



AD HOC QUERY ON 2019.88 Kafala children

Requested by EMN NCP Spain on 4 October 2019

Responses from Austria, Belgium, Croatia, Cyprus, Czech Republic, Estonia, Finland, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Slovakia, Spain, Sweden, United Kingdom plus Norway (22 in Total)

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1. Background information

Kafala is a form of protection of children that exists in several countries whose legal systems are based on, or inspired by, Muslim law, and which prohibits the adoption of children. In the Muslim legal system, the kafala is a kind of delegation of parental authority by which the kafil (adult) agrees to support the makfoul (child) until he/she is of age by providing all his/her basic needs (food, clothing, education).

In some countries, like Morocco, there are two types of kafala: It is the judge who issues the judicial kafala that only concerns abandoned children permanently placed in orphanages (the child may have a known or unknown filiation). The notary-certified kafala is for children whose lineage is known. A notary establishes the deed with parental consent.

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In some situations, it entails the conferral of parental responsibility. The conferral can be done voluntarily by a parent (e.g. to a relative such as an aunt or uncle) or in order to protect a child who has been abandoned by his or her parents.

In Spain recognition of kafala was for a long time considered under migration law bearing in mind how the kafala has been established.

Currently, we'd like to know more about other MS's approaches to this institution and about its effects under migration law.

2. Questions

1. a) Does your MS recognise kafala under migration law/practice by the provision of a visa and/or residence permit to the child? Yes/No

Available choices: Yes, No

2. b) Does your MS establish a different migration treatment to the children depending on how the conferral of parental responsibility has been done to the person who resides or is going to reside in the MS? Yes/No. Why?

3. • In case the conferral has been done voluntarily by a parent (with or without the involvement of a public authority) to a relative who resides or is going to reside in the MS?

4. • In case the conferral has been done voluntarily by a parent (with or without the involvement of a public authority) to a person who is not a relative who resides or is going to reside in the MS? Even before a judicial neglect?

5. • In case the conferral has been done to protect a child who has been abandoned by his or her parents or whose parents have deceased or are unknown?

6. c) Does your MS establish an internal protocol to better applied the obligations of the 1996 Hague Convention?

We would very much appreciate your responses by **8 November 2019**.



3. Responses

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¹ If possible at time of making the request, the Requesting EMN NCP should add their response(s) to the query. Otherwise, this should be done at the time of making the compilation.

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| | | Wider Dissemination ² | |
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|  | EMN NCP Austria | No | This EMN NCP has provided a response to the requesting EMN NCP. However, they have requested that it is not disseminated further. |
|  | EMN NCP Belgium | Yes | <p>1.</p> <p>2. N/A Detailed response to Q1: No, kafala is not recognised as a ground for family reunification or other forms of migration in Belgian law or practice. However, the child or guardian in the kafala system can apply for a humanitarian visa (from abroad) or for an authorisation to stay for humanitarian reasons (in the territory) on the basis of Art. 9 and Art. 9bis Immigration Act. The Immigration Office grants these visa and authorisations on a discretionary basis. In 2018, the Committee on the Rights of the Child ruled that the Belgian state had to reconsider an application for a humanitarian visa by a child wishing to reunite with his guardians under the kafala system. The Committee stated that the administration should assess the best interest of the child, hear the child involved, and take into account the actual family ties (CRC/C/79/D/12/2017).</p> <p>3. N/A</p> |

² A default "Yes" is given for your response to be circulated further (e.g. to other EMN NCPs and their national network members). A "No" should be added here if you do not wish your response to be disseminated beyond other EMN NCPs. In case of "No" and wider dissemination beyond other EMN NCPs, then for the Compilation for Wider Dissemination the response should be removed and the following statement should be added in the relevant response box: "This EMN NCP has provided a response to the requesting EMN NCP. However, they have requested that it is not disseminated further."



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| | | | <p>4. N/A 5. N/A</p> <p>6. Yes. Belgium ratified the 1996 Hague Convention on Parental Responsibility and the Protection of Children in 2014. In August 2018, the Federal Government and the Communities adopted a cooperation agreement regarding the implementation of this treaty. They designated the Federal Public Service Justice as central authority competent for the processing of requests by national and foreign authorities related to the protection of children (concerning for instance the placement of a child, a transfer of jurisdiction, exchange of information and other forms of cooperation). The agreement has not yet entered into force. Link to the agreement (in French): http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&c...</p> |
|  | EMN NCP Croatia | Yes | <p>1. No 2. N/A 3. n/a 4. n/a 5. n/A</p> <p>6. Government of the Republic of Croatia in August 2018. adopted a new Protocol on the treatment of unaccompanied children. The Protocol seeks to establish a solid and efficient national system regarding the treatment of unaccompanied children. In emergencies such as massive influx of unaccompanied children, it will be necessary to secure additional human resources and accommodation facilities to meet the needs of unaccompanied children. Such emergencies also require some deviations from the procedure, but with full respect to the best interests of a child. The purpose of this Protocol is to define the bearers of obligations, ways and deadlines regarding</p> |



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| | | | the treatment of unaccompanied children in order to protect their rights and interests in a timely and effective manner. |
|  | EMN NCP Cyprus | Yes | <ol style="list-style-type: none"> 1. 2. No. A court decision is always needed, in order to define the parental responsibility, if the guardian is different from the parents 3. A court decision is always needed, in order to define the parental responsibility, if the guardian is different from the parents. No voluntarily conferral can be accepted, without a court decision. 4. A court decision is always needed, in order to define the parental responsibility, if the guardian is different from the parents. No voluntarily conferral can be accepted, without a court decision. 5. A court decision is needed in all cases, if the guardian is different from the parents 6. No. |
|  | EMN NCP Czech Republic | Yes | <ol style="list-style-type: none"> 1. No 2. No. In accordance with a principle of non-discrimination and equal treatment, the Czech Republic does not distinguish between children on the basis of how the conferral of parental responsibility has been done to the person who cares for them if the conferral was done with involvement of a public authority (a decision of a court is always needed for establishing parental responsibility). 3. No |


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| | | | <p>4. No</p> <p>5. N/I</p> <p>6. N/I</p> |
|  | EMN NCP Estonia | Yes | <p>1. No</p> <p>2. There is no legislation on this matter and we have not had any practice with Kafala children. Decisions are based on the best interests of the child taking into account the individual circumstances of the case.</p> <p>3. N/A</p> <p>4. N/A</p> <p>5. N/A</p> <p>6. N/A</p> |
|  | EMN NCP Finland | Yes | <p>1. Yes</p> <p>2. No, but we need to be ensured that the guardian is both the official (a decision on conferral of parental responsibility made by a public relevant authority, affidavits are not accepted) and de facto guardian of the child.</p> |




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| | | | <p>3. We do not accept conferrals of parental responsibility done without the involvement of a public authority (and we do not except affidavits), except in cases where a decision on conferral of parental responsibility cannot be made by a public authority due to the fact that such authorities do not exist in the country in question etc. (Alien 's Act Section 37 (3) When no official statement is available on the dependency status (foster child), an unmarried child under 18 years who is under his or her parent's or guardian's de facto care and custody and in need of such care and custody on the date a decision is made on the residence permit application shall be treated as a child under subsection 1. Treatment as a child under subsection 1 requires reliable evidence that the child's previous parents or guardians have died or are missing and that the sponsor or his or her spouse was the child's de facto guardian before the sponsor entered Finland. If the sponsor is a foster child residing in Finland, treatment as a child under subsection 1 requires reliable information which shows that the person concerned was the sponsor's de facto.)</p> <p>4. If the conferral has been done voluntarily by a parent and a public (and relevant) authority has also made a decision on conferral of parental responsibility to the same person who is not a relative and this conferral of parental responsibility is deemed to be in the best interest of the child in question, we recognize it.</p> <p>5. If a public (and relevant) authority has made a decision on conferral of parental responsibility to a person who is not a relative and this is deemed to be in the best interest of the child in question, we recognize it.</p> |
|  | <p>EMN NCP Germany</p> | <p>Yes</p> | <p>1. No The jurisdiction is not clear.</p> <p>2.</p> <p>3.</p> |


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| | | | <p>4.</p> <p>5.</p> <p>6.</p> |
|  | EMN NCP Hungary | No | This EMN NCP has provided a response to the requesting EMN NCP. However, they have requested that it is not disseminated further. |
|  | EMN NCP Ireland | No | This EMN NCP has provided a response to the requesting EMN NCP. However, they have requested that it is not disseminated further. |
|  | EMN NCP Italy | Yes | <p>1. Yes see attachment</p> <p>2. Yes, because Italy recognizes only the judicial kafala (see Q. 1). In fact, according to the jurisprudence, a decision of family reunification based on the notary-certified kafala clashes with the protection of the best interest of the child. In these cases, in fact, no judicial or public authority has been able to prior control the need of the minor and the appropriateness of the foster adult.</p> <p>3. As said in Q. 2, the only type of kafala recognized in the Italian migration system is the one that involves a public or judicial authority. The notary-certified kafala is for children whose lineage is known and, in this case, a notary establishes the deed with parental consent.</p> |



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| | | | <p>So, the conferral of parental responsibility done voluntarily by a parent – to a relative or not - concerns the case of notary-certified kafala</p> <p>4. See Q. 3</p> <p>5. N.a.</p> <p>6. N.a</p> |
|  | EMN NCP Latvia | Yes | <p>1. No</p> <p>2. Yes. Parents are responsible for their children. In other cases there have to be documents which approve that person with whom child is traveling is legally responsible for child. A notarially certified document or a document signed in the presence of an official of the Office of Citizenship and Migration Affairs or the diplomatic and consular mission of the Republic of Latvia on the consent to the travel of the child to the Republic of Latvia of the parent who does not enter together with the child. If the day-to-day custody is implemented by the parent with whom the child enters the Republic of Latvia and restrictions for the change of the place of residence without the consent of the other parent have not been determined, a document issued by the competent institution of the relevant country shall be submitted.</p> <p>If a minor foreigner wishes to receive a residence permit the parents of whom will not reside together with him or her in the Republic of Latvia, he or she shall in addition submit a permission to reside in the Republic of Latvia that is notarially certified or signed by at least one of the parents in the presence of the official of the Office of Citizenship and Migration Affairs or the diplomatic and consular mission of the Republic of Latvia where the natural person who will undertake the responsibility for the minor foreigner during his or her residence in the Republic of Latvia is indicated.</p> |



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| | | | <p>If an Orphan's and Custody Court detects that an orphan or a child who is left without parental care, or a person under trusteeship who is a foreigner, such Orphan's and Custody Court shall inform a competent guardianship or trusteeship authority of the State, in which the child or a person under trusteeship is a citizen, or a guardianship or trusteeship authority of the previous country of domicile without delay and shall request to evaluate the necessity to establish guardianship or trusteeship and to appoint a guardian or a trustee.</p> <p>3. See 2nd answer.</p> <p>4. See 2nd answer.</p> <p>5. See 2nd answer.</p> <p>6. Yes. It is ratified with special law which contains provisions how this convention is implemented.</p> |
|  | EMN NCP Lithuania | No | This EMN NCP has provided a response to the requesting EMN NCP. However, they have requested that it is not disseminated further. |
|  | EMN NCP Luxembourg | Yes | <p>1. Yes lu_emn_ncp_answer_to_201988_kafala_children.docx</p> <p>2. No. A decision is always taken after considering the best interests of the child.</p> <p>3. A decision is always taken after considering the best interests of the child.</p> <p>4. A decision is always taken after considering the best interests of the child.</p> |

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| | | | <p>5. A decision is always taken after considering the best interests of the child.</p> <p>6. The Hague Convention of 1996 was approved by Law of 16 June 2010 on the approval of the Convention of the Hague of 19 October 1996 regarding the competence, applicable law, the reconnaissance, the execution and the cooperation in parental responsibility and the protection measures for children. However, there is no internal protocol.</p> |
|  | EMN NCP Malta | Yes | <p>1. No</p> <p>2. In practice a visa and/or residence permit is granted to a minor provided that the Maltese Authorities are satisfied that care and custody of the minor is exercised in accordance with the state of habitual residence of the minor in order for the child to be granted entry and stay in Malta. Each request is assessed on a case by case basis.</p> |
|  | EMN NCP Netherlands | Yes | <p>1. Yes see attachment attachment_q1_ahq_2019.88_kafala_children.docx</p> <p>2. No. Custody must have been granted to the aspirant foster parent(s) by the competent authorities, in case of related foster children. See answer 1. It is important to note here that in Morocco a judicial kafala is always issued in case the kafala child will be taken abroad to live with his or her foster parents. In the Judicial Kafala the Moroccan judge will give consent to the foster parents to take the kafala child abroad.[1] In case of children that are placed at a foster family pursuant to article 33 of the Hague Convention on the protection of children (1996), the court of origin that contemplates the provision of care by kafala in the Netherlands, will determine that the prospective foster parents will be entrusted with custody. In accordance with the Hague Convention (1996), the foster parents have</p> |



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| | | | <p>to apply to the competent Dutch court for enforcement of the foreign ruling, with the assistance of a Dutch lawyer. The prospective foster parents can initiate these proceedings once the child has relocated to the Netherlands.</p> <p>[1] Kingdom of Morocco, Ministry of Justice and Freedoms, Procedures in Family Justice, Kafala, Permanent residence abroad of the child taken in charge, p. 33, oktober 2012, http://adala.justice.gov.ma/production/Guides_Manuels/fr/PlaqueetteANG.pdf en Jordens-Cotran, Marokkaans Familierecht en Nederlands IPR, 2007, Hoofdstuk 5 Deel A Gezag over de kinderen in het Marokkaanse recht, Paragraaf 9.6 Gevolgen van de beschikking tot definitieve toewijzing van de Kafala, p638</p> <p>3. Custody must have been granted to the aspirant foster parent(s) by the competent authorities, in case of related foster children. (see answer 1) In case of children that are placed at a foster family pursuant to article 33 of the Hague Convention on the protection of children (1996), the involvement of a public authority is required.</p> <p>4. According to article B7/3.7.2 Vc, the related foster child has to be a close relative of the aspirant foster parent and custody must have been granted to the aspirant foster parent(s) by the competent authorities. See answer1. In case of children that are placed at a foster family pursuant to article 33 of the Hague Convention on the protection of children (1996), the involvement of a public authority is required.</p> <p>5. Custody must have been granted to the aspirant foster parent(s) by the competent authorities, in case of related foster children. (see answer 1) In case of children that are placed at a foster family pursuant to article 33 of the Hague Convention on the protection of children (1996), the involvement of a public authority is required.</p> <p>6. The placement of children in a foster family or an institution in the Netherlands under the Convention for the protection of children (1996) has been implemented in Dutch migration law in July 2012 pursuant to article 33 of the Hague Convention and article 9 and 10 of the Dutch Implementation Act International Child Protection.</p> |
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| | | | <p>It was thought then that in case of Moroccan kafala children use would be made of this procedure, because Morocco is a member State to the 1996 Convention (1996). However, the Dutch immigration authorities still see applications of Moroccan kafala children for a regular residence permit for stay with their aspirant foster parents, although in order to be successful the foster child has to be a close relative of the aspirant foster parent.</p> <p>This condition does not apply in the case of placement in a foster family or in an institution under the Hague Convention.</p> |
|  | EMN NCP Poland | Yes | <p>1. No</p> <p>3. As noted above. Additionally it must be stated that all decisions related to conferral must be done under the court supervision. Otherwise, such conferral will not be recognized by the Polish law.</p> <p>4. As mentioned above.</p> <p>5. In each case examination procedure must be carried out, which will determine whether, under Polish law, the person remains the legal guardian of the child.</p> <p>6. No.</p> |
|  | EMN NCP Slovakia | Yes | <p>1. No</p> <p>No, Slovak Republic has no experience with this institute and does not recognize it. Regarding the residence for cases of e.g. family reunification, it is always necessary for the adopted child to provide a photocopy of the decision taken by the respective body on conferral of child care rights. It is also necessary for these documents to fulfil a legal provision on higher superlegalisation of documents/apostille.</p> |




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| | | | <p>2. n/a</p> <p>3. n/a</p> <p>4. n/a</p> <p>5. n/a</p> <p>6. n/a</p> |
|  | EMN NCP Spain | Yes | <p>1. Yes</p> <p>2. Yes. One of the key criteria we take into account is if the parent is known and has taken part of the kafala.</p> <p>3. In cases where the conferral has been done voluntarily by the parent (with or without the involvement of public authority), we cannot consider it as a form of legal representation. As a consequence, we do not provide with a visa/residence permit to the children due to the specific relation with the person who takes part of the kafala and resides or is going to reside in Spain. Other reasons could be taken into account.</p> <p>4. In these cases the answer is not so clear for us.</p> <p>5. In these cases, we can consider it as a form of legal representation. As a consequence, we provide with a visa/residence permit to the children due to the specific link (legal representation) with the person who takes part in the kafala and resides or is going to reside in our Member State.</p> <p>6. We are currently working on some kind of protocol.</p> |

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|  | EMN NCP Sweden | Yes | <ol style="list-style-type: none"> 1. No 2. Not applicable. Sweden only acknowledge international adoptions. 3. Not applicable 4. Not applicable 5. Not applicable 6. The 1996 Hague Convention has been transposed into law. |
|  | EMN NCP United Kingdom | No | This EMN NCP has provided a response to the requesting EMN NCP. However, they have requested that it is not disseminated further. |
|  | EMN NCP Norway | Yes | <ol style="list-style-type: none"> 1. No 2. No, Norway's immigration act allows family reunification to foster children under the age of 18 when it is substantiated that the child is an established member of the household and that those persons exercising parental responsibility for the child are doing so lawfully in accordance with the legislation of the country of origin. In cases where the child's biological parents are alive, documentary evidence must be submitted confirming that parental responsibility has been transferred. In order to issue a permit according to this provision the person taking care of the child must have the parental responsibility of the child. Since kafala implies only guardianship and not parental responsibility, this provision cannot be used in any of these cases. |

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| | | | <p>However, in special circumstances, permits can still be granted if strong humanitarian considerations so indicate, according to the Immigration Act section 49. A permit may for example be granted according to provision in cases where the lineage of the child is not known, or the parents of the child are not alive, if the best interest of the child so indicates.</p> <p>3. No, see the above mentioned regulation. A permit will normally require conferral of parental responsibility.</p> <p>4. No, see above.</p> <p>5. A permit may, in special circumstances, be granted in cases like this, if strong humanitarian considerations and the best interest of the child so indicate, according to the Immigration Act section 49.</p> <p>6. Unclear quest. N/I</p> |
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