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

Prishtina, on 28 September 2023
Ref. no.: MK2285/23

CONCURRING OPINION

of Judge

RADOMIR LABAN

in

case no. KI21/23

Applicant

"Kelkos Energy" L.L.C.

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

Expressing from the beginning my respect and agreement with the opinion of the majority of judges that in this case there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the European Convention for the Protection of Human Rights (hereinafter: the ECHR), I as a judge of the Constitutional Court, consider that there has been another violation of the Applicant's human rights guaranteed by the Constitution and which relates to the violation of the Applicant's right guaranteed by Article 46 [Protection of Property] in conjunction with Article 1 [Protection of property] of Protocol no. 1 of the ECHR, which I will try to reason below.

As a judge, I agree with the factual situation as stated and presented in the judgment and I accept the same factual situation as correct. I also agree with the way the Applicant's allegations were stated and presented in the judgment.

For the above, and in accordance with Rule 57 of the Rules of Procedure of the Constitutional Court, I will present My concurring opinion in writing. In order to follow as easily and clearly as possible the reasoning of My concurring opinion, I will **(I)** repeat the allegations of the Applicant regarding the alleged violations of the Applicant's rights guaranteed by Article 46 [Property Protection] of the Constitution in conjunction with Article 1 [Protection of property] of Protocol no. 1 of the ECHR; **(II)** assess the application of Article 46 [Protection of Property] of the Constitution and Article 1 of Protocol no. 1 of the ECHR; **(III)** present the

content of Article 46 [Protection of Property] of the Constitution and Article 1 of Protocol no. 1 of the ECHR; **(IV)** reason the basic principles of Article 46 [Protection of Property] of the Constitution and Article 1 of Protocol no. 1 of the ECHR; **(V)** apply the abovementioned basic principles in the present case; **(VI)** draw a conclusion regarding the 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.

(I) 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

1. The Applicant alleges that the challenged judgment of the Supreme Court, which postponed the execution of the license for the production of electricity by this company, directly violated the Applicant's right to property, guaranteed by Article 46 of the Constitution in conjunction with Article 1 of Protocol no. 1 of the ECHR. Regarding this allegation of violation of its right to property, the Applicant 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 SA et al v. Belgium; Capital Bank AD v. Bulgaria; Lönnroth v. Sweeden and Saliba v. Malta.

2. The Applicant claims that taking into account all legal acts and the imperative fundamental norms they contain regarding the right to property, and especially "the determination of the Constitution regarding this right - it is clear that - the right to property is fundamental and inviolable human right", considering that this right is included in Chapter II of the Constitution on fundamental rights and freedoms.

3. The Applicant alleges: "*Taking into account the case law of the ECtHR - through Article 53 of the Constitution - it should be borne in mind that* ***the concept of ownership*** *is broadly interpreted. According to the case law of the ECtHR - this concept does not only include property and the right to it - in the material and classical meaning of the word, but also* ***includes a wide range of monetary rights*** *–arising, among the other, from licenses* ***as well as the rights arising from running a business*** *A. Grgić; Z. Mataga; M. Longar and A. Vilfan, The Right to property under the European Convention on Human Rights, p. 7, paragraph 2] [Emphasis aded] Even going further, in Pressos Compania Naviera SA et al v. Belgium, the ECtHR concluded that even a claim for compensation can be considered a property - in the sense of property and enjoys protection under Article 1, Protocol 1, of the ECHR - when it is sufficiently proven by the party that there is a legitimate expectation that such a claim can be realized.* "

4. In the following, the Applicant emphasizes that based on the case law of the ECtHR, obtaining a license represents a legitimate expectation that it will carry out its activity unhindered due to the fact that it fulfilled the legal requirements at the time when it was granted the license, which is why the Applicant's legitimate expectation enjoys protection from Article 46 of the Constitution in conjunction with Article 1 of Protocol no. 1 of the ECHR.

5. According to the Applicant: "*The licenses for the production of electrical energy license granted to the Applicant „Kelkos Energy" by the ERO are of essential importance for the activity of this company because at the time of the execution of some court decision which temporarily prohibits the operation based on that license, the company is forced to completely suspend its activity until the merits of the case are resolved by the court"*. In this regard, it states: *"given the overload of the respective*

courts and practice in other cases, it is expected that the decision on the merits of the matter in question can be made after more than three (3) years."

6. In support of the previous allegation, the Applicant specifies: "*In order to determine the damage that will be unfairly caused to the Applicant, it is enough to look at the production of electricity from renewable energy sources for the period 2017-2020, which it produced by the latter. According to KOSTT reports, the electricity produced by the Applicant and introduced into the grid for 2019, amounts to 46.526 MWh of electricity out of 191,700,000 kWh produced from renewable sources in Kosovo. Also, in 2020 (as a pandemic year), the Applicant produced 35,744.51 MWh of clean electricity. These data prove that, due to the impossibility of producing electricity, extremely great damage will be caused to the Applicant*".

7. The Applicant further alleges that *"The damage, apart from being monetary, is also irreparable. This is because, as it is known in multinational corporations - part of which is the Applicant. "Kelkos Energy is part of Kellag", the financing structure and financial instruments for financing such investment projects have become complicated. In the event that the return of the invested funds is not started for such a long period (at least 3 years), this will result in the financial impossibility of survival for the Kelkos Company, and there will be a serious risk of liquidation"*.

8. The Applicant also refers to the principle of legitimate expectation, emphasizing that provisions of Article 1 of Protocol no. 1 of the ECHR shall not *"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 of *Lonnroth v. Sweden,* states that the ECtHR *"established three (3) basic principles, which apply to the intervention/restriction of property rights and they are as follows: (i) Principle of legality; (ii) Principle of the existence of a legitimate goal in the protection of the public interest and (iii) Principle of a fair balance between the protection of the public interest and the right to property of a certain person (proportionality)"*.

9. The Applicant specifies that interference with the right to property can be justified only *"if it is supported by law [referring to the ECtHR case Saliba v. Malta]; is based on a legitimate purpose that is in the public or general interest and the limitation of this right should be based on the principle of proportionality, namely - that no one is deprived if it is possible to achieve the protection of the general interest by other (milder) means/measures"*.

10. Referring to the ECtHR case *Capital Bank AD v. Bulgaria* the Applicant adds: *"The ECtHR in case Capital Bank AD v. Bulgaria no. 49429/99, found that the criterion of legality assumes, among other things, that the domestic law must provide a mechanism for protection against arbitrary interference by public authorities. The Court further emphasizes that "the concept of legality and the rule of law in a democratic society requires that measures that affect human rights can be subject to review by independent judicial bodies." Therefore, according to the ECtHR, "any interference with the peaceful enjoyment of property must be accompanied by procedural guarantees that enable individuals or legal entities to present their case before the responsible authorities in order to seriously challenge the steps by which the rights guaranteed under this provision have been interfered"*.

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

12. The Applicant states that due to the erroneous application of procedural law and the lack of a convincing reasoning in the decision of the Supreme Court, it can be said that the interference with the applicant's property rights was not accompanied by sufficient guarantees against arbitrariness, and as a consequence, was not in accordance with Article 1 of Protocol 1 of the ECHR.

(II) Assessment of the application of Article 46 [Protection of Property] of the Constitution and Article 1 of Protocol no. 1 of the ECHR

13. First I will assess whether the license and work permit represent "*property*" within the meaning of these provisions, in order to determine whether Article 46 [Protection of Property] of the Constitution and Article 1 of Protocol no. 1 of the ECHR are applicable in the circumstances of the present case, that is, whether the Applicant's allegations of violation of these provisions are *ratione materiae* compatible with the Constitution and the ECHR, as established in Rule 34 (3) (b) of the Rules of Procedure of the Court.

14. I recall that the Applicant is an economic entity that deals with the production of electrical energy from renewable sources in Kosovo, which for the purpose of production has established the necessary infrastructure for the production of electricity from renewable sources.

15. The Applicant has conducted its activity based on the relevant decisions (licenses) of the state bodies, namely ERO, which has continuously issued decisions (licenses) 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.

16. The Applicant, after the construction of the infrastructure in order to start his business activity, namely the production of electricity from renewable sources, applied and secured the water permits, the relevant decisions for environmental permits as well as the relevant licenses for the production of electrical energy, granted by the MEA and ERO, as follows: (i) Decision on Water Permit for HC Belaja L.U.13,4981/20 of 03.11.2020; (ii) Decision on WP for HC Deçan WP 14,4982/20 of 04.11.2020; (iii) Decision on the environmental permit (EP) for HC Belaja 19,5837/ZSP of 06.11.2020; (iv) Decision on EP for HC Deçani 19,5837/ZSP of 06.11.2020; (v) ERO decision for HC Deçani V1303-2020 of 12.11.2020; (vi) Decision of ERO for HC Belaja V-1304-2020 of 12.11.2020; (vii) License for electricity production for HC Deçani LJ-49/20 of 12.11.2020; and (viii) Electricity production license for HC Belaja LI-50/20 of 12.11.2020.

17. In the case before the Court, the Applicant claims that the regular courts by imposing the interim measure ordered that (i) the proposal of the claimant/proposer F.S is APPROVED as grounded; (ii) the execution of the decisions of the first respondent – MEE IS POSTPONED as it follows: 1. Water Permit for HC Belaja, LU. 13. 4981/20, of 03.11.2020; 2. decision on Water Permit for HC Deçani, L.U. 14,4982/20, of 04.11.2020, 3. decision on Environmental Permit for HC Belaja, 19/5837/ZSP, of

06.11.2020, and 4. decisions on Environmental Permit for HC Deçani, 19/5837/ZSP, of 06.11. 2020, until the court by final decision decides on the lawsuit 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 Electricity Production for HC Deçani, Li_ 49/20 of 12.11.2020; and 4. License for Electricity Production for HC 6 Belaja, Li_50 /20, of 12.11.2020, until the court decides by a final court decision regarding the claimant's lawsuit

18. The Applicant alleges that the imposition of an interim measure for an indefinite period actually resulted in the revocation of business licenses, and the decisions of the regular courts, namely, the challenged judgment ARJ. UZVP no. 119/22, of the Supreme Court of Kosovo of 16 December 2022, in violation of Article 46 [Protection of Property] of the Constitution, as well as Article 1 of Protocol no. 1 of the ECHR

19. The Applicant alleges: "*The licenses for the production of electrical energy that were given to the applicant "Kelkos Energy" by the ERO are essential for the activity of this company, because at the moment of the implementation of the decision which temporarily prohibits the operation on the basis of that license, the company was forced to completely suspend its activity until the case is decided on merits by the court regarding this issue, 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.*"

20. For the purpose of examining the allegations of the Applicant regarding the violation of Article 46 of the Constitution in conjunction with Article 1 of Protocol no. 1 of the ECHR, I will first assess whether the license represents "*property*" within the meaning of these provisions, in order to determine whether Article 46 [Protection of Property] of the Constitution and Article 1 of Protocol no. 1 of the ECHR are applicable in the present case.

21. In this regard, I refer to the case law of the ECtHR, which established that a license to conduct business constitutes property, the revocation of that license represents an interference with the right guaranteed by Article 1 of Protocol no. 1 (see ECtHR cases Megadat.com SRL v. Moldova, No. 21151/04, judgment of 8 April 2008, paragraphs 62-63; Bimmer SA v. Moldova, No. 15084/03, judgment of 10 July 2007, paragraph 49; Rosenzweig and Bonded Warehouses Ltd. v. Poland, of 30 November 2005, application no. 51728/99 paragraph 49; Capital Bank AD v. Bulgaria, of 24 February 2006, application no. 49429/99, paragraph 130 ; Tre Traktörer Aktiebolag v. Sweden, no. 10873/84, judgment of 7 July 1989, paragraph 53; Vékony v. Hungary, no. 65681/13 judgment of 1 June 2015, paragraph 29; Fredin v. Sweden (No. 1), no. 12033/86, judgment of 18 February 1991, paragraph 40; Malik v. United Kingdom, no. 23780/08, judgment of 24 September 2012, paragraph 90).

22. I first note that the ECtHR, in its case law has consistently considered the license an "*asset*" in the sense of Article 1 of Protocol no. 1 of ECHR, even considered that the cancellation of a valid license for conducting business activity, in certain cases, represents a violation of the right to peaceful enjoyment of property from Article 1 of Protocol no. 1 of the Convention (see, ECtHR cases Megadat.com SRL v. Moldova, no. 21151/04, judgment of 8 April 2008, paragraph 63; Bimmer S.A. v. Moldova, no. 15084/03, judgment of 10 July 2007, paragraph 49).

23. Furthermore, in the light of the Court's case law, the withdrawal of valid business licenses constitutes an interference with the right to peaceful enjoyment of property guaranteed by Article 1 of Protocol no. 1. It represents a measure of control of the use of

property, which is examined according to the second paragraph of Article 1 of Protocol no. 1 of the ECHR (see ECtHR cases Tre Traktörer Aktiebolag v. Sweden, cited above, paragraph 55; Rosenzweig and Bonded Warehouses Ltd. v. Poland, cited above, paragraph 49).

24. I further recall that having a license was one of the principal conditions on which the applicant bank depended for carrying on its business, and that its withdrawal had the effect of automatic termination of further economic activity of the applicant. Therefore, the cancellation of the license represented an interference with the property of the applicant bank and Article 1 of Protocol no. 1 is applicable (see case Capital Bank AD v. Bulgaria, cited above, paragraph 130).

25. Then, in the case of Vékony v. Hungary, the ECtHR considered an application in which there was a legal cancellation of the applicant's previous license to sell tobacco, instead of which he was not granted another one in the tender process. In that case, the ECtHR emphasized that it was difficult for the Court to imagine that this permit, which once guarantees a significant share of the applicant's turnover, is not considered "*asset*" within the meaning of Article 1 of Protocol no. 1. The ECtHR further recalled that the withdrawal of the license to carry out business activities represented an interference with the right to peaceful enjoyment of property as contained in Article 1 of Protocol no. 1. Considering the obvious economic interests that connect the retail sale of tobacco with the applicant's business in general, the Court assessed that the statutory cancellation of the long-term tobacco license represented an interference with his rights from Article 1 of Protocol no. 1 and that regardless of the harmful consequences of smoking that are made possible by the retail sale of tobacco. (see ECtHR case, Vékony v. Hungary, cited above, paragraph 29).

26. Further, according to the ECtHR, a licence for nationwide terrestrial television broadcasting without the allocation of broadcasting frequencies was deprived of its substance (see ECtHR case, Centro Europa 7 S.R.L. and di Stefano v. Italy, nr. 38433/09, judgment of 07 June 2012, paragraph 177).

27. Similarly, according to the ECtHR, a mussel seed fishing authorization, connected to the usual conduct of the applicant's aquaculture business, was considered a "*possession*" and the temporary prohibition on mussel seed fishing was regarded as a restriction placed on such permit (see ECtHR case, O'Sullivan McCarthy Mussel Development Ltd v. Ireland, no. 44460/16, judgment of 08 October 2018, paragraph 89).

28. Therefore, based on everything stated above, I conclude that the business license represents "*property*" under Article 46 of the Constitution and Article 1 of Protocol no. 1 of the ECHR.

29. In the present case, I find that the Applicant had valid business licenses and a work permit, namely the decisions of the Energy Regulatory Office 1. decision V_1303 _2020 of 12.11.2020; 2. decision V_1304_ 2020 of 12.11.2020; 3. licenses for the production of electricity for HPP Dečani, Li_ 49/20 of 12.11.2020 and 4. license for the production of electricity for HPP Belaja, Li_50/20 of 12.11.2020, therefore, I conclude that the Applicant's allegation falls under Article 1 of Protocol no. 1 of the ECHR, as well as Article 46 of the Constitution and that both of these articles are applicable in the present case.

(III) Content of Article 46 [Protection of Property] of the Constitution and Article 1 of Protocol no. 1 of the ECHR

30. In this regard, I first recall the content of Article 46 [Protection of Property] of the Constitution and Article 1 of Protocol no. 1 of the ECHR.

> 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".*
>
> *[...]*
>
> *Article 1 [Protection of property] of protocol no. 1 of the ECHR:*
>
> 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.*
>
> 2. *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

(IV) Basic principles of Article 46 [Protection of Property] of the Constitution and Article 1 of Protocol no. 1 of the ECHR

31. The content of Article 1 of Protocol no. 1 of the ECHR and its application, have been interpreted by the ECtHR through its case law, as noted above, the Court will refer to the interpretation of the Applicant's allegations of violation of Article 46 of the Constitution in conjunction with Article 1 of Protocol no. 1 of the ECHR.

32. As for the rights guaranteed and protected by Article 46 of the Constitution, the Court first assesses that the right to property according to paragraph 1 of Article 46 of the Constitution guarantees the right to possess property; paragraph 2 of Article 46 of the Constitution defines the way of using the property, clearly specifying that its use is regulated by law and in accordance with the public interest; and, in paragraph 3, guarantees that no one can be deprived of property arbitrarily, also defining the conditions under which property can be expropriated (see case of the Court, KI50/16, Applicant Veli Berisha and others, Resolution on Inadmissibility of 10 March 2017, KI 67/16, Applicant Lumturije Voca, Resolution on Inadmissibility, of 6 December 2016).

33. I recall that based on paragraph 2 of Article 46 of the Constitution, the right to property can be limited by law. In this case, I consider that the Assembly, as a legislative body, has the right to regulate by law the use of property, in accordance with the public interest.

34. As for the rights guaranteed and protected by Article 1 of Protocol no. 1 of the ECHR, I note that the ECtHR has established that the property right consists of three different rules. The first rule, which is defined in the first sentence of the first paragraph, and which has a general nature, reflects the principle of peaceful enjoyment of property. The second rule, in the second sentence of the same paragraph, includes deprivation of

property and subjects it to certain conditions; The third rule, which is included in the second paragraph of this article, recognizes the states, among others, the right to control the use of property in accordance with the general interest, with the implementation of those laws that they consider necessary for this purpose (see ECtHR case, Sporrong and Lonnrot v. Sweden, nos. 7151/75, 7152/75, Judgment of 23 September 1982, paragraph 61; and Court case, KI86/18, Applicant Slavica Đordević, Judgment of 3 February 2021, paragraph 140).

35. However, all the above rules are not "distinct" of being unconnected. The second and third rules are concerned with particular instances of interference with the right to the peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see ECtHR cases Bruncrona v. Finland, of 16 February 2005, Application No. 41673/98, paragraph 65; Anheuser-Busch Inc v. Portugal, of 11 January 2007, Application No. 73049/01, paragraph 62; James and Others v. the United Kingdom, No. 8793/79, Judgment of 21 February 1986, paragraph 37, Beyeler v. Italy, No. 33202/96, Judgment of 5 January 2020, paragraph 98, and see Court case KI129/16, applicant "KOSBAU GmBH", Resolution on Inadmissibility of 13 November, 2017, paragraph 35).

36. The above provisions, however, will not in any way diminish the right of the 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. (see ECtHR cases, The former King of Greece and others v. Greece, no. 25701/94, Judgment of 23 November 2000, paragraph 50).

37. However, the interference must meet certain requirements: it must comply with the principle of legality and pursue a legitimate aim in a way that is reasonably proportionate to the aim sought to be achieved (see case Beyeler v. Italy, cited above, paragraphs 108 - 114).

38. This approach represents the structure of the method that the Court uses to examine cases where it is convinced that Article 46 of the Constitution and Article 1 of Protocol no. 1 are applicable. It consists of a series of successive steps in which the following questions are resolved: Has there been any interference with the Applicant's right to the peaceful enjoyment of his "*property*"? If so, does that interference constitute a deprivation of property? If not, is it about controlling the use of the property? If the measures that affected the rights of the applicant cannot be considered either deprivation or control of the use of property, the Court interprets the factual situation of the case in the light of the general rule respecting the peaceful enjoyment of "*property*".

(V) Application of the above-mentioned basic principles in the present case

39. To examine the Applicant's allegations regarding the violation of Article 46 [Protection of Property] of the Constitution and Article 1 of Protocol no. 1 of the ECHR, the Court must first apply a test that consists of 4 (four) steps, namely it must determine; **(1)** if there have been obstacles or interference in the peaceful enjoyment of property and what type of interference exists in the present case; **(2)** was the obstacle or interference in the peaceful enjoyment of property prescribed by law; **(3)** whether the obstruction or interference with the peaceful enjoyment of the property had a legitimate aim; and **(4)** whether the obstacle or interference with the peaceful enjoyment of the property was proportionate.

(1) whether there have been obstacles or interference with the peaceful enjoyment of the property and what kind of interference exists in the present case

40. I note that the Applicant had a valid license and work permit, namely; Ministry of Economy and Environment (hereinafter: MEE) 1. Water Permit for HC Belaja, LU. 13 4981/20, of 03.11.2020; 2. decision on Water Permit for HC Deçani, L.U. 14,4982/20, of 04.11.2020, 3. decision on Environmental Permit for HC Belaja, 19/5837/ZSP, of 06.11.2020, and 4. decisions on Environmental Permit for HC Deçani, 19/5837/ZSP, of 06.11. 2020, and the decisions and licenses of the Energy Regulatory Office (hereinafter: ERO), as follows: 1. Decision V_ 1303_2020, of 12.11.2020; 2. decision V_1304_2020, of 12.11.2020, 3. License for Electricity Production for HC Deçani, Li_ 49/20 of 12.11.2020; and 4. License for Electricity Production for HC Belaja, Li_50 /20, of 12.11.2020.

41. From the case file, it follows that the claimant filed a lawsuit with the Basic Court in Prishtina, Department for Administrative Matters, on 04 December 2020, for the annulment of the above-mentioned decisions of the respondent with the reasons as in the lawsuit. Along with the lawsuit, he also submitted a proposal to postpone the execution of the decisions.

42. The Basic Court in Prishtina, acting upon the lawsuit, by decision A. no. 2081/20, of 08 December 2020 approved as grounded the request of the claimant to postpone the execution of the decisions of the respondents and suspended the execution of licenses for an indefinite period until the Court decides by a final court decision regarding the lawsuit of the claimant.

43. The Court of Appeals, by decision AA. no. 2/21 of 14 January 2021, remanded the case to the Basic Court for retrial.

44. The Basic Court in Pristina, in the repeated proceedings, by decision A. no. 2081/20, of 11 February 2021, approved again as grounded the request of the claimant to postpone the execution of the decisions of the respondents and suspended the execution of licenses for an indefinite period until the Court decides by a final court decision regarding the lawsuit of the claimants.

45. The Court of Appeals by decision AA. no. 320/21 of 26 April 2021, approved as grounded the appeals of the respondents and modified by decision A. no. 2081/20 of the Basic Court in Prishtina of 11 February 2021, so that it rejected the claimant's proposals for delaying the execution of the respondents' decisions and suspension of the execution of licenses.

46. On 28 July 2021, the Supreme Court by the Judgment [ARJ. UZVP. No. 74/2021] decided: (i) the request of the claimants F.S., Xh.K., and M.L., for an extraordinary review of the judicial decision filed 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 Matters A-U. No. 208/20 of 1 February 2021 is upheld.

47. Based on the above, I note that the Basic Court in Prishtina, in the repeated proceedings, by decision A. no. 2081/20, of 11 February 2021, approved again as grounded the request of the claimant to postpone the execution of the decisions of the respondents and suspended the execution of licenses for an indefinite period until the Court decides by a final court decision regarding the lawsuit of the claimant.

48. The Court further establishes that the Supreme Court by judgment [ARJ. UZVP no. 74/2021] in point (III) upheld the decision of the Basic Court in Prishtina - Department for Administrative Matters A-U. no. 208/20 of 11 February 2021, whereby the claimant's request to postpone the execution of the respondents' decisions and suspend the execution of licenses for an indefinite period was approved as grounded until the Court decides by a final court decision regarding the claimant's lawsuit.

49. After that, on 10 November 2021, the Applicant submitted a request to the Court under number KI202/21, challenging Judgment [ARJ. UZVP no. 74/2021] of the Supreme Court. The Applicant claimed, among other things, that the judgment of the Supreme Court was characterized by a lack of reasoning related to his essential allegations as well as a violation of the right to property.

50. On 14 November 2022, the Court by Judgment KI202/21 found that there has been a violation of rights guaranteed by the Constitution because the Judgment [ARJ. UZVP no. 74/2021] of the Supreme Court of 28 July 2021, was not 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. By Judgment KI202/21, the Court concluded that the judgment of the Supreme Court [ARJ. UZVP no. 74/2021] of 28 July 2021 does not meet the standards of the reasoned decision and requested an answer from the Supreme Court in order to respect the rights of the Applicant and meet the standards of the right to a reasoned decision.

51. On 16 December 2022, after the Court's judgment in case no. KI202/21, the Supreme Court rendered its new and second judgment [ARJ. UZVP. no. 119/22], considering that the request for extraordinary review of the court decision submitted against the decision of the Court of Appeals was grounded, quashed Decision AA no. 320/21 of the Court of Appeals and upheld Decision A-U. no. 208/20 of the Basic Court in Prishtina - Department for Administrative Matters of 01 February 2021.

52. Therefore, I conclude that the Applicant's valid business license and work permit has been suspended or delayed based on the decisions of public authorities and regular courts for an indefinite period until the courts decide by a final court decision regarding the lawsuit of the claimants.

53. The Court note that the measures that the ECtHR, according to the third rule, qualified as control of the use of property cover a variety of situations, including, for example, the following: revocation of licenses or changes to the conditions of licenses affecting the conduct of business (see ECtHR cases, Tre Traktörer Aktiebolag v. Sweden, cited above, paragraph 55; Rosenzweig and Bonded Warehouses Ltd. v. Poland, cited above, paragraph 49; Megadat.com SRL v. Moldova, cited above, paragraph 65; Bimmer S.A. v. Moldova, cited above, paragraph 49).

54. I recall that in accordance with the case law of the ECtHR revocation of licenses or changes to the conditions of licenses affecting the conduct of business represents interference with the right to peaceful enjoyment of property guaranteed by Article 1 of Protocol no. 1. It represents a measure of control of the use of property, which is examined according to the second paragraph of Article 1 of Protocol no. 1 (see ECtHR cases Tre Traktörer Aktiebolag v. Sweden, cited above, paragraph 55; Rosenzweig and Bonded Warehouses Ltd. v. Poland, cited above, paragraph 49).

55. Therefore, I conclude that the Supreme Court by judgment [ARJ. UZVP no. 119/22] which, in point (III), upheld the decision of the Basic Court in Prishtina - Department

for Administrative Matters A-U. no. 2081/20 of 11 February 2021, and which approved as grounded the request of the claimant to postpone the execution of the decisions of the respondents and suspend the execution of the license for an indefinite period until the Court decides by a final court decision regarding the lawsuit of the claimant, delayed the execution, namely the suspension of the valid business license of the Applicant, which resulted in interference with the right to peaceful enjoyment of the Applicant's property, namely control of use of the Applicant's property, and as a result the Applicant is immediately prevented from carrying out economic activity and is prevented from carrying out his business activity for which he had valid permits.

56. However, I recall that despite the fact that the courts determine that the decisions of public authorities have violated the right to peaceful enjoyment of the Applicant's property, in order to prove the violation, other criteria must be met, which were declared in the case Megadat. com SRL v. Moldova, the ECtHR stated that, in order for the measure of control of the use of property to be justified and not to constitute a violation of the right to property, the latter must be prescribed by law, in accordance with the general interest and that there is a relationship of proportionality between the measure granted and the aim sought to be achieved (see ECtHR case Megadat.com SRL v. Moldova, cited above, paragraph 66).

(2) was the obstacle or interference with the peaceful enjoyment of property prescribed by law

57. In order to carry out this step of the test, namely, to determine whether the obstruction or interference with the peaceful enjoyment of property was foreseen by law, I will first describe **(a)** the general principles of the ECtHR indicated in the case law regarding the expression prescribed by law and then carry out **(b)** Application of the general principles prescribed by law.

(a) General principles of the ECtHR presented in the case law regarding the expression „prescribed by law"

58. Any interference with the rights protected by Article 1 of Protocol no. 1 must be in accordance with the presumption of legality (see ECtHR cases Vistiņš and Perepjolkins v. Latvia, no. 71243/01, judgment of 25 October 2012, paragraph 95; Béláné Nagy v. Hungary, no. 53080/13, judgment of 13 December 2016, paragraph 112). The expression "under the conditions provided by law" which refers to any interference with the right to the peaceful enjoyment of "property" should be interpreted in the same way as the expression "in accordance with the law" under Article 8 of the ECHR in relation to the interference with the rights protected by that provision or the term "prescribed by law' which refers to the interference with the rights protected under Articles 9, 10 and 11 of the ECHR.

59. The principle of legality is the first and most important requirement from Article 1 of Protocol no. 1. The second sentence of the first paragraph allows interference with "property" only "under the conditions provided by law", and the second paragraph recognizes the right of states to control the use of property by applying "laws". In addition, the rule of law, one of the fundamental principles of a democratic society, is part of all articles of the ECHR (Iatridis v. Greece, judgment of 25 March 1999, application no. 31107/96, paragraph 58; Former King of Greece and others v. Greece, cited above, paragraph 79. Broniowski v. Poland No. 31443/96, Judgment of 22 June 2004, paragraph 147).

60. The existence of a legal basis in domestic law is not sufficient in itself to satisfy the principle of legality. In addition, the legal basis must have a certain quality, that is, to be in accordance with the rule of law and provide guarantees against arbitrariness. In this regard, it should be noted that when speaking about the "law", Article 1 of Protocol no. 1 alludes to the same concept that the ECHR refers to in other articles when it uses that expression, a concept that includes laws and case law (see ECtHR cases, Špaček, s.r.o., v. Czech Republic, no. 26449/95, Judgment of 9 November 1999, paragraph 54; Vistiņš and Perepjolkins v. Latvia, cited above, paragraph 96).

61. The principle of legality also implies that the applicable provisions of domestic law are sufficiently accessible, precise and predictable in their application (see ECtHR cases, Beyeler v. Italy, cited above, paragraph 109; Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia, no. 60642/08, judgment of 16 July 2016, paragraph 103; Centro Europa 7 S.R.L. and DI Stefano v. Italy, cited above, paragraph 187).

62. With regard to availability, the term "law" should be interpreted in its material sense, not in its formal sense. Therefore, the fact that certain rules related to the exercise of rights protected by Article 1 of Protocol no. 1 have not been published in official gazettes in the form provided by the law for the adoption of legislative or regulatory instruments that bind citizens and legal entities in general, does not prevent these regulations from being considered law, if the Court is convinced that the public is aware of them in another way (see ECtHR cases, Špaček, s.r.o., v. Czech Republic, cited above paragraphs 57 - 60).

63. Furthermore, I recall that when examined based on Article 1 of Protocol no. 1, the laws with retrospective application which were found to represent legislative interference were nevertheless in accordance with the requirement of legality from Article 1 of Protocol no. 1 (see ECHR cases, Maggio and others v. Italy, no. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, judgment of 31 August 2011, paragraph 60, Arras and others v. Italy, no. 17972/07, judgment of 14 May 2012, paragraph 81).

64. The use of control measures implemented on the basis of laws issued after the occurrence of the facts leading to the interference, as such, are not unlawful (see ECtHR case, Saliba v. Malta, no. 4251/02, judgment of 8 February 2006, paragraphs 39 - 40) unless those laws were enacted specifically to influence the outcome of an individual case. Neither the Convention nor its protocols prevent legislative intervention in existing contracts with retroactive effect (see ECtHR cases, Mellacher and others v. Austria, nos. 10522/83, 11011/84; 11070/84, judgment of 19 December 1989; paragraph 50; Bäck v. Finland, no. 37598/97, judgment of 20 October 2004, paragraph 68).

65. However, in certain circumstances, the retrospective application of legislation which has the effect of depriving a person of existing "property" which was part of his "ownership" may constitute an interference which may infringe the fair balance between the requirements in the general interest on the one hand and the protection of the peaceful enjoyment of the right to "property" on the other (see ECtHR cases, Maurice v. France, no. 11810/03, judgment of 6 October 2005, paragraphs 90 and 93).

66. The principle of legality also includes the duty of the state or other public authority to comply with court orders or decisions taken against it (see ECtHR case, Belvedere Alberghiera S.r.l. v. Italy, no. 31524/ 96, judgment of 30 October 2000, paragraph 56).

67. Finally, in the case of Aliyeva and others v. Azerbaijan, the ECtHR also concluded that when manifestly contradictory decisions, and in particular decisions of the Supreme

Court, where judgments that contained contradictory assessments of the same situation in the applicants' cases were rendered and in cases initiated by other persons, represent interference with the right to the peaceful enjoyment of property, unless a reasonable explanation is given for the differences, such interference cannot be considered lawful for the purposes of Article 1 of Protocol no. 1 of the Convention because they lead to inconsistency of their procedures (see ECtHR case, Aliyeva and others v. Azerbaijan, no. 66249/16 66271/16 75978/16 77309/16 77691/16 1038/17 52821/17, judgment of 21 December 2021, paragraphs 130-135).

(b) Application of general principles "prescribed by law"

68. Regarding this criterion, first of all, I note that the right to peaceful enjoyment of property was interfered with the decision A. no. 2081/20 of the Basic Court in Prishtina of 11 February 2021, which approved as grounded the claimant's request for postponement of the execution of the respondents' decisions and suspended the execution of licenses for an indefinite period until the Court renders a final court decision regarding the claimant's lawsuit..

69. I note that in its reasoning the Basic Court referred to Article 22, paragraph 2 of Law no. 03/L – 202 on administrative conflicts (LAC) which stipulates that: „*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*."

70. Further, the Basic Court in its reasoning also referred to paragraph 6 of Article 22 of the Law no. 03/L – 202 on administrative conflicts (LAC) which stipulates that: „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".

71. Thus, when delaying the execution of the decisions of the respondents and suspending the execution of licenses for an indefinite period, the Basic Court referred to Article 22, paragraph 2 and Article 6 of Law no. 03/L - 202 on Administrative Conflicts (LAC) citing them as a legal basis for delaying the execution of the decisions of the respondents and suspended the execution of licenses for an indefinite period until the Court decides by a final court decision regarding the lawsuit of the claimants.

72. This reasoning is supported by the judgment [ARJ. UZVP no. 74/2021] of the Supreme Court which reasoned; *According to Article 22, paragraph 2 of the Law on Administrative Conflicts is determined that at the request of the claimant, the authority whose act is executed, namely the body that is competent for execution, can postpone the execution until the final judicial decision, if the execution would bring harm to the claimant, which would be difficult to repair, while the postponement is not contrary to the public interest, nor would the postponement bring any great harm to the opposing party or the interested person. According to Article 22, paragraph 6, of the said law it was stipulated that: „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*".

73. Based on the above, I conclude that the interference with the unhindered enjoyment of the Applicant's property was caused by the decisions of regular courts, namely, the Supreme Court, based on the applicable law, that is, Law no. 03/L-202 on

administrative conflicts, which was adopted by the Assembly of the Republic of Kosovo and was applicable at the time of rendering the decision.

74. The principle of legality also means that provisions of the domestic law are sufficiently accessible, precise and predictable in their implementation, in the present case we are dealing with the law voted in a public session of the Assembly, which is published in the official gazette, which is available online on the web. Therefore, the Court concludes that the laws were available to the Applicant and that the norms were precise and predictable.

75. The use of control measures implemented on the basis of laws issued after the appearance of the facts leading to the intervention, as such, are not unlawful (see ECtHR case, Saliba v. Malta, no. 4251/02, judgment of 8 February 2006, paragraphs 39 - 40) unless those laws were enacted specifically to influence the outcome of an individual case. In the present case, I note that the challenged law has a general effect and does not intend to affect the individual case of the Applicant, but had *erga omnes* effect and aimed to regulate the rules of administrative procedure in entirety.

76. I conclude that the measures to control the use of property, namely the measure delaying the execution of the decisions of the respondents and suspending the execution of licenses for an indefinite period, were adopted on the basis of Articles 6 and 22 of Law no. 03/L – 202 on Administrative Conflicts. Also, it is obvious that the provisions of Articles 6 and 22 of Law no. 03/L – 202 on administrative conflicts are generally applicable, that they were valid and effective, that the latter were available and predictable for the applicant.

77. For all what was said above, I find that the provisions of the Law were predictable because they were formulated with the necessary clarity and precision. Therefore, the Court comes to the conclusion that the interference with the Applicant's right to the peaceful enjoyment of the property, which was as a result the challenged decisions of the regular courts in this case, was done on the basis of the law.

(3) has the obstacle or interference with the peaceful enjoyment of property had a legitimate aim (public interest)

78. According to the ECtHR, any interference with the rights and freedoms guaranteed by the Convention must have a legitimate aim. Likewise, in cases involving a positive duty, there must be a legitimate justification for the state's inaction. The very principle of "fair balance" inherent in Article 1 of Protocol no. 1 presupposes the existence of a general interest of the community. Moreover, it must be reiterated that the various rules contained in Article 1 are not distinct, in the sense of incoherence, and that the second and third rules refer only to special cases of interference with the right to the peaceful enjoyment of property. One of the effects of this is that the existence of the "public interest" required in the second sentence, or the "general interest" in the second paragraph, are in fact a consequence of the principle defined in the first sentence, so that interference with the exercise of the right to the peaceful enjoyment of property within the meaning of the first sentence of Article 1 must also have an aim in the public interest (see, ECtHR cases, Broniowski v. Poland, cited above, paragraph 148; Könyv-Tár Kft and others v. Hungary, no. 21623/13, judgment of 18 March 2018, paragraph 45, Beyeler v. Italy, cited above, paragraph 111).

79. The list of purposes for which interference would fall within the scope of the concept of public interest is extensive and may include various new purposes that are subject to public policy considerations in different factual contexts. Specifically, the decision to enact a law confiscating property or social security compensation usually involves

consideration of political, societal and social issues (see ECtHR cases, Former King of Greece and Others v. Greece, cited above, paragraph 87; Vistiņš and Perepjolkins v. Latvia, cited above, paragraph 106).

80. According to the system of protection established by the Convention, the national authorities should carry out an initial assessment of the existence of a problem of public interest that requires measures of deprivation of property or interference with the peaceful enjoyment of "property". And in this, as in other areas covered by the safeguards of the Convention, national bodies enjoy a wide margin of appreciation. For example, the margin of appreciation enjoyed by the legislature in the application of social and economic rules is wide and the Court will respect the legislature's assessment of what is "in the public interest" unless that assessment is manifestly without a reasonable basis (see ECtHR case, Béláné Nagy v. Hungary, cited above, paragraph 113).

81. Furthermore, the concept of "public interest" is necessarily broad (see ECtHR cases Vistiņš and Perepjolkins v. Latvia, cited above, paragraph 106; R.Sz. v. Hungary, no. 41838/11, judgment of 4 November 2013, paragraph 44; Grudić v. Serbia, no. 31925/08, judgment of 24 September 2012, paragraph 75). The Court usually respects states' claims that the intervention it examines was in the public interest, and its review in this regard is of the lowest intensity. Therefore, the Applicant's claim that a particular measure in reality served a different purpose than that invoked by the respondent state in the context of a particular case before the Court rarely has a serious prospect of success. In any case, it is sufficient for the Court that the intervention is in the public interest, even if this interest is different from the interest expressed expressly by the State in the proceedings before the Court. In some cases, the Court even found the aim *ex officio* (Ambruosi v. Italy, no. 31227/96, judgment of 19 January 2001, paragraph 28; Marija Božić v. Croatia, 50636/09, judgment of 24 April 2014, paragraph 58).

82. As a result of this respect for the assessment of domestic authorities, there are rare examples of situations in which the Court has not found that there is a public interest that would justify interference (see ECtHR cases, S.A. Dangeville v. France, no. 36677/97, judgment of 16 July 2022, paragraphs 47 and 53 - 58 – non-refund of prepaid tax; Rosenzweig and Bonded Warehouses Ltd. v. Poland, cited above, paragraph 56 - cancellation of the applicant's business permit without referring to any reasons of public interest by the authorities in authoritative decisions).

83. Returning to the present case, I first note that the right to peaceful enjoyment of property was interfered with by decision A. no. 2081/20 of the Basic Court in Prishtina of 11 February 2021, which approved as grounded the request of the claimant to postpone the execution of the decisions of the respondents and suspended the execution of licenses for an indefinite period until the courts decides by a final court decision regarding the lawsuit of the claimants.

84. I note that in Decision A. no. 2081/20 the Basic Court, when reasoning the public interest stated the following:

> *"From the submission of the representative of the claimants of 02.02.2021, specifically from the attached evidence, such as photos comparing the coast and the riverbed before and after the construction of hydro power plants in 2010-2016, and images of the exhausted river of 26.10.2020, the court established the allegations of the claimants that the execution of the challenged decisions of the respondents destroys and causes irreparable damage to sources of drinking and irrigation water, thus causing damage to both plant and animal life.*

The court once again established that the delay in the execution of the challenged decisions is not in conflict with the public interest and that the claimants' request to protect water sources is legal and fair due to the fact that these sources contain state interest.

Based on this factual situation, the Court came to the conclusion that each claimant separately and all of them together gave reliable, legal and proven and verified arguments that the execution of the challenged decisions would cause irreparable damage to the claimants and the citizens they represent, and based on those reasons, the Court determined that the legal requirements prescribed in Article 10, paragraph 1 of the Law on Administrative Conflicts are fully met.".

85. This reasoning is supported by judgment [ARJ. UZVP. no. 119/2022] of the Supreme Court, which reasoned; *"According to the opinion of this court, the claimants proposers by the lawsuit and the letter of 02.02.2021 have presented convincing evidence that proves the facts that the execution of the decision would cause harm to the citizens who are in their properties and live in that environment where the work of these hydropower plants is foreseen, in which case irreparable damage would be caused to them. This court has also found that the execution of the decisions until the final decision on merits is taken would not be contrary to the public interest and the postponement would not cause a greater loss to the opposing party, namely the interested party. In this way, at the same time, in the future, the possible consequences will be avoided in the event that at the end of the judicial process, it would be proven that the challenged decisions of the respondents were in violation of the law*".

86. Based on the above, I note that the regular courts, that is, the Basic Court and the Supreme Court, in their reasoning, tried to reason that the decisions on postponing the execution of the decisions of the respondents and suspending the execution of licenses for an indefinite period until the Court renders a final decision regarding the lawsuit of the claimants, tried to bring with the reasoning that they were protecting the public interest and trying to avoid irreparable damage that could be caused to "the citizens who are in their properties and live in that environment where the work of these hydropower plants is foreseen, in which case irreparable damage would be caused to them"

87. I recall that the state authorities enjoy a wide margin of appreciation both in terms of the choice of enforcement means and in terms of ascertaining whether the consequences of enforcement are justified by the general interest to achieve the purpose of the given law (see, the case of the ECtHR, Beyeler v. Italy, cited above, paragraph 112).

88. In the end, I conclude that based on the reasoning of the Supreme Court, it can be concluded that the regular courts followed a legitimate aim and tried to justify the protection of the public interest with possible irreparable damage that may occur to the claimants. Therefore, I conclude that the regular courts followed a legitimate aim when rendering the challenged decisions.

(4) was the obstacle or interference with the peaceful enjoyment of the property proportional, namely in fair balance

89. In order to be in accordance with the general rule defined in the first sentence of the first paragraph of Article 1 of Protocol no. 1, the interference with the right to the peaceful enjoyment of "property", in addition to being foreseen by law and in the public

interest, must result in a "fair balance" between the requirements of the public interest of the community and the requirements to protect fundamental rights of the individual (see ECtHR cases, Beyeler v. Italy, cited above, paragraph 107; Ališić and others v. Bosnia and Herzegovina, Croatia, Serbia and the former Yugoslav Republic of Macedonia, cited above, paragraph 108).

90. In other words, in cases involving an alleged violation of Article 1 of Protocol No. 1, the Court must ascertain whether by reason of the State's action or inaction the person concerned had to bear a disproportionate and excessive burden. In assessing compliance with that requirement, the Court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are "practical and effective". In that context, it should be stressed that uncertainty – be it legislative, administrative or arising from practices applied by the authorities – is a factor to be taken into account in assessing the State's conduct (see the ECtHR case, Broniowski v. Poland, cited above, paragraph 151)

91. The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1 of Protocol No. 1 (see ECtHR cases, Sporrong and Lönnroth v. Sweden, cited above, paragraph 69; Brumărescu v. Romania, no. 28342/95, judgment of 28 October 1999, paragraph 78; Saliba v. Malta, cited above, paragraph 36).

92. The issue of whether a fair balance has been struck becomes relevant only once it has been established that the interference in question served the public interest, satisfied the requirement of lawfulness and was not arbitrary (see cases of the ECHR, Iatridis v. Greece, cited above, paragraph 58; Beyeler v. Italy, cited above, paragraph 107).

93. The issue is most often decisive for the determination of whether there has been a violation of Article 1 of Protocol No. 1. The Court normally conducts an in-depth analysis of the proportionality requirement, unlike the more limited review of whether the interference pursued a matter of public interest.

94. The purpose of the proportionality test is to establish first how and to what extent the applicant was restricted in the exercise of the right affected by the interference complained of and what were the adverse consequences of the restriction imposed on the exercise of the applicant's right on his/her situation. Subsequently, this impact is balanced against the importance of the public interest served by the interference.

95. Numerous factors are taken into consideration by the ECtHR in this examination. There is no fixed list of such factors. They vary from case to case, depending on the facts of the case and the nature of the interference concerned. The factors and facts that the court takes into account during the test can be as follows; **a)** Procedural factors, **b)** Choice of measures **c)** Substantive issues relevant to the fair balance test, **d)** Aspects concerning the Applicant **e)** Compensation for interference with ownership as an element of fair balance, and **f)** Conclusion about the fair balance.

a) Procedural factors

96. Although Article 1 of Protocol No. 1 contains no explicit procedural requirements, it has been construed to mean that persons affected by a measure interfering with their "possessions" must be afforded a reasonable opportunity to put their case to the responsible authorities for the purpose of effectively challenging those measures, pleading, as the case might be, illegality or arbitrary and unreasonable conduct (see ECtHR cases, G.I.E.M. S.R.L. and others v. Italy, no. 1828/06, judgment of 28 June

2018, paragraph 302; AGOSI v. the United Kingdom, no. 9118/80, judgment of 24 October 1986, paragraphs 55 and 58 - 60).

97. It is relevant that the main arguments presented by the applicants were carefully examined by the authorities (see ECHR cases, Megadat.com SRL v. Moldova, paragraph 74; Bistrović v. Croatia, no 2577/05, judgment of 31 August 2007, paragraph 37).

98. As for the procedural factors, the Court notes that the Applicant had the opportunity to challenge the decision of the Basic Court, first before the Court of Appeals and later also before the Supreme Court so that the Applicant had a reasonable opportunity to present his arguments before the competent authorities in order to effectively challenge these measures, claiming, depending on the case, that they are unlawful or that they constitute arbitrary and unreasonable conduct (see ECtHR case, G.I.E.M. S.R.L. and others v. Italy, cited above, paragraph 302).

99. I further note that in his referral before the Court, the Applicant presented detailed allegations related to: (i) erroneous application related to the interpretation and application of Article 22 of the LAC in the circumstances of his case; (ii) the claim of violation of the right to a reasoned decision, especially in the proceedings before the Supreme Court; (iii) violation of his right to property; and (iv) an allegation for the determination of interim measure by the Court in relation to the challenged judgment of the Supreme Court.

100. As to the allegation of the lack of active legitimacy of the claiming party, I consider that the Supreme Court did not explain: (i) the relationship between the claiming party and the responding party; (ii) did not explain in what way the claimant's right or legal interest was violated as a natural person; (iii) did not give any explanation as to how the claiming party protects the public interest, given that they are not legitimized as such in accordance with paragraphs 1 and 2 of Article 10 of the LAC.

101. Regarding the allegation of the arbitrary application of Article 22 of the LAC, I consider that in the judgment of the Supreme Court there is no clear lack of key explanations on the application of Article 22 of the LAC to the circumstances of the present case because: (i) the Supreme Court did not weigh the balance between irreparable damage that could be cause on the claimant in relation to irreparable damage that could be caused to the applicant, considering his investment in the infrastructure of hydropower plants; (ii) why delaying the execution of the decisions of MEE and ERO is in the protection of the public interest, and not in the protection of the public interest if the execution of the decisions of the MEE and ERO would be allowed considering that hydro power plants produce and provide renewable electricity for a part of citizens in the municipality of Decani; (iii) there is a lack of reasoning with explanation why the claimant's right to protection against irreparable damages overrides the claimant's right also to protection against irreparable damage; and, (iv) why the interest of the claiming party is also the public interest and why the latter does not apply to the applicant and to a part of the residents of the municipality of Decani who are supplied with electricity from the hydro power plants built by the applicant.

102. Regarding the allegation of violation of the right to a reasoned decision, I consider that the Applicant has not received a specific answer to the specific and essential allegations and that the judgment of the Supreme Court does not provide the guarantees of Article 31 of the Constitution and Article 6 of the ECHR, which include the obligation of the courts to give sufficient reasons for their decisions. I also consider that, taken as a whole, the Supreme Court has not achieved a fair balance between the litigants in this procedure, because it did not respond to any of the essential allegations and arguments

of the Applicant that could affect the final outcome of its case and the proper administration of justice.

103. Regarding the allegation of violation of the right to the protection of property, I consider that the Supreme Court has not given any answer or reasoning to the issues raised by the Applicant.

104. From all of the above, the Court concludes the Supreme Court by new Judgment ARJ. UZVP. No. 119/22 of 16 December 2022 did not act according to the judgment of the Court KI 202 21 and that during the entire procedure before the regular courts the Applicant did not receive adequate and reasoned answers to the main questions of the Applicant during the entire procedure, the regular courts did not examine sufficient care the Applicant's main allegations, which are detailed above (see ECtHR case, Megadat.com SRL v. Moldova, cited above, paragraph 74; Bistrović v. Croatia, cited above , paragraph 37).

105. Therefore, I conclude that in terms of procedural factors, the Applicant had a reasonable opportunity to present its arguments before the competent authorities in order to effectively challenge these measures, claiming, depending on the case, that they are unlawful or constitute arbitrary and unreasonable conduct. However, during the procedure, the regular courts, and especially the Supreme Court, did not examine with sufficient care the Applicant's main allegations.

b) Choice of measures

106. One of the elements of the fair balance test is whether other, less intrusive measures existed that could reasonably have been resorted to by the public authorities in the pursuance of the public interest. However, their possible existence does not in itself render the contested legislation unjustified. Provided that the legislature remains within the bounds of its margin of appreciation, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislature's discretion should have been exercised in another way (see ECtHR case, James and others v. United Kingdom, cited above, paragraph 51; Koufaki and Adedy v. Greece, no. 57657, decision of 7 May 2013, paragraph 48).

107. It may also be relevant whether it would have been possible to achieve the same objective by less invasive interference with the applicant's rights and whether the authorities examined the possibility of applying these less intrusive solutions (see ECtHR cases, OAO Neftyanaya Kompaniya Yukos v. Russia, no. 14902/12, judgment of 8 March 2012, paras 651-654; Vaskrsić v. Slovenia, no. 31371/12, judgment of 25 July 2017, paragraph 83).

108. In the case before me, I consider that the interference with the peaceful enjoyment of property, namely the measure of controlling the use of the property was momentary, which required the termination of the applicant's business activity and that there were no other alternative measures, because after the decision to postpone the execution of the respondents' decisions and suspension of the execution of licenses for an indefinite period, the Applicant was forced to terminate his economic activity with immediate effect, facing a heavy and disproportionate burden.

109. Therefore, I conclude that there were no other alternative measures, such measures that are less intrusive, which the public authorities could reasonably implement in pursuit of the public interest. The Court considers that the same objective could have been achieved by a less invasive interference with the Applicant's rights, and that the

authorities did not consider the possibility of implementing those less intrusive solutions.

c) Substantive issues relevant for the fair balance test

110. In certain cases the fair balance test includes a question whether the special circumstances of the case were sufficiently taken into consideration by the State, including whether control measures of the "property" or a part of property affected the value of the part that is not covered by the measures belonging to the applicant (see ECHR cases, Azas v. Greece, no. 50824, judgment of 21 May 2002, paragraphs 51-53; Interoliva ABEE v. Greece, no. 58642/00, judgment of 10 October 2003, paragraphs 31- 33).

111. I note that in the present case, we are dealing with the control measure of "property", taking into account that the applicant's valid license and work permit were suspended, but there has been no confiscation of property, such as hydro power plants or their equipment, as well as the applicant's business premises.

112. Therefore, the Court concludes that despite the fact that there has been no confiscation of the property, but only a control measure of the "property", by the decision to postpone the execution of the valid license and work permit for an indefinite period of time, the value of parts of the Applicant's property that were not covered by the measures was reduced, because the latter lost their basic function that they had while the license existed.

d) Issues concerning the Applicant

113. One of the significant factors for the balancing test under Article 1 of Protocol No. 1 is whether the applicant attempted to take advantage of a weakness or a loophole in the legal system (see the cases of National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. United Kingdom, no. 117/1996/736/ 933-935, judgment of 23 October 1997, paragraph 109). Similarly, in the case of G.I.E.M. S.R.L. and others v. Italy, cited above, paragraph 301), the Court noted that the degree of culpability or negligence on the part of the applicants or, at the very least, the relationship between their conduct and the part in question may be taken into account in order to assess whether a confiscation was reasonable.

114. Regarding this factor, from the case file there is no information either from the competent state authorities or from the regular courts that the Applicant has violated any norm, has been punished or has tried to take advantage of any weakness or a loophole in the legal order. (see ECtHR case, OGIS-Institut Stanislas, OGEC Saint-Pie X and Blanche de Castille and others v. France, no. 42219/98 et 54563/00, judgment of 27 October 2004, paragraphs 69 and 71).

115. Therefore, I conclude that the Applicant did not attempt to take advantage of any weakness or a loophole in the legal order, that the Applicant was not found culpable or negligent in using the license and work permit in illegal manner, so that the Court can assess that it was necessary to control the use of the property.

e) Compensation for the interference with property as an element of fair balance

116. Compensation terms are material to the assessment of fair balance and, notably, whether the contested measure does not impose a disproportionate burden on the applicant (see ECtHR cases, Holy Monasteries v. Greece, nos. 13092/87 and 13984/88,

judgment of 9 December 1994, paragraph 71; Platakou v. Greece, No. 38460/97, judgment of 5 December 2001, paragraph 55). The taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 of Protocol No. 1 only in exceptional circumstances.

117. What is reasonable will depend on the circumstances of a given case, but a wide margin of appreciation is applicable to the determination of the amount of compensation. The Court's power of review is limited to ascertaining whether the choice of compensation terms falls outside the State's wide margin of appreciation in this domain (see ECtHR case, James and others v. the United Kingdom, cited above, paragraph 54). The Court will respect the legislature's judgment as to the compensation due for interference with peaceful enjoyment of „property" unless it is manifestly without a reasonable foundation (see ECtHR case, Lithgow and others v. the United Kingdom, no 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81, judgment of 8 July 1986, paragraph 122).

118. In the present case, I note that the property control measures took place without any compensation for the Applicant. Measures of control of property without payment of an amount reasonably related to its value will usually constitute unreasonable interference and a complete lack of compensation may be considered justified under Article 1 of Protocol no. 1 only in exceptional circumstances.

119. I note that under the legal systems of the Contracting States, the taking of property in the public interest without payment of compensation is treated as justified only in exceptional circumstances that are not relevant to the present purposes. As regards Article 1 (P1-1), the protection of property rights it provides would be largely illusory and ineffective in the absence of any equivalent principle (see ECtHR case, Lithgow and others v Kingdom of the United States, cited above, paragraph 122).

120. Therefore, I find that the interference with the peaceful enjoyment of the Applicant's property occurred without the payment of any compensation to the Applicant, therefore a "fair balance" between the requirements of the general interest of the community and the requirements of the protection of fundamental rights of the individual was not struck.

f) Conclusion about fair balance

121. Therefore, I as an individual judge regarding the factors that are taken into account to determine whether there has been a proportionality in the interference with the right to the peaceful enjoyment of the Applicant's property, reach the conclusion:

a) that in terms of procedural factors the Applicant had a reasonable opportunity to present its arguments before the public authorities for the purpose of effectively challenging those measures, claiming, as the case may be, that they are illegal or that they constitute arbitrary and unreasonable treatment. However, during the procedure, the regular courts, especially the Supreme Court, did not consider with due diligence the main allegations of the Applicant.

b) that there were no other alternative measures, less intrusive measures that the public authorities could have reasonably implemented for the realization of the public interest. I consider that the same objective could have been achieved by a less invasive interference with the Applicant's rights, and that the authorities did not consider the possibility of implementing those less intrusive solutions.

c) that despite the fact that there was no confiscation of property, but only a control measure of "property", the decision on postponing the execution of the decisions of the respondents and suspending the execution of licenses for an indefinite period, have led to the reduction in the value of the parts of the applicant's property that were not included in the measures, because they have lost their basic function that they had while the license existed.

d) that the Applicant has not attempted to take advantage of any weakness or a loophole in the legal order, that the Applicant has not been found culpable or negligent in the use of the license in illegal manner, so that the court can assess that the measure control of the use of the property was necessary.

e) that the interference with the peaceful enjoyment of the Applicant's property occurred without paying any compensation to the Applicant, therefore a "*fair balance*" between the requirements of the general interest of the community and the requirements for the protection of fundamental rights of the individual was not struck.

122. I recall the ECtHR case, Megadat.Com SRL v. Moldova, where the ECtHR assessed that the measure taken by the state authorities against the company that provided Internet services was so severe that the company in question was forced to close its business and to sell all its assets within a very short time (see ECtHR case, Megadat.com SRL v. Moldova, cited above, paragraph 69).

123. Finally, I note that the decision to postpone the execution of the respondents' decisions and to suspend the execution of licenses for an indefinite period was immediate and did not foresee any compensation or transitional period that would allow the Applicant to continue to carry out its economic activity.

124. From all the above, I conclude that in the light of the prevailing circumstances of the case and the assessments described previously, the interference with the peaceful enjoyment of the property in the case of the Applicant was not proportionate because the latter had legitimate expectations that during the period in which it has valid work permit, it will be able to exercise its economic activity and peacefully enjoy its property.

125. Finally, I assess that the judgment [ARJ. UZVP no. 119/2021] of the Supreme Court of 16 December 2022 in conjunction with the decision [AA. no. 2081/2020] of the Basic Court in Prishtina of 11 February 2021, which refers to the suspension of license for indefinite period of time: (i) represents an interference with the unhindered enjoyment of the applicant's property, as a result of the suspension of its business activity; (ii) that the interference was based on law; (iii) that the control measure pursued a legitimate aim; (iv) however, the interference was not proportionate because as a result of the suspension of the license, the performance of the business activity was suspended for indefinite period of time, which leads to a loss of profit and a potential risk that the same activity ceases to exist.

126. Therefore, I hold that the judgment [ARJ. UZVP no. 119/2021] of the Supreme Court and decision [AA. no. 2081/2020] of the Basic Court in Prishtina-Department for Administrative Matters of 1 February 2021, which rendered the decision to postpone the execution of the decisions of the respondents and to suspend the execution of licenses for an indefinite period of time, violated the Applicant's right to peaceful enjoyment of property guaranteed by Article 46 of the Constitution and Article 1 of Protocol no. 1 of the ECHR.

(VI) Conclusion regarding the alleged violations of the Applicant's rights

127. Based on the above, and taking into account the consideration of the Applicant's allegations in its referral:

I. I AGREE that with the conclusion of the majority of judges that the Applicant's allegations that the Judgment [ARJ. UZVP no. 119/22] of the Supreme Court of 16 December 2022, violating its right to a fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR in the manner explained in the judgment, are grounded and that the latter must be declared invalid.

II. I CONSIDER that the Court should have HELD that the Applicant's allegations that Judgment [ARJ. UZVP no. 119/22] of the Supreme Court of 16 December 2022, which rendered the decision on postponing the execution of the respondents' decisions and suspending the valid license and work permit for an indefinite period, violating the Applicant's right to peaceful enjoyment of property, guaranteed by Article 46 of the Constitution and Article 1 Protocol no. 1 ECHR are grounded.

III. I CONSIDER that the Court should have DECLARED unconstitutional Decision A-U. no. 208/20 of 1 February 2021 of the Basic Court in Prishtina – Department for Administrative Matters.

Concurring Opinion is submitted by Judge;

Radomir Laban, Judge

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On 01 September 2023 in Prishtina