



[Poland - Supreme Administrative Court, case II OSK 2552/16](#)

The applicant was born abroad to two Polish mothers, and acquired Polish nationality on the basis of at least one of his parents being Polish. However, he was unable to access Polish identity documents, for which a transcription of a foreign birth certificate into the Polish legal order is required - the latter being denied as the concept of two mothers contradicts the fundamental principles of Polish legal order. The Court ruled in favour of the applicant, relying heavily on national and international children's rights norms.

Case status: Decided

Case number: II OSK 2552/16

Citation: <http://orzeczenia.nsa.gov.pl/doc/013EB55F39>

Date of decision: 10/10/2018

State: Poland

Court / UN Treaty Body: Supreme Administrative Court

Language(s) the decision is available in: Polish

Applicant's country of residence: Unknown

Legal instruments: Convention on the Rights of the Child (CRC), European Convention on Human Rights (ECHR), European Union law

Key aspects: Acquisition of nationality, Birth registration, Childhood statelessness, Discrimination, LGBTIQ families, Respect for private and family life

Relevant Legislative Provisions:

Articles 104 and 107 of the Act on Civil Status Records

Articles 68, 70 and 72 of the Constitution of the Republic of Poland

Article 3 of the Convention on the Rights of the Child

Facts

The applicant was born in May 2014, and has been issued with a foreign birth certificate that listed two women, both Polish nationals, as parents. The Polish authorities refused to transcribe the birth certificate into the Polish legal order on the basis that it contradicted the fundamental principles of law in Poland. Lack of a birth certificate that's transcribed in Poland inhibited the child's access to Polish identity documents, despite there being recognition that as a son of a Polish mother he is undeniably a Polish national too.

Decision & Reasoning

"In the case under examination, the main dispute concerns the legal question of whether it is possible to transcribe a foreign birth certificate of a child of Polish citizens in which two women are indicated as parents. In the present case the public administrative bodies refused to transcribe such foreign birth certificate due to the public policy clause contained in Art. 107 point 3 of the Act on civil status records, and this refusal was upheld by the lower instance court. Without questioning the validity of the application of the public policy clause in general, the Supreme Administrative Court notes that the concept of public order as a justification for a deviation from the basic rule of transcription should be interpreted narrowly, considering carefully the specificities of each case under consideration and assessing the seriousness of actual threats to one or more of the fundamental interests of society (see also judgments of the CJEU of 2 June 2016, in case C-438/14 *Bogendorff von Wolffersdorff* ,, point 67 and of 13 July 2017 in case C - 193/16 *E v. Subdelegación del Gobierno en Álava*, paragraph 18)."

"In the case under examination, we are dealing with a situation in which the child's mother (a Polish citizen) requests a transcription of her son's birth certificate (who is also a Polish citizen by virtue of law). According to applicable law, documents confirming Polish citizenship are a passport and an ID card, and one of the conditions for being issued a Polish identity document is to submit a Polish birth certificate to the competent administrative authority. And this aspect of the case, namely the obligatory transcription of a foreign birth certificate of a Polish citizen, is, in view of the Supreme Administrative Court and contrary to the position of the [first instance court], of key importance."

"Transcription of a foreign civil status certificate involves entering accurately its

content into the Polish civil registry. Article 104 of the Act on Civil Status Records clearly distinguishes entering the contents of a foreign civil status certificate in Polish civil registry, i.e. its transcription, from registering certain events that occurred abroad. In cases of transcription of a foreign civil status certificate it is absolutely forbidden to introduce any changes to its content. The refusal to make a transcription by the head of the registry office can only take place on the basis of reasons clearly indicated in art. 107 of the Act on Civil Status Records, one of which refers to cases when such transcription would be inconsistent with the fundamental principles of the legal order of Poland (Article 107 point 3)."

"It follows from [relevant legislation] that the authorities are obliged to transcribe civil status certificates of a Polish citizen, when: 1) he has a civil status records drawn up in Poland confirming a past event, and requests to confirm legality in the context of registration of a civil status, 2) is applying for a Polish identity document 3) is applying for a PESEL number."

"Apart from the possibility of optional transcription, which the authority may refuse, as indicated above, the legislator has deliberately and consciously introduced the category of obligatory transcriptions in order to prevent situations in which a Polish citizen is not issued identity documents. The latter may lead to obstacles in exercising the rights derived from the acquired Polish citizenship, as in the case under examination, by operation of the law by the minor (e.g. lack of access to the health care system, education system, etc.)."

"The Supreme Administrative Court is of the opinion that to deny transcription on the basis of a public order clause (optional transcription pursuant to Article 107 point 3 of the Act on civil status records) and thus not fulfilling the obligation to transcribe (obligatory transcription pursuant to Article 104 (5) of the Act on civil status records) is incompatible with legal obligations. As a consequence, this leads to a situation where a minor is denied identity documents that evidence that he has acquired citizenship by virtue of applicable law."

"Apart from the issue of non-compliance with the applicable provisions of the Act on civil status records, it should also be pointed out that such a case undoubtedly constitutes a violation of children's rights. The applicant is correct in noting that Art. 72 sec. 1 of the Constitution of the Republic of Poland imposes an obligation on the state to protect children's rights. Therefore, a public administration body, when refusing to transcribe a child's birth certificate, is obliged to take into account not

only statutory provisions, but also the rights of the child, guaranteed, firstly, by the provisions of the Constitution (including the protection of the child's health - Article 68 (3) and (5) of the Constitution and the right of the child to education - Article 70 (1), (2) and (4) of the Constitution), as well as the provisions of the Convention on the Rights of the Child, adopted by the UN General Assembly on November 20, 1989 (Journal of Laws of 1991, No. 120, item 526). According to Art. 3 sec. 1 of this Convention, in all actions relating to children by public or private welfare institutions, courts, administrative authorities or legislative bodies, the best interests of the child should be prioritised. The provision of art. 3 sec. 2 expressly obliges States Parties to act (including in legislative and administrative sphere) towards ensuring the protection and care of a child to the extent necessary for the child's well-being, taking into account the rights and obligations of his parents, legal guardians or other persons with legal responsibilities towards the child.”

“Undoubtedly, the statutory obligation to transcribe a foreign civil status certificate which leads to the confirmation of a child's identity is part of the system of protection of children's rights. The European Court of Human Rights has emphasised in many judgments that where the where children are concerned the best interests of the child must be prioritised [...] A child who has been refused the transcription of his birth certificate find himself in a situation of uncertainty as to his legal situation, while his relation to his parents, which has been established in a foreign birth certificate, is unrecognised in the legal order (ECtHR judgment of 26 June 2014, Labasse v France (application no. 65941/11).”

“Under such circumstances the Supreme Administrative Court takes the position, considering exclusively the context of the present case, that the transcription obligation specified in Art. 104 sec. 5 of the Act on Civil Status Records, if fulfilled solely to protect the rights of the child by enabling him to certify his identity, does not contradict the fundamental principles of the legal order of the Republic of Poland - / similarly the CJEU in its judgment of 5 June 2018 case C-673/16 Coman /.”

Decision documents

[NSA_10Oct2018.pdf](#)

Outcome

The Court confirmed the applicant's right to transcribe a foreign birth certificate of a Polish child into the Polish legal order, even if it lists two parents of the same sex.

Links to other relevant materials related to the case (blogs, analysis,

articles, reports, etc.)

Verfassungs blog, 'Poland's Supreme Administrative Court recognizes Same-sex Parents': <https://verfassungsblog.de/polands-supreme-administrative-court-recogni...>

On a similar issue, see ENS blog, 'Even where countries in Europe recognise marriage equality, children born to same-sex families remain at risk of statelessness': <https://www.statelessness.eu/updates/blog/even-where-countries-europe-r...>