Proceedings in electoral matters at the Supreme Court - theory and practice

Dear Ladies, Dear Gentlemen,

Let me thank for the invitation to this conference. As a member of one of the electoral tribunals of the Supreme Court, I can fully appreciate the topicality and importance of this issue. In my contribution in this forum, I am going to draw your attention to theoretical aspects of Supreme Court proceedings in electoral matters and I will also point out some important decisions of our court.

However, I would like to begin by emphasising the fact that on 1 July 2016, the legal regulation regulating the procedure of the Supreme Court for judicial reviews in electoral matters was amended. The legal regulation is Act No. 162/2015 Coll. Code on Judicial Proceedings in Administrative Cases, as a new procedural code, which regulates the power and competence of administrative courts acting in the administrative judicial system, as well as the proceedings and procedure of administrative courts, parties to the proceedings, and other persons in the administrative judicial system.

Proceedings in electoral matters are regulated in Chapter Three Part Four of the Code on Judicial Proceedings in Administrative Cases. I will discuss in more detail only those, in which the Supreme Court of the Slovak Republic is the court with the appropriate jurisdiction. Pursuant to the provision of Article 11 (b) and (c) of the Code on Judicial Proceedings in Administrative Cases, they include the proceedings for registration of lists of candidates for elections to the National Council and for elections to the European Parliament, and proceedings for accepting a proposal for candidate for the President of the Republic. District courts make decisions in other electoral matters in the administrative judicial system.

Further, I would like to point out three significant characteristic features that distinguish Supreme Court proceedings in electoral matters from other proceedings in the administrative judicial system. The first characteristic feature of proceedings in electoral matters, in which the Supreme Court makes decision at first instance, is that it makes decisions on electoral matters in accordance with the provision of Article 21 (b) of the Code on Judicial Proceedings in Administrative Cases in five-member tribunals made up of the presiding judge and four judges. Thus, two additional tribunal members are added to the occupation of the Supreme Court so

that the decision in electoral matters is as erudite as possible and does not cause any doubts about being tendentious.

The second characteristic feature of proceedings in electoral matters, where the Supreme Court is the court of first instance, is that the proceedings are concentrated due to relatively short procedural time-limits as well as non-mandatory time-limits for the Supreme Court. In the proceedings for registration of lists of candidates for elections to the National Council and for elections to the European Parliament, the action must be brought within three days from the delivery of decision of the defendant in accordance with Article 277, and the Supreme Court must make decision within five days from the delivery of the action. In the proceedings for accepting a proposal for candidate for the President of the Republic, the action must be brought pursuant to the provision of Article 287 of the Code on Judicial Proceedings in Administrative Cases within a time-limit of three days from the delivery of the notice of refusal of the proposal for candidate for president of the republic, and the Supreme Court must make decision on the action within five days from its delivery. Such short procedural time-limits for electoral matters have been specified by the legislature in particular with respect to the purpose and particularities of the proceedings.

Finally, the third characteristic feature of proceedings in electoral matters is that the Supreme Court as an administrative court of first instance always makes decisions in electoral matters by issuing a ruling, regardless of whether it issues a decision on the merits or a decision on rejection in the case concerned.

Now, let us look closer at the proceedings in the matters of registration of lists of candidates for elections to the National Council and for elections to the European Parliament. In these proceedings, the plaintiff may seek through the action both the keeping of a candidate in the list of candidates if the State Commission for Elections and Control of Funding of Political Parties has decided on the registration of the list of candidates with modifications, and also the decision on registering the list of candidates if the State Commission for Elections and Control of Funding of Political Parties has decided on refusing the registration of the list of candidates. The plaintiff – the political party, political movement or their coalition concerned, and the defendant, i.e. the State Commission for Elections and Control of Funding of Political Parties, are parties to the proceedings. As it has already been mentioned, the plaintiff must bring an action within three days from the delivery of the defendant's decision.

The Supreme Court must make decision on the action of the political party or political movement within five days; if it finds out during the review of the action that the action is not

justified, it will dismiss it by ruling. On the contrary, if the Supreme Court comes to a conclusion that the action of the political party or political movement is justified, it will issue a ruling on keeping the candidate in the list of candidates or on the registration of the list of candidates of the political party, political movement or their coalition. Pursuant to the provision of Article 282 of the Code on Judicial Proceedings in Administrative Cases, the Supreme Court must deliver the decision to the parties to the proceedings without undue delay. The Supreme Court has not made decision in the matters of registration of lists of candidates for elections to the National Council and for elections to the European Parliament since the effective date of the Code on Judicial Proceedings in Administrative Cases, although not long ago, on 25 May 2019, elections to the European Parliament took place.

Proceedings in the matter of accepting a proposal for candidate for president are also proceedings in electoral matters, in which the Supreme Court is a court of first instance. In these proceedings the plaintiff may seek a decision on accepting their proposal for candidate for the President of the Republic if the Speaker of the National Council refuses their proposal. The parties to the proceedings include the plaintiff – a natural person, whose proposal for candidate for the President of the Republic has been refused, and the defendant, i.e. the Speaker of the National Council. As it has already been mentioned, too, the plaintiff must bring an action within three days from the delivery of the defendant's notice of refusal of the proposal for candidate for the President of the Republic.

The Supreme Court must make decision on the action of the natural person, whose proposal for candidate for the President of the Republic has been refused, within five days from its delivery. If the Supreme Court finds out during the review of the action that the action is not justified, it will dismiss it by ruling. On the contrary, if the Supreme Court comes to a conclusion that the action of the natural person, whose proposal for candidate for the President of the Republic has been refused, is justified, it will issue a ruling on accepting the plaintiff's proposal for candidate for the President of the Republic, and it will provide in the verdict that it accepts the plaintiff's proposal including their name and surname. Pursuant to the provision of Article 292 of the Code on Judicial Proceedings in Administrative Cases, the Supreme Court must deliver the decision to the parties to the proceedings without undue delay.

As regards the proceedings for accepting a proposal for candidate for the President of the Republic, I would like to mention recent decisions of the Supreme Court, in which the Supreme Court made decisions pursuant to the Code on Judicial Proceedings in Administrative Cases in connection with the election of the President of the Republic called pursuant to Article

89 (2) (d) of the Constitution of the Slovak Republic by Decision of the Speaker of the National Council No. 8/2019 Coll. dated 10 January 2019 and the date of election was determined as Saturday 16 March 2019.

The first one is the ruling of the Supreme Court dated 7 February 2019 Case No. 2 Volpp 1/2019 – Case Znášik. In the matter concerned, on 29 January 2019 the plaintiff submitted to the Speaker of the National Council a proposal for candidate for the President of the Republic, including the statement of the candidate that they agree with standing as a candidate and meet the conditions for being elected the President of the Republic. A commission consisting of civil servants and employees of the Chancellery of the National Council reviewed the submitted proposal for candidate for the President of the Republic and stated that the plaintiff had not met all the conditions because he would not reach the age of 40 years on the date of election. Subsequently, on 31 January 2019, the Speaker of the National Council refused the proposal for candidate for President because the plaintiff did not meet the condition set in Article 103 (1) of the Constitution of the Slovak Republic that the candidate for president has to reach the age of 40 on the date of election.

On 4 February 2019, the disapproved candidate for President brought an administrative action pursuant to the provision of Article 283 and the following of the Code on Judicial Proceedings in Administrative Cases, in which he sought acceptance of his proposal for candidate for the President of the Republic. The plaintiff considered important the fact that prior to the delivery of the proposal for candidate for the President of the Republic in writing in a letter, he had notified the Speaker of the National Council sufficiently in advance that he had formally fulfilled one of the preconditions imposed by the Constitution of the Slovak Republic by collecting more than 15,000 signatures of citizens and and he had appealed to the Speaker of the National Council to set the date of presidential election in such a way as to take into account, within his powers, the plaintiff's age and the will of the citizens, who directly had supported him as a candidate by signing the petition for endorsing him as a candidate for the President of the Republic. With respect to the valid legal regulation, the latest possible date for calling the first round of presidential election was 13 April 2019, as the then serving President's term of office expired on 15 June 2019. Taking into account the fact that the plaintiff would reach the age of 40 years on 11 April 2019, the Speaker of the National Council could and should have consistently followed Article 103 (3) of the Constitution of the Slovak Republic and should have called the election to be held on that date. Otherwise he made it impossible for the plaintiff to compete for the constitutional office of the President of the Republic, which

infringed the plaintiff's constitutional rights to participate directly in governance pursuant to Article 30 (1) of the Constitution of the Slovak Republic, as well as the plaintiff's fundamental right to access the elected and other public offices pursuant to Article 30 (4).

The Supreme Court of the Slovak Republic, to which the matter was submitted for hearing and decision-making, determined that it was indisputable between the parties to the proceedings that presidential election in 2019 with the date specified on 16 March 2019 had been called within the time-limit pursuant to Article 103 (3) of the Constitution of the Slovak Republic. The motion of the plaintiff, whose purpose was to reach a change of the announced date of election so that with respect to the shift of the date after the date of reaching the plaintiff's age of 40 years the plaintiff would meet the age qualification, doubted the constitutional conformity of the decision of the Speaker of the National Council, who, within his powers, had determined the date of election three months before the expiry of the term of office of the then serving President of the Republic, which was supposed to infringe the fundamental right of the plaintiff to participate directly in governance as well as the fundamental right to access the elected and other public offices. For the assessment of the case, the Supreme Court considered to be decisive the conclusion whether the Speaker of the National Council had erred when based on the alleged knowledge of the fact that the plaintiff would reach the age of 40 years only on 11 April 2019 he had failed to determine the date of the first round of presidential election as the latest eligible date of 13 April 2019 and whether consequently the above described procedure of the Speaker of the National Council had infringed the plaintiff's rights pursuant to Article 30 (1) and Article 30 (4) of the Constitution of the Slovak Republic.

As regards the above-mentioned, the Supreme Court stated that the lawful procedure, through which the Speaker of the National Council had set the date of presidential elections, seemed to be standard or adequate to the nature, requirements for organisation, as well as purpose of the presidential election, and emphasised that Article 30 (4) of the Constitution of the Slovak Republic accorded equal protection of access to elected offices and other public offices meaning that all candidates had the right to compete under the same conditions as created for other candidates. In the matter, the equal conditions also included the reaching of the age of 40 years on the date of election. The duty of the Speaker of the National Council to set the date of presidential election within the legal conditions so that a potential candidate will meet the legal age qualification on the date of election cannot be automatically inferred only based on the fact that a potential candidate, for whom it is not sure that on the date of election

he would meet the legal condition of age qualification, has expressed an interest. Taking into account that there is no legal title to the adaptation of the date of presidential election to the reaching of the age of 40 years by a candidate for the President of the Republic, the Supreme Court did not consider the fulfilment of the legal condition for upholding the plaintiff's motion in accordance with the provision of Article 291 (2) of the Code on Judicial Proceedings in Administrative Cases to be proved and it dismissed the administrative action.

The ruling of the Supreme Court dated 7 February 2019 Case No. 3 Volpp 1/2019 – Case Molnár is another, equally interesting decision in the matter of accepting a proposal for candidate for the President of the Republic, on which the Supreme Court decided in connection with the election of the President of the Republic called pursuant to Article 89 (2) (d) of the Constitution of the Slovak Republic by decision of the Speaker of the National Council No. 8/2019 Coll. dated 10 January 2019, with the date set for election being Saturday 16 March 2019. However, due to the time limit of my speech, there is no room to present it.

In conclusion, let me also mention the proceedings for hearing an action of the Prosecutor General for the dissolution of a political party or political movement and the proceedings for hearing an action for the refusal to register a political party or political movement, which can be perceived as the strongest infringement of the right to form and join political parties and movements in the democratic society. Pursuant to Article 11 (d) and (e), the Supreme Court also is the court with the appropriate jurisdiction in such proceedings. In this connection, I would like to briefly mention the recent decision of the Supreme Court on the action of the Prosecutor General for the dissolution of a political party, i.e. the ruling of the Supreme Court dated 29 April 2019 Case No. 4 Volpp 1/2017 – Case Kotleba – Ľudová strana Naše Slovensko (People's Party Our Slovakia).

The Supreme Court made decision on the action of the Prosecutor General for the dissolution of the political party Kotleba – Ľudová strana Naše Slovensko (People's Party Our Slovakia) so that it dismissed the action of the Prosecutor General and stated that the dissolution of a political party or political movement meant the strongest infringement of the citizens' right to form and join political parties in the democratic society, in each stage of proceedings it was necessary to examine whether it might be sufficient to use less drastic means for the elimination of individual expressions of members or organisational units of the political party in order to reach the aim pursued by law. This mainly includes criminal prosecution of particular persons and elimination of other illegal or antisocial activities by lower-degree administrative means. The Supreme Court also stated that in the States of the Council of Europe, including the Slovak

Republic as a member, political parties were dissolved only rarely because the dissolution of a political party was in general considered to be an ultima ratio measure, which should be considered with cautiousness.

Further, the Supreme Court mentioned that it had made decision on that matter as an administrative and not criminal court. The competence of an administrative court does not include decision-making in criminal matters, i.e. an administrative court does not make decision on whether a natural or legal person has committed a criminal offence. Administrative courts do not have the power to issue a preliminary ruling for this matter, either. That means that the tribunal making the decision did not have the legal power to decide on whether the Chairman of the defendant political party and two members of parliament had committed a criminal offence. Tribunals of the criminal division will make the decision. With respect to the existing legislation it was not legally possible for the administrative court in this matter in favour of the plaintiff to assess even preliminarily the possible culpability of acts, for which criminal proceedings are under way against the Chairman of the defendant political party and two members of parliament despite the fact that they were applied as decisive grounds of action in this matter. Having in mind presumption of innocence, because as at the day of decision rendition none of the mentioned head representatives of the defendant political party had been lawfully sentenced and the plaintiff did not lodge a procedural motion, for example, for the suspension of the proceedings pursuant to the provision of Article 100 (2) (a) of the Code on Judicial Proceedings in Administrative Cases, the Supreme Court decided on the basis of the current state of the matter. Based on the issue of fact, the court then came to a conclusion that the reasoning of the action in relation to criminal prosecution of the Chairman of the defendant political party and two members of parliament is legally irrelevant and in relation to the core of the matter, the allegations of the plaintiff could not be considered an aggravating circumstance or legally proved arguments of the plaintiff in making decision on the dissolution of the political party at that stage of the proceedings because presumption of innocence applies until the matter has been legally finished.

Further, in its decision, the Supreme Court expressed the opinion that there was no dispute between the parties to the proceeding that within its political programme, the defendant political party asserted withdrawal from the NATO alliance and was interested in calling a referendum with the question about the withdrawal of the Slovak Republic from the European Union. However, according to the Supreme Court, these value bases alone are not sufficient at this stage of proceedings as the reasons that might lead to the dissolution of the political party.

It even was not proved that the defendant had used for the mentioned intention any means in conflict with the legal order of the Slovak Republic. According to the Supreme Court, the defendant cannot be dissolved only because it criticises the constitutional and legal order of the State and participates in creating public discussion at the political level. The power of the Supreme Court in an adversarial lawsuit of this type in the legally consistent State is not to substitute the task of the plaintiff - Prosecutor General and search for evidence to prove his allegations. The burden of evidence and argumentation loads the plaintiff, consequently, in case of doubts, which also occurred in this matter, the Supreme Court must incline to the defendant political party fully in compliance with the rule "in dubio pro libertate".

Eventually, in the decision the Supreme Court emphasised that it generally accepted the concept of "democracy capable of defending itself" and pointed out the current social development, generally accepted results of elections in the Banská Bystrica self-governing region, as well as the democratic results of the presidential election this year.

Thank you for your attention!