Warsaw, 31 January 2019

Mr Guido Raimondi
President of the European Court
of Human Rights
Council of Europe
67075 Strasbourg-Cedex
France

Request for an advisory opinion
from the French Court of Cassation
ref. P16-2018-001

Pursuant to the letter of Mr. Roderick Liddell, the Registrar of the European Court of Human Rights (hereinafter also referred to as "ECtHR", "Court") dated 10 January 2019, granting leave to make written submission to the Court by the 31 January 2019, the Helsinki Foundation for Human Rights (hereinafter also referred to as "HFHR") with its seat in Warsaw, Poland, would like to respectfully present its *amicus curiae* opinion in the proceedings initiated by the request for an advisory opinion from the French Court of Cassation (no. P16-2018-001).

On behalf of the Helsinki Foundation for Human Rights,

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Request for an advisory opinion
from the French Court of Cassation
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WRITTEN COMMENTS
BY
THE HELSINKI FOUNDATION FOR HUMAN RIGHTS

EXECUTIVE SUMMARY

- The question of legality of surrogacy has to be distinguished from the problem of status of a child born by a surrogate mother. The principle of human dignity forbids treating children in an unfair way in order to "punish" them for their parents' actions or using them as means to dissuade persons from concluding surrogacy agreements.
- In Poland surrogacy is not explicitly regulated, however the law provides that mother of a child is a woman who gave birth to him/her. Moreover, according to majority of legal doctrine, surrogacy contracts are null and void in the light of Polish law.
- In the past, Polish courts presented an interpretation that transcription of foreign birth certificates of children born via surrogacy would be inconsistent with the basic principles of legal order. However, in the recent judgments the Supreme Administrative Court ruled that the authorities may not refuse to transcribe foreign birth certificate or confirm Polish citizenship of children born by surrogates (or raised by same-sex couples). It explained that such refusal would violate fundamental rights of the child.
- It is still unclear how to implement the rulings of the Supreme Administrative Courts, especially in cases concerning same-sex parents. According to some, the administrative authorities should transcribe foreign birth certificate only in so far as it concerns the biological parent and designate mother as "unknown".
- In the HFHR's opinion, such partial transcription may interfere with the child's right to protection of family life and his/her identity. The concept of "family" should not be restricted to persons connected by genetic ties. In many cases children born by surrogate may treat their intended mother as the only "true" mother. Negation of this relationship by the state may deprive children of part of their identity and negatively affect their situation in the sphere of civil and public law.
- Consequently, if a child was raised by his/her biological father and intended mother since birth, there are strong emotional bonds between them, identical to those between biological parents and children, there is a foreign birth certificate which confirms that a child was born via surrogacy and legally registered abroad and the consideration for the best interests of the child do not justify negation of maternity of the intended mother, the state should transcribe the birth certificate in its entirety, that is both with regards to the biological father and the intended mother.

I. INTRODUCTION

1. This third party intervention is submitted by the Helsinki Foundation for Human Rights (HFHR), pursuant to the leave granted by the President of the European Court of Human Rights on 10 January 2019.

2. The HFHR is a non-governmental organization established in 1989 in order to promote human rights and the rule of law as well as to contribute to the development of an open society in Poland and abroad. Among the activities of the HFHR there is participation in legal actions undertaken for the public interest such as representing parties and preparation of legal submissions to national and international courts and tribunals. The HFHR has an established practice as regards to submission of third party interventions to the European Court of Human

Rights (hereinafter: "ECHR") and in representing victims in proceedings before the Court. In the past we had submitted *amicus curiae* opinions not only in cases against Poland (e.g. *Kuchta i Mętel przeciwko Polsce*, app. no. 76813/16; *M.P. v. Poland*, app. np. 20416/13), but also those against other countries, which in our opinion, concerned legal problems important also from the perspective of protection of human rights in Poland (e.g. *Levada Centre against Russia*, app. no. 16094/17; *Baka v. Hungary*, app. no. 20261/12; *Delfi v. Estonia*, app. no. 64569/09).

3. The HFHR believes that although the present case directly concerns the situation in France, the future judgment of the European Court of Human Rights may have a broader impact on the protection of rights of children born from surrogate mothers and their parents. This would be particularly important for the countries which do not directly regulate the question of surrogacy.

4. The present written comments focus on the case law of Polish courts on the recognition of foreign birth certificates of children born by surrogate mothers. We believe that this analysis may be useful in the context of questions posed by the French Court of Cassation, especially taking into account that the analysed Polish judgments referred to international law standards.

II. THE LEGAL STATUS OF SURROGACY IN POLAND

5. Polish law does not explicitly regulate the question of surrogacy. Such a loophole is criticized as being a source of legal ambiguities[1]. Although surrogacy is not directly prohibited, Article 61^9 of the Family and Guardianship Code clearly defines the "mother of a child" as "a woman who gave birth to it" and does not provide any exceptions to this rule. This provision was introduced to the Code in 2009. In the explanation to the draft law, its authors stated that the precise definition of the term "mother" was necessary in light of the constant development of new technologies and methods of insemination outside the body of a woman and surrogate motherhood. They recognized the rule of the mother being the woman who gave birth to a child as consistent with international law, in particular the European Convention on the Legal Status of Children Born out of Wedlock, which Article 2 specifies that "[m]aternal affiliation of every child born out of wedlock shall be based solely on the fact of the birth of the child."[2]

6. According to the majority of Polish legal scholars, in the light of the Family and Guardianship Code, all contracts on surrogate motherhood are *ex lege* null and void[3]. Consequently, they could not be enforced in courts and would not produce any legal effects. Therefore, the surrogate mother would always be a legal mother of a child, even in case of gestational surrogacy (lack of genetic ties between her and the child).

7. Lack of recognition of legal effects of surrogacy in Poland does not seem to stay in conflict with the current international standards. As the Court noted in its judgment of 2014, "there is no consensus in Europe on the lawfulness of surrogacy arrangements or the legal recognition of the relationship between intended parents and children thus conceived abroad. A comparative-law survey conducted by the Court shows that surrogacy is expressly prohibited in fourteen of the thirty-five member States of the Council of Europe – other than France – studied. In ten of these it is either prohibited under general provisions or not tolerated, or the question of its lawfulness is uncertain. However, it is expressly authorised in seven member States and appears to be tolerated in four others. (...)" (*Mennesson v. France*, 26 June 2014, app. no. 65192/11, § 78)[4].

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1 Ł. Żukowski, *Problemy prawne i etyczne umów o macierzyństwo zastępcze – uwagi na tle rozwiązań przyjętych w Izraelu* [in:] A. Bator, M. Jabłoński, M. Maciejewski, K. Wójtowicz, *Współczesne koncepcje ochrony wolności i praw podstawowych*, Wrocław 2013, p. 324.

2 Draft Act amending the Family and Guardianship Code, no. 629 (Sejm of 6-th term of office), 7 December 2007, http://orka.sejm.gov.pl/Druki6ka.nsf/0/1E8CDBD5F38B2E25C125746700371126/$file/629.pdf (access: 29 January 2019).

3 See e.g. G. Jędrejek, *Family and Guardianship Code. Updated Commentary*, LEX/el. 2019; B. Trębska, *Commentary to Article 61^9 of the Family and Guardianship Code* [in:] J. Wierciński (Ed.), *Family and Guardianship Code. Commentary*, LexisNexis 2014.

4 See also: M. Engel, *Cross-Border Surrogacy: Time for a Convention?* [in:] K. Boele-Woelki, N. Dethloff & W. Gephart (Eds.), *Family Law and Culture in Europe*, Intersentia 2014, pp. 202-203.

8. Differences between the laws in various states are the result of, among others, conflicting moral judgments about surrogacy[5]. In this regard it is worth to mention that even some judges of the Court noted that surrogacy may raise serious controversies from the point of view of the Convention: "(...) we consider that gestational surrogacy, whether remunerated or not, is incompatible with human dignity. It constitutes degrading treatment, not only for the child but also for the surrogate mother. (...)" (*Paradiso and Campanelli v. Italy*, 24 January 2017, app. no. 25358/12, joint concurring opinion of judges De Gaetano, Pinto de Albuquerque, Wojtyczek and Dedov, § 7).

9. However, in the opinion of the HFHR, one has to distinguish the issue of legality of surrogacy from the question of recognition of legal status of child born abroad to surrogate mother. Legal and ethical controversies around surrogacy should never be used to discriminate children born with the use of this method or to disproportionately limit their rights. That is because all human beings, regardless of the status of their parents, method of conception etc. are born with inherent dignity which is the source of all human rights[6]. It is also vital to note under international law, the child's rights to be "respect[ed] and ensure[d] (...) without discrimination of any kind (...) [including] birth or other status.[7]" While this provision was originally intended to protect illegitimate children, its inclusiveness suggests a generous and expansive application, including children born of surrogacy.

III. TRANSCRIPTION OF FOREIGN BIRTH CERTIFICATES IN THE CASE LAW OF POLISH COURTS

10. According to Article 104 of the Law on the civil registration certificates (pol. *Prawo o aktach stanu cywilnego*) the foreign civil registration document may be transferred to the Polish civil registry by transcription. Transcription is a faithful and literal transfer of the contents of a foreign civil registration document, both linguistically and formally, without any interference in the spelling of names and surnames of persons indicated in a foreign civil registration document. It is worth to note that according to the case law of the Supreme Court, a foreign birth certificate "is the sole proof of events recorded therein, even if it has not been entered into the Polish civil registry"[8]. Therefore, even without transcription, foreign document may be presented in courts or administrative bodies and, as a rule, should not be questioned. However, lack of transcription may lead to certain ambiguities taking into account that courts may refuse to recognize legal effects of foreign judgments and other decisions on the grounds of their inconsistency with basic principles of the legal order in Poland[9] (as happened in one of cases described below – see paras. 25-26). Moreover, the law provides that the transcription is obligatory if a Polish citizen, indicated in a foreign civil registration document, possesses a Polish civil registration document confirming earlier events and requests to perform activities from the sphere of civil registration or applies for a Polish identity document or for a national identification number (PESEL).

11. Article 107 of the Law on the civil registration certificates provides three grounds for the obligatory refusal of transcription of a foreign civil registration documents. One of them is the inconsistency of the transcription with the fundamental principles of the legal order in Poland. In the past, the authorities and the administrative courts invoked this provision in order to justify the refusal of transcription of foreign birth certificates in which two persons of the same

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5 For the summary of ethical debate around the surrogacy see e.g. L. Brunet, J. Carruthers, K. Davaki, D. King, C. Marzo, J. McCandless, *A Comparative Study on the Regime of Surrogacy in EU Member States,* European Union 2013, pp. 23-25, http://www.europarl.europa.eu/RegData/etudes/STUD/2013/474403/IPOL-JURI_ET(2013)474403_EN.pdf (access: 29 January 2019); see also: Y. Ergas, *Babies without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy*, "Emory International Law Review" 2013, vol. 27, issue 1, pp. 176-177.

6 See e.g. A. Barak, *Human Dignity: The Constitutional Value and the Constitutional Right*, Cambridge 2015, pp. 104-105.

7 Art. 2 of the CRC.

8 Resolution of the 7 judges of the Supreme Court of 20 November 2012, ref. no. III CZP 58/12.

9 Article 1146 § 1 point 7 of the Code of Civil Procedure.

sex were indicated as parents of the child[10]. In the judgment of 6 May 2015 (ref. no. II OSK 2372/13) the Supreme Administrative Court used similar arguments to dismiss cassation complaint in the case concerning refusal of confirmation of the citizenship of a child born by surrogate mother and raised by a homosexual couple. The Court held that the judgment of the American court, which confirmed that the child was born from surrogacy and his parents are two persons of the same sex, is inconsistent with the fundamental principles of the legal order in Poland and as such cannot be legally recognized in the light of the Code of Civil Procedure. The fundamental principle violated by the surrogacy contract is that the child cannot be the subject of a civil contract and be deprived of his/her natural, biological identity. Therefore, a child cannot acquire a Polish citizenship upon the foreign civil registration document, which was issued on the basis of a surrogacy contract. This conclusion cannot be changed by the evidence of genetic ties between the parent and the child.

12. However, in three recent judgments the Supreme Administrative Court departed from the abovementioned, restrictive jurisprudence. In one of them the authorities refused to transcribe foreign birth certificate of a child born by surrogate mother, while in the second – to confirm Polish citizenship of the child. In addition, HFHR was involved in a case concerning transcription of foreign birth certificate of a child raised by a woman living in a same-sex relationship. Although the child was not born from surrogacy, we believe the legal issues presented in that case to be relevant also in the context of surrogacy. In all three cases the Supreme Administrative Court (pol. *Naczelny Sąd Administracyjny*) quashed administrative decisions and first instance judgments unfavourable for the complainants.

Case no. 1: Transcription of foreign birth certificate of a child born via surrogacy

13. The first case concerned a Polish male citizen, who applied for transcription of a foreign birth certificate of his son. It provided information about the father of the child, while the mother was defined as "unknown". However, the man attached to the application a statement of a woman who gave birth to a child in which she informed that she gave her consent on implementation of embryo and waived all parental rights with regards to the child. Moreover, the father attached certificate from General Consulate of Israel (where the child was born), which confirmed that his child was born via surrogacy, as well as other documents which proved that he was the biological father of the child (among others, decision of the Israeli court).

14. The Head of the Civil Registry Office (pol. *Urząd Stanu Cywilnego*) asked the man to submit additional documents which would indicate personal data of the child's mother. The man refused and explained that the child was born from surrogacy via an *in vitro* procedure and so the data of mother cannot be provided. Subsequently, the Head of the Civil Registry Office refused to transcribe the birth certificate. He argued that such transcription would violate fundamental principles of the legal order in Poland.

15. The unfavourable decision was upheld by the Regional Governor (pol. *wojewoda*). He explained that the Polish law does not allow to prepare a birth certificate without indication of the child's mother. All civil contracts for surrogacy are null and void in Poland as they are inconsistent with the Constitution. In Poland, waiver or deprivation of parental rights may be done only before the court or via adoption. Transcription of birth certificate prepared with violation of these rules would violate fundamental principles of legal order in Poland. Moreover, the Regional Governor stated that according to the Polish law the determination of paternity depends on the prior determination of maternity and so without information about mother of a child, paternity of the man could be legally questioned.

16. In the judgment of 14 April 2016 the Regional Administrative Court (pol. *Wojewódzki Sąd Administracyjny*) ruled that the authorities' refusal of transcription did not violate the law. The Court explained that according to Article 7 of the Act on Private International Law, the foreign law is not applicable if its application would to consequences inconsistent with fundamental

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[10] See e.g. judgment of the Regional Administrative Court in Gliwice of 6 April 2016 (ref. no. II SA/Gl 1157/15); judgment of the Regional Administrative Court in Warsaw of 20 October 2016 (ref. no. IV SA/Wa 1784/16).

principles of the legal order in Poland. Polish law does not know the concept of "surrogate mother" and does not recognize legal effects of surrogacy contracts. Moreover, all such contracts are null and void because they treat humans as objects. The Court also agreed with the Regional Governor that without prior determination of maternity, paternity may not be legally determined, regardless of the evidence documenting genetic ties between father and a child.

17. However, the Supreme Administrative Court, in the judgment of 29 August 2018 (ref. no. II OSK 2129/16) quashed the ruling of the Regional Court and prior administrative decisions. It held that while assessing the compatibility of transcription of birth certificate with the legal order in Poland, first instance court and authorities should have taken into account constitutional and international standards of human rights. First of all, the court pointed out that Article 72 of the Polish Constitution obliges all state authorities to consider best interests of the child in all their official actions. Moreover, according to Article 3(1) of the Convention on the Rights of the Child (hereinafter: "CRC"): "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." The court invoked also Article 7 of the CRC which provides that "[t]he 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." and Article 8 which protects the right of the child to preserve his/her identity. The Supreme Administrative Court emphasized also the significance of the Article 8 of the ECHR.

18. According to the Supreme Administrative Court, the Regional Court and the administrative authorities did not take into account standards set in all these provisions. They did not explain convincingly why would the transcription violate fundamental principles of the legal order and did not analyze if the refusal would not violate the rights of the child.

19. The Supreme Administrative Court did not share the argument that the transcription would be impossible because without indication of the child's mother in the birth certificate, paternity of the man could be questioned. Referring to the case law of the ECtHR the court held that "the situation where a legal presumption is allowed to prevail over biological and social reality, without regard to both established facts and the wishes of those concerned and without actually benefiting anyone, is not compatible (...) with the obligation to secure effective «respect» for private and family life" (*Znamenskaya v. Russia*, 2 June 2005, app. no. 77785/01, § 31). The Supreme Administrative Court invoked also the ECtHR's judgments in the cases of *Mennesson v. France* (26 June 2014, app. no. 65192/11) and *Labasse v. France* (26 June 2014, app. no. 65941/11) in which the refusal of transcription of foreign birth certificate of a child born by surrogate mother was found to be inconsistent with Article 8 of the ECHR.

20. The court did not question the fact that the Polish law does not recognize the institution of "surrogate maternity" and that the surrogacy contracts would be invalid. Nevertheless, the refusal to recognize legal effects of a foreign birth certificate and by thus – ignoring biological ties between the parent and the child, could have negative impact on the situation of the child, whose rights have the supreme value. For example, without transcription of birth certificate, person would not be able to obtain Polish identity documents, including passport. As a consequence, he/she may be unable to make use of his/her rights as a Polish, but also – EU, citizen.

21. Therefore, the court concluded that the first instance court and the administrative authorities were wrong to say that the transcription of the birth certificate would violate fundamental principles of the legal order. Such transcription would not lead to legalization of surrogacy contracts in Poland, but merely confirm the paternity of the biological father.

Case no. 2: Confirmation of Polish citizenship of child born by surrogate mother

22. The second case did not concern directly the question of transcription of birth certificate but confirmation of Polish citizenship of a child born by a surrogate mother. Nevertheless, the issue of recognition of legal effects of foreign documents regarding children born by surrogate mothers was also very important for the outcome of the case.

23. In June 2015 four children raised by homosexual couple applied (via their representative) for confirmation of their Polish citizenship. They were all born in the USA by surrogates and so in their original birth certificates there was no information about their mothers. Birth certificates of all four children indicated that their father was T.K. – Polish citizen. In case of two children born in California there was information about a second father – J.E. In case of two other children, born in Texas, there was no such information since the law of that state did not allow to indicate two persons of the same sex as parents.

24. The regional governor urged applicants to complete the form with original birth certificate and requested the information whether surrogates had Polish citizenship and if they were married. The applicants' representative refused to provide requested information. He stated that governor did not have the competence to determine the issue of the children's origin and that he should issue the decision solely on the bases of the applicants' birth certificates. He also stated that collecting data on surrogates faces obstacles that are difficult to overcome. Subsequently, the regional governor refused to confirm Polish citizenship of children.

25. The applicants appealed to the Minister of Interior who upheld the regional governor's decision. He explained that in the light of the Polish law, a child acquires a Polish citizenship if at least one of his/her parents is a Polish citizen and „parents" can be legally defined as one man and one woman. According to the Family and Guardianship Code, mother is a person who gave birth to the child and there is a legal presumption that her husband is the father. Moreover, all surrogacy contracts are invalid. The regional governor indicated that the American birth certificates did not reveal identities of mother and father and so it was not possible to decide who were the biological parents of the children. Taking this into account, the American documents were inconsistent with the Polish legal order and could not be treated as a base for accepting the men as parents.

26. The applicants lodged complaints against the Minister's decisions to the Regional Administrative Court. However, the court dismissed the complaints. It agreed with the authorities that the confirmation of citizenship was not possible since the American birth certificates were inconsistent with the public order in Poland. Otherwise, the organs would have to tacitly approve the surrogacy contracts and parenthood of same-sex couples. Moreover, the court referred to the resolution of the European Parliament of 17 December 2015 which condemned the surrogacy contracts.

27. In the judgments issued on 30 October 2018 (ref. nos. II OSK 1868/16, II OSK 1869/16, II OSK 1870/16, II OSK 1871/16) the Supreme Administrative Court quashed the first instance judgments and the administrative decisions. The court underlined that child of Polish citizen has a right to acquire Polish citizenship. Taking into account that the American documents evidenced that the applicants were children of Polish citizen, the deliberations of administrative authorities and regional administrative courts with regards to same-sex marriages and adoption were irrelevant. Likewise, irrelevant was the question of legality of surrogacy contracts in Poland as no such contract was concluded in Poland and children were born abroad.

28. The Supreme Administrative Court reminded that according to the Polish law "parents" are defined as father and mother – that is the woman who gave birth to a child. In the present case the applicants proved that they faced obstacles that are difficult to overcome with regard to determination of identity of biological mother, as they were born by anonymous surrogates. In this situation, the authorities should have applied the provision according to which child acquires citizenship of his/her father if the mother is unknown. The Court noticed that in case of two children, the birth certificates indicated as second parent another man, however in this regard the birth certificate had no legal effects under the Polish law. In this situation, the Court adopted a factual presumption that the biological mothers of the children were unknown.

29. The Supreme Administrative Court did not share the argument that the confirmation of the complainant children's citizenship would violate fundamental principles of the legal order in Poland. The Regional Court and administrative authorities did not indicate any value which could be violated by the confirmation of citizenship of a child of a Polish citizen.

30. Moreover, the Supreme Administrative Court underlined that the right to citizenship is a human right. Thus, the law in this area should be interpreted in accordance with the principle of human dignity, equality and non-discrimination. In this regard the Court invoked, among others, Article 15 of the Universal Declaration of Human Rights ("Everyone has the right to a nationality") as well as provisions of the CRC. According to the latter, the child "shall be registered immediately after birth" and shall have the right to acquire nationality (Article 7). Moreover, authorities are obliged to respect the nationality of the child (Article 8). The CRC prohibits all forms of discrimination of the children, also based on the status of the parents.

31. Therefore, in the light of the CRC the fact that the child was born by a surrogate is irrelevant for his/her legal status. Every human being is born with an inherent and inalienable dignity and has the right to citizenship if one of his/her parents is a Polish citizen. The Court also held that the refusal of confirmation of citizenship violated Article 8 of the ECHR.

32. In conclusion, the Supreme Administrative Court held that the Regional Court and the administrative authorities did not sufficiently take into account standards of the protection of the rights of the child. They also incorrectly assumed that confirmation of Polish citizenship would be in contradiction with the fundamental principles of the legal order.

Case no. 3: Refusal of transcription of foreign birth certificate of child raised by same-sex couple

33. The third case concerned a homosexual couple of women who applied for a transcription of the foreign birth certificate of their daughter. In the original birth certificate one of them was indicated as a "mother", while the second one – as a "parent". The administrative authorities refused to transcribe a birth certificate arguing that according to the Polish law, legal child cannot have same-sex parents and that any exception to this rule could violate fundamental principles of legal order. Parents appealed against these decisions to the Regional Administrative Court, but the latter endorsed argumentation of administrative authorities and dismissed the parent's complaint.

34. However, similarly as in the previous cases, both administrative decisions as well as the judgment of the court of first instance, were quashed by the Supreme Administrative Court[11]. The Court held that according to the Polish law transcription of a foreign civil registration document means faithful entry of its contents into the Polish civil registry. Therefore, there is an absolute ban on making any changes to the content of the transcribed foreign civil registration document. The transcription is obligatory, among others, when a person applies for Polish identity documents. The authorities cannot refuse to transcribe foreign birth certificate on the ground of inconsistency with the fundamental principles of the legal order. Otherwise, Polish citizen would be unable to obtain, for example, identity document which is necessary to make use of many citizen's rights.

35. Moreover, the refusal of transcription would be also inconsistent with the international standards of protection of the rights of the child, in particular – Article 3 CRC (see above) and Article 8 ECHR. The court also held that transcription would not violate fundamental principles of the legal order, referring in this context to the CJEU judgment in the case of *Coman*[12].

IV. EXECUTION OF THE JUDGMENTS

36. In all three analyzed cases the Supreme Administrative Court ruled that courts and administrative authorities have to take into account the interests of the child. The abstract concept of "fundamental principles of the legal order" should not be invoked to impose disproportionate limitations of the rights of the child. That is why the mere fact that the Polish law does not recognize the legal effects of surrogacy cannot justify the refusal of confirmation of citizenship or refusal of transcription of birth certificate, as long as there are no doubts as to paternity of the Polish citizen.

37. However, the abovementioned judgments are not clear as to how should the authorities transcribe foreign birth certificates. In particular, there may be doubts as to whether the

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11 Supreme Administrative Court, 10 October 2018, ref. no. II OSK 2552/16.

12 CJEU, 5 June 2018, C-673/16 *Coman*, ECLI:EU:C:2018:385.

certificates should be transcribed in their entirety, without any changes or rather the transcription should be done only in so far as concerning a biological father, while a second parent should be designated as "unknown".

38. As already mentioned, the Polish law provides that transcription is "a faithful and literal transfer of the contents of a foreign civil registration document, both linguistically and formally, without any interference in the spelling of names and surnames of persons indicated in a foreign civil registration document"[13]. In the judgment of 8 May 2015 (ref. no. III CSK 296/14) the Supreme Court held that foreign documents should transcribed in such a way that each entry transferred to Polish civil registry is identical with the original document not only in terms of a wording but also of a function.

39. Nevertheless, in practice "faithful and literal" transcription of a foreign birth certificate may face certain obstacles. Article 60 of the Law on the civil registration certificates provides that birth certificate contains, among others, names of parents of the child. Although this provision does not define the term "parents" Polish law makes it clear that parents are "father" and "mother", that is persons of the opposite sex. Moreover, contents of copies of birth certificates defined in the Regulation of the Minister of Interior of 29 January 2015, provide space for entering data of mother and father of a child. This makes very problematic transcription of a foreign birth certificate in which two persons of the same sex are indicated as parents of the child. In the judgment of 5 April 2018 (ref. no. II SA/Po 1169/17 – judgment is not yet final) the Regional Administrative Court in Poznań held that the foreign birth certificate with data of two females as parents may be transcribed in such a way, that the entry for "mother" would be filled in (with date of biological mother), while entry for "father" would be left blank. According to media reports, such solution was recommended also by the Minister of Interior in his instruction to heads of Civil Registry Offices[14]. On the other hand, in the abovementioned (in para. 34) judgment of 10 October 2018, the court underlined that the foreign document has to be transcribed faithfully and without any changes in its content.

40. Theoretically, transcription of the birth certificate of a child born via surrogacy, in which the biological father of the child is designated as "father" and intended mother as "mother", should not face similar obstacles. After all, data of both parents may be entered into the Polish civil registry without violation of the rule that "father" and "mother" must be of opposite sex. Nevertheless, the authorities, similarly to the French Court of Cassation in the present case, may still have doubts as to whether it is permissible to designate as a mother of a child a woman who did not gave birth to it. Therefore, it cannot be excluded that if the practice of "partial transcription" (that is, by entering to registry and Polish birth certificate only data of biological parent) is accepted with regards to same-sex parents, it may as well be applied in the context of heterosexual couples who raise a child born by a surrogate. That is because in both of these contexts, legal status of the second parent is, in the light of the Polish law, questionable.

V. "PARTIAL" TRANSCRIPTION AND THE RIGHTS OF THE CHILD

41. In the HFHR opinion, the problem as to how to transcribe foreign birth certificate of a child born via surrogacy has to be analysed not only in the light of the domestic law, but also international law.

42. As mentioned above, Polish courts noticed that the refusal of transcription may have negative consequences for the child by, for example, preventing him/her from obtaining identity documents. This problem does not appear in the context "partial transcription", because the

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13 Article 104(2) of the Law on the civil registration certificates.

14 E. Świętochowska, *Jak wpisać dwie matki do polskiego aktu urodzenia? "Dyskryminacja przypudrowana"*, „Dziennik.pl", 16 January 2019, https://wiadomosci.dziennik.pl/wydarzenia/artykuly/589269,dyskryminacja-przypudrowana-matka-ojciec-dziecko-homoseksualizm-polska.html (access: 30 January 2019). However, in the letter dated 30 January 2019, sent in response to the HFHR's motion for the access to public information, the Ministry of Interior informed that it did not prepare such instruction.

child obtains a transcribed birth certificate which officially confirms that it's father was a Polish citizen. This does not mean, however, that such solution fully safeguards the rights of the child.

43. The negative impact of the "partial transcription" on the rights of the child results from the lack of legal recognition of bonds between the intended mother (or second parent) and the child. As a consequence, the intended mother would not formally exercise parental authority over the child and could not make any decisions on behalf of him/her, that are normally made by parents (e.g. with regards to healthcare, education etc.).

44. Moreover, the child's right to inherit via intestate succession from the intended mother (or the second parent) would be excluded or limited to exceptional situations[15]. Of course, succession by testament is not excluded, but in that case the child, as a legally third person to testator, may be treated less favourably than in case of legally recognized parent-child relation[16].

45. Furthermore, in case of "partial transcription" child would acquire citizenship of his father but not of his intended mother. This could be particularly problematic if only the intended mother would have an EU citizenship because as a consequence the child would not be recognized as EU citizen and could not make use of many rights guaranteed in EU law[17].

46. However, even leaving aside the question of consequences of "partial transcription" in the sphere of civil and family law or with regards to EU citizenship, in the HFHR opinion the mere fact that the state refuses to accept maternity of intended mother (or second parent) designated in the foreign birth certificate may constitute serious interference with the child's right to privacy and family life. Family ties, especially between child and his/her parents, are very significant from the perspective of human's identity. This fact is reflected, among others, in the wording of the CRC which obliges states to "to respect the right of the child to preserve his or her identity, including (...) family relations as recognized by law without unlawful interference" (Article 8), protects children against unjustified separation from their parents (Article 9) and against arbitrary interferences with privacy and family (Article 16).

47. Although CRC does not define terms such as "parents" or "family"[18] in the HFHR's opinion they should not be interpreted as limited only to persons bound by genetic ties. According to the Polish law, persons may be legally recognized as parents of the child even if they do not have genetic connections with the child. For instance, as mentioned above, the woman who gave birth to a child is his/her mother, even if there are no genetic ties between them[19]. On the other hand, if a man agreed on the artificial insemination of his wife with a donor sperm, he would be presumed to be a father and he could not question his paternity[20] although it would be obvious that he is not a biological father. Also according to the case law of the ECtHR, the lack of genetic ties and of parental relationship legally recognized by the state does not automatically mean that given group of persons does not constitute family. It is also necessary to take into account,

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15 For example, according to Article 934^1 of the Polish Civil Code, child could inherit via intestate succession from the intended mother only in if she was married to biological father and left no spouse or relatives by consanguinity (called to intestate succession) and the parents of the child were dead at the moment of the opening of the succession (Article 934^1 of the Civil Code).

16 For example, Article 999 of the Polish Civil Code provides that liability of a successor to pay legitime to entitled persons is limited if he/she himself/herself is entitled to legitime. If the law does not recognize the bond between testator (intended mother) and successor (child), then the latter is not entitled to legitime and so the abovementioned limitation does not apply.

17 See also: I. Rein-Lescastereyres, *Recent Case Law on Cross-Border Surrogacy* [in:] K. Boele-Woelki & A. Fuchs (Eds.), *Same-Sex Relationships and Beyond: Gender Matters in the EU,* Intersentia 2017, pp. 139-140.

18 J. Tobin, *To Prohibit or Permit: What is the (Human) Rights Response to the Practice of International Commercial Surrogacy?*, "International and Comparative Law Quarterly" 2014, vol. 63, issue 2, pp. 326-327.

19 In this regard it is worth to note, that egg and embryo donation is permitted in Poland under special conditions set in the Act on treatment of infertility.

20 Article 68 of the Family and Guardianship Code.

among others, the length of a relationship and the quality of bonds between a child and his/her factual parents (see e.g. *Paradiso and Campanelli v. Italy*, §§ 149-158).

48. In the HFHR opinion, regardless of the legal status of surrogacy, the intended mother may be *de facto* mother of a child and, what is even more important, may be perceived as a "true mother" by the child itself – the only one he/she has ever known. Negation of this relationship by the state and insistence that intended mother is just a stranger to the child, while his/her real mother was a surrogate with whom he/she may have no contact at all or that he/she has no mother, deprives children of some very important part of his/her personal identity.

49. Therefore, states should not automatically refuse to transcribe foreign birth certificate in so far as it concerns the intended mother, solely on the ground that its domestic law does not recognize the concept of surrogacy. Obviously, states may undertake certain steps in order to prevent surrogacy if it is forbidden by the domestic law, however, as the UN Special Rapporteur correctly noted, they are also obliged to "Protect the rights of all surrogate-born children, regardless of the legal status of the surrogacy arrangement under national or international law"[21]. Therefore, children should never be treated as means to dissuade persons from concluding surrogacy arrangements or punished for actions of their parents.

50. Similarly, in the HFHR opinion the child's right to know its biological identity, recognized also by the ECtHR (see e.g. *Odievre v. France*, 13 February 2003, app. no. 42326/98), may not justify automatic denial of maternity of intended mother. That is because partial transcription would not necessarily help a child to establish his/her biological identity. The latter depends rather on proper registration of personal data of a surrogate mother in the state in which the surrogacy arrangement was concluded or where the child was born.

51. At the same time, there may be circumstances where the considerations for the best interests of the child could justify refusal of transcription. According to the UN Special Rapporteur, "[s]tates generally should not automatically recognize parentage orders or birth records from foreign States in respect of commercial surrogacies, but should review carefully the proceedings abroad. The State of the intending parents is responsible for conducting post-birth best interests determinations, protecting the child's identity rights and access to origins, and making independent assessments as to parentage, and also for inquiring into the treatment and post-birth consent of the surrogate mother. The State of the intending parents should only grant parentage and parental responsibility to intending parents after such evaluations, based on the best interests of the child"[22].

52. Consequently, in the HFHR's opinion, if a child was raised by his/her biological father and intended mother since birth, there are strong emotional bonds between them, identical to those between biological parents and children[23], there is a foreign birth certificate which confirms that a child was born via surrogacy and legally registered abroad and the consideration for the best interests of the child do not justify negation of maternity of the intended mother, the state should transcribe the birth certificate in its entirety, that is both with regards to the biological father and the intended mother.

The amicus curiae opinion was drafted by Dr. Marcin Szwed, lawyer in the Strategic Litigation Programme of the Helsinki Foundation for Human Rights

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21 Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, 15 January 2018, A/HRC/37/60, p. 19, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/007/71/PDF/G1800771.pdf?OpenElement (access: 29 January 2019).

22 Ibid, p. 17.

23 According to V. Jadva, the research conducted in the United Kingdom showed that "No differences were found in the quality of parenting between surrogacy, gamete donation and natural conception families" (V. Jadva, Surrogacy [in:] S. Golombok, R. Scott, J. Appleby, M. Richards, & S. Wilkinson (Eds.), *Regulating Reproductive Donation*, Cambridge 2016, pp. 130-131.