

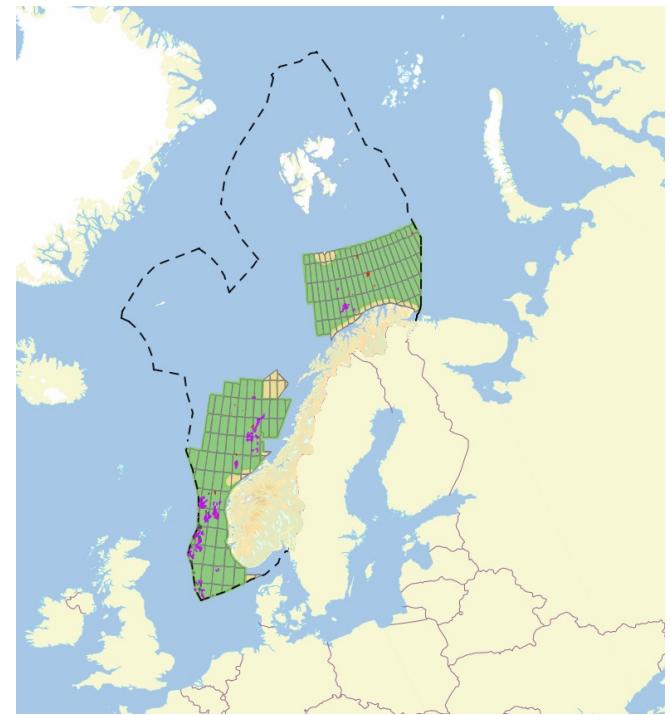


«The climate change case» - HR-2020-2472-P

Supreme Court Justice Ragnhild Noer

Subject matter

The validity of a royal decree to award ten petroleum production licenses on the Norwegian continental shelf in the north – the Barents Sea South and Southeast – the 23rd licensing round.



Key questions

- The decision's compliance with Article 112 of the Constitution on the right to a healthy environment
- Compliance with the right to life and the right to respect for private and family life in the Norwegian Constitution and the corresponding Articles 2 and 8 of the European Convention on Human Rights
- Whether the decision was otherwise invalid due to procedural errors

The parties

- The appellants: Nature and Youth Norway and Greenpeace Nordic – “the environmental groups”
- The respondent: The State of Norway represented by the Ministry of Petroleum and Energy

West Hercules in the Barents Sea



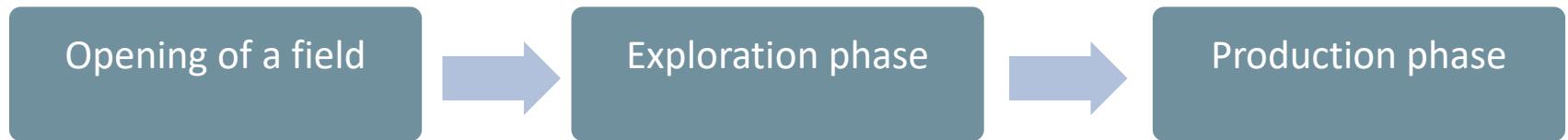
Photo: Ole Jørgen Bratland / Equinor

SUPREME COURT OF NORWAY

Background – climate challenges

"There is broad national and international consensus that the climate is changing due to greenhouse gas emissions, and that these changes may have serious consequences for life on Earth." (para 49)

Petroleum activities in Norway – regulation



The Barents Sea Southeast and the 23rd licensing round

- The 23rd licensing round: Ten production licenses awarded in the Barents Sea
 - At the time of the judgment, three of the licenses had been relinquished
 - All of the licenses awarded in the 23rd round are now relinquished

Article 112 of the Constitution

"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."

Does Article 112 confer rights on individuals?

"The issue at hand is whether Article 112 of the Constitution may be invoked in court as legal basis for a invalidity claim towards an individual decision pursuant to section 3-3 of the Petroleum Act, made in the form of a royal decree and based on a consent of the Storting."



SUPREME COURT OF NORWAY

Article 112 – the Supreme Court's interpretation

- *“On the one hand, obvious rule-of-law considerations suggest that the courts must be able to set limits on the political majority when it comes to protecting constitutional values. On the other hand, decisions involving fundamental environmental issues often involve political balancing of interests and broader priorities. Democracy considerations therefore suggest that such decisions should be made by popularly elected bodies, and not by the courts.”*

Article 112 – the Supreme Court's interpretation (cont.)

*"Against this background, **Article 112 of the Constitution must, when the Storting has considered a case, be interpreted as a safety valve.** In order for the courts to set aside a legislative act of the Storting, the Storting must have grossly neglected its duties under Article 112 subsection 3. ... Consequently, the threshold is very high. ...*

I find it clear that this strict condition is not met."

Consequences of invalidity

"The arguments of the environmental groups imply that crucial parts of the Norwegian petroleum policy, with production and export, are put to the test. These views will also affect subsequent licensing rounds, and largely involve a controlled phase-out of Norwegian petroleum activity. This is not a subject matter in this case." (para 162)



Dommer Høgetveit Berg



The decision is not contrary to other human rights

"There is no doubt that the consequences of climate change in Norway may lead to loss of human lives, for instance through floods or landslides. The question is yet whether there is an adequate link between production licences in the 23rd licensing round and possible loss of human lives, which would meet the requirement of 'real and immediate' risk.

In my view, the answer is no." (paras 167-168)

Is the decision invalid due to procedural errors in the Storting's opening of the Barents Sea Southeast?

"The issue is ... whether an impact assessment should have been made on possible combustion emissions that would occur in the event that, after the opening, production licences were awarded and subsequently a PDO was approved, and in that case, whether that constitutes an error that invalidates the later decision on production licences." (para 209)

11 Justices: No significant procedural errors

"I emphasise that a production licence, despite the wording, is not an unconditional right to extraction even if profitable discoveries should be made. Extraction requires an approved PDO under section 4-2 of the Petroleum Act. With the PDO, an impact assessment will normally be carried out – which must also include emissions into air Emissions into the air comprise greenhouse gas emissions. The authorities will thus have to consider greenhouse gas emissions when assessing the application." (para 218)

4 Justices: Invalid due to procedural errors

"... Article 5 (2) [of the SEA Directive] provides no basis for postponing the consideration of important aspects of the environmental effects as the estimates become more certain and detailed at a later stage." (para 271)

"Other assessments may ... not compensate for the lack of an impact assessment in connection with the opening decision." (para 272)

Judgment

- No violation of Article 112 of the Constitution (consensus)
- No violation of other human rights (consensus)
- Not invalid due to procedural errors (dissent 11-4)

Application to the European Court of Human Rights

- On 16 December 2021, the Court characterised the case as a potential “impact case” and communicated it to the Norwegian State
- The Court has now decided to postpone the the proceedings pending the outcome of three other climate cases from applicants in Portugal, Switzerland and France