quanto riguarda la disciplina sostanziale del nome, sia per quanto riguarda i profili di diritto internazionale privato.

Ad esempio, con riferimento ai coniugi, differenti legislazioni dettano regole decisamente diverse. Soluzioni quali quella italiana, da molti ritenuta insoddisfacente, sono rare. Il diritto italiano detta soltanto una soluzione per i coniugi, *rectius* per la moglie, e cioè quella dell'aggiunta per la moglie del cognome del marito ai sensi dell'art. 143-*bis* c.c.[23]. In generale al diritto al nome è dedicato l'art. 6 c.c., il quale nei tre commi che lo compongono regola: il diritto di ciascun soggetto ad avere un nome, la composizione del nome (prenome e cognome) e le limitazioni circa i cambiamenti, le rettifiche e/o le aggiunte al nome. Gli

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[18] Si rimanda all'analisi di S. TROIANO, *Cognome del minore e identità personale*, in *Jus Civile*, 2020, pp. 559-594. Citando l'Autore: «si rinviene il riconoscimento a chiare lettere della funzione essenziale che il diritto al nome (…) svolge quale espressione dell'identità personale del minore, in quanto tale direttamente riconducibile alla copertura di protezione assoluta della personalità umana offerta dalla clausola generale costituzionale dell'art. 2 Cost.».

[19] G. AUTORINO STANZIONE, *Attribuzione e trasmissione del cognome*, cit., p. 18.

[20] Ancora G. AUTORINO STANZIONE, *Attribuzione e trasmissione del cognome*, cit., p. 13.

[21] S. WINKLER, *Pravo na osobno ime u praksi europskih sudova*, in *Europsko obiteljsko pravo*, a cura di A. Korać Graovac, I. Majstorović, Zagreb 2013, pp. 125 ss.

[22] La Dichiarazione dei diritti dell'Uomo e del Cittadino (*Déclaration des droits de l'homme et du citoyen*), approvata dall'Assemblea Nazionale il 26 agosto del 1789, costituisce il preambolo della Costituzione liberale francese del 1791. Si invita a leggere S. RODOTÀ, *Il diritto di avere diritti*, cit., p. 299.

[23] Si veda sul tema M. TRIMARCHI, *Diritto all'identità*, cit., pp. 34-45.

articoli 7, 8 e 9 c.c. regolano poi nel dettaglio le modalità di tutela del diritto al nome[24]. Vanno anche richiamate le disposizioni del d.P.R. 3 novembre 2000, n. 396 (Ordinamento dello stato civile) che disciplinano profili attinenti alla materia con riguardo all'attribuzione ed alla modificazione del nome (artt. 34, 35 e 36 e artt. 89 ss.)[25].

È evidente che si tratti di una disposizione alquanto criticabile dal momento che l'impossibilità di scegliere un cognome diverso è, di fatto, espressione di una discriminazione, non riconoscendo gli stessi diritti a marito e moglie. Il tema principale d'indagine di questo scritto non permette di soffermarsi sugli aspetti relativi alla disciplina nazionale. Va tuttavia accennato che la disciplina legislativa pare inadeguata anche con riguardo all'attribuzione del nome ai figli[26]. Soprattutto in seguito alla sentenza di condanna emanata dalla Corte di Strasburgo nel caso *Cusan e Fazzo* si sono moltiplicate le proposte di riforma delle regole sottese alla disciplina del nome nell'ordinamento giuridico italiano[27], senza peraltro avere portato ancora a risultati concreti[28]. Non sorprende perciò la recentissima ordinanza della Consulta che ancora una volta ha rimarcato il problema[29].

Altri sistemi giuridici, quale ad esempio quello tedesco, stabiliscono il dovere di scegliere il (cog)nome della famiglia, il c.d. "*Familienname*". Precisamente, i coniugi hanno la libertà di scegliere tanto il cognome di un coniuge, quanto quello dell'altro[30]. Diversamente, ordinamenti come quello spagnolo danno la possibilità di combinare i due cognomi. Altri ordinamenti ancora, come quello francese e quello croato, offrono ai coniugi la piena libertà di scelta del cognome; in pratica, i due coniugi possono anche avere cognomi differenti. Grande libertà viene riconosciuta anche con riferimento ai figli; infatti, l'attuale legislazione francese statuisce il diritto a scegliere per i figli entrambi i cognomi oppure uno soltanto dei

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[24] S. WINKLER, *Sull'attribuzione del cognome*, cit., p. 522.

[25] M. FACCIOLI, *Commentario breve al diritto della famiglia*, a cura di A. Zaccaria, IV ed., Milano 2020, *sub* art. 34 d.P.R. 3 novembre 2000, n. 396, p. 2288 ss.

[26] In particolare sull'attribuzione del nome si veda M. FACCIOLI, *L'attribuzione del prenome alla nascita*, in *Familia*, 2021, n. 2, p. 149 ss.

[27] A tale proposito si rimanda all'attenta analisi condotta da S. TROIANO, *Cognome del minore e identità personale*, cit., pp. 580 e ss. Inoltre, vedi *supra* n. 14.

[28] Tuttavia pare che queste tanto attese modifiche al codice civile in materia di cognome dei coniugi e dei figli potrebbero essere di prossima trattazione del legislatore. Si veda il disegno di legge S. 170 - XVIII Leg., *Modifiche al codice civile in materia di cognome dei coniugi e dei figli*.

[29] Corte cost., ord., 11 febbraio 2021, n. 18, in GU 17 febbraio 2021, n. 7.

Si riporta un passaggio importante dell'ordinanza in oggetto che richiama la sentenza della Corte Edu nel caso *Cusan e Fazzo* c. *Italia*: «che (…) la Corte europea dei diritti dell'uomo, nella sentenza 7 gennaio 2014, Cusan e Fazzo contro Italia, ha ritenuto che la rigidità del sistema italiano - che fa prevalere il cognome paterno e nega rilievo ad una diversa volontà concordemente espressa dai genitori - costituisce una violazione del diritto al rispetto della vita privata e familiare, determinando altresì una discriminazione ingiustificata tra i genitori, in contrasto con gli articoli 8 e 14 Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali». La Consulta negli ultimi anni s'è espressa diverse volte sulla questione del diritto al nome. Così si veda la sentenza del 21 dicembre 2016, n. 286, pubblicata in GU 28 dicembre 2016, n. 52, o prima ancora la sentenza del 16 febbraio 2006, n. 61, pubblicata in GU 22 febbraio 2006, n. 8. Si v. R. CALVIGIONI, *La disciplina del nome e del cognome*, 2ª ed., Santarcangelo di Romagna 2018, p. 22 ss.

[30] G. AUTORINO STANZIONE, *Attribuzione e trasmissione del cognome*, cit., p. 14.

cognomi[31]. Lo stesso approccio liberale caratterizza le scelte operate dal legislatore croato. Invero, ci si potrebbe chiedere se non sia un approccio fin troppo liberale. Precisamente, in Croazia esiste una legge specifica che regola la materia del diritto al nome e offre ampi margini all'esercizio dell'autonomia[32].

La conclusione cui si perviene facilmente già da queste brevi riflessioni, che hanno ricompreso solo alcuni ordinamenti giuridici, è che il panorama europeo è molto variegato, il che certamente non è d'ausilio per la circolazione del nome da un paese all'altro.

A questo già variopinto panorama va aggiunto il fatto che anche la disciplina internazionalprivatistica del nome differisce nei vari ordinamenti, utilizzando alcuni il criterio della cittadinanza del soggetto, ed altri criteri di tipo territoriale, quali la residenza o il domicilio, e intervenendo, in alcuni ordinamenti, l'autonomia della volontà[33].

4. La giurisprudenza delle Corti europee.

Occorre a questo punto fare una disamina sul ruolo che la giurisprudenza delle Corti europee svolge nell'ambito della tutela del diritto al nome. Precisamente occorre valutare l'impatto della giurisprudenza della Corte di giustizia dell'UE e della Corte europea dei diritti dell'uomo al fine di individuare possibili tendenze future nel processo di europeizzazione della disciplina in esame[34].

Le diversità interpretative delle due Corti europee derivano dal diverso ruolo delle due Corti. La Corte europea dei diritti dell'uomo è chiamata a salvaguardare la tutela dei diritti garantiti dalla Convenzione europea dei diritti dell'uomo da parte degli Stati parti della stessa e ciò a prescindere dal

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[31] Ancora S. TROIANO, *Cognome del minore*, cit., p. 584 ss.

[32] S. WINKLER, *Pravo na osobno ime*, cit., p. 126-127. Ad avviso di chi scrive, specialmente nel contesto dei rapporti tra genitori e figli, occorre interrogarsi sulla bontà di una soluzione che per assurdo potrebbe portare alla conclusione che ciascun figlio potrebbe portare un cognome diverso. Non si corre allora il rischio di compromettere l'unità familiare, ma ancor di più il suo collegamento con la funzione identificativa del nome? *De facto*, un'eccessiva liberalizzazione potrebbe risultare negativa anche per il nome quale espressione dell'identità di un soggetto, il quale ad esempio potrebbe non sentirsi unito ai propri fratelli dallo stesso nome. Vero è che va eliminata qualsiasi soluzione discriminatoria, ma va anche detto che occorre garantire un grado di certezza alla discendenza della prole.

[33] Come giustamente osserva W. PINTENS insieme al suo gruppo di lavoro «the state of affairs is not compatible with the idea of a European citizenship and can impede the effective exercise of the fundamental freedoms within the Union». Così *Ein Name in ganz Europa*, cit. Ancora, tra i vari contributi pubblicati in materia si rinvia a *Diritto al nome e all'identità personale nell'ordinamento europeo*, a cura di C. Honorati, Milano 2010. Ancora con riferimento al diritto italiano in particolare si veda S. TONOLO, *Il riconoscimento di atti e provvedimenti stranieri concernenti il diritto al nome nell'ordinamento italiano: problemi e prospettive*, in *Diritto al nome*, cit., pp. 151 ss. A proposito del diritto al nome nell'ordinamento giuridico austriaco e l'influenza su di esso della giurisprudenza europea, si segnala una recente pronuncia della Suprema corte austriaca del 20 aprile 2021. Il testo della sentenza ed un primo commento a firma di P. EICHMÜLLER sono consultabili su https://eapil.org/2021/06/14/whats-in-a-name-dispute-further-developments-in-eu-name-law.

[34] Per un'analisi della giurisprudenza della Corte di giustizia dell'UE si v. E. PATAUT, *A Family Status for European Citizen?*, in *Constructing the Person in EU Law. Rights, Roles, Identities*, edited by L. Azoulai, S. Barbou des Places, E. Pataut, Oxford-Portland, Oregon 2016, p. 315 ss. Si veda anche C. HONORATI, *Il diritto al nome della moglie e dei figli nell'ordinamento italiano ed europeo. Osservazioni generali*, in *Diritto al nome*, cit., p. 3 ss.

fatto che la fattispecie oggetto di esame presenti o no elementi di transnazionalità. Diversamente, la Corte di giustizia da un lato è competente a pronunciarsi unicamente con riferimento a fattispecie che non abbiano carattere puramente interno, dall'altro dovrà bilanciare la tutela del diritto all'identità personale e libertà di circolazione previste dai Trattati.

Partendo dalla Corte di giustizia, il filo conduttore che accomuna diverse sentenze in tale materia è rappresentato dalla tendenza a garantire la stabilità transnazionale del nome, in funzione della tutela delle libertà sancite dagli artt. 18 e seguenti del TFUE (divieto di discriminazione, diritti legati alla cittadinanza, libera circolazione). Nel prosieguo se ne darà brevemente conto, trattando però anche altre decisioni che se ne discostano.

Risale al 1993 la decisione della Corte di giustizia nel caso *Konstantinidis*[35]. A seguito di traslitterazione, il signor Konstantinidis, residente in Germania ma greco per nascita, nella trasformazione dai caratteri greci a quelli latini, vide il suo nome cambiato[36]. Ciò comportò il rischio di compromettere la sua libertà di stabilimento, in quanto il signor Konstantinidis, fisioterapista di professione, rischiava di non essere più riconosciuto dai suoi clienti. A differenza delle sentenze che seguirono, nel caso *Konstantinidis* si evocava ancora la libertà di stabilimento. Risale allo stesso periodo anche la pronuncia nel caso *Dafeki*, ritenuta di fondamentale importanza sulla via dell'affermazione transnazionale dello *status* della persona[37].

Il progressivo allontanamento della libera circolazione delle persone da una dimensione puramente economica emerge, in riferimento alla tutela del nome delle persone fisiche, dalle pronunce nei casi *Garcia-Avello* e *Grunkin-Paul*[38].

Nel primo caso (*Garcia-Avello*) la questione riguardava il cognome da attribuire ai figli minori di una coppia di coniugi aventi cittadinanze diverse (belga e spagnola). Secondo la legge belga ai figli della

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[35] Cfr. Corte giust., 30 marzo 1993, causa C-168/91, *Christos Konstantinidis*, EU:C:1993:115.

[36] Si v. A. LANG, *Problemi di traslitterazione del nome di fronte alle Corti europee: i casi* Konstantinidis *e* Mentzen, in *Diritto al nome*, cit., pp. 139 ss.

[37] Corte giust., 2 dicembre 1997, causa C-336/94, *Dafeki*, EU:C:1997:579. Al fine di rammentare brevemente il contenuto di tale sentenza se ne cita testualmente la massima: «[b]enché le autorità amministrative e giudiziarie di uno Stato membro non siano tenute, in forza del diritto comunitario, a considerare equivalenti i certificati di stato civile rilasciati dalle autorità competenti del proprio Stato e quelli rilasciati dalle competenti autorità di un altro Stato membro, va cionondimeno rilevato che l'esercizio dei diritti derivanti dalla libera circolazione dei lavoratori non è possibile senza la presentazione di documenti relativi allo stato delle persone, i quali di norma sono rilasciati dallo Stato di origine del lavoratore. Ne consegue che, nei procedimenti intesi a determinare i diritti alle prestazioni previdenziali di un lavoratore migrante cittadino comunitario, gli enti nazionali competenti in materia di previdenza sociale e i giudici nazionali di uno Stato membro sono obbligati ad attenersi ai certificati e agli atti analoghi relativi allo stato civile emessi dalle competenti autorità degli altri Stati membri, a meno che la loro esattezza non sia gravemente infirmata da indizi concreti in relazione al singolo caso considerato».

[38] Corte giust., 2 ottobre 2003, causa C-148/02, *Garcia Avello*, EU:C:2003:539; Corte giust. 10 ottobre 2008, causa C-353/06, *Grunkin-Paul*, EU:C:2008:559. In dottrina si v. C. BARNARD, *The Substantive Law of the EU*, 6th ed., Oxford 2019, pp. 368-370. G. ROSSOLILLO, *La legge applicabile al nome alla luce delle convenzioni internazionali e dei principi comunitari*, in *Diritto al nome*, cit., p. 91 ss.; M. LEHMANN, *What's in a name? Grunkin-Paul and Beyond*, in *Yearbook of Private International Law*, 2008, pp. 135-164.

coppia, di doppia cittadinanza belga e spagnola e residenti in Belgio, non poteva venire attribuito il cognome nella sua "versione spagnola", vale a dire composto dal cognome del padre e della madre, in quanto il doppio cognome era vietato dall'ordinamento giuridico belga[39]. Le singole legislazioni nazionali, nel caso specifico quella belga e quella spagnola, dettavano soluzioni normative interne inconciliabili l'una con l'altra sicché i due minori erano identificati con nomi diversi nei due diversi ordinamenti.

La Corte di giustizia dell'UE s'è proclamata competente a decidere della questione, ritenendo che la questione del diritto al nome sottoposta al suo vaglio fosse strettamente connessa alla tutela della cittadinanza europea ed alla libertà di circolazione[40]. I giudici di Lussemburgo hanno ritenuto pertanto che l'impossibilità di attribuire ai figli il cognome nella "versione spagnola", quella cioè in linea con la volontà dei genitori, rappresentasse una discriminazione dei minori nell'espressione della loro identità spagnola. Richiamando gli artt. 18, 20 e 21 TFUE, la Corte ha pertanto ritenuto la legislazione nazionale in contrasto con il diritto primario dell'UE.

Benché il concetto di cittadinanza europea non possa in alcun modo influire su di un ingiustificato allargamento dell'applicazione dei Trattati, è evidente come la Corte di giustizia ritenga necessario che le singole legislazioni nazionali debbano essere in linea con le libertà di circolazione e soggiorno sancite dal diritto primario dell'UE anche quando intervengano in materie che sono di loro esclusiva competenza come nel caso del diritto al nome. Concretamente, i figli del signor Avello, ai sensi dell'art. 18 del TFUE, hanno diritto a non essere discriminati in ragione della legge che disciplina il loro nome personale. Ancora, il fatto di possedere due cittadinanze, una delle quali (quella belga) impedisce ai minori l'attribuzione del cognome secondo la scelta dei genitori, non può portare ad esiti discriminatori.

Anche nel caso *Grunkin-Paul*, di poco successivo, la questione riguardava l'attribuzione del cognome al figlio minore di una *ex* coppia di coniugi. In questo caso però si trattava di soggetti dalla sola cittadinanza tedesca che risiedevano in Danimarca, dove il figlio della coppia era nato e dove gli era stato attribuito il cognome secondo la legislazione danese, la quale prevede l'attribuzione del doppio cognome (materno e paterno). Le autorità tedesche, in quanto il diritto internazionale privato tedesco sottopone il nome alla legge dello Stato di cittadinanza, negavano il riconoscimento della "versione danese" del cognome, pur vivendo il minore in Danimarca. La Corte di giustizia, richiamando agli artt. 18 e 21 TFUE, s'è espressa nel senso che la legislazione tedesca osta all'applicazione del diritto primario dell'UE[41]. Si

[39] Sul punto L. AZOULAI, *The European Individual as Part of Collective Entities (Market, Family, Society)*, in *Constructing the Person in EU Law*, cit., p. 213. G. AUTORINO STANZIONE, *Attribuzione e trasmissione del cognome*, cit., pp. 21-22.

[40] Sul punto si v. T. BALLARINO, B. UBERTAZZI, *On Avello and other judgements: a new point of departures in the conflict of laws?* in *Yearbook of Private International Law*, 2004, p. 106.

[41] Il dispositivo della sentenza recita testualmente: «[l]'art. 18 CE, in circostanze come quelle della causa principale, osta a che le autorità di uno Stato membro, in applicazione del diritto nazionale, rifiutino di riconoscere il cognome di un figlio così come esso è stato determinato e registrato in un altro Stato membro in cui tale figlio – che, al pari dei genitori, possiede solo la cittadinanza del primo Stato membro – è nato e risiede sin dalla nascita».

tratta di una sentenza che ha suscitato interesse perché afferma la supremazia dell'unicità e della stabilità dello *status* del soggetto a prescindere dalla normativa nazionale sui criteri di collegamento per l'individuazione del diritto applicabile[42]. In altre parole, nel caso in esame, cambiare il cognome al minore tedesco abitualmente residente in Danimarca, avrebbe comportato il rischio di confondere l'identità del bambino, il quale non sarebbe stato riconoscibile ovunque con lo stesso cognome.

Dalle pronunce ora citate si ricava l'importanza che la continuità transnazionale del nome ha ai fini di una libera circolazione delle persone nell'Unione europea[43]. Si può affermare che tale giurisprudenza sia da ritenersi ormai costante e se ne rinviene conferma anche nella recente sentenza nel caso *Freitag*[44]. Va comunque precisato che i giudici di Lussemburgo, nel verificare la sussistenza di restrizioni alla libertà di circolazione e di soggiorno dei cittadini europei, in alcune occasioni sono pervenuti alla conclusione che tale restrizione fosse giustificata. A tale riguardo vanno ricordate le pronunce in materia di tutela di nomi contenenti "elementi nobiliari"[45].

Simili restrizioni possono risultare giustificate anche in circostanze diverse quale ad esempio quelle del caso *Runevič-Vardyn and Wardyn* dove viene in rilievo la tutela della lingua nazionale.[46] Si tratta di un caso piuttosto complesso nel quale si intersecano questioni relative alla trascrizione dei segni diacritici ed alla protezione della lingua nazionale. Precisamente tali problemi sono sorti quando i due coniugi hanno chiesto di potere usare la "versione polacca" anziché quella lituana dei loro cognomi facendo all'uopo uso di segni diacritici e lettere non esistenti nella lingua lituana. La Corte di giustizia non

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Ancora, si legga il punto 22: «[o]rbene, il fatto di essere obbligati a portare, nello Stato membro di cui si è cittadini, un cognome differente da quello già attribuito e registrato nello Stato membro di nascita e di residenza è idoneo ad ostacolare l'esercizio del diritto a circolare e soggiornare liberamente nel territorio degli Stati membri, sancito dall'art. 18 CE».

[42] Si v. F. DEANA, *Protecting EU Citizen Minors' Right to identity in the Transnational Family Context*, in *Fundamental Rights and Best Interests of the Child in Transnational Families*, edited by E. Bergamini, C. Ragni, Cambridge-Antwerp-Chicago 2019, p. 29 ss.

[43] Sul punto, si rinvia nuovamente a A. DUTTA, R. FRANK, R. FREITAG, T. HELMS, K. KRÖMER, W. PINTENS, *Ein Name*, cit., p. 33 ss.

[44] Corte giust., 8 giugno 2017, causa C-541/15, *Freitag*, EU:C:2017:432. Secondo il punto 41 «[i]n linea di principio, poco importa sapere, dal punto di vista del diritto dell'Unione, quale sia la disposizione nazionale o la procedura interna in forza della quale il ricorrente può far valere i suoi diritti riguardanti il proprio nome» Proseguendo nel punto 42 «[i]nfatti, in mancanza di una normativa dell'Unione in materia di modifica del cognome, spetta all'ordinamento giuridico interno di ciascuno Stato membro disciplinare le modalità previste dal diritto nazionale e destinate a garantire la tutela dei diritti spettanti ai singoli in forza del diritto dell'Unione, purché, da un lato dette modalità non siano meno favorevoli di quelle relative ai diritti che trovino origine nell'ordinamento giuridico interno (principio di equivalenza) e, dall'altro, esse non rendano impossibile o eccessivamente difficile, in pratica, l'esercizio dei diritti conferiti dall'ordinamento dell'Unione (principio di effettività)».

[45] Cfr. Corte giust., 22 dicembre 2010, causa C-208/09, *Sayn-Wittgenstein v. Landeshauptmann von Wien*, EU:C:2010:806. Cfr. Corte giust., 2 giugno 2016, causa C-438/14, *Bogendorff von Wolffersdorff*, EU:C:2016:401. Si v. F. DEANA, *Protecting EU Citizen*, cit., p. 36.

[46] Corte giust., 12 maggio 2011, *Runevič-Vardyn and Wardyn*, cit. Si v. E. PATAUT, *A Family Status for European Citizen?*, cit., p. 317.

ha riconosciuto nel diniego delle autorità lituane, giustificato nella tutela della lingua nazionale, un comportamento contrario alla libertà di circolazione garantita ai cittadini europei[47].

Quanto alla giurisprudenza della Corte di Strasburgo è di tutta evidenza che il diritto al nome, come testé si osservava, rappresenti un'espressione della vita privata e familiare elevata a diritto fondamentale della persona. In tale senso il richiamo va alla recente sentenza nel caso *Cusan Fazzo* c. *Italia*, ma anche a precedenti quali la sentenza nel caso *Burghartz* c. *Svizzera* e *Ünal Tekeli* c. *Turchia*[48].

In tempi meno recenti le due corti si sono espresse in maniera opposta su alcune situazioni che nei fatti presentavano molte similitudini[49]. Si pensi ad esempio alla sentenza nel caso *Heidecker-Tiemann* c. *Germania* dove la Corte di Strasburgo venne chiamata ad esprimersi circa l'avvenuta violazione dell'art. 8 CEDU in un caso praticamente identico a quello che contemporaneamente veniva sottoposto al vaglio della Corte di giustizia nel caso *Grunkin-Paul*[50]. In entrambi i casi si trattava della possibilità di attribuire ad un cittadino (minore) tedesco, nato e residente in altro Stato europeo più di un cognome. In entrambi i casi le autorità tedesche rigettarono tale possibilità richiamando all'uopo la legislazione nazionale ai sensi della quale al cittadino tedesco non è riconosciuta la facoltà si iscrivere più di un cognome. Se da un lato, come già osservato, la CGUE ritenne una tale norma nazionale rappresentasse un'ingiustificata limitazione della libertà di circolazione e soggiorno riconosciuta ai cittadini europei, per converso, la Corte Edu nel caso *Heidecker-Tiemann* ritenne la disposizione normativa tedesca giustificata in ragione dell'autonomia di cui i singoli stati godono nel regolare detta materia, pervenendo alla conclusione che in tale situazione non fosse riconoscibile la lesione di un diritto fondamentale della persona.

Si può citare anche la sentenza nel caso *Mentzen alias Mencena* c. *Lettonia* i cui fatti ricordano le circostanze del caso *Runevič Vardyn and Wardyn*. Tale pronuncia è rilevante in quanto affermava la centralità della funzione identificativa del nome e difende la necessità di interventi modificativi nella trascrizione del nome da una lingua all'altra. Rappresenta un caso interessante in quanto si trattò di una trascrizione imposta del cognome originario *Mentzen* (cognome tedesco del marito) in *Mencena* al fine di salvaguardare la lingua lettone. La Corte Edu ha ritenuto giustificata l'esigenza di modifica del cognome.

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[47] Si riporta testualmente parte del dispositivo della sentenza della Corte giust., 12 maggio 2011, *Runevič-Vardyn and Wardyn*, cit.: «non osta a che le autorità competenti di uno Stato membro rifiutino, in applicazione di una normativa nazionale secondo cui il cognome e i nomi di una persona possono essere registrati negli atti di stato civile di tale Stato esclusivamente in una forma che rispetti le regole di grafia della lingua ufficiale nazionale, di modificare nei certificati di nascita e di matrimonio di uno dei suoi cittadini il cognome e il nome di detta persona secondo le regole di grafia di un altro Stato membro».

[48] Corte Edu, 22 febbraio 1994, ricorso n. 16213/90, *Burghartz* c. *Svizzera*. Corte Edu, 16 novembre 2004, ricorso n. 29865/96, *Ünal Tekeli* c. *Turchia*.

[49] A riprova del fatto che il rapporto tra la giurisprudenza delle due Corti europee nell'ambito dei diritti fondamentali susciti interesse anche al di fuori dei confini europei, di proposito si rimanda a L. RINCÓN- EIZAGA, *Human Rights in the European Union. Conflict between the Luxembourg and Strasbourg Courts regarding interpretation of Article 8 of the European convention on Human Rights*, in *Int. Law: Rev. Colomb. Derecho Int. Bogotà (Colombia)*, 2008, n. 11, p. 119 ss.

[50] Cfr. G. VIGGIANI, *Nomen Omen*, cit., p. 28 ss.

Pur risultando palese la violazione dell'art. 8 della CEDU, i giudici di Strasburgo hanno ritenuto giustificata l'interferenza delle autorità lettoni.

Da ultimo, si può citare la sentenza nel caso *Daroczy* c. *Ungheria* in quanto testimonia un'evoluzione nel percorso interpretativo della Corte Edu. La pronuncia mostra particolare sensibilità nei confronti dell'esigenza della stabilità del nome. Lo *status nominis* quale uno degli elementi fondanti dello *status* personale di qualsiasi soggetto assume un ruolo centrale nell'espressione dell'identità del singolo[51]. Nel caso in questione la ricorrente si opponeva alla decisione delle autorità ungheresi di correggere dopo cinquant'anni il cognome del marito che già ai tempi in cui i due si sposarono non era in linea con la normativa nazionale. Tale pronuncia è molto interessante in quanto nella sua argomentazione emerge chiaramente l'importanza del nome e della sua stabilità.

Sono evidenti alcune differenze nelle argomentazioni offerte dalla due Corti, il che è naturale posto che operano diversamente. Già si osservava che la Corte di giustizia nei suoi rinvii pregiudiziali procede ad una valutazione preventive ed astratta indipendentemente dalla valutazione di una concreta violazione di un qualsiasi diritto.

Diversamente, la Corte di Strasburgo concretamente valuta se vi sia stata nel caso specifico una violazione concreta dei diritti umani garantiti nella Convenzione sulla quale la Corte è chiamata a vigilare.

Nondimeno, leggendo la giurisprudenza di tempi più recenti (di entrambe le corti) si constata una loro mutua convergenza spronata dal bisogno di proteggere appunto l'unicità dello *status* personale e per l'effetto anche del diritto al nome[52]. In altri termini, è evidente l'incedere di un processo di europeizzazione anche in questo ambito del diritto[53]. Prova evidente ne sia la recente sentenza *Cusan Fazzo c. Italia* della Corte di Strasburgo[54] che, come noto, trattava della volontà di due genitori di attribuire alla propria figlia il cognome materno anziché quello paterno.

Si può concludere da un lato che i giudici di Lussemburgo da tempo richiamino la prassi giurisprudenziale della Corte di Strasburgo, mostrando una crescente attenzione per i diritti fondamentali; mentre dall'altro che negli ultimi tempi sta accadendo anche il contrario e cioè che la Corte EDU stia aprendo a nuove tendenze armonizzatrici dei singoli diritti europei [55].

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[51] S. WINKLER, *Pravo na osobno ime,* cit., p. 128 ss.

[52] Sul punto ancora A. DUTTA, R. FRANK, R. FREITAG, T. HELMS, K. KRÖMER, W. PINTENS, *Ein Name,* cit., pp. 33-44.

[53] In dottrina numerosi autori hanno disaminato la giurisprudenza europea in tale ambito. Tra i vari si v. M., LEHMANN, *What's in a name?*, cit., pp. 135-164; M.D. ORTIZ VIDAL, *Nuevos interrogantes y nuevas respuestas sobre la STJCE de 14 de octubre 2008, Grunkin-Paul*, in *Cuad. Der. Transnacional*, 2009, vol. 1, n. 2, pp. 357-366.

[54] Si legga in proposito l'opinione dissenziente del giudice Popović. Testualmente: «il nucleo della causa, come presentata dinanzi alla Corte europei dei diritti dell'Uomo, si rivela dunque astratto e dà l'impressione che il ricorso rappresenti soltanto una sorta di *actio popularis*, di cui i ricorrenti non possono investire la nostra Corte».

[55] Al riguardo si rinvia a S. WINKLER, *Sull'attribuzione del cognome,* cit., pp. 520-528.

L'europeizzazione del diritto di famiglia passa anche attraverso la tutela della persona e del suo diritto al nome. La crescente attenzione dedicata a questi temi garantisce una maggiore tutela della stabilità del nome, garantendo un effettivo rispetto della vita privata e familiare del singolo anche (o soprattutto) in presenza di elementi di transnazionalità[56].

[56] Si v. E. PATAUT, *A Family Status for European Citizen?*, cit., p. 317.