

Summary:

judgment of the Supreme Administrative Court of 10 October 2018, Case No. II OSK 2552/16

Foreign birth certificate – register – transcription of the foreign vital records of a Polish citizen – parents of the same gender – public policy exception – optional and obligatory transcription – best interest – constitutional obligation to protect children’s rights

The essential doubt in this case was whether it is possible to make a transcription of a foreign birth certificate of a child born to Polish citizens, in which two persons of the same gender are named as parents (two women). Administrative bodies and the first-instance court, referring to the public policy exception as provided for in Article 107(3) of the Vital Records Law (hereinafter referred to as the “Law”), refused to transcribe a foreign birth certificate.

The Supreme Administrative Court, by referring to the EUCJ’s ruling (C-438/14 Bogendorff von Wolffersdorff, paragraph 67; C-193/16 E v. Subdelegación del Gobierno en Álava, paragraph 18), pointed out that the notion of public policy as a ground for derogations from the standard action consisting in transcription should be construed narrowly, taking into account in detail the specificity of the case and assessing a real and serious threat to one of the most fundamental interest of the society in a given case.

In this case, a mother (Polish citizen) applied for the transcription of her son's birth certificate (Polish citizen by law). The Supreme Administrative Court found it essential for the obligatory transcription of the foreign birth certificate that under current legislation legal documents confirming Polish citizenship are a passport and an identity card, while the condition for receiving a Polish identity document is that the Polish birth certificate is produced to the competent administrative authority. The Supreme Administrative Court explained that the transcription of the foreign vital records means that their content is accurately rewritten to the Polish register of vital records, without making any corrections to such content. The Court pointed out that the obligatory transcription (Article 104(5) of the Act) may be derogated from (optional transcription) only for reasons clearly specified in the Act, one of which is a conflict of the transcription with the essential rules of the legal order in the Republic of Poland (Article 107(3) of the Act). Article 104(5) of the Act constitutes a derogation from the rule specified in Article 107(3). The provision in question states that the transcription is obligatory for a Polish national in three cases: 1) has a vital record confirming an earlier event, drafted in Poland, and requests that actions related to vital records are taken, 2) applies for a Polish identity document, 3) applies for a personal identification number (PESEL).

The Supreme Administrative Court specified that the legislator had intentionally introduced the concept of obligatory transcription to prevent situations in which documents confirming identity would not be issued to a Polish citizen, which may lead to preventing the exercise of rights related to having the Polish citizenship acquired by law by a minor. Additionally, according to the Supreme Administrative Court, it is contrary to the current legislation to act in such a manner that transcription is refused on the grounds of public policy (optional transcription) and the obligation under the Act is not performed (obligatory transcription). As a result, such steps lead to a situation in which a minor is refused, for instance, issuing of a document confirming identity and therefore citizenship acquired by law. The Court emphasised further that such steps constitute a breach of children's rights specified both in the Constitution of the Republic of Poland and in the Convention on the Rights of the Child. The Supreme Administrative Court found that the obligation to transcribe the foreign vital records, which leads to confirming the child’s identity, constitutes a part of the entire system of the children’s rights protection, as specified among others in the convention-based case-law, which imposes an obligation to respect the children’s rights as the main guideline in decisions relating to such children. By referring to the ECHR’s case-law, the Court reiterated that a child who had been refused transcription of the birth certificate was in legal uncertainty in terms of their legal status, while their relations with the parents, as named in the foreign act, is unknown to the [Polish] legal order.

As a consequence, the Supreme Administrative Court stated that the obligation of transcription as specified in Article 104(5) of the Act, followed only to protect the child’s rights by allowing him to confirm his identity, does not conflict with the basic rules of the Polish legal order.