REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT

Prishtina, on 4 February 2019
Ref. no.:AGJ 1323/19

[This translation is unofficial and serves for informational purposes only.]

JUDGMENT

in

Case No. KI01/18

Applicants

Gani Dreshaj and the Alliance for the Future of Kosovo (AAK)

Constitutional review of Judgment A.A. –U.ZH No. 64/2017 of the Supreme Court of Kosovo, of 26 December 2017

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge
Gresa Caka-Nimani, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge, and
Nexhmi Rexhepi, Judge

Applicant

1. The Referral was submitted by Mr. Gani Dreshaj, a candidate for the Mayor of the Municipality of Istog in the local elections of 2017 (hereinafter: the first Applicant), and by the political entity the Alliance for the Future of Kosovo (AAK), (hereinafter: the second Applicant).

2. The first Applicant and the second Applicant (hereinafter when referred by the Court jointly: the Applicants) are represented by Mr. Arianit Koci, a lawyer from Prishtina.

Challenged decision

3. The Applicants challenge the constitutionality of Judgment A.A. –U.ZH No. 64/2017 of the Supreme Court of Kosovo of 26 December 2017 in conjunction with Decision ZL. Ano. 1142/2017 of the Election Complaints and Appeals Panel (hereinafter: the ECAP) of 23 December 2017.

Subject matter

4. The subject matter is the constitutional review of the aforementioned decisions, which, allegedly, violated the Applicants' rights guaranteed by Article 45 [Freedom of Election and Participation] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and by Article 3 of Protocol No. 1 to the European Convention on Human Rights (hereinafter: the ECHR).

5. The Applicants also request the imposition of interim measure by requesting the Court to prohibit: "*the enforcement of the Decision of the Central Elections Commission (CEC) on certification of the results of the second round of elections for Mayor of the Municipality of Istog until the merit based decision is rendered by the Constitutional Court*".

Legal basis

6. The Referral is based on Articles 21.4 [General Principles], 113.1 and 7 [Jurisdiction and Authorized Parties] and 116.2 [Legal Effect of Decisions] of the Constitution, Articles 27 [Interim Measures] and 47 [Individual Requests] of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rules 32 [Filing of Referrals and Replies] and 56 [Request for Interim Measures] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

7. On 31 May 2018, the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) adopted in the administrative session the amendments and supplementation to the Rules of Procedure, which was published in the Official Gazette of the Republic of Kosovo on 21 June 2018 and entered into force 15 (fifteen) days after its publication. Accordingly, in reviewing the Referral, the Court refers to the legal provisions of the new Rules of Procedure in force.

Proceedings before the Court

8. On 3 January 2018, the first Applicant submitted the Referral to the Court.

9. On 3 January 2018, the President of the Court appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Ivan Čukalović and Selvete Gërxhaliu-Krasniqi.

10. On 5 January 2018, the Court notified the first Applicant about the registration of the Referral. On the same date, a copy of the Referral was sent to the ECAP, the Supreme Court and to Mr. Haki Rugova, a candidate of the political entity the Democratic League of Kosovo (hereinafter: the LDK), for Mayor of the Municipality of Istog, with the opportunity to submit its comments on the allegations raised in the Referral No. KI01/18.

11. On 15 January 2018, the Court requested the first Applicant to clarify his Referral and a copy of the Referral was sent to the second Applicant, with the opportunity to submit its comments on the allegations raised in Referral No. KI01/18.

12. On 11 and 17 January 2018, the ECAP and Mr. Haki Rugova submitted their comments regarding Referral No. KI01/18.

13. On 19 January 2018, the abovementioned comments were sent to the first Applicant for any possible comment.

14. On 26 and 31 January 2018, the Applicants submitted their responses, in which they repeated their positions for irregular election process, addressed the comments of the ECAP and Mr. Haki Rugova and presented their arguments on exhaustion of legal remedies and of the procedural legitimacy (*standing*).

15. On 1 March 2018, the Court, in its review session, decided that the assessment of the Referral be postponed for another date.

16. On 16 June 2018, the mandate of judges: Snezhana Botusharova and Almiro Rodrigues was terminated. On 26 June 2018, the mandate of judges: Altay Suroy and Ivan Čukalović was terminated.

17. On 9 August 2018, the President of the Republic of Kosovo appointed new judges: Bajram Ljatifi, Safet Hoxha, Radomir Laban, Remzije Istrefi-Peci and Nexhmi Rexhepi.

18. On 22 August 2018, the President rendered decision to appoint Judge Radomir Laban as Judge Rapporteur instead of Judge Altay Suroy.

19. On 28 September 2018, the President of the Court rendered decision on the appointment of the new Review Panel composed of Judges: Arta Rama-Hajrizi and Bajram Ljatifi.

20. On 1 October 2018, the Court sent to the members of the Venice Commission Forum a request with some questions for comparative analysis of the Referral under consideration.

21. On 17 October 2018, Judge Bajram Ljatifi requested the President of the Court to be excluded from the review of the Referral No. KI01/18, because he was previously a part of the decision-making process for the same request regarding the proceedings conducted before the CEC.

22. On 25 October 2018, the President, pursuant to Article 18 of the Law and Rule 9 of the Rules of Procedure, rendered a decision on the appointment of Judge Gresa Caka-Nimani, as a member of the Review Panel, in the Referral No. KI01/18, instead of Judge Bajram Ljatifi.

23. On 23 January 2019, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court to declare the Referral admissible and to hold that the challenged decisions are in compliance with Article 45 of the Constitution and Article 3 of Protocol no.1 to the ECHR.

Summary of facts

24. On 22 October 2017, the first round of local elections in the Republic of Kosovo was held. The first Applicant, Mr. Gani Dreshaj, was the AAK candidate for the Mayor of the Municipality of Istog. The second Applicant, AAK, was a political entity competing in the Municipality of Istog through its candidate, Mr. Gani Dreshaj.

25. The final results of the first round of the elections determined that the competition for the Mayor of the Municipality of Istog would be decided based on the results of the second round of elections (run-off), which would take place between the two candidates with the majority of votes in the first round, namely between the first Applicant, Mr. Gani Dreshaj and Mr. Haki Rugova, a candidate of the Democratic League of Kosovo (the LDK) for the Mayor of the Municipality of Istog.

26. On 19 November 2017, the second round of local elections was held, where for the Mayor of the Municipality of Istog the two aforementioned candidates competed.

27. On 24 November 2017, the LDK complained to the ECAP requesting the cancellation of the second round of elections held on 19 November 2017, alleging that there has been an abuse of the voting process by mail because the number of by mail voters for the Municipality of Istog was extremely high, as 58% of by mail votes in Kosovo are only for the Municipality of Istog.

28. On 27 November 2017, the ECAP (Decision No A. 1114/2017) approved the LDK complaint as grounded, annulled the result for the second round of elections of 19 November 2017 and ordered the CEC to repeat the vote for the second round of local elections, for Mayor of the Municipality of Istog. The ECAP assessed that the by mail ballots for the second round of local elections for the Mayor of the Municipality of Istog are determinative in the final result and that the manner of voting in this case damages and seriously violates the second round of the electoral process for Mayor in the municipality of Istog. The ECAP concluded that the only and fair solution is the repetition and revote in the second round of elections for Mayor of the Municipality of Istog in all polling stations of the Municipality of Istog.

29. The relevant part of the ECAP decision states: "*From all that was emphasized above, regarding the voting by mail from the voters of Montenegro, Austria and Slovenia, for the second round of local elections for Mayor of the*

Municipality of Istog, the panel held that the manner of voting and delivery of packages of the ballots is done in an organized manner, and it does not follow from the case file that the voters in question have voted and have sent ballot papers in person. Therefore, such a way of organizing the voting is assessed by the panel as unlawful and as such it seriously harms and undermines the second round election for Mayor of the Municipality of Istog … The Panel considers that in this situation the only right solution is to repeat the second round of local elections for Mayor of the Municipality of Istog, and to revote, since it is not fair to cancel the ballots by mail only, although it is clear that these votes are manipulated, we do not have the complete assurance that all are manipulated, because there are likely to have regular votes among these votes, so that each citizen vote will go to its destination, the only fair and non-discriminatory solution is the re-voting in all polling stations in the Municipality of Istog".

30. Both, the LDK and the second Applicant (AAK) complained to the Supreme Court against the above-mentioned decision of the ECAP. The LDK requested the cancellation of by mail voting and the exclusion of result of by mail voting from total and final results of the local elections for Mayor of the Municipality of Istog. The second Applicant (AAK) requested that the challenged decision of the ECAP be annulled and the CEC be ordered to certify the final results of the elections in the second round for Mayor of the Municipality of Istog, including by mail votes.

31. On 1 December 2017, the Supreme Court (Decision AA. No. 55/2017) rejected the complaints of the LDK and of the second Applicant (AAK) filed against Decision ZL. A. No. 1114/2017 of the ECAP. The Supreme Court upheld the ECAP decision and found that: (i) the ECAP correctly assessed that there has been an abuse of the voting process by mail; (ii) that the abuse of the voting by mail is unlawful and seriously violates the second round electoral process for Mayor of the Municipality of Istog; (iii) The ECAP has accurately and convincingly found that there was a substantial impairment of the electoral process for Mayor of the Municipality of Istog; and that (iv) in the present case, the revote is the only "right legal way" to remedy violations of this electoral process.

32. The relevant part of the aforementioned decision of the Supreme Court emphasizes: *"The subject of review and assessment in the Supreme Court of Kosovo were the appealing allegations of the appellants as well as those related to the ECAP decision on revote and by mail vote. However, these allegations by this Court are also rejected as ungrounded because the ECAP in its decision has provided sufficient legal reasons which the Supreme Court of Kosovo accepts. Thus, because of the fact, that from evidence, namely the material evidence that are in the case file, it is accurately and convincingly confirmed that the second round electoral process for Mayor of the Municipality of Istog was damaged by the above mentioned violations of law and, which, among other things, determine and influence the final election results. This Court notes that with the forbidden acts, it results, inter alia, that in the present case, the fundamental principles of the election process expressly provided for by the provisions of Article 2 of the Law on General Elections in the Republic of Kosovo have been violated, namely Article 3 on*

Local Elections in the Republic of Kosovo and the European Convention on Human Rights concerning the the right to secret vote, guaranteeing the right to equal vote, etc".

33. On 17 December 2017, the second round of elections for Mayor of Istog was repeated, where the candidates were the first Applicant, (Gani Dreshaj), the candidate of AAK, and Mr. Haki Rugova, the LDK candidate.

34. On 21 December 2017, the CEC approved the Report of the Count and Results Center (hereinafter: the CRC) for the elections of 17 December 2017 in the Municipality of Istog. Based on that report, Mr. Haki Rugova, the LDK candidate won 10,033 votes, whereas the first Applicant (Gani Dreshaj) 10,019 votes.

35. Meanwhile, the second Applicant (the AAK - branch in Istog), represented by legal officer B.L., filed a complaint to the ECAP by challenging the voting process and administration of counting by the Count and Results Center. The second Applicant (AAK) complained about the irregularities that have arisen and the final results of the re-voting for the Mayor of the Municipality of Istog on 17 December 2017. The second Applicant (AAK) mainly complained that 52 (fifty two) ballot papers of voters who had reached the age of majority between 20 October 2017 until 17 December 2017 were not counted.

36. The CEC, in its response to the Applicant's complaint, among other things, stated that: "*... during the CRC administration where the votes of fifty-two (52) voters were rejected, because their names were not in the Final List of the Voters, but who have reached the age of 18 in the elections of 17.12.2017 in the municipality of Istog, point out that the Central Civil Registry Extract contained all the names of 18-year-old registered voters, including those who have turned 18 up to Election Day, 22 October 2017. According to the Election Regulation No. 02/2013 Drafting, Confirmation and Challenge of Voters List, Article 3.3 in order to create the list of voters, the CEC during the election process receives three (3) times the civil registry extract from the Civil Registry Agency. The first time, no later than two days after the announcement of the election date, second time not later than 3 days before the start of the challenge and confirmation from the voter lists, and the third time no later than two (2) days after the end of the challenge period and confirmation of VL. This list the voters had the opportunity to challenge during its review (voter list), by the public and from 29 August 2017 until 12 September 2017*".

37. As for the conditional votes, the votes that were rejected due to their irregularities - during the entire electoral process - for the Mayor of the Municipality of Istog, the CEC explained: "*...by the total number of 481, of conditional votes and VPCV votes it was confirmed that 309 votes meet legal criteria as regular ballot for counting and further proceeding, while 172 votes have been rejected. The reason why 172 ballots have been rejected ... is that they have not met the legal criteria, as 108 rejected ballots have to do with the persons who voted but were not in the Final Voters List (FVL); 61 rejected ballots were because the persons who voted were not voters respectively citizens of Istog where the election process was held; 2 ballots were rejected*

because the voters who voted did not register as voters with special needs and 1 ballot was rejected because the voter besides having conditional ballot was proved to have voted as a voter at his regular polling station".

38. The explanations given by the CEC were accepted and approved by ECAP – in entirety - as set out in the decision below.

39. On 23 December 2017, the ECAP (Decision ZL. Ano. 1142/2017) rejected the second Applicant's (AAK) allegations of irregularities and the final outcome of the re-voting as inadmissible and ungrounded, namely, the ECAP reasoned that the voter list could have been challenged within the deadline set by law - and that after the deadline for challenging - the voter list has been certified. In this regard, the ECAP also added that the voter list is only certified once and is valid for the entire election process because its duration cannot be known in advance. The ECAP concluded that voters who had reached the age of majority in the time period from 20 October 2017 until 17 December 2017 could not have been part of the certified voter list.

40. Regarding the counting of 52 (fifty-two) voters' ballots that reached the age of majority between 22 October 2017 and 17 December 2017, the relevant part of the ECAP decision stipulates:

> *"In respect to allegations of the appellant that there are 50 ballots that were not counted because the voters have reached the adult age to vote between dates of 20 October 2017 and 17 December 2017 which votes were not counted. These allegations were assessed by the Commission as ungrounded because the Central Civil Registry Extract contained all names of voters registered with age of 18 including those who have reached 18 years until the election date of 22 October 2017. […] the CEC during the electoral process receives three (3) times the civil registry extract from the Civil Registry Agency. The first time, no later than two days after the announcement of the election date, second time not later than 3 days before the start of the challenge and confirmation from the voter lists and the third time no later than two (2) days after the end of the challenge period and confirmation of VL". This list could have been challenged by voters during period of its review (the voters list), by the public from 29 August 2017 until 12 September 2017. Since the voters list was certified after expiry of challenging deadline, 12 September 2017, and since it is certified and became valid for an electoral process because it is certified only once for an electoral process regardless of duration of the election process, then, on this ground the voters who have reached the adult age during period from 22 October 2017 and 17 December 2017 could not be part of the certified voters list".*

41. The second Applicant (AAK) filed a complaint with the Supreme Court challenging the legality of the abovementioned ECAP decision, proposing that its appeal be approved, that the challenged decision of ECAP be annulled, the final results of the re-voting for the Mayor of the Municipality of Istog held on 17 December 2017 be annulled and to order CEC to repeat the voting in the Municipality of Istog.

42. On 26 December 2017, the Supreme Court (Judgment A.A. -U.ZH No. 64/2017) rejected the appeal of the second Applicant (AAK) filed against Decision ZL. Ano. 1142/2017 of ECAP as ungrounded. The Supreme Court upheld the ECAP decision finding that the factual situation was correctly determined and that the law was not violated to the detriment of the complainant (AAK). The Supreme Court added that the complainant's allegations were ungrounded and could not affect the determination of a factual situation other than that established by the ECAP.

43. Regarding the allegations of the second Applicant (AAK) on the deprivation of the right to all voters to vote, the relevant part of the reasoning of the Supreme Court can be summarized as follows:

> *"This Court also assesses as ungrounded the allegations when it was stated that by the Decision of ECAP, the right to vote of all voters was prohibited which is in contradiction with Article 45 of the Constitution of the Republic of Kosovo; this is because the CEC receives the latest Civil Registry Extract with all eligible voters even with those voters who until the voting day reach 18 years of age and gain the right to vote. The Voters List for elections is certified only once and is valid for respective elections, because nobody knows how long the elections may take; however the date when the elections shall be held can be known as it was the case with elections of 22 October 2017. Legal provision of Article 6 of Election Regulation no. 10 states that: "The same voter's list that was used for Municipal Elections will be used for the second round of Municipal Mayor Elections". Therefore, the same voters list used for the election date in these municipal elections of 22 October 2017 will be used also for the second round of these elections."*

44. On 27 December 2017, the CEC certified the final results of the elections for Mayor of the Municipality of Istog. On that occasion, Mr. Haki Rugova was officially declared the Mayor of the Municipality of Istog.

Applicants' allegations

45. The Applicants allege that the ECAP and the Supreme Court violated their rights, the right to be elected, as guaranteed by Article 45 [Freedom of Election and Participation] of the Constitution in conjunction with Article 3 of the Protocol No. 1 (Right to free elections) to the ECHR.

46. Regarding the difference in votes between the first Applicant, Mr. Gani Dreshaj, the AAK candidate, and Mr. Haki Rugova, the LDK candidate, the Applicants allege*: "The results of the second round of elections for Municipality of Istog were extraordinary narrow. According to certified results by the Central Election Commission, the candidate from the Democratic League of Kosovo, Mr. Haki Rugova, won elections with a difference of only 14 votes".*

47. The Applicant further add: "*In the second round of elections, there are total 52 (fifty two) ballot papers of the citizens whose votes were not counted. These citizens voted through so called "conditional ballots" as they did not appear on election list certified by the Central Election Commission.*"

48. The Applicants allege: "*In its appeals filed with ECAC and with the Supreme Court, the AAK has been claiming that the Final Voters List was lastly updated prior to municipal elections of 22 September 2017. As consequence of this, the votes of 52 (fifty two) citizens who reached their majority age between dates of 22 October 2017 (the election date) and 17 December 2017 (repetition of elections) were not counted and not included in the final result as their names did not appear in the Final Voters List.*"

49. The Applicants allege that the legal position of ECAP and the Supreme Court that the election lists are only certified once because: *"nobody can know how long can the elections take, instead, only the date when elections will be held can be known as it was the date of 22 October 2017*", is not accurate because it is not in compliance with Article 45 (1) of the Constitution, which provides: *"Every citizen of the Republic of Kosovo who has reached the age of eighteen, even if on the day of elections, has the right to elect and be elected, unless this right is limited by a court decision"*.

50. In this regard, the Applicants emphasize that the Constitution does not make any distinction between the first and second round of elections. The Applicants further claim that the Constitution guarantees to all individuals the right to elect and be elected, *'even on the day of elections',* provided they have reached the age of eighteen.

51. As to the imposition of interim measure, the Applicants request the Court: "*to render decision on interim measure which would prohibit the enforcement of the Decision on certification of the second round elections results for Mayor of the Municipality of Istog rendered by the Central Elections Commission (CEC) of 27 December 2017 until the merit based decision is rendered by the Constitutional Court.*"

52. Finally, the Applicants request the Court: (i) to declare the Referral admissible; (ii) to impose an interim measure until the Court decides on the merits of the case; (iii) to prohibit the implementation of the decision of the Central Election Commission on certification of the results of the second round of elections for the Mayor of the Municipality in Istog of 27 December 2017 until the Court decides on the merits of the case; (iv) to hold that there has been a violation of Article 45.1 of the Constitution; (v) to declare invalid Judgment A.A.-U.ZH. No. 64/2017 of the Supreme Court of 27 December 2017; and (vi) to order the Central Election Commission to repeat again the voting of the second round of local elections for Mayor of the Municipality of Istog.

Comments submitted by the interested parties

53. The ECAP in its response numbering two hundred and ten (210) pages includes the complaints of political entities AAK and LDK, CEC decisions, CD regarding

the procedures conducted, the supplementation of AAK complaints, additional evidence from the CEC, response to AAK appeal before the Supreme Court, etc.

54. The ECAP stated: *"...the Applicant's Referral should be declared inadmissible or manifestly ill-founded and to confirm in its entirety the reasons given in Decision ZL. Ano. 1142/2017 of 23 December 2017 and in the ECAP response to the complaint filed with the Supreme Court".*

55. Mr. Haki Rugova, as an interested party, in his response submitted to the Court, stated that in this case all decisions of the CEC, ECAP and the Supreme Court were rendered in accordance with and by respecting the Constitution, laws and regulations that govern the sphere of the election right in the Republic of Kosovo.

56. Regarding the allegations of the Applicant of the irregularities of the voter list, Mr. Haki Rugova claims that no one has complained within the legal deadlines on the voters list certified by the CEC and that fifty-two (52) votes alleged by the Applicant are unconfirmed and uncounted votes for which it is not known to which candidate they belong.

57. Mr. Haki Rugova, proposes that the Applicant's Referral be declared inadmissible due to non-exhaustion of legal remedies because: "*Judgment A.A.-U.ZH. No. 64/2017 of the Supreme Court which constitutionality is being challenged by this Referral of the Applicant Gani Dreshaj, but also the ECAP Decision that preceded this Judgment, were issued based on (as stated in the Judgment of the SC and the ECAP Decision) the complaints of the Alliance for the Future of Kosovo as a political entity rather than on the individual complaints of the Applicant, the candidate Gani Dreshaj ... therefore, as in the case KI73/09 "Mimoza Kusari-Lila vs Central Election Commission", even in this case it is considered that the Applicant has not exhausted all legal remedies... ."*

58. On 26 and 31 January 2018, the first Applicant (Gani Dreshaj) submitted two responses of eleven (11) pages, which can be summarized as follows: The first Applicant claims: (i) it is a practice that the appeals to ECAP and Supreme Court be filed by a political entity and not the candidate competing for the position of the mayor of municipality; (ii) that he is a direct victim while the second Applicant (AAK) is an indirect victim; (iii) that the first Applicant, in the capacity of the AAK candidate, has exhausted all legal remedies in accordance with the legislation in force; (iv) his Referral to the Court is a continuation of the AAK 'battle' before ECAP and the Supreme Court; (v) fifty-two (52) voters should be given the opportunity to vote because the difference in votes in the competition for the mayor of municipality of Istog was only fourteen (14) votes; (vi) the first Applicant expects a detailed response from the Court and a repetition of the second round of voting for the Mayor of the municipality of Istog.

59. On 31 January 2018, the second Applicant (AAK) represented by Arianit Koci, a lawyer, filed a four (4) page submission, in which case he raised mainly the same allegations as raised earlier by the first Applicant (Gani Dreshaj). The

second Applicant (AAK) stated that in the present case, it is an indirect victim whereas the Mr. Gani Dreshaj is a direct victim and that the case law of the Court and of the Court on Human Rights also recognizes to legal persons the status of a victim.

60. In this regard, as far as its procedural legitimacy (standing) before the Court is concerned, the second Applicant (AAK) stated: *"The AAK submits that the Referral of Mr. Gani Dreshaj in the capacity of AAK candidate for the mayor of the Municipality of Istog and in a capacity of a direct victim of violation of the right to be elected, which is guaranteed by the Constitution and international conventions should be considered a continuation of the legal battle initiated by the legal entity AAK through the complaint filed with the ECAP as well as an appeal with the Supreme Court, as determined by relevant applicable laws".*

Main comments received from the Forum of the Venice Commission

61. The Court notes from the responses received from the Forum of the Venice Commission that there are similar legal situations in the states that have responded but are not identical with the referral under review.

62. The Court sent to the Forum of the Venice Commission a list of questions that mainly relate to the concepts of active and passive election rights as well as their interaction with the constitutional systems of the respective states and the issue of updating the election lists between the rounds of voting.

63. The Federal Constitutional Court of Germany explained: (i) The violation of "active right" does not automatically cause the violation of "passive right". If so, such a violation would certainly affect all qualified persons to be elected, not just a specific complainant but all election candidates; (ii) the question of whether the election law was violated due to non-inclusion of the voters in the voter list is largely dependent on the federal state (*lander*) and by the precise circumstances of the case; (iii) in the event of a repetition of elections in Lower Saxony, the voter lists will not be updated and the initial lists will be used, unless six (6) months have elapsed since the first elections were held; and (iv) election disputes in Germany are not assessed if the rights of individual have been personally violated but if objectively it can be said that the elections were irregular.

64. The Constitutional Court of South Africa stated: (i) the candidate protects his own interest but also of the public. His right is independent and does not depend on whether 52 (fifty-two) voters have complained or not; (ii) active and passive rights are interrelated but not dependent on one another. According to South African law, the main issue would be the correctness of the elections, while the non-counting of 52 (fifty-two) votes of voters, could materially prejudice the result for the complainant; (iii) violation of the active right is not necessarily an automatic violation of the passive right; (iv) the non-counting of 52 (fifty-two) voters' votes did not violate the complainant's right to be elected, but this is a matter of unfair elections in the material sense, and in such cases, the courts of South Africa tend to intervene; (v) the voter lists should be updated for the second round; and (vi) the courts of South Africa would order

updating the list because the universal right to vote should be interpreted in favor of the right to vote, and not for its abolition.

65. The Constitutional Court of Austria stated: (i) according to Austrian election law, the violation of the active right does not imply a violation of the candidate's right to be elected, thus his passive right; and (ii) in principle, the second round of voting is only part of a single election procedure, in case of holding the second round of voting, the original election lists are not updated.

66. The Constitutional Court of Bulgaria stated: (i) under the Bulgarian electoral law, the active and passive rights are interdependent; however, any violation of the active right does not lead to the annulment of the election result; and (ii) whenever two rounds of voting are held, a new voter list is created before the second round is held. If an individual reaches 18 years of age on the same day and is not on the voter list, he can still vote.

67. The Supreme Court of Ireland stated: (i) the voter list is published in a draft form on 1 November and enters into force on 15 February of the following year; (ii) it is valid for 12 months; (ii) any individual wishing to be included in the voter list must complain to the competent bodies to be included in the additional list (*supplementary register*); and (iii) the voter list which entered into force on 15 February is used for the elections and referendums over the next 12 (twelve) months.

68. The Czech Constitutional Court stated that "an individual who is not on the voter list has the right to appeal for non-inclusion on the voter list in the administrative court".

69. The Constitutional Court of Latvia stated that: (i) the municipal elections in Latvia are being held in a single round; however, the repeated elections are possible in a case where the court has annulled the election results; (ii) in case of cancellation of elections, Article 45 of the Municipal Election Law provides that the same voters who have met the requirements for voting in the initial elections may vote in the repeated elections; and, (iii) the passive right to be elected does not go as far as entitling a candidate to be elected by a specific group of voters.

70. The Constitutional Court of Croatia stated that "according to the election law of the Republic of Croatia, in case of holding the second round of elections, the voter lists are not updated".

Relevant constitutional and legal provisions

Constitution of the Republic of Kosovo

Article 45 [Freedom of Election and Participation]

> *"1. Every citizen of the Republic of Kosovo who has reached the age of eighteen, even if on the day of elections, has the right to elect and be elected, unless this right is limited by a court decision.*

2. The vote is personal, equal, free and secret.

3. State institutions support the possibility of every person to participate in public activities and everyone's right to democratically influence decisions of public bodies."

Article 139 [Central Election Commission]

1. The Central Election Commission is a permanent body, which prepares, supervises, directs, and verifies all activities related to the process of elections and referenda and announces their results.

2. The Commission is composed of eleven (11) members.

3. The Chair of the Central Election Commission is appointed by the President of the Republic of Kosovo from among the judges of the Supreme Court and courts exercising appellate jurisdiction.

4. Six (6) members shall be appointed by the six largest parliamentary groups represented in the Assembly, which are not entitled to reserved seats. If fewer groups are represented in the Assembly, the largest group or groups may appoint additional members. One (1) member shall be appointed by the Assembly deputies holding seats reserved or guaranteed for the Kosovo Serb Community, and three (3) members shall be appointed by the Assembly deputies holding seats reserved or guaranteed for other Communities that are not in majority in Kosovo.

European Convention On Human Rights

Article 2 of Protocol No. 1 to the ECHR
(Right to free elections)

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Law No. 03/L-073 on General Elections in Republic of Kosovo as amended and supplemented by Law No. 03/L-256

"Article 9
The Challenge Procedure

9.2 A person who wishes to challenge a name that he/she considers should not be on the VL shall submit a request to the court of first instance clearly stating the facts supporting his/her challenge and including any relevant evidence.

9.3 A person may submit a request to the court of first instance if he/she discovers that his/her name does not appear on the VL. Such request shall include any relevant evidence.

Article 10
Adjudication Process

10.1 All decisions of the court of first instance are final, including decisions regarding the inclusion or exclusion of a name from the VL.
[…]
10.4 A request regarding improper exclusion from the Voters List, regular or by-mail, must be received by the court of first instance within 40 days before the election day.

Article 105
[Complaints Concerning the C&RC Process]

105.1 Complaints concerning the conduct of the count at the C&RC shall be submitted in writing to the ECAC within 24 hours of the complainant's becoming aware of the alleged violation. (Amended by Law No. 03/L-073, Article 4).

105.2 The submission of a complaint shall not interrupt or suspend the counting process.

105.3 All complaints to the ECAP shall be decided no later than seventy two (72) hours from receipt of the complaint in the ECAP central offices. (Amended by Law No. 03/L-073, Article 5).

Article 106
Election Results

106.1 The CEC shall certify the final election results after the completion of all polling station and counting centre procedures and when all outstanding complaints related to voting and counting have been adjudicated by the ECAP and any appeals of ECAP's decisions on them have been determined by the Supreme Court of Kosovo. (Amended by Law No. 03/L-073, Article 6).

106.2 Prior to certification of the election results, the CEC may order a recount of ballots in any polling station, or counting centre, or a repeat of the voting in a polling centre or municipality.

106.3 The results of an election are final and binding once they have been certified by the CEC. […]

Article 117
Procedures of ECAC

117.1 The ECAC shall establish its own rules of procedure.

117.2 The ECAC shall, in adjudicating a complaint or appeal examine and investigate all relevant evidence, and grant a hearing if it deems it necessary.

117.3 Adjudication on appeals and complains by ECAC shall be based on clear and convincing evidence.

117.4 The ECAC may order a recount of the ballots in a polling station or polling centre and an examination of the balloting material as part of its investigation into a complaint or appeal.

Article 118
Decisions

118.2 The ECAP shall provide the legal and factual basis for its decision in writing. The ECAP shall provide copies of its written decisions to the parties involved in the matter within seventy two (72) hours of the issuance of the decision if it affects the certification of the election results. For other decisions the ECAP shall provide copies of its written decisions to the parties involved in the matter within five (5) calendar days. (Amended by Law No. 03/L-073, Article 12 paragraph 1).

118.4 An appeal may be made from a decision of the ECAP, as ECAP may reconsider any of its decisions upon the presentation by an interested party. An appeal to the Supreme Court of Kosovo may be made within twenty four (24) hours of the decision by ECAP, if the fine involved is higher than five thousand Euro (€5,000) or if the matter affects a fundamental right. The Supreme Court shall decide within seventy two (72) hours after the appeal is filed. (Amended by Law No. 03/L-073, Article 12 paragraph 2).

118.5 The ECAP decision is binding upon the CEC to implement, unless an appeal allowed by this law is timely filed and the Supreme Court determines otherwise. (Amended by Law No. 03/L-073, Article 12 paragraph 3).

Article 119
Complaints

119.1 A person who has a legal interest in a matter within the jurisdiction of ECAP, or whose rights concerning the electoral process as established by this law or electoral rule have been violated, may submit a complaint to the ECAP within twenty four (24) hours after the close of the polling stations and the ECAP shall decide the complaint within seventy two (72) hours after the complaint is received. (Amended by Law No. 03/L-073, Article 13). […]

119.2 The Office may submit a complaint to the ECAC in respect of a Political Entity failing to comply with this law or CEC Rules affecting the electoral or the registration process.

119.3 The ECAC shall not consider a complaint concerning a decision of the CEC, but may consider an appeal from a decision of the CEC as specified under article 122 of this Law.

119.4 The ECAC may impose sanctions on a Political Entity for violation of this law or CEC rules committed by the members, supporters and candidates of the Entity. A Political Entity may submit evidence to the ECAC showing

that it made reasonable efforts to prevent and discourage its members, supporters and candidates from violating this law or electoral rules. The ECAC shall consider such evidence in determining an appropriate sanction, if any, to be imposed on the Political Entity.

119.5 The ECAC may upon its own discretion consider matters otherwise within its jurisdiction, when strictly necessary to prevent serious injustice.

119.6 The provision of false information to the ECAC shall be a violation of this law that the ECAC may sanction under article 121 of this Law.

Article 120
Remedies and Sanctions for Violations

120.1 The ECAC may, if it determines that a violation of this law or CEC rules has occurred:

b) prior to certification of the election results and, in the sole discretion of ECAP, under exceptional circumstances to nullify the results of a specific polling station or polling center, and to order the CEC to repeat the voting in a polling centre or polling station; if it considers that the final election results could be affected (Amended by Law No. 03/L-073, Article 14).

Article 122
Electoral Appeals

122.1 A natural or legal person whose legal rights have been affected by any of the following decisions of the CEC may appeal that decision to the ECAP within twenty four (24) hours after the decision being appealed is announced by CEC and the appeal must be decided by ECAP within seventy two (72) hours after the appeal is made. (Ndryshuar me Ligjin nr. 03/L-073, nenin 15).

a) the inclusion or exclusion of a person from participation in an out-of-Kosovo voting programme;
b) the certification or refusal to certify a Political Entity or candidate to participate in an election;
c) a candidate who after certification does not want to participate in an election;
d) the accreditation or refusal to accredit an electoral observer;
e) the imposition or an administrative fee on a Political Entity under article 42 of this law; and
f) the refusal to register a Political Party within the Office.

122.2 The ECAC shall uphold an appeal from a decision of the CEC if it determines that the CEC decision was unreasonable having regard to all the circumstances.
122.3 The ECAC may, if it upholds an appeal from a decision of the CEC:
a) direct the CEC to reconsider its decision; and
b) direct the CEC to take remedial action.

Law on Local Elections in the Republic of Kosovo No. 03/L-072

Article 9
Election of Mayors

"9.5 A candidate is elected Mayor of a Municipality if he or she receives more than 50% plus one vote of the total valid votes cast in that Municipality.

9.6 If none of the candidates receives more than 50% plus one of the total votes cast in that Municipality, a second election shall be organized by the CEC between the two candidates who received the most valid votes. A second round of elections is held on the Sunday four (4) weeks after the first round.

9.7 The candidate who wins the majority of votes in the second round is elected as Mayor of the Municipality."

Rules and Procedures No. 02/2015 of ECAP, of 4 December 2015

Article 2
[Definitions]

The terms used in this rule have this meaning:
[…]
2.1 "Complaint" – means a regular legal remedy submitted in writing by a person who has a legal interest or whose rights have been violated during the election process.
2.2 "Appeal" means a regular legal remedy against first instance decisions.

[…]

Article 5
[Complaints]

[…]
5.3 Complaints regarding the electoral process for the polling day are submitted to the ECAP within twenty-four (24) hours from the moment of the closure of the voting center (Article 113.1 of LGE)
5.4 Complaints concerning the conduct of the count at the C&RC shall be submitted in writing to the ECAP within twenty four (24) hours of the moment of finding out from the complainant of the alleged violation, based on Article 105.1 of LGE.
5.5 For all issues that are not directly related to voting and re-counting, the complaint must be filed with the ECAP within 24 hours of the alleged violation.
[…]

APPEALS
Article 10
[Criteria for appeal]

[…]
10.5 With respect to the appeal of a CEC decision, the appeal must be filed within five (5) days after notification of the CEC decision. For all other appeals, unless otherwise specified, appeals must be filed within twenty four (24) hours from the receipt of the ECAP decision by the Applicant.
[…]

Article 14
Procedure for Administration of Investigation of Election Material

14.1 When ECAP accepts a complaint deemed to be regular and when such a complaint is suspected of fraudulent activity involving the election material, the ECAP Chairperson or the Chairperson of the decision-making panels shall appoint a member of the Secretariat of ECAP, as the main investigator of that complaint.
[…]

CEC Election Regulation No. 02/2013
Drafting, Confirmation and Challenge of Voters Lists
of 2 July 2013

"Article 3
The process of drafting the Voters List

3.1 CEC maintains Voters List and ensures that the Voters List is accurate and updated, and it contains:

a) Extract the most recent available from the Central Civil Registry of all voters entitled to vote who are registered as citizens of Kosovo under the Law on Citizenship;

b) All eligible voters to vote abroad who have successfully applied for voting abroad.

3.2 Central Civil Registry CEC to provide all relevant information that the CEC requires maintaining the Voters List in accordance with the deadlines established by the CEC.

3.3 In order to create the list of voters, the CEC during the election process receives three (3) times the civil registry extract from the Civil Registry Agency. The first time, no later than two days after the announcement of the election date, second time not later than 3 days before the start of the challenge and confirmation from the voter lists, and the third time no later than two (2) days after the end of the challenge period and confirmation of VL".

CEC Election Regulation No. 06/2013 Count and Results Center of 2 July 2013

Article 8
Complaints regarding to process in CRC

8.1 Complaints about the conduct of the count in the CRC, under Article 105 of the Law on General Elections in the Republic of Kosovo and Article 26 of the Law on Local Elections in the Republic of Kosovo must be submitted in ECAP in writing within 24 hours of the occurrence of the alleged violation.

8.2 Submitting the complaint does not interfere or stop the counting process.

8.3Pursuant to the provisions of Article 105.3 of the Law on General Elections in the Republic of Kosovo, and Article 26 of the Law on Local Elections in the Republic of Kosovo, for all the complaints ECAP will decide no later than 72 hours after receiving them in their headquarters.

Article 9
Election Results

[…]

9.3 In exceptional cases before certification of the results, the CEC can order a recount of ballots in any Polling Station, Polling Center, and Counting Center or repeat voting at a Polling Center or in a municipality
.

[…]

9.5. Prior to certification of the election results, it is the competence of EPAC, in exceptional cases to annul the results of a Polling Station or Polling Center, and order CEC to repeat the voting in a Polling Station or Polling Center, if it considers that they have impact in final results.

[…]

CEC Election Regulation No. 10/2013
Second Round of Elections for Municipal Mayors
of 2 July 2013

Article 1
General Provisions

This Regulation is intended to regulate, election observers, appointment of polling station committees, Voters List, voting and counting in polling stations, voting for people with special needs and circumstances, as well as the campaign spending limits and financial disclosure of Political Party for the Second Round of Elections for Municipal Mayor.

Article 3
Applicable procedures

All provisions in the relevant election regulations of the CEC are applicable during the second round of Mayoral elections, unless they are replaced or amended specifically by this Regulation..

Article 5
Appointment of Polling Station Committees

Both candidates that compete in the second round of municipal mayor elections will be allowed to have their representatives in PSC, pursuant to decision of CEC. Political entities of candidates must nominate their representatives. If there are no sufficient nominations received from that political entity, then the composition of PSC will remain as defined in article 4.2 of this Regulation.

Article 6
Voter's List

The same voter's list that was used for Municipal Elections will be used for the second round of Municipal Mayor Elections".

Admissibility of the Referral

71. The Court first examines whether the Referral has met the admissibility requirements established in the Constitution and further specified in the Law and the Rules of Procedure.

72. In this regard, the Court, by applying Article 113 of the Constitution, the relevant provisions of the Law regarding the procedure in the case foreseen in Article 113, paragraph 7 of the Constitution; and Rule 39 [Admissibility Criteria] and Rule 76 [Referral pursuant to Article 113.7 of the Constitution and Articles 46, 47, 48, 49 and 50 of the Law] of the Rules of Procedure shall examine whether: (i) the Referral was filed by authorized parties; (ii) the decisions of public authorities are challenged; (iii) all legal remedies have been exhausted; (iv) the rights and freedoms which have allegedly been violated are specified; (v) the time limits have been respected; (vi) the Referral is manifestly ill-founded; and (vii) there is an additional admissibility requirement, pursuant to Rule 39 (3) of the Rules of Procedure, which is not met.

Regarding authorized parties

73. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties], paragraphs 1 and 7 of the Constitution which establish:

"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.

[…]

7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law".

74. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution which stipulates:

"4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable".

75. Finally, the Court also refers to paragraph (a) of paragraph (1) of Rule 39 [Admissibility Criteria], of the Rules of Procedure which establishes:

"(1) The Court may consider a referral as admissible if:
(a) the referral is filed by an authorized party",

76. As to the fulfillment of these constitutional requirements, the Court first notes that in the present case there are two Applicants and each of them should be legitimated as an authorized party based on the relevant provisions cited above, as a precondition to review this Referral. As to the first Applicant, namely Mr. Gani Dreshaj, the Court notes that he, in a capacity of an individual, that is, a natural person, he is a party authorized to file a constitutional complaint with the Court (see cases of the Constitutional Court: KI73/09 Applicant: *Mimoza Kusari-Lila*, Resolution of 19 February 2010; KI152/17 Applicant: *Shaqir Totaj*, Resolution on Inadmissibility of 17 January 2018; KI157/17 Applicant: *Shaip Surdulli*, Resolution on Inadmissibility of 15 May 2018). As to the second Applicant, namely the political entity AAK, the Court notes that in accordance with paragraph 4 of Article 21 of the Constitution, the second Applicant also has the right to submit a constitutional complaint, invoking the constitutional rights that apply to legal entities, to the extent applicable. (See: Resolution on Inadmissibility, *AAB-RIINVEST University LLC Prishtina v. the Government of the Republic of Kosovo*, Case KI41/09 of 21 January 2010; see also: case of ECtHR, *Party for a Democratic Society and Others v. Turkey*, No. 3840/10, Judgment of 12 January 2016).

77. In addition, and in this regard, the Court also notes that the ECtHR through its case law has found that the right to be elected within the meaning of Article 3 of Protocol No. 1 of the ECHR, is the right that is also guaranteed to political parties as legal entities and that they may complain irrespective of their candidates (see, for example, the case of the *Georgia Labor Party v. Georgia*, complaint no. 9103/04 ECtHR, Judgment of 8 July 2008, paragraphs 72-74 and other references mentioned in that decision). Consequently, the Court concludes that both Applicants are authorized parties.

Regarding the act of public authority

78. In this regard, the Court refers to paragraphs 1 and 7 of Article 113 of the Constitution, cited above and to Article 47 [Individual Requests] of the Law, which provide:

"1.Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority".

79. The Court also refers to paragraph (2) of Rule 76 [Referral pursuant to Article 113.7 of the Constitution and Articles 46, 47, 48, 49 and 50 of the Law] of the Rules of Procedure, which, *inter alia*, provides:

(2) A referral under this Rule must accurately clarify [...] what concrete act of public authority is subject to challenge.

80. In this regard, the Court notes that the Applicants challenge acts of a public authority, namely Judgment of the Supreme Court [Decision AA. U.ZH. No. 64/2017] of 26 December 2017 and the Decision of ECAP [ZL.A. No. 1142/2017] of 23 December 2017, as stipulated by paragraph 7 of Article 113 of the Constitution and other provisions of the Law and of the Rules of Procedure. Accordingly, the Court concludes that the Applicants challenge acts of a public authority.

Regarding the exhaustion of legal remedies

81. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 of the Constitution, cited above, and paragraph 2 of Article 47 [Individual Requests] of the Law and item (b) paragraph (1) of Rule 39 [Admissibility Criteria] of the Rules of Procedure which *foresee:*

Article 47
[Individual Requests]

(...)

2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law.

Rule 39
[Admissibility Criteria]

1. The Court may consider a referral as admissible if:
(...)
(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted,

82. The Court notes that paragraph 7 of Article 113 of the Constitution provides for the obligation to exhaust "*all legal remedies provided by law*". This constitutional obligation is also defined by Article 47 of the Law and item (b) of paragraph (1) of Rule 39 and applies both to natural persons and to legal persons, to the extent applicable.

83. In this regard, the Court must examine whether all legal remedies have been exhausted by the first Applicant, in the capacity of an individual, as a natural

person, and by the second Applicant, in the capacity of the political entity as a legal person. The criteria for assessing whether that obligation is fulfilled are well established in the case-law of the Court and in the case law of the ECtHR in accordance with which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, the Court is obliged to interpret human rights and fundamental freedoms guaranteed by the Constitution.

84. In the circumstances of the present case, the Court recalls that only the second Applicant, namely the AAK as a political entity, specifically, a legal person, was a party to the proceedings before the ECAP and the Supreme Court. The first Applicant was not a procedural party although the applicable law, namely the LGE, in Article 119.1, foresees an opportunity for legal persons, i.e. candidates who have an interest in protecting their fundamental rights and freedoms. Consequently, the Court concludes that only the second Applicant has exhausted all legal remedies and the Court will review the constitutionality of the Judgment of the Supreme Court [A.A.-U.ZH. nr. 64/2017] in relation to the rights and freedoms guaranteed by the Constitution belonging to the AAK as a political entity and a legal person. (See, *mutatis mutandis*, political entities as Applicants before the ECtHR for electoral disputes, *Refah Partisi (Social Welfare Party) and Others v. Turkey*, Nos. 41340/98, 41342/98, 41343/98 and 41344/98, See also the case of the *Russian Conservative Party of Entrepreneurs and Others v. Russia*, No. 55066/00 and 55638/00, Judgment of 11 January 2007, where the Applicant was a political entity along with the candidate who competed under the sign of that same political entity).

85. In this regard, the Court notes that, on one hand, the appeals procedures before ECAP and the Supreme Court were initiated and conducted on behalf of the second Applicant (AAK), while, on the other hand, from the content of the documents submitted it results that the first Applicant (Gani Dreshaj), did not file any complaint on his behalf. The complaint of the first Applicant in his name was filed for the first time with the Constitutional Court, which is confirmed by the power of attorney he had provided for his representative.

86. However, the second Applicant (AAK) in the submission filed on 31 January 2018, notified the Court that it considers the Referral of the first Applicant (Gani Dreshaj), as the "continuation of the battle" conducted before ECAP and the Supreme Court; and in the present case, considers that the first Applicant is a 'direct' victim, while qualifying itself as an 'indirect victim'.

87. The Court emphasizes that this case differs from previous cases No. KI73/09 and No. KI152/17, because in these cases the Applicants submitted their Referrals to the Court individually, while the regular proceedings before the CEC, the ECAP and the Supreme Court were conducted by political entities. In these cases, the political entities did not submit the Referral to the Court to support their candidates (the Applicants), which in fact determines the difference between the cases mentioned and this case (see: Constitutional Court of the Republic of Kosovo: KI73/09 Applicant: *Mimoza Kusari-Lila v. Central Election Commission*, Resolution on Inadmissibility of 24 March 2010, paragraph 35; see also, *mutatis mutandis,* case No, KI152/17 Applicant *Shaqir Totaj*, Resolution on Inadmissibility of 8 February 2018, paragraphs 39-46 and references mentioned in that decision).

88. Based on the foregoing, the Court notes that in the case under consideration, the Applicant AAK has exhausted all legal remedies provided for by Article 113.7 of the Constitution. In addition, the Court based on its case law, notes that the first Applicant Mr. Gani Dreshaj did not exhaust all legal remedies specified in Article 113.7 of the Constitution. Therefore, the Court will consider the appealing allegations only in relation to the second Applicant (AAK), regardless of the fact that the allegations of both applicants are identical..

Regarding the accuracy of the Referral and deadline

89. In addition, the Court also examines whether the Applicants have met other admissibility criteria, further specified in the Law and the Rules of Procedure. In this regard, the Court first refers to Article 48 [Accuracy of Referral] and Article 49 [Deadlines] of the Law, which provide:

Article 48
[Accuracy of the Referral]

In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge.

Article 49
[Deadlines]

The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision (...)

90. The Court recalls that the same requirements are further provided in items c and d of paragraph 1 of Rule 39 [Admissibility Criteria] and paragraphs 2 and 4 of the Rule 76 [Referral pursuant to Article 113.7 of the Constitution and Articles 46, 47, 48, 49 and 50 of the Law] of the Rules of Procedure.

91. As to the fulfillment of these requirements, the Court notes that the Applicants have clearly specified what fundamental rights and freedoms guaranteed by the Constitution have allegedly been violated and have specified the act of the public authority which they challenge in accordance with Article 48 of the Law and relevant provisions of the Rules of Procedure and have filed the Referral within the deadline of four (4) months stipulated in Article 49 of the Law and the provisions of the Rules of Procedure.

Regarding other admissibility requirements

92. Finally and after considering the Applicants' constitutional complaint, the Court considers that the Referral cannot be considered manifestly ill-founded within the meaning of Rule 39 (2) of the Rules of Procedure and there is no other ground for declaring it inadmissible, as none of the requirements established in Rule 39 (3) of the Rules of Procedure are applicable in the present case. (See, *inter alia*, ECHR case *Alimuçaj v. Albania*, Application No.

20134/05, Judgment of 9 July 2012, see also: the case of the Court No. KO73/16, Applicant*: Ombudsperson*, Judgment of 8 December 2016, para 49).

Conclusion regarding the admissibility of the Referral

93. The Court concludes that the Applicants are authorized parties; that they challenge decisions of public authorities; that they have exhausted legal remedies as specifically elaborated above; they have specified the rights and freedoms which allegedly have been violated; have submitted the referral within the deadline; the referral is not manifestly ill-founded; and there is no other admissibility requirement which is not fulfilled.

94. Therefore, the Court declares the Referral admissible.

Assessment of the merits of the Referral

95. In the present case, the Court will not assess *in abstracto* whether the legal framework governing the election right in the Republic of Kosovo is compatible or incompatible with the Constitution. The scope of the Court, in this case, is limited only in assessing whether the challenged decisions of the ECAP and of the Supreme Court are in compliance with Article 45 [Freedom of Election and Participation] of the Constitution in conjunction with Article 3 of Protocol No. 1 (Right to free elections) to the ECHR.

96. In this regard, the Court refers to Article 53 of the Constitution, which establishes:

> *"Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights".*

97. The Court refers to Article 45 [Freedom of Election and Participation] of the Constitution, which foresees:

> *"1.Every citizen of the Republic of Kosovo who has reached the age of eighteen, even if on the day of elections, has the right to elect and be elected, unless this right is limited by a court decision.*
>
> *2. The vote is personal, equal, free and secret.*
>
> *3. State institutions support the possibility of every person to participate in public activities and everyone's right to democratically influence decisions of public bodies".*

98. In addition, the Court refers to Article 3 of Protocol No. 1 (Right to free elections) of the ECHR, which provides:

> *"The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".*

(a) General principles and the ECtHR test under Article 3 of Protocol No. 1

99. Article 3 of Protocol No. 1 differs from other rights guaranteed by the Convention and its Protocols as it is phrased in terms of the obligation of the High Contracting Party to hold elections which ensure the free expression of the opinion of the people rather than in terms of a particular right or freedom. However, having regard to the preparatory work to Article 3 of Protocol No. 1 and the interpretation of the provision in the context of the Convention as a whole, the Court has established that this provision also implies individual rights, including the right to vote and to stand for election (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, §§ 46-51, Series A no. 113).

100. The rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law. Nonetheless, these rights are not absolute. There is room for "implied limitations", and Contracting States must be given a margin of appreciation in this sphere. The Court reaffirms that the margin in this area is wide (see *Mathieu-Mohin and Clerfayt*, cited above, paragraph 52; *Matthews*, cited above, § 63; *Labita*, cited above, paragraph 201; and *Podkolzina v. Latvia*, no. 46726/99, paragraph 33, ECHR 2002-II). There are numerous ways of organizing and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe, which it is for each Contracting State to mould into its own democratic vision (see *Hirst v. the United Kingdom* (no. 2) [GC], no. 74025/01, § 61, ECHR 2005-IX).

101. It is, however, for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions imposed on the rights to vote or to stand for election do not curtail the exercise of those rights to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate (see case *Mathieu-Mohin and Clerfayt*, cited above, paragraph 52). In particular, any such conditions must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage (see *Hirst*, cited above, paragraph 62).

102. In relation to the cases concerning the right to vote, that is, the so-called "active" aspect of the rights under Article 3 of Protocol No. 1, the Court has considered that exclusion of any groups or categories of the general population must be reconcilable with the underlying purposes of Article 3 of Protocol No. 1 (see, *mutatis mutandis, Aziz v. Cyprus*, no. 69949/01, paragraph 28, ECHR 2004-V). In particular, the Court has found that domestic legislation imposing a minimum age or residence requirements for the exercise of the right to vote is, in principle, compatible with Article 3 of Protocol No. 1 (see *Hilbe v. Liechtenstein* (dec.), no. 31981/96, ECHR 1999-VI; see also *Hirst*, cited above, paragraph 62).

103. The Convention institutions have also held that it was open to the legislature to remove political rights from persons convicted of serious or financial crimes (see *Holland v. Ireland*, no. 24827/94, Commission decision of 14 April 1998, DR 93-A, p. 15, and *M.D.U. v. Italy* (dec.), no. 58540/00, 28 January 2003). In *Hirst* (§ 82), however, the Grand Chamber underlined that the Contracting States did not have carte blanche to disqualify all detained convicts from the right to vote without having due regard to relevant matters such as the length of the prisoner's sentence or the nature and gravity of the offence. A general, automatic and indiscriminate restriction on all detained convicts' right to vote was considered by the Court as falling outside the acceptable margin of appreciation. The Convention institutions have had fewer occasions to deal with an alleged violation of an individual's right to stand as a candidate for election, that is, the so-called "passive" aspect of the rights under Article 3 of Protocol No. 1. In this regard the ECtHR has emphasized that the Contracting States enjoy considerable latitude in establishing constitutional rules on the status of members of parliament, including criteria governing eligibility to stand for election. Although they have a common origin in the need to ensure both the independence of elected representatives and the freedom of choice of electors, these criteria vary in accordance with the historical and political factors specific to each State. The multiplicity of situations provided for in the constitutions and electoral legislation of numerous member States of the Council of Europe shows the diversity of possible approaches in this area. Therefore, for the purposes of applying Article 3, any electoral legislation must be assessed in the light of the political evolution of the country concerned (see *Mathieu-Mohin and Clerfayt*, paragraph 54, and *Podkolzina*, paragraph 33, both cited above).

104. In case *Podkolzina*, the ECtHR found a violation of Article 3 of Protocol No. 1 with regard to restrictions on an individual's eligibility to stand as a candidate for election. In that case, the applicant was removed from the list of parliamentary candidates on account of her allegedly insufficient knowledge of the official language of the State. The ECtHR acknowledged that a decision determining a parliament's working language was in principle one which the State alone had the power to take, this being a factor shaped by the historical and political considerations specific to the country concerned. A violation of Article 3 of Protocol No. 1 was found, however, because the procedure applied to the applicant to determine her proficiency in the official language was incompatible with the requirements of procedural fairness and legal certainty, with the result that the negative conclusion reached by the domestic authorities in this connection could be deemed deficient (paragraphs 33-38).

105. In case *Melnychenko v. Ukraine* (no. 17707/02, paragraphs 53-67, ECHR 2004-X), the ECtHR also recognized that legislation establishing domestic residence requirements for a parliamentary candidate was, as such, compatible with Article 3 of Protocol No. 1. At the same time, the decision of the Ukrainian authorities to deny the applicant registration as a parliamentary candidate was found to be in breach of the above provision, given that the domestic law governing proof of a candidate's residence lacked the necessary certainty and precision to guarantee the applicant adequate safeguards against arbitrary treatment. The ECtHR underlined in that case that, while the Contracting

States have a wide margin of appreciation when establishing eligibility conditions in the abstract, the principle that rights must be effective requires that the eligibility procedure itself contains sufficient safeguards to prevent arbitrary decisions (paragraph 59).

106. In certain older cases, the former Commission was required on several occasions to consider whether the decision to withdraw an individual's so-called "active" or "passive" election rights on account of his or her previous activities constituted a violation of Article 3 of Protocol No. 1. In all those cases, the Commission found that it did not. Thus, in the cases of *X v. the Netherlands* (no. 6573/74, Commission decision of 19 December 1974, DR 1, p. 87) and *X v. Belgium* (no. 8701/79, Commission decision of 3 December 1979, DR 18, p. 250), it declared inadmissible applications from two persons who had been convicted following the Second World War of collaboration with the enemy or "uncitizen-like conduct" and, on that account, were permanently deprived of the right to vote. In particular, the Commission considered that "the purpose of legislation depriving persons convicted of treason of certain political rights and, more specifically, the right to vote [was] to ensure that persons who [had] seriously abused, in wartime, their right to participate in the public life of their country are prevented in future from abusing their political rights in a manner prejudicial to the security of the State or the foundations of a democratic society" (see: *X v. Belgium*, p. 253).

107. In case of *Van Wambeke v. Belgium* (no. 16692/90, Commission decision of 12 April 1991, unreported), the Commission declared inadmissible, on the same grounds, an application from a former member of the Waffen-SS, convicted of treason in 1945, who complained that he had been unable to take part in the elections to the European Parliament in 1989. In the case of *Glimmerveen and Hagenbeek v. the Netherlands* (nos. 8348/78 and 8406/78, Commission decision of 11 October 1979, DR 18, p. 187), the Commission declared inadmissible two applications concerning the refusal to allow the applicants, who were the leaders of a proscribed organization with racist and xenophobic tendencies, to stand for election. On that occasion, the Commission referred to Article 17 of the Convention, noting that the applicants "intended to participate in these elections and to avail themselves of the right [concerned] for a purpose which the Commission [had] found to be unacceptable under Article 17" (*ibid.*, p. 197). In that case it was also underlined that the standard of tolerance does not prevent a democratic society from taking steps to protect itself against activities intended to destroy the rights or freedoms set forth in the Convention. Article 3 of Protocol No. 1, which enshrines the individual's capacity to influence the composition of the law-making power, does not therefore exclude that restrictions on electoral rights are imposed on an individual who has, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations.

108. In the context of employment restrictions imposed on public officials on political grounds, the Court has held that Article 10 of the Convention may apply in connection with their dismissal. A violation of Article 10 was found in this respect in *Vogt* (cited above, paragraphs 43-44), where the applicant was dismissed as a civil servant in relation to her specific activities as a member of the Communist Party in West Germany. However, in *Volkmer v. Germany*

((dec.), no. 39799/98, 22 November 2001) and *Petersen v. Germany* (dec.), no. 39793/98, ECHR 2001-XII), the ECtHR declared inadmissible as unsubstantiated the applicant civil servants' complaints under Article 10 about their dismissal on account of their collaboration with the regime and secret services of the former German Democratic Republic. In the case of *Sidabras and Džiautas v. Lithuania* (nos. 55480/00 and 59330/00, §§ 51-62, ECHR 2004-VIII), the ECtHR found a violation of Article 14 taken in conjunction with Article 8 as regards the existence of wide-ranging restrictions barring former KGB officers in Lithuania from access to various spheres of employment in the private sector, which were introduced almost a decade after the re-establishment of Lithuanian independence. At the same time, it is to be noted that those applicants' dismissal from their positions as, respectively, a tax inspector and prosecutor, on the ground of their former KGB employment was not considered to amount to an interference with their rights under Article 10 of the Convention (*ibid.*, paragraphs 67-73).

109. It is also relevant in this context to note that Article 3 of Protocol No. 1, or indeed other Convention provisions, do not prevent, in principle, Contracting States from introducing general policy schemes by way of legislative measures whereby a certain category or group of individuals is treated differently from others, provided that the interference with the rights of the statutory category or group as a whole can be justified under the Convention (see, in the context of a legislative ban on a police officer from engaging in political activities, examined by the Court under Articles 10 and 11 of the Convention, *Rekvényi*, cited above, paragraphs 34-50 and 58-62).

110. In *Rekvényi*, no violation of the Convention was found in that the domestic legislation in issue was judged to be sufficiently clear and precise as to the definition of the categories of persons affected (members of the armed forces, police and security services) and as to the scope of the application of the impugned statutory restriction, the statute's underlying purpose of excluding the whole group from political activities being compatible with the proportionality requirements under Articles 10 and 11 of the Convention. It was thus immaterial for the Court's assessment of the compatibility of the impugned measures with the Convention whether or not the applicant in that case could have requested the domestic courts to scrutinise whether his own political involvement represented a possible danger to the democratic order (*ibid.*). Similarly, in *Podkolzina and Melnychenko*, both cited above, the Court did not state that the Convention require that the domestic courts be empowered to review matters such as the proportionality of the statutory obligations imposed on those applicants to comply with, respectively, language and residence requirements in order to exercise their rights to stand as candidates for election, given that those statutory requirements were in themselves perfectly acceptable from the Convention point of view.

111. It follows from the above analysis that, as long as the statutory distinction itself is proportionate and not discriminatory as regards the whole category or group specified in the legislation, the task of the domestic courts may be limited to establishing whether a particular individual belongs to the impugned statutory category or group. The requirement for "individualisation", that is the necessity of the supervision by the domestic judicial authorities of the proportionality of

the impugned statutory restriction in view of the specific features of each and every case, is not a precondition of the measure's compatibility with the Constitution.

112. Article 3 of Protocol no. 1 deals only with the election of the legislature. This expression, however, does not only define the state parliament. The constitutional structure of the State in question must be considered (*Timke v. Germany*, Commission's decision). In general, the scope of Article 3 of Protocol No. 1 does not cover local or municipal elections (*Xuereb v. Malta*; *Salleras Llinares v. Spain*) or regional (*Malarde v. France*). The ECtHR held that the power to make regulations and by-laws which is conferred on the local authorities in many countries is to be distinguished from legislative power, which is referred to in Article 3 of Protocol No. 1 to the Convention, even though legislative power may not be restricted to the national parliament alone (*Mółka v. Poland* (decision)).

113. Nevertheless, the Court considers that the principles derived from the case law of the ECtHR regarding the guarantees of Article 3 of Protocol No. 1 are useful for municipal election disputes in the Republic of Kosovo and especially for the case under consideration.

114. The rights guaranteed under Article 3 of Protocol No. 1 and are not absolute and there is room for implied *limitations*. The "implied limitations" concept under Article 3 of Protocol No. 1 also means that the ECtHR does not apply the traditional tests of *necessity* or *pressing social need* which are used in the context of Articles 8 to 11 of the ECHR. In examining compliance with Article 3 of Protocol No. 1, the Court has focused mainly on two criteria: whether there has been arbitrariness or a lack of proportionality, and whether the restriction has interfered with the free expression of the opinion of the people. In addition, the ECtHR has stressed the need to assess any electoral legislation in the light of the political evolution of the country concerned, with the result that features unacceptable in the context of one system may be justified in the context of another (*Mathieu-Mohin and Clerfayt v. Belgium*, § 52; *Ždanoka v. Latvia* [GC], §§ 103-104 and 115).

115. Referring to the recommendations of the Venice Commission, the ECtHR found that the post-voting stages should be accompanied by clear procedural guarantees, be open and transparent, and allow observation by members across the whole political spectrum, including the opposition representatives. The ECtHR emphasized that it is true that Article 3 of Protocol No. 1 was not conceived as a code on electoral matters designed to regulate all aspects of the electoral process. Therefore, the level of the scrutiny of ECtHR will depend on the particular aspect of the right to free elections. Thus, tighter scrutiny should be reserved for any departures from the principle of universal right to vote, but a broader margin of appreciation can be afforded to States where the measures prevent candidates from standing for election. A still less stringent scrutiny would apply to the more technical stage of vote counting and tabulation. The ECtHR has accorded a wide margin of appreciation to the responding states in the electoral matters and that any error or irregularity in itself does not imply a violation of Article 3 of Protocol No. 1. Violation can be found in cases of impeding voters, where the election result was distorted in a flagrant manner,

there has been no substantial review of complaints or in the case of a manifestly arbitrary or unreasonable assessment (*Davydov v. Russia* paragraphs 283- 288).

116. The Court considers that Article 45 of the Constitution cannot be read in isolation from other constitutional provisions and that the rights that it protects are not absolute but subject to "implied limitations". In this regard, the Court refers to Article 73 of the Constitution, which stipulates that judges, prosecutors and other public officials explicitly listed in that provision cannot be nominated or elected as deputies of the Assembly, without previously resigning from their duties. Therefore, the drafters of the Constitution have set the conditions that limit electoral rights, which imply that those restrictions are in accordance with the spirit of the Constitution, read as a whole. The Kosovo drafter of the Constitution also established the CEC as a permanent body for overseeing the elections, which among other things, has the duty to respect and enforce the legal deadlines for complaints and other technical aspects such as updating voter lists, counting conditional votes etc. The Constitution, Election Laws and Election Regulations issued by the CEC, according to the Court, should be read as a constitutional-legal entirety and in harmony with each other that, apart from granting the election rights, also restricts them. The Court also considers that if any restriction constitutes a violation of the essence of the election rights, constitutes something that is determined on case-by-case basis.

117. The Court notes that Article 45 of the Constitution consists of 3 separate paragraphs and each of them has the relevant elements and rules. All three paragraphs should be read together and interdependent with one another. In support of the justification of the allegations in the circumstances of the present case, the Court will focus only on the first two paragraphs of Article 45 of the Constitution.

118. The first paragraph of Article 45 of the Constitution defines the right to vote (the active right of vote) and the right to be elected (passive right of vote). The first right, i.e. the one of active vote, belongs only to individuals, i.e. to natural persons, who are citizens of the Republic of Kosovo and who have reached the age of 18, even on the voting day and in the event that their right is not limited by a court decision. The other right, that of a passive vote, belongs to the candidates as individuals, namely as natural persons, who run in elections at the local or central level, as well as to political entities, namely legal persons competing in the elections at the local or central level. Also for the passive right of vote applies the condition that the right of the latter to exercise this right is not limited by a court decision.

119. These constitutional provisions so far have not been dealt with in merit. The Court has had small number cases in which the Applicants' allegations are related to Article 45 of the Constitution. In either of these cases, the Court has not found any violation. In fact, in all of these cases, the referrals filed have been rejected for one of the procedural aspects of admissibility. (See cases of the Constitutional Court: KI73/09 Applicant *Mimoza Kusari-Lila*, Resolution of 19 February 2010; KI152/18 Applicant *Shaqir Totaj*, Resolution on Inadmissibility of 17 January 2018; KI157/17 Applicant *Shaip Surdulli*,

Resolution on Inadmissibility of May 15 2018). The present case is the only/second case so far in which the Court assesses the merits of the referral.

120. However, the Court notes that the ECtHR case law has interpreted Article 3 of Protocol 1 to the ECHR as a guarantee of "*the active right of vote*" and "*the passive right of vote*". In accordance with Article 45 of the Constitution, the first, means the right to elect, namely to vote, and the second, the right to be elected, namely, to run for the position of an elected representative. Both provide substantial and procedural safeguards. However, the Court notes that passive rights have been equipped by less protection through the ECtHR case law than active rights (see ECHR case *Zdanoka v. Latvia*, No. 588278/00, Judgment of 16 March 2006, para. 105 -106). The ECtHR case law in relation to passive rights has largely focused on verifying the lack of arbitrariness in the domestic proceedings that may have resulted in disqualification of a natural or legal person to run in the election. (see case *Zdanoka v. Latvia* cited above, paragraph 115; *Melnitchenko v. Ukraine*, No. 17707/02, Judgment of 19 October 2004, paragraph 57).

121. In addition to the active and passive rights of vote, according to the most recent ECtHR case law, Article 3 of Protocol no. 1 includes the "*post-election period*" or "*post-election rights*". In that regard, the ECtHR has argued that the essence of free elections implies a number of electoral rights that encompass minimum standards governing the practices and institutions designed to administer voting, counting and determining the election result. (See case cited above, *Davydov and Others v. Russia*, No. 75947/11, Judgment of 30 May 2017, paragraphs 284-285).

122. In light of these rights, the ECtHR has, *inter alia*, reviewed cases involving the laws regulating voter registration issues as a prerequisite for the free exercise of the election rights (*Georgian Party v. Georgia* No. 9103/04, Judgment of 8 July 2008); the obligation of the state to organize free elections includes the obligation to establish mechanisms that have the capacity to investigate the allegations of electoral irregularities and to improve and address the latter (*Namat Aliyev v. Azerbaijan* No. 18705/06 Judgment of 8 April 2010); or cases related to the need for a court hearing responsible for complaints and election disputes. The latter determined that the essence of an election right may be restricted, hence violated, if there is no sufficient guarantee for an effective and impartial appeal system. (See ECtHR case*, Grosaru v. Romania*, cited above).

(b) Application of general principles in the present case

123. The Court notes that the Referral raises issues of interconnection and interaction of active and passive electoral rights and the updating of voter lists between the rounds of elections. The Court also notes that the claims raised in the Referral have emerged as a consequence of post-election disputes, which in this case relates to the counting of votes in the second round of voting that, according to Applicants; allegations, are decisive for the winner of the local elections for Mayor of the Municipality of Istog.

124. Taking into account the above mentioned in this present case, the Court will examine the Applicant's allegations in relation to the following constitutionally guaranteed rights; i) Regarding active rights of vote ii) Regarding passive rights of voteiii) As regards the post-election period or post-election rights.

As to active rights of vote

125. The Court recalls that Article 45 of the Constitution establishes the individual's right to elect (the right to vote) this right belongs only to individuals or natural persons who are citizens of the Republic of Kosovo who have reached the age of 18, even on the voting day, and if their right is not restricted by a court decision

126. In accordance with Article 3 of Protocol No. 1, the ECtHR has considered that exclusion of any groups or categories of the general population must be reconcilable with the underlying purposes of Article 3 of Protocol No. 1 (see, *mutatis mutandis, Aziz v. Cyprus*, no. 69949/01, paragraph 28, ECHR 2004-V). In particular, the Court has found that domestic legislation imposing a minimum age or residence requirements for the exercise of the right to vote is, in principle, compatible with Article 3 of Protocol No. 1 (see *Hilbe v. Liechtenstein* (dec.), no. 31981/96, ECHR 1999-VI; see also *Hirst*, cited above, paragraph 62).

127. In the present case, the Court notes that the essence of the Applicants' complaint does not refer to the denial of voting rights to an individual, that is, the restriction of voting rights by a decision of a public authority.

128. The Court recalls that the essence of the Applicants' complaint is that the non-counting of 52 (fifty-two) voters' votes has violated the active right of vote of 52 (fifty-two) voters, which leads to a violation of the passive right of the first Applicant (Gani Dreshaj), to be elected as Mayor in the Municipality of Istog.

129. In this regard, the Court notes that based on the documentation submitted by public authorities, it is about 108 (one hundred and eight) rejected ballots for persons who have voted conditionally, and who have not been on the Final Voters List. Consequently, the Court will consider the Applicants' allegation having regard to 108 (one hundred and eight) voters, whose votes have been rejected and will not be limited to only 52 (fifty-two) voters.

130. The Court considers that the non-count of 108 (one hundred and eight) ballots, essentially addresses the issue of the interdependence of the active right of the voters concerned with the passive right to be elected as alleged by the Applicants.

131. As to the above allegation, the Court notes that none of those 108 (one hundred and eight) voters have complained to the ECAP regarding the administration and counting of votes in the CRC, according to the procedure foreseen in Article 105 of the Law on General Elections. The Applicants did not either substantiate by evidence these allegations, they did not provide evidence to the Court that some of the disputed voters initiated proceedings before the competent authorities concerning the limitation of their active rights of vote.

132. With respect to the same allegation, the Court also notes that, based on the answers received from the Venice Commission, in most of the cases, the Applicants' passive right to be elected does not go so far as to give the candidate the right to be elected by a particular group of voters (see the answers of the Constitutional Courts of Austria, Bulgaria and Latvia).

133. Based on the above, the Court notes that the challenged decisions of the public authorities in the present case are based on the relevant provisions of the election law. This law was correctly applied in the circumstances of the present case. The constitutionality of the legal framework is not considered before the Court and is not initiated in terms of active right of vote.

134. Accordingly, the Court concludes that the Applicants' passive rights are not directly related to the active right of a particular group of voters who have not challenged the procedures that result in the cancellation of their 108 (hundred and eight) votes before the competent public authorities.

135. Taking into account all the facts, the court concludes that in the present case, the constitutional guarantees regarding the active election right provided for in Article 45 of the Constitution and Article 3 of Protocol No. 1 to the ECHR are not applicable in sense the allegations raised by the Applicants, as the subject of dispute is not the deprivation of the voting rights of an individual, that is, the restriction of the right to vote by the decision of a public authority.

As to the passive right of vote

136. The Court reminds that "*passive right if vote*" in accordance with Article 45 of the Constitution, and Article 3 of the Protocol no. 1 to the ECHR means the right to be elected, namely to run for the position of the elected representative. This right does not imply the right of any candidate to be elected. This right includes essential and procedural guaranties. However, the Court notes that passive rights have less protection through the case law (see: the case of the ECtHR, *Zdanoka v. Latvia*, No. 58278/00, judgment of 16 March 2006, paragraphs 105-106).

137. The Court notes that passive right of vote belongs to candidates as individuals, namely to natural persons running for elections at the local or central level, as well as to the political entities, or legal entities in the race at the local or central level election.

138. The case-law of the ECtHR with regard to the passive rights is clearly focused solely on the verification of the lack of arbitrariness in domestic proceedings that may have resulted in the disqualification of a natural or legal person from standing as a candidate for the election (see: abovementioned case of *Zdanoka v. Latvia*, para. 115; *Melnitchenko v. Ukraine*, no. 17707/02, Judgment of 19 October 2004, § 57).

139. The Court notes that the Applicants do not challenge any decision of the public authority resulting in disqualification of any natural or legal person from standing as a candidate in the elections.

140. Therefore, the Court concludes that in the present case, the constitutional guarantees concerning the passive right of vote as foreseen by Article 45 of the Constitution and Article 3 of Protocol no. 1 to the ECHR are not applicable, as the subject of the dispute is not the disqualification of any natural or legal person from standing as a candidate in the elections.

As to the post-election period or post-election rights

141. For the purposes of this test, the Court will use the Code of Good Practice in Electoral Matters (Guidelines and Explanatory Report) (CDL-AD (2002) 23 rev), adopted by the European Commission for Democracy Through Law ("Venice Commission") at its 51st and 52th session (5-6 July and 18th and 19th October 2002) hereinafter (Code of Good Practice).

142. The Court reiterates that the Code of Good Practice in Electoral Matters of the Venice Commission pays considerable attention to the process of counting, transferring and tabulating results, insisting that this process must be transparent and open, and that observers and representatives of candidates must be allowed to be present and obtain copies of the minutes (see Section I.3.2 of the Code). In the same regard, the Explanatory Report contains some additional recommendations that refer to the process of counting, recording results and their transfer to a higher authority (see Rationale, Sections I.3.2.2.4 (Counting) and I. 3.2.2.5 (Transferring the results). The report suggests that observers, the media and others authorized to be present at the polling station have the right to be present during the count, and that there should be "sufficient copies of the minutes to the proceedings to ensure that all the above mentioned persons receive one". Moreover, the transfer of results - a "vital operation whose importance is often overlooked" - should also be conducted in an open and controlled manner, where the person transferring the results, usually the presiding officer of the polling station, should be accompanied by other members of the polling station representing the opposing parties, if necessary with additional security.

143. These detailed recommendations reflect the importance of technical details, which can be crucial in ensuring an open and transparent procedure for determining the will of voters through the counting of ballot papers and accurate recording of election results throughout the system, from a local vote by the Central Election Commission. They confirm that, in the eyes of the Code of Good Practice in Electoral Matters, the post-voting phases relating to counting, recording and transferring election results constitute an essential part of the electoral process. As such, they should be accompanied by clear procedural guarantees, be open and transparent, and allow observation by members throughout the political spectrum, including the opposition, to ensure the exercise of the principle of freedom of voters to express their will and the need to combat electoral fraud.

144. It is true that Article 3 of Protocol No. 1 to the Convention is not conceived as a code on electoral issues aimed at regulating all aspects of the electoral process (see Communist Party of Russia and Others v. Russia, No. 29400/05, paragraph 108, 19 June 2012). However, the Court has already confirmed that the common principles of the European constitutional heritage, which form the

basis of any truly democratic society, include the right to vote in terms of the ability to vote universally, equally, freely, secret and direct elections held at regular intervals (see Code of Good Practice in Electoral Matters). Article 3 of Protocol no. 1 to the Convention explicitly provides for the right to free elections at regular intervals by secret ballot, and other principles are also recognized in the judicial practice of the institutions of the Convention (see the Russian Conservative Party of Entrepreneurs and Others, paragraph 70). In this environment, free elections should be understood both as an individual right and as a positive obligation of the state, which consists of a certain number of guarantees, starting from the right of the voters to freely form an opinion, and extends to the careful regulation of the process in which the voting results are determined, processed and recorded.

145. At the same time, the Court reiterates that the level of its own control will depend on a certain aspect of the right to free elections. Therefore, more stringent oversight should be reserved for any deviation from the principle of universal suffrage (see Hirst (No. 2), cited above, §§ 62). States in which measures preventing candidates from running for elections can be given greater freedom of appreciation, but such interference should not be disproportionate (see Krasnov and Skuratov v. Russia, No. 17864/04 and 21396/04, paragraph 65, 19 July 2007, and the Russian Conservative Party of Entrepreneurs and Others, cited above, paragraph 65).

146. Even less stringent control would apply to the technical phase of counting and tabulation. It is necessary to take into account the fact that this is a complex process, with many people involved in several levels. The mistake or irregularity at this stage would in itself not mean unfairness of the elections, if the general principles of equality, transparency, impartiality and independence of the electoral administration are respected. The concept of free elections would be at risk only if there were evidence of procedural violations that could impede the free expression of the opinion of people, for example, through a significant disturbance of voters' intentions; and where such complaints were not received in an efficient manner at the domestic level. Moreover, the Court should be cautious in granting unlimited status to challenge this stage of the election of individual participants in the electoral process. This is especially the case when domestic legislation contains reasonable restrictions on the ability of individual voters to challenge the results in their constituencies, such as the requirement for a voter quorum (see section II.3.3 (f) of the Code of Good Practice). However, states should ensure such access to a complaint system as it would be sufficient to guarantee under Article 3 of Protocol No. 3 is effective throughout the election cycle. In the Russian context, the decision of the Constitutional Court of 22 April 2013 confirmed that certain voters could challenge the results in the constituencies in which they voted; subsequent legal changes provided such a status.

147. The Court therefore confirms that only serious irregularities in the process of counting and tabulating the votes that remained without effective domestic examination could constitute a violation of the individual right to free elections guaranteed by Article 3 of Protocol No. 1 to the Convention, both in its active and passive aspect. In accordance with its subsidiary role, the role of the Court is limited to ensuring that the examination of the domestic (domestic

legislation of a country) level provides minimal procedural guarantees and that the findings of domestic (regular) courts are not arbitrary or manifestly unreasonable (see the Communist Party of Russia and others, cited above, paragraph 116-17). The Court will continue to analyze the allegations of the Applicants accordingly. (*Davydov v. Russia*, paragraphs 283-288).

148. The Court also reiterates that the ECtHR test in the present case applies in the context of a post-election dispute (*post-election rights)* related to the counting of votes in the second round of voting and the updating of the electoral lists. The Court reiterates that the allegations of the Applicants, in essence, must be considered against the post-election background and in parallel with the ECtHR test.

149. In this regard, the Court will use the ECtHR test to find whether (i) the Electoral Legislation provides minimum procedural guarantees; ii) whether the challenged decisions of the ECAP and the Supreme Court are arbitrary or manifestly unreasonable;

(i) whether Election Legislation provides minimum procedural guarantees

150. The Court emphasizes that in this case, the legal framework governing the right to vote in the Republic of Kosovo is not the subject of consideration by the Court, that is, whether this framework is in compliance or not with the Constitution, but whether the legal framework of electoral legislation provides minimal procedural guarantees. The subject of the review are the challenged decisions of the ECAP and the Supreme Court and whether those decisions can withstand the test of the ECtHR as evidenced by the jurisprudence developed in connection with Article 3 of Protocol No. 1 to the ECHR listed in the previous paragraph.

151. Concerning the minimum procedural guarantees of the Election Legislation, the Court notes that, according to the applicable election laws, there is a possibility of appeal to the ECAP on any decision of the CEC. Furthermore, it is envisaged that there is a two-instance system, that is, the possibility that an unsatisfied party will appeal to the Supreme Court against the decisions rendered by the ECAP.

152. It is also possible to file an appeal against any decision of the Count and Registration Center within twenty-four (24) hours of the occurrence of the alleged violation.

153. In addition, in accordance with the applicable electoral legislation prior to certification of the election results, the CEC may order re-count of ballot papers at any polling station, or counting center, repetition of elections in the polling station or municipality.

154. Furthermore, the Court notes that the ECAP and the Supreme Court have the possibility to annul the elections in accordance with the legislation in force in one or more constituencies if they consider that there are serious election irregularities.

155. The Court notes that the ECAP precisely using the abovementioned jurisdiction due to the irregularities of the ballot papers received by mail cancelled the results for the second round of elections of 19 November 2017 and ordered the CEC to repeat the vote for the second round of local elections for the Mayor of the Municipality of Istog. What is an indicator that the ECAP was particularly cautious in ensuring objective electoral correctness in order to avoid serious violations of the second round of elections for the Mayor of the Municipality of Istog.

156. From the above, the Court concludes that the Electoral Legislation provides for the possibility of a multi instance decision on appeals by independent public authorities and that the appeals are effective, and that the election legislation provides sufficient procedural guarantees to unsatisfied parties to challenge decisions that are not in accordance with the electoral legislation.

ii) whether the challenged decisions of the ECAP and the Supreme Court are arbitrary or manifestly unreasonable

157. For the purpose of the ECtHR test, the Court again emphasizes the ECAP reasoning regarding the allegation of not counting the 52 (fifty-two) voters' votes, which essentially states: "*In respect to allegations of the appellant that there are 50 ballots that were not counted because the voters have reached the adult age to vote between dates of 20 October 2017 and 17 December 2017 which votes were not counted. These allegations were assessed by the Commission as ungrounded because the Central Civil Registry Extract contained all names of voters registered with age of 18 including those who have reached 18 years until the election date of 22 October 2017. [...] the CEC during the election process receives three (3) times the civil registry extract from the Civil Registry Agency. The first time, no later than two days after the announcement of the election date, second time not later than 3 days before the start of the challenge and confirmation from the voter lists and the third time no later than two (2) days after the end of the challenge period and confirmation of VL". This list could have been challenged by voters during periods of its review (the voters list), by the public from 29 August 2017 until 12 September 2017. Since the voters list was certified after expiry of challenging deadline, 12 September 2017, and since it is certified and became valid for an election process because it is certified only once for an election process regardless of duration of the election process, then, on this ground the voters who have reached the adult age during period from 22 October 2017 and 17 December 2017 could not be part of the certified voters list".*

158. The Court recalls that the ECAP was given this decision after a detailed explanation of the CEC regarding the acceptance and rejection of conditional votes "*...by the total number of 481, of conditional votes and VPCV votes it was confirmed that 309 votes meet legal criteria as regular ballot for counting and further proceeding, while 172 votes have been rejected. The reason why 172 ballots have been rejected .is that they have not met the legal criteria, as 108 rejected ballots have to do with the persons who voted but were not in the Final Voters List (FVL); 61 rejected ballots were because the persons who voted were not voters respectively citizens of Istog where the election process was held; 2 ballots were rejected because the voters who*

voted did not register as voters with special needs and 1 ballot was rejected because the voter besides having conditional ballot was proved to have voted as a voter at his regular polling station".

159. The Court notes that the Supreme Court approved in entirety the reasoning given by the ECAP, therefore, the ECtHR test is equally valid for both trial panels.

160. The Court notes that the CEC certified the voter list based on Rule 3.3 of Election Regulation no. 02/2013 of the CEC and later explained in detail why some 309 (three hundred and nine) votes were accepted as regular, and why 172 (one hundred and seventy-two) votes were rejected as irregular..

161. The Court notes that this reasoning of the CEC was supported by the ECAP and the Supreme Court, reasoning in detail based on which legal norms acted when rendering the challenged decisions.

162. Therefore, the Court finds that the challenged decisions of the ECAP and the Supreme Court are in compliance and provided by law, reasoned, and are not arbitrary, or manifestly unreasonable. It is another matter if the aforementioned legal provision is compatible or not with the Constitution. On this issue, the Court has already stated at outset that the legal framework regulating the right to vote in the Republic of Kosovo is not subject to review in the present case.

163. Regarding the Applicants' allegation of updating the voter lists, the Court notes that the challenged decisions of the CEC, ECAP and Supreme Court have been rendered pursuant to Article 6 of Regulation No. 10/2013 of the CEC regarding the voter lists, which establishes: "*The same voter's list that was used for Municipal Elections will be used for the second round of Municipal Mayor Elections".*

164. The Court recalls that Article 3 of the Election Regulation on the Drafting, Confirmation and Challenge of the Voters List, No. 02/2013, specifies: "*In order to create the list of voters, the CEC during the election process receives three (3) times the civil registry extract from the Civil Registry Agency. The first time, no later than two days after the announcement of the election date, second time not later than 3 days before the start of the challenge and confirmation from the voter lists, and the third time no later than two (2) days after the end of the challenge period and confirmation of VL".*

165. Likewise, Article 10.4 of the Law on General Elections No. 03/L-073, as amended and supplemented by Law No.03/L-256, provides: "*10.4 A request regarding improper exclusion from the Voters List, regular or by-mail, must be received by the court of first instance within 40 days before the election day".*

166. The use of the same voter list by the CEC, for the second round of the electoral process, which was subsequently upheld as lawful by the challenged decisions of ECAP and the Supreme Court does not constitute a sudden change and unforeseeable electoral practice or legal basis that could affect the flagrant

distortion of the electoral process. For the Applicant, as for all participants in the electoral competition, the non-update of the voters' list for the second round of elections has been a known fact since the beginning of the electoral process, given the condition set out in Article 6 of Regulation No. 10 regarding the voter lists (see *vice versa*, *Paschalidis, Koutmeridis and Zaharakis v. Greece*). The use of the same election register by the CEC was valid for all municipalities in which the second round was held, and not only for municipal elections in Istog.

167. Therefore, the Court finds that the challenged decisions regarding the update of the voter lists of the ECAP and the Supreme Court are in compliance with the law, reasoned, and the latter are not arbitrary or manifestly unreasonable.

168. Regarding the nature of violations that could lead to the announcement of invalid elections, the Constitutional Court of Bulgaria held: "*The announcement of invalid elections may only be conditional upon particularly serious violations whenever the Constitutional Court finds that the electoral process was incompatible with the basic democratic and constitutional principles that are relevant to the right to vote and are flagrant and frequent to the extent that they completely invalidate the election process and outcome … The Constitutional Court considers that such violations may be due to a failure to open polling stations; constraints on voters to have access to polling stations; replacement of ballots and voter lists on Election Day to violate the voting process; the strong pressure exerted on voters to discourage them from appearing in polling stations or forcing them to vote for candidacy that is not their choice*" (see Constitutional Court of the Republic of Bulgaria, Decision No. 5 of June 9, 2013 in Constitutional Case No. 13/2013).

169. From the foregoing, the Court concludes that the challenged decisions of ECAP and of the Supreme Court are in compliance with Article 45 [Freedom of Election and Participation] of the Constitution in conjunction with Article 3 of Protocol No. 1 to the ECHR.

Request for interim measure

170. The Court recalls that the Applicants also request the Court to impose interim measure to prohibit "*the enforcement of the Decision on certification of the second round elections results for Mayor of the Municipality of Istog of 27 December 2017 rendered by the Central Elections Commission (CEC) until the merit based decision is rendered by the Constitutional Court.*"

171. The Court notes that the Applicants also request the Court to impose the interim measure because *"…it is in the general interest to impose an interim measure until a decision on merits is taken on this matter because any violation of the constitutional rights during the voting process and/or during the administration of counting of the CRC undoubtedly affects the distortion of the result, therefore the actual result does not reflect the will of citizens of the Municipality of Istog".*

172. In this regard, the Court refers to Article 27 [Interim Measures] of the Law, which provides:

> *1."The Constitutional Court ex-officio or upon the referral of a party may temporarily decide upon interim measures in a case that is a subject of a proceeding, if such measures are necessary to avoid any risk or irreparable damages, or if such an interim measure is in the public interest".*

173. The Court also refers to Rule 57 (4) of the Rules of Procedure, which specifies:

> *"Before the Review Panel may recommend that the request for interim measures be granted, it must find that:*
>
> > *"(a) the party requesting interim measures has shown a prima facie case on the merits of the referral and, if admissibility has not yet been determined, a prima facie case on the admissibility of the referral;*
> > *(...)*
> > *(b) the party requesting interim measures has shown that it would suffer unrecoverable damages if the interim relief is not granted; and*
> >
> > *(c) the interim measures are in the public interest".*

174. Taking into account that the Applicants' rights guaranteed by Article 45 [Freedom of Election and Participation] of the Constitution, in conjunction with Article 3 of Protocol No. 1 to the ECHR, have not been violated. The Court also rejects the request for interim measure.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 113.7 and 116.1 and 2 of the Constitution, Articles 27, 47, 48 and 49 of the Law and Rules 56 and 59 (1) of the Rules of Procedure, unanimously, on 23 January 2019,

DECIDES

I. TO DECLARE, unanimously, the Referral admissible;

II. TO HOLD, unanimously, that Judgment (A.A. -U.ZH. No. 64/2017) of the Supreme Court of 26 December 2017 and Decision (ZL.A. No. 1142/2017) of ECAP are in compliance with Article 45 [Freedom of Election and Participation] of the Constitution in conjunction with Article 3 of Protocol No. 1 to the ECHR;

III. TO REJECT, unanimously, the request for interim measure;

IV. TO NOTIFY this judgment to the Parties;

V. TO PUBLISH this judgment in the Official Gazette in accordance with Article 20.4 of the Law;

VI. This judgment is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Radomir Laban Arta Rama-Hajrizi

[This translation is unofficial and serves for informational purposes only.]