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Resolving Administrative Cases Concerning Child Under the Foreign Custody of Same-Sex Persons Without Violating National Principles on Filiation as the Ratio Decidendi of the Supreme Administrative Court (NSA) Resolution of 2 December 2019**

1. INTRODUCTION

The purpose of this paper is to present both the dogmatic as well as practical aftereffects of the resolution of 2 December 2019[1] by 7 judges of the Supreme Administrative Court (Polish: *Naczelny Sąd Administracyjny*), hereinafter referred to as the "NSA Court", on how to deal with a specific administrative case of a child under the custody of same-sex couples[2]. The operative part of the resolution relies on private law and reads as follows: "[A]rticle 104(5) and Article 107(3) of the Act of 28 November 2014 – the Vital Records Law[3] in conjunction with Article 7 of the Act of 4 February 2011 – Private International Law[4] does not render it admissible to have a foreign birth certificate of a child with same-sex parents to be transferred by transcription to a register in Poland". The NSA resolution thus addresses, in reference to the question asked to the Court, the issue of transfer of vital record by transcription, that is a special procedure of birth registration in the country by transcription of the content of a foreign birth registration record[5].

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1 Available at: II OPS 1/19, http://orzeczenia.nsa.gov.pl/doc/0CB4DBF3D4 [accessed on: 31 March 2021].

2 In practice, this applies to homosexual persons, but their sexual orientation can be ignored in further deliberations as irrelevant. The case concerns legal ties between a child and one adult, and not cohabitation of two adults. In order to assess this resolution and its context, it is sufficient to make a general observation on the differences between the basic principles of domestic and foreign legal order stemming from the different approach to the legal concept of a person's filiation and the content of a birth certificate.

3 Consolidated text: Dz.U. z 2018 r. poz. 2224, hereinafter: the "VRL Act".

4 Dz.U. z 2015 r. poz. 1792 ze zm., hereinafter: the „PIL Act".

5 On vital records in international relations see: P. Kasprzyk (ed.), *Podręcznik urzędnika stanu cywilnego* [*Civil Vital Registration Handbook*], Vol. 2, *Obrót prawny z zagranicą w zakresie rejestracji stanu cywilnego* [*International Relations as Regards Civil Vital Registration*], Lublin 2019, p. 47.

The resolution has also, however, brought about far-reaching effects and provided guidelines for another area of law, i.e., it caused a change in the jurisprudence of public administration bodies in administrative cases concerning children, thus producing a positive law-making effect. Latest media news included headlines reporting that a child "has finally been assigned the Polish Resident Personal Identification Number (PESEL) and an ID card"[6]. Despite the foregoing, this change and the admissibility of dealing with a child's affairs based on the current legislation is being challenged in some similar cases. For example, the Voivodship Administrative Court in Kraków (Polish: *Wojewódzki Sąd Administracyjny*, hereinafter: the "WSA Court"), came up with a debatable starting point that the child's case cannot be dealt with and then – ignoring, as it were, the statement of reasons and the *ratio decidendi* for the resolution in question – referred the case in question to the Court of Justice of the European Union (hereinafter: the "CJEU") for preliminary ruling[7]. Furthermore, the said referral ruling included a statement, in fact no longer valid under the Polish legal order, to the effect that vital record transcription "is necessary for an identity document to be issued"[8]. For example, in the statement of reasons for the NSA Court ruling of 10 September 2020[9], reference was made to the resolution in question as the grounds, being in fact of a law-making quality, for a decision that the finding in administrative proceedings that a child is a Polish citizen may not be made dependent on the transcription of a foreign birth record. The latter may be directly invoked in administrative and juridical proceedings[10].

[6] For example in the case dealt with by the Civil Status Registration Office (Polish: *USC*) in Gdańsk, available at: https://wiadomosci.wp.pl/gdansk-azara-jest-wychowywana-przez-dwie-polki-w-koncu-otrzymala-pesel-i-dowod-osobisty-6537052162726528a [accessed on: 31 March 2021].

[7] Available at: http://curia.europa.eu (accessed on: 31 March 2021); https://www.rpo.gov.pl/sites/default/files/Postanowienie_pytanie_%20prejudycjalne_9.12.2020.pdf [accessed on: 31 March 2021].

[8] This issue is not the subject of the present deliberations, but it seems that the question was referred without taking into account the normative state and the possibilities created by the abovementioned resolution passed by the Supreme Administrative Court (NSA) in full court, as well as without taking into consideration the statement of reasons thereof in the part concerning the possibility of referring this question; furthermore, without informing the CJEU that there has already been an actual change in some public administration bodies in the way similar child cases are dealt with.

[9] II OSK 1390/18; available at: https://orzeczenia.nsa.gov.pl/doc/2226E2228C [accessed on: 31 March 2021].

[10] For more information see: the Ombudsman website announcement confirming that the citizenship of a child of a Polish citizen does not depend on the transcription of his or her foreign birth certificate available at: https://www.rpo.gov.pl/pl/content/nsa-potwierdza-obywatelstwo-dziecka-ojcem-obywatel-rp-matka-surogatka [accessed on: 31 March 2021]. As regards the earlier case law of administrative courts, which has now changed, see also texts available at: https://europeistyka.uj.edu.pl/pwpm-vol-xvi-2018 [accessed on: 31 March 2021]: M. Pilich, *Mater semper certa est? Kilka uwag o skutkach zagranicznego macierzyństwa zastępczego z perspektywy stosowania klauzuli porządku publicznego* [*Mater semper certa est? A Few Comments on the Effects of Foreign Surrogacy from the Perspective of the Application of the Public Policy Clause*], „Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego" 2018, Vol. XVI, pp. 7–35; A. Wysocka-Bar, *Nabycie polskiego obywatelstwa a urodzenie przez matkę zastępczą. Uwagi na tle wyroków Naczelnego Sądu Administracyjnego z dnia 6 maja 2015 r.: II OSK 2372/13 oraz II OSK 2419/13* [*Acquisition of Polish Citizenship in the Light of Birth by a Surrogate Mother. Comments on the Judgments of the Supreme Administrative Court dated 6 May 2015: II OSK 2372/13 and II OSK 2419/13*], „Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego" 2018, Vol. XVI, pp. 38–54 and P. Mostowik, *Problem obywatelstwa dziecka prawdopodobnie pochodzącego od obywatela polskiego niebędącego mężem surrogate mother. Uwagi aprobujące wyroki NSA z 6 maja 2015 r. (II OSK 2372/13 oraz II OSK 2419/13)* [*The Problem of Citizenship of a Child Probably Descended from a Polish Citizen who is not the Spouse of the Surrogate Mother. Comments in Approval of the Judgments of the NSA Court of 6 May 2015 (II OSK 2372/13 and II OSK 2419/13)*], „Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego" 2018, Vol. XVI, pp. 55–75. In the last article, the comments in approval of decisions refusing to confirm citizenship have not been motivated by challenging, in principle, the substantive legal possibility of delivering of a positive decision, but by probative deficiencies in the given, very casuistic case at an earlier phase of the proceedings (acquisition of the vital status of the other same-sex parent based on a contract with a woman who was married to another man).

The problem of transcription[11], the scope of national vital statistics and its relationship with principles of the national family and personal law (in particular, the legal recognition of filiation, maternity, and paternity) were discussed by legal scholars in their writings both before[12] and after the passing of the said resolution[13]. It is worth bearing in mind that, as also stated in the resolution, according to the regulations governing conflict of laws (Article 55(1) of the PIL Act), establishing and denial of the parentage of the child takes place under the *lex patriae* of the child as at the moment of the child's birth (i.e., in the case in question, the Polish family law[14]).

In their writings, legal scholars have so far paid less attention to the effects of the said resolution for administrative proceedings and cases that are in fact imperative for the child and persons exercising custody over the child. It must be said upfront that they have been referred to in the statement of reasons for the abovementioned resolution, where it is affirmed that the right interpretation of Article 104(5) of the of the VRL Act may not result in the issue of an identity card or assigning the Polish Resident Personal Identification Number (PESEL) to a Polish citizen being dependent on the transfer of vital record by transcription by the authorities (as it may be impossible in a specific case due to particulars of a woman being entered instead of the father's particulars in a foreign birth certificate). Pronouncing that that the issue of an identity card or assigning the Polish Resident Personal Identification Number (PESEL) to a Polish citizen (a child) cannot be made dependent on the admissibility of creating a national vital record based on the content of a foreign certificate has far-reaching consequences that will be discussed further on in this paper.

2. NOTE ON THE SOURCES OF THE NATIONAL ADMINISTRATIVE LAW

To deliberate on the topic referred to in the title of this paper, it is necessary to take into account the issues of understanding of the child's descent (filiation), as well as

[11] See: P. Wypych, *Charakter prawny transkrypcji aktu stanu cywilnego sporządzonego za granicą* [*Legal Nature of the Transcription of a Vital Record Issued Abroad*], „Kwartalnik Prawa Prywatnego" 2003, No. 1, p. 189; M. Wojewoda [in:] *System prawa prywatnego* [*System of Private Law*], Vol. 20c, *Prawo prywatne międzynarodowe* [*Private International Law*], M. Pazdan (ed.), Warszawa 2015, p. 595; M. Wojewoda, *Transkrypcja zagranicznego dokumentu stanu cywilnego – kilka uwag na temat ewolucji konstrukcji w prawie polskim* [*Transcription of a Foreign Vital Record. A Few Remarks on the Evolution of the Concept in the Polish Law*], „Metryka" 2016, No. 2, p. 53; A. Czajkowska [in:] *Prawo o aktach stanu cywilnego z komentarzem* [*Law on Vital Records with Commentary*], A. Czajkowska (ed.), Warszawa 2015, p. 225.

[12] See: P. Mostowik, *Glosa do wyroku NSA z dnia 10 października 2018 r., II OSK 2552/16* [*Comments on the NSA Court Judgement of 10 October 2018, II OSK 2552/16*], „Zeszyty Naukowe Sądownictwa Administracyjnego" 2019, No. 4, p. 32; P. Sadowski, *Gloss on the judgment of the Polish Supreme Administrative Court of 10 October 2018*, II OSK 2552/16, „Ius Novum" 2020, No. 1, p. 17; J. Gajda, *Kilka uwag na temat problematycznych rozstrzygnięć sądów administracyjnych dotyczących transkrypcji zagranicznych aktów urodzenia* [*A Few Remarks on Problematic Decisions of Administrative Courts Concerning the Transcription of Foreign Birth Certificates*] [in:] *Ustroje – prawa człowieka – bezpieczeństwo – integracja europejska. Księga jubileuszowa z okazji 70. rocznicy urodzin profesora Jerzego Jaskierni* [*Political Systems – Human Rights – Security – European Integration. Jubilee Book on Professor Jerzy Jaskiernia's 70th Birthday*], R.M. Czarny, Ł. Baratyński, P. Ramiączek, K. Spryszak (eds.), Toruń 2020, p. 324.

[13] See: M. Wojewoda, *Zagraniczne rodzicielstwo osób jednej płci a rejestracja stanu cywilnego w Polsce. Glosa do uchwały NSA z dnia 2 grudnia 2019 r., II OPS 1/19* [*Foreign Same-Sex Parentage and Vital Statistics Registration in Poland. Comments to the Resolution of the NSA Court of 2 December 2019, II OPS 1/19*], „Europejski Przegląd Sądowy" 2020, No. 8, p. 30; P. Mostowik, *O żądaniach wpisu w polskim rejestrze stanu cywilnego zagranicznej fikcji prawnej pochodzenia dziecka od rodziców jednopłciowych* [*On Demands for Entry into Polish Birth Records of Foreign Legal Fiction of a Child's Origin from 'Same-Sex Parents*], „Forum Prawnicze" 2019, No. 6, p. 3, available at: https://forumprawnicze.eu/attachments/article/368/Mostowik.pdf [accessed on: 31 March 2021].

[14] For more see: P. Mostowik, *Pochodzenie dziecka oraz odpowiedzialność rodzicielska* [*Descent of a Child and Parental Responsibility*] [in:] *System*..., Vol. 20c, *Prawo*..., p. 303.

those of maternity and paternity, can be seen as a front and back face of the same matter of private law. It influences also resolving of administrative matters and issuing of administrative decisions concerning the child.

An additional issue is the national registration of the childbirth (including the child's parents). Given the state of facts at hand, those issues were in fact closely linked to the administrative cases and proceedings. In the proceedings concerning the child who remains, under a foreign law, under the custody of same-sex persons, the applicants argued that the issue of a Polish document for the child (either the identity card or passport) or/and the Polish Resident Personal Identification Number (PESEL) is a matter of priority which is of vital importance for the basic life needs and the best interests of the child. These matters are duly regulated in the relevant instruments of the national public law, i.e. in the Act of 6 August 2010 on Personal Identity Cards[15], the Act of 13 July 2006 on Passport Documents[16], and the Act of 24 September 2010 on Registration of Population Records[17] that regulates the register of Polish Resident Personal Identification Numbers (PESEL).

The adopted approach to the topic does not require any in-depth discussion of these legislative acts[18]. It suffices to mention that these matters are, based on the premise of a Polish citizenship acquired through the child's descent (filiation) from a Polish citizen, the subject of other administrative proceedings (i.e. administrative cases other that the case for the transcription of a foreign birth certificate).

The principal objective of this paper is to demonstrate how the statement of reasons for the resolution deals with the latter aspects of child's everyday life, i.e., the administrative matters. Firstly, it needs to be demonstrated how the *ratio decidendi* for the resolution has impacted not only the legal issues referred to in its operative part, but an issue that might be of a greater importance in practice, i.e., also the general context of a child's legal status and the child's application for Polish identity documents to be issued to him or her. Before pondering on this, the national and international sources of law which apply to the problem in question need to be mentioned.

3. APPLYING THE INTERNATIONAL LAW

The above-mentioned national sources of law that regulate the administrative--legal premises for handling individual cases (such as obtaining a Polish identity card or being assigned a Polish Resident Personal Identification Number (PESEL)) and administrative proceedings and/or juridical court proceedings in these cases are of fundamental importance for the issue in question. Private international law, substantive family and personal law and vital status registration also play

[15] Consolidated text: Dz.U. z 2019 r. poz. 653, hereinafter: the "PIC Act".
[16] Consolidated text: Dz.U. z 2018 r. poz. 1919, hereinafter: the "Act on Passport Documents".
[17] Consolidated text: Dz.U. z 2019 r. poz. 1397, hereinafter: the "Act on Registration of Population Records".
[18] For example, pursuant to Article 3 of the Act on Passport Documents, every Polish citizen has the right to be issued a passport, and deprivation or limitation of this right may occur only in cases provided for in the statutory law. Pursuant to Article 39(1) of the Act on Passport Documents, refusal to issue a passport takes the form of an administrative decision. Needless to say, the issue of a passport is the subject of neither the proceedings for the transfer by transcription of a foreign birth record nor the operation of vital statistics offices in Poland.

a background role, in particular for the understanding of filiation and the civil status of maternity and paternity. First, however, a few orderly remarks from an international perspective need to be made.

3.1. 1989 UN Convention on the Rights of the Child

Article 7 of the 1989 UN Convention on the Rights of the Child[19] explicitly provides for the child's right to know his or her parents, by whom the States Parties to the Convention certainly did not mean persons of the same sex (that is to say, the States Parties did not express their consent for this understanding of the Convention when deciding to sign it)[20]. According to Article 8 of the said Convention, where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity[21].

3.2. Case law of the European Court of Human Rights

On the other hand, the European Court of Human Rights (ECtHR), whose decisions were invoked in the course of the proceedings, albeit not always in actual relevance to the subject of the resolution in question, has not yet had the opportunity to deal with an identical issue. So far, the ECtHR did not examine any procedural requirements of evidence (including the need to produce national vital records by "replication" of the content of child registration in another country on the basis of a foreign law) to resolve a specific administrative case of a child. It is particularly noteworthy that in the judgement of 24 January 2007 in the case of *Paradiso and Campanelli v. Italy*[22], the Grand Chamber of the ECtHR refined its earlier deliberations on custody over a child and not on filiation or child registration. Furthermore, the Court found no violation of Article 8 of the European Convention on Human Rights[23] with regard to a child who was not genetically tied to his or her current custodian, a surrogate mother. In the opinion delivered by ECtHR on 10 April 2019[24], the Court explicitly stated that "the child's right to respect for private life within the meaning of Article 8 of the ECHR does not require such recognition [of any legal ties between the child and the spouses who

[19] Convention on the Rights of the Child adopted by UN General Assembly on 20 November 1989 (Dz.U. z 1991 r. Nr 120, poz. 526 ze zm.), hereinafter: the "Convention".

[20] „1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.".

[21] Such a deprivation of identity may be understood to mean the general omission of the fact of family ties (i.e., from whom the child may in general descend in nature) from the birth certificate issued in some countries.

[22] Application No. 25358/12, HUDOC. For more see: C. Martinez de Aguirre, *International Surrogacy Arrangements: A Global "Handmaid's Tale"?* [in:] *Fundamental Legal Problems of Surrogate Motherhood. Global Perspective*, P. Mostowik (ed.), Warszawa 2019, p. 451.

[23] Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 (Dz.U. z 1993 r. Nr 61, poz. 284 ze zm.), hereinafter: the "ECHR".

[24] Advisory Opinion of 10 April 2019 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). See: O. Bobrzyńska, *Surrogate motherhood: current trends and the comparative perspective* [in:] *Fundamental legal problems…*, p. 645.

acquired the child – P.M.] to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad". This absence of obligation to accept the content of a foreign vital record is all the more applicable to circumstances where there exist more far-reaching differences between legal systems, i.e. an additional discrepancy (apart from the issue of the commercial aspect to surrogacy) in the fact that the foreign law takes a radically different approach to the legal origin of the child (i.e. the legal fiction of origin from two persons of the same sex). In none of its judgments has the Strasbourg Court mentioned that the national system of vital records registration should be modified to 'import' into it the contents of documents issued abroad, including those based on a utterly different foreign law. It remains an open question whether, if the Court were to deal with cases similar to the one examined by the Polish administrative courts, would it not rather focus on whether the child has indeed descended from a citizen of the respondent State as well as on that the availing of the legal consequences of this fact should not be overly impeded (which does not mean that they should not be impeded at all). As far as the latter is concerned, it suffices, as the NSA Court has pointed out in the statement of reasons for its resolution, to do away with the requirement to rely on a birth certificate transcribed in Poland as probative evidence in favour of the freedom to present other probative evidence (such as a foreign vital record, directly, without the need to transcribe it in accordance with Article 1138 of the Code of Civil Procedure[25]).

3.3. Law of the European Union law and referral for a preliminary ruling by the CJEU

The European Union has competence neither in substantive family law in general nor filiation in particular[26]. Article 5 of the Treaty on European Union[27] lays down the principle of conferral in the following words: "[t]he Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."[28]. It is perhaps worthy

[25] The Act of 17 November 1964 – the Code of Civil Procedure (Polish title: Ustawa z 17.11.1964 r. – Kodeks postępowania cywilnego) (consolidated text: Dz.U. z 2020 r. poz. 1575); hereinafter: the "Code of Civil Procedure".

[26] See: R. Kownacki, *Ingerencja Karty Praw Podstawowych w zakres realizacji przez państwa członkowskie tematów sensytywnych (eutanazja, związki homoseksualne, aborcja) – propagandowy straszak czy realna perspektywa?* [*Interference of the Charter of Fundamental Rights in the Sphere of Implementation* of *Sensitive Subjects (Euthanasia, Homosexual Unions, Abortion) by Member States. Fearmongering or Real Perspective?*] [in:] *Karta Praw Podstawowych w europejskim i krajowym porządku prawnym* [*The Charter of Fundamental Rights in the European and National Legal Orders*], A. Wróbel (ed.), Warszawa 2009, pp. 387, 390.

[27] Dz.U. z 2004 r. Nr 90, poz. 864/30 ze zm.; consolidated text: Dz.Urz. UE C 202 z 2016 r., p. 13.

[28] In the statement of reasons for the judgment of 10 May 2016 (III SA/Kr 1400/15, http://orzeczenia.nsa.gov.pl/doc/431B8D990D, accessed on: 31 March 2021), the Voivodship Supreme Court (WSA) in Kraków has rightly highlighted that "[g]iven the circumstances of the present case, the plea of infringement of Articles 7 and 21(1) of the Charter of Fundamental Rights of the European Union (2007/C 303/01), the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on 13 December 2007 (Dz.U.2009.203.1569), ratified by the Republic of Poland by virtue of the Act of 1 April 2008 on ratification of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on 13 December 2007 (Dz. U. nr 62, poz. 388). According to Article 7 of the Charter, everyone has the right to respect for his or her private and family life, home and communications. In accordance with Article 21 of the Charter, Any discrimination

of mention that a few years ago the European Commission presented the general idea of recognition of vital records between Member States; however, this idea has been abandoned. EU Member States (including Germany and the Netherlands) called attention to the fact that these issues fall beyond the competence of the Union[29]. The final wording of the Regulation (EU) 2016/1191[30], which applies from 16 February 2019, does not regulate the transborder effects of national vital records registration, and even *expressis verbis* provides that this area remains under the jurisdiction of the national legislation[31]. In light of Article 2(4), the "Regulation does not apply to the recognition in a Member State of legal effects relating to the content of public documents issued by the authorities of another Member State". With its explicit emphasis that foreign vital records do not have any substantive-law effect in other states, this provision was added following Member States opposition to the European Commission's initial legislative plans on the grounds of, *inter alia*, lack of EU competence[32].

The exclusive relevance of the national law was also highlighted in CJEU's recent case law, including its *Coman v. Romania* judgment of 5 June 2018[33]. In paragraph 37 of the Consideration of the questions referred, the Court stated that "[a]dmittedly, a person's status […] is a matter that falls within the competence of the Member States and EU law does not detract from that competence", while in paragraph 43: "the European Union is required […] to respect the national identity of the Member States, inherent in their fundamental structures, both political and constitutional".

What's important, the Court was of an opinion that the request for a preliminary ruling to the Court of Justice of the European Union in the case at hand was not justified. The Supreme Administrative Court (NSA) pointed out in particular that only the potentially negative outcome of separate administrative proceeding on the issuing of an identity card (that is, a decision in an administrative case other

based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited (paragraph 1 of Article 21); furthermore, within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited (paragraph 2 of Article 21). The applicant's plea is groundless also for the fact that, as set out in the Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02), Article 21(1) only addresses discriminations by the institutions and bodies of the Union themselves, when exercising powers conferred upon them under the Treaties, and by Member States only when they are implementing Union law".

[29] For more see: P. Mostowik, *Legislative Activities of European Union versus Fundamental Principles of Paternity and Maternity in Member States*, "International Journal of the Jurisprudence of the Family" 2017, Vol. 8, pp. 79–94, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3224049 [accessed on: 31 March 2021].

[30] Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No. 1024/2012, OJ EU L 200, p. 1).

[31] The Regulation provides for exemption from legalisation and similar formality and simplification of other formalities applicable to the use of certain public documents issued by the authorities of another EU Member State. It also establishes multilingual standard forms to be used as a translation aid attached to public documents.

[32] For more see: P. Mostowik, *Kwestia zakresu zastosowania rozporządzenia UE nr 1191/2016 do zagranicznej rejestracji stanu cywilnego* [*The Scope of Application of Regulation (EU) 1191/2016 to Foreign Vital Record Registration*], „Rodzina i Prawo" 2016, No. 37, p. 97.

[33] CJEU judgment of 5 June 2018 in case C-673/16, *Coman v. Romania*, available at: http://curia.europa.eu/juris/document/document.jsf?docid=202542&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=PL&cid=301542#Footnote, 24 January 2020 [accessed on: 31 March 2021].

than the case at hand concerning the issuing of a Polish birth certificate by way of transcription) could possibly be examined from the perspective of its impact on the freedom of movement within the territory of the European Union. This approach deserves to be regarded as legitimate both from the substantive law perspective (the content of European and national laws) as well as formal perspective (the scope of the administrative case and the subject of the proceedings with regard to which the resolution was issued). It is worth adding that the child had its birth certificate issued in another EU Member State; based on it, even without the Polish documents, the child enjoys freedom of movement (and the freedom to visit Poland is a good example thereof).

4. EXPLICATION OF THE MANNER OF DEALING WITH A SPECIFIC ADMINISTRATIVE CASE OF A CHILD

4.1. Context of the resolution wider than a literal reading of its operative part

The Court's deliberations on separate administrative proceedings on detailed administrative matters of a child must be examined in a close connection with the operative part of the resolution (which *prima facie* concerns only the issuing of a national birth certificate). From a practical perspective, these administrative proceedings may be of even greater importance for the applicant than the problem of the scope of national registration and understanding of civil status, as mentioned in the introduction to this paper. The resolution contains guidance on how to moderate the problem that may in some cases arise under Article 104(5) of the VRL Act[34]; furthermore, the Court has emphasized that in a number of cases the transcription requirement is not laid down in legislative acts. The proceedings directly referred to in the resolution may indeed be subservient to some of the administrative proceedings in the child's case, which are essential from its life's perspective. In the statement of reasons for the resolution, the NSA Court has made an observation right to the point that "the obligatory nature of transcription, on the other hand, raises the probative standards in the administrative proceedings enumerated in Article 104(5) of the VRL Act". The probative standards specified in this provision have been in fact set for proceedings in cases regulated under other legislative acts (i.e. concerning identity cards, passports and the Polish Resident Personal Identification Numbers (PESEL) register).

The resolution also contains a pertinent remark that the "[p]ractical problems emerging in connection with Article 104(5) of the VRL Act lie not in the proceedings concerning the transcription, but in the proceedings on the matters referred to in that provision. The obligatoriness does not affect the scope of application of the general rules of transcription proceedings".

[34] This provision literally refers to a citizen of Poland who has a foreign civil status document and vital record confirming earlier events, issued on the territory of the Republic of Poland and who applies, in principle in separate administrative proceedings, for a Polish identity document or for a Polish Resident Personal Identification Numbers (PESEL) number to be assigned to him or her.

4.2. Solution causing that lack of transcription does not hinder the child's case from being dealt with

In the statement of reasons, the Court first mentioned that transcription brings about the issue of a Polish vital record which, in terms of its probative value (Article 3 of the VRL Act), does not differ from a vital record created as a result of registration of a legal event[35]. It is not possible to enter two women as parents of a child in the Polish register of vital records by transfer of foreign vital records by transcription as it would violate the fundamental principles of Poland's national legal order[36]. At the same time, the Court expressed a reservation that Article 104(5) of the VRL Act may not be interpreted to mean that the issue of an identity document or assigning the Polish Resident Personal Identification Number (PESEL) to a Polish citizen is dependent upon transcription of a foreign vital record by authorities which is impossible purely on account of the fact that the said of foreign birth certificate cannot be transcribed in Poland.

The further reasoning of the Court is of essence for the dealing with such an administrative case (and similar cases) of the child (item 8). It reads as follows: "In the provisions on transcription, the lawmaker has introduced a probative requirement that applies in other proceedings, i.e. in the proceedings for the issue of a passport and Polish Resident Personal Identification Number (PESEL). When interpreting Article 104(5) of the VRL Act, reference should be made to the negative effect of the proceedings on transcription for the proceedings mentioned in this legal provision".

Thus, the Court took notice of the broader context of the case, as signalled in the introduction. The Court pointed out that in the legal regulations on transcription, the lawmaker has introduced probative requirements applicable in other administrative proceedings. What's important, the Court added that the interpretation of Article 104(5) of the VRL Act, referred to in the operative part of the judgement, may not lead to a situation where a Polish citizen is denied the Polish Resident Personal Identification Number (PESEL) or an identity card due to the entry of two women as parents in a birth certificate issued abroad. In such case, according to the approach of the Court, the probative value of foreign public documents should be recognized as being on par with Polish public documents under Article 1138 of the (Polish) Code of Civil Procedure.

4.3. Using a foreign document as evidence in administrative proceedings concerning a child

In the statement of reasons for its resolution, the NSA Court also found that the challenged provisions of the VRL Act do not affect the principle derived from Article 1138 of the (Polish) Code of Civil Procedure and endorsed in the resolution of the

[35] See: J. Dobkowski, *Preponderancja aktów stanu cywilnego* [*Preponderance of Vital Records*], „Metryka" 2011, No. 2, p. 15; G. Jędrejek, *Dowód z aktu stanu cywilnego w postępowaniu cywilnym* [*Vital Record as Probative Evidence in Civil Proceedings*], „Monitor Prawniczy" 2012, No. 16, p. 3.

[36] The Court noted that it is only the mother and the father that may be the parents of a child under the Polish law. The Polish law is applicable in this case pursuant to Article 55(1) of the PIL Act.

Supreme Court (hereinafter, the SN Court)[37] to the effect that the probative value of foreign public documents is on par with Polish public documents. In practice this means that a birth certificate issued abroad constitutes the exclusive evidence of the legal events entered in it, even if it has not been registered in Polish vital (birth) records.

To conclude the deliberations on the topic discussed in this paper, the Court explicitly stated that: "[t]he complainant is a Polish citizen. Based on Article 34 para. 1 of the Constitution[38], her son acquired Polish citizenship by operation of law. The absence of transcribed vital record is not an obstacle to confirmation of having obtained the citizenship of Poland. The presented [...] birth certificate, even lacking its transcription, constitutes the exclusive evidence of the legal events entered in it (Resolution of the Supreme Court of 20 November 2012, case file no. III CZP 58/12). The complainant's child may therefore rely on this vital (birth) record in administrative and court proceedings and exercise rights which require the presentation of a vital (birth) record, even if it has not been transcribed".

4.4. Separate character of proceedings in administrative matters of the child

In the statement of reasons the Court also mentioned that: "every citizen has the right to obtain an identity card, which is at the same time a document that confirms his or her identity and Polish citizenship (Article 4 of the Identity Cards Act). Pursuant to Article 32(2) of the Identity Cards Act, the issue of an identity card may be denied by an administrative decision, which at the same time implies a potential judicial control of both such a decision as well as idleness of the respective authorities, should the application for the issue of an identity card remain unprocessed".

The process of assigning the Polish Resident Personal Identification Number (PESEL) has also been explicated. The Supreme Administrative Court ruled that "the authority which issues the Polish identity document applies *ex officio* for the Polish Resident Personal Identification Number (PESEL) to be assigned, providing the particulars specified in the statutory law to the minister in charge of information technology and the said minister assigns the Polish Resident Personal Identification Number (PESEL) as a substantive and technical matter (Article 16(4), Article 17(1).3 and Article 17(2) of the Act on Registration of Population Records). The assignment of the Polish Resident Personal Identification Number (PESEL) has not been corelated with the obligation to transfer (transcribe) a foreign birth certificate since according to Article 8(8) of the said Act, only the data concerning the birth record and the vital (birth) records office where it was issued is entered into the register; therefore, there are no obstacles to entering the data from a vital (birth) record issued abroad. The Polish Resident Personal Identification Number (PESEL) is assigned also upon request of the head of the vital statistics office that registered the birth (Article 20(1) of the VRL Act). If the refusal of transcription is based on reasonable grounds, as in the case at hand [...], then in view of public authorities' duty to act in the best interests of the child, the head of the vital statistics office

[37] Resolution of the Supreme Court (SN) of 20 November 2012, III CZP 58/12, OSNC 2013/5, item 55.
[38] Constitution of the Republic of Poland of 2 April 1997 (Polish title: Konstytucja Rzeczypospolitej Polskiej z 2.04.1997 r., Dz.U. Nr 78, poz. 483 ze zm.).

should at the same time request the Polish Resident Personal Identification Number (PESEL) to be assigned to the child, since it is the head of the vital statistics office that was entrusted by the lawmaker with the powers to apply for the Polish Resident Personal Identification Number (PESEL) to be assigned in connection with the child's registration and issue of the child's Polish birth record".

It has also been noted in the statement of reasons for the abovementioned resolution that pursuant to Article 24(1)(1) of the Act on Passport Documents, a consul may issue a temporary passport to a minor Polish citizen born abroad without the Polish Resident Personal Identification Number (PESEL) in the passport. The Act on Passport Documents does not envisage an obligation to transcribe a child's birth record.

4.5. Partially "forgotten" explanatory memorandum to the Vital Records Act of 2011

Many of the issues discussed in this paper have already been noted in the explanatory memorandum to the Vital Records Act of 2011. It has been overlooked in much of the jurisprudence and legal scholars' writings to date, though it does shed light on the intent of the Polish lawmakers[39]. In the explanatory memorandum it has been highlighted that "[i]ndisputably, the probative value of foreign vital (birth) records does not depend on their registration in the Polish vital records registration system, while the possession of such a document is a sufficient proof of birth [...]. However, vital (birth) records issued abroad often do not contain all the particulars of the a person that are required under the Polish law [...] or the spelling of proper names therein is different from those in an earlier Polish vital record [...], or they do not contain Polish diacritics. These deficiencies must be remedied and the data rectified, otherwise, under the Polish law, it is not possible to assign a Polish Resident Personal Identification Number (PESEL) or issue an identity card. [...] The simplest path to remedy the deficiencies of foreign vital (birth) records is, depending on their type, to file an application or to make a statement before the head of the vital statistics office in connection with the transcription of a foreign vital record[40]. These comments of the lawmakers apply to all juridical and administrative proceedings conducted on the territory of Poland, including cases concerning the identity card or assigning the Polish Resident Personal Identification Number (PESEL), which Polish administrative courts have recently been dealing with.

The explanatory memorandum also contains the observation that "vital (birth) records issued abroad often do not contain all the particulars of the a person that are required under the Polish law [...] or the spelling of proper names therein is different from those in an earlier Polish vital record [...], or they do not contain Polish diacritics. These deficiencies must be remedied and the data rectified, otherwise, under the Polish law, it is not possible to assign a Polish Resident Personal Identification Number (PESEL) or issue an identity card". By way of conclusion, it

[39] See: the government bill of the Vital Records Law, bill No. 2620 (Polish title: Rządowy projekt ustawy – Prawo o aktach stanu cywilnego, druk sejmowy nr 2620, Sejm VII kadencji), p. 48, available at: http://www.sejm.gov.pl/sejm7.nsf/druk.xsp?nr=2620, 24.01.2020 r. [accessed on: 31 March 2021].

[40] Available at: http://www.sejm.gov.pl/sejm7.nsf/druk.xsp?nr=2620 [accessed on: 31 March 2021].

was stated that "[t]he simplest path to remedy the deficiencies of foreign vital (birth) records is, depending on their type, to file an application or to make a statement before the head of the vital statistics office in connection with the transcription of a foreign vital record". Thus, the need for transcription and issue of a national birth record (and, hence, the need to initiate such proceedings) was perceived not as a value in itself, but as a remedy for the problems that may occur when using foreign documents (such as the child's birth record) for probative purposes. In no case should the legislative solution, relating to the discussed resolution of the NSA Court, be treated as a departure from the underlying principle accepted by the VRL Act legislators, that is to be able to confirm the birth (also including the particulars of the mother or father) based on a vital record issued abroad, i.e. without the need of its transfer (transcription) into a Polish register.

Furthermore, another conclusion that can be derived from the explanatory memorandum is that the legislative solution necessitating the conduct of separate proceedings for the purpose of foreign vital record transcription is quite rare across Europe[41].

5. NOTE ON THE APPROACH TO THE UNDERSTANDING OF THE BIRTH STATUS OF THE CHILD AS COMPARED TO THE STATUS BASED ON CONTRACT OF SURROGATE MOTHERHOOD

On the margin, the discussed issue may in practice be related to a separate legal problem of recognition of the legal status of a child born to surrogate mother based on contract of surrogate motherhood. Those contracts may, in fact, be executed also with same-sex male couples who will then have the child registered abroad, with their particulars entered as parents in the foreign birth certificate. Some of the European political institutions and social organizations[42] have recently expressed their disapproval of surrogate motherhood practices resulting in the issue of foreign documents that might not be recognized in other countries (such as Poland). For example, in its Annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter, the EU Parliament was strongly critical of the practice of the so-called surrogate motherhood. Paragraph 114 of the report condemns "the practice of surrogacy, which undermines the human dignity of the woman since her body and its reproductive functions are used as a commodity."[43]. Attention may be drawn here to the 2019 judgement of the

[41] It was noted, admittedly, that "Poland will not be the only country in Europe where transcription of a foreign vital record is obligatory" (para. 51), but further on it is mentioned that obligatory transcription has been introduced, *inter alia*, in Switzerland and Slovakia. This implies that transcription is either not obligatory in other legal systems, but discretionary (as in Poland before the VRL Act came into force) or there is no such procedure and the probative procedure in detailed administrative proceedings is based on foreign documents.

[42] In recent time European feminist social organisations have expressed their far-reaching criticism of the idea that emerged within the frame of the Hague Conference on Private International Law to develop an international agreement recognizing the foreign legal status of parents (filiation) acquired abroad on the basis of a contract with a surrogate mother. This criticism was based on the thesis that the admissibility of executing such a contract violates woman's dignity. See: Contribution of Feminist and Human Rights Organizations to the Work of The Hague Conference on Private International Law Regarding Legal Issues Concerning International Surrogacy Conventions ("Parentage/Surrogacyproject"). Comments on Preliminary Document No. 3 B of March 2014 and Preliminary Document No. 3A of February 2015, available at: https://collectifcorp.files.wordpress.com/2015/01/surrogacy_hcch_feminists_english.pdf, 24.01.2020 r. [accessed on: 31 March 2021].

[43] See: Report of 30 November 2015 on the Annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter, 2015/2229(INI), available at: http://www.europarl.europa.eu/doceo/document/A-8–2015–0344_EN.html?redirect, 24.01.2020 r. [accessed on: 31 March 2021].

Federal Court of Justice, Germany's highest court of civil and criminal jurisdiction (*Bundesgerichtshof* – BGH). The Court ruled that a foreign (Ukrainian) birth certificate, the content of which is contrary to the law of the state of where the register is kept, is not subject to transfer by transcription in the said country[44]. The circumstances of the case were similar to the circumstances described above on the grounds of applicability of the family law of the state of the court and the incompatibility between the foreign law and the vital (birth) record with the fundamental principles of the legal order of the *forum*.

6. CLOSING REMARKS

It was not only the operative part (concerning proceedings before the office of vital statistics) of the resolution by 7 judges of the Supreme Administrative Court (NSA) of 2 December 2019, but also – and perhaps above all – the statement of reasons for the said resolution, which related to the dealing with the child's matters in other proceedings, that exerted influence on the Polish normative state. Despite the negative message that might *prima facie* follow from the operative part of the resolution (such as the inadmissibility of birth registration in the country and issuing a national birth certificate with same-sex persons in place of mother and father), the arguments presented in the statement of reasons for this resolution also – and perhaps above all – have numerous positive consequences. The statement of reasons for the resolution contains explicit guidelines that the child's fundamental "life issues", such as the issue of an identity card, may be dealt with a positive effect, all while the *orde public* in terms of the *forum*'s filiation law is not violated. Indeed, it is a solution that must be recognized even as being a legal interpretation that could be evaluated as Horace's *aurea mediocritas*.

It seems to have been possible thanks to the finding of the Court that there is no need for a far-reaching probative requirement (i.e. the way of proving maternity or paternity), which admittedly has been described in the VRL Act, but in fact refers to other administrative proceedings regulated under other legislative acts (such as proceedings for issue of an identity card or assigning a Polish Resident Personal Identification Number [PESEL]). A positive administrative decision on an identity card may therefore be issued following the general rules of proof, i.e. without the need for transfer by transcription, but on the basis of a foreign document confirming that the child was born to a Polish citizen. Thus, there is no need for additional proceedings for the issue of a national birth certificate (by transcription), since it is not necessary to prove the substantive legal premises for a positive effect of dealing with administrative matters of the child.

The Court exhaustively addressed the situation of a child under the custody of same-sex couple who had foreign documents (issued under a foreign law). In the statement of reasons the Court explained, among other things, what should be the practical consequences of the resolution, also for facilitating the process of obtaining the child's identity card in separate administrative proceedings in this

See also Council of Europe documents in the annex to the publication in: P. Mostowik (ed.), *Fundamentalne prawne problemy surrogate motherhood. Perspektywa krajowa* [*Fundamental Legal Problems of Surrogate Motherhood. A National Perspective*], Warszawa 2019, p. 787 et seq.

[44] For more see: E. Figura-Góralczyk, *Uwagi dotyczące orzeczenia Niemieckiego Sądu Związkowego z 20 marca 2019* (*BGH XII ZB 530/17*) [*Remarks Concerning the Judgement of the Bundesgerichtshof of 20 March 2019 (BGH XII ZB 530/17)*] [in:] *Fundamentalne prawne problemy*..., p. 521 et seq.

case (and similar processes, such as assigning the Polish Resident Personal Identification Number [PESEL]). The merits of the resolution become fully apparent after reading its statement of reasons which, together with the operative part, depict the totality of issues which were the subject of administrative and judicial proceedings and which constitute the "life issues" of the child and its custodians. Referring to Anglo-Saxon terminology, the key passages thereof may be regarded not so much as *obiter dicta*, but as an element of the *ratio decidendi* for the adopted resolution and the answer given as regards the related issues under examination.

Postscriptum 1

On 15 April 2021, the Advocate General of the CJEU delivered his Opinion in the Bulgarian Case *V.M.A. v. Stolichna Obsthina, Rayon Pancharevo* (C-490/20)[45]. Both the opinion and the future judgement of the CJEU will require an in-depth discussion.

Considering the legal problems discussed in the above paper, it is worth noting at this point that a proposal has been put forward in the opinion to recognize the effects of a foreign document and a foreign recognition of the child's origin in specific administrative proceedings (on the issue of an identity or travel document for the child). On the other hand, a negative outcome of other proceedings (i.e. a refusal to an application for a national vital (birth) record based on a foreign private law) was considered justified. The refusal to "re-register" a foreign vital record may be justified by invoking national identity and fundamental principles of national family law. It would seem that this pertinent distinction between the two categories of cases may be further augmented by arguments based on the private international law and international civil procedure. These legal regulations may in fact provide that, from the perspective of a given state (e.g. Article 55 of the PIL Act), it is the private law of such state (*lex fori*) and not the foreign family law which is the proper jurisdiction to deal with the assessment of the legal filiation of a child (maternity and paternity). Foreign family law may be applied in another state where the case of vital status registration has also arisen on the grounds of the difference in its conflict rules (e.g. taking into account the child's second citizenship or permanent residency instead of citizenship). This phenomenon is simply the result of differences in private law systems in the world and is not reserved to family matters, but applies to many areas of civil law (e.g. title to property, legal personality, capacity to enter into marriage).

Postscriptum 2

It should also be noted that on 18 May 2021 a judgment in the case of *Valdís Fjölnisdóttir v. Iceland*[46] was issued by ECtHR. The Court ruled that the refusal to re-register foreign documents of civil status (birth, filiation), in which – contrary

[45] Press report available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2021–04/cp210062en.pdf [accessed on: 10 May 2021].

[46] Application No. 71552/17, HUDOC. For more see: Registrar of the Court, *Refusal to recognise couple as parents of child born via surrogacy not a violation*, ECtHR 152 (2021), 18.05.2021, available at: https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003–7021990–9472889&filename=Judgment%20Vald%C3%ADs%20Fj%C3%B6lnisd%C3%B3ttir%20and%20Others% 20v.% 20Iceland% 20-% 20Refusal% 20to% 20recognise% 20couple% 20as% 20parents% 20of% 20child% 20born% 20via% 20surrogacy% 20not% 20a% 20violation.pdf [accessed on: 26 May 2021].

to the fundamental rules of family law of *forum* – persons of the same sex (who had previously concluded a so-called surrogacy agreement) had been registered as the parents of the child, was not a breach of the ECHR legal standards. This ruling was somewhat anticipated in the discussed Resolution given by 7 judges of the Polish Supreme Administrative Court (NSA) at 2 December 2019.

Summary

Piotr Mostowik, *Resolving Administrative Cases Concerning Child Under the Foreign Custody of Same-Sex Persons Without Violating the National Principles on Filiation as the Ratio Decidendi of the Supreme Administrative Court (NSA) Resolution of 2 December 2019*

The paper discusses the ratio decidendi of the resolution of 2 December 2019 of 7 judges of the Supreme Administrative Court (Polish title: Naczelny Sąd Administracyjny) and in particular the arguments presented by the Court in addition to the operative part of the resolution concerning the inadmissibility of issuing a Polish birth certificate with a content that is contrary to the fundamental principles of the national legal order. The author demonstrates the actual law-making impact of this resolution on the Polish normative state and the possibility of dealing with the child's case in other administrative proceedings. The Court has comprehensively addressed the situation of a child under the custody of same-sex couple who has foreign documents (issued under a foreign law). In the statement of reasons the Court explained, among other things, what should be the practical consequences of the resolution, also for facilitating the process of obtaining the child's identity card in separate administrative proceedings in this case (and similar processes, such as assigning the Polish Resident Personal Identification Number [PESEL]). The merits of the resolution become fully apparent after reading its statement of reasons which, together with the operative part, depict the totality of issues which were the subject of administrative and judicial proceedings and which constitute the "life issues" of the child and its custodians. Referring to Anglo-Saxon terminology, the key passages thereof may be regarded not so much as obiter dicta, but as an element of the ratio decidendi for the adopted resolution and the answer given as regards the related issues under examination.

In the statement of reasons, the Court first mentioned that transcription brings about the issue of a Polish vital (birth) record which, in terms of its probative value (Article 3 of the Vital Records Law), does not differ from a vital record created as a result of registration of a legal event. It is not possible to enter two women as parents of a child in the Polish register of vital records by transfer of foreign vital records by transcription as it would violate the fundamental principles of Poland's national legal order. The Court noted that it is only the mother and the father that may be the parents of a child under the Polish law and that the Polish law is applicable in this case pursuant to Article 55(1) of the Private International Law due to the citizenship of the child. At the same time, the Court expressed a reservation that Article 104(5) of the Vital Records Act may not be interpreted to mean that the issue of an identity document or assigning the Polish Resident Personal Identification Number (PESEL) to a Polish citizen is dependent upon transcription of a foreign vital record by authorities which is impossible purely on account of the fact that the said of foreign birth certificate cannot be transcribed in Poland.

The further reasoning of the Court is of essence for the dealing with such an administrative case (and similar cases) of the child (item 8): "In the provisions on transcription, the lawmaker has introduced a probative requirement that applies in other proceedings, i.e. in the proceedings for the issue of a passport and Polish Resident Personal Identification Number (PESEL). When interpreting Article 104(5) of the Vital Records Act, reference should be made to the negative effect of the proceedings on transcription for the proceedings mentioned in this legal provision".

Thus, the Court took notice of the broader context of the case and pointed out that in the legal regulations on transcription, the lawmaker has introduced probative requirements applicable in other administrative proceedings. What's important for proceedings other than national registration of civil status, the Court added that the accepted interpretation of Article 104(5) of the Vital Records Act may not lead to a situation where a Polish citizen is denied the Polish Resident Personal Identification Number (PESEL) or an identity card due to the entry of two women as parents in a birth certificate issued abroad. In such case, according to the explicit words of the Court, the proceedings in these specific administrative cases may be finalized by a positive decision. For this purpose, instead of a national birth certificate which cannot be issued, the authorities may recognize the probative value of foreign civil status documents (according to established for over a decade interpretation of Article 1138 of the [Polish] Code of Civil Procedure).

The Court has rightly noted that that there is no need for a far-reaching probative requirement (i.e. the way of proving maternity or paternity), which admittedly has been described in the Vital Records Act, but in fact refers to other administrative proceedings regulated under other legislative acts (such as proceedings for issue of an identity card or assigning a Polish Resident Personal Identification Number [PESEL]). A positive administrative decision on an identity card may therefore be issued following the general rules of proof, i.e. without the need for transfer by transcription, but on the basis of a foreign document confirming that the child was born to a Polish citizen. Thus, there is no need for additional proceedings for the issue of a national birth certificate (by transcription), since it is not necessary to prove the substantive legal premises for a positive effect of dealing with administrative matters of the child.

Despite the negative message that might prima facie follow from the operative part of the resolution (such as the inadmissibility of birth registration in the country and issuing a national birth certificate with same-sex persons in place of mother and father), the arguments presented in the statement of reasons for this resolution also – and perhaps above all – have numerous positive consequences. The statement of reasons for the resolution contains explicit guidelines that the child's fundamental "life issues", such as the issue of an identity card, may be dealt with a positive effect, all while the orde public in terms of the forum's filiation law is not violated.

In the form of postscripta were mentioned: opinion the Advocate General of the CJEU issued on 15 April 2021 (case C-490/20, VMA v. Stolichna Obsthina, Rayon Pancharevo) and the ruling of European Court of Human Rights given on 18 May 2021 (case of Valdís Fjölnisdóttir v. Iceland, application No. 71552/17). Both of them were somewhat anticipated in the discussed Resolution of Polish Supreme Administrative Court (NSA).

Keyword: *civil status registration, administrative case, transcription of foreign birth certificate, maternity, paternity, child, public policy clause*

Streszczenie

Piotr Mostowik, *Załatwianie spraw administracyjnych dziecka pod pieczą osób tej samej płci bez naruszenia krajowych zasad filiacji jako ratio decidendi uchwały NSA z 2.12.2019 r.*

Opracowanie dotyczy ratio decidendi uchwały 7 sędziów Naczelnego Sądu Administracyjnego z 2.12.2019 r., w szczególności argumentacji przedstawionej przez Sąd poza jej sentencją dotyczącą niemożności stworzenia polskiego aktu urodzenia o treści sprzecznej z podstawowymi zasadami krajowego porządku prawnego. Autor pokazuje de facto jej prawotwórczy wpływ na polski stan normatywny i możliwość załatwienia spraw dziecka w innych postępowaniach administracyjnych. Sąd zajął się sytuacją dziecka pozostającego

pod pieczą osób tej samej płci, które dysponuje zagranicznymi dokumentami (wydanymi na podstawie obcego prawa) w sposób kompleksowy. W uzasadnieniu wyjaśnił m.in., jakie konwencje w praktyce powinna mieć uchwała, w tym dla usprawnienia uzyskania przez dziecko dowodu tożsamości w osobnym postępowaniu administracyjnym w tej sprawie (i podobnych, np. uzyskania numeru PESEL). Doniosłość uchwały widoczna jest dopiero po zapoznaniu się z jej uzasadnieniem, którego tezy, łącznie z sentencją, ukazują całość problematyki, która była przedmiotem postępowań administracyjnych i sądowych, i która składa się na „życiową sprawę" dziecka i jego opiekunów. Nawiązując do anglosaskiej terminologii, jego kluczowe fragmenty można traktować nie tyle jako obiter dicta, ile jako element ratio decidendi podjętej uchwały i udzielonej odpowiedzi dotyczącej badanych kwestii powiązanych.

Sąd w uzasadnieniu uchwały wskazał najpierw, że w wyniku transkrypcji powstaje polski akt stanu cywilnego, który pod względem mocy dowodowej (art. 3 Prawa o aktach stanu cywilnego) nie różni się od aktu stanu cywilnego powstałego na podstawie rejestracji zdarzenia prawnego. Wpisanie do polskiego rejestru stanu cywilnego w drodze transkrypcji dwóch kobiet jako rodziców dziecka nie jest możliwe, stanowiłoby bowiem naruszenie podstawowych zasad polskiego porządku prawnego. Sąd zauważył przy tym, że w prawie polskim rodzicami dziecka mogą być bowiem matka i ojciec, a polskie prawo rodzinne jest w sprawie właściwe zgodnie z art. 55 ust. 1 Prawa prywatnego międzynarodowego z uwagi na obywatelstwo dziecka. Jednocześnie zastrzegł, że wykładnia art. 104 ust. 5 p.a.s.c. nie może prowadzić do uzależnienia uzyskania przez obywatela polskiego dowodu tożsamości albo numeru PESEL od dokonania przez organ transkrypcji, która nie jest możliwa tylko z tego powodu, iż zagraniczny akt urodzenia nie może zostać transkrybowany w Polsce.

Istotne znaczenie dla załatwienia takiej sprawy administracyjnej dziecka (i spraw podobnych) ma dalsze rozumowanie Sądu (pkt 8): „Ustawodawca w przepisach dotyczących transkrypcji wprowadził wymaganie dowodowe obowiązujące w innych postępowaniach: w sprawach o wydanie paszportu i nadanie numeru PESEL. Dokonując wykładni art. 104 ust. 5 p.a.s.c. należy odnieść się do skutków negatywnego wyniku postępowania w przedmiocie transkrypcji dla postępowań wymienionych w tym przepisie".

Sąd zauważył szerszy kontekst sprawy i podkreślił nie tylko, że ustawodawca w przepisach dotyczących transkrypcji wprowadził wymagania dowodowe obowiązujące w innych postępowaniach administracyjnych. Dodał – co jest istotne dla innych postępowań niż krajowa rejestracja stanu cywilnego – że przyjęta wykładnia art. 104 ust. 5 p.a.s.c. nie może prowadzić jednak do sytuacji, w której polski obywatel nie będzie mógł uzyskać numeru PESEL lub dowodu tożsamości z powodu wpisania w jego zagranicznym akcie urodzenia dwóch kobiet jako rodziców. Sąd wyraźnie wskazał, że można postępowania w tych szczególowych sprawach administracyjnych zakończyć decyzją pozytywną. W tym celu organ zamiast – niemożliwego do wytworzenia – krajowego aktu urodzenia, może uwzględnić moc dowodową zagranicznych dokumentów stanu cywilnego (zgodnie z utrwaloną od dekady wykładnią art. 1138 Kodeksu postępowania cywilnego).

Sąd celnie zauważył, że nie jest konieczne daleko idące wymaganie dowodowe (tj. sposób wykazania macierzyństwa lub ojcostwa), które zostało – co prawda – opisane w ustawie – Prawo o aktach stanu cywilnego, ale de facto odnosi się do toku innych postępowań administracyjnych, regulowanych w innych ustawach (np. o wydanie dowodu osobistego lub nadanie numeru PESEL). Pozytywna decyzja administracyjna w sprawie dowodu osobistego może więc zostać wydana zgodnie z ogólnymi regułami postępowania dowodowego, czyli bez konieczności transkrypcji, a w oparciu na zagranicznym dokumencie poświadczającym, że dziecko pochodzi od polskiego obywatela. Nie ma więc konieczności prowadzenia dodatkowego postępowania w celu wytworzenia krajowego aktu urodzenia (transkrypcji), ponieważ nie jest on konieczny dla udowodnienia materialnoprawnych przesłanek pozytywnego załatwienia zasadniczych spraw administracyjnych dziecka.

Wbrew negatywnemu komunikatowi, który mógłby prima facie płynąć z samej sentencji uchwały (tj. brak możliwości stworzenia krajowego aktu urodzenia, w którym zamiast matki i ojca wpisane byłyby osoby tej samej płci), argumenty przedstawione w uzasadnieniu

uchwały rodzą też, a nawet – przede wszystkim – liczne konsekwencje pozytywne. W jej uzasadnieniu znajdują się bowiem wyraźne wytyczne określające, że pozytywnie może zostać załatwiona zasadnicza „życiowa sprawa" dziecka, tj. wydanie dowodu osobistego, przy jednoczesnym nienaruszaniu orde public w zakresie prawa filiacyjnego forum.
W formie postsriptów zostały wzmiankowane: opinia Rzecznika Generalnego TSUE wydana 15.04.2021 r. (sprawa C-490/20, VMA v. Stolichna Obsthina, Rayon Pancharevo) oraz orzeczenie Europejskiego Trybunału Praw Człowieka z 18.05.2021 r. (sprawa Valdís Fjölnisdóttir v. Islandii, skarga nr 71552/17). Zostały one niejako antycypowane w omawianej uchwale Naczelnego Sądu Administracyjnego.

Słowa kluczowe: *rejestracja stanu cywilnego, sprawa administracyjna, transkrypcja zagranicznego aktu urodzenia, macierzyństwo, ojcostwo, dziecko, klauzula porządku publicznego*

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