REPUBLIKA E KOSOVËS - REPUBLIKA KOSOVO - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
USTAVNI SUD
CONSTITUTIONAL COURT

Prishtina, on 14 November 2022
Ref. no.:AGJ 2076/22

This translation is unofficial and serves for informational purposes only.

JUDGMENT

in

case no. KI202/21

Applicant

"Kelkos Energy" L.L.C

Constitutional review of Judgment ARJ. UZVP. No. 74/21 of the Supreme Court of Kosovo of 28 July 2021

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Gresa Caka-Nimani, President
Bajram Ljatifi, Deputy President
Selvete Gërxhaliu-Krasniqi, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge, and
Nexhmi Rexhepi, Judge

Applicant

1. The Referral was submitted by "Kelkos Energy" L.L.C (hereinafter: the Applicant), represented by law firm "Koci & Vokshi" with its office in Prishtina.

Challenged decision

2. The Applicant challenges the constitutionality of Judgment ARJ. UZVP. No. 74/21 of 28 July 2021 of the Supreme Court of Kosovo (hereinafter: the Supreme Court) in conjunction with Decision [A. No. 2081/2020] of 11 February 2021 of the Basic Court in Prishtina (hereinafter: the Basic Court).

3. The Applicant also requests the imposition of an interim measure against the Judgment [ARJ. UZVP. No. 74/21] of 28 July 2021 of the Supreme Court because it will "*cause irreparable material damage to the Applicant*".

Subject matter

4. The subject matter is the constitutional review of the Judgment of the Supreme Court, whereby the Applicant's fundamental rights and freedoms guaranteed by Articles 31 [Right to Fair and Impartial Trial], 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) and Article 1 (Protection of property) of Protocol no. 1 of the European Convention on Human Rights (hereinafter: the ECHR) have allegedly been violated.

Legal basis

5. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 10 November 2021, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 16 November 2021, the Applicant was notified about the registration of the Referral and a copy of the Referral was sent to the Supreme Court, the Ministry of Economy and the Energy Regulatory Office (ERO).

8. On 22 November 2021, the President of the Court by the Decision [No. GJR. KI202/21] appointed Judge Safet Hoxha as Judge Rapporteur and the Review Panel, composed of judges: Radomir Laban (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi (members).

9. On 31 March and 18 July 2022, the Court considered the preliminary report proposed by the Judge Rapporteur and unanimously decided that the review of the referral be postponed for additional supplementation.

10. On 29 September 2022, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the referral.

11. On the same date, the Court unanimously decided that (i) the referral is admissible; (ii) that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 (Right to a fair trial) of the ECHR; (iii) declares the

Judgment [ARJ. UZVP. No. 74/21] of 28 July 2021 of the Supreme Court invalid; (iv) remand for reconsideration the Judgment [ARJ. UZVP. No. 74/21] of the Supreme Court of 28 July 2021, in accordance with the Judgment of this Court; (v) to hold that the Judgment [AA. No. 320/ 21] of the Court of Appeals of 26 April 2021 remains in force the Judgment until the decision is rendered by the Supreme Court according to point IV of the enacting clause of this Judgment; (vi) rejected the request for the imposition of interim measure.

12. Based on Rule 62 (Concurring Opinions) of the Rules of Procedure of the Court, Judge Radomir Laban prepared a concurring opinion, which will be published together with this Judgment.

Summary of facts

13. It follows from the documents of the case that the Applicant Company "Kelkos Energy" L.L.C. is part of the Kelag Group, a company that deals with the production of electrical energy based in Austria.

14. The Applicant has conducted its activity based on the relevant decisions of the state bodies, namely ERO, which has continuously issued decisions which have enabled the Applicant to invest in electricity generating capacities through the construction of infrastructure for hydropower plants. Based on this investment, the Applicant has started generating electricity at least since 2019.

15. The Applicant, in order to finalize its entire investment, has applied and secured for water permits, the relevant decisions for environmental permits as well as the relevant licenses for the production of electrical energy, granted by the Ministry of Economy and Environment (hereinafter: MEE) and ERO, as follows: (i) Decision Water Permit for HC Belaja L.U.13,4981/20 of 03.11.2020; (ii) Decision WP for HC Deçan WP 14,4982/20 of 04.11.2020; (iii) Decision on the environment (EP) for HC Belaja 19,5837/ZSP of 06.11.2020; (iv) Decision on EP for HC Deçani 19,5837/ZSP of 06.11.2020; (v) ERO decision for HC Deçani V-1303-2020 of 12.11.2020; (vi) Decision of ERO for HC Belaja V-1304-2020 of 12.11.2020; (vii) License for electricity production for HC Deçani LJ-49/20 of 12.11.2020; and (viii) Electricity production license for HC Belaja LI-50/20 of 12.11.2020.

16. On 4 December 2020, F.S., (one of the claiming parties), initiated an administrative conflict by filing a lawsuit against MEE and ERO. Together with this lawsuit, based on the provisions of the Law on Administrative Conflicts (hereinafter: LAC), he also submitted the request for postponement of the execution of the challenged decisions of the MEE and the ERO.

17. The court proceedings developed as summarized in the following text are related to preliminary proceedings, namely to the imposition of interim measure by the regular courts in order to suspend the production of electrical energy by the Applicant until the case is resolved on the merits.

18. On 8 December 2020, the Basic Court in Pristina, by the Decision [A. No. 2081/2020] determined: (i) the proposal of the claimant/proposer F.S. is APPROVED; (ii) The execution of the decisions of the first respondent-MEE is POSTPONED, as follows: 1. Water permit for HC Belaja, W.P. 13, 4981/20, of 03.11.2020; 2. Decision on water permit for HC Deçani, W.P. 14, 4982/20, of 04.11.2020; 3. Decision on environmental permit for HC Belaja, 19/5837/ZSP, of 06.11.2020 and 4. Decision on Environmental Permit for HC Deçani, 19/5837/ZSP, of 06.11.2020, until the court decides by final court decision regarding the claim of the claimant; (iii) The execution of the decisions

of the second respondent, the Energy Regulatory Office, is POSTPONED, as follows: 1. Decision V_1303 _2020, of 12.11.2020; 2. Decision V_1304_ 2020, of 12.11.2020; 3. License for the Production of Electrical Energy for HC Deçani, Li_ 49/20, of 12.11.2020 and 4. License for the Production of Electrical Energy for HC Belaja, Li_50/20, of 12.11.2020, until the court decides by final court decision regarding the claimant's claim.

19. The Basic Court in Prishtina held: (i) based on the legal provisions of Article 22.2 of the LAC, while examining the request for the postponement of the execution of the challenged decisions, the court assessed that the claimant/proposer has offered "*reliable arguments*" which prove the fact that the execution of the decisions would bring harm to the residents of the part in which these Hydropower plants are planned to operate, a harm that would be difficult to repair; (ii) postponement of the execution of the decision until the decision of the case on merits, is not contrary to the public interest, nor would the postponement bring any great harm to the opposing party, namely the interested persons; (iii) water resources, uninterrupted access to drinking and irrigation water as well as water quality, constitute a general state interest, the court assessed that the postponement of the execution of challenged decisions until the decision regarding the claimant's lawsuit is in the public interest and that the postponement would not bring great harm to the opposing party, namely the interested person; and, that (iv) this decision does not prejudge the final epilogue of this administrative conflict.

20. The Applicant and other interested parties, namely ERO and the Ministry of Environment and Spatial Planning (hereinafter: MESP) filed a complaint on the grounds of violations of the legal provisions of th LAC, the violation of the legal provisions of the Law of Contested Procedure (hereinafter: LCP) and incorrect and incomplete determination of the factual situation, with a proposal that the Court of Appeals approve the appeal based and quash the Decision of the Basic Court in Prishtina, namely [A. no. 2081/2020] of 8 December 2020.

21. The claiming party also submitted a response to the appeal, through which it proposed that the appeals of the respondents be rejected as ungrounded and that the challenged Decision be upheld.

22. On 14 January 2021, the Court of Appeals by the Decision [AA. No. 2/21] decided: (i) to APPROVE as grounded the appeals of the respondents ERO with headquarters in Pristina, and the interested parties "Ministry of Environment and Spatial Planning" and the Applicant "Kelkos Energy"; while (ii) the Decision of the Basic Court in Pristina-Department for Administrative Affairs, A. No. 2081/20, of 8 December 2020, is QUASHED, and the case is remanded to the same court for reconsideration and retrial.

23. The Court of Appeals, among other things, found that: (i) the conclusion and position of the court of first instance, regarding the manner of decision, is not fair and legal, since the challenged Decision was rendered in fundamental violation of the provisions of contested procedure under Article 182. par. 2 point n) k), and therefore, the provision of the Decision is contrary to its reasons and that there is a contradiction between what is said in the reasons of the decision and the content of the documents of the case file; (ii) the Decision also contains violations of substantive law which the court officially investigates according to the relevant provisions of the LAC; (iii) The Panel of the Court of Appeals, assesses that the first instance court, during the implementation of the administrative conflict procedure, committed an essential violation of the provisions of the LAC, which consists that by the challenged decisions of the respondent "*which constitute a general obligation*", which direct or indirect

rights or interests have been affected by the claimant, therefore the first instance court has not given any reasoning and has not explained the relationship that the claimant has with the respondents, in order to prove the active legitimacy of the claimant and his interest; (iv) in the repeated procedure, the first-instance court is instructed to act according to the remarks of the second-instance court, so as to remove the flaws of the lawsuit-proposal and correctly assess the issue of active and passive legitimacy in the relationship between the claimant and the respondents; and (v) to assess and verify the fact that the claimant's interest was directly affected by the respondents' decisions by complete and correct determination of the factual situation.

24. On 2 February 2021, the persons M.L., and Xh.K., addressed the Basic Court in Prishtina requesting and stating that they join the original claimant F.S., in a unique co-litigation according to the latter's lawsuit filed in that court on 4 December 2020. The persons M.L., and Xh.K., with the submission of 8 February 2021, have expanded the claim in the subjective and objective aspects as well as the request for postponement of the execution according to the lawsuit of 4 December 2020 with an additional request to cancel the Decision on water permit for HC Lumbardhi II, L.u. no. prot 5058/20 issued by the first respondent MEE on 03.02.2021 with a proposal to postpone the execution of the latter.

25. On 10 February 2021, the Basic Court in Prishtina by the Decision [A. No. 2081/20] found that: (i) the request of M.L. and Xh.K., by which they requested to be included and to join the proceedings together with the claimant F.S., in the capacity of unique co-litigants; (ii) APPROVED as grounded is the proposal of the representative of the claimants presented by the submission of 08.02.2021, by which he requested from the Court the extension of the lawsuit in the subjective and objective sense and the request for postponement of the execution of the decisions according to the lawsuit of 4 December 2020 by additional request for postponement and annulment of the Decision on water permit for HC Lumbardhi II, L.U. no. prot. 5058/20 issued by the first respondent the MEE on 02.03.2021; and (iii) the co-litigants as in point I of this enacting clause, the status of the claimants is recognized, they are allowed access to the case file and they are notified in the future with all court submissions.

26. The Basic Court in Prishtina reasoned that it approved the claims of the claimants based on articles 257.1, 264.1 and 269.1 of the LCP, which regulate issues of amendment and expansion of the statement of claim and the joint claim of the litigants.

27. On 11 February 2021, the Basic Court in Pristina by the Decision [A. No. 2081/20] decided that: (i) the proposal of the claimant/proposer F.S. is APPROVED; (ii) The execution of the decisions of the first respondent-counter-proposer-MEE is POSTPONED, as follows: 1. Water permit for HC Belaja, L.U. 13, 4981/20, dated 03.11.2020; 2. Decision on water permit for HC Deçani, .L.U; 14,4982/20, dated 04.11.2020; 3. Decision on environmental permit for HC Belaja, 19/5837/ZSP, dated 06.11.2020; 4. Decision on environmental permit for HC Deçani, 19/5837/ZSP, dated 06.11.2020; 5. Decision on water permit for HC Lumbardhi II, L.u. no. prot. 5058/20 dated 03.02.2021, until the Court decides by a final court decision regarding the claim of the claimants; (iii) The execution of the decisions of the second respondent-counter-proposer-ERO as follows: 1. Decision V_1303_2020, dated 12.11.2020; 2. Decision V_1304_2020, dated 12.11.2020; 3. License for Electricity Production for HC Deçani, Li_ 49/20, dated 12.11.2020 and 4. License for Electricity Production for HC Belaja, Li_50/20, dated 12.11.2020, until the court decides by final court decision regarding the claim of the claimants.

28. The Basic Court in Prishtina, among other things, found: (i) regarding the active legitimacy of the claimants, the court once again re-assessed this issue raised by the Court of Appeals and re-confirmed that the claimants, through their representative, have full active legitimacy, in accordance with Article 10, paragraph 1 of the LAC; (ii) the claimant F.S., also has express authorization from M.L. and Xh.K., whose immovable property is being affected by the activity of hydropower plants; (iii) thus it is proven that the claimant F.S., represents, among others, the citizens M.L. and Xh.K., as well as an overwhelming part of the residents of that part, who are also signatories of the petition, part of the documents of the case file; (iv) all the decisions and permits issued by the respondents do not constitute, neither in form nor in content, a general obligation according to Article 15, paragraph 1, sub-paragraph 1.3 of the LAC, because they do not contain any element or a feature that acts *erga omnes*, that is, towards everyone, on the contrary, the issues addressed in each of the decisions and permits challenged by lawsuits refer specifically to the legal obligations, rights and obligations of the subject to whom the permit was granted or to whom it was issued the decision, as in the case of Kelkos Energy l.l.c. which in this legal matter has the capacity of the interested party; (v) based on the legal provisions of articles 6.1 and 22.2 of the LAC, while examining the request for the postponement of the execution of the challenged decisions, the court reassessed that the claimant-proposers, by the lawsuit and submission of 02.02.2021, have provided reliable arguments which prove the fact that the execution of the decisions would bring harm to the residents in their properties and the environments where they live and in which these Hydropower plants are expected to operate, this harm which would be difficult to repair; and, that (vi) the postponement of the execution of the decision until the decision of the case on merits, is not contrary to the public interest and that the postponement would not bring any great harm to the opposing party, namely the interested persons; (vii) the court bases this assessment on the fact that the claimants have provided concrete and sufficient evidence based on the relevant provisions of the LAC; and, that (viii) this decision does not prejudge the final epilogue of this administrative conflict.

29. The Applicant submitted a complaint on the grounds of violations of the legal provisions of the LAC, violation of the legal provisions of the LCP and incorrect and incomplete determination of the factual situation, with a proposal that the Court of Appeals approve the appeal as grounded and quash the decision of the Basic Court in Pristina A. no. 2081/2020 of 11.12.2020 or reject the request as ungrounded.

30. The claimant, through the response to the complaint, proposed that the complaints of the respondents be rejected as ungrounded and that the challenged decision be upheld.

31. On 26 April 2021, the Court of Appeals by the Decision [AA. No. 320/21] decided: APPROVED as grounded complaints of the respondents MEE and ERO, based in Pristina, and the legal stakeholder "Kelkos Energy", l.l.c., with headquarters in Deçan, while the decision of the Basic Court in Pristina-Department for Administrative Matters A. No. 2081/20, of 11 February 2021, is MODIFIED, and the case is adjudicated as follows: the proposal of the claimants-proposers F.S., M.L. and Xh.K., all from Deçan is REJECTED, by which they requested to postpone the execution of the decisions of the first respondent Ministry of Economy and Environment, as follows: Water Permit for HC Belaja, LU. 13. 4981/20, dated 03.11.2020; decision on Water Permit for HC Deçani, L.U. 14,4982/20, dated 04.11.2020, decision on Environmental Permit for HC Belaja, 19/5837/ZSP, dated 06.11.2020, decision on Environmental Permit for HC Deçani, 19/5837/ZSP, dated 06.11. 2020, and the decision on Water Permit for HC Lumbardhi II, LU, no: prot.5058/20 dated 03.02.2021, as well as the decisions of the second respondent, the Energy Regulatory

Office with headquarters in Pristina, as follows: Decision V_ 1303_2020, dated 12.11.2020, decision V_1304_2020, dated 12.11.2020, License for Electricity Production for HC Deçani, Li_ 49/20 dated 12.11.2020, as well as License for Electricity Production for HC Belaja, Li_50 /20, dated 12.11.2020, until the court decides by a final court decision regarding the claimant's lawsuit.

32. The Court of Appeals, among other things, found that: (i) The decision challenged by appeal does not contain essential violation of the provisions of the contested procedure under Article 182 paragraph 2, point b), g), j), k) and m) of the LCP, for which reasons the Court of Appeals takes care ex-officio within the meaning of the provision of Article 194 of the LCP, applicable according to Article 63 of the LAC and Article 34 of the LAC, but from the evidence found in the documents of the case file, the substantive law has not been fully applied, therefore the challenged Decision was modified; (ii) The panel of this court assesses that the court of first instance erroneously applied the substantive law, namely article 22.2 and 6 of the LAC and Article 297.1 points a) and b) of the LCP, when it decided to approve the request of the claimants-proposers and postpone the execution of the challenged decisions of the respondents; (iii) the claimants-proposers have under no circumstances made the first condition of the request for the postponement of the execution of the challenged decision credible, which would be the direct or indirect damage that would be caused to the claimants-proposers in the event of the execution of the challenged decision, except that they have mentioned the fact that the execution of this decision would cause irreparable damage since to the latter was violated the property where the hydropower plant was built and the water that supplies their families is being reduced, but without concretely proving by any concrete evidence, to what extent their water supply is being reduced; (iv) the hydropower plant for energy production was contructed for the needs of electricity supply for a part of the residents of Deçan, therefore the postponement of the execution of the decision of the respondents in the present case would cause direct irreparable damage to the party of legal interest (company) ""Kelkos Energy" l.l.c. in Deçan since the investment for the construction of the hydropower plant is large, and this damage would indirectly affect a part of the residents of Deçan who are supplied with electrical energy; (v) The claimants-proposers have not made the second condition of the request credible either, that the postponement of the decision would not be contrary to the public interests and that it would not bring any harm to the opposing party, since the postponement of the execution of the decisions of the respondents would be against the public interest, for the reasons mentioned above, and that the company "Kelkos Energy" possesses all the decisions, permits, licenses by which it has received as an obligation that in the case of the production of electricity adheres to the conditions for the protection of the environment, water, and other conditions determined according to the decisions and (environmental consents) issued by the respondent Ministry of Economy and Environment (MEE); (vi) specifically from the decision of the respondent no. 19/5837/ZSP of 06.11.2020, the fact is confirmed that the legal interested party "Kelkos Energy" l.l.c. has been provided with an Environmental permit where, among other things, it is obliged to carry out continuous monitoring of the equipment, respectively the fulfillment of technical requirements, to respect the ecologically acceptable flow in accordance with Water Permits for water use; The Water Law and sub-legal acts deriving from this law; if during the operation there will be any technical failure, which may have an impact on the environment and on the health of the population, also in case of any environmental accident, the MEE is notified; (vii) the respondent MEE has the obligation to continuously monitor this company regarding compliance with the requirements received by the respondent and in case they are not respected, to revoke the relevant construction and environmental permits.

33. The claimants F.S., and M.L., submitted a request for an extraordinary review of the court decision to the Supreme Court, by which they challenged the legality of the decision of the Court of Appeals, claiming erroneous application of substantive law and violation of the provisions of the procedure, with proposal that the request be approved, the challenged decision of the Court of Appeals be annulled and the case be remanded to the court of second instance for reconsideration or that the Supreme Court renders the decision on merits.

34. Claimants F.S. and M.L., alleged: (i) the decision of the Court of Appeals was rendered in essential violation of the provisions of the contested procedure (Article 182 in conjunction Article 7, paragraph 2 and 8 of the LCP) applicable within the meaning of Article 63 of the LAC; (ii) The Court of Appeals, when adjudicating this legal issue, committed essential violation of the provisions of the contested procedure due to the fact that during the procedure it did not assess the evidence fairly, equally and carefully based on the results of proceedings; (iii) The Court of Appeals in the reasoning of the challenged Decision has not given any reason why the evidence presented by the proposers which the Basic Court administered in the procedure does not contain a sufficient basis for postponing the execution of the challenged decisions; (iv) The allegations of the Court of Appeals that the Basic Court erroneously applied the provisions of substantive law when it decided to approve the request of the claimants-proposals and postpone the execution of the challenged decisions, are ungrounded because the Court of Appeals only cited the paragraphs of Article 22 of the LAC without providing explanations as to which specific provision was incorrectly applied by the Basic Court; (v) it is an indisputable fact that the request of the claimants for the postponement of the execution of the decisions of the MEE and the ERO is not against the public interest, on the contrary, the protection of water sources, as the Basic Court has also assessed when approving the request for postponement also constitutes state interest.

35. The Applicant, being an interested party in this case, submitted the response to the request for an extraordinary review of the claimant's court decision with the proposal that the latter be rejected as ungrounded and that the Decision of the Court of Appeals be upheld.

36. The Applicant submitted a detailed response to the request for an extraordinary review of the court decision, in which case, among other things, it emphasized: (i) The Court of Appeals rightly concluded that the claimants did not fulfill the criteria defined in article 22, paragraph 2 of the LAC-criteria that constitute unsurpassable conditions for the approval of the request for the postponement of the execution of the decision; (ii) the claimants have not provided even an official document, scientific, professional, national or international research that would prove that the execution of the decisions of the MEE and ERO would harm the quality of water and access to drinking water and irrigation, therefore, the claims of the claimants are ungrounded; (iii) The quality of the water remains unaffected since the process of generating electricity through "runoff" hydropower plants uses an infrastructure (intake, dig, turbine), which isolates the river water from any contact with other substances that can affect water quality; (iv) Kelkos Energy has completely re-constructed the drinking water system for the town of Deçan and the surrounding villages as part of an agreement with the Municipality of Deçan in 2015 and that "Hidrodrini" has been successfully operating this system since 2015 and bear responsibility for water quality and water management; (v) The annual water quality report compiled by "Hidrodrini" for the years 2017, 2018 and 2019, shows that "Hidrodrini" is ranked best in terms of consumer satisfaction with drinking water; (vi) the water system in Deçan has a special collection channel from the river bed, which is located near the "KFOR bridge" and that this point is located below the river where the last installation of Kelkos

Energy is located and therefore has full access in the water of the river Deçan for the whole year; (vii) in general, the operation of hydropower plants in the Deçan river does not affect the amount of water in any way because the same amount of water that enters the system through the pipe, exits and flows back into the river after the turbines; the stay in the system of a quantity of water is less than one (1) hour; (viii) the claimants present indicative evidence - photographs - belonging to the period when the hydropower plants were being built (the construction of which was completed in 2015, and since then extensive rehabilitation has been carried out successfully) and that there is a good reason that the claimants fail to provide real evidence regarding the current state of the surrounding environment - now that it has been rehabilitated; (ix) MEE has requested that, in the context of environmental permits, a documentation is provided through photographs, which serve to compare the situation during the construction phase (2013-2015) and the rehabilitation status 2020; (x) water permit decisions contain clear provisions, including minimum water level monitoring, based on the applicable legal and administrative framework, specifying precise formulas for calculating the minimum water level in each period of the year for each segment of the river; (xi) a condition that is foreseen in the license, is the protection of the environment and also the obligation of annual reporting related to the environmental activity at the ERO [Article 14 of Licenses for the Production of Electricity]; (xii) according to Article 22, paragraph 2, of the LAC, it is clearly required to prove - and not just assume - that the postponement of the execution of decisions does not harm the public interest; (xiii) taking into account the limited opportunities for new energy production capacities in Kosovo, this decision would be in complete contradiction with the public interest; (xiv) by fighting and discouraging foreign investments in the energy sector (as in the present case, where we are talking about a total investment of more than 60 million euro as well as additional plans of the investor for the production of green energy in Kosovo) -initiatives for foreign investments in the green energy sector in Kosovo will be hindered; (xv) The Law on Foreign Investments stipulates that the Republic of Kosovo has the obligation to offer foreign investors the basic rights and guarantees, which provide them with assurance that the investments made in the Republic of Kosovo will be protected and treated fairly - in accordance with accepted international standards; (xvi) in the event that the decision of the Court of Appeals would not remain in force, the damage caused to the respondent manifests itself in material damages from losses in energy production, as well as in non-material damages to his reputation.

37. On 28 July, 2021, the Supreme Court by the Judgment [ARJ. UZVP. No. 74/2021] decided: (i) The request of the claimants F.S., Xh.K., and M.L., for an extraordinary review of the judicial decision presented against the Decision of the Court of Appeals, AA. No. 320/21, of 26 April 2021, is approved. (ii) The Decision of the Court of Appeals AA. no. 320/21, of 26 April 2021, is quashed; (iii) The Decision of the Basic Court in Pristina Department for Administrative Matter A-U. No. 208/20 of 01.02.2021 is upheld.

38. The Supreme Court concluded: (i) B**y** Article 22, paragraph 2 of the LAC it is determined that at the request of the claimant, the authority whose act is executed, namely the body that is competent for execution, can postpone the execution until the final judicial decision, if the execution would bring harm to the claimant, which would be difficult to repair, while the postponement is not contrary to the public interest, nor would the postponement bring any great harm to the opposing party or the interested person; (ii) The Court of Appeals in the reasoning of its decision has emphasized that the claimants-proposal have not presented any circumstances that are a prerequisite for the postponement of the challenged decision, which, if it were to be executed, would cause the claimant direct loss, except that they have mentioned the fact that by the execution of this decision, irreparable damage would be caused to them, as the

property where the hydropower plant is built would be infringed upon and thus the water that supplies their families would be reduced; (iii) The Supreme Court cannot accept as right such a position of the court of the second instance, the reasons and decisive facts are missing, while the latter have not been justified in accordance with the evidence in the documents of the case; (iv) therefore, in the specific case, the court of second instance had to assess whether all the conditions for postponing the execution of the challenged decision have been cumulatively met, in accordance with the legal provisions of the LAC, and that in the opinion of this court, the latter has not done this; (v) according to the assessment of this court, the reasoning of the Court of Appeals is deficient in terms of decisive facts, such as the possibility of causing irreparable damage, as long as the postponement would not be contrary to the public interest, and would not cause any great damage to the opposing party, namely the interested party; (vi) Therefore, it is clear that the reasoning of the challenged decision of the Court of Appeals has no support in terms of the evidence in the documents of the case file, so all this leads to the conclusion that the court of second instance when assessing the proposal of the claimant-proposer did not fully assess the facts and evidence presented; (vii) according to the opinion of this court, the claimants-proposals by the lawsuit and the letter of 02.02.2021 have presented convincing evidence that proves the facts that the execution of the decision would cause harm to the citizens who are in their properties and live in that environment where the work of these hydropower plants is foreseen, in which case irreparable damage would be caused to them; (ix) this court has also found that the execution of the decisions until the final decision on merits is taken would not be contrary to the public interest and the postponement would not cause a greater loss to the opposing party, namely the interested party; (x) in this way, at the same time, in the future, the possible consequences will be avoided in the event that at the end of the judicial process, it would be proven that the challenged decisions of the respondents were in violation of the law.

Applicant's allegations

39. The Applicant alleges that his fundamental rights and freedoms guaranteed by Articles 31 [Right to Fair and Impartial Trial], 46 [Protection of Property] of the Constitution in conjunction with Article 6 (1) [Right to a fair trial] and Article 1 of Protocol No. 1 [Protection of property] of the ECHR have been violated.

40. The Applicant has raised detailed allegations related to the right to a reasoned decision, the right to protection of property as well as the request for interim measure in order not to cause irreparable damage to the Applicant.

Reasoning regarding the applicability of Article 31 of the Constitution in conjunction with Article 6 (1) of the ECHR in the preliminary proceedings

41. The Applicant considers that his referral fulfills all the admissibility criteria and that the Court should accept this case for consideration of the merits based on the criteria established in the Judgment of the ECtHR in case *Micallef v. Malta*, but also the case of Court no. KI112/17 Applicant, *Ceska Exportni Banka A.S.*

42. The Applicant alleges that he is aware that Article 6 of the ECHR, in the civil part, is applied in the procedures that determine civil rights or obligations and also understands that the Judgment of the Supreme Court which he claims to contain violation of human rights does not correspond to the merits of the case, but is related to a preliminary procedure, namely to the imposition of an interim measure. In this regard, the Applicant adds that the Constitutional Court in case no. KI122/17 has

concluded that there may be cases where the preliminary procedures may be decisive for the civil rights and obligations of the Applicant.

43. Referring to the *Micallef* case, the Applicant reiterates: *"The exclusion of interim measures from the scope of Article 6 until now has been justified by the fact that, in principle, they do not define civil obligations and rights. However, in conditions where many Contracting States have to deal with a significant backlog of cases due to the overloading of their justice systems, which leads to excessively long proceedings, a judge's decision on a restraining order often happens to be equivalent to a decision on the merits of the case for a considerable time, sometimes even permanently. Therefore, many times it happens that the procedures for provisional measures and those related to the main legal action impose on the same "civil obligations and rights" and give the same long-term or even permanent effects".*

44. Referring to Court case no. KI122/17, the Applicant adds: "*In this Judgment, the Court defines two (2) criteria which must be assessed regarding "whether interim measures can be covered by Article 6 of the ECHR" Always according to this judgment, the first requirement is (i) the qualification of the right in question as "civil", and the second requirement (ii) t the nature of the interim measure must be assessed, whether it is considered such a measure of such importance that effectively determines the civil right or obligation in question*".

45. The Applicant asserts that the equipment with a license for the production of electrical energy from the ERO based on the water and environmental permits granted by the MEE constitute a "civil right" of the Applicant. The Applicant adds that the approval or disapproval of the postponement of the execution of the decision has a substantial impact on the Applicant's civil rights. The Applicant claims that even if in the end he wins the case on the merits, he will still suffer irreparable damage because the decision-making on the merits in the administrative department of the basic court lasts at least three (3) years.

46. In this regard, the Applicant alleges: "*The Basic Court of Pristina - Administrative Department is overloaded with cases, rightly so, it is not expected that the decision regarding the main issue will be taken within a period of at least three (3) years, which time represents the average time of handling cases in this department. In such a situation, even if the final decision is positive for the Applicant, the damage to the Applicant "Kelkos Energy" LLC would now be irreparable, because in addition to the material damage caused, such a long suspension of activity of this company, it would seriously endanger the very existence of this Company [...] therefore, the decision of the court to postpone the execution of the decisions and licenses granted by the MEEand ERO is decisive for the protection of the rights of the Applicant*" .

The allegation related to the lack of active legitimacy of the claiming party

47. The Applicant states that he is aware that the following allegations are related to issues of law and fact, but in his case it is also about arbitrary assessment of facts and arbitrary and unreasonable application of the law. To strengthen this allegation, the Applicant refers to the judgment of the Court in case no. KI195/20, in which case the Court found a violation of the right to fair and impartial trial precisely because of the arbitrary assessment of the facts and the arbitrary and unreasonable application of the law.

48. The Applicant alleges that the lawsuit and the request for postponement of execution of the decision was submitted by persons who lack active legitimacy.

49. In this regard, the Applicant alleges: "*According to the legal logic deriving from Articles 10 and 18 of the Law on Administrative Conflicts, natural and legal persons who appear as claimants in their personal capacity in Administrative Conflicts must prove the violation of their direct and/or indirect interests. In this spirit, the request for postponing the execution of the decision, when filed by a natural person, must be supported by concrete evidence that proves great damage is being caused to him/her that would hardly be repaired. In the present case, the minimum standard to claim that a natural person is being harmed by the challenged decisions is to provide concrete evidence that he or she is personally being harmed in terms of the quality or quantity of drinking water*".

50. To strengthen the allegation that the claimant lacks active legitimacy, the Applicant cites the relevant finding of the Court of Appeals: "*The first instance court did not give any reasoning and did not explain the relationship that the Claimant has with the Respondents in order to prove the active legitimacy of the claiming party and its interest" [...]* The Court of Appeals has rightly found that *[...] it is not known in what capacity the Claimant speaks on behalf of the residents since he is not their authorized representative and it has not been proven that he represents them.*"

51. The Applicant allges that neither the Supreme Court nor the Basic Court has shown any reference or material evidence to prove the fact that with the implementation of the challenged decisions of the MEE and ERO, the right to drinking water has been violated to the claimants.

52. The Applicant states: (i) the claimant F.S. has not presented the power of attorney that he represents the citizens of Deçan, nor has he provided a possession list deed that he is the owner of the land in the vicinity of the hydropower plants or even any scientific research that shows the alleged damage caused by hydropower plants; (ii) the basic court found that the claimant M.L. has active legitimacy because he is the owner of the land where HC Bellaja was built, while it did not take into account the evidence of the Applicant, namely the judgment of the Supreme Court AC-I-16-0183-A0001, which rejected his lawsuit filed against the parties who have allegedly hindered his right to enjoy that property; (iii) as regards the claimant Xh.K., the court did not refer to any material evidence to prove the spread of the pipes of the relevant hydro plant of "Kelkos Energy" in his property 159-0, while the Applicant has provided material evidence to prove the opposite of this claim, among others: a) the view from the geoportal of plot 159-0 and b) the constructed path of the channel, according to which the pipelines of the hydropower plant were laid avoiding the private parcel 159-0.

53. The Applicant claims: "The Applicant's right to fair and impartial trial has been violated, given that the Supreme Court, by its decision, which approved the request for interim measure of the unauthorized parties, suspended the legal activity of the Applicant "Kelkos Energy" for the production of electricity, exercised based on the permits and licenses granted by the administrative bodies - MEE and ERO, thereby depriving the Applicant - of the capacity of a foreign investor, from the development of legal economic activity".

54. The Applicant states that he is aware that these allegations are related to issues of law and fact, but in his case it is also about arbitrary assessment of facts and arbitrary and unreasonable application of the law. To strengthen this allegation, the Applicant refers to the judgment of the Court in case no. KI195/20, in which case the Court found a violation of the right to fair and impartial trial precisely because of the arbitrary assessment of the facts and the arbitrary and unreasonable application of the law.

The allegation that the requirements from Article 22, paragraph 1 of the LAC for imposition of interim measure against the decisions of the MEE and the ERO have not been met

55. The Applicant states that he is aware that the following allegations are related to issues of law and fact, but in his case it is also about arbitrary assessment of facts and arbitrary and unreasonable application of the law. To strengthen this allgeation, the Applicant refers to the judgment of the Court in case no. KI195/20, in which case the Court found a violation of the right to fair and impartial trial precisely because of the arbitrary assessment of the facts and the arbitrary and unreasonable application of the law.

56. The Applicant allges that the requirements from Article 22, paragraph 1 of the LAC for the impostion of interim measure are not met, respectively the cumulative conditions for postponing the execution of the decisions of the MEE and ERO are not met.

57. The Applicant alleges that three (3) conditions must be met for the approval of the request for postponement of the execution of the decision within the meaning of the Law on Administrative Conflicts: *(a) with the execution of the decision, damage would be caused to the claimant that would be difficult to repair; (b) postponement is not contrary to the public interest; (c) the postponement would not bring great harm to the opposing party or the interested person.*

58. Regarding the first condition, the Applicant claims that the decisions of the Supreme Court and the Basic Court did not refer to any material evidence that would prove the allegatiion of the claimants for the irreparable damage that would be caused to them, specifying to what extent the water supply is being reduced and how the right to property is being violated.

59. Regarding the second condition, the Applicant allges that the postponement of the execution of the challenged decisions of the MEE and ERO is contrary to the general interest because the Applicant possesses all the decisions, permits and licenses with which has taken as an obligation to adhere to the conditions for the protection of the environment, water and other conditions determined according to the legal framework of Kosovo in the case of electricity production.

60. Regarding the third condition, the Applicant alleges: *"[...] neither the third condition for postponing the execution of challenged decisions of the MEE and ERO has not been met. The company "Kelkos Energy" L.L.C. is part of the Kelag Group. The latter is one of the leading companies in the production of electricity from renewable sources in Europe. Kelkos L.L.C. is currently one of the largest investors in Kosovo and has invested more than 60 million euro in the creation of the necessary infrastructure for the production of electricity from renewable sources. The sole activity of the investor is the production of renewable electrical energy."*

61. In this regard, the Applicant claims: "T*he interpretation that the appealed Judgment makes regarding the conditions provided for in the Law on Administrative Conflicts is very disturbing. Such a substantial erroneous interpretation and erroneous application of these conditions constitutes a serious professional flaw with major consequences for order and legal security in the country [...] in the event that the decision of the Supreme Court remains in force until the decision on merits of the main claim, the Applicant will suffer great and irreparable material damage from losses in energy production, as well as non-material damage to his reputation. Losses in energy production are calculated based on overall production figures, while non-material damage to reputation as a known investor exceeds material damage figures".*

Allegation of a reasoned decision

62. The Applicant alleges that since the Supreme Court modified the decision of the Court of Appeals, the latter was obliged to justify in detail its decision on the imposition of the interim measure, clearly specifying the reasons for the decisive facts and material evidence in which it based its findings.

63. The Applicant refers to the relevant paragraph of the finding of the Supreme Court which establishes: *"the claimants - the proposers with the lawsuit and the letter dated 02.02.2021 have presented convincing evidence that proves the facts that the execution of the decision would cause damage to the citizens who are in their properties and live in the environment where the work of these hydropower plants is planned, in which case irreparable damage would be caused to them. This court has also found that the execution of the decisions until the final decision on merits is taken would not be contrary to the public interest and the postponement would not cause any greater loss to the opposing party or the interested party"*.

64. The Applicant in the "spirit" of Article 31 of the Constitution in conjunction with Article 6 (1) of the ECHR alleges: "*In the spirit of these provisions, it is the obligation of the Courts to impartially assess the allegations of all parties - something which in the present case did not happen. In the present case, the Supreme Court did not examine the issues raised by the Applicant at all. The Applicant in all his written submissions, before all judicial instances, had argued in detail regarding each claim of the Claimants. Moreover, the Applicant had gone beyond this by arguing and proving that in fact the approval of the Request for Postponement of the Execution of Decisions would be contrary to the public interest. In addition, the response to the Request for Extraordinary Review of the Judicial Decision, of 9 July 2021, which was submitted by the Applicant, should be analyzed with increased attention. In this submission, each claim of the Applicant is counter-argued in detail. The Supreme Court does not address at all the issues raised and the answers given by the Applicant*".

65. The Applicant adds that the Supreme Court has failed to issue a reasoned decision also from the point of view of Article 160 paragraphs (1) and (4) of the LCP, which determine the structure of a judgment as well as the obligation of the courts to address the evidence and facts presented by litigants.

66. In this regard, the Applicant adds: "*At no time has the Supreme Court taken the trouble to argue any of the decisive facts or to cite any of the material evidence on which it based its conclusions. Likewise, the Supreme Court did not address the arguments and evidence presented by the Applicant at all. Thus, the Judgment of the Supreme Court is an unfair and illegal decision in relation to the Applicant, which has resulted in the violation of the Right to Fair and Impartial Trial*".

67. To strengthen the allegations for a reasoned decision, the Applicant refers to the judgments of the Constitutional Court in cases KI72/12, KI138/15 and KI195/20. In particular, the Applicant refers to paragraph 141 of case KI195/20, in which case the Constitutional Court had found: "*The Court also recalls that in cases where a court of third instance, as in the case of the applicant the Supreme Court, which upholds the decisions taken by the lower courts-its obligation to reason the decision-making differs from cases where a court changes the decision-making of lower courts*."

Allegation of the right to protection of property

68. The Applicant alleges that taking into account all the legal acts and the imperative, fundamental norms that they contain regarding the right to property, especially the definition of the Constitution regarding this right, it is clear that the right to property is fundamental and inviolable human right. This can also be seen from the fact that in the Constitution, the right to property is placed in the section where the fundamental human rights and freedoms are found.

69. The Applicant alleges: "*Based on the jurisprudence of the ECtHR - by Article 53 of the Constitution - it should be borne in mind that the concept of ownership is very broadly interpreted. According to the jurisprudence of the ECtHR, this concept does not only include property and the right to it - in the material and classical sense of the word, but includes a wide range of monetary rights - rights deriving from, among other things, licenses and as well as the rights deriving from running a business [...] Even going further, in Pressos Compania Naviera SA et al V. Belgium, the ECtHR concluded that even a claim for compensation can be considered an asset - in the sense of property and enjoys protection under Article 1, Protocol 1, of the ECHR when it is sufficiently proven by the party that there is a legitimate expectation that such a request can be realized*".

70. The Applicant points out that based on the jurisprudence of the ECtHR, the provision of a license constitutes a legitimate expectation for him to carry out his activity in an unhindered manner because he met the legal conditions at the time when he was provided with a license, therefore, the legitimate expectation of the Applicant is protected by Article 46 of the Constitution in conjunction with Article 1 of Protocol No. 1 of the ECHR.

71. The Applicant alleges: "*The licenses for the production of electrical energy that were given to the applicant "Kelkos Energy" by the ERO are essential for the activity of this company, because at the moment of the implementation of a court decision which temporarily prohibits the operation on the basis of that license, the company has been forced to completely stop its activity until the case is decided on merits by the court. Considering the caseload of the courts, a decision on merits on the case in question is expected to be taken after more than three (3) years*".

72. The Applicant alleges: "*To prove the damage caused to the Applicant, it is enough to look at the production of electricity from renewable sources for the years 2017-2020 by the latter. According to KOSTT own reports, the electricity produced and released to the network by the Applicant for 2019 is 46,526 MWh of electricity, out of a total of 191,700 MWh produced from renewable sources in Kosovo. Also, in 2020 (as the year of the pandemic) the Applicant has produced 35,744.51 MWh of clean electricity. These data prove that the Applicant with the impossibility of producing electricity will be extremely damaged*".

73. The Applicant alleges that in addition to the monetary damage, the latter is also irreparable. The Applicant points out that being part of a multinational corporation (Kelkos Energy is part of the Kellag Group), the financing structure and financial instruments for financing investment projects is complicated. In the event that the return of the invested funds is not started for a long period, this would result in the financial inability to survive and the Applicant would be seriously threatened with liquidation.

74. Referring to the ECtHR case, *Capital Bank AD v. Bulgaria*, the Applicant adds: *"The ECtHR in the case of Capital Bank AD v. Bulgaria found that the criterion of legality*

assumes, among other things, that the local law must provide a mechanism for protection against arbitrary interference by public authorities. Furthermore, the Court emphasizes that "the concept of legality and the rule of law in a democratic society requires that measures that affect human rights can be subject to review by independent judicial bodies". Therefore, according to the ECtHR, "any interference with the peaceful enjoyment of property must be accompanied by procedural guarantees that enable individuals or legal entities to present their case before the responsible authorities in order to seriously challenge the steps by which the rights of guaranteed under this provizion have been interfered".

75. The Applicant also claims that the Supreme Court has violated Article 119 (4) [General Principles] of the Constitution which obliges the Republic of Kosovo to promote well-being and sustainable economic development because "*Taking into account the existing energy capacities of the Republic of Kosovo, and the fact that in addition to the significant lack of production capacities, the global energy crisis, and the enormous increase in import prices, the Supreme Court Judgment is in direct contradiction to Article 119, paragraph 4 , since this Judgment discourages sustainable economic development*".

76. The Applicant alleges that given the erroneous application of procedural law and the lack of convincing reasoning of the Supreme Court, there was no sufficient guarantee against the arbitrariness of the Supreme Court, which resulted in a violation of Article 46 of the Constitution in conjunction with Article 1 of Protocol no. 1 of the ECHR.

Allegation of imposition of interim measure

77. The Applicant alleges that the implementation of the judgment of the Supreme Court will cause irreparable material damage, since it will be deprived of the right to exercise legal activity based on the licenses granted by the administrative bodies, without being providedin the issue of administrative conflict, a fair procedure that is guaranteed by the Constitution, calling into question the legal certainty for all citizens, especially for foreign investors such as the Applicant.

78. The Applicant emphasizes that the deprivation for several years in a row from the exercise of legal activity based on the licenses granted by the administrative bodies will not be able to be undone and no monetary compensation will be able to compensate the material and non-material damage that the Applicant would suffer.

79. The Applicant alleges: *"The price for electricity generated by hydropower plants according to the Decision of the Energy Regulatory Office V 810/2016, is EUR 67.47 per MWh. The damage caused to the applicant by the challenged Judgment is irreparable, because the electricity that could be produced in this period of time cannot be replaced with the electricity that will be produced in the future. Simply put, the profit that could be realized from the generation-and consequently the sale of electricity by the Applicant for the kosovo Operator of the System, Transmission and Electricity Market (KOSTT) cannot be compensated through a higher production that could happen in the future."*

80. The Applicant also alleges that the challenged judgment of the Supreme Court is also contrary to the public interest in the Republic of Kosovo and that it brings "substantially" harmful consequences because it negatively affects the investment climate for the development of the new generation of energy capacities of Kosovo. In this context, the Applicant adds: *"[...] it is a fact that the demand for electricity in Kosovo is increasing while the generating capacities remain the same and moreover*

they will decrease after 2023, when the decommissioning of the Kosova A power plant is also foreseen."

81. Referring to Article 10 of Law No. 04/L-2020 on Foreign Investments, which talks about the right of investors to address the courts for compensation of damages in case of violation of the law to their detriment, the Applicant alleges: *"The case in question is being watched carefully by major investors from across Europe. If it ends up in arbitration, it will send a disastrous signal to potential foreign investors around the world. Such a thing confirms the impression that there is no legal certainty for serious investors in Kosovo".*

82. The Applicant alleges that the judgment of the Supreme Court is contrary to Article 55 of the Constitution because it disproportionately violates the essence of the fundamental right, such as the protection of property guaranteed by Article 46 of the Constitution.

83. From the elaboration above, the Applicant alleges to have argued the *prima facie* case for imposing an interim measure against the judgment of the Supreme Court, "as specified in the petitum of the request".

84. Regarding the request for the impositin of an interim measure, the Applicant requests the Court: (i) GRANT the interim measure for the duration set by the Court; (ii) TO immediately SUSPEND the implementation of Judgment ARJ. UZVP. No.74/2021 of the Supreme Court of Kosovo of 28.07.2021 and of Judgment A. No. 2081/2020 of the Basic Court in Prishtina, of 11.02.2021, for the time period as in point I of this decision.

85. Regarding referral no. KI202/21 as a whole and the allegations raised and elaborated, the Applicant requests the Court: (i) TO DECLARE the referral admissible; (ii) TO HOLD that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to a fair trial] of the ECHR; (iii) TO HOLD that there has been a violation of Article 46 [Protection of Property] of the Constitution and Article 1 of Protocol 1 [Protection of property] of the ECHR; (iv) TO DECLARE Judgment ARJ. UZVP. No.74/2021 of the Supreme Court of 28.07.2021 invalid; (v) TO REMAND Judgment ARJ. UZVP. No.74/2021 of the Supreme Court of 28.07.2021 for retrial, in accordance with the judgment of the Constitutional Court; (vi) TO GRANT the interim measure until the time when the Supreme Court of Kosovo decides on the case.

RELEVANT CONSTITUTIONAL AND LEGAL PROVISIONS

CONSTITUTION OF THE REPUBLIC OF KOSOVO

Article 31
[Right to Fair and Impartial Trial]

"1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.

2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.
[...]"

EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 6
(Right to a fair trial)

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
[…]"

LAW No. 03/L-202 ON ADMINISTRATIVE CONFLICTS

Article 6
The principle of verbal review

"*The court shall decide based on verbal review directly and publicly regarding the administrative conflict."*

Article 10
[No title]

"1. Based on the Law, a natural and a legal person has the right to start an administrative conflict, if he/she considers that by the final administrative act in administrative procedure, his/her rights or legal interests has been violated.

2. Administration body, Ombudsperson, associations and other organizations, which protect public interests, may start an administrative conflict.

3. Administration body has the right to initiate the administrative conflict, against the decision taken based on complain in the administrative procedure, if he/she considers that any of his/her rights or interests have been violated.

4. If, by the administrative act the Law has been violated in the favor of a natural or legal entity, the conflict can be initiated by a competent public prosecutor or by other body authorized by the Law. All administration bodies are obliged to inform competent public prosecutor or the body authorized by the Law.

5. An administrative conflict can be initiated also by the competent public attorney or authorized person, if by an administrative act the Law has been violated in the disadvantage of central government bodies and other bodies on their dependence, local government bodies and bodies on their dependence, where the property rights of these bodies have been violated".

Article 22
[No title]

"2. By the plaintiff request, the body whose act is being executed, respectively the competent body for execution can postpone the execution until the final legal decision, if the execution shall damage the plaintiff, whereas postponing is not in

contradiction with public interest and postponing would not bring any huge damage to the contested party, respectively the interested person.
[...]

6. The plaintiff can claim from the court to postpone the execution of administrative act until the court decision is taken, according to the conditions foreseen by the paragraph 2 of this Article."

Article 34
[No title]

"1. The court shall disprove with a decision, if it ascertains that:

1.1. the indictment has been submitted after the timeline or it is premature;
[...]

1.3. it is clear that the administrative act contested by an indictment does not affect the rights of the claimant or his/her direct interest based on the law;

Article 63
[Other procedure provisions]

If this law does not contain provisions for the procedures on administrative conflicts, the law provisions on civil procedures shall be used."

LAW No. 03/L-006 ON CONTESTED POCCEDURE

Article 160
[No title]

160.4 Justification of the verdict consists of: requests of parties, facts submitted and proposed proofs, which of the facts are validated, why and how they were validated, if they were validated according to the proof which proofs were used and how they were validated.

Article 175
[No title]

"Provisions of articles 146, 153, 160 and 169, paragraph 2, of this law is applied accordingly when it is dealt with verdicts."

Article 194
Boundaries of the examining a court case in the first instance

"The complaint court examines the court case of the first instances in the part that complaint refers to, and that is done within the boundaries of causes shown in the complaint, considering them in accordance to the official tasks for applying the material right and violation of provisions for contested procedure from the article 182 paragraph 2, point. b), g), j), k) and m) of this law."

Article 257
Changing the claim

"257.1 Changing the claim means change of the uniqueness of the claim charge, expansion of the claim charge or presentation of a different request from the existing one.

257.2 The charge is not recognized a changed one unless the plaintiff hasn't changed the judicial basis of the claim charge, even though the plaintiff has reduced the claim charge, added or improved the specific sayings mentioned in the claim".

Article 264
Litispendence

"264.1 The claim can be raised jointly by many plaintiffs or against several parties (litispendence) if:

a) if the building at contest is a legal unit or if their rights, respectively obligations come from the same factual or judicial base (material litispendence);

b) the object of contest are request, respectively obligations of the same kind that are based on factual and judicial grounds essentially the same, and if there is subject and territorial competence of the same court for each request and for each charged party (formal litispendence);

c) something of the kind is foreseen by a different law.

264.2 The plaintiff can be joined or expand the charge by another plaintiff with his consent up to the closure of the preliminary session, respectively the main hearing session if the preliminary session was not set, according to the conditions of the parag.1 of this article.

264.3 Person joining the plaintiff, respectively the person with whom the charges are expanded should accept the procedure as it from the moment entered."

CHAPTER XXI INSURING THE CHARGE CLAIM

Article 269
[No title]

"269.1 If according to the law or due to the nature of the judicial relations, the contest can be resolved only in the same way for each of litispendence, than all of the are considered as a sole litidependent party, so when one of the joint litispendent doesn't conduct a procedural action, the effects pf the procedural actions committed by other litidependentts covers the ones who haven't committed the same acts.

269.2 If the litidependent conduct procedural actions that differ among them, than the court will consider that procedural action that is the most favorable one for all."

Article 297
[No title]

"297.1 Measures for insurance can be determined:

a)) if the propose of the insurance makes it believable the existence of the request or of his subjective, and

b) in case there is a danger that without determining a measure of the kind the opposing party will make it impossible or make it difficult the implementation of the request, especially with alienating of its estate, hiding it, or other way through which it will change the existing situation of goods, or in another way will negatively impact on the rights of the insurance party that proposed.

297.2 If it's not determined differently by law, the court will determine the measures of insurance within the set deadline by the court as it is determined by the Law for the final procedure, it will issue guaranties on the measure and the type specified by the court for the damage that can be caused to the opposing party by determining and executing the insurance measures.

297.3 If the party proposing doesn't give guaranties within the set deadline, the court will reject the proposal for determining the insurance measures. With request of the party that proposed it, the court can dismiss him from the issuing of the guaranties if it ascertains that there are no financial possibilities for such thing.

297.4 The units of the local government are excluded from the obligations of the paragraph 3 of this article."

Admissibility of the Referral

86. The Court first examines whether the Referral has fulfilled the admissibility requirements established in the Constitution, and as further specified in the Law and foreseen in the Rules of Procedure.

87. In this respect, the Court refers to paragraph 4 of Article 21 [General Principles] and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which establish:

Article 21

"[...]

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

Article 113

"*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."

88. In the following, the Court also examines whether the Applicant has met the admissibility requirements as established in the Law. In this regard, the Court refers

to Articles 47 (Individual Requests), 48 (Accuracy of the Referral) and 49 (Deadlines) of the Law, which stipulate:

Article 47
(Individual Requests)

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

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...".

89. In this respect, the Court notes that the Applicant, in the capacity of the legal person, is entitled to file a constitutional complaint, by calling upon alleged violations of its fundamental rights and freedoms, which are valid for individuals as well as for legal persons (see the cases of the Court no. KI41/09, Applicant *University AAB-RIINVEST L.L.C.*, Resolution on Inadmissibility of 3 February 2010, paragraph 14; and no. KI35/18, Applicant *Bayerische Versicherungsverbrand,* Judgment of 11 December 2019, paragraph 40).

90. 90. In assessing the fulfillment of the admissibility criteria as mentioned above, the Court notes that the Applicant has specified that it challenges an act of a public authority, namely Judgment of the ARJ. UZVP. No. 74/21 of the Supreme Court of 28 July 2021, after exhausting all legal remedies established by law. The Applicant has also clarified the fundamental rights and freedoms that it alleges to have been violated in accordance with the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadlines set out in Article 49 of the Law.

91. In the context of the circumstances of the present case, taking into account that the challenged decisions are related to decisions regarding security measures, namely "*preliminary proceedings*"", the Court based on its case law and that of the European Court of Human Rights (hereinafter: the ECtHR), must assess the applicability of the guarantees of Article 31 of the Constitution in conjunction with Article 6 of the ECHR. In this context, the Court refers to point (b) of paragraph (3) of Rule 39 of the Rules of Procedure, according to which the Court may consider a referral inadmissible if the latter is not *ratione materiae* in compliance with the Constitution.

92. Therefore, in the context of the latter, the assessment of this criterion in the circumstances of the case is important because the proceedings before the regular courts fall within the scope of the "*preliminary proceedings*", namely the challenged Judgment of the Supreme Court is related to the Decision of the Basic Court in

Pristina for the postponement of the execution of decisions on environmental permits issued by the MEE and licenses for electricity production issued by the ERO, until the lawsuit for the annulment of the decisions of the MEE and the ERO- until the basic court decides with a final decision (review of the merits) regarding the lawsuit of the claiming parties. Therefore, the Court will assess whether Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, is applicable in the circumstances of the Applicant's case.

93. In this specific context, the Court notes that the question of the applicability of Article 6 of the ECHR to pre-trial proceedings has been interpreted by the ECtHR through its case-law, in accordance with which the Court, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret human rights and fundamental freedoms guaranteed by the Constitution.

94. The Court also points out that the criteria in respect of the applicability of Article 31 of the Constitution concerning pre-trial proceedings are also set out in the cases of this Court, including but not limited to cases KI122/17, Applicant *Česká Exportní Banka A.S.*, Judgment of 30 April 2018; KI150/16, Applicant *Mark Frrok Gjokaj*, Judgment of 31 December 2018; KI81/19, Applicant, Applicant *Skender Podrimqaku*, Resolution on Inadmissibility of 9 November 2019; KI107/19, Applicant *Gafurr Bytyqi*, Resolution on Inadmissibility, of 11 March 2020; KI195/20, Applicant *Aigars Kesengfelds*, Judgment, of 29 March 2021. The general principles established through these above-mentioned Court decisions are based on the ECtHR case, *Micallef v. Malta*, no. 17056/06, Judgment of 15 October 2009.

95. Consequently, in order to determine whether in the prezent case is applied Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, The Court will refer to the general principles established through the case law of the ECtHR and the Court regarding the applicability of the procedural guarantees of Article 31 of the Constitution, conjunction with Article 6 of the ECHR and then the latter will apply in the circumstances of the present case.

96. Based on its case law and that of the ECtHR, the Court notes that not all injunctive relief/interim measures determine civil rights or obligations and in order for Article 6 of the ECHR to be applicable, the ECtHR determined the criteria on the basis of which the applicability of Article 6 of the ECHR to the "*preliminary proceedings*" should be assessed (see, the ECtHR case, *Micallef v. Malta*, cited above, paragraphs 83-86).

97. According to the criteria determined in the case *Micallef v. Malta*, which have been accepted also by this Court through case law, firstly, the right at stake should be "*civil*" in both the main trial and in the injunction proceedings, within the autonomous meaning of this notion under Article 6 of the ECHR and secondly this procedure must effectively determine the relevant civil right (see, in this context, the ECtHR case, *Micallef v. Malta*, cited above, paragraphs 84 and 85 and references cited therein, as well as see the cases of Court KI122/17, Applicant *Česká Exportní Banka AS*, cited above, paragraphs 130 and 131; KI81/19, Applicant *Skender Podrimqaku*, cited above, paragraphs 47 and 48; KI107/19, Applicant *Gafurr Bytyqi*, cited above, paragraph 53).

98. The Court recalls that the circumstances of the Applicant's case refers to the decisions on water, environmental permits and licenses for production of electrical energy issued by the MEE and the ERO related to the construction of hydropower plants in the territory of the municipality of Deçan. The claiming parties initiated an administrative conflict by filing a lawsuit against MEE and ERO. Together with this lawsuit, the claimants also submitted a request for postponement of the execution of

the challenged decisions of the MEE and the ERO on the grounds that the hydropower plants built in the territory of the municipality of Deçan damage the quality of drinking water and irrigation. The postponement of the execution of the challenged decisions of the MEE and ERO as an interim measure based on the provisions of the LAC would mean the suspension of the production of electricity by the Applicant "Kelkos Energy" through three (3) existing hydropower plants in the municipality of Deçan, until the decision on merits regarding the case is taken by the Basic Court in Prishtina.

99. Therefore, the request for postponing the execution of administrative decisions, as in the circumstances of the present case, in the procedure of administrative conflict is foreseen in Article 22 of the LAC. This decision to postpone the execution, based on the applicable law, can be taken until the case is decided on merits by the regular courts. The equipment of the Applicant with permits and the relevant licenses from the MEE and the ERO is related to (i) the construction and operation of hydropower plants as a renewable source for the production of electricity in the territory of the municipality of Deçan; and, (ii) since 2019, the Applicant has started generating electricity through hydropower plants.

100. The Court recalls that all the issues raised in the circumstances of the present case fall within the scope of "*preliminary proceedings"* while the main issue for annulment of the decisions of the MEE and ERO that are directly related to the Applicant's activity is still in the merits review procedure before the regular courts.

101. From the above, the Court finds that the Applicant (i) enjoys a "civil right" that sets in motion the procedural guarantees of Article 31 of the Constitution in conjunction with Article 6 of the ECHR; (ii) the Applicant's request regarding the allegation of violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR is *ratione materiae* in compliance with the Constitution; and, that (iii) the procedural guarantees of Article 31 of the Constitution in conjunction with Article 6 of the ECHR are applicable in his case.

102. At the end and after considering the Applicant's constitutional complaint, the Court considers that the referral cannot be considered as manifestly ill-founded on constitutional basis, as provided by paragraph (2) of Rule 39 of the Rules of Procedure, and consequently, the referral is declared admissible for review on the merits (see also the ECtHR case, *Alimuçaj v. Albania*, no. 20134/05, Judgment of 9 July 2012, paragraph 144, as well as see Court cases KI75/21, Applicant "*Abrazen LLC", "Energy Development Group Kosova LLC", "Alsi & Co. Kosovë LLC" and "Building Construction LLC",* Judgment of 19 January 2022, paragraph 64; KI27/20, Applicant, *VETËVENDOSJE! Movement*, Judgment of 22 July 2020, paragraph 43).

Merits of the Referral

103. The Court recalls that the Applicant alleges that its fundamental rights and freedoms guaranteed by Articles 31 [Right to Fair and Impartial Trial], 46 [Protection of Property] of the Constitution in conjunction with Article 6 (1) [Right to a fair trial] and Article 1 of Protocol No. 1 [Protection of property] of the ECHR have been violated.

104. The Court emphasizes that the essence of the case is related to the Applicant's right to conduct electricity production activities based on the relevant decisions, permits and licenses of the MEE and ERO, which enabled the Applicant to invest in electricity generating capacities through the construction of infrastructure for hydropower plants. Meanwhile, the claimants, F.S., M.L., and XH.K., had initiated an administrative conflict by filing a lawsuit against the MEE and the ERO, in which case

they had submitted a request for postponement of the execution of the challenged decisions of the MEE and ERO. The Basic Court approved the proposal of the claiming party and decided to postpone the execution of the decisions of the MEE and ERO, until the Basic Court decides by a final decision regarding the lawsuit of the claimant. The Applicant, as well as the MEE and the ERO, submitted an appeal to the Court of Appeals. The Court of Appeals decided to approve the appeals of the respondents ERO, MEE and the Applicant "Kelkos Energy" as grounded, while quashing the decision of the Basic Court and remanding the case to the same court for reconsideration and retrial. The Basic Court again decided to approve the claimant's proposal and to postpone the execution of the decisions of the MEE and ERO until the Basic Court decides by a final decision regarding the claimant's claim. The Applicant, the MEE and the ERO again filed an appeal with the Court of Appeals. The Court of Appeals again decided to approve the appeals of the respondents MEE and ERO and the Applicant, while it modified the decision of the Basic Court by rejecting the proposal of the claiming party by which they requested to postpone the execution of the decisions of the respondents MEE and ERO , until the Basic Court decides by a final decision regarding the claimant's claim. The claiming parties filed a request for an extraordinary review of the court decision with the Supreme Court, while the Applicant provided a response to the claimant's request. The Supreme Court decided to approve the claimant's request for an extraordinary review of the court decision filed against the Decision of the Court of Appeals and annulled the Decision of the Court of Appeals upholding the Decision of the Basic Court, namely the interim measure, suspending all the activities of the Applicant until the merits of the case before the Basic Court are decided.

105. The Court notes that the Applicant, before the regular courts, raised detailed allegations related to: (i) the lack of active legitimacy of the claimant; (ii) arbitrary application of the law and arbitrary assessment of the facts related to the interpretation and application of Article 22 of the LAC to the circumstances of its case; (iii) allegation of violation of the right to a reasoned decision, especially in the procedure conducted before the Supreme Court; (iv) allegation of violation of the right to protection of property; and, (v) allegation of the imposition of an interim measure by the Court against the decisions of the regular courts for the postponement of the execution of the decisions of the MEE and ERO.

106. The Court in the following text of this Judgment will assess the allegations of arbitrary application of Article 22 of the LAC and for the lack of active legitimacy of the claimant within the framework of the right to a reasoned decision as guaranteed by Article 31 of the Constitution in conjunction with Article 6 (1) of the ECHR.

107. When assessing the merits of these allegations, the Court will also apply the standards of the ECtHR case law, in accordance with which, the Court based on Article 53 [Interpretation of Human Rights Provisions] of the Constitution is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution in harmony with the court decisions of the ECtHR.

General principles related to the right to a reasoned decision

108. As to the right to a reasoned court decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court first notes that it already has a consolidated case-law regarding this issue. This case-law was built based on the case law of the ECtHR, including but not limited to the cases *Hadjianastassiou v. Greece*, no. 12945/87, Judgment of 16 December 1992; *Van de Hurk v. The Netherlands*, no. 16034/90, Judgment of 19 April 1994; *Hiro Balani v. Spain*, no. 18064/91, Judgment of 9 December 1994; *Higgins and others v. France*, no.

20124/92, Judgment of 19 February 1998; *Garcia Ruiz v. Spain,* no. 30544/96, Judgment of 21 January 1999; *Hirvisaari v. Finland,* no. 49684/99, Judgment of 27 September 2001; *Suominen v. Finland,* no. 37801/97, Judgment of 1 July 2003; *Buzescu v. Romania,* no. 61302/00, Judgment of 24 May 2005; *Pronina v. Ukraine,* no. 63566/00, Judgment of 18 July 2006; and *Tatishvili v. Russia,* no. 1509/02, Judgment of 22 February 2007. In addition, the fundamental principles concerning the right to a reasoned court decision have also been elaborated in the cases of this Court, including but not limited to cases KI22/16, Applicant *Naser Husaj,* Judgment of 9 June 2017; KI97/16, Applicant *IKK Classic,* Judgment of 9 January 2018; KI143/16, Applicant *Muharrem Blaku and others*, Resolution on Inadmissibility of 13 June 2018; KI87/18, Applicant *IF Skadiforsikring*, Judgment, of 27 February 2019, and KI24/17, Applicant *Bedri Salihu*, Judgment, of 27 May 2019, KI35/18, Applicant *Bayerische Versicherungsverbrand*, Judgment of 11 December 2019; KI 75/21, Applicant "*Abrazen LLC", "Energy Development Group Kosova LLC", "Alsi & Co. Kosovë LLC" and "Building Construction LLC",* cited, paragraph 69).

109. In principle, the Court notes that the guarantees embodied in Article 31 of the Constitution and Article 6 of the ECHR include the obligation of courts to provide sufficient reasons for their decisions. (See the ECtHR case, *H. v. Belgium*, Judgment of 30 November 1987, paragraph 53; and see case of the Court KI230/19, Applicant *Albert Rakipi,* cited above, paragraph 139 and case KI87/18, Applicant *IF Skadiforsikring,* paragraph 44). A reasoned decision shows the parties that their case has indeed been heard, and that consequently it contributes to a greater admissibility of the decisions. (See the ECtHR case *Magnin v. France,* no. 26219/08, Decision of 10 May 2012, paragraph 29).

110. The Court refers to its case law where it is established that the reasoning of the decision must state the relationship between the merit findings and the examination of evidence on the one hand, and the legal conclusions of the court, on the other. A judgment of a court will violate the constitutional principle of ban on arbitrariness in decision-making, if the reasoning given fails to contain the established facts, the legal provisions and the logical relationship between them (the Constitutional Court, cases: no. KI72/12, *Veton Berisha and Ilfete Haziri*, Judgment of 17 December 2012, paragraph 61; and no. KI135/14, *IKK Classic*, Judgment of 9 December 2020, paragraph 58).

111. This case law also determines that despite the fact that a court has a certain discretion regarding the selection of arguments and evidence, it is obliged to justify its activities and decision-making by providing the relevant reasons. (See the ECtHR cases: *Suominen v. Finland,* cited above, paragraph 36; *Carmel Saliba v. Malta,* no. 24221/13, Judgment of 24 April 2017, paragraph 73; see also the case of the Court, KI227/19, Applicant *N.T. "Spahia Petrol",* Judgment of 20 December 2020, paragraph 46). Moreover, the decisions must be reasoned in such a way as to enable the parties to exercise effectively any existing right of appeal. (See the ECtHR case, *Hirvisaari v. Finland,* cited above, paragraph 30).

112. The Court also notes that based on its case law in assessing the principle which refers to the proper administration of justice, the court decisions must contain the reasoning on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case. It is the substantive arguments of the Applicants that need to be addressed and the reasons given need to be based on the applicable law (see, similarly ECtHR cases *Garcia Ruiz v. Spain,* cited above, paragraph 29; *Hiro Balani v. Spain,* cited above, paragraph 27; and *Higgins and others v. France,* cited above paragraph 42, see also, cases of the Court KI97/16, Applicant *IKK Classic*, cited above,

paragraph 48; and KI87/18, Applicant *IF Skadeforsikring*, cited above, paragraph 48).

113. By not seeking a detailed response to each complaint raised by the Applicant, this obligation implies that the parties to the proceedings may expect to receive a specific and explicit response to their claims that are crucial to the outcome of the proceedings (see case *Moreira Ferreira v. Portugal*, no. 19867/12, Judgment of 5 July 2011, paragraph 84, and all references used therein; and case of the Court KI230/19, Applicant *Albert Rakipi,* Applicant *Albert Rakipi,* Judgment of 9 December 2020, paragraph 137).

114. In dismissing an appeal, an appellate court may, in principle, simply endorse the reasons for the lower court's decision, nevertheless there must be sufficient reasoning to show that the respective court did not merely endorse without further ado the findings reached by a lower court. (See, *inter alia*, case of ECtHR, *Tatishvili v. Russia*, cited above, paragraph 62; see also case of the Court, KI227/19, Applicant *N.T.* "*Spahia Petrol",* cited above, paragraph 47).

115. Therefore, based on the case law of the ECtHR and of the Court, the courts are required to examine and provide a specific and express reply related to the: *(i)* party's main arguments and allegations (see cases of the ECtHR, *Buzescu v. Romania*, cited above, paragraph 67; and *Donadze v. Georgia*, no. 74644/01, Judgment of 3 March 2006, paragraph 35); *(ii)* party's arguments and allegations that are decisive for the outcome of the proceedings (see, cases of ECtHR, *Ruiz Torija v. Spain*, cited above, paragraph 30; and *Hiro Balani v. Spain*, cited above, paragraph 28); or *(iii)* the allegations concerning the rights and freedoms guaranteed by the Constitution and the ECHR (see case of ECtHR, *Wagner and J.M.W.L. v. Luxemburg*, no. 76240/01, Judgment of 28 June 2007, paragraph 96 and the references therein; see also the case of the Court, KI227/19, Applicant *N.T.* "*Spahia Petrol",* cited above, paragraph 48).

Application of general principles in the circumstance of the present case

116. Regarding the allegation of arbitrary application of Article 22 of the LAC and violation of the right to a reasoned decision, the Court recalls the legal requirements that must be met for postponing the execution of an act until the final court decision according to Article 22, paragraph 2 of the LAC which determines that: *"At the request of the claimant, the authority whose act is executed, namely the body that is competent for execution, can postpone the execution until the final judicial decision, if the execution would bring harm to the claimant, which would be difficult to repair, while the postponement is not contrary to the public interest, nor would the postponement bring any great harm to the opposing party or the interested person".*

117. The Court notes that according to the relevant provisions mentioned above, in order to postpone the execution of an act, it is necessary to meet these requirements:

i. if the execution would bring harm to the claimant, which would be difficult to repair, whereas;
ii. the postponement is not against the public interest; and
iii. nor would the postponement bring any great harm to the opposing party or the interested person.

118. In the following text of this Judgment, the Court will confront the allegations raised by the Applicant in the proceedings before the Supreme Court and the latter's response in relation to the allegations of the Applicant.

119. In this regard, the Court once again emphasizes a detailed response of the Applicant to submitted to the Supreme Court that: **(i)** The Court of Appeals rightly concluded that the claimants did not fulfill the criteria defined in Article 22, paragraph 2 of the LAC-criteria that constitute unsurpassable conditions for the approval of the request for the postponement of the execution of the decision; **(ii)** the claimants have not provided even an official document, scientific, professional, national or international research that would prove that the execution of the decisions of the MEE and ERO would harm the quality of water and access to drinking water and irrigation, therefore; **(iii)** The quality of the water remains unaffected since the process of generating electricity through ""runoff" hydropower plants uses an infrastructure (intake, dig, turbine), which isolates the river water from any contact with other substances that can affect water quality; **(iv)** Kelkos Energy has completely re-constructed the drinking water system for the town of Deçan and the surrounding villages as part of an agreement with the Municipality of Deçan in 2015 and that "Hidrodrini" has been successfully operating this system since 2015 and bear responsibility for water quality and water management; **(v)** The annual water quality report compiled by "Hidrodrini" for the years 2017, 2018 and 2019, shows that "Hidrodrini" is ranked best in terms of consumer satisfaction with drinking water; **(vi)** the water system in Deçan has a special collection channel from the river bed, which is located near the "KFOR bridge" and that this point is located below the river where the last installation of Kelkos Energy is located and therefore has full access to the water of the river of Deçan for the whole year; **(vii)** in general, the operation of hydropower plants in the Deçan river does not affect the amount of water in any way because the same amount of water that enters the system through the pipe, exits and flows back into the river after the turbines; the stay in the system of a quantity of water is less than one (1) hour; **(viii)** the claimants present misleading evidence - photographs - belonging to the period when the hydropower plants were being built (the construction of which was completed in 2015, and since then extensive rehabilitation has been carried out successfully) and that there is a good reason that the claimants fail to provide real evidence regarding the current state of the surrounding environment - now that it has been rehabilitated; **(ix)** MEE has requested that, in the context of environmental permits, a documentation is provided through photographs, which serve to compare the situation during the construction phase (2013-2015) and the rehabilitation status 2020; **(x)** water permit decisions contain clear provisions, including minimum water level monitoring, based on the applicable legal and administrative framework, specifying precise formulas for calculating the minimum water level in each period of the year for each segment of the river; **(xi)** a condition that is foreseen in the license, is the protection of the environment and also the obligation of annual reporting related to the environmental activity at the ERO [Article 14 of Licenses for the Production of Electricity]; **(xii)** according to Article 22, paragraph 2, of the LAC, it is clearly required to prove - and not just assume - that the postponement of the execution of decisions does not harm the public interest.

120. The Court also refers to the reasoning of the Supreme Court: *"By Article 22, paragraph 2 of the Law on Administrative Conflicts it is determined that at the request of the claimant, the authority whose act is executed, namely the body that is competent for execution, can postpone the execution until the final judicial decision, if the execution would bring harm to the claimant, which would be difficult to repair, while the postponement is not contrary to the public interest, nor would the postponement bring any great harm to the opposing party or the interested person. Article 22, paragraph 6 of the aforementioned law stipulates that the claimant may*

request from the court the postponement of the execution of the administrative act until the judicial decision is made, according to the conditions provided for in paragraph 2 of this article. Whereas the Court of Appeals in the reasoning of its decision has emphasized that the claimants-proposrs have not presented any circumstances that are a prerequisite for the postponement of the challenged decision, which, if it were to be executed, would cause the claimant direct loss, except that they have mentioned the fact that by the execution of this decision, irreparable damage would be caused to them, as the property where the hydropower plant is built would be infringed upon and thus the water that supplies their families would be reduced; There was no concrete evidence as to what extent their water supply would be reduced. The power plant for energy production was built for the needs of electricity supply, so delaying the execution of such a decision in this case could cause direct irreparable damage to the interested party (the company) "Kelkos energy" l.l.c.. , since the investment for the construction of the power plant is large, and this damage would indirectly cause irreparable damage to the applicant. Likewise, the claimants-proposers have not presented any credible circumstances, which is the second precondition that the postponement of the execution would not be contrary to the interests of the public and that it would not bring any harm to the opposing party, since the postponement of the execution of the respondent's decisions would be against the public interest, for the reasons mentioned above, while (the company) Kelkos Energy owns all the decisions, permits, licenses which it has received as an obligation to, in the case of electricity production, adheres to the conditions for the protection of the environment, water and other conditions determined by the Ministry". The Supreme Court cannot accept as right such a position of the court of the second instance. The reasons and decisive facts are missing, while the latter have not been justified in accordance with the evidence in the documents of the case. Therefore, in the present case, the court of second instance had to assess whether all the conditions for postponing the execution of the challenged decision have been cumulatively met, in accordance with the legal provisions of the Law on Administrative Conflicts, and that in the opinion of this court, the latter has not done this. According to the assessment of this court, the reasoning of the Court of Appeals is deficient in terms of decisive facts, such as the possibility of causing irreparable damage, as long as the postponement would not be contrary to the public interest, and would not cause any great damage to the opposing party, namely the interested party. Therefore, it is clear that the reasoning of the challenged decision of the Court of Appeals has no support in terms of the evidence in the documents of the case file, so all this leads to the conclusion that the court of second instance when assessing the proposal of the claimant-proposer did not fully assess the facts and evidence presented. According to the opinion of this court, the claimants-proposers by the lawsuit and the letter of 02.02.2021 have presented convincing evidence that proves the facts that the execution of the decision would cause harm to the citizens who are in their properties and live in that environment where the work of these hydropower plants is foreseen, in which case irreparable damage would be caused to them. This court has also found that the execution of the decisions until the final decision on merits is taken would not be contrary to the public interest and the postponement would not cause a greater loss to the opposing party, namely the interested party. In this way, at the same time, in the future, the possible consequences will be avoided in the event that at the end of the judicial process, it would be proven that the challenged decisions of the respondents were in violation of the law. Considering what was said above, this court has decided to annul the challenged decision of the Court of Appeals in Prishtina AA.UZh. no. 320/21 of 26.04.2021 and uphold the decision of the Basic Court in Pristina Department for Administrative Matters A-U. no. 2081/20 of 11.02.2020, which approved as grounded the proposal of the proposers-claimants F.S., Xh.K., and M.L., to postpone the respondent's decision until the issuance of the first-instance decision according to the claimants' lawsuit".

121. Regarding the interpretation and application of Article 22 of the LAC, the Court assesses that the Supreme Court has concluded in a generalized manner that the hydropower plants built on the claimants' properties will cause irreparable damage to them and that the postponement of the execution of the decisions of MEE and ERO - until the merits of the case are decided by the first instance court - is not contrary to the public interest and that irreparable damage would not be caused to the interested party, namely the Applicant.

122. For the Court, it is evident that the main explanations are missing regarding the interpretation and application of Article 22 of the LAC to the circumstances of the present case because: **(i)** The Supreme Court has not weighed the balance between the irreparable damage that could be caused to the claiming party against the irreparable damage that could be caused to the Applicant, given his investment in hydropower infrastructure; **(ii)** why the postponement of the execution of the decisions of the MEE and ERO is in the protection of the public interest and is not in the protection of the public interest if the execution of the decisions of the MEE and the ERO would be allowed, considering that hydropower plants produce and provide renewable electricity for a part of the citizens of the municipality of Deçan; **(iii)** there is no explanatory reasoning why the claimant's right to protection from irreparable damage defeats the Applicant's right to protection from irreparable damage; and, **(iv)** why the interest of the claimant is also public interest and why the latter does not apply to the Applicant.

123. In addition, the Court assesses that beyond the description of the relevant legal provisions for postponing the execution of an act as established in Article 22 of the LAC, the Supreme Court has not elaborated any evidence or argument in support of meeting the legal criteria for postponing the execution of MEE and ERO decisions (see, *mutatis mutandis*, case of the Court KI75/21, Applicant *"Abrazen LLC", "Energy Development Group Kosova LLC", "Alsi & Co. Kosovo LLC" and "Building Construction LLC",* Judgment of 19 January 2022, paragraph 86).

124. The Court notes that the Applicant has been equipped with permits and licenses from the competent authorities of the Republic of Kosovo and that it is not allowed to exercise its activity based on the permits and licenses it has already obtained from the competent authorities of the Republic of Kosovo. In addition, the Court assesses that the Applicant is under continuous monitoring by the bodies and inspectorates and the MEE regarding the respect of the conditions of the environmental and construction permits and the revocation of the latter if they are not respected by the Applicant.

125. In addition, the Applicant in the procedure conducted before the Supreme Court has also raised important allegations for his case, such as: **(i)** the claiming party has not provided even an official document, scientific, professional, national or international research that would prove that the execution of the decisions of the MEE and ERO would harm the quality of water and access to drinking water and irrigation; **(ii)** the applicant "Kelkos Energy" has completely re-constructed the drinking water system for the town of Deçan and the surrounding villages as part of an agreement with the Municipality of Deçan in 2015 and that "Hidrodrini" has been successfully operating this system since 2015 and bear responsibility for water quality and water management; **(iii)** the claiming party has presented "misleading evidence – photographs" belonging to the period when the hydropower plants were being built in 2013-2015 and that there is a good reason that the claimants fail to provide real evidence regarding the current state of the surrounding environment - now that it has been rehabilitated in 2020; **(iv)** a condition that is foreseen in the license, is the protection of the environment and also the obligation of annual reporting related to the environmental activity at the ERO [Article 14 of Licenses for the Production of

Electricity]; **(v)** taking into account the limited possibilities for new energy production capacities in Kosovo as well as the investment of 60 million euro, this decision would be in complete contradiction to the public interest.

126. From the above, the Court notes that the Supreme Court had not given any explanation to the central allegations in the case of the Applicant, as required by the procedural guarantees of Article 31 of the Constitution in conjunction with Article 6 (1) of the ECHR, including specification of the fulfillment of the criteria established in Article 22 of the LAC, although it has been referred to in a generalized manner.

127. More precisely, regarding the allegation of lack of active legitimacy of the claimant, the Court again highlights the Applicant's allegation: "*According to the legal logic deriving from Articles 10 and 18 of the Law on Administrative Conflicts, natural and legal persons who appear as claimants in their personal capacity in Administrative Conflicts must prove the violation of their direct and/or indirect interests. In this spirit, the request for postponing the execution of the decision, when filed by a natural person, must be supported by concrete evidence that proves great damage is being caused to him/her that would hardly be repaired. In the present case, the minimum standard to claim that a natural person is being harmed by the challenged decisions is to provide concrete evidence that he or she is personally being harmed in terms of the quality or quantity of drinking water*".

128. In this respect, the Court notes that as regards the active legitimacy of the claiming party, the Court of Appeals stated: *"[...] the first instance court has not given any reasoning and has not explained the relationship that the claimant has with the respondents, in order to rightly prove the active legitimacy of the claimant and his interest [...] in the repeated procedure, the first-instance court is instructed to act according to the remarks of the second-instance court, so as to remove the flaws of the lawsuit-proposal and correctly assess the issue of active and passive legitimacy in the relationship between the claimant and the respondents; [...] to assess and verify the fact that the claimant's interest was directly affected by the respondents' decisions by complete and correct determination of the factual situation".*

129. The Court notes that regarding the active legitimacy of the claimant, paragraphs 1 and 2 of Article 10 of the LAC provide: (i) that natural and legal persons may initiate an administrative conflict against a final administrative act in the event that any right or legal interest is violated to them; (ii) while for the protection of the public interest, an administrative conflict may be initiated by the administration body, the Ombudsperson, associations and other organizations.

130. In this regard, the Court assesses that the Supreme Court has not given any explanation regarding the procedural legitimacy of the claiming party, that is, to clearly and fairly define the relationship between the claiming party and the responding party. Then, taking into account the content of paragraphs 1 and 2 of Article 10 of the LAC, the Supreme Court has not explained how any right or legal interest has been violated to the claimant as natural persons, and as a result, could have active legitimacy of the parties in the proceedings.

131. The Court also assesses, in particular taking into account the allegations of the claiming party that they protect also the interests of other residents of the municipality of Deçan - which in reality and in essence - are allegations for the protection of the public interest that according to the aforementioned legal provisions of the LAC can be protected only by the administration body, the Ombudsperson, associations and other organizations. Therefore, in this respect also, the Court assesses that the Supreme Court has not given any explanation as to how the claiming

party protects the public interest and how they can be legitimized as such in accordance with paragraphs 1 and 2 of Article 10 of the LAC.

132. In other words, the Supreme Court did not explain: (i) the relationship between the claiming party and the responding party; (ii) did not explain how any right or legal interest was violated to the claiming party as natural persons; (iii) has not given any explanation as to how the claiming party protects the public interest and whether the latter can be legitimized as such, in accordance with paragraphs 1 and 2 of Article 10 of the LAC.

133. The Court emphasizes that the joint reading of articles 10, 22 and 34 of the LAC specify (i) the persons who have the right to initiate administrative conflict against an administrative act; (ii) if the execution of the administrative act would bring harm to the claimant, which would be difficult to repair, while the postponement would not bring great harm to the opposing party; and, (iii) dismiss the lawsuit, if it is clear that the challenged administrative act does not affect the claimant's rights.

134. Given that the Applicant has not received a specific answer to the specific and essential allegations, including the issue of the active legitimacy of the claiming party, the Court assesses that the Judgment of the Supreme Court does not provide the guarantees embodied in Article 31 of the Constitution and Article 6 of ECHR that contain the obligation for courts to give sufficient reasons for their decisions (see, the ECtHR case, *H. V. Belgium,* cited above, paragraph 53; and see also cases of the Court KI230/19, Applicant *Albert Rakipi,* cited above, paragraph 139 and KI87/18, Applicant *IF Skadiforsikring,* cited above, paragraph 44).

135. The Court recalls that the ECtHR in its consolidated case law has determined that courts with appellate jurisdiction do not need to provide detailed reasoning in cases where they agree with the reasoning given by the courts of first instance, despite the fact that they must also be sufficiently reasoned (see *Garcia Ruiz v. Spain*, cited above, paragraph 31). However, in the circumstances of the case under consideration, the Court notes that the Supreme Court has quashed the Decision of the Court of Appeals - which means - that the Supreme Court had the obligation to provide express and specific reasoning for all the central allegations raised by the Applicant and elaborated by the Court of Appeals. The Court assesses that the essential criteria of the right to a reasoned decision - one way or the other - determine that the Supreme Court had the obligation to address the central allegations of the Applicant and not to ignore them in their entirety or to address some of them only with a brief and generalized reasoning (see, *mutatis mutandis*, the ECtHR case, *Lindner and Hammermayer v. Romania,* no. 35671/97, Judgment of 3 December 2002, paragraph 33).

136. From the above, the Court reiterates that the Supreme Court quashed the decision of the Court of Appeals and in that situation it was not possible to address the essential issues of the case before it with only a summary reasoning. The Court reiterates that the Supreme Court had the obligation to address all the essential issues of the Applicant, which in the circumstances of the present case did not happen (see, *mutatis mutandis*, the cases of the ECtHR, *Ruiz Torija v, Spain,* cited above, paragraph 30; *Hiro Balani v. Spain,* cited above, paragraph 28 and also see *Petrovic and others v. Montenegro,* no. 18116/15, Judgment of 17 July 2018, paragraph 43).

137. The Court recalls that the Supreme Court, regarding the request of the interested party for postponement of the execution of the decisions of the MEE and ERO, had only cited and described the relevant provisions of the LAC regarding the conditions for the postponement of the execution of the decisions of MEE and ERO, emphasizing that the claimants have provided "convincing evidence" which proves the fact that the

execution of the decisions of MEE and ERO until the decision on the merits of the case, would cause irreparable damage and nor would the postponement bring any harm to the Applicant, without giving any justification and without elaborating the "convincing evidence" that would prove why those legal conditions were met in the present case (see Court case KI75/21, Applicant "*Abrazen LLC*", "*Energy Development Group Kosova LLC" "Alsi & Co. Kosova LLC" and "Building Construction LLC*", cited above, paragraph 88).

138. In this regard, the Court considers that the Supreme Court, beyond the description of the legal provisions and the finding that the aforementioned conditions have been met, did not explain: (i) what is the damage caused to the claimants by the execution of the challenged decisions and why that damage is irreparable ; (ii) what evidence has been assessed and found that the postponement of the decisions of the MEE and the ERO is not against the public interest; (iii) why no damage is caused to the Applicant, since he has claimed that damage is caused to him and has argued this claim by evidence; (iv) the decision of the Supreme Court does not contain any reasoning regarding the central allegations raised by the Applicant; and, (v) the lack of active legitimacy of the claiming party (see Court case KI75/21, Applicant "*Abrazen LLC*", "*Energy Development Group Kosova LLC" "Alsi & Co. Kosova LLC" and "Building Construction LLC*", cited above, paragraph 89).

139. From the above, the Court assesses that the challenged Judgment of the Supreme Court has not fully and clearly addressed (i) the crucial facts and legal conditions related to allowing the postponement of the execution of the decisions of the MEE and ERO; and (ii) no specific answer has been given to the claim of the Applicant regarding the lack of procedural legitimacy of the claiming party. Both of these aspects reflect essential and defining claims of the Applicants, and which, based on the case law of the Court and the ECtHR, must necessarily be addressed and reasoned by the courts, in order to respect the procedural guarantees established in Article 31 of the Constitution in conjunction with Article 6 of the ECHR (see Court case KI75/21, Applicant "*Abrazen LLC*", "*Energy Development Group Kosova LLC" "Alsi & Co. Kosova LLC" and "Building Construction LLC*", cited above, paragraph 90).

140. The Court reiterates that procedural justice requires that the essential claims raised by the parties in the regular courts must be answered in the appropriate way - especially if they are related to decisive allegations that in the present case refer to (i) decisive facts and legal conditions related to allowing the postponement of the execution of the decisions of the MEE and ERO; as well as (ii) not giving a specific answer to the decisive claim regarding the lack of procedural legitimacy of the claiming party (see Court case KI75/21, Applicant "*Abrazen LLC*", "*Energy Development Group Kosova LLC" "Alsi & Co. Kosova LLC" and "Building Construction LLC*", cited above, paragraph 91).

141. Viewed as a whole, the Court assesses that the Supreme Court did not find the right balance between the litigants in this procedure because it did not address any of the essential allegations and arguments of the Applicant, which would ensure the proper administration of justice (see, *mutatis mutandis,* ECtHR case *Magomedov and others v. Russia,* no. 33636/09, 34493/09 35940/09 37441/09 38237/09 28480/13 28506/13 Judgment of March 28, 2017, paragraphs 94-95).

142. From the above, the Court finds that the Judgment of the Supreme Court regarding the postponement of the execution of the Decisions of the MEE and the ERO, due to the lack of a reasoned court decision, does not meet the criteria of a fair trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 (1) of the ECHR. The Court also emphasizes that the Decision of the Court of Appeals [AA. no.

320/21] of 26 April 2021, remains in force until the decision is issued by the Supreme Court in the manner defined in the enacting clause of this Judgment.

143. The Court also emphasizes that it will not assess the allegations of the Applicant of protection of property because this allegation in the Court's view is premature, because in the present situation before the Court the preliminary proceedings are for consideration (see, *mutatis mutandis*, Court case KI75/21, Applicant "*Abrazen LLC*", "*Energy Development Group Kosova LLC" "Alsi & Co. Kosova LLC" and "Building Construction LLC*", cited above, paragraph 95).

Request for interim measure

144. The Court refers to Article 116.2 [Legal Effect of Decisions] of the Constitution and Article 27 [Interim Measures] of the Law, which stipulate:

Article 116 [Legal Effect of Decisions]

"[...]

2. While a proceeding is pending before the Constitutional Court, the Court may temporarily suspend the contested action or law until the Court renders a decision if the Court finds that application of the contested action or law would result in unrecoverable damages.

[...]

Article 27 [Interim Measures]

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.

2. The duration of the interim measures shall be reasonable and proportionate."

145. The Court also refers to Rule 57 (5) [Decision on Interim Measures] of the Rules of Procedure, which specifies: *"(5) If the party requesting interim measures has not made this necessary showing, the Court shall deny the request for interim measures".*

146. The Court has already decided on the merits of the referral and found a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, therefore, the imposition of an interim measure is unnecessary.

147. For these reasons, the request for interim measure is to be rejected.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 21 (4), 113 (1) and (7) and 116 (2) of the Constitution, Articles 20, 27 and 47 of the Law and Rules 57 (5) and 59 (1) of the Rules of Procedure, in the session held on 29 September 2022, unanimously

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo, in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights;

III. TO DECLARE Judgment [ARJ. UZVP. No. 74/21] of the Supreme Court of Kosovo of 28 July 2021 invalid;

IV. TO REMAND Judgment [ARJ. UZVP. No. 74/21] of the Supreme Court of 28 July 2021 for reconsideration, in accordance with the Judgment of this Court;

V. TO HOLD that Decision [AA. No. 320/21] of the Court of Appeals of 26 April 2021, remains in force until the decision is rendered by the Supreme Court in accordance with point IV of the enacting clause of this Judgment.

VI. TO REJECT the request for imposition of interim measure;

VII. TO ORDER the Supreme Court to notify the Court, in accordance with Rule 66 (5) of the Rules of Procedure, by 31 January 2023, about the measures taken to implement the Judgment of this Court;

VIII. TO REMAIN seized of the matter pending compliance with that order;

IX. TO NOTIFY this Judgment to the Parties, and in accordance with Article 20.4 of the Law, to publish it in the Official Gazette;

X. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Safet Hoxha	Gresa Caka-Nimani

This translation is unofficial and serves for informational purposes only.