



## Poland - Supreme Administrative Court, case II OPS 1/19

The judgment is an answer to a general legal question as to whether Polish law allows the incorporation of foreign birth certificates where parents are of the same sex. The question was prompted by the authorities' refusal to transcribe into Polish law the foreign birth certificate of a child born to two mothers, both of whom are Polish nationals. The applicant argued that since lack of a transcribed birth certificate inhibits her child's access to a Polish passport, it in practice leads to a situation that is identical to statelessness.

**Case status:** Decided

**Case number:** II OPS 1/19

**Citation:** <http://orzeczenia.nsa.gov.pl/doc/0CB4DBF3D4>

**Date of decision:** 02/12/2019

**State:** Poland

**Court / UN Treaty Body:** Supreme Administrative Court

**Language(s) the decision is available in:** Polish

**Applicant's country of birth:** Unknown

**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, Determination/confirmation of nationality, Discrimination, LGBTIQ families, Respect for private and family life

### **Facts**

This judgment is an answer to a question forwarded from the panel of judges of the Supreme Administrative Court hearing the relevant case to a larger panel of judges within the same court mandated with answering contradictory or complex legal questions. The question essentially enquires whether Polish law allows for

transcription of a foreign birth certificate where both parents listed are of the same sex.

In justifying the question presented, the adjudication panel of the Supreme Administrative Court pointed to the discrepancy in the jurisprudence of administrative courts regarding the lawfulness of transcription of a foreign birth certificate in which same-sex persons are listed as parents. Two lines of jurisprudence exist in Poland on this issue. Under the first line of jurisprudence, such transcriptions violate the fundamental principles of the Polish legal order. This line of jurisprudence relies, among others, on ECHR case law that allows restricting access to marriage for same-sex couples, and therefore refusal to register a birth certificate with two same sex parents does not constitute discrimination on the basis of sexual orientation. Under the second line of jurisprudence the refusal to transcribe such a birth certificate constitutes a violation of the rights of the child as codified in CRC. The judges submitting the question also refer to the Supreme Administrative Court judgment of 29 August 2018, concerning the transcription of a foreign birth certificate of a child born using the in vitro procedure and a surrogacy contract. In this case, the Supreme Administrative Court refused the transcription based on the public order clause, arguing that such transcription would violate children's rights as guaranteed by CRC.

The case in the main proceedings that lead to the question was initiated by an applicant who was listed as one of the mother's on her son's birth certificate. Both mothers are Polish nationals. The Polish authorities refused to transcribe the birth certificate into the Polish civil status registry, on the basis that it would violate the fundamental principles of the Polish legal system.

The applicant also applied for a passport for her child, but the application was not considered because of the failure to submit a transcribed Polish birth certificate.

### **Legal arguments by the applicant**

The applicant argued that the authorities failed to respect the principle of protection of children's rights, and in particular violated Article 8 in conjunction with Article 14 ECHR of the applicant, her son, and her partner, and Art. 2 of the CRC. The applicant argued that her child is discriminated against due to the legal status and sexual orientation of his parents (the legal status being the status of non-heterosexual cohabitation in Poland). Moreover, the best interests of the child have

not been protected. Lack of transcription of the birth certificate results in difficulties in obtaining proof of nationality, leading to a factual situation that is identical to that of statelessness of the child. The child's right to identity, which includes his Polish nationality, and respect for relation with the parents, has been violated.

The applicant moreover invoked Article 20 TFEU, as the authorities' decision limits the child's ability to move and reside freely within the Member States of the EU, as the child is unable to access travel documents. In addition, the applicant invoked a violation of Articles 7, 21(1) and 24(2, 3) of the Charter of Fundamental Rights of the European Union.

### **Legal arguments by the opposing party**

The authority argued that under Polish law the mother of a child is the woman who gave birth to that child. Regardless of how paternity is established, the only other parent is the father, and it is always a man. Deviations from this would violate fundamental principles of the Polish legal order.

### **Decision & Reasoning**

The Court reasoned as follows:

"3. [...] The dominant position in the legal literature is that transcription is in itself not a registration, but merely a [...] reproduction and a copy of a foreign civil status record. [It is] a declaratory act, because it does not have any constitutive effect, and the drafting of a transcription does not have any impact on the assessment of the substantive legal consequences of the events recorded. [...] As a rule, an act submitted for transcription is only subject to control of the formal conditions, and the authorities, when making the entry, cannot include any content other than what is contained in the document that is being transcribed. In the course of transcription, the truthfulness of event certified by civil status document created abroad, its legality, and the motivation of the entity requesting transcription is generally not subjected to controls. However, the authority is obliged to determine whether the document submitted for transcription is a copy of the civil status certificate [and] whether it is an original document [...]. Foreign civil status records are also subject to assessment of their compliance with the fundamental principles of the legal order of the Republic of Poland. [...]"

"4. [...] The purpose of the transcription is to use the resulting Polish civil status

record before public administration authorities without the need to make a formal translation each time [...] . Therefore, the transcription of a foreign document must be carried out on the basis of the provisions of Polish law, and in the case of a birth certificate, the transcribed document must contain exactly the same data as in the birth certificate [according to the format in Poland]. The meaning of the terms used in it should be consistent with their understanding under Polish law.”

“5. The content of the foreign document does not always fully correspond to the content of the civil status record resulting from the transcription. The transcription does not consist of translating a foreign document drawn up in a foreign language into Polish. If this were the case, then instead of a transcription, it would be sufficient to translate the foreign civil status document into Polish by a sworn translator.”

“When comparing the versions of a foreign and a Polish civil status document, it should be stated that the content included in foreign documents does not always fully correspond to the content required by the Polish legislator. In the case at hand, it is necessary to compare the content of the [applicant’s son’s] birth certificate with its Polish counterpart. The [applicant’s son’s] birth certificate includes the occupation of the mother and of the other parent, as well as the mother's residence address. However, it does not include their dates of birth, which is required for a Polish birth certificate. Therefore, some data is omitted during transcription as irrelevant from the point of view of the Polish law [...]. However, other data needs to be added.”

“The scope of permissible modifications as a result of transcription do not allow, however, for such far-reaching changes that would lead to a contradiction between the content of the foreign act and the Polish civil status record that was created as a result of its transcription. In the foreign birth certificate [of the applicant’s son], a woman who is not the child's mother was entered as a "parent". [The applicant’s son’s] birth certificate does not contain the data of the child's father. In the Polish civil status record, the father's data should be provided, and cannot be omitted [...]. If there has been no recognition of paternity or a judicial determination of paternity, the birth certificate shall include either the father's first name, or the first name of the person reporting the birth, and in the absence of any of these two, the father's name is chosen by the [authority]. In such a case, the mother's name at the time of the child's birth is entered as the father's surname, together with an relevant note. Thus, the binding legal regulations do not provide for the possibility to leave the

"father" field blank."

"7. [...] The public policy clause [invoked by the authorities against the transcription], is a protection against the effects of the application of foreign law contrary to the basic (including constitutional) values accepted in the Polish legal order. Thus, the public order clause guarantees protection of the domestic legal order against its violation in the form of giving the effect (recognition) to a civil status act which does not comply with the fundamental principles of the [Polish] legal order. [...] A crucial point is not the mere contradiction between a foreign civil status record and the fundamental principles of the legal order, but that the effects of transcribing such record are incompatible with these principles. The basic principles of the legal order should be understood as not only the fundamental principles of the socio-political system, i.e. constitutional principles, but also the guiding principles governing areas of civil, family and procedural law. According to Article 18 of the Constitution, marriage as a union of a woman and a man; family, motherhood and parenthood are under the protection and care of the Republic of Poland. The principles resulting from the Constitution are reflected in the statutory regulations. The legislator did not provide for the possibility of entering a female person as a father in a Polish civil status certificate. [...] A birth certificate contains the surnames, first names and family names, and dates and places of births of the child's parents. In Polish law, only the mother and the father may be the parents of a child. Polish legal system knows no other category of a parent. [...] It should be noted that only spouses can adopt a child jointly. The recognition of adoption of a child by persons of the same sex is inadmissible [...]. Polish law does not recognise the concept of "same-sex parents", and does not grant parental rights to such partnerships. [...] The coherence of the Polish legal system would be threatened with the effects of a Polish birth certificates that contains data that cannot be included in the certificate of a birth of a child in Poland."

"To sum up, it is not possible to enter in the Polish civil records instead of the child's father a "parent" who is not a man, as such a transcription would be contrary to the fundamental principles of the Polish legal order."

"[...] the applicant initiated proceedings for the issuance of a passport for the minor child. Due to the impossibility of presenting a copy of a Polish birth certificate, the application was not examined. The lawfulness of not considering the applicant's application has never been subject to judicial review, as the applicant has not lodged a complaint about the lack of response from the authority with which she

had lodged the application. [...] Every Polish national has the right to receive a passport. [...] Therefore, the final decision on refusal to issue a passport may be appealed to the administrative court.”

“Every national has the right to receive an identity card, which is also a document confirming identity and Polish nationality [...].”

“If the refusal to transcribe is justified, as is the case under examination, since [the applicant’s son’s] birth certificate indicates that the mother is a Polish national, and so is the second parent, the authority is obliged to act in accordance with the best interests of the child and apply for a [social security] number for the child [...].”

“[...] Polish national’s access to a [social security] number or an identity card may not depend on the transcription, which is not possible only because the child's foreign birth certificate contains data of a woman who is a civil partnership that is unknown to Polish law, but the child's mother is a Polish national.”

“9. The European Court of Human Rights addressed the consequences of refusing to register foreign birth certificates of children of same-sex couples and children born through surrogacy. First of all, it should be emphasised that the matter of civil records and their transcription does not fall within the scope of the provisions of the ECHR. The jurisprudence of the ECtHR does not indicate a general obligation to transcribe foreign birth certificates of children whose parents are in a same-sex partnership, when the latter are recognised in the country that is issuing the birth certificate, and not recognised in the country which is a party to the Convention. It is worth noting here the advisory opinion issued by the Grand Chamber on 10 April 2019 at the request of the French Court of Appeal (application No.P-16-2018-001) on the basis of Protocol No. 16 to the ECHR of 2 October 2013. The foreign civil status record disputed in the proceedings contained the data of a child born abroad as a result of a surrogacy arrangement, which defined the "intended mother" as "full-fledged mother" and the "intended father" was the man who was the biological father of the child and the husband of the "intended mother ". The facts on the basis of which the opinion was issued thus concerned a marriage of a woman and a man, and a child born abroad as a result of a surrogacy agreement, for which a male reproductive cell from the intended father was used, and a female one from a donor - a third person. In the case [under consideration in the current proceedings], the applicant demands that the relationship between her child and her partner be recognised in the transcribed civil status act, where the relevant partnership is not

recognised by Polish law. The request for transcription does not therefore apply to a civil status certificate in which the indicated parents are married, and in which one of the spouses is the biological parent of the child. It is worth noting that even with regard to the child's foreign birth certificate in which the parents were indicated as parents, the Tribunal found in its opinion that the child's right to respect for private life within the meaning of Art. 8 of the ECHR does not require the recognition of a legal relationship to take the form of an entry in the civil status register of data from a foreign birth certificate, where other procedures may apply, such as the adoption of a child by the intended mother, provided that the procedure and its implementation provided for in the domestic law [can safeguard this right] in accordance with the best interests of the child.”

“The jurisprudence of the Court focuses primarily on the consequences of the failure to transcribe the child's birth certificate for the rights guaranteed by the Convention. It should therefore be considered that the provisions of the ECHR must be taken into account in those administrative matters which directly concern the rights guaranteed by the Convention. The protection of the rights contained in the ECHR is not abstract in nature, but is closely related to the facts. In a case for issuing an identity document, it is the responsibility of the administrative authority and the courts to assess whether the transcription condition for issuing an identity card is justified in a specific case, and whether it does not violate the Convention (the same rule applies to the rights guaranteed in the Convention on the Rights of the Child, or the European Union law). It should be emphasised here that the applicant's child acquired Polish nationality by operation of law. Under no circumstances may the acquisition of Polish nationality be conditional on transcription. The applicant is a Polish national. Her son [has therefore] acquired Polish nationality by operation of law. The lack of a transcript is not an obstacle to confirming Polish nationality. The [son's] birth certificate, even without its transcription, is the only evidence of the events stated therein [...]. The applicant's child may therefore rely on such an act in administrative and judicial proceedings as well as in accessing rights which depend on the proof of the relevant civil records, even if those had not been transcribed.”

“In the cases of transcription of foreign civil status records, the Court drew attention to the margin of appreciation which depends on the individual circumstances of the case (e.g. the judgment of the ECtHR of 26 June 2014 in the case of *Mennesson v.*

France, application no. 65192/11, § 77 - § 79) . The Court noted that a child who was refused the transcription of a birth certificate may be in a situation of uncertainty as to his legal status, and that his relationship with his parents, as established in a foreign birth certificate, is unrecognised by the legal order (ECHR judgment of 26 June 2014, no. in Labassee v. France, no. 65941/11, § 75). The cited cases of Labassee and Mennesson, however, did not concern the transcription of a civil status record in which same-sex partners are indicated as parents. These acts concerned married persons in which one of the spouses was the biological parent of the child. It should also be emphasised that the Court linked the finding the violation of the child's right to private life as a result of non-recognition of surrogacy contracts under French law to the inability of confirming the child's French nationality and biological ties with one of the parents, as well as possible adverse effects in terms of inheritance law. In the judgment of the Grand Chamber of the Court of 24 January 2017 in the case of Paradiso and Campanelli v. Italy, application no. 25358/12, the Court found no violation of Art. 8 of the ECHR, and recalled that [Article 8] did not guarantee the right to establish a family or the right to adoption (§ 141). The refusal to recognise same-sex unions concluded abroad was subject of the judgment of the ECtHR of 14 December 2017 in the case of Orlandi et al. v. Italy (no. 26431/12; 26742/12; 44057/12 and 60088/12). The Court found a violation by Italy of Art. 8 of the ECHR due to the refusal to recognise same-sex partnerships concluded abroad. The inability of same-sex couples to enter into a legally recognised union was subject of the judgment of the ECtHR of 21 July 2015 in the case of Oliari and others v. Italy (applications no. 18766/11 and 36030/11), which found a violation of Art. 8 of the ECHR. The cases cited did not, however, concern the transcription of a child's civil status record, and the recognition of a child's parent's partner as the other parent, but only the obligation to legally recognise partnerships in national law."

"To sum up, the cited judgments of the ECtHR, unlike the case about which the question was asked, concern the legal recognition of a surrogacy contract or the conclusion of a partnership of people of the same sex. The case heard by the Supreme Administrative Court concerns the transcription of a foreign civil status certificate in which the parents are indicated as same-sex parents, and are not married parents. In the case under examination, there are no doubts as to the acquisition of Polish nationality by the applicant's child, or as to the parental rights



of the child's mother. It should also be stated that it is not the mere refusal to transcribe a child's birth certificate that may result in the state's liability for the breach of the Convention, but its effects, and the lack of protection against the negative consequences of the lack of transcription. These effects, however, will be assessed in separate individual proceedings, for example in the context of potential refusal to issue an identity card. [...] The refusal to make a transcription due to a breach of the principles of the Polish legal order is not tantamount to a breach of the constitutional and international obligation of public authorities to take into account the best interests of the child, because a foreign birth certificate, even without its transcription, is the only evidence of the events stated therein, and the applicant's child may rely on such an act in administrative and court proceedings that concern his rights.”

“10. The jurisprudence of the [EU] Court of Justice so far indicates that legislation on civil status falls within the competence of the Member States and EU law does not prejudice this competence (see, for example, the judgments in the cases: *Garcia Avello*, C-148/02, EU: C: 2003 : 539, paragraph 25; *Maruko*, C-267/06, EU: C: 2008: 179, paragraph 59; and also *Grunkin and Paul*, C-353/06, EU: C: 2008: 559, paragraph 16). The lack of harmonisation of the provisions on civil status at the EU (as well as international) level means that solutions adopted in this area in individual Member States differ in terms of content, form and scope of data registered in national registers of civil status. The European Union law does not provide for an absolute obligation to recognise the effects of a foreign civil status record, and to transfer it into the national registry. The refusal to transfer a foreign document to the national register of civil status may be justified by the application of the national public policy clause. The Court noted that resolving an issues related to the transfer of data resulting from a foreign official document to the national register of civil status requires respect for a fair balance of conflicting interests, i.e. on the one hand, the protection of rights under EU law and, on the other hand, justified protection of Member State’s traditions (see judgment in *Runevic-Vardyn and Wardyn*, C-391/09, ECLI: EU: C: 2011: 291, paragraph 91). It should be noted that under Art. 20 paragraph 2a, and art. 21(1) TFEU, the right to free movement within the Schengen area does not depend on the possession of a transcribed birth certificate, but on the possession of an identity document proving the nationality of one of the European Union Member States. The documents proving Polish

nationality are passports and ID cards. It should be noted that the case concerning the refusal to issue the documents which would enable the applicant's child to move freely within the territory of the European Union is a separate administrative matter. Only at the stage of refusal to issue an identity document can the infringement of the EU citizen's right to free movement be considered [...]. Therefore, the Supreme Administrative Court did not find grounds for referring a question for a preliminary ruling to the Court of Justice of the European Union."

"11. Bearing in mind the above, the Supreme Administrative Court, [concludes that Polish law] does not allow the transcription of a foreign birth certificate of a child in which the parents are persons of the same sex."

## **Decision documents**

[NSA\\_2Dec2019.pdf](#)

### **Outcome**

The Court concluded that Polish law does not allow the transcription of a foreign birth certificate of a child in which the parents are persons of the same sex, but that lack of transcription should not impede such a child's access to a passport and other identity documents, and that his Polish nationality is unquestionable.

### **Third party interventions**

The National Ombudsman intervened on behalf of the applicant, arguing that the refusal to transcribe the birth certificate of a minor Polish national violates his right to nationality and identity, and, as a consequence, may also lead to a violation of the right to health, the right to education, the right to liberty and security, and the right to freedom of movement and choice of place of residence. He moreover argued that the fundamental principles of the Polish legal order are not endangered by the transcription of a birth certificate where the parents are of the same sex into Polish civil status registers. The Ombudsman also noted that the refusal to transcribe the birth certificate impedes the way to an effective application for an identity document, the latter being necessary for the free movement within the territory of the European Union.

The Public Prosecutor General intervened on behalf of the authorities, arguing that the authorities have correctly honoured the public policy clause. He requested the Court to find that Polish law does not allow the transcription of a foreign birth certificate of a child in which same-sex persons are recorded as parents - which

does not prevent the child from being assigned a social security number and being issued a Polish identity document. According to the Public Prosecutor, refusal to transcribe the birth certificate does not lead to unequal treatment or discrimination against children over whom persons of the same sex obtained parental rights abroad. Such children should be guaranteed equal rights, including the right to obtain a social security number, an ID card, and a passport. The practice of public administration bodies which makes it impossible to implement these rights is inconsistent with the applicable Polish law.