Norwegian case-law

Thom Arne Hellerslia, Supreme Court Justice

Honorable colleagues, esteemed participants,

I am honored to be at this conference, which deals with some of the most important issues of our time.

Norway is faced with a dilemma. On the one hand, Norway has the self-image of being a humanitarian great power, of being "the good guy", promoting human rights worldwide. On the other hand, Norway is one of the world's biggest oil and gas producers. While contributing immensely to the Norwegian economy, this also means that Norway plays a role on the energy market that one may find a bit difficult to unite with being "the good guy".

From this dilemma, the following question arises: Is it possible to challenge the Norwegian petroleum production by legal means? This was the primary question behind the Norwegian Climate Case, also called "the case of the century", decided by the Supreme Court in plenary in December 2020.[1]

In 2016, Nature and Youth Norway and Greenpeace Nordic filed a lawsuit against the state, with the Grandparents` Climate Campaign and Friends of the Earth Norway as interveners. The aim was to achieve a gradual shutdown of Norwegian petroleum production. To achieve this, the environmental groups contested the validity of the decision to grant ten specific production licenses. The claimants argued that the decision was a violation of the environmental provision in the Constitution – Article 112 – as well as Articles 2 and 8 of the European Convention on Human Rights, and moreover, that the decision was invalid due to procedural flaws.

The contested production licenses all applied to blocks in the Barents Sea, north of Norway. In addition to the climate concerns, it was argued that the local environment was threatened. Both the ice edge and the polar front[2] have unique ecology, particularly vulnerable to oil spill. However, because of the low risk of

[1] HR-2020-2472-P. The judgment is available in English at www.lovdata.no.

[2] Where cold waters from the Arctic Ocean meet warmer waters from the Atlantic Ocean.

oil spill, the licenses were not found to be invalid on such grounds. In the following, I will not elaborate on the local environmental issues, but limit myself to the threat to the climate.

The case entailed several legal challenges.

The understanding of Article 112, which also mentions future generations, had not previously been tried before the courts. Contrary to other provisions in the human rights chapter of the Constitution, Article 112 is not modelled after any particular right in a binding international instrument, as there is no international convention on environmental rights.

One of the major questions, was whether Article 112 grants substantive rights to individuals that may be asserted in the courts, or on the contrary, is to be perceived primarily as a guideline for the authorities. This issue raised difficult questions under the principle of the separation of powers between the legislature and the judiciary, because a large majority in the Parliament had consented to the granting of the licenses.

The Supreme Court thoroughly considered both the wording and the preparatory works of the provision.[3] How strongly had the Parliament itself intended – like Odysseus – to tie itself to the mast? The Supreme Court stated that the provision gives substantive and enforceable rights, however not in the same way as core human rights, but merely as a safety valve. For the courts to set aside a decision by the Parliament, the Supreme Court provided that the Parliament must have "grossly neglected" its duty to protect the environment. Consequently, the threshold is very high.

A main consideration behind the high threshold, was precisely the separation of powers. The Supreme Court stated that decisions on environmental issues often

[3] Article 112 reads as follows:
"Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.
In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out.
The authorities of the state shall take measures for the implementation of these principles."

require a political balancing of interests, and that this balancing should be done by the Parliament, not by the courts.

At that time, I had not been appointed yet to Supreme Court, but I was one of the judges who decided the case in the Court of Appeal. The Court of Appeal had mainly reached the same conclusion but had set the legal threshold significantly lower.

Regarding the assessment of the environmental impact of the production licenses, several questions arose:

Most of the oil and gas extracted in Norway is exported. Is the emission from the combustion abroad relevant, or is it up to the state in which the combustion takes place, to regulate this? The argument of the Government was that the Paris Agreement builds upon the principle that each state only is responsible for its own national emissions. The Supreme Court stated that the Constitution does only protect the environment within the borders of Norway. However, the combustion abroad of Norwegian oil and gas has effect on the global climate, and consequently, it causes harm in Norway as well. By this reasoning, the combustion abroad was relevant.

But what about the "drop in the ocean"-argument? Globally considered, Norwegian oil and gas plays a marginal role – about 1 % of the global CO_2-emissions. The petroleum that possibly would be extracted under the contested licenses would thus play an even more marginal role on a global scale. The Supreme Court stated that the effects of the specific licenses must be the starting point. On the other hand, like pollution of, for instance, a river, the emissions stemming from these licenses cannot be considered in isolation.

It was also of importance that at the time of the decision, it was uncertain whether one would discover oil or gas under the licenses that had been granted. A production license is mainly a permission to explore for petroleum. The emissions could therefore only be vaguely estimated. And if any resources were discovered, the oil companies had to apply for further approvals, so-called plan for development and operation.

Moreover, it is uncertain what the net effect will be if Norway stops exporting oil and gas. The demand will still be there, and other countries may respond by producing more oil and gas, or even replace gas with coal. These questions raise difficult issues concerning how to regulate the supply and demand of carbon energy resources in general.

In its overall assessment, the Supreme Court found it relevant that the Parliament had taken different measures to reduce greenhouse gas emissions. Regarding combustion abroad, the court attached weight to the principle that each state is responsible for combustion on its own territory, in accordance with international agreements. Based on such a broad and general assessment, the conclusion was that the licenses did not constitute a serious negligence under article 112 of the Constitution, and, therefore, were not invalid under a material test.

But what about article 2 and 8 of the European Convention on human rights? These rights were invoked at a rather late stage in the case and was not the main focus – the main focus was article 112. Furthermore, the case was decided before the Klimaseniorinnen case, the Supreme Court therefore based its understanding on former case-law. It found that climate changes would not amount to a "real and immediate risk" in Norway, and that there were no direct and immediate link between the contested licenses and the applicant's home, private life or family life.

Thus, it was not possible to reach a result like the Urgenda Case by challenging specific licenses. The different result must also be seen in the light of the fact that the Netherlands are more vulnerable to climate change than Norway. Further, the conclusion must be understood on the background of the general Norwegian interpretive guideline that evolving the Convention is primarily a task for the European Court of Human Rights, not the Norwegian courts. In my eyes, it is difficult not to view the Klimaseniorinnen case as an evolution of article 8.

However, Article 112 also provides procedural obligations. The Supreme Court stated that restraint is less required when it comes to assessing the procedure. The courts must control that the decision-making body has struck a fair balance

of interests. The larger the effects a decision has, the stricter are the requirements for clarification of consequences. This may be seen as an echo of the development under the European Convention on Human Rights, concerning the shift of focus from a material to a procedural test.

The environmental groups contended that the opening report of the Barents Sea was deficient, because the impact assessment did not address the emissions abroad created by exported oil and gas.[4] In addition to Article 112 in the Constitution, the EU Council Directive on Strategic Environmental Assessment, the «SEA Directive»[5], provide for an assessment of the total environmental impact.

On the procedural issues, the Supreme Court was divided into two factions. The majority of eleven judges took the standpoint that the operation phase was the time best suited to assess the global climate impact, not the opening phase, because at the opening stage, the size of the emissions is uncertain. The majority found that in any case, any procedural errors had not influenced the decision. The Parliament had several times, by a broad political majority, rejected proposals to out-phase the Norwegian petroleum production due to the climate crisis. The political majority made references to the role of the petroleum production for the Norwegian economy, and the fact that oil and gas production will also be possible in a low-emission society. In addition, the net effect of a shut-down of the Norwegian production is, as I have already mentioned, complicated and unclear.

The four dissenting judges were of the opinion that the lack of an assessment of the total climate impact at the opening stage, was a procedural error. They particularly relied on the SEA Directive. The minority agreed that the decision probably would not have been different if the impact assessment had included the combustion abroad. However, because of the seriousness of the error, the decisions, according to the minority, were invalid under the procedural test.

[4] The regulation of Norwegian petroleum activities may be roughly divided into three phases: (1) the opening of a field, (2) the exploration phase and (3) the production phase.
[5] Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment.

To sum up, the Supreme Court accepted a broad scope of the assessment of climate impact, including the relevance of emissions from the combustion abroad. However, the Supreme Court set the threshold for a violation of Article 112 very high in situations in which the Parliament has given its consent. A key point for the environmental groups was that there is no need to discover more carbon resources – there has already been discovered more carbon resources in the world than what can be produced within the temperature goals in the Paris Agreement. However, the judgment implies that it seems difficult to challenge Norway`s petroleum or climate policy as such by contesting individual decisions.

From an environmental perspective, the most useful outcome is the requirements of broad climate impact assessments at the operation stage, and that there is a duty to reject the approvals required at this stage if they are not compatible with Article 112.

In my opinion, the case illustrates the challenges of combatting a global problem with domestic legal means.

The judgment has been brought before the European Court of Human Rights. The case has been referred to the Court. It is prioritized as a possible «impact case», but was not among the first three climate cases before the Grand Chamber that were decided recently. Does the Klimaseniorinnen case imply a conviction of Norway? In my eyes, the outcome is quite uncertain. The Klimaseniorinnen case deals with the responsibility to diminish national emissions. However, the judgment also contains the Court`s assessment of the relevance of so-called embedded emissions – emissions stemming from the production of imported goods – that may be of interest regarding the assessment of the export of oil and gas, creating emissions abroad. If Norway is convicted, it may be on procedural and not material grounds.

There is now a second climate case in Norway, that focuses on the procedural obligations to make a full assessment of the environmental impact, including the emissions from combustion abroad, before approving plans for development and operation – the last stage of petroleum licenses – regarding three new petroleum fields. Several legal bases are invoked – article 112 of the Constitution, as

developed by the Supreme Court in the first climate case, as well as the EU Environmental Impact Assessment Directive, the "EIA Directive".[6] In addition, articles 2, 8 and 14 of the European Convention on Human Rights, and articles 3 and 12 of the Convention on the Rights of the Child, were invoked. In a judgment in January this year,[7] the Oslo District Court declared that the decisions to approve the plans for development and operations for the three fields were invalid according to article 112 and the EIA Directive. The Court did not find any violation of the European Convention or the Convention on the Rights of the Child. The District Court also announced an interim decision that prohibits petroleum production from these fields until there is a final judgment. The judgment has been appealed by the state to the Court of Appeal, and may be finally decided by the Supreme Court. The District Court is very proud of the fact that the United Kingdom Supreme Court in a recent decision cited from the District Court`s reasoning on the interpretation of the EIA directive.

Monday this week, the Court of Appeal set aside the interim decision to prohibit petroleum production before there is a final judgment.[8] The main reasoning is the principle of separation of powers, in line with the Supreme Court judgment in the first climate case.

Another case that has attracted attention is a case regarding the validity of the permission to establish a mineral mine close to the Førde fjord, which especially regards the interpretation of the Water Directive and the Mineral Waste Directive.[9] Article 112 was also invoked. The environmental organizations lost the case before the Oslo District Court, but the judgment has been appealed.

The Court of Appeal has decided to request the EFTA Court to provide an advisory opinion of the interpretation of the EU directives in both these cases. The EFTA Court is the equivalent of the EU Court of Justice for the European Economic Area – the agreement between EU and Norway, Iceland and Liechtenstein for these countries to be a part of the European market, with an obligation to implement EU legal acts.

[6] Directive 2011/92 of the European Parliament and the Council on the assessment of effects of certain public and private projects on the environment.
[7] TOSL-2023-99330.
[8] LB-2024-36810.
[9] TOSL-2022-165021.

Finally, I will briefly mention one other case that highlights the difficult dilemmas in this area. The Fosen Case, decided by the Supreme Court sitting as a grand chamber in 2021, concerned the validity of the license for the biggest onshore windfarm project in Europe, located at the Fosen peninsula.[10] The windfarms are located within the area of a reindeer grazing district. The Supreme Court unanimously found that the windfarms interfered with the Sami people's right to enjoy their own culture under article 27 of the International Covenant on Civil and Political Rights. Consequently, the license was invalid. At the outset, there is no room for a margin of appreciation or a proportionality assessment under article 27. However, the Supreme Court stated that it may be necessary to strike a balance if Article 27 conflicts with other basic rights, such as the right to a healthy environment.

Thank you for your attention.

[10] HR-2021-1975-S, available in English at www.lovdata.no.