



Poland - Supreme Administrative Court, case II OSK 3362/17

The applicant was born in the US, and his birth certificate indicated a Polish national as the father, and an unknown surrogate mother as the mother. Polish authorities refused to confirm the applicant acquired Polish nationality at birth as a child of a Polish parent, because the birth certificate is against the Polish public order, in particular the prohibition of surrogacy. The courts ruled in favour of the applicant, stating that confirmation of his Polish nationality on the basis of the birth certificate does not amount to validation of surrogacy.

Case name (in original language) : II OSK 3362/17

Case status: Decided

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Citation: <http://orzeczenia.nsa.gov.pl/doc/2D8C95994C>

Date of decision: 10/09/2020

State: Poland

Court / UN Treaty Body: Supreme Administrative Court

Language(s) the decision is available in: Polish

Applicant's country of birth: United States

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, International Covenant on Civil and Political Rights (ICCPR)

Key aspects: Access to social and economic rights, Acquisition of nationality, Birth registration, Deprivation of nationality, Determination/confirmation of nationality, Discrimination, Gender, LGBTIQ families, Respect for private and family life, Surrogacy & reproductive technology

Facts

The applicant was born on 2 August 2016 in the US to a Polish father and an unknown surrogate mother. In December 2016 the authorities refused to confirm

that the child is Polish, since the birth certificate was “incomplete” - not specifying the identity of the mother. First instance court ruled in applicant’s favour, but the authorities appealed to the Supreme Administrative Court, resulting in this judgment.

Legal arguments by the applicant

The applicant argued that a foreign birth certificate has the same validity in establishing legal facts, whether it has been transcribed into the Polish law or not. Transcription into the Polish law of this birth certificate of the applicant is impossible, as it only contains information about the father.

The applicant emphasised that the present case does not raise issues about presumption of the child’s origin from a marriage, and this presumption should not apply to a case of an American surrogate mother. Denying validity of a birth certificate as evidence would only be justified if the fact that such evidence establishes is in violation of the Polish legal order. The applicant’s father, who is on his certificate, is his biological and factual father, and not a surrogate father. The relevant facts that are evidenced by the certificate therefore do not touch on the issue of surrogacy. Maternity is irrelevant for the present dispute. The birth certificate is the sole indicator of the applicant’s paternity, which cannot be questioned with hypothetical consideration about the possibility that the surrogate mother might be married.

Finally, the applicant has the right to his Polish identity, regardless of whether he became US national.

Legal arguments by the opposing party

The authorities confirmed that a Polish national is someone who has at least one parent who is a Polish national. They emphasised the principle of biological motherhood enshrined in Polish law, which states that a child’s mother is the woman who gave birth to the child, and the establishment of motherhood is essential for the establishment of paternity, as paternity is presumed through marriage, and not from biological reality. There are rules on how such presumption of paternity through marriage can be challenged. Surrogacy is invalid in Poland, and surrogacy contracts are inadmissible under Polish law. It is possible to deny effect of paternity established abroad if the relevant man is not the mother’s husband, as that is contrary to the presumption of the child’s origin in marriage. If the

applicant's mother is married, the applicant's birth certificate would violate the fundamental principles of the Polish legal order.

The applicant's US birth certificate could not constitute evidence as it is contrary to the Polish legal order – it indicates the mother as a surrogate mother with undetermined identity. Accepting the birth certificate would amount to the validation of the surrogacy arrangement, which would be contrary to Polish law. The authorities argued against selective recognition of validity of the birth certificate, which would allow to accept the information about paternity as evidence, while ignoring other aspects of the birth certificate which are contrary to the Polish public order, such as lack of information about the mother.

The authorities moreover argued that confirmation of Polish nationality is a declaratory and not a constitutive act, therefore lack of confirmation of nationality does not amount to deprivation of nationality. Similarly, Article 24(3) of ICCPR does not apply, since the child already acquired US nationality at birth, and therefore statelessness is out of the question. The authorities denied violation of Article 8 ECHR as well.

Decision & Reasoning

“The [court of first instance] emphasised that [the birth certificate] confirmed that the applicant's father was a Polish national, and found that the information about the mother, in particular that she was an unknown surrogate mother, was irrelevant.”

"[...] when considering the case of determination of Polish nationality on the basis of this provision, one should refer to the events which, in light of their content, result in the acquisition of Polish nationality. [...] According to Art. 14(1) of the [Law on Nationality], a minor acquires Polish nationality by birth if at least one of the parents is a Polish national. [...] Thus, Polish nationality is acquired through the law itself, and the conditions include – apart from birth – the nationality of at least one of the parents. In other words, if a parent, regardless of whether it is the mother or the father, has Polish nationality, the minor acquires Polish nationality by birth, even if the other parents does not have Polish nationality, or remains unknown. In this context the first instance court arrived at a correct conclusion that if a Polish national is mentioned in the applicant's birth certificate as the father, the mother's status is irrelevant."

"[...] establishing the facts is a responsibility, and not a procedural right, of the authorities."

"The first instance court rightly concluded that the applicant had provided evidence that he had acquired Polish nationality by operation of law."

"It appears from the foreign birth certificate that [the applicant's] father is a Polish national."

"The applicant's representative rightly observed [...] that the possibility that the surrogate mother who gave birth to the applicant might be married is only hypothetical, and is not in the slightest based on evidence. It cannot be considered that it is highly probably that a surrogate mother is married."

"The court of first instance did not refuse the surrogate mother the status of a mother within the meaning [of relevant Polish law], it only stated that motherhood was irrelevant to the present case, and it was not alleged in the appeal that the applicant's birth certificate contained untrue data."

"The applicant's birth certificate is evidence of two essential facts for the present dispute: the applicant's birth and [the father's] paternity. These are facts in the strict sense of the word, in the physical or biological sense, and not merely legal events such as getting a marriage registered in the civil status records. In other words, when applying Polish law [...], the point is not to recognise the legal effects that have been certified by a foreign official document, but to establish the facts

listed therein, which subsequently lead to legal effects on the basis of the Polish legal system as far as the acquisition of Polish nationality is concerned. This excludes the possibility of applying the public policy clause [...] which protects the legal order against the effects of applying foreign law, such as effectuating a civil status act that violates fundamental values of Polish legal order. [...] It is therefore impossible to invoke the public policy clause in order to deny the facts of applicant's birth and his paternity as indicated in his birth certificate. After all, these are not the legal effects of the document, but facts that are not contrary to the Polish legal order. [The authorities arguments] would lead to a paradoxical and contrary to reality conclusion that [the applicant's] birth did not take place due to its incompatibility with Polish law."

"Polish law does not rule out accepting [a foreign birth certificate] as evidence in specific cases, including those on the basis of which Polish nationality is acquired, even when such documents cannot be transcribed into Polish law due to other content they contain. This has recently been confirmed in the resolution of the Supreme Administrative Court of 2 December 2019 [...], which directly determines that the acquisition of Polish nationality by operation of law cannot be made conditional on the transcription of a foreign birth certificate, which, despite the lack of transcription, remains the only evidence of the events stated therein (in the case considered by the Court, the child was born to a mother who is Polish national)."

"It should therefore be concluded that the refusal to transcribe a foreign birth certificate due to its inconsistency with the fundamental principles of the legal order of the Republic of Poland, caused by an entry that the child was born from an unknown surrogate mother [...], does not preclude the acquisition of by a child of Polish nationality on the day of birth, pursuant to art. 14 point 1 of the [Nationality Law], if in the birth certificate indicates that the father is a man who is a Polish national."

"In the light of the above considerations, the [authorities' arguments] against the provisions of the Constitution and international law are also unfounded. The view of the court of first instance must be upheld, in particular that the refusal to confirm the applicant's Polish nationality was in fact a breach of [Constitutional and international law] provisions, since this confirmation was a necessary condition for full effectuation and security of rights that arise from those provisions."

Decision documents

Outcome

The Court ruled in applicant's favour.

Third party interventions

The Ombudsman intervened on behalf of the applicant. He argued that the only relevant question is to determine whether one of the applicant's parents is a Polish national. Since mere confirmation of paternity is not contrary to the Polish public order, and the father is indisputably Polish, the child should be considered as Polish. The nationality of the applicant's mother is irrelevant for the dispute. He argued that the authorities failed to strike the right balance between the interests of the state and the interests of the child. He moreover invoked Article 24(3) ICCPR, as well as Article 8 CRC, and the principle of best interests of the child, arguing that the contested decision leads to "civil and parental alienation" of the child.

The Human Rights Defender also intervened on behalf of the applicant, referring to the violation of a right to a nationality that entailed a violation of a number of other rights, including rights related to the citizenship of the European Union.