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Recent Polish Case Law on the Application of the *Ordre Public* Exception in Case of Transcription (Registration) of Foreign Birth Certificates into the Domestic Register of Civil Status

Abstract: This article is an overview of the recent Polish case law on the application of the *ordre public* exception in case of transcription of foreign birth certificates in Poland. In recent times, the *ordre public* exception was applied to prevent the transcription of birth certificates that indicate same-sex couples as parents of a child and birth certificates of children born by surrogacy. Simultaneously, it was commonly assumed that the transcription is obligatory in order to obtain Polish identity documents. For that reason, the refusal of transcription meant in fact i.a. the inability to obtain Polish identity documents. It caused not only practical complications in everyday life but it was also a serious breach of rights.

This article outlines the evolution of the transcription case law in Poland. Initially, the administrative authorities and the courts had been refusing the transcription due to its inconsistency with fundamental principles of the legal order. Subsequently, however, transcription was found admissible on the basis of the principle of the best interests of the child. Due to the divergence in the case law, the issue of transcription was the subject of the resolution of seven judges of the Supreme Administrative Court of 2 December 2019 (ref. no. II OPS 1/19). The resolution states that the transcription is contrary to the fundamental principles of the legal order. However, the resolution also under-

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lines that the fact that a child is a Polish citizen may be confirmed solely by a foreign birth certificate so there is no need for transcription in order to obtain Polish identity documents.

Keywords: *ordre public* exception — public policy exception — registration of civil status — transcription of foreign civil status records — birth certificates — surrogacy agreements — same-sex relationships

I. Introduction

The intensification of international migration and increasing differences between legal systems are challenging issues. Nowadays, more and more states provide legal regulations considered unknown or illegal in other states, for example, the legal possibility of registering same-sex relationships or the legalization of surrogacy agreements. Those differences affect various areas of law and undoubtedly, the registration of foreign civil status documents is one of them. The present article aims to examine the issue of registration of foreign birth certificates, which recently has been the subject of a variety of judgments of Polish courts.

Although under Polish law the registration process of foreign civil status documents is conducted in accordance with administrative law procedure, it is closely connected with family law regulations as it frequently concerns its subjects such as marriage, maternity, paternity, adoption, etc.¹ Bearing in mind increasing differences in family law regulations between states, it comes as no surprise that Polish courts of late have been confronted with the question of how to deal with the registration of birth certificates, which indicate same-sex persons as parents of the child, issued under the provisions of foreign law. It is indeed a significant challenge for those countries that do not provide a possibility to register a same-sex relationship and do not recognize them (e.g. Poland). Many cases concerning that problem were raised by Polish citizens who are in same-sex relationships (marriage or civil unions established abroad), as they were demanding recognition of their legal parentage by the Polish state. Similarly, the problem with registration of a birth certificate occurs in case of children born as a result of surrogacy agreement when a foreign birth certificate indicates only one parent.

¹ H. Knysiak-Sudyka: *Prawo administracyjne a byt prawny jednostki — uwagi na tle transkrypcji zagranicznego aktu urodzenia oraz potwierdzenia posiadania obywatelstwa polskiego*. In: *Fenomen prawa administracyjnego. Księga jubileuszowa Profesora Jana Zimmermanna*. Eds. W. Jakimowicz, M. Krawczyk, I. Niżnik-Dobosz. Warszawa, Wolters Kluwer Polska, 2019, pp. 512 *et seq.*

This article is devoted to the issue of the application of the *ordre public* exception in cases regarding the transcription of foreign birth certificates in Poland. In recent times the public policy exception was applied, *inter alia*, to prevent the transcription of birth certificates that indicate same-sex couples as parents of the child and birth certificates of children born through surrogacy.² The article discusses the recent Polish administrative courts' case law on the legal status of the children born and raised abroad by same-sex couples where at least one parent is a Polish citizen. The legal status of children born through surrogacy is examined as well.

It should be noted that transcription of a foreign birth certificate is directly connected with the administrative procedure for confirmation of the acquisition of Polish citizenship and with the procedure for issuing Polish identity documents. Parents would usually submit an application for transcription in order to subsequently apply for the issuance of the passport, identity card, or national identification number for the child (PESEL number, Polish *Powszechny Elektroniczny System Ewidencji Ludności* — the General Electronic System of Population Registration).

This article consists of three main parts. The first one briefly examines the procedure of transcription of foreign birth certificates into the domestic register of civil status in Poland. Then, the practice of Polish administrative authorities and administrative courts in that matter is discussed. However, at this point, it should be emphasized that a significant change in the transcription cases was caused by the landmark resolution of seven judges of the Supreme Administrative Court (hereinafter: the SAC) adopted on 2 December 2019 (ref. no. II OPS 1/19). The court stated that the transcription of foreign birth certificate which indicates a same-sex couple as parents of the child is contrary to the fundamental principles of the Polish legal order.³ Due to the significance of this resolution, the second part of the article discusses the case law of Polish courts and the position of legal doctrine prior to the resolution having been passed, while the third part of the article is devoted to the resolution itself and its influence on Polish legal practice.

² M. Wojewoda: *Konstrukcje rodzinoprawne nieznanne prawu polskiemu a krajowa rejestracja zdarzeń z zakresu stanu cywilnego*. "Metryka" 2020, no. 2, p. 86.

³ Resolution of Supreme Administrative Court of 2 December 2019, ref. no. II OPS 1/19.

II. Registration of foreign civil status records in Polish law

The registration of civil status records is regulated by the Law on Civil Status Records (Polish *Prawo o aktach stanu cywilnego*).⁴ Pursuant to that act, registration of foreign civil status records was termed as transcription (Polish *transkrypcja*). Article 104 section 2 states that a foreign civil status record may be transferred into the Polish civil registry by means of transcription, which was defined as a “faithful and literal transfer of the content of a foreign civil status record both linguistically and formally, without any interference in the spelling of names and surnames of persons indicated in a foreign civil status record.” In addition, pursuant to Article 104 section 3, “a civil status record may be transcribed when it is recognized as a civil status document in the issuing country and has the force of an official document, was issued by a competent authority, and does not raise doubts as to its authenticity.” In accordance with the prevailing view, transcription has a reproductive nature, meaning that it results only in the reproduction of data included in a foreign civil status record, which had been previously registered abroad.⁵ Moreover, the process of transcription arises from administrative law, therefore it is governed entirely by internal regulations and does not involve the application of choice-of-law rules.⁶

In principle, when entering the particulars of a foreign civil status record, an administrative authority, the registrar, does not examine its merits. The registrar must only enter the data contained in the foreign civil status record to the register, therefore no formal decision is taken.⁷

⁴ Ustawa z dnia 28 listopada 2014 r. Prawo o aktach stanu cywilnego, consolidated text, Journal of Laws of the Republic of Poland of 2020, item 463 as amended. For the more detailed overview of the civil status registration in Poland, see: M. Wojewoda: *Surrogate motherhood and the civil status registration in Poland*. In: *Fundamental legal problems of surrogate motherhood. Global perspective*. Ed. P. Mostowik. Warszawa, Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2019, pp. 831 *et seq.*

⁵ The reproductive nature of transcription was also confirmed by the Supreme Court, see the resolution of seven judges of the Supreme Court of 20 November 2012, ref. no. III CZP 58/12; M. Wojewoda: in: *System Prawa Prywatnego. T. 20C: Prawo prywatne międzynarodowe*. Ed. M. Pazdan. Warszawa, C.H. Beck, 2015, pp. 592 *et seq.*

⁶ M. Wojewoda: *Surrogate motherhood and the civil status registration...*, p. 835. ; M. Pilich: *Mater semper certa est? Kilka uwag o skutkach zagranicznego macierzyństwa zastępczego z perspektywy stosowania klauzuli porządku publicznego* “Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego” 2018, vol. 16, pp. 10 *et seq.*

⁷ M. Wojewoda: *Surrogate motherhood and the civil status registration...*, p. 835.

There are, however, circumstances when registration may be declined. Article 107 of the Law on Civil Status Records provides three grounds for refusal of transcription. It states that the registrar refuses transcription of the foreign act if: “1) the document in the country of issue is not recognized as a civil status document, or is not certified as an official document, or was not issued by the competent authority, or raises doubts as to its authenticity, or confirms an event other than birth, marriage or death; 2) the foreign document was created as a result of transcription in a country other than the state of the event; 3) the transcription would be contrary to the fundamental principles of the legal order of the Republic of Poland.” Pursuant to this provision, the registrar must assess the formal issues of the foreign document, such as its authenticity, validity, whether it concerns birth, marriage, or death, and the fact that it was not created as a result of transcription in a country other than the state of the event. In addition to those formal issues, the Registrar must also assess whether the transcription is not contrary to the fundamental principles of the legal order. Therefore, the third ground for the refusal is the *ordre public* exception, an instrument that has its origin in private international law and international civil procedure.⁸ The public policy exception included in Article 107 point 3 of Law on Civil Status Records was recently invoked in cases of the registration of foreign birth certificates which indicated two persons of the same-sex as parents of a child, or birth certificates which did not indicate particulars of a mother in case of children born through surrogacy, and also in cases concerning the registration of same-sex marriages.

III. The legal situation before the resolution of the SAC of 2 December 2019 (ref. no. II OPS 1/19)

1. The practice of administrative authorities

The competent authority in the matter of transcription is a registrar (Polish *kierownik urzędu stanu cywilnego*). An application for registering a foreign birth certificate may be filled in any registry office. People residing abroad may also apply for the registration at a Polish embassy or

⁸ Ibidem, p. 836; M. Pilich: *Mater semper certa est?*..., p. 13.

consulate.⁹ The cases regarding the registration of foreign birth certificates in which the *ordre public* exception was applied had usually a very similar course of events so the general overview of those proceedings will be presented next. The facts of the vast majority of those cases may be summarized as follows. As already outlined, in principle, the registrar does not review the submitted birth certificate with regard to its merits but is obliged *inter alia* to assess whether the transcription would be contrary to the fundamental principles of the legal order. If the birth certificate indicates two persons of the same sex, namely, a “mother” (a woman who gave birth to the child) and another “parent”, who is a woman as well, or the birth certificate indicates two men as parents, the registrar will refuse to enter the birth certificate into the domestic register of civil status. Likewise, when a child was born through surrogacy treatment and a foreign birth certificate indicates that the mother of a child is “unknown” the registrar will refuse the transcription. It should be noted that the refusal of the transcription is in a form of an administrative decision issued by the registrar. The administrative decision may be reviewed by the second instance authority, the voivode (Polish *wojewoda*). If the voivode upholds the refusal decision, an applicant usually submits an appeal to the Regional Administrative Court (Polish *wojewódzki sąd administracyjny*, hereinafter RAC). Nevertheless, the administrative courts’ case law will be presented later as the grounds for refusal invoked by administrative authorities should be discussed first.

When it comes to cases concerning registration of a foreign birth certificate indicating same-sex parents, the administrative bodies consistently referred to Article 18 of the Polish Constitution which reads as follows: “marriage, being a union of a man and a woman, as well as the family, motherhood, and parenthood, shall be placed under the protection and care of the Republic of Poland.”¹⁰ According to the refusal decisions, by virtue of Article 18, a transcription of foreign birth certificate which indicates a same-sex couple as parents of a child is not allowed since the term “parents” always implies two people of the opposite sex.¹¹ Moreover, the fundamental principles of Polish family law included in the Family and Guardianship Code¹² (Polish *Kodeks Rodzinny i Opiekuńczy*), were

⁹ Article 104 section 4 and 4a of the Law on Civil Status Records.

¹⁰ English translation published at <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> (accessed: 31.05.2021).

¹¹ See e.g. judgment of the Supreme Administrative Court of 10 October 2018, ref. no. II OSK 2552/16, judgment of the Regional Administrative Court in Warsaw of 20 October 2016, ref. no. IV SA/Wa 1784/16.

¹² Ustawa z dnia 25 lutego 1964 r. Kodeks rodzinny i opiekuńczy, consolidated text, Journal of Laws of the Republic of Poland of 2020, item 1359.

also invoked. Article 61⁹ of that act provides that a mother of a child is a woman who gave birth to the child, without any exceptions to this rule. What is more, the determination of paternity depends on the previous determination of maternity and without any information about the mother of a child, the paternity of the man may be questioned. Also, regardless of the procedure for the determination of paternity, according to the Family and Guardianship Code, the term “father” always implies a male person.¹³ Furthermore, it was also emphasized that, according to Article 115 of the Family and Guardianship Code joint adoption is only possible by a married couple.¹⁴ Given the above, it was claimed that transcription of a birth certificate which indicates a same-sex couple is contrary to the Polish legal order because such transcription introduces misleading data to Polish registry since, according to the Polish law, a child always has two parents of the opposite sex — a mother (woman) and a father (man).¹⁵ The problem with the “technical” aspect of the transcription was also mentioned as a copy of a Polish birth certificate provides space for entering particulars of “mother” and “father” understood as persons of the opposite sex.¹⁶ Under the Law on Civil Status Records, a transcription is a faithful and literal transfer of the content of a foreign civil registration document so there is no possibility of transferring different data than those included therein. That is why it was impossible to indicate a woman as a “father” of a child.¹⁷

When it comes to birth certificates that as a result of surrogacy agreement did not indicate particulars of a mother, the authorities argued that the transcription of such a certificate would violate the fundamental principles of the legal order since Polish law does not allow creating a birth certificate without indicating particulars of the mother of a child.¹⁸ What

¹³ See e.g. judgment of Supreme Administrative Court of 11 February 2020, ref. no. II OSK 1330/17; judgment of the Regional Administrative Court in Gliwice of 6 April 2016, ref. no. II SA/Gl 1157/15; judgment of the Regional Administrative Court in Warsaw of 20 October 2016, ref. no. IV SA/Wa 1784/16.

¹⁴ See e.g. judgment of the Supreme Administrative Court of 10 October 2018, ref. no. II OSK 2552/16, judgment of the Regional Administrative Court in Gliwice of 6 April 2016, ref. no. II SA/Gl 1157/15.

¹⁵ See e.g. judgment of the Supreme Administrative Court of 10 October 2018, ref. no. II OSK 2552/16.

¹⁶ See e.g. judgment of the Supreme Administrative Court of 11 February 2020, ref. no. II OSK 1330/17.

¹⁷ See e.g. judgment of the Supreme Administrative Court of 10 October 2018, ref. no. II OSK 2552/16; judgment of Regional Administrative Court in Gliwice of 6 April 2016, ref. no. II SA/Gl 1157/15; judgment of the Regional Administrative Court in Warsaw of 20 October 2016, ref. no. IV SA/Wa 1784/16.

¹⁸ See judgment of the Supreme Administrative Court of 29 August 2018, ref. no. II OSK 2129/16.

is more, pursuant to the Family and Guardianship Code provisions, the surrogate mother (a woman who gave birth to the child) is always a legal mother of the child. In addition, lack of information about the mother calls into question the paternity of the man indicated on the birth certificate as the father.¹⁹ Also, according to the Family and Guardianship Code, waiver or deprivation of parental authority is possible only as a result of a decision of a court or as a consequence of the adoption of a minor.²⁰ Additionally, when it comes to surrogacy cases, the administrative authorities were highlighting that, according to Polish law, surrogacy contracts are void because a human is treated there as an object.²¹

2. The position of the legal doctrine

The refusal of transcription was criticized by the Polish Commissioner for Human Rights (Polish *Rzecznik Praw Obywatelskich*)²² and some legal scholars.²³ In fact, such a solution had been causing many complications on a daily basis for children raised by same-sex couples. Due to refusal of transcription, issuance of Polish identity documents was impossible because, in order to obtain identity documents, passport, and national identification number, the administrative authorities required prior transcription of foreign birth certificate.

It should be noted that pursuant to Article 34 of the Polish Constitution, “Polish citizenship shall be acquired by birth to parents being Polish citizens.” That rule was specified in the Law on Polish Citizenship (Polish *Ustawa o obywatelstwie polskim*).²⁴ Article 14 point 1 of that law

¹⁹ Ibidem.

²⁰ Ibidem.

²¹ Ibidem; judgment of the Supreme Administrative Court of 6 May 2015 r., ref. no. II OSK 2372/13.

²² See e.g. *Kolejne polskie dziecko ze związku jedнопłciowego bez prawa do dokumentu tożsamości. Skarga RPO do sądu* (5.11.2019), <https://www.rpo.gov.pl/pl/content/rpo-kolejne-dziecko-ze-zwiazku-jednopłciowego-bez-prawa-do-dokumentow> (accessed: 31.05.2021).

²³ See e.g. M. Zachariasiewicz: *Klauzula porządku publicznego jako instrument ochrony materialnoprawnych interesów i wartości fori*. Warszawa 2018, pp. 135 et. seq.; T. Tadla: *Glosa do wyroków Naczelnego Sądu Administracyjnego z dnia 10 i 30 października 2018 r. (sygn. akt: II OSK 1868/16, II OSK 1869/16, II OSK 1870/16, II OSK 2552/16)*. „Zeszyty Naukowe Sądownictwa Administracyjnego” 2019, vol. 3; P. Sadowski: *Gloss on the judgment of the Polish Supreme Administrative Court of 10 October 2018, II OSK 2552/16*. “Ius Novum” 2020, vol. 1; G. Krawiec: *Transkrypcja zagranicznego aktu urodzenia się dziecka osób tej samej płci pozostających w związku*. “Studia Prawnicze. Rozprawy i Materiały” 2019, vol. 2.

²⁴ Ustawa z dnia 2 kwietnia 2009 r. o obywatelstwie polskim, consolidated text, Journal of Laws of the Republic of Poland of 2020, item. 347.

reads as follows: “[...] a minor acquires Polish citizenship by birth if at least one parent is a Polish citizen.” The proper method of official confirmation of the acquisition of Polish citizenship is an application for confirmation of citizenship, submitted on the basis of the Law on Polish Citizenship.²⁵ It should be noted, however, that the legal parent-child relationship is determined within the meaning of the law applicable indicated by the choice-of-law rules. Therefore, depending on circumstances, the law applicable which determines the legal parent-child relationship may be Polish or foreign internal law.²⁶ In practice, in case of minors born abroad the fact that they are descendants of Polish citizens is usually confirmed by the foreign birth certificate. Parents submit the birth certificate documenting the birth abroad and indicating who the parents are according to the issuing state.²⁷

It should be noted that there were some obstacles not only to the transcription itself but also to the applications for confirmation of the acquisition of Polish citizenship, however, the latter issue is beyond the scope of this article.²⁸ Even though the children were Polish citizens by operation of law, the legal confirmation of that fact and the issuance of Polish identity documents was impossible.²⁹ Undoubtedly, such state of affairs was a detriment of the children’s best interest as they were unable to obtain recognition in Poland of parent-child relationships that had been legally established abroad. For this reason, they were deprived of their rights of Polish citizens.³⁰ As a consequence, they could not exercise their rights, namely, the right to protection of health, the right to education, the right to personal security, the right to free movement, and choice of place of residence.³¹ There is no doubt that it was contrary to the principle

²⁵ See Article 55 of the Law on Polish Citizenship.

²⁶ M. Pilich: *Mater semper certa est?...*, pp. 24 *et seq.*

²⁷ T. Tadla: *Glosa do wyroków Naczelnego Sądu Administracyjnego...*, p. 151.

²⁸ See: judgment of the Supreme Administrative Court of 6 May 2015, ref. no. II OSK 2372/13; judgment of the Supreme Administrative Court of 6 May 2015, ref. no. II OSK 2419/13. In Polish doctrine this problem was discussed in: P. Mostowik: *Problem obywatelstwa dziecka prawdopodobnie pochodzącego od obywatela polskiego niebędącego mężem surrogat mother. Uwagi aprobujące wyroki NSA z 6 maja 2015 r. (II OSK 237/13 oraz II OSK 2419/13)*. “Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego” 2018, vol. 16; M. Pilich: *Mater semper certa est?...*; A. Wysocka-Bar: *Nabyć polskiego obywatelstwa a urodzenie przez matkę zastępczą — uwagi na tle wyroków Naczelnego Sądu Administracyjnego z dnia 6 maja 2015 r.: II OSK 2372/13, II OSK 2419/13*. “Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego” 2018, vol. 16.

²⁹ M. Zachariasiewicz: *Klauzula porządku publicznego...*, p. 136.

³⁰ T. Tadla: *Glosa do wyroków Naczelnego Sądu Administracyjnego...*, p. 154.

³¹ *Ibidem*, p. 156.

of the best interest of the child enshrined in the Constitution³² and in the international law.³³ It was argued in the doctrine that a failure to enter the particulars of the second parent of the same sex where they could have been entered or other “technical” aspects of transcription cannot be acknowledged as the fundamental principles of the legal order, unlike the constitutional and international law provisions which require protection of, for example, children’s rights.³⁴

Furthermore, it was also claimed that pursuant to the established case law of the European Court of Human Rights (hereinafter: ECtHR), a refusal of transcription might have been also an infringement of Article 8 of the European Convention on Human Rights, particularly the right to respect for private and family life.³⁵ The judgments of ECtHR, such as *Labassée v. France*,³⁶ *Menesson v. France*³⁷, *Foulon and Bouvet v. France*³⁸, *Laborie v. France*³⁹ were cited by supporters of transcription.⁴⁰ These judgments concern the refusal of granting legal recognition to parent-child relationships legally established abroad between children born as a result of surrogacy treatment and their biological fathers. According to ECtHR: “[...] totally prohibiting the establishment of a relationship between a father and his biological children born following sur-

³² Article 72 of the Constitution of the Republic of Poland of 2 April 1997 which reads as follows “1. The Republic of Poland shall ensure protection of the rights of the child. Everyone shall have the right to demand of organs of public authority that they defend children against violence, cruelty, exploitation and actions which undermine their moral sense. 2. A child deprived of parental care shall have the right to care and assistance provided by public authorities. 3. Organs of public authority and persons responsible for children, in the course of establishing the rights of a child, shall consider and, insofar as possible, give priority to the views of the child. 4. The competence and procedure for appointment of the Commissioner for Children’s Rights shall be specified by statute.” English translation published at <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> (accessed: 31.05.2021).

³³ See e.g. Article 3 section 1 of the Convention on the Rights of the Child adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 which reads as follows “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” English version published at <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (accessed: 31.05.2021).

³⁴ G. Krawiec: *Transkrypcja zagranicznego aktu urodzenia...*, p. 8.

³⁵ M. Zachariasiewicz: *Klauzula porządku publicznego...*, pp. 139 *et seq.*; G. Krawiec: *Transkrypcja zagranicznego aktu urodzenia...*, pp. 10 *et. seq.*

³⁶ *Labassée v. France* (application no. 65941/11).

³⁷ *Menesson v. France* (application no. 65192/11).

³⁸ *Foulon and Bouvet v. France* (application no. 9063/14 and no. 10410/14).

³⁹ *Laborie v. France* (application no. 44024/13).

⁴⁰ See e.g. M. Zachariasiewicz: *Klauzula porządku publicznego...*, p. 139.

rogacy arrangements abroad was in breach of the Convention,” namely, right to respect for private life.⁴¹ It should be highlighted that in these cases the ECtHR emphasized the importance of the genetic link between the children and intended parents.⁴² In *Menesson v. France* case the ECtHR stated that, given the requirements of the child’s best interests and the reduced margin of appreciation, the legal parent-child relationship with the biological father should be recognized in domestic law.⁴³ Following this judgment, the French authorities acknowledged the parental link with the father.⁴⁴ However, those cases should be viewed in the light of the subsequent Advisory Opinion requested by the French Court of Cassation in *Menesson* case. In this opinion, the ECtHR stated that the legal parent-child relationship with the intended mother should be recognized as well, even if there is no genetic link between the child and the intended mother.⁴⁵ Nevertheless, it was also claimed that the recognition does not have to take the form of entry in the register and “another means, such as adoption of the child by the intended mother, may be used provided that the procedure laid down by domestic law ensures that it can be implemented promptly and effectively, in accordance with the child’s best interests.”⁴⁶

The impact of those judgments was widely discussed in the doctrine.⁴⁷ Undoubtedly, the aforementioned ECtHR jurisprudence influenced the

⁴¹ See press release of 26.06.2014 issued by the registrar of the ECtHR no. 185 (2014).

⁴² Cf. *Paradiso and Campanelli v. Italy* (application no. 25358/12) — the case where due to the absence of genetic link between both intended parents the child, the ECtHR did not recognize any family ties between them. According to the ECtHR a short *de facto* relationship was not sufficient to recognize family life.

⁴³ See paragraphs 100—103 of the *Menesson v. France* judgment.

⁴⁴ K. Trilha: *Surrogacy in the context of private international law? Cross-border effects of international reproductive agreements*. In: *Global Private International Law: Adjudication Without Frontiers*. Eds. H. Muir Watt, L. Bíziková, A. Brandão de Oliveira, D. P. Fernández Arroyo. Cheltenham—Northampton, Edward Elgar Publishing, 2019, p. 500.

⁴⁵ See paragraphs 46—47 of Advisory Opinion of the Grand Chamber of ECtHR concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother requested by the French Court of Cassation (Request no. P16-2018-001) 10 April 2019. Nevertheless, the advisory opinions of the ECtHR are not binding, see Article 5 of Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms.

⁴⁶ *Ibidem*, p. 13.

⁴⁷ See e.g.: K. Duden: *International Surrogate Motherhood — Shifting the Focus to the Child*. “Zeitschrift für Europäisches Privatrecht” 2015, no. 3; K. Trilha: *Surrogacy in the context of private international law?...*; D. Coester-Waltjen: *A case for harmonisation of private international law? Juggling between surrogacy, interests of a child and parent-hood*. In: *Global Private International Law...*; C. Fenton-Glynn: *International surrogacy before the European Court of Human Rights*. “Journal of Private International Law”

practice of the national courts in countries that prohibit surrogate motherhood. Nevertheless, the European jurisdictions seemed to present varied approaches towards the recognition of a legal-parent relationship in surrogacy cases. For instance, the German Supreme Court in the case of a same-sex couple (unlike in *Menesson* case where the intended parents were not a same-sex couple) recognized not only the genetic father but also his civil partner who was also indicated as a parent in the Californian judgment. A similar approach was presented in the Czech Republic where the Czech Supreme court recognized not only the parent-child relationship with respect to genetic father but also, as a result of a constitutional complaint lodged in the same case, the parent-child relationship of his male partner.⁴⁸ On the other hand, the Swiss Supreme Court recognized only the genetic father aside from the other intended parent.⁴⁹ In the case where there was no genetic link between the child and either of the intended parents, the Swiss Supreme Court refused the recognition of the foreign judgment in respect of both intended parents.⁵⁰

When it comes to the cases of children born through surrogacy arrangements, it should be emphasized that the question of recognition of the legal status of children born abroad must be distinguished from the legality of surrogacy itself. The discrimination or limitation of the rights of children born through surrogacy treatment cannot be caused by the fact that surrogacy agreements bring legal and ethical controversies.⁵¹ It was argued in the doctrine that in the event of the “post-birth perspective” a more flexible approach is advised so the family life of concrete individuals could be also protected.⁵² Furthermore, it was alleged that

2017, vol. 13, no. 3; P. Kinsch: *Enforcement as a fundamental right*. “Nederlands Internationaal Privaatrecht” 2014, no. 4; G. Puppinc, C. de La Hougue: *ECHR: Towards the Liberalisation of Surrogacy Regarding the Mennesson v France and Labassee v France cases (n°65192/11 & n°65941/11)*. “Revue Lamy de Droit Civil” 2014, vol. 118. The problem of surrogacy from an Italian perspective, see: M. Winkler, K. Trilha Schappo: *A Tale of Two Fathers*. “The Italian Law Journal” 2019, vol. 5, no. 1.

⁴⁸ D. Frintová, O. Frinta: *Surrogacy from the Czech perspective: “past the point of no return”*. In: *Fundamental legal problems of surrogate motherhood. Global perspective*. Ed. P. Mostowik. Warszawa, Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2019, pp. 704 *et seq.*

⁴⁹ D. Coester-Waltjen: *A case for harmonisation of private international law?...*, p. 506; K. Duden: *International Surrogate Motherhood...*, pp. 657—658.

⁵⁰ D. Coester-Waltjen: *A case for harmonisation of private international law?...*, p. 506.

⁵¹ *Amicus curiae* opinion of Helsinki Foundation for Human Rights on the request of French Court of Cassation no. P16-2018-001, p. 3, text available online at <https://www.hfhr.pl/wp-content/uploads/2019/02/Opinia-do-ETPC-w-sprawie-transkrypcji-aktow-urodzenia-dzieci-urodzonych-przez-surogatki.pdf> (accessed: 31.05.2021).

⁵² M. Wojewoda: *Surrogate motherhood and the civil status registration...*, pp. 847. See also: M. Pilich: *Mater semper certa est?...*, pp. 33 *et seq.*

the differences between domestic law and foreign law do not automatically imply that the fundamental principles of the legal order are violated. According to an established view of legal academics, the application of public policy exception requires the consideration of individual aftermath which may arise in a particular case as a result of applying the exception.⁵³ Disproportionate limitations of the rights of the child cannot be initiated by invoking the abstract concept of the fundamental principles of the legal order or the concept of “integrity of Polish system of registration of civil status.”⁵⁴ It was claimed that the Polish authorities, while applying the *ordre public* exception, should not ignore the individual consequences which may arise from the refusal of transcription and cause a serious problem with the legal status of the minors.⁵⁵

3. The question of obligatory transcription

Prior to proceeding with further discussion, it seems necessary to address the question of obligatory transcription in Polish law which is a crucial element of the discussed problem. According to Article 104 section 5 of the Law on Civil Status Records the transcription is obligatory if a Polish citizen indicated in a foreign civil status document has a Polish civil status document confirming previous events, which were drawn up in Poland and requests to perform actions concerning the civil registration or applies for a Polish identity document or a national identification number. There were two main views on how this statutory provision should be interpreted. According to the first interpretation, expressed not only in the doctrine⁵⁶ but also in an established line of judicial decisions,⁵⁷ a transcription is obligatory in order to obtain identity documents. It means that, without previous transcription, identity documents cannot be issued.

This view was also shared by the relevant administrative authorities as they were refusing the issuance of identity documents without previous transcription of a birth certificate. As a consequence, the legal

⁵³ G. Krawiec: *Transkrypcja zagranicznego aktu urodzenia...*, p. 8; M. Zachariasiewicz: *Klauzula porządku publicznego...*, p. 137, M. Wojewoda: *Surrogate motherhood and the civil status registration...*, p. 846.

⁵⁴ *Amicus curiae* opinion of Helsinki Foundation for Human Rights..., p. 7.

⁵⁵ M. Zachariasiewicz: *Transkrypcja aktów urodzenia dzieci par jedнопłciowych*. “*Studia Prawno-Ekonomiczne*” 2019, vol. 111, pp. 157 *et seq.*

⁵⁶ See e.g. M. Zachariasiewicz: *Klauzula porządku publicznego...*, p. 133.

⁵⁷ See e.g. judgment of the Supreme Administrative Court of 10 October 2018, ref. no. II OSK 2552/16.

status of the children raised by homosexual couples remained in a legal vacuum. Due to the fact that such children could not obtain Polish documents, they were not recognized as Polish citizens so indeed this situation caused a serious breach of their rights.

On the other hand, some legal scholars supported a different view, claiming that since transcription is impossible due to its inconsistency with the fundamental rules of the legal order, there is still an option to use foreign official documents (in that case foreign birth certificates) for relevant proceedings being conducted in Poland.⁵⁸ Article 1138 of the Code of Civil Procedure⁵⁹ states that “foreign official documents have the same probative value as Polish official documents.” That rule was confirmed by the resolution of seven judges of the Supreme Court of 20 November 2012 (ref. no. III CZP 58/12), which states that “a foreign civil status record is the sole proof of events recorded therein, even though it has not been entered into Polish civil registry.”⁶⁰ If the probative value of a foreign official document is the same as the Polish one, it may be submitted for relevant proceedings.⁶¹ That rule also applies to the document which the court found inadmissible to transcribe due to its inconsistency with the fundamental rules of the legal order, therefore it is allowed for an applicant to submit such foreign document to the relevant authorities. Owing to that interpretation, Polish identity documents could be issued.⁶² Nevertheless, administrative authorities did not follow that interpretation and were demanding from applicants to submit Polish (transcribed) birth certificate in proceedings concerning the issuance of identity documents.

4. Case law of administrative courts

Bearing in mind the previous remarks, the administrative courts' case law can be examined next. As already presented, the decisions-making bodies — registrars and voivodes, had been consistently refusing the

⁵⁸ P. Mostowik: *Problem rejestracji w polskich aktach urodzenia pochodzenia dziecka od „rodziców jedнопłciowych” na tle orzecznictwa sądów administracyjnych w 2018 r.* Warszawa 2019, p. 14, text available online at <https://iws.gov.pl/wp-content/uploads/2019/03/IWS-P.-Mostowik-problem-rejestracji.pdf> (last accessed: 31.05.2021).

⁵⁹ Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego, consolidated text, Journal of Laws of the Republic of Poland of 2020, item. 1575 as amended.

⁶⁰ *Amicus curiae* opinion of Helsinki Foundation for Human Rights..., p. 3.

⁶¹ M. Wojewoda: *Surrogate motherhood and the civil status registration...*, pp. 833 *et seq.*

⁶² P. Mostowik: *Problem rejestracji w polskich aktach urodzenia pochodzenia dziecka...*, p. 14.

transcription due to its inconsistency with the fundamental principles of the legal order in Poland. However, there was no coherence when it comes to the jurisprudence of administrative courts as some of them had started to support the separate view on the matter of obligatory transcription and also started to emphasize the principle of the best interest of the child. It should be noted that an administrative court of the first instance hears the case after the refusal of administrative authorities of two instances (first — the registrar, second — the voivode), whereas the second instance competent court is the Supreme Administrative Court (Polish *Naczelny Sąd Administracyjny*).

Nonetheless, initially, the courts' judgments were consistent in the view of the fact that the adjudicating panels agreed with the previous decisions of administrative authorities claiming that the refusal of transcription did not violate the law.⁶³ The reasons for judgments were similar to the previously discussed decisions of administrative authorities. The courts mainly referred to Article 18 of the Polish Constitution and the fundamental rules of the Polish family law included in the Family and Guardianship Code. What is more, courts also pointed out that transcription is a faithful and literal transfer of the content of a foreign civil registration document, so a change of any information included therein is unacceptable.

However, the previously prevailing standpoint was subsequently called into question. The first judgment which reversed the foregoing view and found the transcription admissible was the judgment of the RAC in Poznań of 5 April 2018 (ref. no. II SA/Po 1169/17). Afterwards, the new standpoint was expressed in a different case by the judgment of the Supreme Administrative Court (hereinafter SAC) of 10 October 2018 (ref. no. II OSK 2552/16). The reasons for judgments in both cases were similar. Undoubtedly, the new approach brought a significant change in Polish transcription case law but also caused divergence in this matter. Both judgments broke the impasse on the legal situation of minors raised by same-sex couples (or born by surrogate mother) as previous judgments did not allow the transcription, so as a consequence the issuance of a Polish identity card or a Polish passport was impossible.

⁶³ See e. g. judgment of the Regional Administrative Court in Kraków of 10 May 2016, ref. no. III SA/Kr 1400/15; judgment of the Regional Administrative Court in Gliwice of 6 April 2016, ref. no. II SA/Gl 1157/15; judgment of the Regional Administrative Court in Warsaw of 18 May 2016, ref. no. IV SA/Wa 581/16; judgment of the Regional Administrative Court in Warsaw of 20 October 2016, ref. no. IV SA/Wa 1784/16; judgment of the Regional Administrative Court in Warsaw of 14 April 2016, ref. no. IV Sa/Wa 182/16; judgment of the Regional Administrative Court in Warsaw of 18 May 2016, ref. no. IV SA/Wa 581/16.

In the first case, reviewed by the RAC in Poznań, the birth certificate indicated two women as parents of the minor. Although the applicant requested the transcription of the particulars of only one parent (the biological mother) indicated in the foreign birth certificate, the administrative organs had refused on the grounds that, *inter alia*, a transcription is “a faithful and literal transfer of the content of a foreign civil registration document” so no particulars should be omitted.⁶⁴ The RAC ruled that the transcription in that particular case is not contrary to the fundamental principles of the legal order. The adjudicating panel pointed out that the interpretation of statutory provisions should be pro-constitutional, in accordance with binding international law and with the axiological grounds of these laws. It was underlined that due to the obligatory transcription regulated in Article 104 section 5 of the Law on Civil Status Records, the refusal of transcription implies the impossibility of obtaining Polish documents (passport, identity document) and national identification number. For this reason, the denial of transcription meant in fact that the constitutional rights, namely the access to the Polish education system or Polish healthcare system, were very limited. What is more, a Polish citizen who does not possess any travel document cannot go abroad. Indeed, the situation when a Polish citizen cannot obtain identity documents results in a serious violation of rights.

According to the court’s standpoint, interpretation of law which implies the denial of registering foreign birth act is inadmissible. First and foremost, it causes a serious breach of children’s rights while in cases involving children, the child’s best interest should be paramount. If a minor has citizenship of another country, that interpretation leads to the deprivation of access to Polish healthcare and education systems, but when a child is not a citizen of any other country a risk of statelessness occurs. Furthermore, the court underlined that a Polish citizen has a right to obtain Polish documents but at the same time obtaining an identity card document is mandatory. In conclusion, the RAC ruled that taking into account the principle of best interests of the child, the transcription in that particular case is allowed, so as a result, the previous administrative decisions were quashed.⁶⁵

A similar approach was adopted in the judgment of the SAC of 10 October 2018 (ref. no. II OSK 2552/16). The judges ruled that fundamental values and public order cannot justify the denial of transcribing a foreign birth certificate to the Polish civil registry, even if the foreign birth certifi-

⁶⁴ See judgment of Regional Administrative Court in Poznań of 5 April 2018, ref. no. II SA/Po 1169/17.

⁶⁵ *Ibidem*.

icate indicates that the child has same-sex parents. However, the decision of SAC was justified in a slightly different way. The judges did not question the legitimacy of an application of the public order exception in case of same-sex relationships in Polish legal order in general but underlined the “exceptional” nature of *ordre public* exception. The adjudicating panel pointed out that the public order exception has to be applied narrowly. It means that the consequences which may occur for each individual situation as a result of an application of that measure have to be taken into account.

Furthermore, the SAC stated that in the reviewed case the key point is the necessity of transcription with the aim of obtaining Polish documents. It was pointed out that the Law on Civil Status Records makes a distinction between an obligatory transcription and optional transcription. According to the interpretation of the adjudicating panel, in case of the obligatory transcription, the grounds for refusal of transcription stated in Article 107 point 3 cannot be applied because as a result, a Polish citizen is deprived of the right to obtain the Polish documents. Therefore the differentiation implemented by the legislator was made on purpose and it implies that the registrar cannot refuse transcription in such circumstances.⁶⁶ What is more, the SAC indicated that the refusal of transcription was not only contrary to the statute but it was also a serious infringement of children’s rights enshrined in the Constitution and international conventions such as the United Nations Convention on the Rights of the Child. Underscoring the role of the system of international protection of children’s rights, the SAC referred to ECtHR judgments in cases *Menesson v. France* and *Labassée v. France*.⁶⁷ Based on them, the adjudicating panel decided that the obligation of transcription in order to protect the children’s rights is not contrary to the fundamental principles of the Polish legal order.

The new approach of court jurisprudence expressed in the aforementioned judgments was approved by some legal scholars and commentators. It was stated that the new approach satisfies the standard of protecting the best interest of the child enshrined in the Constitution together with national and international law and breaks the deadlock on the legal situation of children raised by same-sex couples within the Polish legal system.⁶⁸

⁶⁶ See judgment of the Supreme Administrative Court of 10 October 2018, ref. no. II OSK 2552/16.

⁶⁷ *Ibidem*.

⁶⁸ See e.g. T. Tadla: *Glosa do wyroków Naczelnego Sądu Administracyjnego...*, p. 158; G. Krawiec: *Transkrypcja zagranicznego aktu urodzenia...*, p. 8; P. Sadowski: *Gloss on the judgment...*, p. 187; M. Zachariasiewicz: *Transkrypcja aktów urodzenia dzieci par jedнопłciowych...*, pp. 157 *et seq.*

Nevertheless, the opposite standpoint was also expressed as some legal scholars did not support the point of view revealed in the above-presented rulings.⁶⁹ The critics of the SAC judgment (ref. no. II OSK 2552/16) pointed out that the SAC misinterpreted the relation between obligatory transcription and the grounds for its refusal.⁷⁰ It was claimed that the application of the public policy exception cannot be excluded in the event of obligatory transcription since the *ordre public* exception is a general legal measure that serves the protection of the fundamental principles of the legal order.⁷¹ Furthermore, the SAC should have differentiated the administrative proceedings mentioned in the judgment, namely the transcription procedure from the procedure for issuing documents (identity card or passport).⁷² Also, it was underlined that the obligatory transcription stated in Article 104 section 5 of the Law on Civil Status Records *de facto* means an increased probative requirement for the purpose of subsequent administrative proceedings, for example, the procedure for issuing an identity card. The obligatory transcription was supposed to simplify those procedures in terms of information requirements.⁷³ It means that the transcription of a foreign birth act is not necessary in order to obtain Polish documents because a foreign birth certificate is the sole proof of events recorded therein, even though it was not entered into the Polish civil registry, as it has the same probative value as a Polish one. During the proceedings for issuing identity documents, which should be considered as entirely separate administrative procedures, the fact that a child has obtained Polish citizenship by operation of law may be confirmed solely on the basis of a foreign birth certificate.⁷⁴ So, according to some legal scholars, since there was no need for transcription, the measures taken by the SAC were disproportionate, as the problem could have been solved without interfering with the fundamental principles of the Polish legal order.⁷⁵

Similarly, when it comes to surrogacy jurisprudence, the best interests of the child had started to prevail over the abstract notion of the fundamental principles of the legal order. The judgment of 29 August

⁶⁹ See P. Mostowik: *Glosa do wyroku Naczelnego Sądu Administracyjnego z dnia 10 października 2018 r. (sygn. akt. II OSK 2552/16)*. "Zeszyty Naukowe Sądownictwa Administracyjnego" 2019, vol. 4., pp. 136 *et seq.*; P. Mostowik: *Problem rejestracji w polskich aktach urodzenia pochodzenia dziecka...*, pp. 12 *et seq.*

⁷⁰ P. Mostowik: *Glosa do wyroku Naczelnego Sądu Administracyjnego z dnia 10 października 2018 r...*, p. 137.

⁷¹ *Ibidem*, p. 142.

⁷² *Ibidem*, p. 143.

⁷³ *Ibidem*.

⁷⁴ *Ibidem*.

⁷⁵ *Ibidem*, p. 136.

2018 (ref. no. II OSK 2129/16) regarding the refusal of transcription of a birth certificate of a child born by a surrogate mother and the judgments of 30 October 2018 concerning the refusal of confirmation of the acquisition of Polish citizenship acquired by birth after the father (ref. no. II OSK 1868/16, ref. no. II OSK 1869/16, ref. no. II OSK 1870/16, ref. no. II OSK 1871/16) were based on similar axiological justification as the aforementioned judgments of 5 April 2018 (ref. no. II SA/Po 1169/17) and 10 October 2018 (ref. no. II OSK 2552/16) as the child's best interest was the top priority.⁷⁶

In the surrogacy cases, the SAC did not call into question the inconsistency of surrogacy contracts as there is no doubt that under Polish law such contracts are void. However, the court underlined that the transcription of a birth certificate of a child born by a surrogate mother does not lead to the legalization of surrogacy contracts but only serves to confirm the paternity of the biological father.⁷⁷ Similarly, in another case, which concerned the refusal to recognize legal effects of a foreign birth certificate with the object of the confirmation of acquisition Polish citizenship, the SAC stated that the most important thing is the fact that “a human being with inherent and inalienable dignity was born.”⁷⁸ A child has a right to Polish citizenship, inasmuch as at least one parent is a Polish citizen, so the fact that a child was born by a surrogate mother is irrelevant.⁷⁹

5. Enforcement of the judgments

The contentious question was the enforcement of the judgments which acknowledged the transcription as admissible. On the one hand, partial transcription was advised, but on the other, it was claimed that transcription is “a faithful and literal transfer,” so the content of a birth certificate cannot be changed.

According to the suggestion of RAC in Poznań (judgment ref. no. II SA/Po 1169/17), the administrative authorities should transcribe the for-

⁷⁶ T. Tadla: *Glosa do wyroków Naczelnego Sądu Administracyjnego...*, p. 152

⁷⁷ See judgment of the Supreme Administrative Court of 29 August 2018, ref. no. II OSK 2129/16.

⁷⁸ *Ibidem*.

⁷⁹ See judgments of the SAC ref. no. II OSK 1868/16, ref. no. II OSK 1869/16, ref. no. II OSK 1870/16, ref. no. II OSK 1871/16. This approach was subsequently approved by legal scholars, see J. Jagielski: *Kwestia obywatelstwa polskiego osoby, w której akcie urodzenia jako rodzice wskazane są osoby jedнопłciowe, z których jednej przypisane jest obywatelstwo polskie. Glosa do wyroku NSA z dnia 30 października 2018 r., II OSK 1868/16*. “*Orzecznictwo Sądów Polskich*” 2020, vol. 2, pp. 25–26.

eign birth certificate only in terms of the biological mother while the entry which indicates a father should be left empty. Also, the note about obligatory transcription should be made.⁸⁰ This solution is called “the partial transcription.” The court pointed out that the transcription usually cannot be “a faithful and literal transfer of the content of a foreign civil registration document,” since the particulars required in Polish civil registration documents are diverse.⁸¹ For example, a Polish birth certificate does not contain information about the occupation of parents, whereas its British counterpart does. That “additional” information, insignificant from the Polish perspective, is just skipped over during the process of transcription. A similar situation occurs when a foreign birth certificate contains data that cannot be transcribed such as a woman’s particulars in the “father” entry, since according to Polish law only a male’s particulars can be entered in the “father” entry.⁸²

Furthermore, the court pointed out that such solution will not be misleading, given the rules of drawing up birth certificates envisaged by the Law on Civil Status Records. According to Article 61 section 2, “if the paternity has not been established by the acknowledgement of paternity or by virtue of a court judgment, the birth certificate shall include the father’s name as the name indicated by the person reporting the birth, and in the absence of such indication, the father’s name shall be the name chosen by the registrar; the father’s surname and his family name are the mother’s surname at the time of the child’s birth, with a note that the mother’s name and the chosen first name are entered as the father’s data.” This exceptional regulation is an exemption to the rule of objective truth as it enables to enter fictitious parent’s particulars in a birth certificate in certain circumstances.⁸³ Due to this regulation, Polish birth certificates cannot contain the entry “father unknown”. In Polish doctrine, this solution is called “overshadowing data” or “covering data” (Polish *dane przesłaniające*).⁸⁴ However, given the reproductive nature of transcription, it is questioned in the doctrine whether the concept of “overshadowing data” should be applied when transcribing foreign birth certificates.⁸⁵

⁸⁰ Judgment of Regional Administrative Court in Poznań of 5 April 2018, ref. no. II SA/Po 1169/17.

⁸¹ Ibidem.

⁸² Ibidem.

⁸³ See R. Łukasiewicz: *Dane przesłaniające w akcie urodzenia dziecka w świetle najnowszego orzecznictwa NSA — potencjalne wyzwania i zmiany prawa*. “Prawo w działaniu. Sprawy cywilne” 2020, vol. 42.

⁸⁴ J. Pawliczak: *Dane przesłaniające — nieustalenie ojcostwa*. “Metryka” 2020, no. 1, s. 62

⁸⁵ Ibidem, p. 51.

The partial transcription suggested by the RAC in Poznań was believed to be the solution that could have enabled obtaining Polish identity documents. Subsequently, however, the partial transcription was called into question. It was argued that it does not fully safeguard the rights of the child and might interfere with the child's right to protection of family life and identity.⁸⁶ The opponents of partial transcription underlined that the concept of family should not be limited only to the persons connected by genetic ties.⁸⁷ What is more, lack of recognition of the legal parent-child relationship with the second parent causes that they would not formally exercise parental authority over the child, which might bring various difficulties. For instance, there might be problems with entering the territory of a country that do not recognize such legal parentage when a child travels only with a non-recognized parent or there might be problems with accessing a child's medical data. Moreover, the lack of recognition of the legal parent-child relationship between them might have an impact on their situation in civil law, especially in the sphere of inheritance law.⁸⁸ The transcription of full details helps to avoid "limping" parentage relationships, which means a situation when one of the parents is legally recognized by the Polish (or other) state but the other parent is not. It causes unnecessary differentiation in terms of civil status (different filiation relationships) in various countries.⁸⁹

The judgment of SAC (ref. no. II OSK 2552/16) did not specify the precise way of its execution. Nonetheless, the court mentioned that Article 104 of the Law on Civil Status Records states that transcription is "a faithful and literal transfer of the content of a foreign civil registration document" and that is why it is forbidden to change its content.⁹⁰ It claimed that the court did not determine how the authorities should register the birth certificate⁹¹ but eventually, in that particular case, the birth certificate was transcribed only partially. The "mother" entry was filled with particulars of the biological mother, while the "father" entry was left blank. However, the particulars of the second parent (second

⁸⁶ *Amicus curiae* opinion of Helsinki Foundation for Human Rights..., pp. 8 *et seq.*

⁸⁷ *Ibidem*, p. 1.

⁸⁸ *Ibidem*, p. 9.

⁸⁹ D. Gruenbaum: *Foreign Surrogate motherhood: mater semper certa erat*. "The American Journal of Comparative Law" 2012, vol. 60, no. 2, pp. 500 *et seq.*; M. Zachariasiewicz: *Klauzula porządku publicznego...*, pp. 138 *et seq.*

⁹⁰ See judgment of the Supreme Administrative Court of 10 October 2018, ref. no. II OSK 2552/16.

⁹¹ M. Zachariasiewicz: *Transkrypcja aktów urodzenia dzieci par jednopłciowych...*, p. 159; M. Wojewoda: *Zagraniczne rodzicielstwo osób jednej płci a rejestracja stanu cywilnego w Polsce — glosa do uchwały Naczelnego Sądu Administracyjnego (7) z 2.12.2019 r., II OPS 1/19*. "Europejski Przegląd Sądowy" 2020, vol. 8 (sierpień), p. 31.

woman) were written into the annotation part of the register.⁹² According to the judgment of 29 August 2018 rendered by the SAC (ref. no. II OSK 2129/16) partial transcription may also be applied in the case of children born by a surrogate mother. In case when a foreign birth certificate indicates only the particulars of the father while the mother remains “unknown” it is admissible to transcribe a certificate without the mother’s particulars.⁹³

IV. The legal situation after the resolution of the Supreme Administrative Court of 2 December 2019 (ref. no. II OPS 1/19) was adopted

1. The reasoning of the SAC

Undoubtedly, the issue of transcription had been causing doubts and divergence in the jurisprudence, as some judgments did not allow transcription while the others found transcription admissible. In the event of such discrepancies, it is possible to formulate a legal question to the SAC in order to settle the problematic matter by a resolution of the judges of the SAC.⁹⁴ It should be emphasized that, according to the Law on Proceedings before Administrative Courts, a resolution adopted by a panel of seven judges is binding not only in the case to which it relates, but also for other administrative courts.⁹⁵

The significant change in the transcription case law was caused by the landmark resolution of seven judges adopted on 2 December 2019 (ref. no. II OPS 1/19). The resolution was taken due to the request of the panel of judges of the SAC who were reviewing the cassation complaint

⁹² See the information included in the resolution of SAC of 2 December 2019, ref. no. II OPS 1/19; cf. judgment of Regional Administrative Court in Kraków of 4 June 2019, ref. no. III SA/Kr 233/19.

⁹³ See judgment of the Supreme Administrative Court of 29 August 2018, ref. no. II OSK 2129/16.

⁹⁴ See Article 187 section 1 of the Law on Proceedings before Administrative Courts, Ustawa z dnia 30 sierpnia 2002 r. Prawo o postępowaniu przed sądami administracyjnymi, consolidated text, Journal of Laws of the Republic of Poland of 2019, item. 2325 as amended.

⁹⁵ Article 187 section 2 and Article 269 of the Law on Proceedings before Administrative Courts.

in the case concerning the transcription of the British birth certificate which indicated two women as parents of the child (both women were Polish citizens). One of them was a biological mother of a child.

The adjudicating panel held that the registration of foreign birth certificate which indicates a same-sex couple as parents of the child is inadmissible because the consequences of transcription would be contrary to the fundamental principles of the legal order of the Republic of Poland. The SAC shared the aforementioned views of the opponents of transcription expressed in the doctrine and in the jurisprudence.⁹⁶

First of all, the adjudicating panel shared the view that there should not be any difference between a foreign birth certificate and its Polish transcription, especially when it comes to the wording and functions of particulars of the birth certificate.⁹⁷ The court pointed out that, according to Polish law (Article 61 section 2 of the Law on Civil Status Records), omitting particulars of one parent is inadmissible, therefore the “father” entry cannot be left blank.⁹⁸ By doing so, the SAC rejected the previous interpretation on the admissibility of partial transcription in Polish law. Additionally, the adjudicating panel referred to Article 18 of the Polish Constitution as well as to the fundamental rules of Polish family law concluding that, according to Polish law, only man and woman shall be indicated in a birth certificate as parents of the child, otherwise the coherency of Polish legal order would be endangered.⁹⁹

Nevertheless, the SAC shared an entirely different view on the obligatory transcription. The court rejected the standpoint, previously expressed by SAC in the judgment (II OSK 2552/16), which stated that in the case of obligatory transcription the *ordre public* exception cannot be applied.¹⁰⁰ Although the transcription cannot be done due to its inconsistency with fundamental principles, the SAC pointed out that the acquiring of Polish citizenship is not dependent upon transcription of birth certificate, since the citizenship was acquired by operation of law because the biological mother of the minor is a Polish citizen. The obligatory transcription creates only an “increased probative value requirement” for proceedings enumerated in Article 104 section 5 (application for Polish identity documents or a national identification number).

⁹⁶ See P. Mostowik: *Glosa do wyroku Naczelnego Sądu Administracyjnego z dnia 10 października 2018 r...*, pp. 136 *et seq.*; P. Mostowik: *Problem rejestracji w polskich aktach urodzenia pochodzenia dziecka...*, pp. 12 *et seq.*

⁹⁷ Resolution of SAC of 2 December 2019, ref. no. II OPS 1/19, see reasons for resolution, point 3.

⁹⁸ See reasons for resolution, point 4.

⁹⁹ See reasons for resolution, point 7.

¹⁰⁰ See reasons for resolution, point 6.

Nevertheless, the “increased probative value requirement” does not affect the rule which states that foreign official documents have the same probative value as Polish official documents. As confirmed in the resolution of seven judges of the Supreme Court of 20 November 2012 (ref. no. III CZP 58/12), it also applies in case of transcription as a foreign birth certificate “is the sole proof of events recorded therein, even though it has not been entered into the Polish civil registry.”¹⁰¹ It means that the fact that a child is a Polish citizen may be confirmed solely by a foreign birth certificate and there is no need for an obligatory transcription. Although transcription is advantageous because it results in the issuing of a Polish copy of the birth certificate, in cases when the transcription is contrary to the public order it is allowed to make use of the foreign birth certificate. The requirement to use a Polish birth certificate has a purely pragmatic justification due to the fact that the original foreign act may not contain all the necessary data, its translation may be dubious or it will be necessary to make other assessments, which may be problematic during the procedure for issuing a passport or identity card.¹⁰²

The court underlined that every Polish citizen has the right to receive documents confirming the identity and citizenship of the Republic of Poland. For that reason, the issuance of such a document should not be subject to additional formal requirements, such as submitting a Polish birth certificate.¹⁰³ It means that the inadmissibility of transcription does not automatically imply the inability to obtain a Polish passport, identity card, or national identification number. In cases where a child’s citizenship is unquestionable and a birth certificate transcription meets with difficulties (such as its inconsistency with the fundamental principles of legal order in Poland), the requirement of obligatory transcription should not be considered as a mandatory provision of law.¹⁰⁴ Therefore, if decision-making bodies refuse to issue required documents, it is necessary to appeal against such decision in relevant proceedings (e.g. the procedure for issuing a passport).

What is more, the court stated that the refusal of transcription due to its inconsistency with the fundamental principles of the legal order does not imply the breach of constitutional and international duty of taking into account the best interests of the child. The adjudicating panel referred to the ECtHR case law arguing that there is no general obliga-

¹⁰¹ Ibidem.

¹⁰² M. Wojewoda: *Zagraniczne rodzicielstwo osób jednej płci a rejestracja stanu cywilnego w Polsce...*, p. 33.

¹⁰³ Ibidem, p. 33; reasons for resolution, point 8.

¹⁰⁴ M. Wojewoda: *Zagraniczne rodzicielstwo osób jednej płci a rejestracja stanu cywilnego w Polsce...*, pp. 33—34; for reasons for resolution, see point 8.

tion of transcribing the birth certificates if there are other possibilities to acknowledge legal parentage. In that case, the fact that the child acquired Polish citizenship by operation of law may be confirmed solely by a foreign birth certificate. Therefore, it is admissible to submit a foreign birth certificate for relevant legal proceedings (e.g. issuance of a passport) without prior transcription. That solution enables to confirm the legal parentage and permits to obtain relevant identity documents.¹⁰⁵

Furthermore, the court pointed out that the refusal of transcription itself does not imply the breach of the freedom of movement enshrined in EU treaties. The court agreed that the freedom of movement would be endangered if the authorities refused to issue an identity document or a passport. Nonetheless, the freedom of movement is not dependent upon having a transcribed birth certificate, but upon possessing an identity document that confirms the citizenship of one of the Member States of the EU, whereas that particular case involved only the refusal of transcription.¹⁰⁶

As already stated, the adopted resolution is binding not only in that particular case,¹⁰⁷ therefore in similar cases judges generally have to follow the standpoint expressed in the resolution of the seven judges panel, hence a change of view in that matter should not be expected in the near future.¹⁰⁸ Nevertheless, it is still possible, for if another panel of judges has a different point of view, it may request adapting a new resolution on the same matter. It shows that the question of transcription is not, however, definitely answered.¹⁰⁹

¹⁰⁵ M. Wojewoda: *Zagraniczne rodzicielstwo osób jednej płci a rejestracja stanu cywilnego w Polsce...*, p. 36; point 9.

¹⁰⁶ Reasons for resolution, point 10.

¹⁰⁷ See Article 187 section 2 of the Law on Proceedings before Administrative Courts. See also judgment of the Supreme Administrative Court of 11 February 2020, ref. no. II OSK 1330/17 where the court was obliged to follow the standpoint expressed in the resolution; therefore the cassation complaint was dismissed and transcription was refused.

¹⁰⁸ See e.g.: judgment of the Regional Administrative Court in Lodz of 5 February 2020, ref. no. III SA/Łd 617/19; judgment of the Regional Administrative Court in Szczecin of 19 March 2020, ref. no. II SA/Sz 1075/19 (the refusal of transcription of a birth certificate which indicates same-sex couple); judgment of the Supreme Administrative Court of 10 September 2020, ref. no. II OSK 1390/18 (the refusal of transcription of a birth certificate of a child born by a surrogate mother).

¹⁰⁹ See: A. Wysocka-Bar: *Same-sex parentage and surrogacy and their practical implications in Poland*, Conflictoflaws.net (12.02.2020), <https://conflictflaws.net/2020/same-sex-parentage-and-surrogacy-and-their-practical-implications-in-poland/> (accessed: 31.05.2021).

2. The impact of the resolution

The resolution of 2 December 2019 was widely discussed. Some of the authors fully approved the new approach.¹¹⁰ Michał Wojewoda described it as a “conservative standpoint” and expressed cautious endorsement concluding that on the matter at hand, the application of *ordre public* exception is sufficiently justified.¹¹¹ Opposite and more critical opinions on the resolution were also expressed.¹¹² For instance, the lawyers from the Commissioner for Human Rights Office remarked that “the SAC had the opportunity to significantly improve the legal situation of many Polish citizens, whose rights were limited only because same-sex parents are indicated in their foreign birth certificates. Meanwhile, the adopted resolution does not prioritize the best interests and rights of the child but transfers to the citizen the burden of demanding legal protection.”¹¹³

The question is whether the decision-making bodies (the registrars and the voivodes) will follow the standpoint expressed in the resolution. It should be noted that, in practical terms, despite the resolution, the administrative authorities still have been demanding to submit Polish (transcribed) birth certificate in order to issue identity documents and national identification number. Given the above, the Commissioner for Human Rights demanded an explanation from respective ministers. First of all, he requested from the Minister of Internal Affairs and Administration the amendment to the relevant regulations to make explicit that there is no need to submit a transcribed birth act. Moreover, he demanded information about whether the ministry is to issue appropriate recommendations or guidelines for administrative authorities to unify the conduct in that matter.¹¹⁴ The Ministry of Digital Affairs was also

¹¹⁰ P. Mostowik: *O żądaniach wpisu w polskim rejestrze stanu cywilnego zagranicznej fikcji prawnej pochodzenia dziecka od “rodziców jedнопłciowych”*. “Forum Prawnicze” 2019, no. 6, pp. 24 *et seq.*

¹¹¹ M. Wojewoda: *Zagraniczne rodzicielstwo osób jednej płci a rejestracja stanu cywilnego w Polsce...*, p. 35.

¹¹² See e.g.: K. Mendecka: *Born to Polish same-sex parents — a case study. A human rights perspective on birth certificate transcriptions*. “Acta Iuris Stetinensis” 2020, vol. 32 no. 4, pp. 46 *et seq.*; J. Pawliczak: *Odmowa transkrypcji zagranicznego aktu urodzenia dziecka, w którym jako rodziców wskazano dwie kobiety. Głosa do uchwały NSA z 2.12.2019 r., II OPS 1/19*. “Państwo i Prawo” 2021, vol. 1, pp. 154—155.

¹¹³ *Transkrypcja zagranicznego aktu urodzenia dziecka rodziców tej samej płci jest niedopuszczalna — uchwała 7 sędziów NSA z 2 grudnia 2019 r. (2.12.2019)*, <https://www.rpo.gov.pl/pl/content/NSA-transkrypcja-zagranicznego-aktu-urodzenia-dziecka-rodzicow-tej-samej-plci-niedopuszczalna> (accessed: 31.05.2021).

¹¹⁴ *Dzieci ze związków osób jednej płci wciąż bez prawa do polskich dokumentów. RPO pisze do MSWiA i MSZ (18/03/2020)* <https://www.rpo.gov.pl/pl/content/rpo-dzieci-ze-zwiazkow-osob-jednej-plci-bez-prawa-do-polskich-dokumentow> (accessed: 31.05.2021).

asked about the problems with issuing national identification number. In response, the Ministry of Digital Affairs pointed out that, according to the interpretation indicated in the latest resolution of SAC, the administrative authorities cannot demand from applicants to submit a transcribed birth certificate and refuse the issuance of documents if such condition is not met. Notwithstanding the “technical difficulties” of electronic registers, the respective authorities should follow the interpretation of SAC and issue identity documents and national identification number. Especially, while issuing an identity card in such circumstances, the particulars of the second parent should be omitted.¹¹⁵

It should be noted that the RAC in Kraków has recently submitted the preliminary question to the Court of Justice of the European Union.¹¹⁶ The preliminary question reads as follows: “Should Article 21(1) in connection with Article 20(2)(a) of the Treaty on the Functioning of the EU in connection with Article 7, Article 21(1), and Article 24(2) of the EU Charter of Fundamental Rights be interpreted in such a way that it precludes the authorities of an EU Member State, whose nationality a child holds, from objecting to the transcription of the birth certificate issued in another Member State, indispensable for the issuance of the identity card of the Member State of the child’s nationality, on the ground that its national law does not provide for same-sex parentage, whereas the birth certificate indicates persons of the same sex as parents?”¹¹⁷ As of the day of writing the present article, this case (C-2/21) is still pending and both the opinion and the judgment are awaited, however, there is no doubt that the standpoint of the CJEU will have a significant impact on Polish jurisprudence. Furthermore, it should be emphasized that there is a striking resemblance between the aforementioned case and the case *C-490/20 V.M.A. v Stolichna obshtina, rayon Pancharevo*,¹¹⁸ also pending

¹¹⁵ *PESEL i polski dokument dla dzieci z zagranicznym aktem urodzenia ze związków osób jednej płci. Odpowiedź Ministra Cyfryzacji* (7.09.2020), <https://www.rpo.gov.pl/pl/content/mc-o-peselu-dowodzie-dla-dzieci-z-zagranicznym-aktem-urodzenia-w-zwiazku-jednoplciowym> (last accessed: 31.05.2021). More flexible and open approach is also advised in the doctrine, see: M. Wojewoda: *Konstrukcje rodzinoprawne nieznanie prawu polskiemu a krajowa rejestracja zdarzeń z zakresu stanu cywilnego*. “Metryka” 2020, no. 2, pp. 98—99.

¹¹⁶ *WSA zadał TSUE pytanie prejudycjalne w sprawie ze skargi RPO. Szansa na poprawę sytuacji prawnej dzieci, których rodzice są tej samej płci* (10.12.2020), <https://www.rpo.gov.pl/pl/content/rpo-pytanie-prejudycjalne-ws-dzieci-ktorych-rodzice-sa-jednej-plci> (accessed: 31.05.2021).

¹¹⁷ English translation published at: A. Wysocka-Bar: *Polish Court Asks the CJEU to Rule on the Status of Children Born to Same-Sex Couples*, The EAPIL Blog (16/12/2020) <https://eapil.org/2020/12/16/polish-court-asks-the-cjeu-to-rule-on-the-status-of-children-born-to-same-sex-couples/> (last accessed: 31.05.2021);

¹¹⁸ Case *V.M.A. v Stolichna obshtina, rayon ‘Pancharevo’*, C-490/20, ECLI:EU:C:2021:296.

before the CJEU. The C-490/20 case also pertains the refusal by Bulgarian authorities to register the birth certificate in which two married women are designated as “mothers” of the child. It should be noted that according to Bulgarian law a birth certificate is necessary for the issuing of a Bulgarian identity document, therefore the refusal of issuing of a birth certificate was the reason that the effective exercise of the child’s right to freedom of movement was endangered.

A certain point of reference may be the recent Advocate General’s Opinion on this case, as the judgment of the CJEU has been not delivered yet.¹¹⁹ According to Advocate General Juliane Kokott, a Member State is required to recognize the family relationships for the purposes of the exercise of the rights conferred on European Union citizens by secondary EU law on the free movement of citizens. Therefore, a Member State is required to issue an identity document and the necessary travel documents referring to both women as parents of that child, even if the law of the child’s Member State of origin does not provide for either the institution of marriage between persons of the same sex or for the maternity of the wife of the biological mother of a child. However, the Advocate General also stated that reliance on the national identity of the Member State may justify the refusal to recognize the parental relationship in order to draw up a birth certificate for the purposes of the family law of that Member State.¹²⁰

In addition to CJEU judgments, the standpoint of ECtHR is also awaited, as two more cases against Poland relating to the matters in question are still pending before the Strasbourg court. One of them pertains the refusal of confirmation of acquiring Polish citizenship by descent of two children on the ground that their birth certificate indicated two men as parents,¹²¹ whereas the second one relates to the refusal of registration of the birth certificate which indicated two women as parents into the Polish Civil Status Register.¹²²

Although some of the relevant administrative authorities are still refusing the issuance of identity documents without prior transcription, an opposite approach has begun to emerge as well. Recently, it was noted by the media that the President of the city of Gdańsk issued an identity card for the child of a same-sex couple. The document was issued only

¹¹⁹ Opinion of Advocate General Kokott delivered on 15 April 2021, Case C-490/20 *V.M.A. v Stolichna obshtina, rayon ‘Pancharevo’*.

¹²⁰ *Ibidem*, point 170.

¹²¹ Applications nos. 56846/15 and 56849/15 *Segev Schlittner-Hay v. Poland* and *Matan Schlittner-Hay v. Poland* lodged on 5 November 2015 and 5 November 2015, respectively.

¹²² Application no. 30806/15 *A.D.-K. and Others v. Poland* lodged on 16 June 2015.

on the basis of the foreign birth certificate which indicated two women as parents of the child.¹²³ Pursuant to the above-mentioned solution proposed by the Ministry of Digital Affairs, particulars of only one mother were entered to the registrar while the entry “father” indicated “no data”.

Furthermore, the influence of the resolution of 2 December 2019 in the case law may be noted as well. In the judgment of the SAC of 10 September 2020, ref. no. II OSK 3362/17 it was stated that it is enough to submit a foreign birth certificate to confirm the acquisition of Polish citizenship by birth, despite the fact that the transcription was earlier refused due to its inconsistency with the public order in Poland.¹²⁴ It happened so because the foreign birth certificate did not indicate the mother’s particulars as the child was born through surrogacy.¹²⁵ The court pointed out that it is enough to confirm the acquisition of citizenship if the foreign birth certificate indicates that the father is a Polish citizen. It shows that the resolution of 2 December 2019 certainly has started to gradually influence the practice of decision-making bodies and courts, but unfortunately it is not a general trend yet.

V. Conclusions

As presented in the foregoing sections, the jurisprudence on the application of the *ordre public* exception in transcription cases has been changing gradually. The starting point for the said shift was the legal impasse and the unacceptable breach of children’s rights. Nonetheless, recently the situation slowly seems to clarify. Although the resolution of SAC of 2 December 2019 (ref. no. II OPS 1/19) was supposed to resolve doubts, in fact, its enforcement in practical terms was far from obvious. Nevertheless, the standpoint expressed in the recent resolution has started to gradually change the practice of Polish authorities. Furthermore, it should be noted that in all the mentioned cases the courts agreed that same-sex parentage or surrogate agreements are inconsistent with the

¹²³ *Gdańsk: dowód osobisty dla córki dwóch matek*, Serwis Samorządowy PAP (27.07.2020) <https://samorzad.pap.pl/kategoria/aktualnosci/gdansk-dowod-osobisty-dla-corki-dwoch-matek> (accessed: 31.05.2021).

¹²⁴ A. Wysocka-Bar: *Legal Status of a Child Born Through Surrogacy — Latest From Poland*. The EAPIL Blog (23.09.2020), <https://eapil.org/2020/09/23/legal-status-of-a-child-born-through-surrogacy-mother-latest-from-poland/> (accessed: 31.05.2021).

¹²⁵ See judgment of the Supreme Administrative Court of 10 September 2020, ref. no. II OSK 1390/18.

fundamental principles of the Polish legal order. However, the crucial issue was the correlation between the values enshrined in the Constitution such as the best interest of the child and the question which value prevails.

The approach on the matter of transcription adopted by the SAC in the resolution of 2 December 2019 (ref. no. II OPS 1/19) and the solution expressed therein may be disappointing for those who asserted the rights of same-sex couples as the ruling in question may not meet their expectations. On the other hand, the resolution should be approved for the reason that it aimed to solve several practical problems by allowing the issuance of necessary documents, and undoubtedly has brought to an end the legal impasse on the legal situation of minors raised by same-sex couples or born by surrogate mother.

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