



WRITTEN OBSERVATIONS

submitted to the European Court of Human Rights

in the case

Y. v. Poland

(Application No. 74131/14)

Grégor Puppinck, Director

Priscille Kulczyk, Research Fellow

March 13, 2020

1. In *Y v. Poland* (No. 74131/14), the applicant, a Polish national, was born a woman in 1969. After a gender reassignment procedure, the applicant obtained a decision from the Polish courts in 1992, which modified his sex and forename on the civil registries and amended his birth certificate with a marginal note indicating the decision.

2. Thus, the complete copy of the applicant's birth certificate (*odpis zupełny* in Polish) shows the changed sex and forename, with a reference to the decision on the margin, while the abbreviated copy of the birth certificate (*odpis skrócony* in Polish) only mentions the new sex and forename, without any reference to the change.¹

3. Subsequently, the applicant requested the deletion of the marginal reference to his sex reassignment from the complete copy of his birth certificate. The Polish government refused, and the civil courts also rejected to grant him a new birth certificate, as happens in the case of adoption.

4. The applicant currently lives in France, where he got married in 1993 to a woman who gave birth to a daughter in 2001. The birth certificate of the latter records the applicant as her father. The couple is planning to adopt the wife's niece, who was born in France and is already under their care following a French court decision. However, they are refrained from completing the adoption procedure, for under French law, the adopter must provide the complete copy of his birth certificate. The same applies when applying for French citizenship. Since only the applicant's wife is aware of the sex change, he feared that providing such document would allow more people to become aware of his sex reassignment, which could have a negative impact on his private and professional life.

5. Thus, based on the right to respect for private and family life (Article 8 of the Convention), the applicant complained that he did not enjoy the full legal recognition of his new identity because his birth gender and sex reassignment are visible on the complete copy of his birth certificate and may be revealed in certain situations. He also complained that he has been subjected to discriminatory treatment (Articles 8 and 14 combined) because transgenders are unable to obtain a new birth certificate, as happens to adopted children.

6. It should be noted that this request regarding transsexualism concerns neither a lack of recognition of a sex change, nor of the conditions for the recognition of such a change, nor its consequences, but the procedures for registering the sex change in civil status. In concrete terms, what should the civil status of a person who has undergone a gender reassignment procedure contain? It seems to be the first time that the Court will have to rule on this question.

7. The *European Centre for Law and Justice* (ECLJ) believes that the decision did not violate the right to respect for private and family life as guaranteed by Article 8 of the Convention; moreover, the acts of the Polish authorities do not constitute a discrimination contrary to Article 14. In this sense, the ECLJ wishes to submit the following to the Court.

¹ See the definition of the content of these two types of documents in Polish law: <https://www.gov.pl/web/gov/odpis-aktu-stanu-cywilnego-informacje-ogolne>

1. NATURE, ROLE AND RELIABILITY OF CIVIL STATUS

a. Civil status is a matter of general interest

8. The present case questions the nature, role, and reliability of civil status: is the recording of facts in the register aimed at satisfying personal desires or pursuing the society's general interest? It is the latter purpose that prevails, as the Court “fully accepts” in *A.P., Garçon and Nicot v. France* that: “safeguarding the principle of the inalienability of civil status, ensuring the reliability and consistency of civil-status records and, more generally, ensuring legal certainty, are in the general interest.”² Indeed, by providing “A legal document entered in the civil register, which attests to the occurrence and characteristics of a vital event”³, civil status promotes good democratic governance.⁴ In particular, the birth certificate has both a legal and a statistical purpose.⁵

b. Polish law reflects the dual function of civil status

9. Civil status has a dual function. First, it preserves the past, and second, it is the proof and identification of persons for both the present and the future.⁶ It records “facts” and “events”.⁷ The birth record, which attests to the event of a person's birth, first of all, fulfills the first of the functions of civil status and its content, therefore, derives directly from the reality of the birth: there is a certain consensus on the fact that it contains objective characteristics about the person and his or her filiation, which correspond to a historical event (birth) and will serve as a reference for his or her entire life.⁸ Thus, according to the United Nations Children's Fund (UNICEF): “The term ‘birth certificate’ can refer either to the original document certifying the circumstances of the birth, or to a certified copy or representation of the registration of that birth, depending on the practices of the country issuing the certificate.”⁹

10. It should be noted here that the two types of Polish civil-status documents at issue in this case perfectly reflect this dual function of civil status. The birth certificate (*odpis skrócony*) contains the current entries and therefore constitutes a proof and a means of identifying the person. The full copy of the birth certificate (*odpis zupełny*) is the original as established at the time of birth with entries added in the margins during the person's lifetime and corresponds to a place of preservation of the past.

² ECHR, *A.P., Garçon and Nicot v. France*, Nos. 79885/12, 52471/13 and 52596/13, 6 April 2017, § 132 and § 122; See also UNICEF, *A Passport to Protection: A Guide for Birth Registration Programmes*, New York, 2013, p. 21; United Nations, Department of Economic and Social Affairs, Statistics Division, 1998, p. 9.

³ United Nations Children's Fund, *A Passport to Protection: A Guide for Birth Registration Programmes*, UNICEF, New York, 2013, p. 139.

⁴ *Ibid*, p. 12.

⁵ *Ibid*, p. 122.

⁶ Irène Théry and Anne-Marie Leroyer, *Filiation, origines, parentalité - Le droit face aux nouvelles valeurs de responsabilité générationnelle*, 2014, p. 69.

⁷ See official definitions of ‘civil status’: United Nations, Department of Economic and Social Affairs, Statistics Division, 2001, p. 50; *Ibid*, Statistics Division, 1998, p. 9.

⁸ UNICEF, *Every Child's Birth Right: Inequities and Trends in Birth Registration*, 2013, p. 4.

⁹ See UNICEF, *A Passport to Protection: op. cit.* ‘Glossary - ‘Birth Certificate’’, p. 138.

c. The individual interest justifies the responsibility of the State in maintaining a civil status that reflects the reality of the situation.

11. The civil status that the State is responsible for maintaining must reflect the reality of what a person is and has experienced and not be subject to their wishes. Because of its nature as a legal instrument written and authenticated by State officials, the truthfulness of the content of a birth record is of great importance. Irène Théry and Anne-Marie Leroyer, French authors of a 2014 report on filiation, origins, and parenthood, note the importance for the good of each person of having a complete “honest” copy of their birth certificate:

“It is the responsibility of the State to keep this Ledger of people’s private life, which is their birth certificate, including all the marginal mentions (which it would be better to name subsequent ones) and which allows them to know their own history, and this for obvious purposes of preservation and probative value. Preserving in the birth record what belongs to the past is necessary because civil status has a function as a guarantor of the civil identity of persons . . . The preservation of civil history is all the more important because, before being an adult, every person was a child, an infant, that is to say, a being totally dependent and without any knowledge of what was done with themselves. The right to access one’s own “civil” past belongs to the individual. It is, therefore, the responsibility of the State to preserve the memory of this past of persons. This objective is all the more important today as we have become aware of certain biographical “manipulations” that were not perceived as such in the past. Hence the affirmation of the right of access to personal origins in the case-law of the European Court of Human Rights. The first stage of this right is to benefit from a civil status that is the memory of one’s true civil biography.”¹⁰

4

2. ON THE MARGIN OF APPRECIATION

12. In determining the margin of appreciation, the Court generally considers several important factors.¹¹ The ECLJ wishes to highlight a few elements, which tend towards a wide margin of appreciation in this case in favor of the Polish State.

a. The balance struck between competing public and private interests

13. The Polish State should enjoy a wide margin of appreciation as it must strike a balance between competing public and private interests in this case. This balance has been achieved,

¹⁰ Irène Théry and Anne-Marie Leroyer, *Filiation, Origins, Parenthood: Le Droit face aux nouvelles valeurs de responsabilité générationnelle*, Report for the Ministry of Social Affairs and Health and the Ministry Delegate in charge of the Family, 2014, pp. 69-70, available at the following address http://www.justice.gouv.fr/include_htm/etat_des_savoirs/eds_thery-rapport-filiation-origines-parentalite-2014.pdf (free translation).

¹¹ See in this respect *Hämäläinen v. Finland*, § 67; *Christine Goodwin v. the United Kingdom*, § 85; *Fretté v. France*, § 41-42; *X, Y and Z v. the United Kingdom*, § 44.

because the Polish law on the content of the integral copy (*odpis zupełny*) of the birth certificate in dispute is in line with safeguarding both the general interest and the individual interest, as explained above (*cf.* nature, role and reliability of civil status).

b. The mention of gender reassignment in the margin of the birth certificate is not a Polish exception

14. In 2002, Professor Frédérique Granet-Lambrechts and the International Commission on Civil Status indicated that:

“The judgment admitting a change of sex and possibly of forename is the subject of a marginal note or a subsequent entry on the birth certificate of the person concerned in most ICCS States (Austria, Belgium, France, Germany, Greece, Italy, Luxembourg, Netherlands, Portugal, Spain) . . . Finally, in Turkey, by decision of the court, which sends a copy of the judgment to the civil registrar, the transsexual’s birth record is cancelled. A new record is drawn up, indicating the new sex and the new forename of the person concerned. It should also be noted that the confidentiality of the particular situation of the transsexual is preserved by several different measures, in particular thanks to the limitations brought in many States to the delivery of integral copies including all the marginal mentions of the birth certificates.”¹²

15. Concerning the current case, Poland is part of the group of States having such marginal mention. Several of these States have modified the procedure for sex reassignment to civil status in a very permissive way as regards the conditions required for such a change.¹³ However, these States have maintained the practice of mentioning the sex reassignment in the margin of the birth certificate. This is the case at least in Belgian law (Law of June 25, 2017, reforming regimes relating to transgender persons concerning the mention of a change of sex registration in civil status records and its effects),¹⁴ Luxembourg law (Law of August 10, 2018, on the modification of the mention of sex and first name(s) in civil status records

5

¹² Frédérique Granet, *Le transsexualisme en Europe*, Commission internationale de l’état civil, 2000, updated 2002, pp. 10 et seq.: http://www.ciec1.org/SITECIEC/PAGE_Etudes/nA0AAAbsOntzU09Rb3dWRUtkQQA (free translation). See also Frédérique Granet and the ICCS Secretariat General, « L’application en matière d’état civil des principes posés par la Convention européenne des droits de l’homme dans les Etats membres de la CIEC », *Revue trimestrielle de droit européen*, Dalloz-Sirey, 1997, No. 3, pp. 653-684.

¹³ Probably with a view to anticipating (France) or complying (Belgium and Luxembourg) with the ECHR case-law resulting from the *AP, Garçon et Nicot v. France* (Nos. 79885/12, 52471/13 and 52596/13, 6 April 2017), which demedicalised the procedure for changing sex in civil status by conditioning the change in the mention of sex in civil status to a proof of the irreversibility of the change in appearance violates the Convention.

¹⁴ See the brochure of the Federal Public Service Justice, *Changing your first name and changing gender registration at the civil registry office*, p. 26 (“Certified copy: A certified copy of your birth certificate is a complete reproduction of your original birth certificate, with an indication of the changes. Be aware that a copy therefore mentions the modification of your sex and/or first name registration.”): https://igvm-iefh.belgium.be/sites/default/files/109_-_changer_prenom_et_enregistrement_du_sexe.pdf

and amending the Civil Code)¹⁵ and French law (Law of November 18, 2016, on the modernization of justice in the XXIst century).¹⁶

c. French law is identical to Polish law

16. Under French law, which is flexible to gender reassignment in the civil status, the Law of November 18, 2016, on the modernization of justice in the twenty-first century (supplemented by Decree No. 2017-450 of March 29, 2017, on procedures for changing forenames and changing the mention of gender in civil status) created a section titled “*About changing the mention of gender in civil status*” in articles 61-5 to 61-8 of the Civil Code. Under article 61-7, it is provided that:

*“A reference to the decision to change the sex and, where appropriate, first names shall be entered in the margin of the birth certificate of the person concerned, at the request of the public prosecutor, within 15 days after the date on which the decision becomes res judicata.”*¹⁷

17. Thus, as in Polish law, the marginal mention indicating the change of sex and/or first name is visible in the complete copy of the birth certificate, whereas the abbreviated birth certificate directly incorporates such a change without mentioning its existence.¹⁸

d. Is the applicant mistaken his opponent?

18. While French and Polish law are identical in terms of the birth certificate reference to sex reassignment in the civil status, it is important to ask whether the applicant is genuinely entitled to complain of a failure on the part of the Polish authorities, even though he is seeking a settlement of his situation in France.

19. Rather than the content of the complete copy of the act under Polish law, it is the (possibly broad or inconsistent) manner in which that document is publicized and/or used in France, under French law, that poses a problem for the applicant in the current case.

20. It should be noted that the applicant did not complain about the manner in which the complete copy (*odpis zupełny*) of the birth certificate is made public under Polish law, but about the content of this document which may be requested by the French authorities in the context of an application for French citizenship or adoption.

21. However, Poland ought not be condemned for the content of its civil-status documents because the French laws protect a person’s privacy; therefore, as long as French authorities

¹⁵ Law of 10 August 2018 - Art. 21: Mention of the ministerial order modifying the mention of sex and first name(s) is made in the margin of the birth certificate of the only person concerned. The same applies to judgments of modification given in application of Article 16.

¹⁶ Article 61-7 of the Civil Code, resulting from the Law of 18 November 2016.

¹⁷ See also *Circulaire du 10 mai 2017 de présentation des dispositions de l’article 56 de la loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXI^e siècle concernant les procédures judiciaires de changement de prénom et de modification de la mention du sexe à l’état civil NOR : JUSC1709389C* : <https://www.maire-info.com/upload/files/circulairechangementprenom.pdf>

¹⁸ See in particular Irène Théry and Anne-Marie Leroyer, *op. cit.*, p. 67.

do not misuse the document to cause the applicant any harm (disclosure to third parties, which, incidentally, is prohibited by law), the applicant would not suffer such harm. Hence, such harm is a mere possibility and the result of the applicant's fear that his sex reassignment might be disclosed to third parties in the course of a procedure that he might consider initiating. Ironically, the applicant has chosen to bring proceedings before the courts and the European Court of Human Rights, thereby giving wide publicity to his situation. The reality of his fear then becomes difficult to identify: an accidental or malicious disclosure of his situation can just as easily occur in such legal proceedings as in an administrative procedure.

3. ABOUT NON-DISCRIMINATION

22. Based on Articles 8 and 14 combined, the applicant complains of discriminatory treatment compared to persons in a similar situation to his, such as adopted children who are given a new birth certificate.

23. The applicant did not explain how the situation of a transsexual person and that of an adopted person would be similar. This comparison is, in any case, surprising. Perhaps it is necessary to guess behind this reference that the applicant considers a sex reassignment on the civil status as a kind of **second birth that would erase the first**, following the idea sometimes evoked that adoption would constitute a second birth for the adopted child?

24. In any case, the applicant seems to refer to this new birth certificate of adopted persons as a positive measure that he was unable to benefit from. However, even if it be accepted that there are similarities between the situation of the applicant and that of an adopted child, the positive aspect of this new birth record must be minimized in view of the concept of civil status as we have seen. The ECHR has established the right “to trace some of [one's] roots”¹⁹ and that; “Birth, and in particular the circumstances in which a child is born, forms part of a child's, and subsequently the adult's, private life guaranteed by Article 8 of the Convention.”²⁰ This concern to preserve a civil status that is consistent with the truth of the birth also explains the Court's position on the transcription of birth records drawn up abroad following surrogacy and mentioning the biological father and the intended mother.²¹

25. Moreover, the total change in the birth certificates of adoptees is widely criticized. Indeed, it does not guarantee the latter the right to a civil status that recalls their true civil biography, which Irène Théry and Anne-Marie Leroyer consider being the first step in the right of access to personal origins.

“This idea of a second birth or “pseudo-birth” does not seem to us to be in conformity with the whole movement towards more respect for the adopted child's personal history and identity. Numerous surveys at the international level have shown that this leads to uncertainty about identity, which is even more pronounced in the case of intercountry adoption, even though it is the responsibility of States to

¹⁹ ECHR, *Godelli v. Italy*, no. 33783/09, 25 September 2012, § 55.

²⁰ ECHR, *Odièvre v. France*, [GC], no. 42326/98, 13 February 2003, § 29.

²¹ ECHR, Grand Chamber, *ADVISORY OPINION concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother*, 10 April 2019 (No. P16-2018-001).

help adoptive parents to consolidate their child's life path.”²² According to these specialists, it is important “not to replace one birth certificate by another, but to keep only one certificate, the original birth certificate. The child is not born a second time, adoption is not an erasure of a previous birth and life. The adoption should be transcribed on the original birth certificate, with a mention of the current names of the parent(s).”²³

26. Therefore, adopted children who are given a new birth certificate are precisely subjected to a discriminatory treatment regarding their right of access to their origins and their right to identity. From this point of view, to consider Mr. Y.'s situation as giving rise to discriminatory treatment would paradoxically have the effect of creating additional discrimination.

27. On the contrary, there was no violation of Article 14 because the applicant was treated like any other person who requested and obtained a change in his civil status. The record would add marginal references whenever there is a change in a person's civil status, be it first name, surname, and/or sex. As proof, the 1986 Polish law on civil status records (Article 21.1) considers all events after the issuing of such a record and affecting its content as being subject to a marginal mention.²⁴ Thus, the result would be the same if there were only a first name or surname change, without there being any question of a change of sex. Indeed, the law of 2014 on civil-status records explicitly indicates (Article 24): the administrative decision to change one's first name or surname is subject to a marginal mention.²⁵

8

CONCLUSION - A HIGH-STAKES CASE

28. The ECLJ considers that the Polish State's refusals to erase all traces of sex reassignment from the applicant's complete copy of his birth certificate and to issue a new birth certificate did not violate the applicant's rights under the Convention. The objectives and functions of civil status legitimize such refusals.

29. Regarding sex reassignment, *AP, Garçon et Nicot v. France*, initiated the “de-medicalization” of this procedure. According to the Court, it is sufficient for the person concerned to prove that the sex indicated on their birth certificate is not consistent with their current social life. Now, the Court is being asked to make another far-reaching change to

²² Irène Théry and Anne-Marie Leroyer, *op. cit.*, p. 70. On identity uncertainties, see: F. R. Ouellette and J. Saint-Pierre, « Parenté, citoyenneté et état civil des adoptés », *Enfance, Famille, Générations* n°14, 2011, p. 51-76.

²³ Irène Théry and Anne-Marie Leroyer, *op. cit.*, p. 70. See also Clotilde Brunetti-Pons, « Existe-t-il un droit de connaître ses origines ? » *Le don de gamètes*, Colloque Evry 2013 (under the direction of Aude Mirkovic), Bruylant, 2014, p. 107.

²⁴ Law of 29 September 1986, Law on civil status records. Article 21. 1: If, after the civil-status record has been established, events occur that affect its content or validity, the changes resulting from them are entered in the record in the form of an additional mention.

²⁵ ACT of 28 November 2014, Law on civil-status records, Art. 24. 1. An entry affecting the content or validity of a civil-status record shall be attached to the civil-status record as an additional mention.

2. an additional mention is attached to the base:

(...) 2. final administrative decisions and administrative decisions to change the name.

civil status by taking a further step towards its total privatization. As part of a continuum, the present case is once again set on against the backdrop of subjectivism and individualism.

30. However, if the Court were to condemn Poland, this would be tantamount to obliging that State, like those who have adopted identical rules in this area, to falsify their civil status registers by inserting false information to comply with the individual's wishes. This would create confusion for the States about how to maintain accurate records and would elevate an individual's (artificial) right to self-determination above society's competing interest in preserving the integrity of civil status. In doing so, the civil status would thus be subject to individual will and no longer oriented towards the common good. The individual would be offered perfect control over the elements appearing in his or her civil status, regardless of their being in accordance with historical reality. If the Court were to condemn Poland, it would, therefore, be leading Europe "*from identity cards to à la carte identity*."²⁶

31. In any case, as Irène Théry and Anne-Marie Leroyer remind us, in matters of civil status: "*we cannot erase what we want. We only need to recall here the practice of totalitarian States which do not hesitate to 'touch up the photo' to erase what is bothering*."²⁷

32. It follows from the foregoing that this application should be dismissed, possibly at the stage of examination of its admissibility as manifestly ill-founded.

²⁶ « La Cour de cassation refuse la mention « sexe neutre » à l'état civil », interview with Laurence Neuer, *Le Point*, 4 May 2017.

²⁷ Irène Théry, Anne-Marie Leroyer, *op. cit.*, p. 69.