Same-sex parentage and surrogacy and their practical implications in Poland

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On 2 December 2019 Supreme Administrative Court of Poland (*Naczelny S?d Administracyjny*) adopted a resolution of seven judges (signature: II OPS 1/19), in which it stated that it is not possible – due to public policy – to transcribe into the domestic register of civil status a foreign birth certificate indicating two persons of the same sex as parents. The Ombudsman joined arguing that the refusal of transcription infringes the child's right to nationality and identity, and as a result may lead to infringement of the right to protection of health, the right to education, the right to personal security and the right to free movement and choice of place of residence. Interestingly, the Ombudsman for Children and public prosecutor suggested non-transcription. The background of the case concerns a child whose birth certificate indicated two women of Polish nationality as parents, a biological mother and her partner to a *de facto* union. Parents applied for such transcription in order to apply subsequently for the issuance of the passport for the child.

The Supreme Administrative Court stated that in accordance with the law on civil status register, the transcription must be refused if contrary to *ordre public* in Poland. The public policy clause protects the domestic legal order against its violation. Such violation would result from the "recognition" of a birth certificate irreconcilable with fundamental principles of public policy. It was underlined that in accordance with Article 18 of the Constitution of Poland marriage is understood as a union between a man and a woman; family, motherhood and parenthood are under protection and guardianship of the State. In accordance with those principles and the whole system of family law, only one mother and one father might be treated as parents of a child. Any other category of "parent" is unknown. The Court underlined, at the same time, that transcription of the birth certificate into the domestic register should not be indispensable for a child to obtain a passport, as the child has, by operation of law, already acquired Polish nationality as inherited from the mother. However, in practical terms this would

require challenging administrative authorities' approach (requesting domestic birth certificate) in another court procedure.

It should be explained here that the resolution was taken on the request of the panel of judges of the Supreme Administrative Court reviewing the cassation appeal brought by the parents, and therefore, in this particular case is binding. In other, similar cases panels of judges should, in general, follow the standpoint presented in such resolution. If the panel of judges is of a different view, it should request another resolution, instead of presenting a view contrary to the previous one. As a result, it might happen that there are two resolutions of seven judges presenting different views. Given the above, it can be said that the question of transcription is not as definitively answered as might seem at first glance.

A similar justification based on the public policy clause in conjunction with Article 18 of the Constitution has already been presented before in other cases, for example one concerning children born in the US out of surrogacy arrangements with a married woman, whose birth certificates indicated two men as parents, a (biological) father and his partner (identical judgments of 6 May 2015, signature: II OSK 2372/13 and II OSK 2419/13). The implications of these judgments were quite different as the Court refused to confirm that children acquired Polish nationality by birth from their father. In the eyes of the Court and according to fundamental principles of Polish family law, children born out of surrogacy (which is not regulated in Poland) by operation of law have filiation links only with the (biological, surrogate) mother and her husband. The paternity of the biological father (only) might be (at least theoretically) established, once the paternity of the surrogate mother's husband is successfully disavowed in a court proceeding.

Here it should be added that opposite views were presented by the Supreme Administrative Court in other judgments. One of the cases concerned transcription of the birth certificate of a child born in India out of surrogacy arrangement. Such birth certificate indicates only the father (in this case a biological father) and do not contain any information about the (surrogate) mother. This was perceived as contrary to public policy by the administrative authorities, which underlined that in the Polish legal order establishing paternity is always dependent on the establishment of maternity. As a result, the lack of information about the mother raises doubts as to paternity of the man indicated on the birth certificate as father. Interestingly, based on the same birth certificate the acquisition of Polish nationality of the child was earlier confirmed by

administrative authorities. In its judgment of 29 August 2018 (signature: II OSK 2129/16), Supreme Administrative Court criticized the way the public policy clause was so far understood. The Court (which hears the case after the refusal of administrative authorities of two instances and administrative court of the first instance – just as in all of the mentioned cases) underlined that this clause must be interpreted having regard to a broader context of the legal issue at hand, in particular it should take into account constitutional values (always prevailing best interest of a child) and international standards on protection of children's rights and human rights. This allows for the transcription of the birth certificate into civil status records in Poland.

Another interesting case concerned again the question of confirmation that the children acquired Polish nationality by birth after their father (four identical judgments of 30 October 2018, signatures: II OSK 1868/16, II OSK 1869/16, II OSK 1870/16, II OSK 1871/16). Four girls were born in US through surrogacy. The US birth certificates indicated two men as parents, one of them being a Polish national. The Supreme Administrative Court underlined that for the legal status of a child, including the possibility of confirming acquisition of Polish nationality, it should not matter that the child was born to a surrogate mother. What should matter is that a human being with inherent and inalienable dignity was born and this human being has a right to Polish nationality, as long as one of the parents is a Polish national.

The above mentioned cases, where the Supreme Administrative Court presented a conservative approach and approved the refusal of the confirmation that children born out of surrogacy acquired Polish nationality by birth is now pending before European Court of Human Rights (Schlittner-Hay v. Poland). The applications raise violation by Poland of Article 8 (respect for private and family life) and Article 14 (discrimination on grounds of parents' sexual orientation) of the European Convention on Human Rights.

This shows that practical implications for children to same-sex parents and from surrogacy arrangements are of growing interest and importance also in Poland. The approaches of domestic authorities and courts seems to be evolving, but are still quite divergent. The view on the issue from the European Court of Human Rights is awaited.