

**BETWEEN A CHILD'S WELFARE
AND THE LETTER OF LAW:
DETERMINING THE CONTENT OF A BIRTH
CERTIFICATE OF A TRANS-FATHER'S CHILD.
DISCUSSION IN THE CONTEXT
OF ON THE RULING OF THE APPELLATE COURT
IN WROCLAW OF 7 MARCH 2016, I ACA 1830/15***

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1. INTRODUCTION

Writing a gloss on the Supreme Court ruling of 6 December 2013 in the case I CSK 146/13 concerning the recognition of a transsexual person's gender¹ and indicating that children born by transsexual persons will have a legal interest in suing their parents for gender determination because otherwise it will not be possible to develop their birth certificates in accordance with the provisions binding in Poland, I had a ray of hope that before a child was given birth by a trans-father in Poland, a legal act on gender determination would be passed and it would unambiguously establish the method of developing birth certificates of such children. Unfortunately, my hope proved to be vain and the anticipated problems with filling in such a certificate² came true. Courts in Wrocław has had to address the issue recently.

* The author would like to thank the employees of the Ombudsman office for their assistance in giving access to anonymous documents concerning the discussed cases and providing information about their course.

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¹ M. Szeroczyńska, „Dzieci powstaną przeciw rodzicom” – glosa do wyroku Sądu Najwyższego z 6 grudnia 2013 r. w sprawie I CSK 146/13 [“Children will rise up against parents” – a gloss on the Supreme Court ruling of 6 December 2013, in case I CSK 146/13], *Prawa człowieka w orzecznictwie sądów polskich*, 29 April 2014, <http://prawaczlowieka.edu.pl/index.php?dok=301377d6f91551c76bdeceb505896fd2d31b918e-d3> [accessed on 1 March 2017].

² M. Szeroczyńska, *Rodzicielstwo prawne w wypadkach medycznie wspomaganey prokreacji – między genetyką, fizjologią a wolą posiadania dziecka* [Legal parenthood in cases of medically-assisted

It is typical of a first instance adjudicating court to adopt a legal-human attitude and act in the child's best interest. However, the court of second instance made an attempt to dogmatically apply regulations, which proved to be inefficient but directly infringed the principle of the child's welfare exposing the child to discrimination. It is also sad that it was the prosecutor who tried to adjust the persons involved, the child and the father who gave birth to the child, to the reality of the written law regulations forgetting about his primary duty to care for human rights.³

The judgements have their origin in the tragic history of Konrad.⁴

2. BACKGROUND

Konrad was born in a female body. His transsexuality was recognised and his male gender was determined by court. As a result, he changed his female name for a male one. At the same time, he underwent medical treatment of sex reassignment: hormone therapy and bilateral mastectomy. However, due to insufficient financial resources, he did not undergo hysterectomy.

Three years after the issue of the ruling determining his male gender, Konrad was raped, got pregnant and gave birth to a child. The criminal proceedings were discontinued because Konrad did not file a motion to prosecute the perpetrator (at the time when he was raped, the criminal regulations in force concerning a crime under Article 197 §1 of the Criminal Code stipulated prosecution on the motion of the aggrieved). Regardless of this fact, the rapist's data remained unknown.

The Civil Registration clerk who was reported of the birth of Konrad's child refused to develop a birth certificate and filed a motion to a competent court, the Regional Court Family and Minors Chamber to determine the content of the birth certificate. The clerk indicated in the motion that the certificate could not be developed because, pursuant to Article 61⁹ of the Family and Guardianship Code (hereinafter FGC), the name of a mother in the certificate must be the name of a woman who gave birth to a child, and in this particular case a person who gave birth to the child, from the legal point of view, was a man.

The Regional Court referred the case to the District Court as one that is difficult to adjudicate on. The District Court notified a prosecutor, who joined the proceedings.⁵

reproduction – genetics, physiology and will of having a child], *Przegląd Filozoficzny. Nowa seria*, No. 2, 2009, pp. 241–243.

³ Compare the Council of Europe Recommendation Rec (2000)19 on the role of public prosecution in the criminal justice system of 6 October 2000; International Association of Prosecutors, Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors of 23 April 1999; 6th Conference of Prosecutors General of Europe, European guidelines concerning ethics and conduct for public prosecutors – “Budapest Guidelines” of 31 May 2005; Opinion No. 9 (2014) Consultative Council of European Prosecutors (CCPE) to the Committee of Ministers of the Council of Europe on European norms and principles concerning prosecutors of 17 December 2014 (Rome Charter).

⁴ The name has been changed for the purpose of this article.

⁵ At the same time, the prosecutor applied for the reopening of the proceedings concerning the determination of Konrad's gender. The Court dismissed the motion due to the time of five years that had passed from the ruling. The prosecutor appealed against the decision but after the

Moreover, also the Ombudsman and a non-governmental organisation: Fundacja Instytutu na Rzecz Kultury Prawnej Ordo Iuris in Warsaw joined in. The District Court summoned the child concerned represented by a guardian *ad litem* appointed by the Regional Court Family and Minors Chamber.

3. STAND OF THE PARTIES TO THE PROCEEDINGS

The child's guardian *ad litem* indicated before court that Konrad should be entered into the birth certificate as a mother because he actually was the person who gave birth to the child. In the guardian's opinion it was less important to determine whether the name to be entered should be his present masculine name: Konrad or his former feminine name: Anna.⁶ The guardian *ad litem* also asked the court to take into consideration a possibility of reopening the proceedings concerning Konrad's gender determination.

On the other hand, Konrad applied for entering his present data as a father into the birth certificate of his child. He indicated that he gave birth to his child as a man and it should be reflected in the child's birth certificate. He also applied for entering the name chosen by him as the mother's name (by the way, he chose his former name: Anna) and his family name into the certificate. He also applied for entering an additional note informing about the proceedings of his gender determination and the change of name into the certificate. According to Konrad, such a birth certificate would respect his interests (recognising him as a father, who he feels he is, although he gave birth to the child) and the child's interests (eliminating the risk of discrimination and unequal treatment, which a different birth certificate would pose).

Moreover, Karol opposed the reopening of the proceedings concerning his gender determination, indicating that he has been functioning in the community as a man for years, and has fatherly bonds with his child and his partner. The reopening of the proceedings would infringe his right to sexual identity and, as a result, his dignity.

The Ombudsman fully supported Konrad's stand. In the substantiation, he mainly raised that the lack of the birth certificate for the period of a year since the child's birth has infringed his rights resulting from the UN Convention on the Rights of the Child and the Constitution of the Republic of Poland, including the right to respect for dignity, citizenship, as well as family and private life. With regard to that, he indicated the necessity of developing the birth certificate concerned as quickly as possible. Moreover, in the Ombudsman's opinion, in the event of the lack of provisions directly regulating the actual situation, it is necessary to apply

deadline he also filed an application for reinstatement of a time limit. The Court dismissed the motion to reinstate the time limit and refused to reopen the proceedings, which the prosecutor appealed against. The Appellate Court reversed the District Court decisions and reinstated the time limit and then quashed the decision refusing to reopen the proceedings. At the time of the development of this article, the proceedings concerning Konrad's gender determination was reopened before the court of first instance and was in progress.

⁶ The name has been changed for the purpose of this article.

proceedings by analogy with the provisions concerning adoption by one person or development of a certificate of birth given by unknown parent so that the solution would limit the level of the discrimination against or stigmatisation of the child to the minimum. According to the Ombudsman, the only such solution was to enter the present Konrad's data as the father's ones with an additional note concerning his gender determination and the change of name, and the name chosen by Konrad and his family name as the mother's data (by analogy with what is done in case of unknown father).

Fundacja Instytutu na Rzecz Kultury Prawnej Ordo Iuris in Warsaw indicated three possible options in its opinion:

- 1) reopening the proceedings determining Konrad's gender;
- 2) filing a suit against Konrad in order to determine his gender as female;
- 3) developing a certificate of the child's birth from unknown parents and then adoption of the child by Konrad as an adoptive father.

4. FIRST INSTANCE COURT RULING

The District Court in Wrocław, in the ruling of 24 September 2015, determined the content of the birth certificate as follows: Konrad's data should be entered into the certificate as father's data, the given name Anna and Konrad's family name provided by Konrad should be entered as mother's data. Moreover, the Court ruled that two additional notes should be entered, too: firstly, the judicial determination of Konrad's gender as male and the change of his given name from a feminine one to a masculine one; and secondly, information concerning the origin of mother's name: the father's will. The Court prohibited disclosure of the judicial determination of Konrad's gender and his change of name in the abbreviated copy of the birth certificate.

The District Court rejected the suggestion of developing a certificate of birth from unknown parents and the child's adoption by Konrad. There are no doubts in the case that Konrad is a biological parent and acts of civil registration must reflect the actual state, at least as far as possible. In this case, it is not possible to speak about an unknown origin of the child and the adequacy of adoption – Konrad not only gave birth to the child but also (at the stage of this ruling) took care of and reared the child, while an idea behind adoption is recognition of someone else's child as one's own. It is necessary to fully approve of the Court's opinion that the issue of a certificate of birth from unknown parents and next adoption would make Konrad and his child unnaturally submit to legal norms that did not envisage their family situation only in order to develop a birth certificate with the literal application of the provisions of law but without its spirit and aim. The District Court clearly expressed its stand that law should serve people and not vice versa, and that is why it dismissed the motion, which is worth approving of.

Referring directly to the issue of entering Konrad's data to his child's birth certificate, in the substantiation of the ruling, the Court emphasised that in accordance with Article 61⁹ FGC, the only and at the same time indispensable and

sufficient requirement for determining maternity is the fact of bearing a child. On the other hand, the Court pointed out that pursuant to this provision, the mother's data should be female ones. In the case, undoubtedly Konrad gave birth to the child; yet although biologically capable of getting pregnant and giving birth, from the legal point of view he was a man. In the first instance Court's opinion, the fact of judicial determination of Konrad's gender makes it impossible to enter his data as mother's data to the birth certificate.

Moreover, the District Court clearly held that entering Konrad's present data, i.e. male ones, into the certificate in the place dedicated for the mother's data, would have influence on the child's entire life and it would be legally inadmissible influence posing a threat of stigmatisation as well as discrimination. Thus, acting in the best interest of the child, which is a superior principle in all proceedings concerning children, the Court decided to reveal the civil state and origin in a different way. According to the first instance Court, entering Konrad's data as the father's ones makes it possible, while revealing the actual biological origin of the child, to exercise the child's right to privacy on the one hand, and on the other hand, respect Konrad's need to live in conformity with his gender identity recognised by law.⁷ Due to the same reason, recognising the importance of the additional notes concerning the judicial determination of Konrad's gender as male and his change of name from a feminine one to a masculine one, the Court prohibited revealing them in the abbreviated copies of the child's birth certificate. The District Court assumed, by the way absolutely rightly, that revealing the information in every copy of the child's birth certificate would be stigmatising, especially in contacts with state bodies and religious institutions which require a copy of this act. The conclusion made by the first instance Court is absolutely appropriate because the provision of this information in abbreviated copies would undermine the result of the protection of the best interest of the child, which the Court wanted to achieve by formulating the content of the birth certificate indicating the data of the person giving birth to the child as his father's data.

In the District Court's opinion, the provisions that regulate establishing paternity do not contradict entering Konrad's data as the father's ones. However, the Court did not substantiate this stand in a broad way, indicating only that FGC makes the establishment of paternity conditional upon the determination of maternity. It did not take into account, however, the determination of maternity in this particular factual state; it only emphasised the lack of the presumption of paternity from marriage (as Konrad, before his gender was determined as male, was not married) and the lack of other methods of paternity establishment (in the event of the child's origin from rape committed by an unidentified man).

The District Court rightly held that the potential reopening of the proceedings to determine Konrad's gender does not have influence on the establishment of the content of the child's birth certificate. It is true that the main argument used

⁷ Similarly, M. Boratyńska, *Glosa do postanowienia Sądu Apelacyjnego we Wrocławiu z 7 marca 2016 r., sygn. I ACa 1830/15* [Gloss on the ruling of the Appellate Court in Wrocław of 7 March 2016, I ACa 1830/15], *Prawo i Medycyna* No. 4, 2016, pp. 142–143.

here was the fact of refusal to reopen the proceedings until the ruling concerning the certificate is issued, however, the District Court also indicated that the sex reassignment surgery does not result in the judicial determination of gender but vice versa – it results from the judicial determination of gender,⁸ and Konrad abandoned hysterectomy because of financial reasons. Based on those facts, the District Court seems to rightly suggest, although does not state that directly, that the fact of giving birth to a child resulting from rape could not be a reason for the change of the ruling determining Konrad's gender, and thus, even in the event of the potential reopening of the proceedings, the ruling would not be changed and would not have influence on the content of the child's birth certificate.

Taking a decision to enter Konrad's data as the father's ones into the certificate, the District Court had to take a decision on the mother's data to be entered. The Court assumed the necessity of applying a procedure by analogy with the regulation concerning entering the data of an unknown father. Therefore, the Court decided to enter Konrad's family name as the mother's surname and the name indicated by Konrad as her first name, which was described in the additional note. It was Konrad's choice to enter his former feminine name by analogy with the procedure of entering the name of an unknown father. The District Court had no influence on the choice of the mother's name. Undoubtedly, it was the Court's intention to suggest that the child originated from a single person, although the people who had known Konrad before the judicial determination of his gender might draw such a conclusion from the content of the certificate.

Taking into consideration how much space the District Court devoted to the explanation of the application of analogy in the procedure of entering the mother's name into the certificate concerned in the event of the lack of regulations to be applied directly, it is a great pity that the Court did not present a similar reasoning in connection with the determination of paternity without prior establishment of maternity. In this case, there are no regulations to be applied directly, either, so the Court should have explained the reasons for proceedings by analogy and with what regulations. The District Court might have used the arguments provided by the Ombudsman, who indicated that the provisions concerning civil status allow the application of legal fiction in order to prevent discrimination and stigmatisation, suggested the application of cover data like in case of a birth certificate for a child whose parents are unknown, and first of all, what was the best analogy, by the way actually applied by the District Court, the development of a birth certificate like in case of an unknown father. It is hard not to have an impression that, giving up the analysis of the possibility of determining paternity without determining maternity and the reasons for abandoning the direct application of those regulations, the District Court gave the court of second instance grounds for changing the ruling.

⁸ The requirement of sterilisation before the judicial determination of gender was recognised by the Court in Strasbourg as violating human rights, case *Y.Y. v. Turkey* of 10 March 2015, Application No. 14793/08.

5. REASONS FOR APPEAL

The prosecutor appealed against the ruling. The prosecutor claimed: the procedural law provisions were infringed because the paternity was determined in the non-litigious proceedings, while the issue of such a ruling requires a trial; an error in establishing facts: based on evidence, Konrad is not the father, the rapist is, however, he is unknown; and the infringement of substantive law by groundless application of analogy and indication of the mother's data by the father. The prosecutor applied for reversing the ruling and referring the case to the first instance court for rehearing.

The prosecutor mainly raised that entering Konrad's name as the father's name into the birth certificate was not the statement of a fact but the establishment of the paternity bond between him and the child, which can only be established in the course of a paternity filiation suit. Thus, he accused the District Court of abusing its competence in the non-litigious proceedings to establish the content of a birth certificate. Although the charge is just a formal one, it indicates that there is no father-child relationship between Konrad and his child and so it cannot be registered in a birth certificate because it is not an objective fact. According to the prosecutor, the entry of Konrad's name as the father's name in fact constituted granting him this status (which can be done only in the course of litigation) and not a description of the actual state. By the way, in the prosecutor's opinion, it was an erroneously granted status because the real father (the rapist) remained unknown.

Unlike the first instance Court in the ruling, the prosecutor in the appeal broadly presented a rule that only a woman can be a mother and only a man can be a father and did not find any exceptions to that principle in case law.⁹ Based on this exceptionless principle, the prosecutor drew a conclusion that the only possible solution was to enter a woman's data as the mother's name in a birth certificate. Thus, he emphasised that it was justified to make the content of the certificate depend on the reopening of the proceedings to determine Konrad's gender, which was at the stage of hearing the appeal against the refusal to reopen it. According to the prosecutor, the reopening of the proceedings to determine Konrad's gender would create a possibility of establishing that Konrad is a woman and would make it possible to enter the mother's feminine data to the certificate.¹⁰ The prosecutor emphasised that only such a birth certificate would reflect the actual family relationship between Konrad and the child and would ensure respect for the child's

⁹ This is reflected in rulings refusing to transcribe British birth certificates of a child registered as born from two women, compare J. Gierak-Onoszko, *Polska cię nie chce, dziecko* [Poland does not want you, child], *Polityka* No. 4, 2015.

¹⁰ By the way, it is necessary to agree with M. Boratyńska that the prosecutor's motion to reopen the proceedings was his abuse of procedural law. Konrad is a man and the fact that he was raped and as a result gave birth does not change it. His morally proper conduct and the fact that he did not have abortion, although had the right to it, cannot be the grounds for challenging the ruling determining his male gender. M. Boratyńska is absolutely right stating that only medical reasons (e.g. new evidence confirming that the person is not transsexual) could be the premises of challenging this judgement, which did not take place in this case; compare, M. Boratyńska, *Glosa do postanowienia...* [Gloss on the ruling...], pp. 150–151.

rights. Paradoxically, the latest statement should be approved of, however, it must be remembered that it would entirely deprive Konrad of his rights.

Moreover, the prosecutor challenged the District Court conclusion that the fact that no man seeks paternity in this case makes it possible to enter Konrad's data as the father's data into the certificate. He indicated that the origin of the child from rape does not exclude the potential possibility of initiating a paternity rights establishment lawsuit by the biological father, which would negate Konrad's paternity.

The prosecutor's final charge concerned the groundlessness of the application of analogy in connection with the mother's data. The prosecutor broadly presented his arguments – he was against the application of analogy in any part of the solution adopted. In his opinion, the factual state was simple; it was clear who had given birth to the child and so who the mother is. It is also obvious that the father is unknown. Thus, the provisions concerning parenthood should be applied directly without the necessity of applying any provisions by analogy with anything because there is no loophole, especially if we wait until Konrad is re-granted female data as a result of the reopening of the proceedings to determine his gender. What is typical of the prosecutor's stand is that he constantly emphasised the child's right to establish genetic origin in conformity with the actual state and the obligation to enter female data as the mother's ones into the certificate. It means that he did not acknowledge that even if the proceedings was reopened (what finally happened), a court would determine Konrad's gender as male again and, as a result, the dilemma how to develop a birth certificate and avoid exposing the child to discrimination and stigmatisation would not disappear.

During the proceedings before the Appellate Court, the prosecutor supported the appeal and filed an alternative motion to reverse the first instance court ruling and dismiss the motion to determine the certificate content. The prosecutor's stand was obviously absurd because it literally meant a demand that the Appellate Court should refuse to determine the child's birth certificate, which is impossible from the legal point of view as well as would infringe all the rights of the child. One can only guess that the prosecutor did not mean the dismissal of the motion to determine the certificate content but the dismissal of Konrad's (and the Ombudsman's) motions concerning the method of establishing its content. However, if so, the prosecutor should have clearly indicated how the content of the certificate should be determined, in his opinion. The prosecutor did not present such proposals, which is especially interesting in the context that he did not present his stand before the first instance court, either, although he declared his participation in the proceedings. This shows that the prosecutor was not able to propose such a solution to the case that would ensure the protection of lawfulness and human rights (the child's as well as Konrad's ones), which he in fact was to safeguard in the proceedings.

The guardian *ad litem* supported the prosecutor's stand.

On the other hand, Konrad filed a motion to dismiss the prosecutor's appeal.

In response to the prosecutor's appeal, the Ombudsman applied for upholding the District Court decision appealed against, which the Commissioner for Children's Rights, who joined the proceedings at the appeal stage, supported.

In his procedural statement, the Ombudsman held that regardless of the prosecutor's statements concerning the case, it does not concern the determination of the child's origin (paternity) because Konrad's parenthood is unquestionable. By the way, the Ombudsman rightly raised that Konrad, in accordance with Polish provisions, would not be able to establish his paternity because the child was born out of wedlock and Konrad is not the child's mother's husband; he cannot be recognised one because this requires the child's mother's consent and the child has no mother from the legal point of view as Konrad gave birth to this child; Konrad cannot apply for denial of paternity and then for determination of his paternity either because the birth certificate has not been determined and there is nothing to deny (regardless of the issue that he would not be able, because of the wording of Article 85 §1 FGC, to prove that he had sexual intercourse with the mother, and the fact of the child's birth alone would not be sufficient for the court determining paternity if the fact is a requirement for determination of maternity).¹¹

As regards the prosecutor's argument that the biological father may try to assert his paternity, the Ombudsman rightly demonstrated that the argument is totally inaccurate from the point of view of practical life realities (it does not happen that rapists claim their paternal rights and duties at least because they do not want their crime commission to be revealed) or from the legal perspective (because the possibility of challenging a birth certificate either by denial of paternity or maternity or by establishment of paternity or adoption of a child, and in case of a child registered as originating from unknown father, never constitutes grounds for refusal to develop a birth certificate containing false or fictitious data).

In the Ombudsman's opinion, the birth certificate determined by the court of first instance fully reflected the child's genetic bonds and through the additional note about the father's transsexuality provided full knowledge about the child's origin. Moreover, the Ombudsman expressed approval of the application of analogy by the court of first instance. The Polish legal system does not regulate the development of a birth certificate for a child when a transsexual person gave birth and at the same time regulates other situations in which, in order to prevent discrimination or stigmatisation, the data entered into a birth certificate are fictitious. That is why, in the event of the lack of regulations, it is justified to apply those other regulations to obtain the same aim: ensure respect for the child's welfare.¹²

Moreover, the Ombudsman opposed postponing the development of the child's birth certificate until the decision on the potential reopening of the proceedings to determine Konrad's gender. He pointed out that it was absolutely necessary to immediately develop a birth certificate and there was no interdependence between the certificate content and the ruling determining Konrad's gender, which as a rule

¹¹ Similarly, M. Szeroczyńska, *Rodzicielstwo prawne...* [Legal parenthood...], pp. 241–242; M. Szeroczyńska, A. Śledzińska-Simon, *Założenia zmian prawnych dotyczących osób transpłciowych w prawie polskim* [Proposed legal changes concerning transsexual persons in the Polish law], [in:] W. Dynarski, K. Śmiszek (ed.), *Sytuacja prawna osób transpłciowych w Polsce. Raport z badań i propozycja zmian* [Legal status of transsexual persons in Poland. Report on the research and proposed changes], trans-fuzja, PTPA, Warsaw 2013 p. 208 ff.

¹² Similarly, M. Boratyńska, *Glosa do postanowienia...* [Gloss on the ruling...], p. 149.

should not influence the content of the birth certificate of a transsexual person's children. In addition, the Ombudsman emphasised that, paradoxically, even if the proceedings were reopened and Konrad's gender was determined as female, this would not have influence on the content of the child's birth certificate developed in accordance with the first instance court ruling because if Konrad was given the name Anna again, there would be no need to change the certificate because he chose this name (and the proper family name) to be entered into the child's birth certificate.

6. SECOND INSTANCE COURT RULING

The Appellate Court in Wrocław, in the ruling of 7 March 2016, reversed the ruling of the court of first instance in the following way:

- 1) mother's first name shall be Konrad,
- 2) father's first name shall be Jakub,¹³
- 3) the birth certificate shall contain an additional note that father's surname is the mother's surname, and the father's first name was given by the Court,
- 4) all other notes shall be deleted, including information about judicial determination of Konrad's gender and the change of his name from a feminine one into a masculine one.

The rest of the certificate shall remain unchanged.

The Appellate Court established two new facts. Firstly, after the first instance court ruling was issued, the prosecutor was relieved from the effects of the expiration of the time for appeal against the refusal to reopen the proceedings concerning the determination of Konrad's gender and the decision on dismissal of the motion was quashed. Secondly, Konrad made a declaration before a family court giving consent to his child's future adoption without the indication of the potential adoptive parent.¹⁴

It is hard to resist having an impression that the two circumstances, especially the decision to put the child up for adoption, influenced the Appellate Court ruling.

Recognising the prosecutor's appeal as justified, the second instance court emphasised that the District Court did not determine the content of the birth certificate in conformity with the actually recognised facts: the Court recognised the data of the person who gave birth to the child but did not reveal them in the certificate as the mother's data; on the other hand, the Court revealed the father's data, while the real father remains unknown. According to the Appellate Court,

¹³ The name has been changed for the purpose of this article.

¹⁴ It is hard to resist the feeling that Konrad did not manage to cope with the social pressure and the fight for his paternity. Most probably, if the proceedings had not taken so long and had not been connected with the reopening of the proceedings concerning his gender determination, Konrad would not have taken such a decision. The fact that the justice system caused Konrad to make this decision is a shameful side-effect of the proceedings, a consequence which certainly has little in common with the child's welfare and the protection of his/her rights to privacy and life in a genetic family.

knowing such facts, it was inadmissible to adopt fictitious circumstances that the mother is unknown and the father is known.

It is typical of the court of second instance, like of the prosecutor, to hold in the ruling that it is a fundamental principle to protect social interests and to that end maintain a coherent system of family law, and reveal the real data of parents in accordance with the child's genetic origin. The court of second instance, emphasising that it is in the interest of the child to reveal his/her genetic origin, without hesitation accepted the fact that there will be male data in the place provided in the certificate for the mother's data. It did not take into consideration the issue of the child's stigmatisation and as a result a justified risk of being unequally treated or even discriminated against. One can really feel that the Appellate Court decided that putting the child up to the full adoption will lead to the development of a completely new birth certificate for the child with the data of adoptive parents without a possibility of revealing the content of the primary certificate. Thus, in fact, the child will not be stigmatised because he/she will use a new "standard" birth certificate. This way of drawing conclusions, although absolutely illegitimate and showing objective treatment of Konrad and his child, let the Appellate Court choose the principle of public order before the child's welfare, which – as we can speculate, "thanks to adoption" – will be maintained. The Appellate Court felt released from the obligation to protect the child's interest. As the developed birth certificate was to be temporary, the court could devote itself to creating a document as compatible with the provisions in force as possible.

Obviously, the Appellate Court failed to develop such a document because it could not succeed in doing so. The second instance Court assumed that the only requirement for the determination of maternity is the fact of giving birth to a child, which also, in the Court's opinion, determines the content of the birth certificate and obliges to enter the data of a person who gave birth to the child as the mother's ones. The Court does not mention the requirement laid down in Article 61⁹ FGC stipulating that only a woman can be a mother. Thus, in the place provided in the certificate for the mother's name, there should be a feminine first name. Quite the opposite, the Appellate Court directly holds that the masculine name Konrad does not constitute any obstacle to have it entered into the space dedicated for the mother's data.

Moreover, the Appellate Court does not see any problems with entering Konrad's data in the birth certificate as mother's data and determines that a mother is a person who, from the legal point of view, is a man. The Court does not see the problem because the determination of Konrad's gender is for the Court insignificant at that moment. As the Court writes in the justification: "biologically, Konrad remains a woman because he still has female reproductive organs, was able to conceive and carry a baby to full term, and gave birth to a child". For the Appellate Court, despite the judicial determination of Konrad's gender as male, Konrad remains a woman and thus, there are no contraindications to revealing his data as the mother's ones, i.e. the woman's who gave birth to the child.

The above statements of the Appellate Court completely depreciate the judicial determination of Konrad's gender on the one hand, and on the other hand, what is even most important and saddest about the ruling, it undermines Konrad's gender identity treating it as a solely biological fact concerning the possession of female

reproductive organs and the ability to conceive and bear children. The statement is not only abusive to Konrad but also infringes his subjective right to gender identity, which is not challenged by anybody at present.¹⁵ By the way, if we generalised the Appellate Court's conclusions in accordance with sentence logics, we would have to state that in its opinion, persons who do not have female reproductive organs are not able to conceive and carry a baby to full term are not women. A big number of women who are unable to conceive or bear a child, including some who do not possess reproductive organs (sometimes born without them), shows that the statement is not right and should be assessed as offensive not only to Konrad but to all women, who were assigned a biological reproductive function.¹⁶

It is worth knowing that this statement of the second instance Court had a direct impact on Konrad's life. When the proceedings concerning determination of his gender was reopened, fearing that the District Court would follow the Appellate Court's biological interpretation, Konrad borrowed money and underwent sex reassignment surgery. Thus, the Appellate Court's ruling played the role of psychical coercion in Konrad's life, which is inadmissible as such if we take into consideration the above-mentioned judgement of the Court in Strasbourg, pursuant to which coercing transsexual people to deprive themselves of the ability to procreate as a requirement for recognising their psychical gender constitutes the violation of their right to privacy.¹⁷

As regards the father's data, the Appellate Court established that he remained unknown because, as it directly stated, "the child's mother did not reveal¹⁸ him and paternity was not established in another mode", and refused to enter the name indicated by Konrad (i.e. his name) because then the data of both parents would be identical and suggest that the child originates from one person. That is why, the Court chose a masculine first name to be entered into the certificate. This way, the first birth certificate with both parents' masculine first names was developed in Poland.

However, the Appellate Court rightly refused to postpone the adjudication until the decision was made on reopening the proceedings concerning Konrad's gender determination. The Court indicated that the lack of the child's birth certificate for so long infringes the child's rights, including the right to citizenship and privacy. It is a great pity that the Appellate Court noticed the issue of privacy only in this context and forgot about the child's right to keep the fact of the parent's transsexuality private in every situation when it is necessary to use a birth certificate or an identification document.

¹⁵ A. Śledzińska-Simon, *Międzynarodowe standardy ochrony praw osób transpłciowych* [International standards of protection of transsexual persons' rights], [in:] W. Dynarski, K. Śmiszek (ed.), *Sytuacja prawna...* [Legal status...], p. 80 ff and legal acts and case law quoted therein.

¹⁶ Similarly, M. Boratyńska, *Glosa do postanowienia...* [Gloss on the ruling...], pp. 143–144.

¹⁷ Judgement in the *Y.Y. v. Turkey* case; compare A. Śledzińska-Simon, *Międzynarodowe standardy...* [International standards...], p. 80 ff.

¹⁸ This, unfortunately, was also offensive to Konrad who was the victim of rape. Moreover, the phrase was completely useless because, in accordance with Polish law, the indication of a child's father by a mother does not result in entering him into a child's birth certificate but requires that he should acknowledge that child is his or the court establish his paternity.

7. CONCLUSIONS

First of all, it is necessary to agree with the Ombudsman's stand, and thus the rulings of both courts, that the lack of the child's birth certificate for a period of over a year, as it happened in the case discussed, violates the child's rights to privacy and citizenship laid down in the Convention on the Rights of the Child, the European Convention of Human Rights and Fundamental Freedoms and the Constitution of the Republic of Poland. Because of the lack of a birth certificate, the child did not have access to public healthcare services, social insurance and other guaranteed entitlements (e.g. *crèche* childcare). Konrad could not benefit from other entitlements such as a childbirth benefit or parental leave because he could not submit his child's birth certificate to his employer or any public administration authorities and indicate whether he was entitled to the mother's rights or father's rights, which is in Polish law connected with gender and not the fact of childbirth (this is essential because of the difference between the maternity and paternity leave). Therefore, the lengthiness of the proceedings and the lack of temporary decisions (e.g. the assignment of the PESEL number without a birth certificate) violated the child and Konrad's subjective rights.¹⁹

Similarly, it is necessary to agree with the Ombudsman that the judicial determination of Konrad's gender as male obliges state bodies to respectively reflect his gender in official documents, including his child's birth certificate. If we assume the existence of subjective rights to gender identity, and the judicial determination of gender confirms this stand, we must be consistent in the entire official treatment of the given person. State bodies cannot choose whether and when they treat a given person as a man and when as a woman. Entering Konrad's data into his child's birth certificate in the space dedicated for the mother's ones indicates this kind of selectiveness and arbitrariness in gender determination, which the Court clearly stated in its ruling justification, writing that these are biological features (ability to conceive and bear a child) and not the legal status (judicial determination of gender) that decide in this case on Konrad's social and legal role. What is the judicial determination of gender for if the same courts do not respect their constitutive rulings binding them? This inconsistency unambiguously infringed Konrad's right to gender identity and, what is more and most important in the discussed case, the child's rights to privacy and non-discrimination.

We might agree for the infringement of Konrad's rights if it served his child's welfare. In case of the conflict of subjective rights of the two persons, the rights of one of them might be limited and the protection of the more important rights chosen. Undoubtedly, the child's rights should prevail, which the Ombudsman rightly indicated as a principle of the Convention on the Rights of the Child as well as the Polish legal system. In the factual state of this case, however, there was no conflict like this. Quite the opposite, Konrad's and his child's interests were concurrent, despite the different stand of the guardian *ad litem*, who did not represent the child's best interest, it seems. The best solution for the child would be to enter Konrad's name as the father's one. This would indicate a biological bond with the real parent, on the

¹⁹ Similarly, M. Boratynska, *Glosa do postanowienia...* [Gloss on the ruling...], p. 142.

one hand, and on the other hand, it would protect the child against stigmatisation and unequal treatment, which in our community results from a birth certificate where the mother's name is masculine. Due to this ruling, the child will have an ID in which everybody (we often show this document in many different, also private, situations) will be able to read that his/her mother was a man, which will make him/her constantly explain his/her father's transsexuality (provided the child is not to be adopted and be given a new birth certificate, which should not influence the court's reasoning in any way). Even the possible exposure to such necessity infringes the child's right to privacy, regardless of the very probable negative, at least sneering, if not scornful or even aggressive, reactions of other people (schoolmates, teachers, a religion teacher, an employer, physicians, etc.) who, in our community, are not prepared to respect and accept diversity.²⁰ The Appellate Court adjudicating in this case lacked not only courage and will to base directly on human rights laid down in the Constitution and international law but also mainly ordinary human empathy. The Court forgot that its rulings are to serve people and not the formal letter of law, which could not have been followed in the discussed case, and it did not fulfil the purposefulness function of the provisions regulating civil status documents.

Certainly, the District Court ruling was not ideal. It could not be such because of the loophole in the law practically making it impossible to register the trans-father's child in compliance with law (that is also confirmed by the Appellate Court's ruling, which is not in conformity with the law in force, either). The idea to apply the procedure of registering the child's birth by analogy with the provisions concerning a child whose father is unknown was in this particular situation the best solution for the child's welfare. Only the certificate as ruled by the District Court, regardless of its incompatibility with the provisions in force, fully safeguarded the child's interests, respected privacy and dignity and protected the child against stigmatisation and discrimination as well as respected Konrad's rights and dignity. It is a great pity that the Appellate Court did not substantiate its choice in a more convincing way.

8. PROPOSALS DE LEGE FERENDA

Finally, it is worth considering what the optimum systemic solution to such situations would be because it cannot be assumed that we dealt with an event, which will never reoccur.

I personally think that the best solution to this situation, respecting a child's rights and a transsexual parent's rights, would be to withdraw from the use of the names of parents' roles determined by gender. We might use the terms "parent 1" and "parent 2" as is practiced in the UK.²¹ Paradoxically, it would make life easier not only for the children of transsexual parents but also for the children born in same-sex partnerships, who are denied by Polish courts at present the right to transcribe their birth certificates

²⁰ Similarly, *ibid.*, p. 149.

²¹ M. Szeroczyńska, A. Śledzińska-Simon, *Założenia zmian...* [Proposed legal changes...], pp. 210–211.

issued abroad, which limits their right to citizenship and many other subjective rights the exercise of which requires the possession of the PESEL number and ID.

The story of what happened to Konrad and his child strengthens my belief that the indication of gender in legal acts and documents should be abolished²² because it does not serve safeguarding anybody's rights (which should not be differentiated with regard to gender in accordance with the principle of equal treatment) and, as the discussed case shows, it only leads to doctrinal disputes, in which the transsexual person's as well as the child's welfare is lost. One cannot forget, as the Appellate Court did, that the provisions (especially those concerning registration, and civil status acts are such) should be constructed and applied to serve people and respect their dignity and subjective rights resulting from it; and that nobody's dignity and subjective rights can be infringed in order to adjust a man to registration norms unsuitable for the reality.

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²² M. Szeroczyńska, *Procedura zmiany płci metrykalnej transseksualistów a ochrona prawa do życia prywatnego w prawie polskim i zagranicznym* [Procedure of changing gender in birth certificates in case of transsexuals vs. protection of privacy in Polish and international law], *Studia Prawnicze* No. 1–2, 2009, pp. 279–280; M. Szeroczyńska, A. Śledzińska-Simon, *Założenia zmian...* [Proposed legal changes...], p. 186.

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BETWEEN A CHILD'S WELFARE AND THE LETTER OF LAW: DETERMINING THE CONTENT OF A BIRTH CERTIFICATE OF A TRANS-FATHER'S CHILD. DISCUSSION IN THE CONTEXT OF THE RULING OF THE APPELLATE COURT IN WROCŁAW OF 7 MARCH 2016, I ACA 1830/15

Summary

The article discusses the rulings of the District Court and the Appellate Court in Wrocław issued in the first case in Poland concerning the development of a birth certificate of a child when a person who has given birth, from the legal point of view is a man. The author points out unsuitability of Polish family law regulations in force for the legal situation of transsexual fathers. She also proves that the literal application of those provisions inadequate to the reality leads to the violation of subjective rights of the child as well as the transsexual father, which has not only doctrinal importance but mainly, what is evident in the discussed case, has a direct influence on human decisions and even their life.

Keywords: transsexuality, legal parent, determination of the content of a birth certificate

MIEDZY DOBREM DZIECKA A LITERĄ PRAWA – USTALENIE TREŚCI AKTU URODZENIA DZIECKA URODZONEGO PRZEZ TRANS-OJCA. ROZWAŻANIA NA TLE POSTANOWIENIA SĄDU APELACYJNEGO WE WROCŁAWIU Z DNIA 7 MARCA 2016 R., SYGN. I ACA 1830/15

Streszczenie

Artykuł omawia postanowienia Sądu Okręgowego i Sądu Apelacyjnego we Wrocławiu wydane w pierwszej w Polsce sprawie sporządzenia aktu urodzenia dziecka przez osobę będącą z prawnego punktu widzenia mężczyzną. Autorka wskazuje na nieprzystosowanie obowiązujących w Polsce przepisów prawa rodzinnego do sytuacji prawnej transpłciowych ojców. Wykazuje również, jak trzymanie się literalnie takich niedostosowanych do realiów przepisów, prowadzi do naruszenia praw podmiotowych, zarówno dziecka, jak i transpłciowego ojca, co ma znaczenie nie tylko doktrynalne, ale przede wszystkim – co w przedmiotowej sprawie widać bardzo wyraźnie – wywiera bezpośredni wpływ na decyzje ludzkie, a wręcz ich życie.

Słowa kluczowe: transpłciowość, rodzic prawny, ustalenie treści aktu urodzenia