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

Prishtina, on 6 March 2023
Ref. no.: AGJ 2133/23

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JUDGMENT

in

case no. KI36/22

Applicant

"MATKOS GROUP" LLC

Constitutional review of Judgment ARJ. no. 116/2021 of the Supreme Court of Kosovo of 28 October 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,
Nexhmi Rexhepi, Judge and
Enver Peci, Judge

Applicant

1. The Referral was submitted by "Matkos Group" LLC, with its seat in Prishtina (hereinafter: the Applicant), which is represented by Betim Shala, a lawyer in the Municipality of Prishtina.

Challenged decision

2. The Applicant challenges the constitutionality of Judgment [ARJ. no. 116/2021] of the Supreme Court of Kosovo (hereinafter: the Supreme Court) of 28 October 2021 in conjunction with Decision [AA. no. 665/2021] of the Court of Appeals of Kosovo (hereinafter: the Court of Appeals) of 30 July 2021 and Decision [A. no. 472/2021] of the Basic Court in Prishtina (hereinafter: the Basic Court) of 17 June 2021.

3. The Applicant j was served with the challenged decision on 19 November 2021.

Subject matter

4. The subject matter is the constitutional review of the challenged judgment, whereby the Applicant's fundamental rights and freedoms guaranteed by Articles 31 [Right to Fair and Impartial Trial] and 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.

5. In addition, the Applicant requests before the Court the imposition of interim measure, claiming that the execution of the judgment [ARJ. no. 116/2021] of the Supreme Court, "*will cause irreparable material damage to the Applicant*".

Legal basis

6. 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

7. On 17 March 2022, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

8. On 24 March 2022, the President of the Court by the Decision [GJR. KI. 36/22] appointed Judge Nexhmi Rexhepi as Judge Rapporteur and the Review Panel, composed of judges: Gresa Caka-Nimani (Presiding), Safet Hoxha and Radomir Laban (members).

9. On 21 April 2022, the Court notified the Applicant about the registration of the Referral. On the same date, a copy of the referral was sent to the Supreme Court, the Ministry of Economy and the Energy Regulatory Office (hereinafter: ERO).

10. On 20 May 2022, the Court notified the Basic Court about the registration of the Referral and requested it to provide the Court with an acknowledgment of receipt proving when the Applicant was served with the challenged decision.

11. On 27 May 2022, the Basic Court submitted to the Court the requested acknowledgment of receipt indicating the date when the Applicant was served with the challenged decision.

12. On 16 December 2022, Judge Enver Peci took the oath in front of the President, in which case his mandate at the Court began.

13. On 18 January 2023, the Review Panel considered the report of the Judge Rapporteur and unanimously made a recommendation to the Court on the admissibility of the Referral.

14. 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. no. 116/2021] of 28 October 2021 of the Supreme Court invalid; (iv) remand for reconsideration the Judgment [ARJ. no. 116/2021] of the Supreme Court of 28 July 2021, in accordance with the Judgment of this Court; (v) to hold that the Judgment [AA. no. 665/21] of the Court of Appeals of 30 July 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) rejected the request for the imposition of interim measure.

15. 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

16. It follows from the case file that the Applicant is a business entity engaged in the production of electricity, the activity conducted by producing the electricity in the HPP Brezovica hydroelectric plant, built in the valley of the Lepenac River. It also turns out that he entered into contractual relations with state company KOSTT for the purchase of electricity.

17. According to the case files, the Applicant performed his activity based on the decisions of the Energy Regulatory Office (hereinafter: ERO), which continuously issued decisions that enabled the Applicant to invest in capacities for the production of electricity through the construction of infrastructure for hydropower plants.

18. On 18 September 2020, the Regional Authority for River Basins under the Ministry of Economy and Environment (hereinafter: MEE) rendered a decision to approve the Applicant's Referral no. 5784/18 for the water license for HPP Brezovica.

19. On 26 February 2021, the Group for Legal and Political Studies (hereinafter: GLPS) and the GAIA Organization filed a lawsuit against the MEE with the Basic Court, with the proposal (i) that the lawsuit be approved in its entirety as grounded; (ii) to annul the decision of MEE on the water permit for HPP Brezovica; (iii) to adopt the request for an interim measure; (iv) that the Applicant suspends the construction of hydroelectric power plants and their supporting structures in the municipality of Shterpce, HPP Brezovica, Shterpce Štrpce, HPP Vica and HPP Sharri, until the final decision of the court; as well as (v) to approve the request for postponement of the execution of decisions of the MEE.

20. On 22 March 2021, the Basic Court by decision [A. no. 472/2021] approved as grounded the proposal of the claimants and postponed the execution of the decision of the MEE, namely the decision on the approval of water permit no. 5784/18 until the final court decision on the lawsuit of the claimants.

21. In the reasoning of the above-mentioned decision, the Basic Court based on paragraph 2 of Article 22 as well as Article 6 of Law no. 03/L-202 on Administrative Conflicts (OG, No. 82, 21 October 2010) (hereinafter: LAC), assessed that the claimants/proposers provided reliable arguments, photographs of citizen protests over the years, photographs of environmental damage, reports of various organizations related to the construction of hydroelectric power plants, which confirm that the execution of the decisions will cause damage to the residents of the area where these hydroelectric power plants are expected to operate, a damage that would be difficult to repair. In addition, the Basic Court, taking into account that water resources and access to water for drinking and irrigation, water quality, negative impacts on flora and fauna, represent the general state interest, determined that delaying the execution of the decision until the merits of the case is not against the public interest , nor would a delay cause greater damage to the opposing party, namely, to the interested parties.

22. On 26 March 2022, the Ministry of Justice, acting as a representative of the Ministry of Justice, appealed to the Court of Appeals against the decision [A. no. 472/2021] of the Basic Court on the grounds of essential violation of the provisions of the procedure, erroneous and incomplete determination of factual situation and erroneous application of substantive law.

23. On 31 March 2021, the Applicant submitted to the Court of Appeals a submission to join the administrative conflict as an interested party.

24. On 13 April 2021, the Applicant filed an appeal against the decision [A. no. 472/2021] of the Basic Court on the grounds of violation of the provisions of LAC and erroneous and incomplete determination of factual situation.

25. On 17 May 2021, the Court of Appeals by Decision [AA. no. 472/2021] approved as grounded the appeals of the MEE and the Applicant, and annulled the Decision [A. no. 472/2021] of the Basic Court, and remanded the case to that court for retrial and decision-making.

26. By its decision, the Court of Appeals assessed that the Basic Court did not correctly and completely determine the factual situation and did not correctly apply substantive law. In the reasoning of the above-mentioned decision, the Court of Appeals emphasized that it cannot accept as correct and lawful the first-instance court's position because the appealed decision is not based on sustainable decisive facts and contains essential violations of the provisions of the contested proceedings from points i) and n) of paragraph 2 of Article 182 as well as Articles 183 and 184 of Law no. 03/L-006 on Contested Procedure (OG, No. 38, 20 September 2008) (hereinafter: LAC), which is applicable according to Article 63 of the LAC. In addition, the Court of Appeals found that the appealed decision contains essential violations of Articles 21, 37, 39 and 55 of the LAC, because the Applicant was not given the opportunity to be a party to the consideration of the case in court, as an interested party.

27. On 29 May 2021, the Basic Court by Decision [A. 472/21] approved as grounded the proposal of the Applicant for the recognition of the status of an interested party. On the same date, the Basic Court obliged the Applicant to submit to the court, within 3 (three) days from the date of service of the decision, a response to the claimant's request to postpone the execution of the decision, as well as to submit all the evidence concerning the disputed matter.

28. On 17 June 2021, the Basic Court by Decision [A. no. 472/2021], in the repeated procedure, approved, as grounded, the claimant's proposal and postponed the execution of the decision of the MEE, namely the decision on the approval of water

permit no. 5784/18, until the court render a final decision on the lawsuit of the claimants.

29. In the reasoning of the decision of the Basic Court, it was stated that the requirements from paragraph 6 in conjunction with paragraph 2 of Article 22 of the LAC for delaying the execution of the challenged decision until the final resolution of the case are met. In this respect, the Basic Court assessed that the claimants/proposers submitted reliable arguments, photos of citizens' protests over the years, photos of damage of environment, reports of various organizations related to the construction of hydroelectric power plants, which confirmed that the execution of the decisions will cause damage that can hardly be repaired to the residents in the part where the operation of these hydroelectric plants is planned.

30. In addition, the Basic Court by its decision assessed that the water resources and access to water for drinking and irrigation, water quality, negative impacts on flora and fauna, represent the general state interest and that delaying the execution of the challenged decision until the final resolution of the case is in the public interest and that it would not cause more damage to the opposing party, namely the interested parties.

31. On an unspecified date, the Applicant filed an appeal with the Court of Appeals against the above-mentioned decision of the Basic Court on the grounds of violation of the provisions of the LAC and the erroneous and incomplete determination of factual situation.

32. On 30 July 2021, the Court of Appeals by Decision [AA. no. 665/21], (i) approved as grounded the appeals of the MEE and of the Applicant; (ii) modified the decision [A. no. 472/21] of the Basic Court; and (iii) rejected the proposal of the claimants GLSP and GAIA to postpone the execution of the respondent's decision, namely, the decision on the approval of water permit no. 5784/18 until the final court decision upon the lawsuit of the claimants.

33. In the reasoning of its decision, the Court of Appeals assessed that the Basic Court has erroneously applied the substantive law when it decided to approve the claimants' proposal to postpone the execution of the challenged decision. In this regard, referring to paragraphs 2 and 6 of Article 22 of the LAC, as well as points a) and b) of paragraph 1 of Article 297 of the LCP, the Court of Appeals found that the claimants did not make credible the fact that direct or indirect damage that threatens them in the event of the enforcement of the challenged decision, but only mention the fact that the enforcement of the decision endangers the environment and drinking water, without providing concrete evidence to what extent the water supply will be reduced or the environment endangered.

34. Furthermore, the Court of Appeals found that the claimants did not make credible the fact that the delay in the execution of the decision is not against the public interest and that no damage is caused to the opposing party. This is because delaying the execution of the challenged decision was against the public interest because the Applicant received a decision on the water permit, thereby assuming the obligation to use the hydropower potential according to the conditions established in that decision in the public interest.

35. In this regard, the reasoning of the decision of the Court of Appeals states the following: *"Specifically, from the decision of the respondent no. 5784/18-ZSP of 18.09.2020, it was established that the party with a legal interest "Matkos Group" llc obtained a water permit, in which, among other things, it is obliged to carry out*

continuous monitoring of the equipment, namely measuring the level and flow of water, to respect the acceptable ecological flow in the corresponding profiles in accordance with the water permits for the use of water and "if, due to the use of hydroelectric power water, there is a disruption of the water regime, erosive processes in the river bed near the water intake facility of the production facility and along the pipeline and this causes damage of any nature, the user is obliged to remove the causes of damage and to compensate for the damage", therefore, the court considered the same evidence to be reliable, since, based on that decision, the respondent MEE has the obligation to carry out continuous supervision of this company in relation to compliance with the conditions received from the respondent and to revoke the relevant permits in the event they are not respected".

36. On an unspecified date, GLPS and GAIA submitted to the Supreme Court a request for an extraordinary review of the court's decision against the decision [AA. no. 665/21] of the Court of Appeals, on the grounds of violation of the procedural provisions and substantive law.

37. On 28 October 2021, the Supreme Court by judgment [ARJ no. 116/2021] approved as grounded the claimants' request for an extraordinary review of the court decision, annulled the decision [AA. no. 665/21] of the Court of Appeals and upheld the decision [A. no. 472/2021] of the Basic Court.

38. The Supreme Court by the abovementioned judgment assessed that the Court of Appeals did not cumulatively weigh all the circumstances as prescribed by Article 22 of the LAC. In this respect, in the reasoning of the judgment of the Supreme Court, it was emphasized that the reasoning of the Court of Appeals is flawed and unconvincing in terms of decisive facts and that it does not contain justified reasons according to the evidence in the case. In addition, the Supreme Court added the following:

> *"According to the opinion of this court, the claimants-proposers, by the lawsuit and the request for an extraordinary review of the final court decision, provided reliable evidence that with the execution of the decision of the respondent, before its legality is assessed, damage will be caused that can hardly be repaired and it would be in the public interest to postpone the decision of the respondent authority. Also, the panel assesses that in this case it is not a question of material investment with the construction of hydropower plants, and if it were decided otherwise with decision on merits of the case, it would be difficult to recover and avoid damage. Therefore, the postponement of the execution of the decision of the respondent authority until the decision on merits by the final decision is rendered, is not against the public interest, on the contrary, it is not proven that it will not cause great or irreparable damage to the opposing party or the interested party. While on the other hand, the possible consequences will be avoided, no matter what is decided on the merits during the assessment of the legality of the decision challenged by a lawsuit of the claimant at the end of the court proceedings".*

Applicant's allegations

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

40. The Applicant emphasizes that by erroneous application of the procedural law, giving a restrictive and arbitrary interpretation and insufficient reasoning, the Supreme

Court by its judgment [ARJ No. 116/2021] violated its right to fair and impartial trial guaranteed by Article 31 of the Constitution, and that it was arbitrarily deprived of its property, as a right guaranteed by Article 46 of the Constitution.

I. Regarding the allegation of violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR

41. At the beginning, the Applicant considers that its referral fulfills all the admissibility criteria for the application of Article 31 of the Constitution in conjunction with Article 6 (1) of the ECHR to decisions related to previous proceedings, claiming 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*, no. 17056/06, judgment of 15 October 2009, but also in Court cases KI122/17, Applicant *Ceska Exportni Banka A.S*, judgment of 18 April 2018 and KI195/20, Applicant *Aigars Kesengfelds*, judgment of 29 March 2021.

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 it claims to contain violation of human rights does not concern the merits of the case, but is related to a preliminary proceedings, namely the imposition of an interim measure. In this regard, the Applicant adds that the Constitutional Court in case no. KI122/17 found that there may be cases where the preliminary proceedings may be decisive for the civil rights and obligations of the Applicant.

43. Furthermore, referring to the case *Micallef v. Malta,* the Applicant recalls the ECtHR's finding that *"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. The Applicant also refers to Court case no KI122/17, adding that: "*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 notes that the relevant licenses for the production of electrical energy by the ERO based on the water and environmental permits granted by the MEE constitute a "civil right" in the form of authorization for the production of electricity within the existing hydroelectric power plant in the municipality of Shterpce and for its further sale to the state company KOSST. In this regard, the Applicant, referring to the ECtHR case *Capital Bank AD v. Bulgaria*, no. 49429/99, judgment of 24 November 2015, adds that the ECtHR has an extensive practice of qualifying "license" as a civil right, since the license contains economic interests.

46. In addition, the Applicant emphasizes that the approval or non-approval of the request to postpone the execution of the decision has a substantial impact on its civil rights. In this respect, the Applicant adds that "*the Basic Court in Prishtina - Administrative department is overloaded with cases, so it is rightly not expected that the decision on the main case will be rendered within less than three (3) years, which is the average time of processing cases in this department. In such a situation, even if the final decision would be positive for the Applicant, the damage to the Applicant, "Matkos Group" LLC would already be irreparable, because along with the material damage, such a long suspension of the activity of this company would seriously threaten the very existence of this company. Therefore, the decision to postpone the execution of the decision – the water permit issued by the MEE is decisive for the protection of the Applicant's rights*".

47. The Applicant alleges that the challenged judgment of the Supreme Court violates its right to fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, as a result of (i) erroneous application of law and (ii) lack of reasoning of the court decision.

(i) Regarding allegation of erroneous application of law

48. The Applicant states that it is aware that it is not the role of the Constitutional Court to deal with errors of fact or law, but that the Constitutional Court, given that in its case the erroneous application of the law resulted in violation of its constitutional rights and freedoms, it should have been engaged in consideration of the errors of the Supreme Court. To support this allegation, the Applicant refers to the judgment of the Court in case no. KI195/20, adding that the Constitutional Court should be convinced and take measures when it is noted that a certain court applied the law in manifestly erroneous manner which could have resulted in „arbitrary" or „manifestly ill-founded conclusions" for the applicant, which, as it claims, happened in in his case.

49. The Applicant considers that the Supreme Court by judgment [ARJ no. 116/2021] has erroneously applied the procedural law for the reason that (a) the legal requirement for consideration of the request for an extraordinary review of the court decision was not met and (b) the conditions from Article 22, paragraph 1 of the LAC for the imposition of interim measure were not met.

(a) Regarding the allegation of non-fulfillment of the legal requirement for consideration of the request for an extraordinary review of the court decision

50. The Applicant claims that the Supreme Court by judgment [ARJ no. 116/2021] erroneously applied paragraph 2 of Article 228 in conjunction with paragraph 2 of Article 214 of the LCP in conjunction with Article 63 of LAC. In this regard, the Applicant states that *"the provisions of Article 228, paragraph 2 of the LCP established that revision against the decision from paragraph 1 of this article is not allowed in disputes in which revision against the judgment would not be allowed, while Article 214, paragraph 2 of the LCP established that the revision cannot be submitted due to incorrect or incomplete determination of factual situation*".

51. In support of its allegation, the Applicant recalls that in the challenged judgment the Supreme Court assessed that in the request for an extraordinary review of the court decision, reliable evidence was provided that the execution of the challenged decision, before its legality is assessed, will cause irreparable damage and that delaying the execution of the decision is in the public interest. In this regard, the Applicant points out that the above-mentioned reasoning of the Supreme Court confirms that the decision was rendered as a result of an erroneous determination of factual situation,

and not as a result of a violation of substantive or procedural law, by which it decided on a request for which it had no legal authority.

(b) Regarding the allegation that the requirements from paragraph 1 of Article 22 of the LAC for imposition of an interim measure have not been met

52. The Applicant alleges that the requirements from Article 22, paragraph 1 of the LAC for the imposition of interim measure are not met.

53. 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 LAC: (i) with the execution of the decision, damage would be caused to the claimant that would be difficult to repair; (ii) postponement is not contrary to the public interest; i (iii) the postponement would not bring great harm to the opposing party or the interested person.

54. 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 allegation of the claimants for the irreparable damage that would be caused to them and the extent to which damage is caused to flora and fauna, access to drinking water, the natural landscape and tourism. In this regard, the Applicant states that the first-instance court should have scheduled a hearing to properly determine whether delaying the execution of the challenged decision would cause irreparable damage to the claimants and whether the delay is in the public interest.

55. In addition, the Applicant alleges that the first-instance court should have taken into account the fact that the relevant permits and licenses for the construction of electricity production capacity are issued by competent institutions and bodies which are obliged by law to take into account the protection of environment and the public interest when issuing them.

56. Regarding the second condition, the Applicant alleges that the postponement of the execution of the challenged decision of the MEE is contrary to the general interest because the Applicant possesses all the decisions, permits and licenses by 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. Furthermore, the Applicant points out that the delay in the execution of the challenged decision negatively affects the development of the energy sector and the investment climate for the development of a new generation of production capacity from renewable sources. As a result, the Applicant adds that foreign investment initiatives in the green energy sector in Kosovo will be prevented, which will significantly harm the general public interest in Kosovo.

57. The Applicant alleges that the third condition for delaying the execution of the challenged decision of the MEE has not been met either. The Applicant states that the company within which 4 (four) other companies operate with the main activity of producing renewable electricity, one of which is the HPP Brezovica company, and that it, as one of the largest investors in Kosovo, has invested more than 25 million euro in establishing the necessary infrastructure for the production of electricity from renewable sources.

58. In this respect, the Applicant states: "*Therefore, in the event that the decision of the Supreme Court remains in force until the merits of the main claim are decided, the applicant will suffer greater and irreparable material damage due to losses in energy production, as well as non-material damage to his reputation. Losses in*

energy production are calculated on the basis of total production figures, while the non-material damage to his reputation as a well-known investor exceeds the material damage figures".

(ii) Regarding the allegation of the lack of reasoning of the court decision

59. The Applicant emphasizes that the right to fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR includes the right to have a reasoned court decision.

60. The Applicant states that the Supreme Court, after modifying the decision of the Court of Appeals, was obliged to reason in detail its decision on the imposition of an interim measure, clearly stating the reasons for the decisive facts and the material evidence on which it based its findings.

61. Furthermore, the Applicant states that the Supreme Court did not reason its allegations and arguments, but used a template reasoning in the following paragraph: *"According to the opinion of this court, the claimants-proposers, by the lawsuit and the request for an extraordinary review of the final court decision, provided reliable evidence that with the execution of the decision of the respondent, before its legality is assessed, damage will be caused that can hardly be repaired and it would be in the public interest to postpone the decision of the respondent authority. Also, the panel assesses that in this case it is not a question of material investment with the construction of hydropower plants, and if it were decided otherwise with decision on merits of the case, it would be difficult to recover and avoid damage. Therefore, the postponement of the execution of the decision of the respondent authority until the decision on merits by the final decision is rendered, is not against the public interest, on the contrary, it is not proven that it will not cause great or irreparable damage to the opposing party or the interested party".*

62. Referring to the previous paragraph, the Applicant considers that the Supreme Court did not present any reference on what facts were established, what evidences confirm those facts, how the damage that will be caused to citizens is determined and which citizens are being harmed. According to the Applicant's allegations, the Supreme Court, as a result of not considering the issues of fact and law at all, as well as the Applicant's arguments, violated Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 of the ECHR.

63. The Applicant further states that in their request for an extraordinary review of the court's decision, the claimants failed to argue that the requirements for delaying the execution of the decision of the MEE in terms of the LAC were met, and that the Supreme Court did not provide sufficient reasoning on the fulfillment of those requirements.

64. The Applicant states that it is the duty of the courts to impartially assess the allegations of all parties, which, according to it, did not happen in its case. In this regard, the Applicant claims that during the retrial and after the Applicant appeared as an interested party, the Basic Court should have scheduled a hearing before rendering a decision on postponing the execution of the MEE decision. In addition, the Applicant adds that, in the absence of arguments and evidence of the existence of risk, the Supreme Court had to remand the case for retrial with the obligation to schedule a hearing where arguments would be presented to determine the existence of risk, especially bearing in mind that during the entire course of the proceedings, the Basic Court acted contrary to paragraph 1 of Article 107 of the LCP in conjunction with Article 63 of the LAC, since it did not send any of its decisions or the decisions of

higher courts to the representative of the interested person and thus was not given the opportunity to become familiar with the content of decisions in a timely manner.

65. The Applicant further considers that the challenged judgment of the Supreme Court is in contradiction with the guarantees from Article 31 of the Constitution in conjunction with Article 6 of the ECHR because it does not meet the minimum criteria for reasoning of the decision. The Applicant states that the Supreme Court acted with disturbing neglect in relation to the Applicant's allegations with insufficient reasoning. According to the Applicant, the legal consequences in cases of insufficient reasoning lead to essential violations of the provisions of the contested procedure. In this aspect, the Applicant, referring to point n) of paragraph 2 of Article 182 of the LCP, claims that the Supreme Court did not argue any of the decisive facts or to cite any of the material evidence on which it based its findings.

II. Regarding the allegation of violation of Article 46 of the Constitution in conjunction with Article 1 of Protocol no. 1 of the ECHR

66. The Applicant alleges that the challenged judgment of the Supreme Court, which postponed the execution of the MEE decision constitutes interference with the right to property.

67. The Applicant claims that taking into account all legal acts and the imperative fundamental norms they contain regarding the right to property, and in particular the determination of the Constitution regarding this right, it is clear that the right to property is fundamental and inviolable human right. This can be seen from the fact that in the Constitution, the right to property is included in the part where fundamental human rights and freedoms are found.

68. The Applicant further refers to the case law of the ECtHR, noting that concept does not only include property and the right to it, in the material and classical meaning of the word, but also includes a wide range of monetary rights arising, among the other, from licenses as well as the rights arising from running a business. In addition, the Applicant adds that, *" Even going further, in Pressos Compania Naviera SA et al v. Belgium, the ECtHR concluded that even a claim for compensation can be considered a property - 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 claim can be realized".*

69. When it comes to legitimate expectation, the Applicant states, *"Therefore, in accordance with the ECtHR case law, obtaining a water permit in itself refers to the right to obtain an electricity production license from ERO for the performance of this economic activity according to the prescribed legal requirements (in this case according to the criteria provided in the relevant legislation) represents goods in terms of property resulting from the performance of economic activity. Bearing in mind the legitimate expectations - because they had a legitimate expectation to operate in accordance with the Law since the state itself guaranteed them that, in the event that they meet the legal requirements (be licensed), they will be guaranteed uninterrupted activity - then this legitimate expectation enjoys protection under Article 46 of the Constitution in conjunction with Article 1 of Protocol 1 of the ECHR".*

70. The Applicant emphasizes that the water permit granted to the Applicant by the ERO is of essential importance for the activity of this company, because at the moment of execution of the court decision which temporarily prohibits business based on that license, the company is forced to entirely suspend its activity until resolution on merits of the case by the court, whereby, considering the overload of the courts with cases,

the decision on the merits of the matter in question is expected to be made after more than 3 (three) years.

71. In the following, the Applicant adds: "*In order to determine the damage that will be unfairly caused to the Applicant, it is enough to look at the production of electricity from renewable energy sources for the period 2019-2020, which it produced. According to KOSTT reports, the electricity produced by the Applicant and introduced into the grid, for 2019 amounts to 3, 672.5 MWh of electricity out of total of 191, 700 MWh produced from renewable sources in Kosovo. Also, in 2020, (as a year of pandemic), the Applicant produced 4, 389.32 MWh clean electricity. These data prove that, due to the impossibility of producing electricity great damage will be caused*".

72. The Applicant claims that the damage, apart from being large in monetary terms, is also irreparable. The Applicant emphasizes that with multinational corporations, the financing structure and financial instruments for financing investment projects are complicated. In this regard, the Applicant states that if the return of the invested funds is not started in a long period of time, it will result in the financial impossibility of survival and the Applicant would be seriously threatened with liquidation.

73. Furthermore, the Applicant, referring to the ECtHR case of *Lonnroth v. Sweden*, no. 7151/75 7152/75, judgment of 23 September 1982, the ECtHR established three (3) basic principles, which apply to the intervention/restriction of property rights and they are as follows: (i) the principle of legality; (ii) the principle of the existence of a legitimate goal in the protection of the public interest and (iii) the principle of a fair balance between the protection of the public interest and the right to property of a certain person (proportionality).

74. Referring to the ECtHR case *Capital Bank AD v. Bulgaria*, the Applicant further adds: "*The ECtHR in case Capital Bank AD v. Bulgaria, no. 49429/99, found that the criterion of legality assumes, among other things, that the domestic law must provide a mechanism for protection against arbitrary interference by public authorities. The Court further 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 guaranteed under this provision have been interfered".*

75. The Applicant also alleges that the Supreme Court violated Article 119 (4) [General Principles] of the Constitution, which obliges the Republic of Kosovo to support welfare 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, we have the global energy crisis, and the enormous increase in import prices, the Judgment of the Supreme Court is in direct contradiction with Article 119, paragraph 4, since this Judgment discourages sustainable economic development*".

76. The Applicant states that due to the erroneous application of procedural law and the lack of a convincing reasoning by the Supreme Court, there have been no sufficient guarantees in relation to 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.

III. As to the allegation of imposition of interim measure

77. The Applicant alleges that the enforcement 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 provided in the issue of administrative conflict, a fair procedure that is guaranteed by the Constitution, calling into question the legal certainty for all citizens.

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 Kosovo 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. Regarding the request for the imposition of an interim measure, the Applicant requests the Court: to impose an interim measure for the duration determined by the Court and to immediately suspend the execution of the judgment [ARJ. no. 116/2021] of the Supreme Court and decision [AR. no. 472/21] of the Basic Court.

83. Finally, 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 [Protection of property] of Protocol 1 of the ECHR; (iv) to declare the judgment [ARJ. no. 116/2021] of the Supreme Court of 28 October 2021 and the decision [AR. no. 472/21] of the Basic Court of 17 June 2021 invalid; (v) to remand the decision [AR. no. 472/21] of the Basic Court of 17 June 2021, for reconsideration in accordance with the judgment of the Constitutional Court; and (vi) to grant an interim measure until the time when the Supreme Court of Kosovo decides on the case again.

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.

3. Trials shall be open to the public except in limited circumstances in which the court determines that in the interest of justice the public or the media should be excluded because their presence would endanger public order, national security, the interests of minors or the privacy of parties in the process in accordance with law.

[...]

Article 46
[Protection of Property]

1. *The right to own property is guaranteed.*
2. *Use of property is regulated by law in accordance with the public interest.*
3. *No one shall be arbitrarily deprived of property. The Republic of Kosovo or a public authority of the Republic of Kosovo may expropriate property if such expropriation is authorized by law, is necessary or appropriate to the achievement of a public purpose or the promotion of the public interest, and is followed by the provision of immediate and adequate compensation to the person or persons whose property has been expropriated.*
4. *Disputes arising from an act of the Republic of Kosovo or a public authority of the Republic of Kosovo that is alleged to constitute an expropriation shall be settled by a competent court.*

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.

Article 1 of Protocol no. 1

(Protection of property)

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

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 21
[No title]

The position of the party in an administrative conflict has the person, to whom the annulment of contested administrative act shall cause direct or indirect damages.

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 19 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.

Admissibility of the Referral

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

85. 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 [General Principles] of the Constitution, paragraph 4

"[…]

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

Article 113 [Jurisdiction and Authorized Parties] of the Constitution, paragraphs 1 and 7.

"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".

86. 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...".

87. 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 KI41/09, Applicant University *AAB-RIINVEST L.L.C.*, Resolution on Inadmissibility of 3 February 2010, paragraph 14; and KI35/18, Applicant *Bayerische Versicherungsverbrand,* Judgment of 11 December 2019, paragraph 40).

88. 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 [ARJ. no. 116/2021] of the Supreme Court of 28 October 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.

89. 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.

90. Therefore, the assessment of this criterion in the circumstances of the present 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 Prishtina for the postponement of the execution of decisions on environmental permits issued by the MEE, until the lawsuit for the annulment of the decisions of the MEE until the Basic Court decides by 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.

91. In this regard, 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.

92. 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, cited above; KI75/21, Applicant *Abrazen LLC", "Energy Development Group Kosova LLC", "Alsi & Co. Kosovë LLC"* and "*Building Construction LLC*", judgment of 19 January 2022; 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; and 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. Malt*a, cited above.

93. Consequently, in order to determine whether in the present 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, in conjunction with Article 6 of the ECHR and then the latter will apply in the circumstances of the present case.

94. 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).

95. According to the criteria determined in the case *Micallef v. Malta*, which have been accepted also by this Court through its 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, the ECtHR case *Micallef v. Malt*a, cited above, paragraphs 84-85 and cases of the Court KI122/17, cited above, paragraphs 130-131; KI81/19, cited above, paragraphs 47-48; and KI107/19, cited above, paragraph 53).

96. The Court recalls that in the circumstances of the case before us, the Applicant refers to the decision on the water permit issued by the MEE, which refers to the construction of hydroelectric power plants and their accompanying structures in the territory of the municipality of Shterpce. GLPS and Organization GAIA initiated an administrative dispute in that they filed a lawsuit against the MEE, where together with that lawsuit, they submitted a request to postpone the implementation of the challenged decision of the MEE, with the reasoning that the hydroelectric power plants that were built on the territory of the municipality of Shterpce have a negative impact on the flora, fauna and natural landscape. Postponing the execution of the challenged decision of the MEE as an interim measure based on the provisions of the LAC, would mean the suspension of electricity production by the Applicant, "MATKOS Group", until the Basic Court render a decision on the merits of the case.

97. 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.

98. In this respect, the Court notes that the Applicant obtained the relevant water permit from the MEE, which refers to the use of hydropower potential in the river segment of the Lepenc River for the functioning of the Brezovica hydroelectric power plant as a renewable source for the production of electricity in the territory of the municipality of Shterpce.

99. 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 referral 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 its case.

100. 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. Albani*a, no. 20134/05, Judgment of 9 July 2012, paragraph 144, as well as see Court case KI27/20, Applicant *VETËVENDOSJE!* Movement, Judgment of 22 July 2020, paragraph 43).

Merits of the Referral

101. The Court recalls that the Applicant alleges that its fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] and Article 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.

102. The Court emphasizes that the essence of the case relates to the Applicant's right to perform the activity of electricity production in the Brezovica HPP hydroelectric plant constructed in the valley of the Lepenc river, based on the decision on the water permit issued by the MEE. GPPS and Organization GAIA filed a lawsuit against the MEE for the annulment and postponement of the execution of the decision of the MEE on the water permit for HPP Brezovica, pending a decision on merits by the Basic Court. The Basic Court approved the claimants' proposal as grounded and decided to postpone the execution of the decision of the MEE until the Basic Court decides by a final decision on the claimant's lawsuit. The Applicant submitted to the Court of Appeals a submission to intervene in the administrative dispute as an interested party, and then an appeal against the decision of the Basic Court. The Ministry of Justice filed an appeal against the decision of the first-instance court. The Court of Appeals approved as grounded the appeals of the MEE and the Applicant and annulled the decision of the Basic Court, and then remanded the case to the same court for retrial and reconsideration. The Basic Court first decided to approve the Applicant's proposal for recognition of the status of an interested party. Also, on another date, it decided to approve again the proposal of the claiming party as grounded, as well as to postpone the execution of the decision of the MEE until the Basic Court decides by a final decision on the lawsuit of the claiming party. The Applicant and the MEE appealed again to the Court of Appeals, and that court approved their appeals as grounded and modified the decision of the Basic Court, rejecting the proposal of the claiming party to postpone the execution of the MEE decision granting the Applicant a water permit. GLPS and GAIA submitted to the Supreme Court a request for an extraordinary review of the court decision against the decision of the Court of Appeals on the grounds of essential violation of the provisions of the procedure and substantive law, which the Supreme Court approved as grounded, and modified the decision of the Court of Appeals and upheld the decision of the Basic Court.

103. The Court notes that the Applicant claims that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution, as a result of (i) arbitrary application of the law and arbitrary assessment of facts in connection with the interpretation and application of Article 22 of the LAC in the circumstances of the case, as well as in connection with the fulfillment of the legal requirement for consideration of the request for an extraordinary review of the court decision; and (ii) the lack of reasoning of the court decision in the proceedings conducted before the Supreme Court. In addition to the allegations of violation of Article 31 of the Constitution, the Applicant alleges a violation of Article 46 [Protection of Property] of the Constitution before the Court.

104. The Court will, within this judgment, as a result of the connection of similar issues, assess the allegation of arbitrary application of Article 22 of the LAC, in the context of the right to a reasoned decision, which is guaranteed by Article 31 of the Constitution in conjunction with Article 6 (1) ECHR.

105. 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 regarding the right to a reasoned decision

106. 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. 26 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, and KI230/19, Applicant *Albert Rakipi,* Judgment of 9 December 2020, paragraph 135).

107. 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, cited above, paragraph 139 and case KI87/18, cited above, 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).

108. 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).

109. The 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. Fin*land, cited above, paragraph 30).

110. 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 27; *Hiro Balani v. Spain*, judgment of 9 December 1994, paragraph 27; and *Higgins and others v. France* paragraph 42, see also, cases of the Court KI97/16, Applicant *IKK Classic*, cited above, paragraph 48; and KI87/18, *IF Skadeforsikring*, cited above, paragraph 48).

111. 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 EctHR case *Moreira Ferreira v. Portuga*l, no. 19867/12, Judgment of 5 July 2011, paragraph 84; and case of the Court KI230/19, cited above, paragraph 137).

112. 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 case of ECtHR *Tatishvili v. Russia*, cited above, paragraph 62; see also case of the Court KI227/19, cited above, paragraph 47).

113. 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. Romniae*, 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. Spaine*, no. 18390/91, judgment of 9 December 1994, 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 see case of the Court KI227/19, cited above, paragraph 48).

Application of general principles in the circumstance of the present case

114. The Court recalls once again that that the essence of the case included in this referral relates to the MEE decision, which approved to the Applicant the water permit for the HPP Brezovica for the use of hydropower potential in the river segment of the Lepenc River. GPPS and Organization GAIA filed a lawsuit for the annulment and postponement of the execution of the decision to the Basic Court, and that court approved the claimants' proposal as grounded and decided to postpone the execution of the decision of the MEE until the Basic Court decides by a final decision. In the second instance, the Court of Appeals approved as grounded the appeals of the MEE and the Applicant and annulled the decision of the Basic Court, and then remanded the case to the same court for retrial and reconsideration. The Basic Court in the repeated procedure approved the the proposal of the claiming party as grounded, postponed the execution of the decision of the MEE until the Basic Court decides by a final decision on the lawsuit of the claiming party. The Applicant and the MEE appealed again to the Court of Appeals, and that court approved their appeals as grounded and modified the decision of the Basic Court, rejecting the proposal of the claiming party to postpone the execution of the MEE decision granting the Applicant a

water permit. GLPS and GAIA submitted to the Supreme Court a request for an extraordinary review of the court decision against the decision of the Court of Appeals, whereas the Supreme Court approved that request as grounded, and annulled the decision of the Court of Appeals and upheld the decision of the Basic Court.

115. The Applicant before the Court, in essence, claims that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 of the ECHR, as a result of the lack of reasoning of the court decision and the arbitrary application of the law when interpreting and applying Article 22 of the LAC.

116. Regarding the allegation of the arbitrary application of Article 22 of the LAC and the violation of the right to a reasoned decision, the Court recalls the legal requirements that must be met in order to postpone the execution of a certain act until the final court decision in accordance with Article 22, paragraph 2 of the LAC, which determines: *"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 19 contradiction with public interest and postponing would not bring any huge damage to the contested party, respectively the interested person"*.

117. The Court notes that according to the relevant provisions previously mentioned, in order to postpone the execution of the act, it is necessary to fulfill the following requirements:

i) if the execution would cause damage to the claimant that could be hardly compensated, and
ii) the delay is not against the public interest;
iii) nor would a delay cause greater damage to the opposing party, namely, to an interested person.

118. In connection with the fulfillment of the legal requirements for delaying the execution of the decision in question, the Court notes that the Basic Court, by decision [A. no. 472/2021], established that, *"...the court assessed that the claimants/proposers provided sufficient reliable arguments, namely photographs of the protests by citizens over the years regarding the construction of hydropower plants, photos of environmental damage, reports of organizations related to the construction of hydropower plants, which confirm the fact that the execution of the decision would cause damage to the residents of the area where these hydropower plants are expected to work, damage that is difficult to repair. Also, the court found that postponing the execution of the decision until the case is decided on merits, is not in contradiction and would not cause any great damage to the opposing party, namely the interested parties.*

Since water sources, access to drinking water and water for irrigation as well as water quality, negative impacts on all natural values, on flora and aquatic and terrestrial fauna, on landscapes, represent the general state interest, the court assessed that postponing the execution of the challenged decision until it is decided regarding the claimant's lawsuit, is in the public interest and that the postponement would not cause great damage to the opposing party, in this case the ministry, and also to the interested party, the company „Matkos Group", because in this case, for the latter, the delay in execution implies only a delay profit for later. This would avoid possible consequences that would be caused in the future, if the challenged decision of the respondent, at the end of the court proceedings, turns out to have been rendered in violation of the law".

119. The Court also recalls the reasoning of the Court of Appeal in the decision [AA. no. 665/21], in which, referring to the fulfillment of the requirements for delaying the execution of the decision, it determined that the first-instance court incorrectly applied substantive law, stating the following:

> *"Setting from this, the panel of the Court of Appeal assesses: that the claimants-proposers in no case made credible the first condition of the request for the postponement of the execution of the challenged decision, which would be 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 mentioned the fact that the execution of this decision will cause irreparable damage to the latter, because to the latter the construction of hydroelectric power plants endangers the environment and drinking water, but without concretely proving by any concrete evidence the extent to which their water supply is reduced and the environment is endangered".*

120. Furthermore, the Court of Appeals assessed that the second requirement was not met either, namely that delaying the execution of the decision in this case was against the public interest and would cause damage to the applicant since it possessed the decision on the water permit, on the basis of which it took over as the obligation to use the hydropower potential according to the conditions established by this decision. In this sense, in the reasoning of its decision, the Court of Appeals stated the following: *"Specifically, from the decision of the respondent no. 5784/18-ZSP of 18.09.2020, it was established that the party with a legal interest "Matkos Group" llc obtained a water permit, in which, among other things, it is obliged to carry out continuous monitoring of the equipment, namely measuring the level and flow of water, to respect the acceptable ecological flow in the corresponding profiles in accordance with the water permits for the use of water and "if, due to the use of hydroelectric power water, there is a disruption of the water regime, erosive processes in the river bed near the water intake facility of the production facility and along the pipeline and this causes damage of any nature, the user is obliged to remove the causes of damage and to compensate for the damage", therefore, the court considered the same evidence to be reliable, since, based on that decision, the respondent MEE has the obligation to carry out continuous supervision of this company in relation to compliance with the conditions received from the respondent and to revoke the relevant permits in the event they are not respected".*

121. On the other hand, the Court recalls the reasoning of the Supreme Court in the judgment [ARJ. No. 116/2021], by which the legal position of the Court of Appeals regarding the non-fulfillment of the conditions from Article 22 of the LAC was assessed as incorrect, illegal and deficient. In this regard, it was stated in the reasoning of the above judgment:

> *"In the opinion of this court, the claimants-proposers, by the lawsuit and the request for an extraordinary review of the final court decision, provided reliable evidence that the execution of the decision of the responding authority before its legality is assessed will cause damage that can be difficult to repair and that it would be in the public interest that the decision of the respondent body is postponed. Also, the panel assesses that in this case it is a matter of material investment through the construction of a hydroelectric power plant and that in the event that by the decision on the merits is decided otherwise, it would be difficult to compensate for the damage and eliminate the damage. Therefore, the postponement of the execution of the decision of the respondent until the final decision on merits is not against the public interest, on the contrary, it has not been proven that greater or irreparable damage would be caused to the opposing*

party or the interested party. On the other hand, possible consequences would be avoided no matter what is decided on the merits when assessing the legality of the decision that the claimants challenge by a lawsuit at the end of the court process".

122. With regard to the interpretation and application of Article 22 of the LAC, the Court assesses that the Supreme Court has generally established that the execution of the decision of the MEE would cause damage that would be difficult to repair, and that delaying its execution is in the public interest and so as not to cause greater or irreparable damage to the applicant.

123. However, it is obvious to the Court that the main explanations are missing regarding the interpretation and application of Article 22 of the LAC in relation to the circumstances of this case because: (i) the Supreme Court did not weigh the balance between irreparable damage that could be caused on the claimant in relation to irreparable damage that could be caused to the applicant, considering his investment in the infrastructure of hydropower plants; (ii) why delaying the execution of the decisions of MEE and ERO is in the protection of the public interest, and not in the protection of the public interest if the execution of the decisions of the MEE would be allowed considering that hydro power plants produce and provide renewable electricity; (iii) there is a lack of reasoning with explanation why the right of GLPS and GAIA Organization to protection against irreparable damages overrides the Applicant's right also to protection against irreparable damage; and, (iv) why the interest of the claiming party is also the public interest and why the same does not apply to the applicant.

124. In addition, the Court assesses that, except for the description of the relevant legal provisions on the postponement of the execution of an act as prescribed in Article 22 of the LAC, the Supreme Court did not present any evidence or argument in support of the fulfillment of the legal requirements for the postponement of the execution of the decisions of the MEE (see the Court cases KI75/21, cited above, paragraph 86 and KI202/21, Applicant *"KELKOS Energy"* L.L.C., judgment of 29 September 2022).

125. The Court notes that the Applicant obtained a water permit from the competent authorities of the Republic of Kosovo and that the latter continuously suffers damage every day that it is not allowed to carry out activity based on the permit it has legally obtained from the competent authorities of the Republic of Kosovo. In addition, the Court assesses that the Applicant is under constant supervision by the MEE in terms of compliance with the conditions of the permit and its cancellation if the Applicant does not comply with them.

126. The Court recalls that the ECtHR in its consolidated case law has determined that courts with appellate jurisdiction do not need to provide a 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 the case of the ECtHR *Garcia Ruiz v. Spain*, cited above, paragraph 31).

127. 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 explicit reasoning for all the central allegations raised by the Applicant and elaborated by the Court of Appeals, and not to ignore them in their entirety or to address some of them only with a brief and generalized reasoning (see the ECtHR case *Lindner and Hammermayer v. Rumania*, no. 35671/97, Judgment of 3 December 2002, paragraph33 and case of the Court KI202/21, cited above, paragraph 135). Therefore, the Court reiterate that that the Supreme Court could not only answer the essential

questions with a brief reasoning, but had the obligation to answer all the essential questions presented by the applicant, which did not happen in the circumstances of the present case (see ECtHR case *Hiro Balani v. Spain*, cited above, paragraph 28).

128. The Court considers that the Supreme Court did not present in the reasoning of its judgment: (i) what is the damage caused to the claimant by the execution of the challenged act and why is this damage irreparable; (ii) what evidence was assessed in order to establish that delaying the execution of the decision of the MEE is not against the public interest; (iii) why greater or irreparable harm is not caused to the applicant.

129. Given that the Applicant has not received a specific answer to the specific and essential allegations, the Court considers 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 KI202/21, cited above, KI230/19, Applicant *Albert Rakipi,* cited above, paragraph 139 and KI87/18, Applicant *IF Skadiforsikring,* cited above, paragraph 44).

130. Therefore, 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 could affect the final outcome of its case and the proper administration of justice (see, ECtHR case *Magomedov and others v. Russia*, nr. 33636/09, 34493/09 35940/09 37441/09 38237/0928480/1328506/13, judgment of 28 March 2017, paragraphs 94-95).

131. 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 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 [AA. br. 665/21] of the Court of Appeals of 30 July 2021, remains in force until the decision is issued by the Supreme Court in the manner defined in the enacting clause of this Judgment.

132. The court also points out that this conclusion refers to the alleged constitutional violation. Therefore, the Court confirms that the findings contained in this judgment in no way prejudge the outcome of the proceedings related to the applicant's case.

133. With regard to the allegation of violation of the right to protection of property, the Court emphasizes that this allegation is premature in the Court's opinion, because before the Court the preliminary proceedings are for consideration (see the Court's cases KI75/21, cited above, paragraph 95; and KI202/21, cited above, paragraph 143).

Request for interim measure

134. 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.*
>
> *[…]*

135. Given that 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. 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 18 January 2023, 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 and Article 6 [Right to a fair trial] of the ECHR;

III. TO DECLARE Judgment [ARJ. no. 116/2021] of the Supreme Court of 28 October 2021 invalid;

IV. TO REMAND Judgment [ARJ. no. 116/2021] of the Supreme Court of 28 October 2021 for reconsideration, in accordance with the Judgment of this Court;

V. TO HOLD that Decision [AA. no. 665/21] of the Court of Appeals of 30 July 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 13 Jun 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**
Nexhmi Rexhepi	Gresa Caka-Nimani

This translation is unofficial and serves for informational purposes only.