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Gloss on the judgment of the Polish Supreme Administrative Court of 10 October 2018, II OSK 2552/16

"Fundamental values and public order cannot justify the rejection of transcribing a foreign birth certificate to the Polish civil registry in case of a Pole born in another EU Member State by a Polish mother, even if the foreign records indicate that the child has same-sex parents"

FACTS OF THE CASE

The applicant (I.Z.) asked the Head of the Registry Office in Kraków, Poland (Kierownik Urzędu Stanu Cywilnego, hereinafter the HRO) to transcribe the birth certificate of her son who was born in the United Kingdom and obtained Polish citizenship by law.[1] The British document indicated that the child has a mother (I.Z.) and the other parent who is also a woman. The HRO claimed that, according to Polish law, a child always has two parents: "a mother" – a woman who gave birth to the child and another "parent" who is always a man. Hence, the transcription cannot be made as it would infringe Polish law and introduce misleading data to the Polish civil register.

I.Z. appealed to the Voivode indicating discrimination, infringement of the right to respect for private and family life, as well as rights specified by the EU law, in particular the right to freedom of movement[2] and Articles 7, 9, 21 and 24 of the

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1 All of the Polish rulings are available at: http://orzeczenia.nsa.gov.pl (accessed 31.7.2019).

2 Provided for by Article 3(2) of the Treaty on European Union, Article 21 of the Treaty on the Functioning of the European Union (both amended by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed

Charter of Fundamental Rights of the European Union. The Voivode followed the HRO's view that the transcription would be contrary to the Polish law, because Article 18 of the Constitution of the Republic of Poland (hereinafter Constitution)[3] defines "parents" as persons of the opposite sex.

The applicant submitted an appeal to the Voivodeship Administrative Court in Kraków (henceforth "VAC"). The Commissioner for Human Rights presented his views to the case claiming, *inter alia*, that "the refusal of a transcription and, consequently, failure to issue a Polish identity document (…) could make the child *de facto* stateless, what violates public order, namely, the child's rights".[4] Nevertheless, the VAC stressed that the Polish civil registry forms refer to the mother and "a parent" who is always a person of the opposite sex to the mother.[5] Hence, the VAC relied on a public policy clause to keep in force the decision of the Voivode. The Court in Kraków decided that international law, including the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter the ECHR)[6] developed by the European Court of Human Rights (hereinafter the ECtHR),[7] does not impose an obligation to regulate a legal situation of same-sex parents. Judges indicated that the rights of the child are secured because in Poland I.Z. and her son can always refer to the British birth certificate. The VAC also claimed that the reference to the freedom of movement was irrelevant as the case focused on the transcription of the birth certificate and not on the execution of that freedom.

Finally, on 10 October 2018, the Polish Supreme Administrative Court (hereinafter SAC) revoked the VAC judgment and stressed that the HRO has to transcribe the British birth certificate to the Polish civil register. The Court decided that the case focused only on the birth certificate. Consequently, the judges indicated that Polish law stipulates an obligation to make the transcript of a foreign birth certificate. This interpretation, however, changed the previous views expressed in the SAC ruling of 17 December 2014, II OSK 1298/13.

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at Lisbon, OJ C 306 of 17.12.2007) and Article 45 of the Charter of Fundamental Rights of the European Union (consolidated version OJ C 202 of 7.6.2016).

[3] Consolidated text, Dz.U. of 1997, No. 78, item 483.

[4] Rzecznik Praw Obywatelskich, *NSA uchylił odmowę wpisania do polskich akt stanu cywilnego aktu urodzenia dziecka urodzonego w Londynie w małżeństwie dwóch kobiet*, press note of 10 October 2018, available at: https://www.rpo.gov.pl/pl/content/nsa-uchylil-odmowe-wpisania-do-polskich-akt-stanu-cywilnego-aktu-urodzenia-dziecka-urodzonego-w-Londynie-z-malzenstwa-jednoplciowego (accessed 31.7.2019). The Helsinki Foundation for Human Rights also joined the case.

[5] Ruling of the Voivodeship Administrative Court in Kraków of 10 May 2016, III SA/Kr 1400/15.

[6] Dz.U. of 1993, No. 61, item 284, as amended.

[7] All of the ECtHR judgments are available at: https://hudoc.echr.coe.int (accessed 31.7.2019).

COMMENTARY

The above-presented ruling gives rise to many controversies. Nevertheless, this commentary would be limited to reflections on the "margin of appreciation", a "right to ask a court to submit a request for a preliminary ruling", and the rights of the child. The selection of topics is justified by the fact that they are raised by the opponents and the proponents of the wide discretion left to member states of the European Union and the Council of Europe (hereinafter the CoE).

Unquestionably, relations between parents and children are covered by the right to respect for private and family life as the child is *ipso facto* a family member.[8] Likewise, it is undisputable that the states enjoy a wide margin of discretion in family issues. This is the case, both in the CoE, the oldest and the most advanced system of protection of human rights, as well as in the EU, an organisation which shows increased interest in fundamental rights.[9] A question should, however, be asked if the sovereign power of a state is still truly unlimited in family matters.

Although family law is not within the EU competence, the EU law touches upon that area of law as it regulates, *inter alia*, enforceability of the authentic legal instruments.[10] Poland and Hungary were, however, afraid that this expansion of the EU law on issues primarily related to, e.g. matrimonial property regimes, would be used as a loophole to support an introduction of homosexual marriages to domestic legislations.[11] These views referred to the declaration of the government of the Netherlands which, according to Piotr Mostowik, was interested in making that kind of a promotion.[12] Still, such campaigns would be only a political pressure. Poland and Hungary managed to persuade the EU to rely on the "enhanced cooperation" in matrimonial property issues,[13] but they would be facing increasing difficulties in defeating their position. This is because "In 2018, (…) Three EU countries offer no

[8] Cf. case of *Gül v. Switzerland* (the ECtHR judgment of 19 February 1996, Application no. 23218/94), § 32 and the ruling of Polish Constitutional Tribunal of 12 April 2011, SK 62/08, Dz.U. of 2011, No. 87, item 492.

[9] More in: R. Smith, *Textbook on International Human Rights*, 6th edn, Oxford 2014, pp. 97–112.

[10] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 183 of 8.7.2016, and Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183 of 8.7.2016.

[11] More in: P. Mostowik, *Rozdział VIII. O uzasadnionych powodach nieprzystąpienia Polski do rozporządzeń UE Nr 2016/1103 i 2016/1104 dotyczących wewnętrznych i zewnętrznych relacji małżonków i rejestrowanych partnerów*, [in:] W. Popiołek, *Kolizyjne i procesowe aspekty prawa rodzinnego*, Warszawa 2019, pp. 109–111. Polish political debates focusing on this aspect of the Charter lead to the Polish signature under the Protocol (No. 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, OJ C 115 of 9.5.2008. Cf. R. Wieruszewski, *Rola i znaczenie Karty Praw Podstawowych Unii Europejskiej dla ochrony praw człowieka*, Przegląd Sejmowy No. 2, 2008, pp. 57–59.

[12] P. Mostowik, *supra* n. 12, pp. 106–107.

[13] These regulations do not impose an obligation to introduce registration of same-sex couples to domestic legislation. M. Pazdan, *Rozdział X. Współczesne wyzwania prawa prywatnego międzynarodowego w zakresie prawa rodzinnego*, [in:] W. Popiołek, *Kolizyjne i procesowe aspekty prawa rodzinnego*, Warszawa 2019, p. 129.

recognition of (…) [same-sex marriages] (Italy, Slovakia, Romania), and four even explicitly forbid them (Poland, Bulgaria, Latvia, Lithuania) (…) [, but] In total, 27 countries on the continent, of which 21 belong to the EU, offer a legal framework for same-sex couples."[14]

Bearing in mind the fact that Poland ratified the ECHR, stressing an importance of the ECHR to the EU member states (owing to the equivalent protection doctrine[15] and the still intended accession of the EU to that Convention), one should emphasize that thanks to "the living instrument doctrine"[16] an interpretation of the ECHR should take into account, *inter alia*, social changes in Europe. However, the judicial activity which expands the application of the ECHR to an ever widening range of contexts is limited by the identification of the "general trend" in European countries.[17] Recognition of that trend is a difficult task, what has been especially proven in the ECtHR judgments which were decided by a marginal majority.[18] Although the lack of the Europe-wide consensus cannot be seen as an obstacle to an evolutionary interpretation of the ECHR, the Strasbourg Court is reluctant towards imposing a "foreign morality". Hence, the states benefit from a wide margin of appreciation as regards, e.g. legalisation of same-sex relationships and, consequently, they can enact laws which take into account a domestic morality.

Nonetheless, the increasing number of the CoE countries which provide a legal possibility to register homosexual relationship would affect not only the European family law but also other areas of law. The above-mentioned enforceability of authentic instruments perfectly exemplifies this reasoning. Other issues, including the respect of rights of children of same-sex couples would, therefore, be an increasing challenge for national legislators of those countries which do not recognise a possibility to register that kind of relationships. This is clearly visible in the ruling II OSK 2552/16, which – interestingly – is focused on decisions made in two countries which intended to keep a wide margin of appreciation in, *inter alia*, family matters by signing the Protocol No. 30 to the Charter.

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[14] EHNE, *Same-Sex Marriage in Europe*, available at: https://ehne.fr/en/article/gender-and-europe/civil-law-tool-masculine-domination/same-sex-marriage-europe (accessed 31.7.2019).

[15] Case of *Bosphorus v. Ireland* (the ECtHR judgment of 30 June 2005, Application no. 45036/98), §§ 155–157.

[16] Starting from the case of *Tyrer v. the United Kingdom* (the ECtHR judgment of 25 April 1978, Application no. 5856/72), § 31. More in: A. Mowbray, *The Creativity of the European Court of Human Rights*, Human Rights Law Review Vol. 5, Issue 1, 2005, pp. 60–71; B. Gronowska, *Europejski Trybunał Praw Człowieka. W poszukiwaniu efektywnej ochrony praw jednostki*, Toruń 2011, pp. 189–209.

[17] Cf. case of *Tyrer v. the United Kingdom* (the ECtHR judgment of 25 April 1978, Application no. 5856/72), § 38. More in: G. Letsas, *Strasbourg Interpretive Ethic: Lessons for the International Lawyer*, European Journal of International Law Vol. 21, No. 3, 2010, pp. 527–529. The evaluative interpretation has been questioned by some states parties to the ECHR. More in: F. de Londras, K. Dzehtsiarou, *Managing Judicial Innovation in the European Court of Human Rights*, Human Rights Law Review Vol. 15, Issue 3, 2015, p. 523.

[18] Cf. case of *Frette v. France* (the ECtHR judgment of 26 February 2002, Application no. 36515/97).

The Supreme Administrative Court judges clearly indicated that Polish law[19] differentiates between an obligation to transcribe a foreign birth certificate to the Polish civil registers and a possibility to make such a transcription. As the SAC put it, "this aspect of the [analysed] case (…) is, according to the Supreme Administrative Court [and] contrary to the Voivodeship Administrative Court in Kraków, essential" to decide upon the matters of the case. The mere fact that a rational legislator introduced such a differentiation implies that administration cannot reject making the transcript if this would deprive a Polish citizen of his/her right to obtain the Polish identity document or passport. However, Article 104(2) of the Registry Records Act prohibits making changes during the transcription,[20] so the administration may face a problem of incoherency of the Polish birth certificate form with its foreign counterpart.

Nevertheless, in the I.Z.'s son case the SAC limited itself to the literal interpretation of the law. Contrary to the judgment of 17 December 2014 and to other decision-making bodies which expressed their opinions at the earlier stages of this case, the SAC did not try to define the term "parent". This approach is well-justified in the *ratione decidendi* as judges referred to the most important national (the Constitution and the Registry Records Act) and international law (the Convention of the Rights of the Child, hereinafter the CRC[21] and the ECHR).

Unsurprisingly, the decision not to refer to public morality in the commented case has already been declared as "making a small loophole which would introduce a possibility to recognize in Poland homorelationships and homoadoptions".[22] That language has to be condemned.[23] However, the author of the above-cited text correctly identified the European-wide trend to secure rights of children of the same-sex parents, but he expects that the Polish legislator would make it impossible to issue subsequent similar rulings.[24] The views of the HRO, the Voivode, and the VAC are close to that reasoning and they followed the judgment of 17 December 2014. They used the Family and Guardianship Code[25] and Article 18 of the Constitution to indicate that the transcription of a foreign birth certificate in which both parents are of the same sex would be misleading and manifestly contradictory to Polish law.

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[19] Article 104 of the Registry Records Act [Prawo o aktach stanu cywilnego] of 28 November 2014, Consolidated text, Dz.U. of 2018, item 2224.

[20] Cf. the SAC ruling of 17 December 2014, II OSK 1298/13.

[21] Adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, Dz.U. of 1991, No. 120, item 526, as amended.

[22] List Prezesa Zarządu Stowarzyszenia Europa Tradycja Pana Ryszarda Skotnicznego z dnia 26 listopada 2018 roku, available at: https://www.europatradycja.pl/download/List%20Stowarzyszenia%20Europa%20Tradycja%2026.11.2018r.pdf (accessed 31.7.2019). Similar views were presented in the comments to the article by E. Świętochowska, *Ojcem i matką w dokumentach mogą być dwie kobiety*, 11 October 2018, available at: https://prawo.gazetaprawna.pl/artykuly/1296853,para-jednoplciowa-rodzicami-dziecka-wyrok-nsa.html (accessed 31.7.2019).

[23] The language of some comments to the article by E. Świętochowska, see *supra* n. 23, was homophobic.

[24] List Prezesa Zarządu Stowarzyszenia, *supra* n. 23.

[25] Kodeks rodzinny i opiekuńczy z 25 lutego 1964 r., consolidated text, Dz.U. of 2017, item 682.

According to the Polish Constitution, international agreements which have been ratified by Poland in a qualified way should be favoured during the interpretation of national legislation if this did not infringe the Constitution. This concerns treaties, which meet prerequisites specified in, *inter alia*, Article 89(1) of the Constitution. Thus, international agreements concerning, among others, freedoms, rights or obligations of citizens, as specified in the Constitution, have a higher rank than "ordinary" acts of the Polish Parliament. However, Article 18 of the Constitution (and Article 7 of the Private International Law Act[26]) can be used to contest the application of foreign law as incompliant with the constitutional values and axiology. Nevertheless, the SAC changed its interpretation presented in the judgment of 17 December 2014 and opposed the VAC in Kraków ruling of 10 May 2016, III SA/Kr 1400/15. According to the judges, the case was not focused on "motherhood" or "parenthood", especially as nobody contested the right of the applicant who (according to the British birth certificate) was the mother of the child, to take care of her son.

The Supreme Administrative Court stressed that the HRO, the Voivode, and the VAC ignored the fact that the decision not to transcribe the birth certificate infringes the rights of the child. Personally, I agree with the SAC. However, its justification lacks reference to Article 72 of the Constitution which concerns "the rights of the child", so it has to be understood as the rights of "every child". Consequently, no child can be discriminated owing to, *inter alia*, the marital status of the child's parents or their sex. Hence, contrary to the SAC judgment of 17 December 2014, I think that the application of law in force may be called a discrimination if the law itself is discriminatory.

The relevant international law, including the CRC and the ECHR formed an important part of the SAC's reasoning. The relevant ECtHR judgments were also cited.[27] These arguments correctly brought judges to the conclusion that the decision to deny making the transcription would expose the child to the situation of uncertainty regarding his/her legal status. As the best interest of the child should be a priority to all administrative bodies, decisions rejecting the transcription cannot be approved of. The HRO, the Voivode and, especially, the VAC unquestionably based their reasoning on the letter of law and historical interpretation. Hence, the omission of reference to the Polish involvement in the works on the CRC is really surprising.

Secondly, the commented case dealt with the right to obtain the Polish transcription of the birth certificate which was issued by British bodies in accordance with the British law to a Polish citizen. Polish bodies *de facto* asked I.Z., who stays in a homosexual marriage legally recognized by the British law, to indicate to the British civil registry that the other parent is a man in order to obtain a British document which would be in line with the Polish law and, maybe, with the biological facts. However, this approach of the HRO, the Voivode and the VAC

[26] Prawo prywatne międzynarodowe z dnia 4 lutego 2011 r., consolidated text, Dz.U. of 2015, item 1792. See the SAC ruling of 17 December 2014.

[27] References to the ECtHR case law without an indication of names of the cited cases are a regular practice of, e.g. the CJEU. P. Sadowski, *A Safe Harbour or a Sinking Ship? On the Protection of Fundamental Rights of Asylum Seekers in Recent CJEU Judgments*, European Journal of Legal Studies Vol. 11, Issue 2, 2019, pp. 29–64.

goes far beyond their powers as a decision on the transcription cannot contest the facts, which are unveiled in the source document. The VAC expressly indicated that "policy-making is not under its cognition". Thus, it cannot amend the law as regards definitions of "parents", "family" and "marriage". Bearing in mind that, according to the VAC, the changes in the interpretation of the above-mentioned phrases were needed to transcribe the birth certificate of the child of same-sex parents, judges rejected the option of making such transcription.[28] Nevertheless, this interpretation shows that the VAC was not applying law objectively, but it looked for law which could support it in relying on Article 104(2) of the Registry Records Act. Hence, Article 18 of the Constitution was overused, ignoring Article 72 of the Constitution.

The VAC's reasoning is also internally inconsistent. The judges reiterated on the SAC judgment of 17 December 2014 that the British birth certificate is "legally valid in the United Kingdom", but I.Z. can rely on it in Poland. This would, however, result in verification of the validity of the British certificate each time in the case of I.Z.'s son.[29] Was this the VAC's attempt to hinder an inflow of similar cases? If this was an issue, the "freezing effect" was not achieved as other cases have been raised by same-sex parents who relied on the Registry Records Act.[30]

Certainly, one could say that I.Z. should be aware that in Poland homosexual couples cannot obtain birth certificates of their children. Still, "the margin of appreciation" should recognize the consequences of the Polish bodies' decisions on the child's rights.[31] I think that the I.Z.'s son was discriminated against his personal features which are out of his control. Even if we adopt the view that Article 18 of the Constitution as well as the Family and Guardianship Code limit the right to get married to persons of the opposite sex, homosexual relationships are not prohibited by Polish law, including criminal law. Moreover, the commented case did not focus on the transcription of a same-sex couple marriage certificate, but on the transcription of the birth certificate. Thus, the HRO, the Voivode, and the VAC discriminated against the child due to the decisions which were made by his parents, and, in practice, made it impossible to solve the child's case in Poland. Hence, these verdicts infringed the rights of the child and, consequently, the Constitution and the CRC. They may also infringe the ECHR and (albeit not cited by the SAC) Article 24(1) of the International Covenant on Civil and Political Rights.[32]

Thirdly, an unquestionable preference given to the public order over rights of individuals would undermine the whole concept of human rights. The SAC correctly stressed that the phrase "public order" (as defined by the Court of Justice

[28] The VAC followed, e.g. the SAC judgment of 17 December 2014.

[29] This was also stressed by the Voivodeship Administrative Court in Łódź in the ruling of 14 February 2013, III SA/Łd 1100/12. The SAC in its judgment of 17 December 2014 decided that this issue goes beyond the merits of the case.

[30] The child has the Polish citizenship. This makes that case different from the case of a child born by an American surrogate to a Pole staying in a homosexual relationship (the SAC judgment of 30 October 2018, II OSK 1868/16).

[31] This was indicated by the SAC judge in his oral presentation of the judgment. See Rzecznik Praw Obywatelskich, *NSA uchylił odmowę*, *supra* n. 5. Regrettably, this interpretation cannot be found in the judgment.

[32] Dz.U. of 1977, No. 38, item 167.

of the European Union, hereinafter the CJEU) has to be interpreted narrowly, and the decision to rely on *ordre public* must be made after an in-depth analysis of the facts of the case, taking into account its real impact on the interests of an individual who asked for the transcription.[33] The Court's views clearly address the need to take administrative decisions on an individual basis in order to avoid arbitrariness. Hence, the judges followed the ECtHR interpretation.[34] This approach has to be supported as it ensures that individuals' rights are – to rephrase the case *Airey v. Ireland* (the ECtHR judgment of 9 October 1979, Application no. 6289/73) – protected "in a real and practical way". The SAC stressed that the law-implementing bodies have to differentiate between the possibility of making the transcription and the obligation to make it, if the legislator differentiates these institutions in law. As we deal with the obligation imposed by law, we must assume that it is in line with the Constitution, and this dependency cannot be questioned by administrative courts, what was correctly stressed by the VAC. Therefore, the SAC could not agree with the HRO, the Voivode, and the VAC that the decision to make the transcript of the birth certificate would infringe fundamental Constitutional values.

Finally, the SAC judges relied on the *Acte éclairé* to justify their rejection of submitting a request for a preliminary ruling, but they did not name the EU law which was clear to them. This approach can be disputed. The SAC did not indicate a close link between the Polish citizenship and the EU citizenship.[35] Can we assume that judges took the view that an organisation of civil registers is the EU member states' competence, so there was no need to cite the EU law and, subsequently, to ask a preliminary question? This could, however, indicate that the Court thought that the EU law does not apply to the EU citizens who stay in the country of their nationality. This opinion should be rejected because the decision not to make the transcription precludes the execution of other rights of Polish citizens, *inter alia*, the freedom of movement, which is unconditionally guaranteed by the Treaty on European Union to all EU citizens.[36] That right was used by Tribunal du travail de Bruxelles to ask the CJEU if the right of the child who holds the Belgian citizenship would not be infringed if the child's father were expelled from the EU.[37] Hence, I agree with the Commissioner for Human Rights that in the I.Z.'s case the SAC should have asked the preliminary question if a decision which *de facto* hinders the EU citizen's right to benefit from the freedom of movement can be based only on national law.[38]

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[33] They followed the SAC judgment of 17 December 2014. A similar argumentation (without citations of the CJEU judgments) was made by the VAC.

[34] Cf. *R.R. v. Poland* (the ECtHR judgment of 26 May 2011, Application no. 27617/04), § 183.

[35] The link was raised in Rzecznik Praw Obywatelskich, *NSA uchylił odmowę*, *supra* n. 5.

[36] CJEU Case C-413/99 *Baumbast and R v. Secretary of State for the Home Department* of 17 September 2002, ECLI:EU:C:2002:493.

[37] CJEU Case C-34/09 *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)* of 8 March 2011, ECLI:EU:C:2011:124.

[38] Rzecznik Praw Obywatelskich, *NSA uchylił odmowę*, *supra* n. 5.

Moreover, the decision not to submit a preliminary question has to be convincingly substantiated.[39] This guaranties that the applicants' rights are adequately secured as she/he can only ask a national court to consider making such a request. However, the decision of a national court not to follow that request may be questioned by the ECtHR.[40] Hence, insufficient justification to that decision is a serious omission in the commented judgment.

Finally, the request for a preliminary ruling could be an inspiration for judges serving in lower-instance national courts to consider if their cases fall "within the EU law". This is because the phrase "within the EU law" should always be interpreted broadly as "rights conferred by EU law have to be effectively protected by domestic legislation, as the Member States will clearly be acting within the scope of EU law when they implement, enforce, or interpret EU secondary legislation".[41] This view was stressed recently in the CJEU case C-560/14 *M. v. Minister for Justice and Equality, Ireland, and the Attorney General* of 9 February 2017 (in § 25 of the judgment) in which it was explicitly indicated that "acting within the EU law" also covers an indirect application of the EU law, so an indirect effect of national authorities' decisions has to be analysed. Hence, I am convinced that the submission of the request for a preliminary ruling (or a more elaborated reasoning not to submit that request) could contribute to the national horizontal judicial dialogue. It could also be a guide for advocates and barristers as, e.g. the VAC in its ruling of 10 May 2016 repeatedly stressed that the representative of the applicant did not justify his arguments sufficiently (hence, we can ask if the 2016 ruling could be different if the applicant's argumentation was more comprehensive).

To conclude, the commented case concerned the rights of the child who, according to the British birth certificate, was the son of his mother and the other parent who was also a woman. However, I agree with the SAC that this case did not focus on the rights of the child's parents but on the legal situation of the child. As the legislator differentiated between the possibility to transcribe foreign birth certificates and the obligation to transcribe them, recalling that none of the bodies making a decision in the commented case could question the coherency of that law with the Constitution, I support the SAC that the HRO, the Voivode and the VAC should not try to interpret the term "a parent" but they should transcribe the British certificate. That kind of a decision would also satisfy the standard of protecting the best interest of the child, which is explicitly provided for in the Constitution, as well as international and national law. It may, certainly, be raised that this interpretation can be used as a loophole for expanding the rights of same-sex couples in Poland. However, the HRO, the Voivode, the VAC and the SAC are not policy-making bodies, so they should limit themselves to the application of the law in force in individual cases.

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[39] Starting with case of *Bakker v. Austria*, the ECtHR judgment of 10 April 2003, Application no. 43454/98.

[40] Case of *Dhabi v. Italy*, the ECtHR judgment of 8 April 2014, Application no. 17120/09.

[41] P. Sadowski, *supra* n. 28, pp. 52–53.

BIBLIOGRAPHY

Gronowska B., *Europejski Tybunał Praw Człowieka. W poszukiwaniu efektywnej ochrony praw jednostki*, Toruń 2011.

Letsas G., *Strasbourg Interpretive Ethic: Lessons for the International Lawyer*, European Journal of International Law Vol. 21, No. 3, 2010.

Londras F. de, Dzehtsiarou K., *Managing Judicial Innovation in the European Court of Human Rights*, Human Rights Law Review Vol. 15, Issue 3, 2015.

Mostowik P., *Rozdział VIII. O uzasadnionych powodach nieprzystąpienia Polski do rozporządzeń UE Nr 2016/1103 i 2016/1104 dotyczących wewnętrznych i zewnętrznych relacji małżonków i rejestrowanych partnerów*, [in:] W. Popiołek, *Kolizyjne i procesowe aspekty prawa rodzinnego*, Warszawa 2019.

Mowbray A., *The Creativity of the European Court of Human Rights*, Human Rights Law Review Vol. 5, Issue 1, 2005.

Pazdan M., *Rozdział X. Współczesne wyzwania prawa prywatnego międzynarodowego w zakresie prawa rodzinnego*, [in:] W. Popiołek, *Kolizyjne i procesowe aspekty prawa rodzinnego*, Warszawa 2019.

Sadowski P., *A Safe Harbour or a Sinking Ship? On the Protection of Fundamental Rights of Asylum Seekers in Recent CJEU Judgments*, European Journal of Legal Studies Vol. 11, Issue 2, 2019.

Smith R., *Textbook on International Human Rights*, 6th edn, Oxford 2014.

Wieruszewski R., *Rola i znaczenie Karty Praw Podstawowych Unii Europejskiej dla ochrony praw człowieka*, Przegląd Sejmowy No. 2, 2008.

Online sources

EHNE, *Same-Sex Marriage in Europe*, available at: https://ehne.fr/en/article/gender-and-europe/civil-law-tool-masculine-domination/same-sex-marriage-europe (accessed 31.7.2019).

List Prezesa Zarządu Stowarzyszenia Europa Tradycja Pana Ryszarda Skotnicznego z dnia 26 listopada 2018 roku, available at: https://www.europatradycja.pl/download/List%20Stowarzyszenia%20Europa%20Tradycja%2026.11.2018r.pdf (accessed 31.7.2019).

Rzecznik Praw Obywatelskich, *NSA uchylił odmowę wpisania do polskich akt stanu cywilnego aktu urodzenia dziecka urodzonego w Londynie w małżeństwie dwóch kobiet*, press note of 10 October 2018, available at: https://www.rpo.gov.pl/pl/content/nsa-uchylil-odmowe-wpisania-do-polskich-akt-stanu-cywilnego-aktu-urodzenia-dziecka-urodzonego-w-Londynie-z-malzenstwa-jednoplciowego (accessed 31.7.2019).

Świętochowska E., *Ojcem i matką w dokumentach mogą być dwie kobiety*, 11 October 2018, available at: https://prawo.gazetaprawna.pl/artykuly/1296853,para-jednoplciowa-rodzicami-dziecka-wyrok-nsa.html (accessed 31.7.2019).

GLOSS ON THE JUDGMENT OF THE POLISH SUPREME ADMINISTRATIVE COURT OF 10 OCTOBER 2018, II OSK 2552/16

Summary

The gloss deals with Polish Supreme Administrative Court's judgment of 10 October 2018 concerning a right to transcribe a British birth certificate (issued to the child holding the Polish citizenship by birth who was born in the United Kingdom) to the Polish civil register. The

Polish administration bodies and the Voivodeship Administrative Court in Kraków refused to make the transcript. They claimed that, according to the British document, the child has a mother and "a parent" who is also a woman, hence the transcript would infringe Polish law, provide misleading information, and be against public order. The Supreme Administrative Court changed its previous interpretation by citing the Constitution of the Republic of Poland, as well as international law, which has been ratified by Poland: the Convention of the Rights of the Child, the European Convention of Human Rights and judgments of the European Court of Human Rights. However, the judges did not find the case to be "within the EU law", and they did not submit a request for a preliminary ruling. This judgment exemplifies the clash between "a wide margin of appreciation" and the right of individuals to "translate" decisions issued in other European states into their national legal systems. Thus, the gloss contributes to the discussions on an extent of a state sovereign power in private and family life matters.

Keywords: margin of appreciation, preliminary question, private and family life, best interest of the child, EU citizenship

GLOSA DO WYROKU NACZELNEGO SĄDU ADMINISTRACYJNEGO Z DNIA 10 PAŹDZIERNIKA 2018 R., II OSK 2552/16

Streszczenie

Glosa dotyczy wyroku polskiego Sądu Najwyższego z 10 października 2018 r. w sprawie prawa do sporządzenia transkrypcji brytyjskiego aktu urodzenia wydanego obywatelowi polskiemu z urodzenia, urodzonemu w Wielkiej Brytanii. Kierownik Urzędu Stanu Cywilnego, wojewoda i Wojewódzki Sąd Administracyjny w Krakowie odmówiły sporządzenia takiego zapisu. W ich ocenie brytyjski dokument stwierdzający, że dziecko ma matkę i „rodzica", który także jest kobietą, naruszałby prawo polskie, zawierał informacje wprowadzające w błąd i byłby sprzeczny z porządkiem publicznym. Sąd Najwyższy odstąpił od swojej wcześniejszej linii orzeczniczej i odrzucił tę argumentację. Powołał się przy tym na Konstytucję Rzeczypospolitej Polskiej i na ratyfikowane przez Polskę umowy międzynarodowe: Konwencję o prawach dziecka, Europejską Konwencję Praw Człowieka i na właściwe wyroki Europejskiego Trybunału Praw Człowieka. Nie odwołał się jednak do prawa UE (nie zbadał też, czy sprawa pozostaje „w zakresie prawa UE") i odmówił zadania pytania prejudycjalnego. Glosowany wyrok unaocznia więc praktyczne trudności wynikające ze zderzenia doktryny „szerokiego marginesu oceny" z prawami osób, które próbują „przetłumaczyć" decyzje wydane w innych krajach Europejskich do krajowego systemu prawnego. Stanowi on więc interesujący wkład do dyskusji o zakresie suwerennej władzy państwa w kształtowaniu krajowych regulacji dotyczących prawa do poszanowania życia prywatnego i rodzinnego.

Słowa kluczowe: margines swobody oceny, pytanie prejudycjalne, życie prywatne i rodzinne, najlepszy interes dziecka, obywatelstwo UE

COMENTARIO A LA SENTENCIA DEL TRIBUNAL GENERAL ADMINISTRATIVO DE 10 DE OCTUBRE DE 2018, II OSK 2552/16

Resumen

El cometario se refiere a la sentencia del Tribunal General Administrativo polaco de 10 de octubre de 2018 sobre el derecho a transcribir el acta de nacimiento británica expedida al ciudadano polaco por nacimiento, nacido en Gran Bretaña. El jefe de la Oficina de Estado Civil, el jefe de la región y el Tribunal Regional Administrativo se negaron a efectuar tal inscripción. Según ellos, el documento británico, constando que el niño tiene la madre y el "progenitor" que también es una mujer, infringiría el derecho polaco, ya que contenía la información que inducía al error y sería contrario al orden público. El Tribunal General Administrativo ha desistido de su anterior línea jurisprudencial y ha desestimado tales argumentos. Alegó la Constitución de la República de Polonia y tratados internacionales ratificados por Polonia: Convenio sobre los derechos del niño, Convención Europea de Derechos Humanos y sentencias pertinentes del Tribunal Europeo de Derechos Humanos. Sin embargo, no alegó el derecho comunitario (tampoco revisó si la causa queda "en el marco del derecho comunitario") y denegó la cuestión prejudicial. La sentencia comentada demuestra las dificultades prácticas resultantes de choque de la doctrina del "amplio margen de valoración" con derechos de personas que intentan "traducir" los actos expedidos en otros países europeos al sistema jurídico nacional. Es una aportación interesante al debate sobre la soberanía del poder del Estado en la formulación de regulación nacional relativa al respeto de vida privada y familiar.

Palabras claves: margen de valoración libre, cuestión prejudicial, vida privada y familiar, el mejor interés del niño, ciudadanía comunitaria

КОММЕНТАРИЙ К ПОСТАНОВЛЕНИЮ ВЫСШЕГО АДМИНИСТРАТИВНОГО СУДА ОТ 10 ОКТЯБРЯ 2018 ГОДА, II OSK 2552/16

Резюме

Комментарий касается решения Верховного суда Польши от 10 октября 2018 г. по делу о праве на предоставление выписки из британского свидетельства о рождении, выданного родившемуся в Великобритании гражданину Польши по рождению. В составлении такой выписки отказали начальник органа записей актов гражданского состояния, воевода и воеводский административный суд в Кракове. По их мнению, британский документ, в котором указано, что у ребенка есть мать и «родитель», также являющийся женщиной, нарушает польское законодательство, содержит вводящую в заблуждение информацию и противоречит общественному порядку. Верховный суд пересмотрел свой прежний подход и отклонил эту аргументацию. При этом он сослался на Конституцию Республики Польша и на ратифицированные Польшей международные соглашения: Конвенцию о правах ребенка, Европейскую конвенцию о правах человека и на соответствующие решения Европейского суда по правам человека. Однако, суд не сослался на законодательство ЕС (а также не рассмотрел вопрос о том, находится ли данное дело «в рамках законодательства ЕС»), а также отказался направить преюдициальный запрос в Суд ЕС. Таким образом, рассматриваемое решение иллюстрирует практические трудности, возникающие в результате столкновения между доктриной «широкой свободы усмотрения» и правами тех, кто пытается «перевести» решения, принятые в других странах Евросоюза, в национальные правовые системы. По этой причине

оно представляет большой интерес для обсуждения границ суверенной власти государства при формировании национальных норм, касающихся права на уважение частной и семейной жизни.

Ключевые слова: пределы свободы усмотрения, преюдициальный запрос, частная и семейная жизнь, наилучшие интересы ребенка, гражданство ЕС

GLOSSAR ZUM URTEIL DES OBERSTEN VERWALTUNGSGERICHTS VOM 10. OKTOBER 2018, II OSK 2552/16

Zusammenfassung

Der Glossar betrifft das Urteil des polnischen Obersten Gerichtshofs vom 10. Oktober 2018 über das Recht, eine britische Geburtsurkunde zu transkribieren, die einem in Großbritannien geborenen polnischen Staatsbürger ausgestellt wurde. Der Betriebsleiter des Standesamtes, der Woiwode und das Provinzverwaltungsgericht in Krakau lehnte eine solche Einreise ab. Ihrer Ansicht nach würde ein britisches Dokument, das besagt, dass ein Kind eine Mutter und einen „Elternteil" hat, der auch eine Frau ist, gegen das polnische Recht verstoßen, es enthält irreführende Informationen und verstößt gegen die öffentliche Ordnung. Der Oberste Gerichtshof ist von seiner bisherigen Rechtsprechung abgewichen und hat dieses Argument zurückgewiesen. Er verwies auf die Verfassung der Republik Polen und die von Polen ratifizierten internationalen Abkommen: Konvention über die Rechte der Kinder, die Europäische Menschenrechtskonvention und die Urteile des Europäischen Gerichtshofs für Menschenrechte. Er bezog sich jedoch nicht auf das EU-Recht (er prüfte nicht, ob der Fall „im Rahmen des EU-Rechts" bleibt) und lehnte es ab, die Frage zur Vorabentscheidung zu stellen. Das Urteil hob somit die praktischen Schwierigkeiten hervor, die sich aus dem Zusammenprall der Doktrin des „breiten Ermessensspielraums" mit den Rechten von Personen ergeben, die versuchen, in anderen europäischen Ländern erlassene Entscheidungen in das nationale Rechtssystem zu „übersetzen". Somit ist es ein interessanter Beitrag zur Diskussion über den Umfang der souveränen Macht des Staates bei der Gestaltung nationaler Vorschriften über das Recht auf Achtung des Privat- und Familienlebens.

Schlüsselwörter: Ermessensspielraum, Vorabentscheidung, Privat- und Familienleben, Wohl des Kindes, Unionsbürgerschaft

COMMENTAIRE À L'ARRÊT DE LA COUR ADMINISTRATIVE SUPRÊME DU 10 OCTOBRE 2018, II OSK 2552/16

Résumé

Le commentaire concerne l'arrêt de la Cour suprême polonaise du 10 octobre 2018 concernant le droit de transcrire un acte de naissance britannique délivré à un citoyen polonais de naissance né en Grande-Bretagne. Le chef du greffe, le voïvode et le tribunal administratif provincial de Cracovie ont refusé de faire une telle entrée. Selon eux, un document britannique déclarant qu'un enfant a une mère et un «parent» qui est aussi une femme, violerait la loi polonaise, contiendrait des informations trompeuses et serait contraire à l'ordre public. La Cour suprême s'est écartée de sa jurisprudence antérieure et a rejeté cet argument. Il a évoqué la Constitution de la République de Pologne et les accords internationaux ratifiés par la Pologne: la Convention

relative aux droits de l'enfant, la Convention européenne des droits de l'homme et les arrêts pertinents de la Cour européenne des droits de l'homme. Cependant, il n'a pas fait référence au droit de l'UE (il n'a pas examiné si l'affaire reste «dans le champ d'application du droit de l'UE») et a refusé de poser la question préjudicielle. L'arrêt commenté révèle ainsi les difficultés pratiques résultant du conflit de la doctrine de la «large marge d'appréciation» avec les droits des personnes qui tentent de «traduire» les décisions rendues dans d'autres pays européens en système juridique national. Il s'agit donc d'une contribution intéressante à la discussion sur l'étendue du pouvoir souverain de l'État dans l'élaboration des réglementations nationales concernant le droit au respect de la vie privée et familiale.

Mots-clés: marge d'appréciation, question préjudicielle, vie privée et familiale, intérêt supérieur de l'enfant, citoyenneté de l'UE

COMMENTO ALLA SENTENZA DELLA CORTE SUPREMA AMMINISTRATIVA DEL 10 OTTOBRE 2018, II OSK 2552/16

Sintesi

Il commento riguarda la sentenza della Corte Suprema polacca del 10 ottobre 2018 sul diritto alla trascrizione dell'atto di nascita britannico rilasciato a un cittadino polacco nato in Gran Bretagna. Il direttore dell'Ufficio di Stato Civile, il voivoda e la Corte Amministrativa del Voivodato di Cracovia si erano rifiutati di effettuare di tale trascrizione. Secondo la loro valutazione il documento britannico che affermava che il bambino ha una madre e un altro "genitore" che è donna, sarebbe in violazione del diritto polacco, contenendo informazioni ingannevoli e in contrasto con l'ordine pubblico. La Corte Suprema si è discostata dalla sua precedente linea giurisprudenziale e ha rigettato tale argomentazione. In questo ha fatto riferimento alla Costituzione della Repubblica di Polonia e agli accordi internazionali ratificati dalla Polonia: la Convenzione internazionale sui diritti dell'infanzia, la Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali e alle sentenze pertinenti della Corte europea dei diritti dell'uomo. Non ha fatto tuttavia riferimento al diritto dell'UE (non ha neanche esaminato se la questione fosse "nell'ambito del diritto dell'UE") e non ha formulato la questione pregiudiziale. La sentenza commentata mette quindi in evidenza le difficoltà pratiche derivanti dal conflitto della dottrina dell'"ampio margine di valutazione" con i diritti delle persone che tentano di "tradurre" decisioni emesse in altri paesi europei nel sistema giuridico nazionale. Costituisce quindi un interessante contributo alla discussione sull'ambito dell'autorità sovrana dello stato nella formazione della disciplina nazionale riguardante il diritto al rispetto della vita privata e familiare.

Parole chiave: margine di libertà della valutazione, questione pregiudiziale, vita privata e familiare, interesse del bambino, cittadinanza dell'UE

Cytuj jako:

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