Article

# Citizenship on Paper: On the Risk of Statelessness of Polish Children Raised in Same-Sex Unions Abroad

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ABSTRACT

*The paper discusses a new cause of statelessness of children that is currently emerging under Polish law. Statelessness in children can arise in situations where their foreign birth certificate is not tolerated by the legal system of ex-lege nationality iure sanguinis on the grounds of disclosing persons of same-sex as parents and the place of birth does not confer nationality iure soli. This cause of statelessness can be characterized as technical because it arises where citizenship law does not regulate proof of citizenship and mediates the acquisition of identity and travel documents through other procedures. The children of same-sex couples are thus citizens de iure--purely on paper--but not in any meaningful practical sense, effectively becoming stateless because they do not receive the treatment of nationals by the state of which they are citizens in this manner. This sort of statelessness can be just a temporary hurdle, but it may well be permanent or at least indefinite. The matter has been the subject of strategic litigation in Poland.*

*Accordingly, this paper discusses the administrative proceedings before consular sections and vital-records registers for identity and travel documents. It also provides an overview of the diverging decisions of administrative courts (following judicial review) concerning the transcription of birth certificates*

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*disclosing persons of the same sex as parents. Lastly, it deals with the recent resolution of an extended panel of the Supreme Administrative Court effectively forestalling all such litigation as irrelevant. The SAC held that access to formal citizenship (ID, passport, PESEL number) may be granted on the basis of such a foreign birth certificate; this, however, has led to its own wave of problems with administrative authorities. The paper concludes by highlighting the developments in the Council of Europe and European Union's law as a potential cure against the palpable malaise of administrative authorities in respect to 'offending' birth certificates.*

***Keywords:*** *Statelessness, Citizenship Law, Ius Sanguinis, the Right to Protection of Private and Family Life, EU Citizenship, Birth Certificates Disclosing Persons of the Same Sex as Parents*

CONTENTS

For children born in same-sex couples living abroad, access to Polish citizenship[1] is automatic only on paper. This is because they are unable to get a Polish passport, ID or national identification number. In this way they cannot avail themselves of the rights stemming from their Polish nationality, which they acquire *ex lege* at the moment of their birth but have thus no proof of. This situation leads to a new cause of statelessness. The approach taken by Polish administrative courts to the decisions of administrative authorities in such cases is not uniform and hardly solves the problem. After introducing the notion of statelessness in the context of children born abroad who have same-sex parents (1), we discuss the scenarios under which the law of citizenship and the law on civil registers interact to neuter *ex-lege* citizenship (2). Next, we analyze the various court decisions that arose out of the extensive litigation of such cases (3) and the resolution of the Supreme Administrative Court extended panel that thwarted existing litigation efforts and suggested a different solution to the problem (4), one that does not seem to convince the administrative authorities but rather suggests new points for further litigation (5). In the last part, current litigation efforts at the level of EU and Council of Europe are discussed (6). We conclude that the administrative leg of the law on citizenship and civil status does indeed pose a serious problem giving rise to temporary or permanent statelessness and requiring a fair degree of administrative-law expertise and litigation skills to deal with.

## I. REFUSAL OF DOCUMENTS CONFIRMING POLISH NATIONALITY TO CHILDREN BORN IN SAME-SEX COUPLES AS A NEW CAUSE OF STATELESSNESS[2]

### A. *Definition of a Stateless Person*

According to Article 1.1 of the Convention relating to the Status of Stateless Persons (hereinafter the "1954 Convention"), "the term 'stateless person' means a person who is not considered as a national by any State under the operation of its law." This definition was considered by the International Law Commission as part of customary international law.[3] The current interpretation of this definition by the UNHCR is wide--the UNHCR

1. We use words "nationality" and "citizenship" interchangeably in this paper.

2. The matters discussed in this paper concern statelessness and we do not delve into other interesting aspects of this problem, such as recognition of identity when children are refused documents or administrative regulation of parental rights and duties by the country of nationality of their parent(s).

3. "This definition can no doubt be considered as having acquired a customary nature," Rep. of the Int'l Law Comm'n, 58 Sess., May 1-June 9, July 3-Aug 11. 82-84, 2006, U.N. Doc. A/61/10; GAOR, 61d Sess., Supp. No. 10 (2006).

suggests that the definition includes individuals historically classified as *de facto* stateless persons (possessed of a nationality that was for some reason ineffective).[4]

In the specific context of the problems discussed in this paper, it is important to note the following position taken by the UNHCR, "Where a State's laws provide for automatic acquisition of nationality, but in practice a State places additional requirements on individuals to acquire nationality, this does not negate the automatic nature of the nationality law. Rather, it indicates that the State in practice does not consider those who do not satisfy the extra-legal requirements as nationals, potentially rendering them stateless under the Article 1(1) definition."[5] The risk of statelessness in this meaning is a problem for children of Polish origin born abroad and raised by same-sex parents.

### B. *The Risk of Statelessness in Children Born Abroad Who Have Same-Sex Parents*

Under Polish law nationality is acquired *iure sanguinis* by birth to Polish parents. This is the rule expressed in the Polish Constitution of 1997 in Article 34, "Polish citizenship shall be acquired by birth to parents being Polish citizens."[6] The statutory rule makes this principle more precise by stating that, "A child who has at least one Polish parent is Polish" (Article 14.1 of the Act on Citizenship of 2009).[7] This principle provides for the acquisition of Polish nationality to be automatic, which means that no further act of administration is needed for this rule to take effect. The rule does not draw any distinction between children born on Polish territory or abroad. The parents' status not relevant, either (whether they are married or not, same-sex or different sex, etc.). However, children who are born abroad and who have same-sex parents revealed in a foreign birth certificate based on the fact that they were born in same-sex unions or were adopted by same-sex couples cannot obtain documents confirming their Polish nationality. They are legally Polish citizens, but the state denies them documents confirming that nationality. Such children effectively become stateless, because they do not enjoy the rights of citizenship, and in practice the state does not consider them to be Polish.

The refusal to issue documents confirming citizenship is pregnant in

4. More on this topic *see* D. PUDZIANOWSKA, BEZPAŃSTWOWOŚĆ W PRAWIE PUBLICZNYM [STATELESSNESS IN PUBLIC LAW] (2019) (English version forthcoming).

5. UNHCR, HANDBOOK ON PROTECTION OF STATELESS PERSONS 16, 37 (2014).

6. Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. [Constitution] art. 34 (Poland).

7. Ustawa z dnia 2 kwietnia 2009 r. o obywatelstwie polskim [Act of 2 April 2009 on Polish Citizenship], (Dz. U. 2012, poz. 161 [Journal of Laws 2012 item 161]).

legal consequences, as the rights linked with citizenship can be exercised in practice only when a citizen has documents confirming the possession of this status. In Poland's case those are either an ID card or a passport. Without them one cannot exercise the citizenship rights or rights attached to EU citizenship. The rights that are restricted in this way and have particular importance for children include (unpaid) access to public healthcare and education, diplomatic protection when staying abroad, and the right of free movement within and without the EU.

Needless to say, the problem of statelessness in cases of children born abroad in same-sex couples is the result of their discriminatory treatment by the decision-makers. The children are selected for unfavorable treatment on the basis of the circumstances of their parentage. This cause of statelessness is specific only to some countries such as Poland, Ireland and Bulgaria, but discrimination as a cause of statelessness is nothing new to statelessness scholarship.[8]

## II. TYPICAL CASES AND HOW THE ADMINISTRATION (PURPORTEDLY) SOLVES THIS PROBLEM



The cases usually originate when parents of the same sex (typically two women) of whom at least one is Polish want to get a Polish passport for their children and are denied this right by Polish consuls. Under Polish law same-sex couples are unable to marry, and there is no specific legal framework for them.[9] Nevertheless, Polish citizens enter into such unions abroad and children are sometimes born and raised in them. A birth certificate issued abroad in which both parents are of the same sex is not recognized as sufficient basis on which to issue the child with a Polish passport.

The facts of a typical case are as follows. Two women live together in a civil partnership registered in the United Kingdom. One of them gives birth to a child. The original birth certificate specifies the mother who gave birth as the "mother" of the child, and the other woman is specified as the child's "parent". The risk of statelessness arises if both mothers are Polish and have no other nationality--being denied Polish documents means that the child will have no documents confirming any nationality. Statelessness may also occur if one mother is Polish and the other has a nationality that cannot be

8. *See, for example* Alice Edwards & Laura van Waas, *Introduction, in* NATIONALITY AND STATELESSNESS UNDER INTERNATIONAL LAW 1-10 (Alice Edwards & Laura van Waas eds., 2014).

9. Poland is in a minority of European states in this respect, as 30 out of 47 Council of Europe member states have passed some kind of legislation permitting same-sex couples to register their relationships (marriage or a form of registered partnership, civil partnership or civil union), *cf.* ILGA-EUROPE RAINBOW MAP AND INDEX 2020, https://www.ilga-europe.org/rainboweurope/2020.

passed on to the child. In one case a child was born to an Irish-Polish married same-sex couple. The child did not get Polish documents, but it is also not considered Irish because the law of that country provides that only a woman who gives birth can pass nationality to her child (the child was born from IVF).[10]

### A. *Proceedings Before the Consuls*

When same-sex parents apply for a Polish passport for their child at the Polish consulate, they are refused. Consuls claim that a foreign birth certificate is not a sufficient basis for them to issue the child with a Polish passport. If the child does not hold a national identification number (PESEL)[11] issued by Polish authorities, then it is necessary to submit a Polish birth certificate.[12] In practice, to get a PESEL number, the child's parents have to submit a Polish birth certificate.[13] This is a vicious circle--either way a Polish birth certificate is required.

When the parents ask the consul for a written refusal, they only get a document saying that they have to get a transcription of the birth certificate in Poland. The consuls do not issue an administrative decision in these matters, and thus their refusal cannot be appealed to a higher administrative instance or, at a later stage, challenged before an administrative court. The couples, therefore, typically act on the guidance received from the consuls and initiate the procedure to transcribe the child's foreign birth certificate into the Polish civil registry.

### B. *Procedure for the Transcription of a Foreign Birth Certificate in Poland*

When approached by same-sex parents for the transcription of a foreign birth certificate, Heads of Civil Registry Offices in Poland refuse to make it. At this stage couples receive an administrative decision citing a basis in law and fact. The typical justification is that it would be contrary to the, "basic

10. Sorcha Pollak, *Getting IVF abroad: 'Our daughter is stateless, she doesn't exist'*, The Irish Times (Oct. 14, 2019, 2:09 AM).

11. PESEL is the personal identification number and the term is an acronym for *Powszechny Elektroniczny System Ewidencji Ludności* (Universal Electronic System for Registration of the Population).

12. *Cf.* Letter from the Minister of Foreign Affairs to the Polish Commissioner for Human Rights (Apr. 7 2020) (On file with the authors).

13. *See* Polish government's webpage with a description of the procedure to obtain a PESEL number for a child born and living abroad, listing the transcription of a foreign birth certificate as the first step: Anna Gawrylik, *Jak uzyskać PESEL dla małoletnich urodzonych i mieszkających za granicą?* [*How to get the PESEL number for children born and residing abroad*], (Powroty, Jan. 8, 10.04 AM), https://powroty.gov.pl/-/jak-uzyskac-pesel-dla-maloletnich-urodzonych-i-mieszkajacych-za-granica-.

principles of the Polish legal order," particularly Article 18 of the Constitution of Poland (which states, *inter alia*, that marriage is a union between a woman and a man) and the principles of family law (only a woman can be a mother and only a man can be a father).[14] Such decisions are upheld by higher-instance administrative bodies (voivods, i.e. provincial governors). The latter practice is uniform and no deviation from this position has been documented. This line of decision-making has been judicially termed a "well known practice" ("notorious fact").[15] Refusals by Heads of Civil Registry Offices to transcribe foreign birth certificates have been challenged before administrative courts, and the resulting decisions will be discussed below.[16]

## III. Divergent Judgments in Cases of Registration[17] of Foreign Birth Certificates

The issue of registration of foreign birth certificates of children who have same-sex parents has been a contentious one in the judgments of Poland's administrative courts. It is possible to distinguish two lines (groups) of judgments, in which the courts considered the refusal to transcribe as being either in accordance with the law (3.1) or contrary to the law (3.2). The litigation in this area led to the Supreme Administrative Court's resolution of December 2, 2019 (II OPS 1/19), aimed to clarify a "legal issue that raise[d] serious doubts"[18] and to avert such discrepancies (3.3). It is interesting to see the different types of reasoning in the courts' rationales and which arguments prevailed.

14. Decision in a case before the Head of Registry Office in Łódź of October 5, 2012, DOA-USC.5353.520.2012, 4. *See also*: summaries of justifications of decisions of Heads of Registry in the following judgments: Wyrok [judgment] WSA w Warszawie [District Administrative Court in Warsaw] z [of] Oct. 20, 2016, IV SA/Wa 1784/16, and Wyrok [judgment] WSA w Krakowie [District Administrative Court in Krakow] z [of] May 10, 2016, III SA/Kr 1400/15, 1-2.

15. Polish: *okoliczość notoryjna*; *see* Wyrok [judgment] WSA w Poznaniu [District Administrative Court in Poznan] z [of] Apr. 5, 2018, II SA/Po 1169/17, 6.

16. There are two tiers of administrative courts in Poland--Wojewódzki Sąd Administracyjny [District Administrative Court] (WSA) and Najwyższy Sąd Administracyjny [Supreme Administrative Court] (NSA). Administrative courts typically judge only the legality of an act of administration without examining any issues of justice or adequacy.

17. The terms "registration" and "transcription" are used interchangeably in this paper.

18. Polish: *zagadnienie prawne budzące poważne wątpliwości*. In the Polish legal system, discrepancies in administrative courts' decision-making are resolved by resolutions of an extended panel of the Supreme Administrative Court.

A. *Judgments "against" Registration*[19]

In this line of judgments courts upheld the decisions of administrative bodies (Heads of Registry Offices and Voivods) and repeated their basic arguments. Two main argumentative strategies can be distinguished in these judgments. The first one is on the level of principles, and the second one is on the level of interpretation of the Act on Civil Status Records (hereinafter the "ACSR").[20]

The first principal argument refers to the "principle of the public order"--a general clause originating from private international law. Article 7 of the Act on Private International Law[21] provides: "[f]oreign law shall not apply, should the effects of its application be contrary to the fundamental principles of the legal system of the Republic of Poland." This principle also appears in Article 107.3 ACSR: "The Head of the Registry Office shall refuse to make a transcription if ( . . . ) the transcription would be contrary to the fundamental principles of the legal order of the Republic of Poland."

According to the courts, transcribing into Polish vital records a foreign birth certificate that specifies the child's mother or father alongside a second parent of the same sex as the first parent would result in a violation of the fundamental principles of Poland's legal order. Fundamental principles of the legal order are to be understood as the, "fundamental principles of the socio-political system, *i.e.* rules of a constitutional character," as well as, "principal rules governing particular branches of the law."[22] In this context, it is emphasized that the term "parenthood" and "parents" can only denote persons of different sex, *i.e.* a man and a woman, as indicated by Article 18 of the Polish Constitution. Furthermore, the courts rely on the Family and Guardianship Code[23] ("FGC"), which defines the mother of a child as the woman who gave birth (Article 61.9 FGC) and the father as always a man (subchapter 2 "Paternity" in Title II Division IA Chapter I FGC). It is thus

19. Wyrok [judgment] NSA [Supreme Administrative Court] z [of] Dec. 17, 2014, II OSK 1298/13); Wyrok [judgment] NSA [Supreme Administrative Court] z [of] Jun. 20, 2018, II OSK 1808/16; Wyrok [judgment] WSA w Gliwicach [District Administrative Court in Gliwice] z [of] Apr. 6, 2016, II SA/Gl 1157/15; Wyrok [judgment] WSA w Krakowie [District Administrative Court in Krakow] z [of] May 10, 2016, III SA/Kr 1400/15; Wyrok [judgment] WSA w Warszawie [District Administrative Court in Warsaw] z [of] Apr. 14, 2016, IV SA/Wa 182/16; Wyrok [judgment] WSA w Warszawie [District Administrative Court in Warsaw] z [of] Oct. 20,.2016, IV SA/Wa 1784/16. We summarize arguments from these judgments below.

20. Ustawa z dnia 28 listopada 2014 r. Prawo o aktach stanu cywilnego [Act of 28 November 2014 on Civil Status Records], (Dz. U. 2014, poz. 1741 [Journal of Laws 2014, item 1741]).

21. Ustawa z dnia 4 lutego 2011 r. Prawo prywatne międzynarodowe [Act of 4 February 2011 on Private International Law], (Dz.U. 2011 nr 80 poz. 432 [Journal of Laws 2011, no 80, item 432]).

22. Wyrok [judgment] WSA w Warszawie [District Administrative Court in Warsaw] z [of] Oct. 20,.2016, IV SA/Wa 1784/16, 6.

23. Ustawa z dnia 25 lutego 1964 r. - Kodeks rodzinny i opiekuńczy [Act of 25 February 1964 on Family and Guardianship Code], (Dz.U. 1964 nr 9 poz. 59 [Journal of Laws 1964, no 9, item 59]).

posited that the Family and Guardianship Code forecloses the possibility of there being two mothers or two fathers because "parenthood" and the term "parent" can only denote two persons of the opposite sex.[24]

The second main argument concerns the nature of the act of transcription of a foreign civil-registry document. It is emphasized that in accordance with the ACSR (Article 104.2) the transcription of the foreign birth certificate consists in the transferring of the data from the foreign birth certificate into Polish vital records faithfully and literally in respect to the language and form, *i.e.* with no interference into the original spelling of foreign names of persons identified in the foreign vital-records document. It is submitted that where the foreign certificate of birth specifies persons of the same sex as the parents, the Head of Registry Office would be obligated to transcribe the foreign birth certificate into the Polish Book of Births by inscribing one of the parents in the form field indicating the "mother" and the other parent in the form field indicating the "father". It is also submitted that the forms are not the only impediment to transcribing the foreign birth certificate; should the official forms contain form fields specifying "parent" generically, such form fields cannot legally be filled by specifying two persons of the same sex because the term "parent" is defined restrictively by the Family and Care Code to pertain only to one of two persons of the opposite sex. The courts also do not acquiesce in the argument that the authorities are obligated to transcribe a foreign certificate of birth (and thus have no power to refuse such a transcription) in cases where the transcription is required for the production of identity and travel documents for a Polish citizen.

### B. *Judgments "in Favor" of Registration*[25]

The main argument in the rationales of these judgments is also made on the level of principles of the law. Here, however, it is not the public-order clause which is relied upon, but the, "principle of the best interest of the child." In the courts' view Article 72[26] of the Constitution provides for the obligation of the state to secure the rights of the child. The state authority refusing to transcribe a foreign birth certificate cannot invoke legal

24. Wyrok [judgment] WSA w Warszawie [District Administrative Court in Warsaw] z [of] Oct. 20,.2016, IV SA/Wa 1784/16, 5-6.

25. The first judgment favorable to registration came from the Wyrok [judgment] WSA w Poznaniu [District Administrative Court in Poznan] z [of] Apr. 5, 2018, II SA/Po 1169/17. A similar judgment was handed down shortly thereafter by the Wyrok [judgment] NSA [Supreme Administrative Court] z [of] Oct. 10, 2018, II OSK 2552/16. We summarize the arguments from theses judgments below.

26. Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. [Constitution] art. 72, sec.1 (Poland) 'The Republic of Poland shall ensure protection of the rights of the child. [ . . . ]'.

instruments of the ordinary statutory order but rather ought to make a determination in respect of the constitutional obligation of securing the rights of the child. The following was thus stated: "[ . . . ] the obligation to secure the welfare of the child is the fundamental and supreme principle of the Polish system of family law, and this principle governs all legal relations between the parents and the child [ . . . ]."[27] This principle should, in the court's view, guide the construction of the detailed statutory provisions that concern the child's position in society. The courts also emphasize the importance of the Convention on the Rights of the Child that Poland is party to; the Convention is superior to and takes precedence before statutes that are incompatible with its stipulations.

According to the courts, refusal to transcribe the birth certificate is a legal act that limits the rights of the child, thus, "interfering with the exercise of the fundamental rights of Polish citizenship." The courts also made an inventory of the statutory rights joined with Polish citizenship, concluding that a Polish citizen enjoys the unconditional right to receive a passport and an identity card; these documents are proof of identity and Polish citizenship, and to receive them is the citizen's unconditional right. The reasoning also verbalized the courts' sensitivity to the wider interference with the rights of the child entailed by the refusal to transcribe its foreign birth certificate, *viz.* how the refusal of identity documents can adversely affect the right to healthcare and education, as well as the freedom of movement.

The second argument touches on the characteristics of the act of "transcription" itself. In the first of the cases (II SA/Po 1169/17), the court noted in particular the necessity of construing (interpreting) the ACSR in conformity with the Constitution.[28] In the court's view, the principle of conforming interpretation required by the Constitution precludes state authorities from relying on the ACSR to the effect of refusing the transcription of a birth certificate when the statute can be so construed as not to warrant the unconstitutional result. The court acquiesced to the idea that the Act provides for the transcription to carry the contents of the foreign birth certificate literally into Polish civil-registry records. Nonetheless, the court also noted that in most cases the transcription does not result in there being a relation of "fidelity"[29] to the foreign birth certificate. In certain cases, some data are regarded as irrelevant. For example, Polish records do not provide for the inclusion of details of the mother's workplace or place of

27. Wyrok [judgment] WSA w Poznaniu [District Administrative Court in Poznan] z [of] Apr. 5, 2018, II SA/Po 1169/17, 6.

28. *Id*. at 4.

29. Polish: *w większości przypadków nigdy nie będzie to wierne odzwierciedlenie treści zagranicznego aktu stanu cywilnego*.

residence, and thus any such information is not carried into the Polish record. According to the court, this mechanism should be employed *per analogiam* in respect to form fields "parent" (in the British civil record) and "father" (in the Polish civil record). The term "parent" is wider than the term "father" describing the relevant form field in the Polish certificate of birth, as the term "parent" does not preclude a female in the British certificate. The authorities should, therefore, carry out the transcription by transferring the mother's credentials into the form field with the heading "mother", and the form field "father" should be left blank.[30]

In the second of the cases discussed (II OSK 2552/16), the Supreme Administrative Court, on the other hand, in the first place emphasized the fact that under the ACSR such registration is mandatory and thus the public-order clause cannot be invoked. According to the court, the statute precludes any latitude for decision-making where the transcription is part and parcel of the procedure created for the citizen to claim his or her identity document or PESEL number. The language of the statute makes the transcription non-discretionary under Article 104.5.[31] This argument was also made in the Poznań court's rationale discussed above, though it was not considered as dispositive of the case.[32] In the second place, the court stated that refusal of transcription constitutes an interference with the rights of the child. According to the court, the obligation to transcribe a birth certificate is part of the whole system of protection of children's rights under Polish law.[33] The Court invoked the standards of the Convention on the Rights of the Child (Articles 3.1[34] and 3.2[35]). Moreover, the court cited decisions from the European Court of Human Rights,[36] holding that the best interest of the

30. What made the court's conclusion possible in this case was the applicant being a birth mother who wished for the transcription to leave the field "father" blank. The court found no issue with this form of information about the child's parentage being entered into the Polish register. In any case, the inscription can be appended with a relevant annotation (Polish: *przypisek*) in order to, "preclude any controversy that could arise from the clash between some foreign constructions that are not tolerated by the Polish legislature with the provisions of Polish law." On the other hand, the court also noted that the records do not produce any substantial legal effects and have the function of a register of facts and rights. Cf. Wyrok [judgment] WSA w Poznaniu [District Administrative Court in Poznan] z [of] Apr. 5, 2018, II SA/Po 1169/17, 8.

31. Polish: *charakter obligatoryjny*. Wyrok [judgment] NSA [Supreme Administrative Court] z [of] Oct. 10, 2018, II OSK 2552/16, 5-6.

32. Uchwała [resolution] NSA [Supreme Administrative Court] z [of] Dec. 2, 2019, II OPS 1/19, 5.

33. *Id*. at 6.

34. "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration."

35. "States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures."

36. Judgments in cases Labassee v. France, No. 65941/11 Eur. Ct. H.R. (2014) and Mennesson v.

child must be the primary consideration in such cases and that the non-recognition of a birth certificate places the child in a position of legal uncertainty regarding its identity within society.[37]

Looking at these two lines of judgments coming down from administrative courts, it is obvious that the judgments "against" registration are anchored solely in Polish law and jurisprudence, while judgments "in favor" rely on international-law standards. In the latter case, both the UN system and ECHR judgments are invoked. Interestingly, no reference was made in the latter judgments to EU law, even though the right to move and reside freely within the territory of the Member States is one of the most important rights of EU citizenship.[38] Moreover, courts supportive of registration did not interpret the issue as being one of discrimination. Although citing the Convention on the Rights of the Child is cited, the courts rely on its Article 3 without mentioning Article 2, the latter of which prohibits discrimination.[39] In our opinion, because the issue of same-sex couples is a matter of heated public debate (even more so in the context of children being raised in such unions), the courts were content that the principle of the best interest of the child sufficed to support their reasoning and they did not need to invoke the discrimination clause.



C. *Resolution of the Supreme Administrative Court*

The discrepancies in the jurisprudence summarized above were the reason for the resolution of the Supreme Administrative Court of December 2, 2019 (II OPS 1/19), clarifying, "a legal issue that raise[d] serious doubts"; the decisions discussed above clearly diverged on the issue, justifying the procedure. The Supreme Administrative Court held that the ACSR precludes the transcription of a foreign birth certificate disclosing same-sex persons as parents. This determination relied on the public-order clause, understood roughly in the terms discussed above.[40]

Firstly, the resolution found that it is not possible to make changes to a

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France, No. 65192/11 Eur. Ct. H.R. (2014).

37. Uchwała [resolution] NSA [Supreme Administrative Court] z [of] Dec. 2, 2019, II OPS 1/19, 6.

38. Art. 20.2(a) in conjunction with Article 21.1 of the Treaty on the Functioning of the EU.

39. Article 2: "1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."

40. Uchwała [resolution] NSA [Supreme Administrative Court] z [of] Dec. 2, 2019, II OPS 1/19, 19-20.

civil-status record during its transcription.[41] The administrative authority cannot transcribe any other contents than the contents of the foreign birth record being transcribed.[42] On the other hand, in the SAC's view the administrative authority is obligated to fill in blank field forms as directed by the statute; the statute, for example, provides for fictional data to be recorded when the father is unknown.[43]

Secondly, the Supreme Administrative Court panel also provided an alternative reading of the statute in respect of the obligatory character of the transcription. Rather than curtailing the discretionary powers of the civil-records authority or removing any powers from it, Article 104.5[44] should be construed as obligating the claimant to apply for and obtain the transcription of the foreign birth certificate. Accordingly, the provision only mandates that the Polish citizen is "obligated" to carry out the transcription procedure and thus, supposedly, has no claim to demand identity documents or PESEL number if the claim is not accompanied by a Polish birth certificate.[45] This reasoning has been criticized as running against the letter of the statute--or *contra legem*, in Polish legal parlance.[46]

Finally, the Supreme Administrative Court considered the arguments relating to the best interest of the child. This argument had been relied on by the lower administrative courts supportive of transcription but was found by the Supreme Administrative Court to be non-conclusive. The court determined that the fact that the transcription of a birth certificate is refused on the grounds of public order does not amount to a violation of the constitutional or international obligation of the state to further the best interest of the child. According to the Supreme Administrative Court, the non-transcription of a foreign certificate of birth does not interfere with the rights of the child, because any such rights can be secured within the legal order inasmuch as the foreign certificate of birth itself is sufficient for the state authorities' needs in any administrative or judicial proceedings.[47] Contrary to the all-or-nothing reasoning of the administrative courts discussed above, the extended panel of judges resolved that the statute

41. Polish: *nie jest możliwe wprowadzanie w trakcie transkrypcji zmian w akcie stanu cywilnego*.

42. Polish: *Organ dokonując wpisu zagranicznego wpisu aktu stanu cywilnego nie może podać innej treści aktu, niż treść wynikająca z tego dokumentu*.

43. Uchwała [resolution] NSA [Supreme Administrative Court] z [of] Dec. 2, 2019, II OPS 1/19, 15-16.

44. Polish: *obligatoryjnie należy dokonać transkrypcji aktu urodzenia na potrzeby ubiegania się o dokument tożsamości*--[it is mandatory to have the transcription of the birth certificate made for the purposes of applying for an identity document.]

45. Uchwała [resolution] NSA [Supreme Administrative Court] z [of] Dec. 2, 2019, II OPS 1/19, 17-18.

46. Such an argument was made by A. Błaszczak-Banasiak of the Commissioner for Human Rights Office during The National Congress on Human Rights conference, Dec. 13, 2019.

47. Uchwała [resolution] NSA [Supreme Administrative Court] z [of] Dec. 2, 2019, II OPS 1/19, 26.

neither allows nor needs a conforming interpretation. Instead, it was posited that the non-issuance of a Polish certificate of birth and the impossibility of transcription of a foreign certificate is not an impediment for the authorities to issue an identity card or a passport or assign a PESEL number for the citizen. The authorities exercise a margin of discretion to give effect to the rights of citizenship in such circumstances, thus safeguarding the rights of the child. The panel considered that, indeed, state authorities are obligated to interpret the statutes and proceed in such cases on the basis of the foreign certificate of birth itself. The panel noted that failure to do so is controlled by the statutes and falls within the ambit of judicial review.

With this resolution, the Supreme Administrative Court, therefore, barred any further litigation pursuing the registration of a child's foreign certificate of birth disclosing same-sex parents by holding such registration to be contrary to the public order on account of such disclosure. The resolution is not only binding for the individual case coming up before the Supreme Administrative Court for a ruling,[48] but the scholarship and practice of administrative courts show that it binds generally all administrative courts in this type of cases.[49]

Clearly, the resolution carved out a less dramatic paradigm for the consideration of this issue. The new paradigm is based on the idea that domestic law provides for procedures for the matter to be resolved without transcribing the contentious birth certificate. Before considering the precise detail of the statutes, it will be important to note that the analysis does not formally belong to the legal issue being resolved and does not explicitly belong to the terms of reference of the resolution itself and thus might well be considered *obiter dicta*, thus not binding.

## IV. THE ADMINISTRATIVE-LAW SOLUTION SUGGESTED BY THE SUPREME ADMINISTRATIVE COURT AND HOW IT FALLS ON DEAF EARS OF THE ADMINISTRATION

In its resolution, the SAC emphasized that the fact that the transcription of a birth certificate disclosing two parents of the same sex is not possible does not mean that the child is not entitled to receive Polish documents. Even though the procedural path for transcription is foreclosed, other

48. Ustawa z dnia 30 sierpnia 2002 r. Prawo o postępowaniu przed sądami administracyjnymi [Act of August 30 2002 on Proceedings before Administrative Courts] (Dz.U. 2002 nr 153 poz. 1270), Art. 187, para. 2.

49. A. Skoczylas, *Moc wiążąca uchwał NSA a prawa jednostki* [*The Binding Force of SAC Resolutions and Individual Rights*], *in* JEDNOSTKA W DEMOKRATYCZNYM PAŃSTWIE PRAWA [THE INDIVIDUAL IN A DEMOCRATIC STATE OF LAW] 601 (Filipek J. ed., 2003); PIĄTEK W., PODSTAWY SKARGI KASACYJNEJ W POSTĘPOWANIU SĄDOWOADMINISTRACYJNYM [GROUNDS FOR CASSATORY COMPLAINTS IN ADMINISTRATIVE COURT PROCEEDINGS], 341, LEX 2011.

procedural options are available and can be used. First, the SAC explained that consular procedures can be challenged before administrative courts. The Act on Passport Documents,[50] on the other hand, allows for issuing a temporary passport to a child born abroad without need to apply for and receive a PESEL number. The panel noted that the passport application is required to specify the PESEL number[51] but the consular authorities are not forbidden from issuing the passport without it. Indeed, the statute explicitly provides for the power of issuing a passport to a child without a PESEL number[52] and the Act on Passport Documents does not provide for any mandatory requirement of transcription of the birth certificate,[53] meaning that a passport can be issued based on a foreign certificate of birth. Secondly, the law does not require the transcription of the birth certificate in order to obtain a PESEL number. There is nothing in the statue to disqualify an untranscribed foreign certificate of birth. The Head of the Civil Registry should thus proceed with the request for the issuance of a PESEL number based on the obligation of state authorities to act according to the best interest of the child. Finally, the panel noted that the right to obtain an identity document is part and parcel of Polish citizenship because the former is the only document stating citizenship. According to Article 32.2 of the Act on the Identity Document, any refusal to issue an ID must be made in the form of an administrative decision and is thus subject to judicial review, as is indeed failure by the authorities to consider the application.[54]

The solutions to the problem proposed by the SAC are at this moment ineffective, and it is possible that it will take another court battle to settle the issue. As to the possibility of obtaining a Polish ID, the following case is telling. Shortly after the judgment in the case in which the resolution of seven judges was issued, an applicant in this case (a Polish mother) filed with the Warsaw Mayor an ID application for her and her partner's son (the child was already 5 at the time, administrative and court procedures having lasted almost four years).[55] The Mayor refused to issue the document.[56] The case is now pending before the voivod, and it is possible that another lengthy court procedure will follow. As to the possibility of obtaining the passport,

50. Ustawa z dnia 13 lipca 2006 r. o dokumentach paszportowych [Act of July, 13 2006 on Passport Documents] (Dz.U. 2006 nr 143 poz. 1027).

51. *Id*. art. 13a. 1. (1).

52. The Consul can issue a temporary passport without entering the PESEL number for a Polish child born abroad, on the basis of Article 24.1.1 of the Act on Passport Documents.

53. Uchwała [resolution] NSA [Supreme Administrative Court] z [of] Dec. 2, 2019, II OPS 1/19, 22.

54. *Id*.

55. From Apr. 2016 to Feb. 2020. *Cf. Memorandum by the Campaign against Homophobia, The President Trzaskowski condemned a 5-year-old son of lesbians to live without papers* (Kampania przeciw Homofobii, May 5, 2020), https://kph.org.pl/prezydent-trzaskowski-skazal-piecioletniego-syna-lesbijek-na-zycie-bez-dokumentow/.

56. *Id*.

the Polish Commissioner for Human Rights submitted an intervention[57] with the Minister of Foreign Affairs after the resolution of SAC was issued. The Minister[58] took the view that, as a matter of principle, a passport can be issued only if a Polish birth certificate is submitted with the application for the passport. Only in limited cases does the law permit the acceptance of a foreign birth certificate--only in order to issue a temporary passport to a person who does not have a PESEL number. On the other hand, the Minister insisted on the power of the consular authorities to require Polish certificates, as well as the power--but not an obligation--to waive the requirement and instead proceed on the basis of foreign certificates, in special circumstances only. The Minister underlined that Article 7 of the Constitution precludes absolutely any act lacking a statutory basis; this last remark is telling, because the extended panel resolution had not expounded the idea that there exists not only a statutory basis for such procedures but in fact also a constitutional obligation.

The uncanny result of the resolution is that the matter has been *dissolved* both conceptually, and procedurally. The conceptual issue consists in the fact that it turned out that the claimants were fighting the wrong legal battle over the years. The procedural *dissolution* consists in the fact that lower-level administrative authorities are not likely to invoke high-brow constitutional arguments when their superiors are unfavorable to such arguments, and thus the claimants need to look to the courts.

## V. EUROPEAN COURT OF HUMAN RIGHTS' AND COURT OF JUSTICE OF THE EU'S POSSIBLE RULINGS

It is possible that the solution to the problem will only be brought via the intervention of supra-national courts. Interestingly, the issue is pending both before the European Court of Human rights (hereinafter the "ECtHR") (the Council of Europe judicial body) and the Court of Justice of the European Union (hereinafter the "CJEU").

In one of the cases discussed above (SAC judgment of December 17, 2014), an application was filed with the ECtHR in 2015. The case was communicated to the Polish government in 2019 and is pending.[59] The applicants (two mothers and a child) claim that the refusal to transcribe the birth certificate infringed on their rights protected under Article 8 (right to

57. Letter from the Commissioner of Human Rights to the Minister of Foreign Affairs (Mar. 9, 2020). (On file with the authors)

58. Letter from the Minister of Foreign Affairs to the Commissioner of Human Rights (Apr. 7, 2020). (On file with the authors)

59. A.D.-K. and Others, application no. 30806/15. This paper's co-author, D. Pudzianowska, is representing the applicants in this case.

private and family life), both taken separately and in connection with Article 14 (prohibition of discrimination). The main argument in the case is that the general and absolute impossibility of obtaining recognition of the relationship between the child and the intended homosexual parents is incompatible with the child's best interest. Such non-recognition places the child in a position of legal uncertainty regarding his or her identity within society. Moreover, it is claimed that both mothers were discriminated against on the ground of their sexual orientation because they were treated differently in respect to the possibility of registering the birth certificate compared to different-sex couples irrespective of their legal status. The transcription of the birth certificate would not have sparked any controversy if the parents were each of a different sex, with no consideration given to the legal nature of their relationship, *i.e.* whether they were spouses or not. The transcription of the birth certificate would not have encountered any obstacles if persons of different sexes were entered on the birth certificate. The argument is also made that the child was discriminated against because of the legal status of the parents.

As has been noted above, the cases discussed did not delve into the EU law argument. It marks, therefore, a new turn in the legal battle that the Regional Administrative Court in Cracow referred the point to the CJEU for a preliminary ruling[60] on December 9, 2020.[61] The reference was made in one of the cases mentioned above. The case concerned a Polish-Irish couple whose child had been born in Spain from an IVF procedure and could get neither Polish nor Irish documents.[62] The child was granted Spanish nationality after the case arrived in court,[63] but the judges decided to make a preliminary reference because the matter of non-issuance of documents is a problem in itself regardless of the problem of statelessness. The main issue raised by the referring court is that the refusal of transcription of a birth certificate infringes on the right of a citizen of the EU to move and reside freely within the territory of any member state (Article 20.2(a) in connection with Article 21.1 of the Treaty on the Functioning of the EU) in conjunction with the provisions of the Charter of Fundamental Rights concerning respect for private and family life (Article 7), the principle of non-discrimination (Article 21.1) and the principle of the best interest of the child (Article 24.2).

Roughly two months prior, on October 2, 2020, the regional administrative court in Sofia (Bulgaria) had also asked for a preliminary

60. Wyrok [judgment] WSA w Krakowie [District Administrative Court in Krakow] z [of] Dec. 9, 2020, III SA/Kr 1217/19.

61. On the basis of Article 267 of the Treaty on the Functioning of the EU.

62. Reference for a preliminary ruling by Wyrok [judgment] WSA w Krakowie [District Administrative Court in Krakow] z [of] Dec. 9, 2020, III SA/Kr 1217/19, point III.7.

63. *Id.* at point II.4.

ruling in a case involving the refusal of transcription of a birth certificate disclosing two persons of the female sex as mothers.[64] That reference, too, raises the issue of free-movement rights, but it also differs in the approach taken. It does not put the issue in light of the principle of non-discrimination but instead raises the issue of national and constitutional identity of the member states and asks the CJEU to consider how to strike a balance between the latter principle on the one hand[65] and, on the other hand, the right to respect for private and family life and the best interest of the child.

While in the Polish case there is no issue of statelessness (the child now has Spanish nationality), it is an issue in the Bulgarian case. This raises a very interesting angle for the CJEU to adjudicate on this case in light of access to EU citizenship. If the issue of the birth certificate is interpreted by the CJEU as being a refusal to recognize nationality with the effect of rendering the child stateless (*i.e.* also without EU citizenship), then it can be considered under the heading of access to EU citizenship. It can be argued that such a situation has an impact on the child's access to EU citizenship and on the enjoyment of the rights derived from it. Reference could be made to the Zambrano case (Case C-34/09), in which the CJEU stated that Article 20 TFEU, "precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union."[66]

## CONCLUSION

We have shown that the intersection of the administrative leg of the law of citizenship and new forms of family life produce a new and distinct source of statelessness. Children born abroad and having same-sex parents of whom at least one is Polish are Polish citizens, but this citizenship is only theoretical. Polish authorities' refusal to issue documents to such children puts them at a risk of statelessness. In some cases--when they do not have any other nationality *iure sanguinis* or *iure soli*--they become stateless. Administrative bodies do not look for solutions to this problem, and administrative courts have a track record of shifting the responsibility onto the administration. The upcoming judgments of the CJEU and the ECHR have a potential to change this.

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64. Case C-490/20, *V.M.A.* v. *Stolichna Obsthina*.

65. Protected by Article 4.2 of the Treaty on European Union. The detailed issue under consideration is whether the state has a right to request information on the child's biological parentage.

66. More on this issue *cf.* Patrícia Cabral, *Protecting the right to a nationality for children of same-sex couples in the EU--A key issue before the CJEU in V.M.A. v Stolichna Obsthina (C-490/20)*, (European Network on Statelessness Blog, Feb. 3, 2021), https://www.statelessness.eu/updates/blog/protecting-right-nationality-children-same-sex-couples-eu-key-issue-cjeu-vma-v.

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# 紙上的公民身分：關於在國外同性婚姻中成長的波蘭兒童之無國籍風險問題

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## 摘　要

本文探討在波蘭法律下，造成兒童無國籍狀態之新興成因。兒童的無國籍狀態可能出現於以下的情形：他們的外國出生證明不被採取屬人主義的法律制度所承認，理由是他們以同性之人作為父母，並且他們的出生地並不承認屬地主義。這種無國籍狀態之成因可被定性為技術性的，蓋這是在國籍法沒有規定公民身分證明之情形下，亦無法透過其他調解程序以獲得身分和旅行證件所產生之結果。因此，同性伴侶的孩子儘管是法律上的公民——純粹是書面上意義的——但並未有任何實質上意義。他們確實是無國籍之人，因為他們並未享有其作為法律上公民所應得之國民待遇。這種無國籍狀態可能只是一個暫時的障礙，但亦有高度可能具有永久性，或至少是無限期的。此一問題在波蘭長期是策略性的訴訟問題。

因此，本文討論了領事部門和關鍵紀錄登記處對身分和旅行文件之行政程序。本文尚概述行政法院（在司法審查之後）對於父母為同一性別之人的出生證明所為之不同決定。最後，本文亦涉及最高行政法院最近的一則決議，該決議有效地阻止所有不相關的訴訟。最高行政法院指出，可以根據前述之外國出生證明以獲得正式的公民身分（身分證、護照、PESEL字號）。然而這也導致行政當局面臨新一波問題。本文最後強調歐洲委員會和歐盟法律對此一問題之發展，係當局在處理「違法」出生證明相關議題之潛在良方，並以此作為結論。

**關鍵詞**：無國籍狀態、國籍法、屬人主義、保護私人和家庭生活之權、歐盟公民、出生證顯示父母為同一性別之人