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

Prishtina, on 28 September 2023
Ref. no.: AGJ2284/23

This translation is unofficial and serves for informational purposes only.

JUDGMENT

in

Case no. KI21/23

Applicant

"Kelkos Energy" Sh.P.K.

Constitutional review of the Judgment ARJ. UZVP. No. 119/22 of the Supreme Court of Kosovo of 16 December 2022

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 "Kelkos Energy" Sh.P.K. (hereinafter: the Applicant), represented by the law firm "Koci & Vokshi" based in Prishtina.

Challenged decision

2. The Applicant challenges the constitutionality of the Judgment ARJ. UZVP. No. 119/22 of the Supreme Court of Kosovo (hereinafter: the Supreme Court) of 16 December 2022.

Subject matter

3. The subject matter of the case is the constitutional review of the Judgment of the Supreme Court, whereby it is alleged that the Applicant has been violated the 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 to the European Convention on Human Rights (hereinafter: ECHR).

4. The Applicant also requests the imposition of an interim measure regarding the Judgment [ARJ. UZVP. No. 119/22] of the Supreme Court of 16 December 2022 as "*the execution of the judgment of the Supreme Court would cause it irreparable material and immaterial damage because it would be deprived of the right to exercise the lawful activity on the basis of the water permit and the environmental permit issued by the administrative bodies*."

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, on 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 25 (Filing of Referrals and Replies) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

6. On 7 July 2023, the Rules of Procedure No. 01/2023 of the Constitutional Court of the Republic of Kosovo were published in the Official Gazette of the Republic of Kosovo and entered into force fifteen (15) days after their publication. Consequently, when reviewing the request, the Constitutional Court refers to the provisions of the above Rules of Procedure. In this regard, in accordance with Rule 78 (Transitional Provisions) of the Rules of Procedure No. 01/2023, exceptionally, certain provisions of the Rules of Procedure No. 01/2018, shall continue to be applied in cases registered in the Court before its abrogation, only if and to the extent that they are more favourable for the parties.

Proceedings before the Constitutional Court.

7. On 14 November 2022, the Constitutional Court rendered the judgment in the case KI 202/21, the Applicant "Kelkos Energy" Sh.P.K., constitutional review of Judgment [ARJ. UZVP no. 74/21] of the Supreme Court of Kosovo of 28 July 2021 (hereinafter: Judgment of the Court in case no. KI202/21). The Court declared Judgment [ARJ. UZVP no. 74/21] of the Supreme Court of Kosovo of 28 July 2021 invalid, after holding that this judgment was rendered contrary to Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

8. On 12 January 2023, the Supreme Court notified the Court that it had rendered a new Judgment regarding case no. KI202/21, namely the Judgment [ARJ. UZVP no. 119/22], of 16 December 2022.

9. On 2 February 2023, the Applicant submitted to the Court a new Referral, registered as Referral no. KI21/23, alleging that the new judgment, namely the Judgment [ARJ. UZVP no. 119/22], of 16 December 2022 of the Supreme Court, rendered in respect of the judgment of the Court in case no. KI202/21 continues to violate its right to a reasoned decision and the right to property.

10. On 9 February 2023, the President of the Court, by decision [No. GJR. KI21/23] appointed Judge Radomir Laban as Judge Rapporteur and the Review Panel composed of judges: Gresa Caka-Nimani (Presiding), Bajram Ljatifi and Safet Hoxha (members).

11. On 24 February 2023, the Applicant was notified of 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).

12. On 14 March 2023, the NGO "Pishtarët" in the capacity of the interested party "intercessors" (in the case of ARJ. UZVP. No. 119/22 of the Supreme Court of 16 December 2022) requested the Court to be notified about the proceedings before the Court regarding this case.

13. On 16 March 2023, the NGO "Pishtarët" was notified about the registration of the Referral.

14. On 31 March 2023, the NGO "Pishtarët" submitted its comments to the Court.

15. On 29 August 2023, the Review Panel reviewed the report proposed by the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral. On the same date, the Court decided (i) to declare the Referral admissible; (ii) to hold that there had been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR; (iii) to declare Judgment ARJ UZVP. No. 119/22 of the Supreme Court of 16 December 2022 invalid; (iv) to remand Judgment ARJ UZVP. No. 119/22 of the Supreme Court of 16 December 2022 for reconsideration, in accordance with the Judgment of this Court; (v) to hold that Decision AA. 320/21 of the Court of Appeals of 26 April 2021, remains in force until the decision is rendered by the Supreme Court; (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 2024, about the measures taken to implement this Judgment.

16. In accordance with Rule 57 (Concurring Opinions) of the Rules of Procedure, Judge Radomir Laban prepared a concurring opinion, which will be published together with this Judgment.

Summary of facts

17. It follows from the case files that the Applicant, Company "Kelkos Energy" Sh.P.K., is part of the Kelag Group, a company that deals with the production of electrical energy based in Austria.

18. 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.

19. 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 Deçan 19,5837/ZSP of 06.11.2020; (v) ERO decision for HC Deçan 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 Deçan LJ-49/20 of 12.11.2020; and (viii) Electricity production license for HC Belaja LI-50/20 of 12.11.2020.

20. 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.

21. The court proceedings conducted 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.

22. On 8 December 2020, the Basic Court in Prishtina, 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 Deçan, 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 Deçan, 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 Deçan, 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.

23. 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 the LAC, the violation of the legal provisions of the Law of Contested Procedure (hereinafter: LCP) and erroneous 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 Prishtina, namely [A. no. 2081/2020] of 8 December 2020.

24. 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.

25. 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 based in Prishtina, and the interested parties "Ministry of Environment and Spatial Planning" and the Applicant "Kelkos Energy"; while (ii) the Decision of the Basic Court in Prishtina-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.

26. 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. prot. no. 5058/20 issued by the first respondent MEE on 03.02.2021 with a proposal to postpone the execution of the latter.

27. 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 February 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. prot. no. 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.

28. 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.

29. On 11 February 2021, the Basic Court in Prishtina 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, of 03 November 2020; 2. Decision on water permit for HC Deçan, L.U; 14,4982/20, of 04 November 2020; 3. Decision on environmental permit for HC Belaja, 19/5837/ZSP, of 06 November 2020; 4. Decision on environmental permit for HC Deçan, 19/5837/ZSP, of 06 November 2020; 5. Decision on water permit for HC Lumbardhi II, L.U. no. prot. 5058/20 dated 03 February 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 is POSTPONED as follows: 1. Decision V_1303_2020, of 12 November 2020; 2. Decision V_1304_2020, of 12 November 2020; 3. License for Electricity Production for HC Deçan, Li_ 49/20, of 12 November 2020 and 4. License for Electricity Production for HC Belaja, Li_50/20, of 12 November 2020, until the court decides by final court decision regarding the claim of the claimants.

30. 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 erroneous 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 Prishtina A. no. 2081/2020 of 11.12.2020 or reject the request as ungrounded.

31. 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.

32. On 5 March 2021, the Group for Legal and Political Studies and the Non-Governmental Organization NGO "Pishtarët" submitted a request to be recognized as "intercessors" to the Basic Court in Prishtina.

33. On 12 March 2021, the Basic Court in Prishtina, by resolution A. no. 2081/20 approved the request of the Group for Political and Legal Studies and the Non-Governmental Organization NGO "Pishtarët" to be recognized as "intercessors", providing them access to all case files and ordered they be notified of all new submissions in this case.

34. 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 Prishtina, and the legal interested party "Kelkos Energy", Sh.P.K., based in Deçan, while the decision of the Basic Court in Prishtina-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, L.U. 13. 4981/20, of 03 November 2020; Decision on Water Permit for HC Deçan, L.U. 14,4982/20, of 04 November 2020, Decision on Environmental Permit for HC Belaja, 19/5837/ZSP, of 06 November 2020, Decision on Environmental Permit for HC Deçan, 19/5837/ZSP, of 06 November 2020, and the Decision on Water Permit for HC Lumbardhi II, L.U. prot. no. 5058/20 of 03 February 2021, as well as the decisions of the second respondent, the Energy Regulatory Office with headquarters in Prishtina, as follows: Decision V_ 1303_2020, of 12 November 2020, Decision V_1304_2020, of 12.11.2020, License for Electricity Production for HC Deçan, Li_ 49/20 of 12.11.2020, as well as License for Electricity Production for HC Belaja, Li_50 /20, of 12.11.2020, until the court decides by a final court decision regarding the claimant's claim.

35. 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.

36. 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.

37. 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.

38. On 28 July, 2021, the Supreme Court by 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 Prishtina Department for Administrative Matter A-U. No. 208/20 of 01 February 2021 is upheld.

39. On 10 November 2021, the Applicant filed a Referral with the Court challenging the aforementioned judgment of the Supreme Court. This Referral was registered as case no. KI202/21 (see: Judgment in case KI202/21, Applicant: "Kelkos Energy" Sh.P.K., constitutional review of the Judgment ARJ. UZVP. No. 74/2021 of the Supreme Court of Kosovo of 28 July 2021).

40. The Applicant alleged that this judgment of the Supreme Court was rendered in contradiction to Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR and Article 46 [Protection of Property] of the Constitution in conjunction with Article 1 of Protocol 1 of the ECHR. The Applicant alleged, among other things, that the judgment of the Supreme Court was characterized by a lack of reasoning regarding his substantial claims, as well as by a violation of property law.

41. On 14 November 2022, the Court by judgment in case no. KI202/21 held that there had been a violation of the rights guaranteed by the Constitution because the Judgment [ARJ. UZVP no. 74/2021] of the Supreme Court of 28 July 2021 had not been adequately reasoned and 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.

42. By the Judgment of the Court in the case no. KI202/21 was held that the Judgment [ARJ. UZVP no. 74/2021] of the Supreme Court of 28 July 2021 does not meet the standards of the reasoned decision and with the Judgment [KI202/21] it summarized the Applicant's allegations, which it considered important, and therefore requested a response from the Supreme Court in order to respect the Applicant's rights and to meet the standards of the right to a reasoned decision.

43. In fact, the Judgment of the Court in case no. KI202/21 held that with the first judgment of the Supreme Court [ARJ. UZVP. No. 74/2021] of 28 July 2021 had not fully and clearly addressed (i) the crucial facts and legal conditions related to allowing the postponement of the execution of the decisions of MEE and ERO; and (ii) no specific response had 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 the Constitutional Court case KI202/21, Applicant: "Kelkos Energy" Sh.P.K., Judgment of 28 July 2021, paragraph 139).

44. On 16 December 2022, following the judgment of the Court in case no. KI202/21, the Supreme Court rendered its new Judgment [ARJ. UZVP. No. 119/22] of 16 December 2022, by which it reiterated the findings from the first Judgment [ARJ. UZVP. No. 74/2021] of 28 July 2021, considering that the request for extraordinary review of the court decision filed against the Resolution [AA no. 320/21] of the Court of Appeals of 26 April 2021 is grounded, annulled the Resolution [AA no. 320/21] of 26 April 2021 of the Court of Appeals and upheld the Resolution [A-U. 208/20] of the Basic Court in Prishtina - Department for Administrative Affairs of 01 February 2021.

45. In response to the decisive facts and legal conditions regarding the allowed delay of the execution of the decisions and the response to the substantial claims of the Applicant, as noted in the decision of the Court in case no. KI202/21, the Supreme Court with the second Judgment [ARJ. UZVP. No. 119/22] of 16 December 2022 responded by adding the following text to the existing paragraph:

> *"[...] The Panel of this court also considers that the claimants-proposers, with the claim and the request for extraordinary review of the court decision, have given quite credible reasons showing that the execution of the decision of the respondent body before assessing the legality of the same, would cause damage that would be difficult to repair, and it would be in the public interest to postpone the execution of the decision of the respondent body. The Panel also considers that in this case it is a material investment for the construction of a hydropower plant and if by a decision on merit in this case it were decided otherwise, it would be difficult to prevent the repair of possible damages. Therefore, the postponement of the execution of the decision of the respondent body until the rendering of the final merit decision is not contrary to the public interest, on the contrary, because it is not proved that the opposing party or the interested party would be caused great or irreparable harm, while, on the other hand, the possible consequences would be avoided, regardless of how it would be decided on the merit when assessing the legality of the legal basis of the annulled decision with the claimants' claim, at the end of the court proceeding."*

Applicant's allegations

46. The Applicant alleges that by the challenged judgment of the Supreme Court 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.

47. The Applicant submitted detailed allegations regarding:

    (i) applicability of Article 31 of the Constitution in conjunction with Article 6 of the ECHR in the circumstances of the present case;
    (ii) allegation of violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR as a result of (a) the lack of reasoning of the challenged judgment, and (b) the Supreme Court's erroneous application of the law; and
    (iii) allegation of violation of the right to protection of property guaranteed by Article 46 of the Constitution in conjunction with Article 1 of Protocol no. 1 of the ECHR; as well as
    request for the imposition of the interim measure.

48. The Applicant stated that the Court has already dealt with the constitutional facts and violations that it raised in the challenged judgment in Judgment KI 202-21 of 14 November 2022, where the Applicant challenged the Judgment [ARJ-UZVP. no. 74/21]

of the Supreme Court of 28 July 2021. The Court in this case found that this judgment of the Supreme Court was taken contrary to the procedural guarantees set out in Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights, due to the absence of a reasoned court decision, by remanding the case to the Supreme Court for reconsideration.

49. The Applicant also alleges that the Supreme Court in the repeated proceedings rendered Judgment [ARJ-UZVP. no. 119/2022, of 16 December 2022] which the Applicant challenges in this case and which it alleges to have been issued with identical reasoning, therefore, in this case, the Applicant alleges a violation of the *Res Judicata* principle and the principle of *legal certainty*. Further, the Applicant alleges that "*the challenged decision of the Supreme Court represents a completely new situation in the domestic legal system, where the Supreme Court openly disputes and ignores the decisions of the Constitutional Court*."

(i) Reasoning regarding the applicability of Article 31 of the Constitution in conjunction with Article 6 of the ECHR

50. The Applicant considers that its Referral meets all the admissibility criteria and that the Court should admit this case for consideration of the merits based on the criteria established in the Judgment of the ECtHR in case *Micallef v. Malta* (Application no. 17056/06, Judgment of 15 October 2009), but also the Court cases KI112/17 (Applicant *Ceska Exportni Banka A.S.*, Judgment of 30 April 2018) and KI195/20 (Applicant *Aigars* Kesengfelds, Judgment of 19 April 2021).

51. The Applicant claims that it 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 alleges to contain violation of human rights does not correspond to the merits of the case, but is related to preliminary proceedings, 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 proceedings may be decisive for the civil rights and obligations of the Applicant.

52. Referring to the *Micallef v. Malta* 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".

53. 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)*** *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"*.

54. The Applicant alleges that in the circumstances of his case "*Both requirements are cumulatively met in the case in question. Regarding the first requirement:* ***(i)*** *we submit that the respective licenses for production of electrical energy, granted by the Energy Regulatory Office based on water permits and environmental permits issued by the Ministry of Economy and Environment, which the Applicant had at disposal constituting "civil rights" in the form of an authorization to produce electrical energy within the existing hydropower plants in the municipality of Deçan and to sell that energy to the state enterprise KOSTT. The ECtHR has a longstanding case law of designating the "license" as a civil right, since the license entails economic interests. (See Judgment of the European Court of Human Rights of 24 February 2006, Capital Bank AD v. Bulgaria, n. 49429/99, which clearly dealt with the license as a civil right*".

55. The Applicant adds that the approval or disapproval of the request to postpone the execution of the decision has a substantial impact on the civil right the Applicant. This is because considering that the Basic Court of Prishtina - Administrative Department is overloaded with cases, rightly, it is not expected that the decision regarding the main issue will be taken within a period of at least three (3) years. With regard to the latter, the Applicant specifies that *"Based on the public information shared by the Commercial Court, the latter has the lowest efficiency rate among the regular Courts of the country, with only 38% efficiency compared to the 68% average efficiency of the other Regular Courts. The Commercial Court has not yet been consolidated, it is overloaded with cases and it cannot be predicted how soon it will decide on the meritorious request. However, based on the efficacy rate mentioned above - the duration can be longer than 3 years — that was the average case handling in the Administrative Department. In such a situation, even if the final decision were positive for the Applicant, the damage to the Applicant "Kelkos Energy Sh.P.K." would already be irreparable, because in addition to the material damage caused, such a long suspension of the activity of this enterprise would seriously jeopardize the existence of this Company (more will be elaborated in this regard further in this request). Therefore, the decision of the court to postpone the execution of the decisions and licenses granted by MEE and ERO is crucial for the protection of the rights of the Applicant. The allegation regarding the lack of active legitimacy of the claiming party.*"

56. In light of the above, the Applicant also alleges: *"The Constitutional Court, in case KI202/21, with the Applicant "Kelkos Energy" Sh.P.K. in a case completely identical to the identical allegations of constitutional violations of an identical decision of the Supreme Court with the same parties, has found that the Applicant (i) enjoys a civil right" that puts into 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 a ratione matter in accordance 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." Therefore, the Applicant respectfully submits that nothing has changed with the challenged Decision of the Supreme Court, and consequently the Referral is admissible."*

(ii) Allegation of violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR

57. The Applicant alleges that there has been a violation of his right to a fair and impartial trial, guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, due to (a) erroneous application of the law by the Supreme Court and (b) lack of reasoning of the challenged court decision.

58. The Applicant further alleges that *"the Constitutional Court in Judgment [KI202/21](#), has found that the guarantees enshrined in Article 31 of the Constitution and Article 6 of the ECHR include the obligation for the courts to give sufficient reasons for their decisions. Further, in this Judgment, the Court finds that the reasoning of the decision should emphasize the relationship between the findings of merit and the reflections when considering the evidence proposed on the one hand and the legal conclusions of the court on the other. Also, the Court has found that the courts are obliged to justify their activities and decision-making by giving the relevant reasons [...], in order to enable the parties to effectively exploit any existing rights of appeal and to show the parties that their case has indeed been heard."*

59. The Applicant alleges that the Court in Judgment KI 202-21 has stated that the Supreme Court in the remanded proceedings should address the substantive arguments of the Applicants and that the reasons given should be based on the applicable law, and that the parties in the court proceedings can expect to receive a specific and explicit response to their allegations that are decisive for the outcome of the conducted proceedings.

60. The Applicant is aware that these allegations refer to legal and factual issues, but that in its case it is an arbitrary assessment of the facts and an arbitrary and ungrounded application of the law. In support of this allegation, the Applicant refers to the Judgment of the Court in case KI195/20 [cited above], stating as follows: "According to the already established ECtHR case law — the Constitutional Court must be sure and take measures when it observes whether a court has clearly erroneously applied the law in a specific case which may have resulted in "arbitrary conclusions" or "manifestly unreasonable" for the Applicant."

61. Regarding the erroneous application of the procedural law and legal provisions, the Applicant has two sets of allegations, namely (a) the lack of active legitimacy of the claimants; (b) the non-fulfilment of the requirements from Article 22, paragraph 1, of the Law on Administrative Conflicts for imposing an interim measure.

(a) Allegation regarding the lack of active legitimacy of the claiming party

62. The Applicant alleges that the claim and the request for postponement of execution of the decision were submitted by persons who lack active legitimacy.

63. In this regard, the Applicant alleges: "*According to the legal logic deriving from Articles 10 and 18 of the Law on Administrative Conflicts (hereinafter: LAC), 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"*

64. 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."*

65. The Applicant alleges 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.

66. 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 Belaja was built, while it did not take into account the evidence of the Applicant, namely the Judgment AC-I-16-0183-A0001 of the Supreme Court, which rejected his claim 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 hydropower plant of "Kelkos Energy" in his property 159-0, while the Applicant has provided material evidence to prove the opposite of this allegation, 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.

67. The Applicant further alleges: "*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 - in the capacity of a foreign investor, from conducting the legal economic activity"*.

68. The Applicant states that all these cases were brought by the Applicant before the Supreme Court, but that the Supreme Court has disregarded them and has not referred to the arguments or evidence of the Applicant.

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

69. The Applicant alleges that the requirements from Article 22, paragraph 1 of the LAC for the imposition 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.

70. 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; and (c) the postponement would not bring great harm to the opposing party or the interested person.*

71. 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, specifying to what extent the water supply is being reduced and how the right to property is being violated.

72. Regarding the second condition, the Applicant alleges 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.

73. 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" Sh.P.K. 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 Sh.P.K. 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."*

74. In this regard, the Applicant alleges: *"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"*

75. Therefore, the Applicant concludes that the Supreme Court, by erroneously applying the legal provisions and by erroneously proving the factual situation, rendered an unfair and unlawful decision, which resulted in a violation of the right to a fair and impartial trial of the Applicant.

(c) Allegation of the lack of a reasoned decision

76. 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.

77. The Applicant further alleges that: *"This is the second time that an identical decision of the Supreme Court ends up in the Constitutional Court. The Applicant has submitted a similar request for the constitutional review of an identical decision of the Supreme Court. It is about the referral for constitutional review of the challenged Judgment of the Supreme Court [ARJ.UZVP.No.74/21], of 28 July 2021, where the Constitutional Court of Kosovo, on 14 November 2022, rendered the Judgment with reference number: AGj 2076/22 by which it holds that the Judgment of the Supreme Court was rendered contrary to the procedural guarantees provided for in Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights, due to the lack of a reasoned judicial decision, by remanding the case for reconsideration to the Supreme Court."*

78. In support of the allegations for the reasoned decision, the Applicant refers to the judgments of the Constitutional Court in cases KI75/21, and KI202/21 alleging: *"The Court has emphasized the importance that the imposition of interim measures, namely the suspension of the execution of decisions until the meritorious resolution of cases, should be reasonable, proportionate and based on the detailed reasoning of meeting the criteria set out in this context in the respective provisions of the Law on Administrative Conflicts"*.

79. The Applicant states that *"the reasoning of the challenged Judgment of the Supreme Court is identical to the reasoning of the annulled Judgment [ARI.UZVP.No.74/21] of*

the Supreme Court, of 28 July 2021. Constitutional Court, in Judgment no. KI 202/21 has found that (paragraph 132) the Supreme Court has not explained: (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. Furthermore, the Constitutional Court points out that the Judgment of the Supreme Court does not provide the guarantees enshrined in Article 31 of the Constitution and Article 6 of the ECHR that entail the very obligation for the courts to give sufficient reasons for their decisions."

80. The Applicants point out that the Supreme Court, despite the clear instructions of the Constitutional Court in its judgement KI 202-21 regarding the postponement of the execution of decisions of MEE and 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, for which it remands this decision for reconsideration to the Supreme Court.

81. In light of the above, the Applicant alleges that, "*The Supreme Court of Kosovo, in reconsideration, acts like Judgment no. KI 202/21 of the Constitutional Court does not exist. The Supreme Court of Kosovo in reconsideration, renders the same Judgment with identical reasoning as in Judgment [AJ. UZVP. No. 74/21], of 28 July 2021 and not only does not address any of the findings of the Constitutional Court, but it disregards and makes no reference at all to these findings, calling them not in the correct terminology but treating them as "allegations" of the Constitutional Court, pointing out the following (page 6 par. 2 of the challenged Judgment): "By deciding upon the request of the claimants [...], after examining the allegations in the Referral, the challenged resolution of the Court of Appeals [...] and the allegations in the stated judgment of the Constitutional Court [...] this court holds as follows." [...]". So, this statement of the Court itself clearly proves that 1) the Supreme Court completely disregarded the findings of the Constitutional Court, even calling them as "allegations"; and 2) The list of reference documents on which this Judgment is based does not mention the response of Kelkos Energy in the Claimants' Request for Extraordinary Reconsideration of the Decision, which implies that the Supreme Court does not even take into account the arguments and evidence submitted by Kelkos Energy."*

82. In addition, the Applicant considers that "the *Supreme Court did not make even a minimal effort to complete its reasoning according to the requests of the Constitutional Court. The Supreme Court, in fact, precisely in the part where it articulates the reasons for deciding according to the enacting clause, uses the text identical to the one it used in the Judgment annulled by the Supreme Court, noting the following: "the claimants - the proposers with the lawsuit and the letter of 02 February 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". [...].*

83. 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 analysed 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".

84. In line with the above violations of Article 6 of the ECHR and Article 31 of the Constitution, the Applicant considers that the judgment of the Supreme Court does not meet the minimum criteria of reasoning of a decision — as it did not respect the standard of reasoning of court decisions, and as such contradicts the guarantees set forth in Article 6 of the ECHR and Article 31 of the Constitution (see, *mutatis mutandis*, case KI 202/21, Applicant "Kelkos Energy" Sh.P.K. and KI138/15, Applicant "Sharr Beteiligungs GmbH" Sh.P.K., Judgment of 20 December 2017).

85. 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.

86. 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 unlawful decision in relation to the Applicant, which has resulted in the violation of the Right to Fair and Impartial Trial".*

(iii) Allegation of violation of the right to the protection of property guaranteed by Article 46 of the Constitution in conjunction with Article 1 of Protocol no. 1 of the ECHR.

87. The Applicant alleges that the challenged judgment of the Supreme Court, by which the execution of the license for electrical energy production by this company is postponed, consists in direct interference with the right to property of the Applicant, guaranteed by Article 46 of the Constitution, in conjunction with Article 1 of Protocol no. 1 of the ECHR. The Applicant regarding to its allegation for violation of its right to property refers to the case law of the European Court of Human Rights (hereinafter: ECtHR), namely the cases *Tre Traktorer AB v. Sweden, Pressos Compania Naviera S.A. et al v. Belgium; Capital Bank AD v. Bulgaria; Lönnroth v. Sweden* and Salib *v. Malta*.

88. 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.

89. 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".*

90. 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.

91. According to the Applicant, *"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".*

92. Pursuant to the previous allegation, the Applicant specifies: *"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".*

93. 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 Kelag 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".*

94. The Applicant further refers to the principle of legitimate expectation, for which it states that the provisions of Article 1 of Protocol no. 1 of ECHR "*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*". Following the above, the Applicant, referring to the case Lonnroth v. Sweden, states that the ECtHR: "*has established three (3) basic principles that apply as regards the intervention/limitation of the right to property — according to Article 1 of Protocol 1 of the ECHR and they are as follows: (i) The principle of legality; (ii) the principle of the existence of a legitimate aim 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 given person (proportionality)".*

95. The Applicant specifies that any interference with property can only be justified "*if it is based on the law [referring to the Saliba v. Malta case], it is based on a legitimate purpose which is in the public or general interest and the limitation of this right should*

be based on the principle of proportionality, namely — no one should be deprived if through other (easier) means/measures protection of the general interest can be achieved".

96. 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 provision have been interfered"*

97. The Applicant also alleges that the Supreme Court has violated Article 119 (4) [General Principles] of the Constitution which obliges the Republic of Kosovo to promote wellbeing 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".*

98. The Applicant alleges that given the erroneous application of procedural law and the lack of convincing reasoning in the decision 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.

(iv) Allegations on the imposition of the interim measure

99. The Applicant initially points out that it has shown the *prima facie* case on the merits of the Referral, reiterating that "the *fact that prima facie, the Applicant has proved the merits of the Referral is verified through Judgment no. KI 202/21 of the Constitutional Court. As elaborated in the main claim, this is the second time that an identical decision of the Supreme Court ends up in the Constitutional Court. As elaborated above, the Applicant has submitted a similar Referral for the constitutional review of an identical decision of the Supreme Court. It is about the Referral for constitutional review of the challenged Judgment [ARJ.UZVP.No.74/21] of the Supreme Court, of 28 July 2021, where the Constitutional Court of Kosovo, on 14 November 2022, rendered the Judgment with reference number: AGj 2076/22 by which it holds that the Judgment of the Supreme Court was rendered contrary to the procedural guarantees provided for in Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights, due to the lack of a reasoned judicial decision, by remanding the case for reconsideration to the Supreme Court.*"

100. Secondly, the Applicant specifies that: "*Implementation of the Judgment of the Supreme Court will cause irreparable material damage to the Applicant, since it will be deprived of the right to exercise lawful activity based on the licenses granted by the administrative bodies, without providing it in the matter of administrative conflict a fair procedure guaranteed by the Constitution, putting into question the legal certainty for all citizens, and especially for foreign investors such as the Applicant.*"

101. The Applicant further alleges that: "*The incentive fee (price) for the purchase of electricity generated from hydropower plants, by the Kosovo Electricity System, Transmission and Market Operator (KOSTT), according to Decision V 810/2016 of the Regulatory Office is EUR 67.47 per MWh. In this sense, taking into account the duration of the handling of cases in the Constitutional Court (case KI 202/21 took approximately one year until the decision was rendered from the date of submission of the Referral), the damage that would be caused to the Applicant may amount to ten million EUR. This with a simple calculation where 17.86 MW would be produced in one hour would be sold at the set price of EUR 67.47 per MW. In this case, damages for only one hour lost could amount to EUR 1,205, while the maximum value of daily damage would be EUR 28,920. This damage is irreparable due to the fact that electricity generated within a period of time cannot be replaced by an amount of the same production in the future. This means that there is no system that ensures the storage of electricity for the purposes of its subsequent generation and sale. Consequently, energy that is not used for the immediate production of electricity is lost because it cannot be accumulated, stored and produced at a later stage — therefore this damage is irreparable. That the damage that may be caused is irreparable is evidenced by the fact that the Applicant is in serious danger of bankruptcy, as a result of the failure to realize the income from the exercise of the lawful activity. The financial statements of Kelkos Energy Sh.P.K. prove that its debt to various creditors reaches the value of EUR 47,981,000. Therefore, the impossibility of Kelkos Energy's business activity would make it impossible for it to repay its debt to its creditors*."

102. The Applicant also alleges that the challenged judgment of the Supreme Court brings "substantially" harmful consequences to the public interest.

103. 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 investor [...] shall have a right to refer to the court or arbitration for compensation for losses and expenses incurred as a consequence of any action or inaction that is directed against the foreign investor and that is a violation of the applicable law in the Republic of Kosovo or generally accepted norms of international law; and is attributable to the Republic of Kosovo". 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.*

104. Additionally, the Applicant alleges that "*The challenged judgment is contrary to the general interest in Kosovo in another aspect as well. Considering that the process of getting permits for the two disputed hydropower plants of Kelkos Energy has been executed by the responsible institutions within the legal framework — the investor is free from any liability as a result of the intervention of third parties. Consequently, postponing the execution of decisions is a major* ***risk*** *for the public interest of Kosovo, since the investor would without delay use legal instruments against the Republic of Kosovo for* ***compensation*** *of the damage. This claim for compensation against the Republic of Kosovo may be as high as the total value of the investment*".

105. Finally, the Applicant alleges that "*there is another equally important aspect that poses the need to approve the request for an interim measure. As we have noted above, this is the second time that an identical decision of the Supreme Court ends up in the Constitutional Court. The Constitutional Court had ruled in favour of the Applicant for the first time, finding violations in the Judgment of the Supreme Court. The remanded judgment of the Supreme Court is identical to the annulled judgment, which makes the same unconstitutional. Consequently, the non-approval of the interim measure would*

produce a consequence whereby an unconstitutional decision (held by the Constitutional Court itself) would continue to be in force. In this way, there would be a continuous violation of the constitutional rights of the Applicant, which is contrary to the public interest of Kosovo."

106. Regarding the request for the imposition of the interim measure, the Applicant requests the Court to:

(i) IMPOSE the interim measure and stop the execution of the Judgment ARJ. UZVP. No. 1 19/2022 of 16.12.2022 of the Supreme Court of the Republic of Kosovo until the final decision of the Constitutional Court of the Republic of Kosovo regarding this constitutional Referral.

107. In the following, the Applicant requests from 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 European Convention on Human Rights;
(iv) TO DECLARE Judgment ARJ. UZVP. No. 1 19/2022 of the Supreme Court of 16.12.2022, invalid;
(v) TO REMAND Judgment ARJ. UZVP. No. 1 19/2022 of the Supreme Court of 16.12.2022 for retrial, in accordance with the judgment of the Constitutional Court;

Comments of the NGO "Pishtarët" as an interested party "intercessor"

108. The NGO "Pishtarët", in its response to the Applicant's Referral, points out that the Applicant's Referral does not stand and therefore is inadmissible, and in sum, in essence, state the following:

- *Water Permits issued by the responsible authorities are in complete violation of the Law on Waters*;
- The NGO "Pishtarët" and other persons, according to Article 10 of the LAC, *are granted the right of the party in the administrative conflict procedure, consequently the active legitimacy, also to the entities that protect the public interest, including civil society organizations. More precisely, Article 10, paragraph 2 LAC decisively stipulates that: "Administration body, Ombudsperson, associations and other organizations, which protect public interests, may start an administrative conflict." Such an arrangement is a progressive interpretation of the logically supported presumption that civil society - non-governmental organizations, in order to protect the general interest, have the right to initiate the administrative conflict; the request for postponement of the execution of the challenged decisions was made on the basis of Article 22, paragraph 2 and 6 of the LAC, taking into account the circumstances of the case, the nature of the damages caused and the duration of the procedures for examining the main issue;*
- *The investment company has directly endangered drinking water, losing a source of drinking water, and caused environmental degradation. Regarding these issues, the interested party - the company "Kelkos Energy" Sh.P.K. <u>has not provided any evidence that it has revitalized and intervened in improving the environment and avoiding the risk of disrupting/damaging access to drinking water</u>, for which it is estimated that the damage that will be caused to the claimants and the intercessor*

party - who protect the public interest - is irreparable, in case of execution of the challenged decisions. Also, the continuation of the operation of hydropower plants, which have damaged drinking water sources and massively degraded the environment in this area, is completely contrary to the public interest. Therefore, in our view, conducting of any activity that endangers water resources and causes such environmental damage should be suspended until the final decision of the competent court;

- *including the possible endangerment of access to water for the citizens of Deçan, in combination with the extremely low capacity of hydropower plants in covering Kosovo energy needs, under no circumstances can it be interpreted as constituting an act contrary to the public interest. On the contrary, the suspension of the execution of decisions by the Supreme Court of Kosovo represents a completely fair decision and a proper balance of the interests of the litigants. This balance is reflected in the fact that the damage caused, and consequently being caused to the claimants and the intercessor parties - which in this case represent the interest of the citizens of Deçan based on the legal provisions of LAC, in relation to the constant and permanent risk for denial of access to water for personal and economic needs, prevails any economic interest that a single entity such as the investor Kelkos Energy Sh.P.K. may have.*
- *The Supreme Court of Kosovo, with the decision for which the referral was submitted by Kelkos Energy Sh.P.K., clearly emphasized that in no form is the basic decision for this judicial process prejudiced, and that the interim measure at this stage does not imply the finding of unlawfulness of the challenged decisions. In this regard, considering that Kelkos Energy Sh.P.K., although with many legal violations, has secured permits and licenses with a duration of up to 40 years (license for operation from ERO - see point 4), the suspension of the permits until the completion of the court proceeding on merit, would not cause great harm that would be irreparable for it as an opposing - interested party. This argument is strengthened even more, when the litigants have already been invited for a court hearing and that the proceeding is expected to continue at a faster pace.*
- *Regarding the damage to reputation, as one of the allegations of the Applicant. it is worth noting the negligent approach to human rights of this company. Kelkos Energy Sh.P.K. has misused the judicial system to try to silence environmental activists and their valuable criticism towards Kelkos for endangering and damaging the environment;*
- *Therefore, in our view, the Supreme Court of Kosovo, on deciding to suspend the execution of the challenged decisions, acted in accordance with the legal procedural provisions, resulting in a fair and lawful decision by fully verifying the factual situation in relation to the interim measure. Therefore, in our view, the Applicant's allegations that there has been a procedural violation by this court, which has resulted in a violation of the right to a fair trial provided for by Article 6 of the ECHR and Article 31 of the Constitution of the Republic of Kosovo, do not stand.*

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.

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.

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.
[...]"

Protocol no. 1 of the European Convention on Human Rights
Article 1
[Protection of Property]

1. 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.

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 favour 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 PROCEDURE

Article 160
[No title]

160.1 A verdict compiled in written should have: summary, disposition, justification and guide on the right to file a complaint against the verdict.
160.2 The summary of the verdict should have: the name of the court, the name of the judge, the names of the parties and their address, the names of their legal representatives, brief narrative of the contesting issue and the amount, the ending day of the main hearing, the narrative of the parties and their legal representatives and with proxy that were present in the session of the kind as well as the day when the verdict was issued.
160.3 The verdict disposition consists of: decision which approves or rejects special requests dealing with issue at stake and accessing requests, decision for existence or non-existence of the proposed requests to compensate it with statement of claim as well as the decision on procedural expenses.
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.
160.5 The court specifically should show which provisions of the material right are applied in the case of deciding upon the requests from the parties. If necessary, the court will pronounce on the standing of the parties regarding the judicial basis for the contests, as well as for their proposals and turndowns, for which the court hasn't justified decisions issued earlier in the process.
160.6 In the contumacy verdict, verdict on the basis of pleading guilty, verdict on the basis of withdrawing the charges, or the verdict due to the lack of attendance, the justification consists of only the reasons for issuing the verdict of the kind.

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 para. 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, then all of them 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, then the court will consider that procedural action that is the most favourable 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."

LAW NO. 05/L-081 ON ENERGY

Article 15
Renewable Energy Targets

1. The Government shall establish annual and long-term renewable energy targets for the consumption of electricity, thermal energy generated from renewable energy sources and from cogeneration and energy from renewable sources used in transport. A National Renewable Energy Action Plan to reach twenty-five percent (25%) share of energy from renewable sources in gross final energy consumption for an agreed in 2020 shall be adopted by the Government. After adoption the National Renewable Energy Action Plan shall be submitted to the Energy Community Secretariat.
2. On reaching the objective of twenty-five percent (25%) share of energy from renewable sources in gross final energy consumption in 2020, Kosovo can enter in cooperation mechanisms with other Contracting Parties of the Energy Community or with European Union Member States. The framework for the cooperation mechanisms shall be adopted by the Government by separate sub-legal act.
3. Long-term renewable energy targets shall be developed for a ten (10) year period, according to the methodology as determined by sub-legal acts, approved by the Ministry.
4. The Ministry shall prepare and issue sub-legal act containing adequate measures intended to achieve the renewable energy targets, and any such measures shall take into account:
4.1. principles of a competitive energy market; and
4.2. the characteristics of renewable energy sources and generation technologies.
5. The Ministry drafts and publishes the report on the realization of long-term renewable energy targets annually, as part of the report on the implementation of the National Renewable Energy Action Plan and Strategy Implementation Program specified in paragraph 7 of Article 7 of this Law. The report shall include a progress analysis of the realization of renewable energy targets, particularly taking into account the impact of climatic factors. This analysis shall also indicate the extent of measures undertaken for the realization of renewable energy targets and possible remedies to be on track of reaching the objectives.
6. The Regulator certifies the origin of energy produced from renewable energy sources according to objective, transparent and non-discriminatory criteria, in accordance with the provisions of the Law on Energy Regulator.
7. The institutions involved in promotion of renewable energy shall ensure that the information on support measures is made available to all relevant actors, such as consumers, builders, installer, architects and suppliers of heating, cooling and electricity equipment compatible with the use of energy from renewable sources.
8. Local and regional authorities shall develop suitable information, awareness raising, guidance and training programmes in order to inform the citizen of the

benefits and practicalities of developing and using energy from renewable sources.

LAW NO. 04/L-147 ON WATERS OF KOSOVO

Article 70
(Gain and conditions of gaining the water right)

1. Gain of the water legal right, is provided as following:
1.1. with the water permit;
1.2. with the concession.
2. Bearer of water rights shall use the water according to the criteria determined by the act of gaining the water right.
3. Concession, respectively the public and private partnership, is performed in conditions, manner and procedure for the concession of water use determined by this Law and legislation into force.

Article 71
(Procedures for the issuance of water permit)

1. The procedure for gaining water permit is:
1.1. water conditions;
1.2. water compliance;
1.3. water permit;
1.4. water direction.
2. Procedures for water conditions, water compliance, water permit and water direction shall be regulated by sub-legal act issued by the Ministry.

Article 72
(Water Permit)

1. Water permit shall be issued for:
1.1. extracting water for general consumption;
1.2. discharge of polluted waters;
1.3. construction, reconstruction or demolition of buildings and equipment that affect the water regime;
1.4. activities of mining and geological works which affect the water regime;
1.5. hydro-geologic research and collecting data;
1.6. exploitation of sand, gravel, stone and argil;
1.7. use of water in order to use electrical and geothermal energy; and
1.8. other activities that may affect the water regime.
2. Water permit is not required for: use of the wells, resources, similar facilities and tankers for supplying with drinking water for housekeeping, fires extinction and undertaking emergency measures and sanitary and other measures, in case of general danger.
3. By water permit there shall be determined the destination, method and conditions of water use, discharge of contaminated waters, the work regime of objects and plants, dumping of solid and liquid waste and also other conditions.
4. Water permit, according to this Law, for the use of inter-boundary waters and the discharge of polluted waters, in inter-boundary waters, is given in accordance with international convention or agreement.
5. The right of use or discharge of contaminated water, obtained under the water permit, cannot be transferred to other persons, without consent of the competent authority.

6. Ministry issues water permits by sub-legal act, the Ministry may delegate powers for which the municipalities and the Authority may issue the water permit.
7. Water permit shall be revised at least every five (5) years.
8. Holder of water right shall be obliged to inform authority of permit issuance, in case of change in action, technology and water use or other cases, when it can have significant impact on water regime.

LAW NO. 03/L-025 ON ENVIRONMENTAL PROTECTION

Article 31
(Environmental Permit)

1. Constructed facilities, installations and machinery that have been subject to Environmental Impact Assessment cannot commence operations without an Environmental Permit from the Ministry.
2. An Environmental Permit for operation shall be issued for a five-year period and during the application procedure and probation period for the technical approval, but not later than six months after starting of operations.
3. The Ministry, by legal act, shall prescribe the activities that are subject to an Environmental Permit, the application form, the content of Environmental Permit, continuing of effectively and the registry of approved permits.

ADMINISTRATIVE INSTRUCTION (MED) No. 05/2017 RENEWABLE ENERGY SOURCE TARGETS [MINISTRY OF ECONOMIC DEVELOPMENT]
(adopted on 23 June 2017)

Article 3
(Mandatory and indicative target for renewable energy sources)

1. Specific terms used in this Administrative Instruction shall have the following meaning:
1.1. Mandatory target of renewable energy sources until 2020 is 25% of the gross final consumption of energy, as defined with article 4 of the Council of Ministers of the Energy Community Decisions No. D/2012/04/MC-EnC;

[...]

1.3. The indicative renewable energy source target for 2020 shall be 29.89% of the gross final consumption of energy;

[...]

ADMINISTRATIVE INSTRUCTION MESP-NO. 03 /2018 ON PROCEDURES FOR WATER PERMIT [MINISTRY OF ENVIRONMENT AND SPATIAL PLANNING]
(adopted on 24 August 2018)

II.3 Water Permit

Article 15
(Providing water permit and documentation)

1. The water permit is provided for all facilities and activities for which by the legal provision are determined the issuance of water consent, except for the

extraction of material from watercourses and regulation of water- flows and other waters.
[...]

Article 17
(Duration and extension of the water permit)

1. The duration of the water permit is determined by Article 73 of the Law.
[...]

ADMINISTRATIVE INSTRUCTION MESP-NO. 07/2017 OF ENVIRONMENTAL PERMIT [MINISTRY OF ENVIRONMENT AND SPATIAL PLANNING]
(adopted on 9 June 2017 and abolished by the Administrative Instruction MESP 04/2022 on Environmental Permit of 3 June 2022)

Article 11
(No title)

1. On the basis of proposal decision of the commission, the Ministry issues or refuses the application for an Environmental Permit within fifteen (15) days and for the decision made notify in writing the applicant and the Municipality/ Municipalities.
2. If the operator fulfils technical and environmental conditions Environmental Permit is issued.
[...]
4. Environmental Permit is issued for a period of five (5) years.

Assessment of the admissibility of the Referral

109. The Court first examines whether the Referral has met the admissibility criteria established by the Constitution, provided by Law and further specified by the Rules of Procedure.

110. In this regard, 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 stipulate:

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."

[...]

111. In addition, the Court also examines whether the Applicant has met the admissibility criteria, as established by Law. In this regard, the Court first 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...".

112. In this respect, the Court notes that the Applicant 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 Court cases no. KI41/09, Applicant AAB-RIINVEST University Sh.P.K., Resolution on Inadmissibility of 3 February 2010, paragraph 14; and no. KI35/18, Applicant *Bayerische Versicherungsverbrand*, Judgment of 11 December 2019, paragraph 40).

113. In assessing the fulfilment 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. UZVP. No. 119/22 of 16 December 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 criteria of Article 48 of the Law and has submitted the Referral in accordance with the deadlines set out in Article 49 of the Law.

114. In addition, the Court shall assess whether Article 31 of the Constitution is applicable in conjunction with Article 6 of the ECHR, as well as Article 46 of the Constitution in conjunction with Article 1 of Protocol no. 1 of the ECHR. Namely, the Court shall assess whether the Applicant's Referral, which relates to the preliminary proceedings for suspending or postponing the execution of the decisions of the Ministry responsible for issuing the water permit and the environmental permit, in terms of allegations of violation of the right to fair and impartial trial and its right to property is *ratione materiae* with the Constitution.

Regarding the applicability of Article 31 of the Constitution in conjunction with Article 6 of the ECHR in the preliminary proceedings

115. 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.

116. 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 Prishtina 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.

117. In this specific context, the Court notes that the question of the applicability of Article 6 of the ECHR to preliminary 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.

118. The Court also points out that the criteria in respect of the applicability of Article 31 of the Constitution concerning preliminary 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 *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 abovementioned Court decisions are based on the ECtHR case, *Micallef v. Malta*, no. 17056/06, Judgment of 15 October 2009.

119. 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, conjunction with Article 6 of the ECHR and then the latter will apply in the circumstances of the present case.

120. 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).

121. 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 Court cases KI122/17, Applicant *Česká Exportní Banka A.S.*, 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).

122. The Court recalls that in the circumstances of the concrete case the Applicant 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.

123. Consequently, 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.

124. From the above, the Court holds that the Applicant:

- *(i)* enjoys in an uncontested manner a "civil right" that sets in motion that the Applicant has procedural guarantees of Article 31 of the Constitution in conjunction with Article 6 of the ECHR;
- *(ii)* the Applicant's Referral concerning 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.

Conclusion about the admissibility of the referral

125. Finally, and after reviewing the Applicant's Referral, the Court considers that the Referral cannot even be considered manifestly ill-founded on constitutional grounds, as defined in paragraph (2) of Rule 34 of the Rules of Procedure, and consequently, the Referral is declared admissible for consideration on merit.

Merits of the Referral

126. 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. The Applicant initially alleges that through the second judgment, namely the challenged judgment of the Supreme Court its right to a fair trial and its property right have been violated, because its substantive arguments, including those presented and reviewed through the judgment of the Court in case no. KI202/21 have not been addressed in the challenged decision

127. 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. After this, the Applicant submitted a Referral to the Court for the constitutional review of the Judgment of the Supreme Court, which approved the Applicant's Referral as grounded, annulled the Judgment of the Supreme Court and remanded it for reconsideration due to the lack of reasoning of the Judgment. In the remanded proceedings, the Supreme Court again decided to approve as grounded the request of the claiming party for extraordinary review of the court decision filed against the resolution of the Court of Appeals and annulled the resolution of the Court of Appeals, upholding the resolution of the Basic Court, respectively the interim measure, suspending all activities of the Applicant until the resolution on merits of the case in the Basic Court.

128. 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 on 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.

129. The Court also notes that the Applicant alleges that the Supreme Court in the remanded proceeding again rendered an identical decision, disregarding the Court's recommendations.

130. The Court in the following text of this Judgment shall assess the allegations for arbitrary application of Article 22 of the LAC and for lack of active legitimacy of the claiming party 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.

131. When assessing the merits of these allegations, the Court shall also apply 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.

132. In the following, the Court shall proceed to the examination of the Applicant's allegations of a violation of its right to a fair and impartial trial, guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

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

A. Assessment of the allegation on the lack of a reasoned decision

(i) General principles regarding the right to a reasoned decision

133. The guarantees enshrined in Article 6 (1) of the ECHR also include the obligation for the courts to provide sufficient justification for their decisions (see: the ECtHR case, H. v. Belgium, no. 8950/80, Judgment of 30 November 1987, paragraph 53). The reasoned court decision shows the parties that their case has indeed been examined.

134. Despite the fact that the domestic court has a certain freedom of assessment regarding the selection of arguments and the admissibility of evidence, it is obliged to justify its actions by justifying all its decisions (see, ECtHR cases: Suominen v. Finland, no. 37801/97, Judgment of 24 July 2003, paragraph 36; and the case Carmel Saliba v. Malta, no. 24221/13, Judgment of 24 April 2017, paragraph 73).

135. The lower court or state authority, on the other hand, must provide such reasons and justifications that will enable the parties to make effective use of any existing right of appeal (see: ECtHR case Hirvisaari v. Finland, no. 49684/99, of 25 December 2001, paragraph 30).

136. Article 6, paragraph 1 obliges the courts to give reasons for their decisions, but this does not mean that a detailed response is required regarding each argument (see the ECtHR cases, Van de Hurk v. Netherlands, no. 16034/90, Judgment of 19 April 1994, paragraph 61; García Ruiz v. Spain, no. 30544/96, Judgment of 29 January 1999, paragraph 26; Perez v. France, no. 47287/99, Judgment of 12 February 2004, paragraph 81).

137. The nature of the decision rendered by the court depends on whether the Court is obliged to justify it, and this can be decided only in the light of the circumstances of the case in question: it is necessary to take into account, inter alia, the different types of submissions that a party may submit to the court, as well as the differences that exist between the legal systems of the countries in relation to the legal provisions, the customary rules, the legal positions and the presentation and drafting of judgments (see

ECtHR cases KI202/21, no. 18390/91, Judgment of 9 December 1994, paragraph 29; Hiro Balani v. Spain, no. 18064/91, Judgment of 9 December 1994, paragraph 27).

138. However, if a party's submission is decisive for the outcome of the proceedings, it requires to be responded to specifically and without delay (see the ECtHR cases, Ruiz Toria v. Spain, cited above, paragraph 30; Hiro Balani v. Spain, cited above, paragraph 28).

139. Therefore, the courts are obliged:

(a) to consider the main arguments of the parties (see the ECtHR cases, Buzescu v. Romania, no. 61302/00, Judgment of 24 August 2005, paragraph 67; Donadze v. Georgia, no. 74644/01, Judgment of 7 June 2006, paragraph 35); and

(b) to consider very rigorously and with particular care the claims concerning the rights and freedoms guaranteed by the Constitution, the ECHR and its Protocols (see ECtHR cases: Fabris v. France, 16574/08, Judgment of 7 February 2013, paragraph 72; Wagner v. Luxembourg, no. 76240/01, Judgment of 28 June 2007, paragraph 96).

140. Article 6, paragraph 1, does not require the Supreme Court to provide a more detailed reasoning when it merely applies a certain legal provision regarding the legal basis for the rejection of the appeal because that appeal does not have a prospect of success (see ECtHR cases, Prison and others v. France, no. 34763/02; Decision of 28 January 2003; Gorou v. Greece (No. 2), no. 12686/03, Decision of 20 March 2009, paragraph 41).

141. Similarly, in a case where it is a request to allow the filing of an appeal, which is a prerequisite for the proceedings before a higher court, as well as for a possible decision, Article 6, paragraph 1, cannot be interpreted in the sense that it orders a detailed reasoning of the decision to reject the request to file the appeal (see ECtHR cases, Kukkonen v. Findland (no. 2),no. 47628/06, Judgment of 13 April 2009, paragraph 24; Bufferne v. France, no. 54367/00, Decision of 26 February 2002).

142. In addition, when rejecting an appeal, the appellate court can, in principle, simply accept the reasoning of the decision rendered by the lower court (see the ECtHR case, García Ruiz v. Spain, cited above, paragraph 26; see, contrary to this, Tatishvili v. Russia, n. 1509/02, Judgment of 9 July 2007, paragraph 62). However, the concept of fair proceedings implies that the domestic court that has given a close explanation of its decisions, either by repeating the justifications previously given by a lower court or in some other way, actually dealt with important matters within its jurisdiction, meaning that it did not simply and without additional effort accept the conclusions reached by the lower court (see the ECtHR case, Helle v. Finland, no. (157/1996/776/977), Judgment of 19 December 1997, paragraph 60). This requirement is all the more important if the contesting party has not been able to present its arguments orally in the proceedings before the domestic court.

143. However, the appellate courts (in the second instance) which have jurisdiction to dismiss unfounded appeals and to resolve factual and legal issues in the contested proceedings, are obliged to reason why they reject to rule on the appeal (see, ECtHR case, Hansen v. Norway, no. 15319/09, Judgment of 2 January 2015, paragraphs 77–83).

144. In addition, the ECtHR did not determine that the right had been violated in a case in which no specific explanation was provided in relation to an affirmation referring to an irrelevant aspect of the case, namely the lack of signature and seal, which is an error of

a more formal than material nature and that error was promptly corrected (see the ECtHR case, Mugoša v. Montenegro, no. 76522/12, Judgment of 21 September 2016, paragraph 63).

(ii) Application of general principles in the circumstances of the present case

145. The Applicant alleges that despite the second judgment of the Supreme Court [ARJ. UZVP. No. 119/22 of 16 December 2021], his substantive allegations were not addressed or reasoned by the judgment in question.

146. During the proceedings before the Supreme Court and before the Court in case KI 202/21, the Applicant submitted a detailed response as follows: **(i)** The Court of Appeals rightly concluded that the claimants did not fulfil 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, dam, 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.

147. The court in its judgment in case no. KI202/21 acknowledged the Applicant's allegations seeking settlement and considered that the Supreme Court did not strike a

fair balance between the litigants in this proceeding because it did not respond to any of the Applicant's substantive claims and arguments, which would ensure proper administration of justice. The Court emphasized in particular that based on the specific nature and circumstances of the case, the Supreme Court has not provided answers and reasons on the following main issues to take a decision that meets the standards of entitlement to a reasoned decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR: (i) the decisive facts and legal conditions regarding allowing the postponement of the execution of decisions of MEE and ERO; and (ii) no specific response has been given to the Applicant's allegation regarding the lack of procedural legitimacy of the claiming party." (see: Court Judgment KI202/21, paragraph 139).

148. The court notes that the Supreme Court in its second Judgment [ARJ. UZVP no. 119/22], of 16 December 2022, namely in the challenged decision, stated that "*With the judgment of the Constitutional Court of Kosovo, it was found that the Judgment ARJ.UZVP no. 74 2021 of the Supreme Court, of 28 July 2021 is invalid and the aforementioned judgment of the Supreme Court has been remanded to this court for reconsideration, in accordance with the allegations made in the judgment of the Constitutional Court*".

149. Indeed, in an attempt to address the Applicant's allegations and the Court's judgment in case no. KI202/21, the Supreme Court in the existing reasoning added "*The Panel of this court also considers that the claimants-proposers, with the claim and the request for extraordinary review of the court decision, have given quite credible reasons showing that the execution of the decision of the respondent body before assessing the legality of the same, would cause damage that would be difficult to repair, and it would be in the public interest to postpone the execution of the decision of the respondent body. The Panel also considers that in this case it is a material investment for the construction of a hydropower plant and if by a decision on merit in this case it were decided otherwise, it would be difficult to prevent the repair of possible damages. Therefore, the postponement of the execution of the decision of the respondent body until the rendering of the final merit decision is not contrary to the public interest, on the contrary, because it is not proved that the opposing party or the interested party would be caused great or irreparable harm, while, on the other hand, the possible consequences would be avoided, regardless of how it would be decided on the merit when assessing the legality of the legal basis of the annulled decision with the claimants' claim, at the end of the court proceeding*."

150. Based on the foregoing, the Court finds that the Supreme Court only repeats and paraphrases the previous reasoning without giving a concrete answer and reasoning for (i) the decisive facts regarding the legal conditions in Article 22, paragraph 2 of the LAC, for allowing the postponement of the execution of the decision of MEE and ERO; and (ii) no concrete answer was given to the claimant's claim, which refers to the lack of procedural legitimacy of the claimant under Article 34 of the LAC. Namely, the decision of the Supreme Court does not resolve the substantial allegations of the Applicant and does not provide adequate reasoning regarding the allegations raised by the Applicant.

151. 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.

152. 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.

153. 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.

154. 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 the Court cases KI230/19, Applicant Albert Rakipi, cited above, paragraph 139 and KI87/18, Applicant IF Skadiforsikring, cited above, paragraph 44).

155. 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).

156. 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*, ECtHR cases, Ruiz Toria 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).

157. 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).

158. 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).

159. 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).

160. 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).

161. 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 28 March 2017, paragraphs 94-95).

162. 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.

B. *Assessment of the allegation on erroneous interpretation of the law*

163. The Court initially recalls the Applicant's allegation, who in terms of the criteria established by Article 22 of the LAC for the postponement of the execution of the decision states that three (3) conditions must be met, namely: (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; and (c) the postponement would not bring great harm to the opposing party or the interested person.

164. According to the Applicant, none of these three (3) conditions are met, and regarding the latter, it alleges that in the present case, the challenged Judgment of the Supreme Court is involved with erroneous interpretation and application of the law.

165. The Court initially notes that in support of its allegation for erroneous interpretation and application of the provisions of LAC, the Applicant raises inter alia issues related to the lack of reasoning of the decision or lack of reasoning by the Supreme Court regarding the fulfilment of each criterion set out in Article 22 of LAC. Regarding the allegation of lack of reasoning of the court decision, the Court has already found that the challenged Judgment of the Supreme Court has not respected the standard of a reasoned judicial decision as determined through the ECtHR case law, a practice affirmed also through the Court's own case law.

166. Therefore, the Court, taking into account the circumstances of the present case, namely, the allegations raised by the Applicant in its submissions before the regular courts and before the Court itself, will consider its allegation for interpretation and clearly erroneous application of the law in the light of the findings of the Court regarding the reasoning of the Supreme Court related to the fulfilment of the criteria set out in Article 22 of the LAC. That said, the Court will examine and assess whether the erroneous interpretation and application of Article 22 of LAC has resulted in arbitrary conclusions for the Applicant.

167. When elaborating on the above allegation related to the violation of the right to a fair and impartial trial of the Applicant as a result of the "*clearly erroneous interpretation and application of the law*", the Court will refer to its case law and that of the ECtHR.

(i) General principles

168. Relating to the allegations in the present case, the Court initially points out that as a general rule, the allegations for the erroneous interpretation of the law alleged to have been made by the regular courts relate to the area of legality and as such, are not within the jurisdiction of the Court, and therefore, in principle, the Court cannot review them (see Court cases: KI06/17, Applicant *L.G. and five others*, Resolution on Inadmissibility, of 25 October 2016, paragraph 36; KI122/16, Applicant *Riza* Dembogaj, Judgment of 30 May 2018, paragraph 56; KI75/17, Applicant *X,* Resolution on Inadmissibility, of 6 December 2017; KI154/17 and KI05/18, Applicant, *Basri Deva, Afërdita Deva and Limited Liability Company "Barbas"*, Resolution on Inadmissibility, of 28 August 2019, paragraph 60; KI119/19, Applicant: *Privatization Agency of Kosovo (PAK)*, Judgment of 2 September 2020, paragraph 58).

169. However, the Court points out that the ECtHR case law and that of the Court also set out circumstances in which exceptions to this position should be made. The ECtHR has emphasized that insofar as local authorities, namely in concrete circumstances courts, have a primary duty to resolve problems around the interpretation of legislation; the Court's role is to ensure or verify that the effects of this interpretation are in accordance

with the ECHR (see the case of the ECtHR, *Miragall Escolano and others v. Spain*, application no. 38366/97 and 9 others, Judgment of 25 May 2000, paragraphs 33-39; and see the Court case KI119/19, Applicant: Privatization Agency of Kosovo (PAK) Resolution on Inadmissibility of 2 September 2020, paragraph 61). Consequently, the Court has emphasized that it is mainly the role of the regular courts to deal with the issue of interpretation of the law, while the role of the Constitutional Court is to verify whether the consequences of such interpretation are in accordance with the Constitution (see the case cited above KI75/17, Applicant X, paragraph 58).

170. In this sense, the Court in accordance with the ECtHR case law has emphasized that although the Court's role is limited in terms of assessing the interpretation of the law, it must be ensured and take action when it finds that a court has manifestly erroneously applied the law in a specific case that may have resulted in "arbitrary conclusions" or "manifestly unreasonable" for the respective Applicant (see ECtHR cases, Anheuser-Busch Inc., application no. 73049/01, Judgment, of 11 January 2007, paragraph 83, Kuznetsov and others v. Russia, application no. 184/02 Judgment of 11 January 2007, paragraphs 70-74 and 84; Păduraru v. Romania, no. 63252/00, Judgment, of 1 December 2005, paragraph 98; Sovtransavto Holding against Ukraine, application no. 48553/99, Judgment, of 25 July 2007, paragraphs 79, 97 and 98; Beyeler v. Italy [GC] cited above, paragraph 108; see also, case cited above KI122/16, Applicant Riza Dembogaj, paragraph 57; cases KI154/17 and 05/18, Applicant Basri Deva, Afërdita Deva and Limited Liability Company "BARBAS", paragraphs 60 to 65; as well as case KI121/19, Applicant Ipko Telecomunications, Resolution on Inadmissibility of 29 July 2020, paragraph 58, and references used therein).

(ii) Application of the above principles in the circumstances of the present case

171. The Court has already found that the Applicant has been violated the right to a fair and impartial trial, as a result of the lack of reasoning of the Judgment of the Supreme Court. In the following, the Court then examine whether the Applicant has had his right to a fair and impartial trial violated as a result of the manifestly erroneous interpretation of the law. In applying the general principles in the circumstances of the present case, the Court shall also take into account whether the lack of reasoning of the judgment has affected the erroneous interpretation and application of the law, which could consequently have resulted in arbitrary conclusions.

172. In addition, the Court reiterates that the specific legal basis in the preliminary proceeding conducted in the framework of the administrative proceeding, initiated at the request of claimants/proposers, is Article 22, paragraphs 2 and 6 of the LAC, which stipulate the criteria that must be met in order for the court to allow the postponement of the execution of an administrative decision, as is the case with the Decisions of the relevant Ministry of Environment for the issuance of the water permit, of 5 June 2020 and the Decision on the Issuance of the Environmental Permit, of 26 June 2020.

173. In the following and in the context of this, paragraphs 2 and 6 of Article 22 of the LAC stipulate that:

> *[...]*
> *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.*

174. Regarding the interpretation and application of Article 22 of the LAC, the Court considers that the Supreme Court in general has found that: *"the claimants - the proposers with the lawsuit and the evidence attached to the lawsuit, 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*".

175. Based on the reasoning given in the Judgment of the Supreme Court, the Court notes that despite the Court's clear recommendations in Judgment KI 202/21, and dealing with the shortcomings of the challenged judgment in that case, namely the shortcomings in the content and quality of the reasoning, the Supreme Court, completely disregarded the recommendations of the Court given in Judgment KI202/21, rendered an identical judgment [ARJ. UZVP. No. 119/22 of 16 December 2022], which the Applicant challenges in this case. The Supreme Court in the new Judgment, respectively in the challenged judgment, has not reviewed and has not given reasoning for the fulfilment of each criterion set out in Article 22 of the LAC, in order for the latter to be able to ascertain that all criteria set out in this provision are met cumulatively.

176. Therefore, the Court considers that the lack of reasoning of the decision, which is directly related to the interpretation and application of the law, respectively to the criteria set out in paragraph 2 of Article 22 of the LAC, has resulted in arbitrary conclusions for the Applicant.

177. Finally, based on the above elaboration and applying the principles of the Court's case law and that of the ECtHR regarding the clearly erroneous interpretation and application of the law, the Court considers that the interpretation and application of Article 22 *of the LAC is "manifestly erroneous*", and consequently has resulted in "*arbitrary*" or "*manifestly unreasonable* conclusions" for the Applicant.

178. Consequently, the Court holds that the Judgment [ARJ-UZVP.no. 119/2022] of 16 December 2022 of the Supreme Court, in terms of interpretation and application of the law is not in accordance with the right to a fair and impartial trial, guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

II. Regarding the Applicant's allegations regarding alleged violations of the Applicant's rights guaranteed by Article 46 [Protection of Property] of the Constitution in conjunction with Article 1 [Protection of property] of Protocol no. 1 of the ECHR.

179. The Court, as noted above, held that Judgment [ARJ-UZVP no. 119/22] of 16 December 2022 of the Supreme Court is not in accordance with the Applicant's right to a fair and impartial trial, guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, and therefore does not consider it necessary to examine separately his allegations of violation of the right to property, guaranteed by Article 46 of the Constitution in conjunction with Article 1 of Protocol no. 1 of the ECHR.

180. Finally, the Court points out that this judgment concerns only the procedure regarding the suspension of the challenged decisions on the granting of water and environmental permits by the Ministry responsible for the environment, before the regular courts, until the latter decide on the merits of the lawsuit. The issue of the legality of the challenged

decisions of the Ministry responsible for environment is being considered before the regular courts and the Court's judgment in this case in no way prejudices their decision-making regarding the lawsuit against the challenged decisions of the ministry in question.

Request for interim measure

181. 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 Effects 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."

182. The Court also refers to Rule 45 (2) (b) [Decision-making Regarding the Request for Interim Measure] of the Rules of Procedure which specifies: "(2) (b) *The justification for either granting or denying the request for an interim measure, based on the criteria established in Article 27 (Interim measures) of the law"*.

183. 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.

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

CONCLUSION

185. In summary, the Court holds that the Judgment [ARJ. UZVP. No. 119/22, of 16 December 2022] of the Supreme Court does not meet the condition for "fair trial" in accordance with paragraph 1 of Article 31 of the Constitution in conjunction with Article 6, paragraph 1, of the ECHR due to the lack of adequate reasoning of the decision and interpretation of the law that is not in compliance with the Constitution.

186. In addition, the Court holds that, considering that it has held that with the challenged Judgment [ARJ. UZVP no. 119/2022] of the Supreme Court, of 16 December 2022, the right of the Applicant to a fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR has been violated, therefore it

does not consider it necessary to examine separately its allegations of violation of the property right guaranteed by Article 46 of the Constitution in conjunction with Article 1 of Protocol no. 1 of the ECHR.

187. Finally, the Court considers that taking into account the fact 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, consequently, the imposition of the interim measure is unnecessary.

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 45 (2) (b) and 48 (1) (b) of the Rules of Procedure, in the session held on 30 August 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 of the Republic of Kosovo, and Article 6 (Right to a fair trial) of the European Convention on Human Rights;

III. TO DECLARE Judgment [ARJ. UZVP. No. 119/22] of the Supreme Court of 16 December 2022 invalid;

IV. TO REMAND Judgment [ARJ. UZVP. No. 119/22] of the Supreme Court of 16 December 2022 for reconsideration, in accordance with the Judgment of this Court;

V. TO HOLD that Decision [AA. No. 320/21] of 26 April 2021 of the Court of Appeals shall remain 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 60 (5) of the Rules of Procedure, by 31 January 2024, about the measures taken to implement this Judgment;

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. TO HOLD that this Judgment is effective on the day of publication in the Official Gazette of the Republic of Kosovo, in accordance with paragraph 5 of Article 20 of the Law.

Judge Rapporteur	**President of the Constitutional Court**
Radomir Laban	Gresa Caka-Nimani

This translation is unofficial and serves for informational purposes only.