

THE ITALIAN REGIME OF RECOGNITION OF INTERCOUNTRY ADOPTIONS OF CHILDREN IN LIGHT OF THE ECHR: WHAT ABOUT SINGLES?

IL SISTEMA ITALIANO DI RICONOSCIMENTO DELLE ADOZIONI INTERNAZIONALI DI MINORI ALLA LUCE DELLA CEDU: IL CASO DEI SINGLE

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Recibido: 09.05.2015 / Aceptado: 21.05.2015

Abstract: This paper deals with the compatibility of the Italian regime of recognition of intercountry adoptions of children by single persons with the right to family life enshrined in Art 8 ECHR such as interpreted by the ECtHR, according to which a violation thereof may occur also in cases where familial status established abroad are denied transnational effects.

Keywords: intercountry adoption of children, recognition, single persons, Article 8 ECHR, familial status created abroad, cross-border continuity.

Riassunto: Il presente contributo affronta la questione della compatibilità del sistema italiano di riconoscimento delle adozioni internazionali di minori da parte dei single con l'art. 8 della CEDU così come interpretato dalla Corte di Strasburgo, secondo la quale una violazione del diritto fondamentale al rispetto della vita familiare può configurarsi anche laddove non sia garantita la continuità transnazionale degli status familiari validamente e stabilmente costituiti all'estero.

Parole chiave: adozione internazionale di minori, riconoscimento, single, articolo 8 CEDU, status familiari create all'estero, continuità transnazionale.

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I. Introduction

1. The assessment of the effects produced, within the Italian legal system, by foreign decisions regarding intercountry adoption of children by single persons still represents a controversial issue both among national courts and scholars.

2. On the basis of a brief outline of the legal framework governing the matter as well as of the related interpretative approach followed by the prevailing jurisprudence, this paper aims at setting out some reflections on the compatibility of such regime of recognition with the fundamental right to family life enshrined, as well known, in Art 8 of the European Convention of Human Rights (ECHR) such as interpreted by the European Court of Human Rights (ECtHR), according to which a violation of said right may be devised also in cases where familial *status* validly and permanently established abroad are denied transnational effects.

II. The legal framework governing intercountry adoptions in Italy

3. The legislative framework governing the recognition, in Italy, of the effects stemming from adoption decisions issued abroad stands out for the remarkable stratification of the provisions which it is made up of.

4. Such a character – which constitutes in itself a drawback – is all the more regrettable if one comes to consider that it concerns a subject matter – i.e. international adoptions – whose regulation should be clear and give rise to no uncertainty, given that its primary objective consists – as it will better arise below – in the child's best interests being fully satisfied. For the purposes of exactly identifying the rules governing recognition of adoption decisions rendered abroad it therefore seems useful to preliminarily outline the complex legal framework existing on the matter.

5. To be taken into account first is Law No 218 of 31 May 1995, which provides the “Reform of the Italian system of private international law”. Chapter V of Title III of such Law is in fact dedicated to adoption. It is made up of four articles, which on purpose do not deal with every and single issue the Italian legal system may be concerned with when faced with intercountry adoption.

6. Arts 38 to 41 of Law No 218/1995 are indeed concerned with the conditions triggering the existence of the Italian jurisdiction and the determination of the law applicable to adoption both of children and adults whenever the relationship features an international character, as well as with the requirements for the recognition and enforcement of the related decisions issued abroad.

7. However, beside the abovementioned provisions one has to consider also Law No 184 of 4 May 1983, regarding adoption and custody of children, as amended, first, by Law No 476 of 31 December 1998, authorizing the ratification and implementation of the 29 May 1993 Hague convention on protection of children and cooperation in respect of intercountry adoption, and, subsequently, by Law No 149 of 28 March 2001.

8. As a matter of fact, the rules currently governing intercountry adoption in Italy are those emerging from the alignment of Law No 184/1983 to the 1993 Hague Convention¹, aimed at guaranteeing that said relationships be established in accordance with fundamental rights by means of a system of cooperation among contracting States whose main purpose is that of fostering – pursuant to the child's best interests – the recognition of adoptions created in the contracting States' legal orders and on the basis of the convention itself. The rules laid down by the convention are therefore of the utmost importance whenever a child habitually resident in a contracting State (State of origin) has been or is to be moved to another contracting State (receiving State) either after his or her adoption in the State of origin by persons habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin.

¹ Reference is obviously made to the convention made under the auspices of the Private International Law Hague Conference, which entered into force on 1 May 1995. The convention has been ratified both by States that are member of the Conference and States which are not party thereto. An updated list of the contracting parties is available at <http://www.hcch.net>.

9. The conflict of laws provisions set forth by Law No 218/195 and the rules embodied in Law No 184/1983 as subsequently amended are therefore strictly interrelated; this is confirmed (i) by the fact that, for the purposes of the recognition of intercountry adoption decisions, Art 41.2 of Law No 218/1995 makes reference to the special rules on children adoption as well as (ii) by the existence, among the substantial rules on intercountry adoption, of provisions of a private international law character which especially deal with the effects that foreign adoption decisions are allowed to display within our legal system.

10. Art 41 of Law No 218/195 is made up of two provisions: the first one, despite its making reference to the general rules on recognition of judgements as laid down by Arts 64 ff of Law No 218 itself, is only apparently of a general character. As it arises from its second paragraph, in fact, the said provision is applicable only insofar as the decision to be recognised does not concern full adoption of a child. The general rules on recognition of foreign judgements provided by Law No 218 shall, in other words, come into play only to the extent that the foreign adoption decision does not create a permanent parent-child relationship.

1. The rules on recognition of intercountry adoptions of children

11. As a consequence, when the adoption decision actually establishes a relationship of this kind the recognition thereof has to take place in accordance with the special rules on adoption of children as laid down by Law No 184/1983.

12. The recognition of adoption decisions issued abroad is governed by Arts 35-36 of Law No 184/1983, which design a mechanism involving the participation of both the Commission for intercountry adoption (which has its headquarters at the Prime Minister's Office) and the Youth court of the adoptive parents applicants' place of residence².

13. More precisely, Art 35.2-3 governs recognition in cases where adoption has already taken place in another State party to the 1993 convention prior to the child's arrival in Italy. In such cases adoption shall undergo a control aimed at ascertaining its compliance with the requisites established by Art 4 of the convention itself. To this end, it has to be verified that the competent authorities of the State of origin have: (i) declared that the child is adoptable; (ii) determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests; (iii) collected the necessary consent by persons and institutions; (iv) ensured that the child has been counselled, informed and, when required, has given his or her consent to adoption. Moreover, it is required that the Commission for intercountry adoption has previously authorised the child's entry and stay in Italy. When all such conditions are met, the adoption decision is transcribed in the registries of civil status. Such transcription gives the child the status of son or daughter of the adoptive parents and definitively makes him or her an Italian citizen.

14. If the adoption is to take place after the child's entry into Italy, Art 35.4 of Law No 184/1983 provides that the foreign decision be recognised as pre-adoptive foster care. When one year has elapsed since the child's entry into the new family, provided that such solution matches the same child's interests, the Youth court is to issue the adoption decision ordering the transcription thereof in the civil status registry.

15. Pursuant to Art 36.4, when the adoptive parents have continuously stayed and resided for at least two years in the same foreign country where adoption took place, such adoption is to be given full effects in Italy provided that it complies with the principles enshrined in the 1993 Hague convention. To this end, it is not required that the applicants adoptive parents be previously declared eligible to adopt

² Pursuant to Art 35.5 of Law No 184/1983, the Youth court vested with territorial competence is the court sitting in the district where the aspirants adoptive parents reside at the date of the minor's entry in Italy.

nor the intervention of the competent authorities nor the certification, to be usually issued by the Commission for intercountry adoption, that the adoption complies with the Hague convention.

2. The grounds for refusal of recognition

16. As far as the grounds for refusing recognition are concerned, Art 24 of the 1993 Hague convention stipulates that «*The recognition of an adoption may be refused in a Contracting State only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child*».

17. The said provision has been implemented by the Italian legislator by means of Art 35.3 of Law No 184/1983, which provides that when lodged with an application for recognition of intercountry adoption the Youth court is bound to ascertain that such adoption does not violate the fundamental principles which govern Italian law on family matters, to be appreciated in respect of the child's best interests.

18. According to such provision, therefore, the public policy clause contemplated by the convention as the unique ground for refusing recognition of adoption has been implemented by the Italian legislator by means of a referral to the fundamental principles underpinning domestic law on family matters, which are meant to come into play subject to the consideration of the child's best interests.

19. As already mentioned, the protection of said interests represents the principle underlying the whole convention, whose objective, pursuant to Art 1 let. a), is «*to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law*». The very same principle is indeed the guiding principle of the Italian law on adoption which, as remarked, intends to implement the convention within the national legal order.

20. In reality, the need to primarily safeguard the child's interests is in itself among the fundamental principles of the Italian legal system insofar as its origin are to be traced back to international law (in particular, to Art 3 of the 1989 New York convention on the rights of the child) as well as to European Union law (within which such principle is enshrined in Art 24 of the EU Charter on fundamental rights): the public policy clause is therefore to be deemed as strictly instrumental in the protection of the child's best interests.

21. This implies that, much more than in other matters, when dealing with adoption issues Italian courts should refrain from rigorously sticking to the legal institutions existing under domestic law, especially in cases where the applicant adoptive parent is a single person.

III. The Italian regime of recognition of intercountry “full” adoptions of children by single persons

22. In light of the well-established jurisprudence of the Italian Supreme Court (Corte di Cassazione), the adoption decisions handed out abroad in favour of single persons are admitted to display in Italy only the limited effects recognised to the so called adoption in particular cases as envisaged by Art 44 of the Italian Law on adoption. This means that, even when the adoption decision is capable of producing, in the country of origin, the effects of full adoption, the entire recognition of such effects in Italy is precluded. This approach rests on the adoption in particular cases being conceived as not capable of interrupting the relationship between the child and his/her family of origin and giving rise to parental links between the former and the family of the adoptive parent.

23. It is therefore not disputed whether such decisions are to be denied recognition on the grounds of their alleged contrast with public policy; rather, they are denied recognition as full adoption

decisions despite their being qualified as such in their country of origin. This may clearly result in the effects of such decisions being altered or eventually manipulated.

24. The reason behind such approach is that the adoptive parent fails to meet one of the requisites which, according to the Italian law on adoption, must be satisfied for the declaration of eligibility to adopt to be issued, *i.e.* a marital relationship.

25. This limitation results in the specific procedure to be followed (1) when the single resides in Italy and he or she decides to start the intercountry adoption proceedings therein as well as (2) when the single resides and stays continuously, for at least two years at the date when adoption takes place, in the foreign country of origin of such adoption, and subsequently applies for the recognition thereof before the territorially competent Italian Youth court.

1. The procedure to be followed if the single resides in Italy ...

26. In the first case the aspirant adoptive parent is bound to lodge the Youth court of the place of his/her residence with a request for authorisation to adopt pursuant to Art 44 of the Law No 184/1983, since the declaration of eligibility to adopt based on Art 29a of such Law cannot be issued due to the requisite of the marital relationship being lacking.

27. This has eventually been clarified by the Italian Constitutional Court in its decision No 347/2005, which stated that “on the basis of the rules currently in force, it is not possible to hold that the certificate of eligibility to adopt cannot be issued for intercountry adoption in particular cases, with the consequence that such certificate shall be released whenever the conditions laid down in Art 44 are met”; “such certificate shall be deemed instrumental in the particular cases of adoption envisaged by Art 44 and, during the phase of recognition of the foreign adoption decisions, an appreciation shall be carried out of the existence of the conditions triggering adoption in such cases”.

28. The authorisation to adopt pursuant to Art 44 is necessary regardless of the adoption having taken place either in a State party to the 1993 convention (see Art 35.6 lett. b of Law No 184/1983) or in a State which is not a party thereto (see Art 36.2, lett. b-c, of Law No 184/1983).

29. Irrespective of the country of origin enabling singles to full adoption of a child, in Italy these persons cannot be authorised to adopt but for the sole purposes and to the limited effects of adoption in particular cases, *i.e.* for a kind of adoption unsuitable to create a permanent parent-child relationship.

2. ... and the one applied to singles residing in the country of origin of adoption

30. When, by contrast, the conditions triggering the application of Art. 36.4 of Law No 184/1983 are met (that is to say that the applicant adoptive parent has given proof of his/her having resided and continuously stayed, for at least two years, in the foreign State where adoption took place), the authorisation to adopt is not necessary³. Yet, also in these cases the adoption cannot be given but the limited effects envisaged by Art 44 of Law No 184/1983 (irrespective of Art 36.4 of such Law establishing that in said cases adoption is to be recognised to all effects), subject only to the ascertainment of its compliance with the 1993 convention.

31. It therefore bears no relevance the fact that, according to the rules of the country of origin – where the adoptive parent has resided and continuously stayed for at least two years – the adoption established a permanent parent-child relationship: such adoption cannot be recognised in our legal system but as adoption in particular cases, *i.e.* as a kind of adoption which, by its very nature, is unsuitable to create a permanent parent-child relationship.

³ As it is inferable from Art 29a.2 of Law No 184/1983.

3. The Italian Supreme Court's approach as regards the effects to be given to intercountry "full" adoptions of children by singles

32. The above has eventually been confirmed by the Italian Supreme Court by means of its judgement No 3572/2011⁴. The case concerned the recognition of a full adoption decision issued in the district of Columbia in accordance with a previous decision rendered by the regional court of Lipetsk (Russia); the Genoa Youth court recognised the adoption pursuant to Art 44 let. d) of Law No 184/1983, whereas the Court of second instance dismissed the appeal filed by the adoptive parent against such a partial recognition.

33. Before the Supreme Court the claimant invoked, among others, Art 36.4 of Law No 184/1983 and complained about the Italian competent authorities having denied, in contrast with such legislative provision, recognition of adoption to all effects, subject only to the previous control of its compliance with the Hague convention: since adoption was qualified as "full" pursuant to both USA and Russian rules, such adoption should have been given the same effects in Italy as well, also in light of Art 23 of the Hague convention providing for the recognition *de plein droit* ("by operation of law") of intercountry adoptions created in accordance with the convention itself.

34. The claim, however, has been dismissed by the Supreme Court arguing that, even if Art 36.4 of Law No 184/1983 were to be applied, intercountry adoption must nonetheless comply with the general principle referred to in Art 35.3 of the same Law, i.e. the fundamental principles underpinning domestic law on family matters.

35. And it is the Supreme Court's opinion that among such principles is the requisite of the marital link which Law No 184/1983 still addresses as a *condicio sine qua non* for the aspirants adoptive parents to be declared eligible to adopt in accordance with the child's best interests.

36. As remarked by the Court, in fact, also the cases in which Art 25.4-5 of Law No 184/1983 admits full adoption by a single person presuppose that, during the period of pre-adoptive foster care, the child has eventually been placed with a married couple and allows for the authorisation to adopt in the exclusive exceptional cases of either supervening death or incapacity of one of the spouses or their legal separation during the adoption proceedings.

IV. The reasons underlying the Italian Supreme Court's approach

37. It is undeniable that the above described approach is the result of the current status of the Italian rules on adoption, also in light of the amendments brought about by the recent legislative decree No 154/2013.

38. Indeed, as written in the explanatory report to the draft of such decree those who are adopted pursuant to Art 44 of Law No 184/1983 are to be recognised the same status as that of adopted adults. This is due to the fact that in both cases the link with the family of origin is not interrupted, with the consequence that the adoption cannot be described as "full" pursuant to Art 27 of Law No 184/1983, as recently amended by the abovementioned decree.

39. It is likewise undeniable that the Italian legislator is not bound to remove the restrictions currently limiting the effects of children adoption by singles.

⁴ Reference is made to the judgement of the Italian Corte di Cassazione dated 14 February 2011, No 3572.

40. The above has eventually been clarified by the Italian Constitutional Court in its decision No 183/1994, where it referred to the 1967 Strasbourg convention on children adoption, to which Italy is a contracting party. Even though Art 6 of such convention entrusts singles with the possibility to adopt, it is however left to the discretionary power of any contracting party the decision whether or not to implement such possibility within their respective legal system⁵.

41. The same considerations were made by the Italian Supreme Court on the occasion of the abovementioned decision No 3572/2011, which eventually reiterates what it already pointed out in previous judgements⁶.

42. Nor can Art 8 of the ECHR – which, as recalled, consecrates the right to family law – be read as grounding the right to adopt nor certainly the right of a single person to become an adoptive parent.

43. The issue of adoption by single persons has been dealt with by the ECtHR in the *E.B.* case⁷, concerning a homosexual woman who claimed to have been denied intercountry adoption due to her being homosexual. She therefore lodged a claim to the Court that her fundamental right to family life had been violated also in light of the prohibition of discriminations based on sex as equally enshrined by the Convention (Art 14).

44. In addressing the case, at para 49 the Court pointed out that “The present case does not concern adoption by a couple or by the same-sex partner of a biological parent, but solely adoption by a single person. Whilst Article 8 of the Convention is silent as to this question, the Court notes that French legislation expressly grants single persons the right to apply for authorisation to adopt and establishes a procedure to that end. Accordingly, the Court considers that the facts of this case undoubtedly fall within the ambit of Article 8 of the Convention. Consequently, the State, which has gone beyond its obligations under Article 8 in creating such a right – a possibility open to it under Article 53 of the Convention – cannot, in the application of that right, take discriminatory measures within the meaning of Article 14.”

45. In other words, the Court is of the view that Art 8 does not entitle, in itself, single persons to adopt. However, provided that the national legislator – as the French legislator did – entrusts single persons with the right to adopt, such right automatically falls within the scope of application of Art 8 and must as such be granted to, and exercised by, any single person, with no room for discriminatory measures (also) based on sex which the Convention, as seen, prohibits pursuant to Art 14.

V. Cross-border continuity of familial status created abroad as a fundamental right safeguarded by Article 8 ECHR

46. However, the ECtHR has also interpreted Art 8 of the Convention as encompassing the principle whereby familial status validly and permanently established abroad must be given transnational effects.

47. In light of the *Wagner* (2007)⁸ and *Negrepontis* (2011)⁹ judgements, in particular, it seems possible to hold that a violation of Art 8 may occur also when a State denies recognition of a foreign decision establishing a familial *status*.

⁵ Reference is made to the convention made on 24 April 1967, which Italy has ratified and ordered the implementation of by means of Law No 357 of 22 May 1974. Pursuant to the abovementioned Art 6, such convention permits adoption “by either two persons married to each other, whether they adopt simultaneously or successively, or by one person”.

⁶ In particular, see the judgement of the Italian Corte di Cassazione dated 18 March 2006, No 6078.

⁷ Judgement of 22 January 2008, application No 43546/02, available at hudoc.echr.coe.int.

⁸ Judgement of 28 June 2007, application No 76240/01, available at hudoc.echr.coe.int.

⁹ Judgement of 3 May 2011, application No 5659/08, available at hudoc.echr.coe.int.

48. From the Court's viewpoint, such a violation occurs when the conditions established by a State for the purposes of recognising foreign decisions fall short of the requirements laid down by the jurisprudence of the ECtHR itself. Namely, when they fail to either pursue a legitimate aim or comply with the proportionality principle.

49. Both in *Wagner* and *Negrepontis*, therefore, the Court ruled that the national authorities respectively sitting in Luxemburg and Greece violated Art 8 of the Convention due to the fact that, relying on the relevant rules of domestic law, they refused to recognise the effects of adoption decisions rendered abroad. The violation was found in that such denial amounted to a disproportioned interference with the applicants' right to fully enjoy their familial *status* as constituted abroad.

50. In the *Wagner* case, in particular, the effects of the adoption established in Peru could not be recognised in Luxembourg because, according to the relevant conflict of laws rules existing in this latter State, the law applicable to adoption was that of Luxembourg, pursuant to which full adoption was precluded to unmarried people such as the adoptive parent was in the case at issue.

51. In the Court's opinion, domestic rules such as the ones coming into play in the *Wagner* case have to be regarded as inadmissibly affecting the right to family life of the persons involved in the familial relationship; it therefore arises that, according to the Court, such right also entails, and grants protection to, the expectation of said persons that the foreign decision be recognised, in each and every national legal system, the very same effects as those displayed in its country of origin.

52. And the stricter and tighter is the link existing between the familial relationship and its State of origin, the more this expectation is to be deemed covered by Art 8 of the Convention.

53. As remarked in literature, the abovementioned jurisprudence of the ECtHR does not necessarily mean that "conflict of law rules are to be set aside if their enforcement gives rise, in the case at stake, to the infringement of a fundamental right".

54. Rather, it seems that the Court's statements imply its aim "to simply clarify that States are bound to carefully appreciate the effective impact that their private international law rules are liable to have on the social reality, with a view to assessing the adequacy (*rectius*, proportionality) thereof to achieve the objective pursued"¹⁰.

55. Art 8 is therefore violated if an adoptive relationship constituted abroad is denied recognition of those very same effects which are to be deemed stemming therefrom according to the law which governed its establishment within the country of origin.

56. The above, however, requires an important clarification which can be equally inferred from the Strasbourg jurisprudence.

57. The duty to ensure that foreign decisions are granted cross-border continuity does not entail that the requested State give the familial relationships constituted abroad effects other than those deriving therefrom pursuant to the rules which grounded their creation.

58. Thus, according to the clarifications provided by the ECtHR in the *Harroudj v. France* judgement, no violation of Art 8 occurs if a State, such as France in the case at issue, refuses recognition as adoption of a foreign decision regarding a child whose national law does not conceive, or even prohibits, the application of such institution¹¹.

¹⁰ C. CAMPIGLIO, *Identità culturale, diritti umani e diritto internazionale privato*, in *Riv. dir. int.*, 2011, p. 1029.

¹¹ Judgement of 4 October 2012, *Harroudj v Francia*, application No 43631/09, in *Revue critique DIP*, 2013, p. 146. In brief, the case concerned the question whether France was to be found in violation of Art 8 ECHR due to its having refused

59. In other words, what has to be ascertained in order to exclude the existence of any violation of Art 8 is that the familial status constituted abroad is recognised the very same effects as those displayed in the State of origin but not that it is also given other or further effects.

60. To this purpose, States other than the one where the relationship was created are bound to recognise it, as the case may be, also by treating it in the same way as they treat familial relationships grounded on categories of domestic law which, despite not being exactly equivalent, are eventually of a similar nature.

61. Given that, in the abovementioned *Harroudj* case, the French approach eventually permitted that the *kafala* created abroad – despite being not capable of recognition as adoption due to such latter institution being prohibited by the child's national law – continue nonetheless to display its very same effects also in France, the Court ruled that such country could not be found to be in violation of Art 8. Indeed, by treating the *kafala* as a legal institution, substantially equivalent, existing under domestic law, i.e. guardianship, France had fulfilled its obligations under Art 8 of the Convention¹².

62. However, the solution endorsed by the Court confirms that Art 8 is to be deemed violated whenever the requested State – instead of treating the familial relationship created abroad in the same way as domestic legal institutions of an equivalent or similar nature – limits the effects or alter the very nature thereof in a manner incompatible with the principle of cross-border continuity covered by Art 8 of the convention.

VI. The irreconcilability of the Italian approach with the Strasbourg jurisprudence on Art 8 ECHR

63. In light of the abovementioned jurisprudence of the Strasbourg Court, the question arises as to whether the Italian regime of recognition of single persons' adoptions may be deemed compatible with Art 8 of the ECHR.

recognition as adoption of a *kafala* care relationship created in Algeria between an Algerian minor and a French woman. The ground for such refusal was to be found in the provision, laid down in the French Civil Code, (Art 370-3 of the Code Civil, as brought about by Law No 111 of 6 February 2001), whereby adoption of a child is precluded «*si sa loi personnelle prohibe cette institution, sauf si ce mineur est né et réside habituellement en France*». On said judgement see, in addition to S. CORNELOUP, *Revue critique DIP*, 2013, p. 161; P. KINSCH, *Harroudj v. France: Indications from the European Court of Human Rights on the nature of choice of law rules and on their potentially discriminatory effect*, in *Yearbook of Private International Law*, 2013-2014, p. 39; A. DI PASCALE, *La kafalah al vaglio della Corte europea dei diritti dell'uomo: tra tutela dell'interesse del minore e preoccupazioni di ordine pubblico*, in *Dir. imm. citt.*, 2012, p. 112, also C.E. TUO, *Riconoscimento degli effetti delle adozioni straniere e rispetto delle diversità culturali*, in *Riv. dir. int. priv. proc.*, 2014, p. 43. On the *kafalah* care institution see R. CLERICI, *La compatibilità del diritto di famiglia musulmano con l'ordine pubblico internazionale*, in *Fam. dir.*, 2009, p. 197; C. CAMPIGLIO, *Il diritto di famiglia islamico nella prassi italiana*, in *Riv. dir. int. priv. proc.*, 2008, p. 43.

¹² All the more so since the prohibition at issue, according to the same French rule taken into account (see above, fn 11), is not to be read as absolute, given that, on the contrary, it allows for the adoption of the child (i) in case the latter was born and habitually resides in France; (ii) as soon as the minor, placed with a French citizen, has him/herself acquired the nationality of said country. And it bears mentioning that also more recently, even though on the question of cross-border continuity of familial status other than the adoptive one – i.e. the parent-child relationship based on medically assisted procreation –, the ECtHR (judgements of 26 June 2014, *Menneson v France*, application No 65192/11, and *Labassee v France*, application No 65941/11) declared that contracting States cannot be deemed liable for the violation of the right to family life consecrated by Art 8 of the convention if they refuse (as France did in the cases at issue) the transcription of birth certificates issued abroad whenever the reasonable suspect exists that birth took place by means of surrogated maternity due to the contrast of such technique with the national public policy. The reason behind this conclusion is that – as it is stated, in particular, in the *Menneson v France* judgement (especially at paras 92-94) – the interferences with the full enjoyment of said right which eventually derive from the denial of recognition are not such as to prevent family life from going on without excessive obstacles also in the requested State. However, the fact that Art 8 cannot be deemed violated as regards the right to family life has not prevented the Court from taking an opposite position with respect to the children's right to private life. According to the Court, in fact, said subjects – owing to their status validly constituted abroad being denied recognition – are deprived of their personal identity as well as of the rights (such as the succession rights) that they would have been endowed with had their status been recognised in the requested State. Such situation is all the more regrettable when – as in the case at issue – one of the parents (namely, the father) is also the true biological parent of the children. The biological parenthood amounts to an essential part of personal identity, with the consequence that when such link has already been ascertained the denial of the legal effects thereof is against the best interests of the child seeking for its recognition together with his or her biological parent.

64. As a matter of fact, it seems hardly deniable that – if examined through the lens of the Strasbourg jurisprudence – the mechanism whereby such adoptions are recognised pursuant to domestic law would be regarded as not capable of ensuring that an adoptive status created abroad be granted that very same degree of cross-border continuity which the ECtHR identifies as a mandatory condition of compliance with Art 8 ECHR.

65. It is certainly true that the Italian courts do not address such adoptions as devoid of any effect in our legal order. However, it is likewise undeniable that single persons' adoptions are prevented from displaying in Italy the very same effects which legitimately derive therefrom according to the rules of their State of origin.

66. Neither is the public policy clause capable of grounding such restrictions of the right enshrined in Art 8 ECHR. As well known, according to the ECtHR jurisprudence it is by means of public policy that – subject to well-established conditions – States are enabled to exercise the margin of appreciation they are endowed with in the accomplishment of their duties under the Convention¹³.

67. Public policy, however, can no longer be conceived as aimed at protecting merely national values, given that such values may be invoked as limits to the recognition of legal relationships created abroad only insofar as they either are entailed among principles common to the States party to the Convention or eventually represent the very constitutional identity of said States¹⁴.

68. As seen, the approach of the Italian Supreme Court is that full adoptions established abroad in favour of single persons cannot be given their whole effects due to their being contrary to the Italian principle of public policy whereby only married couples are entitled to adopt¹⁵.

69. It therefore seems highly debatable that such approach would be endorsed by the ECtHR.

70. Indeed, it is the Italian law on adoption itself that, even though in exceptional cases, admits that single persons be entrusted with full adoption of children (see the already mentioned Art 25, paras 4-5).

71. Moreover, it cannot be overlooked that in most European States this kind of adoption is nowadays no longer subject to limitations, irrespective of the sexual orientation of the adoptive parent. As a matter of fact, single persons are presently entitled to adopt children in Germany (§ 1741.2 of B.G.B.); in France (Art 343-1 of the Code Napoleon as reformed by Law No 66-500 of 11 July 1966); in Switzerland (Art 246-b of the Civil Code as amended by the Federal Law of 30 June 1972); in Sweden (Chap. 4, Section 1 of the Parenthood and Guardianship Code); in Norway (act. No 8 of 28 February 1986 relating to adoption, issued by the Royal Norwegian Ministry of Health and Social Affairs); in the UK (2002 Adoption and Children Act).

72. Likewise, in the majority of the other European countries – such as Belgium, Ireland, Finland, Austria and Spain – the trend is toward fostering intercountry adoptions even when the adoptive parent is a single person, without limiting them to exceptional cases, provided that a careful evaluation is carried out on a case by case basis as of the capability of the applicant to become an adoptive parent.

73. Furthermore, against the Supreme Court approach stands the consideration that issues concerning parental relationships such as the adoptive ones must always be dealt with in light of the princi-

¹³ See P. TANZARELLA, *Il margine di apprezzamento*, in M. CARTABIA (ed.), *I diritti in azione*, Bologna, 2007, p. 145.

¹⁴ See S.M. CARBONE, *I diritti della persona tra CEDU, diritto dell'Unione europea e ordinamenti nazionali*, in *Dir. Un. eur.*, 2013, p. 1, esp. pp. 25-26; C.E. TUO, *La rivalutazione della sentenza straniera nel regolamento Bruxelles I: tra divieti e reciproca fiducia*, Padua, 2012, esp. pp. 113-124.

¹⁵ Reference is made to the already mentioned judgement of the Italian Corte di Cassazione No 3572/2011.

ple of the child's best interests, which has to both underlie the general rules governing such matters and drive the effective application thereof¹⁶.

74. It is eventually Art 35.3 of the Italian law on adoption itself which – in making the recognition of intercountry adoptions conditional upon the respect of the fundamental principles that govern, in Italy, family matters – expressly prescribes that said principles are put into force having regard to the child's best interests.

VII. The way forward: proposal for a necessary review of the Italian approach

75. For such interests to be effectively enhanced and, at the same time, for the risk that our country be found in violation of Art 8 ECHR to be avoided, it seems therefore highly advisable that our courts give whole effects to intercountry single persons full adoptions.

76. At least, such solution should be endorsed with regard to those Italian singles who moved their residence to the country of origin of adoption and have thus reached such a level of integration within the community thereof to be entrusted, pursuant to the law of that country, with full adoption of a child.

77. In this perspective, it seems worth mentioning the 27 April 2007 judgment whereby the Bologna Youth Court stated that “to give whole effects to a single person full adoption cannot be deemed in contrast with the so called Italian public policy”¹⁷.

78. The case concerned an Italian single woman residing in Argentina for more than ten years at the time she was entrusted with the full adoption of a child. Such adoption has been given full effects by the Italian Youth Court of Bologna on the grounds of the general mechanism of recognition of foreign judgements as laid down by Law No 218/1995.

79. Such conclusion was reached by the Tribunal after having declared that the special rules on adoption cannot come into play whenever – as in the case at issue – adoption is not granted in favour of a married couple but rather of a single person. In these cases, it is pursuant to the general rules governing recognition and enforcement of foreign decisions (Arts 64 ff. of Law No 218/1995) as referred to by Art 41 of Law No 218/1995 that adoptions are to be given effects in our legal system.

80. The same conclusion has more recently been reached by the 17 April 2013 judgement of the same Bologna Youth Court¹⁸. The case concerned again the recognition of a full adoption, which this time had been established in the USA where the adoptive parent, an Italian single, resided for years.

81. The application for recognition has been endorsed again on the basis of Arts 64, 65 and 66 of Law no 218/1995, in light of the consideration that (i) even though “adoption by a couple of married people represents the preferred solution as opposed to that of adoption by a single person” given that “taking into account the child's best interests” the latter “has certainly the right, whenever possible, to establish and maintain a permanent relationship with a father and a mother”, “this does not prevent that in particular cases an adoptive link is created with a single parent”; (ii) such possibility – as remarked by the Youth Court – is contemplated by the same Italian law on adoption, which admits it, as full adoption, pursuant to Art 25.4-5; (iii) as a consequence, to give whole effects to a single person's full adoption – in addition to being not disruptive of the overall domestic legal system – also represents “an unquestionable advantage in the child's best interests”, “at least in cases such as the one at issue”.

¹⁶ See, for instance, para 133 of the *Wagner* judgement (above, fn 8) and para 95 of the *E.B.* judgement (above, fn 7).

¹⁷ In *Il merito* 2007, p. 38.

¹⁸ Available at <http://dirittocivilecontemporaneo.com/wp-content/uploads/2014/11/ASTONE-TRIB-MINORENNI-BOLOGNA-17-aprile-2013.pdf>.

82. The Bologna Youth Court has therefore proceeded to the correct recognition as full adoption of the relationship established abroad on the basis of a reading of the public policy clause which can be certainly deemed compatible with the indications provided by the ECtHR.

83. As a matter of fact, not only have the effects stemming from the foreign decision been assessed in light of their consistency with the fundamental principles which govern Italian law on family matters; such effects have also been appreciated taking into account the child's best interests, which, as seen, constitute in themselves a pillar of our legal system and which are as such safeguarded by the same public policy clause.

84. The recognition as full adoption has been deemed compatible with the above principles in that full adoption ensures greater stability than adoption in particular cases can do (given that the latter may in some cases be revoked and is eventually devoid of effects *vis-à-vis* the adoptive parent's family).

85. It cannot be overlooked, however, that such solutions may give rise to cases of, so to say, "reverse discrimination", to the prejudice of Italian singles that, whilst maintaining their residence in Italy, are entrusted with full adoption of a child in a foreign country. The application that these persons would file for the recognition of the related foreign decision as full adoption would indeed continue to be dismissed, given that (pursuant to Arts, as the case may be, 35, para 1, 35, para 4 or 36, para 2, of the Law No 184/1983) said adoptions would still be awarded only the limited effects stemming from adoption in particular cases.

86. It is therefore desirable that some changes be brought about by the Italian legislator.

87. In favour of a removal of the existing limitations to the adoption of single persons actually stand (i) Art 2.1 of the 1993 Hague Convention¹⁹ and, more in general, the principle of the child's best interests which underpins the rules on adoption currently existing in Italy as the result of the implementation, in our legal system, of the abovementioned convention; (ii) the already mentioned Art 6 of the 1967 Strasbourg convention as well as Art 7 of the 2008 convention, which has superseded the former (but to which Italy is not a contracting party), and which, in the opinion of some scholars, has to be read as depriving the States party of the freedom to choose whether to enable single persons to adopt or not²⁰; (iii) the Italian Constitutional Court, which, by its decision No 183/1994, having regard to Arts 3, 29, 30 of the Italian Constitution has clarified that such provisions cannot be construed as preventing adoption by single persons save for the exceptional cases currently envisaged by the Italian Law on adoption; such Law limits itself to express a preference for adoption by a married couple whereas Arts 3, 29 and 30 of the Italian Constitution are not against a legislative innovation recognising in a wider range of cases that – subject to specific circumstances predetermined by the law itself or to be appreciated, on a case by case basis, by the competent court – adoption by a single person be qualified as the solution more suitable to satisfy the child's interests"; (iv) the jurisprudence of the Italian Supreme Court which (by its judgments No 3572/2011 and No 6078/2006) – in underlining that Art 6 of the 1967 Strasbourg convention entitles a single person to adopt – points out that the national legislator would be empowered to widen the conditions for admissibility of full adoption of children by single persons.

¹⁹ Such Article, in drawing the limits of the subjective scope of application of the convention, expressly refers to adoption "by spouses or a person". On this convention see above, § I.

²⁰ E. LAMARQUE, *Adozione da parte dei single omo e eterosessuali: i paesi del Consiglio d'Europa stanno perdendo il loro margine di apprezzamento?* available at www.forumcostituzionale.it.