

Warsaw, 14 May 2021

..... /2021/PSP/JJ

Ms Ksenija Turković
President of the Chamber
European Court of Human Rights
Section I
Council of Europe
F-67075 Strasbourg-Cedex
France

Ref. A.P. and R.P. against Poland
Application No. 1298/19

Pursuant to the letter from Ms Renata Degener, the Section Registrar of the First Section of the European Court of Human Rights (hereinafter also referred to as "ECtHR", "Court") dated 23 April 2021, granting leave to make written submission to the High Court by the 14 May 2021, the Helsinki Foundation for Human Rights with its seat in Warsaw, Poland, hereby respectfully presents its written comments on the cases of A.P. and R.P. against Poland (Application No. 1298/19).

On behalf of the Helsinki Foundation for Human Rights,

Piotr Kładoczny

Secretary of the Board

Helsinki Foundation for Human Rights

A.P. and R.P. against Poland
Application No. 1298/19

WRITTEN COMMENTS
BY
THE HELSINKI FOUNDATION FOR HUMAN RIGHTS

EXECUTIVE SUMMARY:

- The case *A.P. and R.P. against Poland* provides the ECtHR with the opportunity to develop standards for the protection of rights of children of same-sex families.
- The question of legal recognition of homosexual relationships have to be distinguished from the status of a children born in LGBTI families. The crucial issue in present case is whether the Convention requires the states authorities to recognize the links already legally and factually established in another country among the members of family where persons of the same sex play the parental roles.
- The principle of human dignity forbids treating children in an unfair way in order to “punish” them for their parents’ decisions or parents’ sexual orientation.
- In the past, the Supreme Administrative Court in several judgements ruled that the authorities may not refuse to transcribe foreign birth certificate or confirm Polish citizenship of children raised by same-sex couples. It explained that such refusal would violate fundamental rights of the child. However, in 2019 the Supreme Administrative Court closed the possibility of registration in the Polish Civil Status Register of foreign birth certificates of children of same sex couples. This judgement did not end the discussion about the rights of children of LGBTI families.
- The refusal of transcription of foreign birth certificates of children of same-sex couples should be analyzed from the perspective of the child’s right to protection of family life and his/her identity, and in the context the best interests of the child.

I. INTRODUCTION

1. The Helsinki Foundation for Human Rights (“HFHR” or “the Foundation”) is a non-governmental organisation working in the field of human rights protection, whose statutory activities include, *inter alia*, dealing with issues related to the respect of the rights and freedoms of LGBTI persons and children of same-sex families. The Foundation

was involved in several cases concerning the issue of recognition of a legal parent-child relationship in LGBT families. In Polish legal system there is no solutions which would comprehensively address the legal situation of LGBTI families and clarify legal doubts around the status of children raised by homosexual couples.

2. In *A.P. and R.P. against Poland*, the Applicants complain under Article 8 of the European Convention on Human Rights (“ECHR”) that the Polish authorities have failed to fulfil their obligation to respect for their private and family life due to the lack of transcription of the R.P.’s foreign birth certificate. The Applicants also complain under Article 14 ECHR read in conjunction with Article 8 ECHR as they consider that they have been discriminated on the grounds of the first Applicant’s sexual orientation.

3. In view of the scope of the leave granted by the ECtHR, the opinion does not directly address the factual situation of the above-mentioned case but presents the wider context of the situation. In particular, the Foundation respectfully draws the Court's attention to the current practice referring to legal status of children of LGBT families, especially in the context of transcription of a birth certificates of the minors, and with regards to the cases concerning rights of children of same-sex couples. Furthermore, the Foundation would like to emphasize relevant international standards regarding the rights of a child which could be applied to case of refusal by the public authorities to recognize the legal effects of parenthood of same sex relationships.

II. RIGHTS OD THE CHILDREN OF LGBTI FAMILIES IN THE CASE LAW OF POLISH COURTS

4. 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”¹. Therefore, even without a transcription, foreign document may be presented in courts or administrative bodies and, as a rule, should not be questioned. However, lack of a transcription may lead to certain ambiguities taking into account that courts may refuse to recognize the legal effects of foreign judgments and other decisions on the grounds of their inconsistency with basic principles of the legal order in Poland².

5. 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

¹ Resolution of the 7 judges of the Supreme Court of 20 November 2012, ref. no. III CZP 58/12.

² Article 1146 § 1 point 7 of the Code of Civil Procedure.

civil registration or applies for a Polish identity document or for a national identification number (PESEL).

6. 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.

7. The authorities and the administrative courts invoke this provision in order to justify the refusal of transcription of foreign birth certificates in which two persons of the same sex were indicated as parents of the child³. In the judgment of 6 May 2015 (ref. no. II OSK 2372/13) the Supreme Administrative Court (“SAC”) 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.

8. However, in some judgments the administrative courts departed from the abovementioned, restrictive jurisprudence and decided in favour of the LGBTI families. Nevertheless, in 2019 the panel of 7 judges of the SAC issued the ruling closing in practice the possibility of registration in the Polish Civil Status Register of foreign birth certificates of children of same sex couples. These judgments will be discussed below.

A. Judgement of the SAC in case concerning the transcription of foreign birth certificate of a child raised by same-sex couple

9. The factual background of the first case is similar to the facts of *A.P. and R.P. against Poland* case, which is currently under the examination of the High Court. That 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.

10. However, in judgement of 10 October 2018 (ref. no. II OSK 2552/16) the Supreme Administrative Court quashed administrative decisions and first instance judgment unfavorable for the complainants.

11. The SAC 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 Court underlined that the authorities cannot refuse to transcribe foreign birth certificate on the ground of

³ 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).

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.

12. Moreover, the refusal of transcription would be also inconsistent with the international standards of the protection of the rights of the child, in particular – Article 3 of the Convention on the Rights of the Child (CRC) (see section III. below) and Article 8 ECHR. The court also held that the transcription would not violate fundamental principles of the legal order, referring in this context to the Court's of Justice of the European Union ("CJEU") judgment in the case of *Coman*⁴.

13. In the *Coman* case the CJEU ruled that the obligation for a Member State of the European Union to recognise a same-sex marriage concluded in another Member State in accordance with the law of that state, for the sole purpose of granting a derived right of residence to a third-country national, does not undermine the institution of marriage in the other EU Member State. The CJEU underlined that such recognition does not require the institutionalization of the homosexual marriages. What is important, the CJEU stressed that "the concept of public policy as justification for a derogation from a fundamental freedom must be interpreted strictly, with the result that its scope cannot be determined unilaterally by each Member State without any control by the EU institutions. It follows that public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society" (§ 44). In conclusion, an obligation to recognise same-sex marriages for the sole purpose of granting a derived right of residence to a third-country national "does not undermine the national identity or pose a threat to the public policy of the Member State concerned" (§ 46).

14. What is more, after the verdict of the SAC, mentioned case has its continuation. According to the guidelines of the SAC, the administrative proceeding were reopened and the Kraków Civil Status Registry transcribed the foreign birth certificate and issued a copy of the Polish birth certificate. However, the 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 a mother and a father of a child. According to that, the transcription was made in such a way, that the entry for "mother" was filled in with data of the biological mother, while entry for "father" was left blank. Also, on the Polish birth certificate was made an annotation with data of the second women, who was indicated in the foreign birth certificate as a "parent".

15. In addition, the Regional Prosecutor of Kraków brought an action against mentioned transcription of the foreign birth certificate. In a complaint lodged to the Regional Administrative Court in Kraków the Prosecutor underlined that the transcription and issuing of a copy of the Polish birth certificate was contrary to the principles of the Polish legal order. In the judgment of 4 June 2019 the Regional Administrative Court in Kraków

⁴ CJEU, 5 June 2018, C-673/16 *Coman*, ECLI:EU:C:2018:385.

dismissed the Prosecutor's complaint⁵. In the reasoning of the verdict the Court stressed that the transcription was necessary to protect the rights of the minor. The judgement is not final and the Regional Prosecutor lodged a cassation complaint against the ruling. The date when the SAC will pass the verdict in this case is not yet known.

B. Judgement of the SAC in case concerning the confirmation of the Polish citizenship of a child raised by same-sex couple

16. As context is important to underline that in the judgments of 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 ruled that authorities have to confirm Polish citizenship of four children raised by homosexual couple. They were all born in the USA by surrogates and 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.

17. First of all, The SAC 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 SAC underlined that authorities did not indicate any value which could be violated by the confirmation of citizenship of a child of a Polish citizen.

18. The SAC underlined that the 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 a Polish citizen, the deliberations of administrative authorities and regional administrative courts with regards to same-sex marriages and adoption were irrelevant. The SAC noticed that in case of two children, the birth certificates indicated as the 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.

19. Moreover, the SAC underlined that the right to a 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). Also, the CRC prohibits all forms of discrimination of the children, also based on the status of the parents. Therefore, in the light of the CRC the fact that the child was born by a surrogate is irrelevant for his/her legal status. The Court stressed that every human being is born with an inherent and inalienable dignity and has the right to a citizenship if one of

⁵ Ref. no. III SA/Kr 233/19.

his/her parents is a Polish citizen. The Court also held that the refusal of confirmation of citizenship violated Article 8 of the ECHR.

C. The judgement of 2 December 2019 (ref. no I OPS 2/19) of the panel of 7 judges of the Supreme Administrative Court

20. Despite that in 2018 the SAC delivered several verdicts in favor of children of same-sex couples in the judgement of 2 December 2019 the SAC closed the possibility of registration in the Polish Civil Status Register of the foreign birth certificates of children of same sex couples.

21. The panel of 7 judges of the SAC ruled that the Article 104.5 (terms and conditions of mandatory transcription of foreign certificates) and Article 107.3 (conditions of refusal to transcribe the foreign documents) of the Law on the civil registration certificates taking together with the Article 7 of the Private International Law Act (principle of legal order clause) do not permit to transcribe the foreign birth certificate of child in which are indicated two persons of same-sex as a parents. This judgement was a consequence of the question formulated in April 2019 by the panel of 3 judges of the SAC. According to the Polish law, the decision of the panel of 7 judges is binding for other panels of judges of the SAC (and - in practice - for all administrative courts in Poland) dealing with similar cases in the future.

22. The SAC stressed that the transcription of the civil status certificate is only a declaratory act because it does not have any constitutive effect, and the issuing of the transcribed certificate has no impact on the assessment of the material and legal consequences of the events stated therein. As a result of the transcription, a Polish civil status certificate is created, which detaches from the certificate on which it was based and its further fate in the Polish jurisdiction is independent of the fate of the foreign certificate. Also, the purpose of the transcription is to use the resulting Polish civil status certificate before public administration authorities without the need to make a sworn translation of the foreign certificate each time.

23. However, the SAC takes into account the potential consequences that would arise in the Polish legal system as a result of the transcription of a birth certificate in which same-sex persons are entered as parents. In such situation in Poland would function the Polish birth certificates containing data of two women or two men as a parents that could not be put in the certificate recording the birth of a child at the territory of the Republic of Poland. In the opinion of the SAC, it would jeopardize consistency of the Polish legal system and would be contrary to the fundamental principles of the Polish family law.

24. On the other hand, in the reasoning of the judgement the SAC said that regardless of the statutory provisions of the Law on the civil registration certificates the lack of the transcription of the foreign birth certificate of the child raised by a homosexual couple should not be an obstacle to issuing the identity document or identity number (PESEL) of the minor. But it should be stressed, that these views made by the SAC in the reasoning of

the verdict are not legally binding for the other administrative bodies or courts. For instance, in the child's case, which serve as a factual background of the judgement of the panel of 7 judges of the SAC, the Mayor of Warsaw did not take into account the guidelines of the SAC and refused to issue an identity document, because the child's foreign birth certificate was not transcribed. However, in the judgement of 20 November 2020 (ref. no. IV SA/Wa 1618/20) the Regional Administrative Court in Warsaw quashed the negative decision of the Mayor of Warsaw (verdict is not final). What is important, the Court said that in the identity document of the minor should be included name of the one mother only and the data of the second woman should be omitted. The mother of the child and the Polish Commissioner for Human Rights lodged the cassation complaints against this judgement. They argue that issuing the ID without data of the second parent do not safeguard properly the rights of the child.

25. It should be stressed that the judgement of the panel of 7 judges of the SAC did not resolve all doubts concerning the transcription of the birth certificates of children of LGBTI couples, especially in the context of European law. In December 2020 the Regional Administrative Court in Kraków decided⁶ to refer the request to the CJEU for a preliminary ruling concerning the interpretation of the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights of the European Union. The Court asked whether the refusal of the registration of the birth certificate issued by another Member State of EU is contrary to: (1) the freedom of movement of EU citizens, (2) obligation to respect for private and family life, (3) principle of the child's best interest, (4) and principle on non-discrimination based on the ground of sexual orientation. The proceeding before the CJEU is pending (case no. C-2/21). In HFHR's opinion it shows that the decision of the High Court in the *A.P. and R.P. against Poland* case will be of great importance for LGBTI families in Poland and in Europe.

III. PERSPECTIVE OF THE RIGHTS OF THE CHILD

26. In the HFHR's opinion, the problem of the transcription of the foreign birth certificate of the children of same-sex couples should be analysed not only in the light of the domestic law. As mentioned above, Polish courts which delivered the judgements in favour of LGBTI families, during the examination of the cases took into account the international standards and the perspective of rights of children.

27. The situation of the children of same-sex families should be assessed from the perspective of Article 3(1) of the Convention on the Rights of the Child which stipulates that: "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." Under the CRC, the best interests principle functions as a substantive right, a fundamental interpretive legal principle and a rule of procedure. The obligation on State Parties includes: (i) to ensure

⁶ Decision of 9 December 2020, ref. no. III SA/Kr 1217/19.

that the child's best interests are appropriately integrated and consistently applied in every action taken by a public institution, especially in all implementation measures, administrative and judicial proceedings which directly or indirectly impact on children; and (ii) to ensure that all judicial and administrative decisions as well as policies and legislation concerning children demonstrate that the child's best interests have been a primary consideration. This includes describing how the best interests have been examined and assessed, and what weight has been ascribed to them in the decision.

28. The negative impact of the lack of the transcription on the rights of the child results from the lack of legal recognition of bonds between the parents and the child. This situation poses a risk that the foreign document may be continuously questioned by the administrative bodies or the courts on the grounds of its inconsistency with basic principles of the legal order in Poland.

29. However, even leaving aside the question of consequences of lack of the transcription in the sphere of civil and family law or with regards to a citizenship, in the HFHR opinion the mere fact that the state refuses to accept parenthood of persons designated in the foreign birth certificate may constitute a serious interference with the child's right to privacy and family life. The 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 "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). Also, Article 7 of the CRC stipulate 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."

30. Although the CRC does not define terms such as "parents" or "family"⁷ in the HFHR's opinion they should not be interpreted as limited only to persons bound by the genetic ties. According to the Polish law, persons may be legally recognized as parents of the child even if they do not have the genetic connections with the child. For instance, the woman who gave birth to a child is his/her mother, even if there are no genetic ties between them⁸. 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 paternity⁹ 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 a family. It is also necessary to take into account, among others, the length of a

⁷ 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.

⁸ 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.

⁹ Article 68 of the Family and Guardianship Code.

relationship and the quality of bonds between a child and his/her factual parents (see e.g. *Paradiso and Campanelli v. Italy*, §§ 149-158). Negation of this relationship by the state and insistence that parents (especially the second parent) indicated in the foreign birth certificate are just a strangers to the child, deprives children of some very important part of his/her personal identity.

31. It is also vital to note that under international law, the child's rights have to be "respect[ed] and ensure[d] (...) without discrimination of any kind (...) [including] birth or other status."¹⁰ The Committee on the Rights of the Child has addressed non-discrimination on the basis of birth under art. 2 CRC in its General Comment No. 7 (para 12): "Young children may also suffer the consequences of discrimination against their parents, for example if children have been born out of wedlock or in other circumstances that deviate from traditional values, or if their parents are refugees or asylum-seekers. States parties have a responsibility to monitor and combat discrimination in whatever forms it takes and wherever it occurs - within families, communities, schools or other institutions."¹¹ While this provision of the CRC was originally intended to protect illegitimate children, its inclusiveness suggests a generous and expansive application, including children of same-sex families. Minors should not suffer the negative consequences of their parents' decisions.

32. Consequently, in the opinion of the HFHR, one has to distinguish the issue of the legal recognition of homosexual relationships from the question of a status of a child born in LGBTI family. A sexual orientation of the parents should never be used to discriminate the children 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 rights¹². In this context, the transcription of the foreign birth certificate (in its entirety, that is both with regards to the each parent) may play a predominant role in safeguarding of the rights of a child.

IV. CONCLUSIONS

33. In view of the arguments presented above, we would like to draw the following conclusions:

- The ECtHR has the opportunity to develop standards for the protection of rights of children of same-sex families. The decision in the present cases will be of great importance for LGBTI families in Poland and in Europe.
- The question of a legal recognition of homosexual relationships have to be distinguished from the issues of status of a child born in LGBTI family. The

¹⁰ Art. 2 of the CRC.

¹¹ Committee On The Rights Of The Child, General Comment No. 7 (2005) Implementing child rights in early childhood.

¹² See e.g. A. Barak, *Human Dignity: The Constitutional Value and the Constitutional Right*, Cambridge 2015, pp. 104-105.

principle of human dignity forbids treating children in an unfair way on the basis of their parents' actions or parents' sexual orientation.

- The refusal of transcription of foreign birth certificates of children of same-sex couples should be analyzed from the perspective of the child's right to protection of family life and his/her identity, and in the context the best interests of the child.