

RESOLUTION

3 August 2020

The Supreme Court, composed of:

Ewa Stefańska, Supreme Court Judge (Presiding Judge)
Antoni Bojańczyk, Supreme Court Judge
Leszek Bosek, Supreme Court Judge
Paweł Czubik, Supreme Court Judge
Tomasz Demendecki, Supreme Court Judge
Marek Dobrowolski, Supreme Court Judge
Paweł Księżak, Supreme Court Judge (Judge Rapporteur)
Marcin Łochowski, Supreme Court Judge
Oktawian Nawrot, Supreme Court Judge
Janusz Niczyporuk, Supreme Court Judge
Adam Redzik, Supreme Court Judge
Mirosław Sadowski, Supreme Court Judge
Marek Siwek, Supreme Court Judge
Aleksander Stępkowski, Supreme Court Judge
Maria Szczepaniec, Supreme Court Judge
Krzysztof Wiak, Supreme Court Judge
Jacek Widło, Supreme Court Judge
Grzegorz Żmij, Supreme Court Judge

Court Reporter: Przemysław Szuty

Having examined, in an open session of the Extraordinary Control and Public Affairs Chamber, on 3 August 2020,
with the participation of the Prosecutor General and the Chair of the National Electoral Commission,
the validity of the elections of the President of the Republic of Poland held on 28 June 2020 and 12 July 2020,

drawing on the election report presented by the National Electoral Commission and the opinions issued following the examination of protests against the election of the President of the Republic of Poland,

having taken into account the announcement of the National Electoral Commission of 13 July 2020 regarding the results of the run-off voting and the result of the election of the President of the Republic of Poland (Dz.U. – Polish Journal of Laws of 2020, item 1238) and having taken into account the motions filed by the Prosecutor General and the Chair of the National Electoral Commission,

pursuant to Article 129 para. 1 of the Constitution of the Republic of Poland and Article 324 § 1 of the Act of 5 January 2011 – The Electoral Code (Dz.U. – Polish Journal of Laws of 2019, items 684 and 1504 and of 2020, item 568),

confirms the validity of the election of Andrzej Sebastian Duda as President of the Republic of Poland, made on 12 July 2020.

GROUND S

The elections of the President of the Republic of Poland ordered by virtue of the decision of the Speaker of the Sejm of 3 June 2020 ordering the elections of the President of the Republic of Poland (Dz.U. – Polish Journal of Laws of 2020, item 988), and scheduled for Sunday, 28 June 2020, had the following legal grounds: Article 127 in conjunction with Article 128 para. 2 of the Constitution of the Republic of Poland, the Act of 5 January 2011 – The Electoral Code (Dz.U. – Polish Journal of Laws of 2019, items 684 and 1504 and of 2020, item 568; hereinafter: “Electoral Code”) and the Act of 2 June 2020 on special rules for the organisation of general elections of the President of the Republic of Poland ordered in 2020 with the possibility of postal voting (Dz.U. – Polish Journal of Laws of 2020, item 979; hereinafter: “Election Law 2020”).

In the first vote held on 28 June 2020, none of the candidates received more than half of the valid votes, which was established by the National Electoral Commission in its announcement of 30 June 2020 on the results of the vote and the result of the election of the President of the Republic of Poland ordered for 28 June 2020 (Dz.U. – Polish Journal of Laws of 2020, item 1163), and, as a result, a

run-off vote was held on 12 July 2020 for two candidates: Andrzej Sebastian Duda and Rafał Kazimierz Trzaskowski, as the two candidates who received the two highest numbers of votes in the first vote. The announcement of the National Electoral Commission of 13 July 2020 regarding the results of the run-off vote and the result of the election of the President of the Republic of Poland (Dz.U. – Polish Journal of Laws of 2020, item 1238) stated that out of the two candidates for the post of President of the Republic of Poland, Andrzej Sebastian Duda received more votes in the run-off vote on 12 July 2020 and, pursuant to Article 127 para. 6 of the Constitution of the Republic of Poland and Article 292 § 4 of the Electoral Code, he was elected President of the Republic of Poland.

Article 324 § 1 of the Electoral Code provides that the Supreme Court, on the basis of the election report presented by the National Electoral Commission and after examination of protests, adjudicates on the validity of the election of the President of the Republic of Poland. According to § 1a of the said provision, in the case referred to in § 1, the Supreme Court adjudicates the matter as the entire competent chamber. Pursuant to Article 26 § 1 of the Act of 8 December 2017 on the Supreme Court (Dz.U. – Polish Journal of Laws of 2019, item 825, as amended), the Extraordinary Control and Public Affairs Chamber is competent to determine the validity of elections. Article 15 para. 3 of the Election Law 2020 provides that the Supreme Court shall adopt a resolution in the case referred to in Article 324 § 1 of the Electoral Code within 21 days following the date when the election result was published by the National Electoral Commission.

The Supreme Court familiarised itself with the content of the election report presented by the National Electoral Commission and the opinions issued following the examination of electoral protests.

The report of the National Electoral Commission on the elections of the President of the Republic of Poland ordered for 28 June 2020, adopted on 27 July 2020, includes information on the elections ordered for 10 May 2020 and those ordered for 28 June 2020.

With regard to the elections ordered by virtue of the decision of the Speaker of the Sejm of 5 February 2020 ordering the elections of the President of the Republic of Poland (Dz.U. – Polish Journal of Laws of 2020, item 184), scheduled for Sunday, 10 May 2020, the National Electoral Commission indicated that it had undertaken all

measures related to the conduct of the elections, as required by law. However, the Act of 16 April 2020 on special support instruments in connection with the spread of the SARS-CoV-2 virus (Dz.U. – Polish Journal of Laws of 2020, item 695) became effective on 18 April 2020 and, under that Act, the information obligations imposed on voits and election commissioners by the Electoral Code were suspended, as were the provisions regarding the issuance of certificates of entitlement to vote, to vote via postal voting and by proxy as well as the provisions regulating the powers of the National Electoral Commission to determine the specimen of the ballot paper and to order the printing of ballot papers. As a result, voting in the elections of the President of the Republic of Poland on 10 May 2020 became impossible. The National Electoral Commission published a communique to that effect on 7 May 2020. In turn, the Act of 6 April 2020 on special rules for holding general elections for the President of the Republic of Poland ordered in 2020 (Dz.U. – Polish Journal of Laws of 2020, item 827), which became effective on 9 May 2020, provided for postal voting only. However, no election packages were delivered to voters by 10 May 2020, i.e. the voting day. As a result, no elections were held on 10 May 2020.

The National Electoral Commission stated that the existing situation was not regulated by law. It was not possible to draw up the report on the vote, to establish the results of the election or to prepare a report. Therefore, considering the existing legal and factual situation as a whole, the National Electoral Commission, during its meeting on 10 May 2020, unanimously decided that the absence of the possibility to vote for candidates had equivalent effects in comparison with the lack of the possibility to vote due to the lack of candidates, as provided for in Article 293 § 3 of the Electoral Code (Resolution of the National Electoral Commission No. 129/2020 of 10 May 2020 on establishing the absence of the possibility to vote for candidates in the elections of the President of the Republic of Poland, Dz.U. – Polish Journal of Laws of 2020, item 967).

In the second part of its report, the National Electoral Commission presented information on the elections of the President of the Republic of Poland held on 28 June 2020 and 12 July 2020.

The content of that report shows that, in principle, the elections were conducted in a proper manner. Precinct Electoral Commissions established the voting results and correctly prepared the voting reports, without errors that would require the votes to be recounted and the reports to be re-written, and violations of electoral law were not numerous. In conclusion, the National Electoral Commission, on the basis of the

documents held and information obtained about the course of voting and the course of the elections on 28 June 2020 and 12 July 2020, did not establish any violations of electoral law which could have affected the voting results and the result of the election of the President of the Republic of Poland.

In connection with the election of the President of the Republic of Poland, ordered for 28 June 2020 (first vote) and for 12 July 2020 (run-off vote), the Supreme Court recorded 5,847 cases initiated by protests; the cases were recorded in its repertory NSW maintained, among others, for the purposes of electoral protests.

When setting about examining the electoral protests, the Supreme Court first examined the admissibility of those protests. After establishing the existence of negative premises in this respect, approx. 88% of the protests were left without further action, mainly due to the following reasons: 1) failure to meet the deadline for lodging an electoral protest (Article 15 para. 2 of the Election Law 2020); 2) protests being lodged by an unauthorised person (Article 82 § 4 and § 5 of the Electoral Code) or concerning a matter in respect of which the Electoral Code provides for the possibility to lodge a complaint or appeal to the court or to the National Electoral Commission before the voting day (Article 322 § 2 of the Electoral Code); 3) allegations not falling within the range of grounds for lodging a protest (Article 82 § 1 of the Electoral Code), including, in particular, allegations relating to how the election campaign was financed and how the candidates for the office of President of the Republic of Poland were presented in the public media, the course of the legislative process, the conformity of the functioning of public bodies and the content of laws and normative acts with the Constitution of the Republic of Poland; 4) failure to present or indicate the evidence underlying the allegations made in the protest (Article 321 § 3 of the Electoral Code).

In 93 cases, the Supreme Court expressed the opinion that the allegations made in protests were justified, in whole or in part, but the violations established as a result left the outcome of the elections unaffected.

The following allegations were recognised as justified:

- failure to send an election package (I NSW 134/20, I NSW 2106/20);
- an election package being sent to the wrong address despite the voter providing correct address details (I NSW 91/20);
- an incorrect address placed on the parcel containing an election package (I NSW 134/20);

- no due diligence exercised in the delivery of the election package to the voter, which resulted in a failure to deliver the package (I NSW 85/20, I NSW 139/20, I NSW 4753/20, I NSW 5535/20);

- an election package being sent to a voter who had previously requested a certificate of entitlement to vote (I NSW 5507/20);

- the electoral authorities erroneously stating that an election package for postal voting could only be sent to the address located in the municipality where the voter was entered in the electoral register (I NSW 139/20, I NSW 2266/20, I NSW 5318/20);

- delivery of an incomplete election package to the voter (I NSW 91/20, I NSW 1059/20, I NSW 5855/20);

- the consul's failure to collect a parcel containing a return envelope despite its timely dispatch by the voter (I NSW 2302/20);

- failure to ensure the secrecy of the ballot by using envelopes transparent enough to reveal the voter's choice (I NSW 89/20, I NSW 91/20, I NSW 331/20, I NSW 381/20, I NSW 1261/20);

- ballot papers being issued without the seal of the Precinct Electoral Commission (I NSW 1232/20, I NSW 1836/20, I NSW 2303/20, I NSW 2481/20);

- the polling station not being adapted to the needs of people with disabilities in a situation where the polling station was marked as adapted to the needs of people with disabilities (I NSW 3313/20);

- the existence of discrepancies between the number of ballot papers received by the Precinct Electoral Commission, determined by counting the ballot papers before the start of the vote, the total unused ballot papers and the number of voters to whom ballot papers were issued (I NSW 2090/20);

- improper performance of duties by members of the Precinct Electoral Commission, which consisted in accepting a certificate of entitlement to vote in the run-off election which was erroneously presented during the first vote (I NSW 511/20, I NSW 4815/20);

- a member of the Precinct Electoral Commission retaining, in an unauthorised manner, a document containing both certificates of entitlement to vote (entitling the voter to vote in the first vote and run-off vote), placed on a single sheet of paper (I NSW 1727/20);

- members of the Precinct Electoral Commission failing to fulfil their obligation to close and seal the ballot box (I NSW 1589/20);

- members of the Precinct Electoral Commission drawing an unauthorised conclusion that a certificate conforming the loss of an identity card, issued by a junior inspector for identity cards, was proof of the voter's identity (I NSW 630/20);

- incorrect recognition of the validity of a vote cast on a ballot paper where the voter did not put an 'X' but instead only a single line next to the name of a candidate (I NSW 892/20);

- incorrectly declaring as invalid a vote cast on a ballot paper bearing the seal of the Precinct Electoral Commission which was for the most part legible (I NSW 1589/20);

- the Precinct Electoral Commission working in the so-called subgroups (I NSW 803/20, I NSW 1589/20);

- failure to verify the voter's identity before issuing the ballot paper to that voter (I NSW 1608/20);

- refusing to issue a ballot paper to a voter in view of the fact that there was already another person's signature in the relevant box of the electoral register (I NSW 1517/20, I NSW 1557/20, I NSW 1953/20, I NSW 2149/20, I NSW 3595/20, I NSW 5253/20);

- erroneous admission of a voter to vote after the voter signed the relevant box in the electoral register in a situation where these data should have been crossed out and the voter should have presented a certificate of entitlement to vote in order to cast a vote (I NSW 155/20);

- failure to publish the results of voting by posting a copy of the precinct voting report at the polling station in a place easily accessible to voters (I NSW 5603/20);

- campaigning at the polling station on election day (I NSW 4032/20);

- failure to include a voter in the electoral register despite previously issuing a positive decision on the voter's request to be included in the electoral register (I NSW 1210/20, I NSW 2786/20, I NSW 2974/20, I NSW 5767/20);

- failure to include a voter in the electoral register on the voting day in connection with the voter's previous stay in a medical facility (I NSW 3684/20, I NSW 5226/20);

- failure to remove a voter from the electoral register despite the voter having received a certificate of entitlement to vote (I NSW 2139/20);

- failure to effectively inform a voter about having been included, by force of law, in the electoral register of a separate electoral precinct (I NSW 1739/20);

- failure to add a voter to the electoral register in a voting precinct in Poland despite the voter's name being removed from the electoral register in a voting precinct abroad (I NSW 3365/20);

- unjustified deletion of a voter from the electoral register where the voter had been previously added at their own request (I NSW 2277/20);

- a voter being removed from the electoral register without their request or knowledge, while simultaneously adding that voter, also without their knowledge, to the electoral register in another voting precinct (I NSW 408/20);

- misleading a voter as to the possibility of being entered in the electoral register in Poland which, due to the lapse of time limits specified in the electoral law, prevented the voter from exercising their electoral franchise (I NSW 280/20);

- a voter's name being placed in two electoral registers, which hypothetically enabled that voter to cast two valid votes (I NSW 491/20, I NSW 1210/20, I NSW 4107/20, I NSW 4900/20, I NSW 5299/20);

- a voter being included in the wrong electoral register (I NSW 5226/20);

- a voter being misled as to the impossibility of issuing and sending a certificate of entitlement to vote to them (I NSW 3125/20);

- issuing a defective certificate of entitlement to vote, which resulted in the voter not being allowed to vote (I NSW 2424/20, I NSW 2949/20, I NSW 3669/20);

- issuing a certificate of entitlement to vote within a period that prevented the voter from exercising their electoral franchise (I NSW 372/20, I NSW 2144/20, I NSW 2974/20);

- an unjustified refusal to issue a ballot paper because the voter presented a certificate of entitlement to vote issued by a consul without a hologram (I NSW 2255/20).

The allegations made in the remaining protests were considered unfounded, mainly due to the failure to present proof; the protesters' misinterpretation of the provisions of the Electoral Code and the Act of 2 June 2020 on special rules for the organisation of general elections of the President of the Republic of Poland ordered in 2020 with the possibility of postal voting; and in view of the fact that it was found in the course of the proceedings in cases initiated by the protests that the electoral authorities and consuls had correctly fulfilled their duties imposed under the provisions of electoral law.

Acting under Article 129 para. 1 of the Constitution of the Republic of Poland, the Supreme Court takes into account any and all circumstances that may be of relevance to the validity of the elections, including those which could not have been the subject of allegations in electoral protests.

Within its competence, delineated in this way, the Supreme Court considered that elections in a democratic country are an indispensable institution of public life, enabling the election of representatives to exercise power on behalf of the sovereign, that is the Nation. The electoral law has an ancillary character as it enables the election of representative bodies. The need to ensure the continuity of sovereign power based on democratic legitimacy must be a normative priority, also in exceptional situations.

In a democratic country governed by law, it is unacceptable to create such legal and factual conditions where an electoral act cannot be effected. Although none of the states of emergency provided for in the Constitution of the Republic of Poland was introduced, the elections scheduled for 10 May 2020 were not held. In view of this situation, not regulated by the Constitution of the Republic of Poland, it was the duty of the state to bring about the elections without delay.

The Supreme Court considered two constitutional values, i.e. the need to ensure conditions for the sovereign's will to be expressed as to the future President of the Republic of Poland, and the need to respect the constitutional time limits. The Supreme Court found that under the aforementioned circumstances, the fact that the Speaker of the Sejm re-ordered the elections for 28 June 2020 by her decision of 3 June 2020—in connection with the content of the Resolution of the National Electoral Commission No. 129/2020 of 10 May 2020—enabled both these values to be achieved to the fullest extent possible.

The Act of 2 June 2020 on special rules for the organisation of general elections of the President of the Republic of Poland ordered in 2020 with the possibility of postal voting was adopted only 26 days before the elections and became the basis for the election of the President of the Republic of Poland.

The Supreme Court fully shares the position of the Constitutional Court, emphasising the stability of the electoral process and the electoral law (Constitutional Court rulings of: 3 November 2006, K 31/06; 28 October 2009, Kp 3/09; and 20 July 2011, K 9/11), which means that apart from “extraordinary circumstances of an objective nature,” it is inadmissible to introduce significant amendments to electoral

law during the period of six months of “legislative silence” before elections which would otherwise be based on such new regulations.

At the same time, the Supreme Court noted that the electoral law did not provide for adequate solutions in the specific situation that emerged in connection with the SARS-CoV-2 pandemic. In the opinion of the Supreme Court, the state of epidemic, combined with the failure to hold the elections within the constitutionally prescribed period, falls within the scope of “extraordinary circumstances of an objective nature” indicated by the Constitutional Court.

The Supreme Court also bore in mind that the amendments to the electoral law introduced by the aforementioned act of law extended the possibility for citizens to participate in voting in the conditions of pandemic, in particular through postal voting, which helped to ensure a fuller exercise of electoral rights held by Polish citizens, including the electoral franchise (Article 62 of the Constitution of the Republic of Poland), as well as the following principles laid down in the Constitution of the Republic of Poland: democratism (Article 2 of the Constitution of the Republic of Poland) and continuity of power, where the President of the Republic of Poland acts as a guarantor thereof (Article 126 of the Constitution of the Republic of Poland).

Furthermore, given that the elections ordered for 28 June 2020 were held after the failure to conduct the elections ordered for 10 May 2020, the Supreme Court considered the following normative solutions to be admissible: solutions guaranteeing that individuals who had registered their candidacies for the elections ordered for 10 May 2020 would be allowed to run during the 28 June 2020 elections without the requirement of repeated submission of 100,000 citizen signatures, and solutions enabling the registration of new candidates. In its decision of 12 June 2020, I NSW 61/20, the Supreme Court also decided that it was possible to include signatures collected previously by candidates who did not collect the required number of signatures in the elections ordered for 10 May 2020 and count those signatures towards the required 100,000 support signatures. Candidates who ran again were not in the same factual situation as the newly proposed candidates and, therefore, it was acceptable to differentiate their situation with respect to the duration of the election campaign and, consequently, with regard to the spending limits for their campaigns (Article 32 of the Constitution of the Republic of Poland).

Elections of the President of the Republic of Poland are universal, equal, direct and secret (Article 127 para. 1 of the Constitution of the Republic of Poland). Each

voter is entitled to one vote of equal strength, and each candidate has equal rights in the same situation. Candidates' unequal access to mass media does not affect the validity of the elections as long as unrestricted media pluralism (legal and factual) is ensured. The Supreme Court notes that a neutral approach of the public authorities towards the election campaign should be a good practice with regard to the electoral process. The electoral campaign should be reported in all media, especially public ones, in a fair manner. However, violations of these standards, as reported in the public domain and electoral protests, did not take a form that would restrict free choice.

The Chair of the National Electoral Commission requested that a resolution be adopted to confirm the validity of the election of Andrzej Sebastian Duda as President of the Republic of Poland made on 12 July 2020.

The Prosecutor General requested that a resolution be adopted to confirm the validity of the election of Andrzej Sebastian Duda as President of the Republic of Poland made on 12 July 2020.

After analysing the report and the opinions issued and, in particular, the infringements identified therein, the Supreme Court found that neither those infringements individually nor all of the infringements taken together provide grounds for challenging the validity of the election of the President of the Republic of Poland made on 12 July 2020.

Considering the foregoing, pursuant to Article 129 para. 1 of the Constitution of the Republic of Poland and Article 324 § 1 of the Electoral Code, the Supreme Court ruled as in the operative part hereof.