SUPREME COURT OF NORWAY

J U D G M E N T

given on 22 December 2020 by the plenary of the Supreme Court with

Chief Justice Toril Marie Øie
Justice Jens Edvin A. Skoghøy
Justice Bergljot Webster
Justice Wilhelm Matheson
Justice Aage Thor Falkanger
Justice Kristin Normann
Justice Henrik Bull
Justice Knut H. Kallerud
Justice Arne Ringnes
Justice Ingvald Falch
Justice Espen Bergh
Justice Cecilie Østensen Berglund
Justice Borgar Høgetveit Berg
Justice Erik Thyness
Justice Kine Steinsvik

HR-2020-2472-P, (case no. 20-051052SIV-HRET)
Appeal against Borgarting Court of Appeal's judgment 23 January 2020

Nature and Youth Norway Greenpeace Nordic Friends of the Earth Norway (intervener) The Grandparents Climate Campaign (intervener)	(Counsel Emanuel Feinberg and Cathrine Hambro)
v.	
The State represented by the Ministry of Petroleum and Energy	(The Office of the Attorney General represented by Fredrik Sejersted) (Assisting counsel Anders Flaatin Wilhelmsen)

(1) Justice **Høgetveit Berg:**

Issues and background

Subject matter

(2) This case concerns the validity of a royal decree of 10 June 2016. The decree – the decision – concerns ten petroleum production licences awarded for a total of 40 blocks or parts of blocks on the Norwegian continental shelf in the marine areas referred to as the south Barents Sea South and the southeast Barents Sea – the 23rd licensing round.

(3) The decision has its legal basis in section 3-3 of the Petroleum Act. The key issue raised is the decision's compliance with Article 112 of the Constitution on the right to a healthy environment. The case also raises the issue of whether the decisions complies with Article 93 on the right to life or Article 102 on the right to respect for private and family life, and with the corresponding Articles 2 and 8 of the European Convention on Human Rights – ECHR – or whether the decision is otherwise invalid due to procedural errors. The crux of the matter is the interpretation of Article 112 of the Constitution and to which extent it confers substantive rights on individuals that may be asserted in court.

(4) The parties agree that we are facing major challenges related to climate change, that at least a considerable share of the last century's temperature increase on earth is due to greenhouse gas emissions, and that these emissions must be reduced to halt, and hopefully reverse, the trend.

(5) The overall constitutional issue is which role the courts are to play in the environmental work. The case touches upon the principle of separation of powers and the tripartite system of the legislature, the executive and the judiciary.

The court proceedings

(6) On 18 October 2016, Nature and Youth Norway and Greenpeace Nordic brought an action in Oslo District Court against the State represented by the Ministry of Petroleum and Energy, contesting the validity of the decision of 10 June 2016 to award the ten production licences. The claimants argued that the decision is a violation of Article 112 of the Constitution, and entirely or partially invalid because it breaches section 3-3, cf. section 3-1, of the Petroleum Act interpreted in the light of Article 112. In the alternative, it was argued that the decision was invalid due to a number of procedural errors.

(7) The 13 companies that were awarded the licences are not parties to the case. In the writ of summons, the claimants referred to the Supreme Court judgment Rt-2015-641. Here, it is assumed that although a judgment on the validity of an administrative decision is only aimed at the State, and thus has no legal implications for private parties having benefited from the decision, the public administration may – if invalidity is declared – be forced to consider revoking it. Against this background, it is not disputed that the claimants had, and still have, a legal interest in the action.

(8) The Grandparents' Climate Campaign acted as intervener for the claimants in the District Court. Friends of the Earth Norway joined the case as intervener in the Court of Appeal. The

two organisations act as interveners also in the Supreme Court. The appellants and the interveners will from now on be referred to as "the environmental groups".

(9) On 4 January 2018, Oslo District Court ruled as follows:

> "1. The District Court finds in favour of the State represented by the Ministry of Petroleum and Energy.
>
> 2. Greenpeace Nordic, Nature and Youth Norway and the Grandparents Climate Campaign will jointly within 2 – two – weeks, pay costs of NOK 580 000 – fivehundredandeightythousand – to the State represented by the Ministry of Petroleum and Energy."

(10) The District Court found that Article 112 of the Constitution is a "rights provision", conferring rights on individuals that may be asserted in court if the State fails to take measures under Article 112 subsection 3. The District Court also found that Article 112 applies to local environmental damage and greenhouse gas emissions in Norway, but not to emissions and combustion taking place abroad. The District Court concluded that the decision was not a violation of Article 112, since the risk of environmental harm and climate deterioration was limited, and the mitigating measures were adequate. Finally, the District Court found no procedural errors that could invalidate the decision.

(11) Nature and Youth Norway and Greenpeace Nordic appealed to Borgarting Court of Appeal. As new and alternative grounds for invalidity, they claimed that the decision was a violation of Article 93 of the Constitution and Article 2 ECHR on the right to life, and of Article 102 of the Constitution and Article 8 ECHR on the right to respect for private and family life. The contentions relating to section 3-3, cf. section 3-1, of the Petroleum Act were abandoned. Otherwise, the environmental groups maintained the invalidity grounds in the Court of Appeal.

(12) On 23 January 2020, Borgarting Court of Appeal ruled as follows:

> "1. The appeal is dismissed.
>
> 2. Costs are not awarded, neither in the District Court nor in the Court of Appeal."

(13) The Court of Appeal found, like the District Court, that Article 112 of the Constitution confers rights on individuals that may be asserted in court. The Court of Appeal also found that the provision applies to all environmental harm asserted in the case at hand, local damage as well as greenhouse gas emissions; the latter created by the petroleum extraction itself and the combustion abroad. At the same time, the Court of Appeal stated that environmental harm must be balanced against the measures that are being taken. It found that the threshold for invalidating the decision had to be high – and that it had not been exceeded. It also found that the decision could not be invalidated under Article 2 or 8 ECHR, or the corresponding provisions in Articles 93 and 102 of the Constitution. Finally, the Court of Appeal found no procedural errors to invalidate the decision.

(14) Nature and Youth Norway and Greenpeace Nordic have appealed the judgment to the Supreme Court. The appeal challenges the Court of Appeal's application of the law and findings of fact with regard to Article 112 of the Constitution. The appeal against the

procedure is currently limited to the licences awarded in the southeast Barents Sea. A reservation was made in the appeal to invoke Articles 2 and 8 of the ECHR, and Articles 93 and 102 of the Constitution as special legal bases, and this was done during the hearing.

(15) The Supreme Court's Appeals Selection Committee granted leave to appeal on 20 April 2020. On the same day, the Chief Justice decided in HR-2020-846-J to refer the case to the plenary, see section 5 subsection 4 and section 6 subsection 2 of the Courts of Justice Act.

(16) Three of the justices – Arntzen, Indreberg and Noer – had to withdraw due to possible bias in the Supreme Court's order 28 October 2020, see HR-2020-2079-P. Justice Bergsjø was also absent, as he is currently on study leave. Justice Matningsdal participated in the hearing, but was absent during the voting due to sickness.

(17) The Supreme Court has received six written submissions pursuant to section 15-8 of the Dispute Act that are to highlight public interests. These are from the Environmental Law Alliance Worldwide (ELAW), the Allard K. Lowenstein International Human Rights Clinic of Yale Law School, Center for International Environmental Law (CIEL), the UN Special Rapporteur on human rights and the environment, the Norwegian National Human Rights Institution and the Climate Realists. The three first-mentioned also provided submissions in the District Court and the Court of Appeal. The submissions form part of the basis for the decision, see section 15-8 subsection 2 third sentence of the Dispute Act.

(18) One area in the south Barents Sea and two in the southeast Barents Sea have been returned. For the production licence remaining in the southeast Barents Sea, the operator has applied for a return of 62 percent of the area. The parties agree that a legal interest still exists, also for the part concerning the southeast Barents Sea. I agree.

(19) A memorandum dated 8 March 2013 from the Norwegian Petroleum Directorate on the valuation of undiscovered petroleum resources the southeast Barents Sea, has been presented as a new document to the Supreme Court. The evidence of two witnesses has been taken, and some other documents related to the memorandum have been presented. Apart from that, the case stands as it did in the Court of Appeal.

The parties' contentions

The appellants

(20) The appellants – *Nature and Youth Norway and Greenpeace Nordic* – contend:

(21) The decision to award production licences – the 23rd licensing round – is invalid because it amounts to a violation of Article 112 of the Constitution.

(22) Article 112 of the Constitution must be read as a provision that confers rights on individuals as a safeguard against unacceptable encroachments on the natural environment, and that may be asserted in court. This follows from the wording of the provision and from the preparatory works to the former Article 110 b of the Constitution and the current Article 112. Policy considerations and legal literature support this interpretation.

(23) As for the content of Article 112 of the Constitution, the provision lays down both an absolute and a relative threshold. The provision is dynamic and must be adjusted to the climate crisis. The assessment is not limited to the harmful effects of the individual decision, as this would entail a marginalisation contrary to the purpose of the provision. If emissions are considered in isolation, the targets will never be reached. The measures taken by the State under Article 112 subsection 3 must be adequate and sufficient. Subsection 3 also lays down a duty to abstain from making decisions that will infringe the right under subsection 1.

(24) The environmental harm must be assessed as a whole. Based on the purpose of Article 112, both the risk of traditional environmental harm and of damaging effects of greenhouse gas emissions from extraction and subsequent combustion of petroleum, also abroad, must be relevant.

(25) The consequences of global warming will be catastrophic if drastic measures are not taken with urgency. Norway is already emitting too much CO_2, and cannot hold the petroleum production at its current level. In such a situation, no further production licences can be granted for new fields without existing infrastructures if it may lead to petroleum production in 2030 and onwards. This applies at least until the State has established an appropriate national tolerance limit and a framework to handle it safely. Any production licences must be adjustable to this.

(26) The fossil resources that may be exploited globally in order to comply with the Paris Agreement have already been found. The emission cuts have not yet started in Norway. Our national targets are in any case too modest, and the aggregate national contribution under the Paris Agreement will not be sufficient to meet the 1.5-degree target. Norway's responsibility must be assessed based on Norway's status as a large oil exporter with resources to restructure. Norway must take a proportionally larger share of the climate cuts, both because we have produced oil and gas resulting in major emissions, and because we have the economic capacity to do so. Norway must therefore cut at least 60 percent of the greenhouse gas emissions within 2030.

(27) No decisive weight can be attached to the Storting's general position in climate and petroleum matters, as Article 112 of the Constitution is intended to give the court a right of review. If Article 112 is to have significance, extraction cannot be justified by possible socio-economic profitability alone. Stopping the process is not a real possibility for instance in connection with approval of a plan for development and operation (PDO). The production licence is awarded for a particularly vulnerable and valuable area connected to the polar front and the ice edge, which must also be given weight.

(28) The decision is consequently invalid under both the absolute and the relative threshold in Article 112 subsection 1 of the Constitution. The decision is also invalid under Article 112 subsection 3 because the duty to take measures is not complied with.

(29) In the alternative, the appellants contend that the decision is invalid because it amounts to a violation of Article 93 of the Constitution and Article 2 of the ECHR on the right to life, and of Article 102 of the Constitution and Article 8 of the ECHR on the right to respect for private and family life. The ECHR protects such rights as are asserted in the action at hand. This forms the basis of, among others, the Dutch Supreme Court's judgment 20 December 2019 in the Urgenda case. The climate crisis affects and will affect persons in Norway, and there is without a doubt a "real and imminent threat".

(30) In the second alternative, the appellants contend that the part of the decision concerning the southeast Barents Sea is invalid due to procedural errors.

(31) Article 112 of the Constitution complements the procedural rules in the Petroleum Act. This is particularly relevant to the awarding of the production licences, since there an impact assessment is not required at this stage.

(32) The Supreme Court must give a preliminary ruling on whether the Storting's opening of the southeast Barents Sea for petroleum production is valid. If that is not the case, the royal decree will also be invalid.

(33) The factors that according to the appellants invalidate the decision should in any case have been assessed and justified. This concerns above all global greenhouse gas emissions. Furthermore, there was a failure in the socio-economic analysis prior to the opening, as the stated income to the State was not discounted. If one applies the correct method, the societal calculation becomes negative. Finally, there are errors in the assessment of the effects related to employment and CO_2 costs. The appellants also contend that the oil price dropped so dramatically from the opening decision until the production licence that a new assessment of the economy should have been carried out. These errors imply that the decision is based on incorrect information – which may have affected its content. The decision must therefore be ruled invalid.

(34) Nature and Youth Norway and Greenpeace Nordic request the Supreme Court to rule as follows:

> "1. The royal decree of 10 June 2016 to award production licences on the Norwegian continental shelf – the '23rd licence round' – is invalid.
>
> 2. Greenpeace Nordic, Nature and Youth Norway, the Grandparents Climate Campaign and Friends of the Earth Norway are awarded costs in the Court of Appeal and the District Court."

The interveners

(35) The interveners – *The Grandparents Climate Campaign and Friends of the Earth Norway* – fully support the grounds of appeal submitted by the appellants and request the Supreme Court to issue the same ruling.

(36) When I herein refer to "the environmental groups", this includes the interveners.

The respondent

(37) The respondent – *The State represented by the Ministry of Petroleum and Energy* – contends:

(38) The royal decree is valid. The decision is invalidated by neither Article 112 of the Constitution, Article 2 or Article 8 of the ECHR, nor by Articles 93 and 102 of the Constitution. Nor have procedural errors been committed that partially invalidate the decision.

(39) Article 112 subsection 1 of the Constitution does not confer substantive rights that private parties may assert in court. Although the provision lays down duties in subsection 3, it does not confer corresponding rights on individuals or organisations. This follows already from the wording. The preparatory works and prehistory do not sufficiently support that the intention was to confer to rights on individuals, and the former provision in Article 110 b was also not interpreted as a rights provision. In addition, there is no sufficient basis for claiming that the provision changed its character during the constitutional revision in 2014. The considerations of separation of powers and democracy, of which issues are suited to be reviewed in court and of a legally manageable and foreseeable rule, clearly suggest the same.

(40) Article 112 subsection 3 of the Constitution imposes a duty on the State to take measures, but this duty only concerns positive measures and cannot entail a duty to abstain from making a decision. It follows from the preparatory works that the courts cannot review the Storting's decisions. A breach of the duty to take measures may not in any case invalidate individual decisions.

(41) If Article 112 of the Constitution confers rights, a number of interpretative issues arise, including whether the provision contains a threshold for measures in connection with validity challenges. With regard to climate emissions, the provision raises a number of issues beyond that. The provision is not suited to regulate greenhouse-gas emissions – and may not in any case be interpreted as a limit for Norwegian petroleum expert. The emissions from combustion of Norwegian petroleum occur outside of Norway, and both international and national climate policy builds on the principle that each state is responsible for its own national emissions.

(42) In the alternative, the respondent contends that the decision is not a violation of Article 112, irrespective of whether the right in subsection 1 is independent or must be read in context with the State's duty to take measures in subsection 3. The greenhouse gas emissions from the extractions will not give any increase in net emissions, since these are included in the EU's emissions trading system. Emissions from the 23rd licence round are in any case uncertain – and will be marginal. Moreover, a number of measures have been taken under subsection 3, and further measures can be taken if profitable discoveries are made. The emissions from combustion after export are also uncertain, and will in any case be globally marginal. The relevant issue would be the effect on the climate in Norway. The net effect of reducing Norwegian export of oil and gas is unclear and subject to debate. Also, measures are implemented under subsection 3 related to global emissions. Local environmental damage is not present, and the risk of such damage is minimal.

(43) The environmental groups cannot invoke the ECHR, since they are not a "victim" under the Convention. Neither Article 2 nor Article 8 of the ECHR has been violated, among other things due to the requirements of causality. Article 93 and Article 102 of the Constitution have also not been violated.

(44) No procedural errors have been committed in either in connection with the opening of the southeast Barents Sea or in connection with the decision to award the production licences.

(45) The opening was a result of an extensive process, where also environmental concerns were assessed. The non-discounting of the estimated income to the State was not an error. Future income is in any case highly uncertain at this stage.

(46) At the licensing stage, there is no requirement of an impact assessment, nor is it serviceable, since it is uncertain whether profitable discoveries will be made. Section 4-2 of the Petroleum Act on requirements for approval of PDOs, provides sufficient room for maintaining environmental and socio-economic considerations in connection with profitable discoveries. The climatic effect of national emissions are assessed at a superior level, and the effect of combustion of Norwegian petroleum is considered on a regular basis in the political debate.

(47) In the alternative, the State contends that possible errors have not at any level influenced the decision. The Storting has upheld the decisions after having considered all objections that by far coincide with those currently asserted by the appellants.

(48) The State represented by the Ministry of Petroleum and Energy requests the Supreme Court to rule as follows:

> "The appeal is dismissed."

My opinion

The climate challenges

Global warming and climate

(49) 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.

(50) In December 2018, the Climate Risk Commission presented the report *Climate risk and the Norwegian economy*, NOU 2018: 17. Here, the Commission presents climate-related risk factors and their relevance for the Norwegian economy. The report also contains a description of the climate challenges globally and in Norway. The report is primarily a compilation of knowledge provided by the UN's Intergovernmental Panel on Climate Change (IPCC) – including its Fifth Assessment Report from 2014 ("IPCC AR5") and the special report on 1.5 degrees of warming from 2018 ("IPCC 1.5C"). The IPCC is a scientific body whose primary task is to carry out regular assessments and comparisons of applicable knowledge on climate and climate change. It was established in 1988 by the UN Environmental Programme (UNEP) and the World Meteorological Organization (WMO). Its reports are considered the most important and best scientific basis for knowledge on climate change. What I state in the following has been obtained from the Climate Risk Commission's report, NOU 2018: 17, chapter 3, pages 31–53:

(51) The global mean temperature has risen by around 1°C since pre-industrial times. The effects of this warming are currently observed on all continents and in all oceans. Although the climate on Earth exhibits natural variations, what we know today suggests that there is a 95–100 percent probability that emissions from human activities are the dominant cause of the observed warming. The risk posed by the climate changes increases significantly along with increased future emissions, directly or indirectly affecting nearly all natural and anthropogenic systems. The IPCC has estimated that global temperatures will rise by 1.5 °C around 2040, and reach 3–4 °C towards the end of this century, unless adjustments are made to climate policies around the world. A stabilisation of global warming between 1.5 and 2 °C

in the second half of this century is considered the best possible achievement given the current circumstances. For all practical purposes, the effects of global warming will be irreversible in the current social perspective, and greenhouse gas emissions that have already occurred will affect the climate for centuries to come.

(52) The global risk picture with a temperature rise of 2 °C includes extreme heat, draught, sea level rise, ocean acidification, floods and extreme weather. The climate changes will alter the conditions of life for many species and ecosystems. Hundreds of millions of people will be exposed to serious effects, and some ecosystems and cultures are particularly vulnerable. The most exposed groups are the poor, indigenous peoples and local communities depending on agriculture and small-scale fishing along the coast. For the Arctic, the difference between 1.5 and 2 degrees of global warming will be immense.

(53) Temperatures rising beyond 2 °C creates a genuine risk of several critical tipping points being be crossed. Extreme weather without historic precedent is likely to follow, and the changes will have an enormous impact on marine life and the possibilities of producing food.

(54) Like elsewhere in the world, the climate in Norway has changed notably during the last century. The annual average temperature has increased by 1 °C from 1900, and large parts of the country have experienced warmer summers, milder winters, more rain, shrinking glaciers and higher sea levels.

(55) Analyses of possible effects for Norway are often based on a high-emission scenario, involving a global temperature rise of 4.3 °C towards the end of the century compared to the reference period 1971–2000, and an increase of the mean temperature in Norway by up to 5.5 °C above pre-industrial levels. In Arctic regions and parts of the county of Finnmark, the warming will be even greater. The risk picture for Norway includes more drought, higher treelines and increased forest fire hazard. The distribution of snow will change, glaciers will continue to shrink and the ocean will be warmer and more acid. The latter factor will be detrimental to marine species and eco systems. The sea level will rise, and the consequences of storm surges will be greater. A study cited in the report from the Climate Risk Commission maintains that Norway is particularly exposed to storm surges. It is expected that the weather pattern will stabilise for longer periods, which will give longer high-pressure periods with not weather and weeks of little rain, alternatively large amounts of precipitation and cold and longer winter periods.

The Paris Agreement

(56) The international treaty on climate change – the Paris Agreement – was adopted at the UN's climate summit on 12 December 2015 and is the most recent protocol to the UN Framework Convention on Climate Change. Norway ratified the Paris Agreement on 20 June 2016, see Proposition to the Storting 115 (2015–2016) and Recommendation to the Storting 407 (2015–2016). The Paris Agreement entered into force on 4 November 2016. The royal decree that is being challenged in the case at hand was issued six months after the Paris Agreement was signed, but ten days before Norway ratified it and some five months before it entered into force.

(57) The purpose of the Paris Agreement is to hold the increase in the global average temperature to well below 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C above the same levels, see Article 2 (1).

(58) The principle of common but differentiated responsibilities in Article 2 (2) implies that affluent countries, such as Norway, carry a larger responsibility. According to Article 3, cf. Article 4, each party is to undertake and communicate "ambitious efforts", which in aggregate will "represent a progression over time". In other words, it is not a matter of even distribution; all parties are to do their best.

(59) In 2015, Norway communicated to the UN an obligation to reduce emissions by at least 40 percent from 1990, see Report to the Storting 13 (2014–2015) and Recommendation to the Storting 211 (2014–2015). The total emission target communicated at the time of the Climate Risk Commission's report were, according to the Commission, far from enough to comply with the Paris Agreement, see Norwegian Official Report 2018: 17 page 46. Norway communicated in February 2020 an increased goal of 50 percent, with a cap of 55 percent, see Report to the Storting 2 (2019–2020) page 69.

(60) Through the EEA Agreement, Norway participates in the EU Emissions Trading System. In June 2019, the Storting consented to the incorporation of legislative acts for reaching emissions goal for 2030 jointly with the EU into EEA Agreement, see Proposition to the Storting (Bill) no. 94 (2018–2019) and Recommendation to the Storting 401 (2018–2019).

Norwegian climate legislation

(61) Act relating to Norway's climate targets – the Climate Change Act – was adopted in 2017. The Act is to promote the implementation of Norway's climate targets as part of its process of transformation to a low-emission society by 2050, see section 1 subsection. One of the targets is for greenhouse gas emissions to be reduced by at least 40 percent by 2030 compared with the reference year 1990, see section 3. The target for 2050 is that Norway is a low-emission society with emissions reduced by 80 to 95 percent from the reference year 1990. The effect of Norway's participation in the EU Emissions Trading System is to be taken into account in assessing the progress towards this target, see section 4. To promote the transformation, the Government shall every fifth year submit updated and as far as possible quantitative and measurable climate targets to the Storting, see section 5. In addition, the Government shall provide an annual account of how these targets may be achieved and of how Norway otherwise is preparing for and adapting to climate change, see section 6.

(62) The Climate Change Act is aimed at the highest decision-making bodies in society; that is, the Storting and the Government. The Act does not lay down rights or obligations for citizens that may be enforced through legal action, see Proposition to the Storting (Bill) no. 77 (2016–2017) pages 34 and 53. The preparatory works also specify that Norway's contribution under the Paris Agreement, see section 2 of the Climate Change Act, "is an 'economy wide' target for reduced emissions. It covers, in this respect, all greenhouse gas emissions from Norwegian territories, including Svalbard and Jan Mayen, and from the activities on the Norwegian continental shelf", see the Proposition page 53.

(63) The Norwegian Act relating to greenhouse gas emission allowance trading and the duty to return emission allowances – the Greenhouse Gas Emission Trading Act – was adopted in

2004. The purpose of this Act is to limit the greenhouse gas emissions in a cost-efficient manner by means of a duty to surrender greenhouse gas emission allowances and freely transferable emission allowances, see section 1 subsection 1.

(64) Norway has several other climate-related Acts, including the Environmental Information Act, the Nature Diversity Act, the Pollution Control Act, the Petroleum Act and the CO_2 Tax Act. In addition, Norway has a large number of regulations for protecting the environment and ensuring petroleum production safety. Management plans are being prepared for the marine areas. Petroleum production must be carried out in accordance with plans for the designated area. There was previously a separate management plan for the Barents Sea and the marine areas off Lofoten islands. The most recent management plans, from April 2020, are compiled in Report to the Storting 20 (2019–2020).

Petroleum activities in Norway

Regulation until production

(65) The regulation of Norwegian petroleum activities may be roughly divided into three phases: the opening of a field, the exploration phase and the production phase. Before each phase, reports and assessments are made in accordance with the rules applicable to the relevant phase. For the opening phase, the main question is whether it is appropriate and desirable to open the area for petroleum activities in the light of an overall balancing of advantages and disadvantages. Before a production licence is awarded, the assessment is primarily related to which blocks should be announced, based on the likelihood of discovery. A block is a defined geographic area. Public consultation rounds are held, involving the Storting at several stages. Before extraction and production, the actual consequences of the extraction are assessed in more detail.

(66) Marine areas must be opened for petroleum activities before a production licence can be awarded. The opening procedure is regulated in section 3-1 of the Petroleum Act:

> "Prior to the opening of new areas with a view to awarding production licences, an evaluation shall be undertaken of the various interests involved in the relevant area. In this evaluation, an assessment shall be made of the commercial and environmental impact of the petroleum activities and possible risk of pollution, as well as the economic and social effects that petroleum activities may have.
>
> The question of opening of new areas shall be put before the local public authorities and key interest organisations that may be presumed to be particularly interested in the matter.
>
> It should be made known through public announcement which parts are planned opened for petroleum activities, and the nature and extent of the activities in question. Interested parties shall be given a time limit of no less than three months to present their views.
>
> The Ministry is to decide on the administrative procedure to be followed in each individual case."

(67) According to the preparatory works, the legislature has assessed these rules against the former Article 110 b subsection 2 of the Constitution, see Proposition to the Odelsting no. 43 (1995–

1996) page 33. In section 6 d of the Petroleum Regulations, it is stated that any opening of a new area under section 3-1 of the Petroleum Act must be presented to the Storting.

(68) During the opening process, the Ministry of Petroleum and Energy is to carry out an impact assessment for the area on the continental shelf that is being considered opened, see chapter 2 a of the Petroleum Regulations. The impact on the environment and the climate is among the factors to be clarified, see section 6 c subsection 1 (b) and (e) of the Regulations. The Storting considers possible opening of an area based on the impact assessment.

(69) A production licence gives the licensee an exclusive right to perform investigations, exploration drilling and extraction of petroleum deposits within the geographical area stated in the licence, but not a right to initiate development and production until further licences are awarded. The licensee becomes the owner of the oil and gas that is produced, see section 3-3 subsection 3 of the Petroleum Act. The procedure for announcing and granting a production licence is provided in section 3-5 of the Petroleum Act and chapter 3 of the Petroleum Regulations. The Regulations contain several requirements for the application on the part of the applicant, but during this phase, the State does not have a statutory obligation to carry out an impact assessment.

(70) If profitable discoveries are made under a production licence, a process is initiated until the actual exploitation of the specific discovery. This process is regulated in chapter 4 of the Petroleum Act and in chapter 4 of the Petroleum Regulations. Among other things, the licensee must apply for and obtain approval of a plan for development and operation (PDO), based on an impact assessment, before development and operation may be initiated, see section 4-2 of the Petroleum Act and sections 22 to 22 c of the Petroleum Regulations. I will return to this.

Factual circumstances – particularly the 23rd licensing round

(71) The first licensing round on the Norwegian continental shelf was announced in 1965, when 22 production licences were awarded for 78 blocks. The first major discovery was the Ekofisk field in 1969, where production commenced in 1971. A field comprises production from several blocks. Many great discoveries have since been made on the Norwegian continental shelf; a total of 3 196 blocks have been awarded. Today, there is activity on 88 fields.

(72) Of these 3 196 blocks, 663 have been awarded in the Barents Sea. The south Barents Sea was opened for exploration drilling in 1989, and has currently two fields in operation: Snøhvit and Goliat.

(73) The Barents Sea is particularly rich in species diversity and an important reproduction area for large fish stocks. Along the ice edge, there is a unique ecology, with a considerable production of plankton in the spring. The polar front, were cold waters from the Arctic Ocean meet warmer waters from the Atlantic Ocean, also has a unique ecology.

(74) Both the ice edge and the polar front are particularly vulnerable to oil spill. The ice edge is constantly in movement and varies from year to year. Climate changes generally cause the ice edge and the polar front to move towards the north. In addition to the risk of oil spill, the area is particularly vulnerable to soot emissions, which intensifies the ice melting.

(75) After the entry into force of the delimitation agreement between Norway and Russia entered in the summer of 2011, an impact assessment was initiated immediately for the southeast Barents Sea. The impact assessment was presented as an appendix to Report to the Storting 36 (2012–2013). The assessment included 24 professional studies, of which around a third related to environment and climate. In the summer of 2003, the Storting consented to the opening of the southeast Barents Sea, see Recommendation to the Storting 495 (2012–2013).

(76) Seven of the production licences in the 23rd licensing round (14 blocks) apply to the south Barents Sea, while three licences (26 blocks) apply to the southeast Barents Sea. All blocks lie north of the mainland between 71° 30' and 74° 30' north latitude, and 20° 40' east longitude, towards the Russian delimitation line.

(77) On the blocks from the 23rd licensing round, seven exploration wells have been drilled to this point, three in the south Barents Sea and four in the southeast. One area from this round in the south Barents Sea and two in the southeast have been returned – in total 20 blocks or parts of blocks. Under the only remaining licence in the southeast Barents Sea (seven blocks), the operator has applied for a return of 62 percent of the area. The background for the returns is that there have been no profitable discoveries.

Does Article 112 of the Constitution confer rights on individuals that may be asserted in court?

The issue

(78) It is essential for an action alleging violation of Article 112 of the Constitution to succeed that the provisions may be invoked in court at all as a substantive impediment for the authorities.

(79) Some provisions in the Constitution, for instance Article 100 on the freedom of expression, clearly confer rights that may be asserted in court. The right may be positive and give a legal claim to something, or negative and give individuals or groups freedom from interference. Such rights are likely to correspond with the duties for the authorities. Other constitutional provisions are mere "manifestos" imposing duties on the authorities, but from which one cannot derive specific rights that may be asserted in court. We also find constitutional provisions expressing something in between. These provisions are intermediate solutions where certain rights may be asserted in court, but where the duties of the authorities are more extensive. What type of constitutional requirement one is dealing with depends on interpretation, where the wording of the provision determines to which extent it is binding how it is to be enforced.

(80) If a constitutional provision confers rights that may be asserted in court, but which are not as extensive as the duties of the authorities, it is a question of how far-reaching the rights are. The answer may vary, depending on whether it is a legislative decision or an individual decision and on which body has made it.

(81) The issue at hand is whether Article 112 of the Constitution may be invoked in court as a legal basis for claiming that an individual decision, in the form of a royal decree based on the Storting's consent, is invalid under section 3-3 of the Petroleum Act. It is true that the Storting has not consented to the individual decision specifically. However, it is based on opening decisions in 1989 and 2013 to which the Storting did consent, and which are in fact key in this

context. Furthermore, it is a crucial premise for the individual decision that several bills to stop the 23rd licensing round were rejected by the Storting with a broad political majority during the period before it was issued. Therefore, the starting point for my assessment will be that a decision has been made conclusively based on the Storting's consent. The fact that we are formally dealing with an individual decision issued by the Government, is therefore less important.

(82) The environmental groups claim that Article 112 subsection 1 of the Constitution confers an entirely general right that coincides with the duties for the authorities and that may be asserted in court. In the alternative, they claim that such a substantive right follows from subsections 1 and 2 read in context with subsection 3.

(83) The State, on the other hand, claims that Article 112 subsection 1 confers no rights, either in itself or read in context with subsection 3, that coincide with the duties for the authorities. However, the State finds that Article 112 *does have* a legal content as (i) a guideline for the Storting's legislative function, (ii) a guideline for administrative discretion, (iii) a principle of interpretation and (iv) as a legal impediment when the Storting has overlooked an environmental issue. In addition, the State contends that (v) the measures requirement in Article 112 subsection 3 entails legal duties, but without corresponding rights. Possible violation of these duties may only be brought before the Court of Impeachment, as the State views it.

The wording in Article 112 of the Constitution

(84) Constitutional provisions must as a starting point be interpreted in the same way as other legal rules. Yet, they are distinct in the way that they tend to be more general and discretionary than ordinary laws and regulations. The wording of a constitutional provision is often not suited to give the full understanding of the nature and the scope of the provision. The genre is brief and refined, and may thus differ from ordinary statutory provisions and other written norms. However, the judicial method is the same: the starting point is the wording.

(85) The provisions currently found in Article 112 of the Constitution were adopted in 1992 – then as Article 110 b. In 1992, the Constitution was divided into five parts. Article 110 b was placed in Part E "General Provisions". When the Constitution was revised in 2014, a number of new provisions were added. The Constitution had a new style of language – both in Nynorsk and Bokmål. Many provisions were gathered in Part E, that was renamed "Human Rights". In addition, the order of the Articles was partially changed. The former Article 110 b became the current Article 112 and placed in Part E, which now covers human rights.

(86) Article 112 of the Constitution reads:

> "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."

(87) The Article imposes clear duties on the authorities both in subsection 1 second sentence, that the authorities shall manage the resources on the basis of comprehensive long-term considerations, and in subsection 3, that the authorities shall take measures for the implementation of the principles in the constitutional requirement. The question is whether subsection 1, alternatively subsection 3 read in context with subsection 1, also confers a right that an individual or a group of individuals may assert in court, and, in that case, how extensive this right is.

(88) Read in a contemporary linguistic light, the wording in Article 112 subsection 1 considered in isolation implies that it concerns rights that may be asserted in court. However, the expression may also be interpreted as a form of principle or norm without a corresponding right to assert the principle or norm in court.

(89) Article 112 subsection 2 of the Constitution gives the citizens a right to information and impact assessments to safeguard their right under subsection 1. The content is more specific than in subsection 1. When including subsection 2 in the overall interpretation, it suggests that it generally concerns rights of individuals.

(90) The wording "these principles" in Article 112 subsection 3 refers to the rights mentioned in subsections 1 and 2. From a purely linguistic perspective, "principle" is naturally interpreted as something other than a "right". A principle is closer to a norm or an axiom – and nothing on which one may base a legal claim.

(91) Against this background, the wording may be interpreted in several ways and gives no clear answer to whether, and possibly to which extent, the provision confers rights that may be asserted in court. In my view, however, the rather wide and general wording – as well as the use of "principles" – clearly suggests that a possible right is at least not as extensive as the duties for the authorities, which means that the category is somewhere in-between.

(92) As mentioned, Article 112 of the Constitution is placed in chapter E on human rights, but this label is not very helpful in the interpretation. The right to a healthy environment is often characterised as a third-generation human right, see Erik Møse, *Mennskerettigheter* (human rights), 2002, page 90. As opposed to the first- and second-generation rights in the ECHR and in UN human rights conventions, Article 112 of the Constitution – and the former Article 110 b – are not modelled on a binding rule of international law. No individual right to relating to environment or climate is established by any convention. Thus, this interpretation has no support in the wording of such sources.

The background to the former Article 110 b in the Constitution

(93) Before the adoption of Article 110 b of the Constitution, the predecessor of Article 112, several proposals were made by members of the Storting to incorporate the right to a healthy environment. A summary of these proposals is given in Recommendation to the Storting 163 (1991–1992) page 2–3:

> "In 1972, the representative Helge Seip put forward a bill (Bill no. 13 in Document no. 13 for 1971–72) on the inclusion of a new subsection 1 in Article 110 of the Constitution,

> imposing the State to protect the natural environment and natural resources, to ensure access for everyone to clean air and water, and access to recreational and free areas, and so as to secure the production base in the soil, the forest and water was for the posterity.
>
> The bill was discussed in the Storting in 1976 (Recommendation to the Storting 207 for 1975–76) and rejected by all except one. The Standing Committee on Foreign and Constitutional Affairs stated with regard to the bill that one should be on guard against the increased tendency of including declarations of principle without legal significance in the Constitution, although the content of these declarations are solid enough in themselves. The Committee agreed that the State has a duty to protect the environment to secure the access to clean air and clean water, but did not consider the present bills expedient.
>
> In 1984, the Storting discussed two bills to constitutionalise the protection of the environment (Bills nos. 9 and 13 in Document no. 13 for 1979–80). The idea in one of the bills from Nils Christie, cleared for submission by Anne-Lise Bakken and Ingrid Eidem, was to add a new Article 82 in the Constitution, stating that significant encroachments on the environment could only be carried out with a two-third, alternatively a three-fourth, majority. In other words, the bill would give local governments and county authorities a right to appeal against an individual decision on encroachment on the environment to the Storting (see Recommendation to the Storting 163 for 1983–84). The bill was unanimously rejected by the Storting.
>
> The second bill put forward by Øyvind Bjorvatn was identical to that from Helge Seip in 1972. This bill, too, was unanimously rejected by the Storting. (Recommendation to the Storting 164 for 1983–84)."

(94) Nonetheless, the rejection of the latter proposition had the effect that the Standing Committee on Foreign and Constitutional Affairs asked the Ministry to initiate an assessment to provide a basis for considering possible constitutionalisation of the protection of natural resources, see Recommendation to the Storting 164 (1983–1984) page 2. This assignment was given to former Professor Inge Lorange Backer. I will return to this assessment.

(95) In Recommendation to the Storting no. 163 (1991–1992) page 3, the Committee further explains that the Storting, in 1988, discussed a constitutional bill from Eva Funder Fleischer, presented by Osmund Faremo, regarding encroachments on the natural environment, see Proposition no. 12 in Document no. 10 (1983–1984):

> "Everyone has a right to clean air, clean soil and clean water. Any individual or group of individuals has a right to have determined in court whether an acceptable level of cleanliness had been exceeded."

(96) The bill was drafted as a substantive right to clean air, clean soil and clean water – by declaring that all individuals or groups of individuals had a right to have the courts determine whether an acceptable level of cleanliness had been exceeded. The majority of the Committee found that the rights conferred on the legal entities under this constitutional bill were so unclear that they were suited to cause uncertainty and disputes in a disproportionate scope, see Recommendation to the Storting no. 95 (1987–1988) page 4.

(97) The constitutional bill from Eva Funder Fleischer was repeated by Kjellbjørg Lunde and Theo Koritzinsky during the following Storting period, and rejected simultaneously with the adoption of Article 110 b of the Constitution.

(98) In other words, when the work leading to Article 110 b was commenced, the Storting wanted neither a declaration of principle without legal significance nor a pure rights provision with extensive rights that could be asserted in court. In my view, this prelude – which has also been highlighted in subsequent preparatory works – must be emphasised when interpreting the former Article 110 b and the current Article 112.

(99) Professor Backer's report on the constitutionalisation of environmental law principles was submitted to the Ministry of Environment on 20 March 1988. The report has later been published in Institute for Public Law's publications no. 6/1990. Backer initially discusses what may be considered environmental law principles. He also mentions the former constitutional bills on environmental protection. Backer remarks that the Constitution is *lex superior*, and that any provision therein will take precedence over ordinary legislation in the event of conflict. He then refers to the key considerations, for instance on page 27–28:

> "From an environmental protection perspective it is desirable to a constitutional provision that is a binding as possible, at least as long as one avoids a gap between the provision and the factual reality that may be realised. On the other hand, an extensive and binding emphasis on environmental considerations may conflict with other societal objectives. Although the environment sets limits for human activities in order to secure human existence with a reasonable quality of life, it is not so that environmental considerations imply that any strain on the environment must be avoided. Often, it is the overall strain that becomes detrimental to the environment, and not one specific activity. The extent to which environmental considerations clash with other societal objectives often depends on whether the environment is to be improved by one stroke, or over a certain period of time making room for adjustment of other socially useful activities."

(100) Here, Backer points out that the consideration of other societal interests and the necessity of an overall perspective suggest that we are not dealing with a binding constitutional provision.

(101) On the following pages, Back does not favour giving individuals a general substantive right to a certain environmental quality that may be asserted in court. He points out that the courts are not as suited to consider such questions as the popularly elected bodies, the necessity of coordinating measures in several fields and ensuring supply of public resources, the overall impact, considerations for other societal interests and the overall perspective.

(102) However, the statement from Backer contains "a constitutional alternative providing substantive legal protection for the environment, but without being as binding and giving the courts such a superior position as mentioned above", see page 30. In other words, he favoured an intermediary solution, a right that *may* be asserted in court, but not a right corresponding to the duty of the authorities. Backer supported an alternative that was very similar to that subsequently adopted by the Storting.

(103) Backer based himself on a principle on the right to a certain environmental quality, such that the Storting was to regulate by statute how the principle should be implemented. He assumed that once legal rules were enacted, they had to take precedence over the constitutional provision. Next, Backer gave examples of how constitutional provisions also where legal rules are given, may have legal significance: as a guideline for the Storting, as an interpretive principle and as a guideline for administrative discretion. In addition, the principle must be used to solve environmental issues that the legislature has not considered. Here, Backer emphasised that the use should be left to the courts. Backer summarised it as follows on page 30:

> "Accordingly, it may be said that this alternative gives popularly elected bodies the opportunity to play the main role in ensuring satisfactory environmental quality, and that it gives the courts a more withdrawn role without excluding them."

(104) Read in context, I interpret this to mean is that individuals or groups could freely bring the case to court, directly based on the constitutional provision when the legislature has failed to consider an environmental issue.

The content of the former Article 110 b

(105) Article 110 b of the Constitution was given the following wording:

> "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 a comprehensive long-term consideration that 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 issue further provisions for the implementation of these principles."

(106) Article110 b was adopted in 1992 following a bill put forward the Storting members Liv Aasen and Einar Førde, see Document no. 12 (1987–1988), bill no. 15. This bill did not explicitly mention Professor Backer's report. However, Backer's report presented four variants of constitutionalisation: one that conferred clear rights on individuals, one that only imposed duties on the State, one that was merely a "manifesto" and one that was something in between. Considering the similarities with the wording of the bill from Aasen and Førde that was adopted, there is every reason to believe that this was based on the latter option.

(107) Aasen and Førde justified the bill by the fact that several previous proposals to include an provision in the Constitution had been dismissed "either because they [had] been mere declarations of principle without legal significance, or because too extensive rights [had] been conferred on the citizens that may be directly asserted in court with reference to the Constitution", see Document no. 12 (1987–1988) page 34. Aasen and Førde pointed out that they had considered this in their bill. Against this background alone, it must be clear that Aasen and Førde aimed at something in between these two extremities; that is, a provision that *neither* conferred extensive rights on the citizens that could be enforced through legal proceedings, *nor* functioned as a declaration of principle without legal significance.

(108) It is then stated in Document no. 12 (1987–1988) page 34–35:

> "Constitutional provisions will have legal significance in several manners. The Constitution takes precedence over other legislation in the event of conflict. It will also carry great weight in the interpretation of ordinary legislation. A provision on environmental protection will also be instructive for administrative practice.

> All three options entail a duty for the authorities to issue further provisions necessary for implementing principles in the constitutional provision. The further content and the scope of the principles that we propose constitutionalised, must be specified through rules laid down by the authorities. The provisions entail a duty for the authorities to ensure that environmental considerations are incorporated in the set of rules in all areas of society where this is relevant. The term 'the State's authorities' primarily aims at the Storting as the legislative power. Further rules may nonetheless also be provided through other Storting decisions dealing with environmental considerations, including regulations issued by the Government or another administrative body with a basis in the law. Therefore, where rules are provided, it is the Storting's interpretation of constitutional provisions that normally takes precedence when determining the rights of the citizens.
>
> In cases where environmental considerations are not incorporated into legislation, one should nonetheless allow private individuals or organisations with a legal interest under ordinary procedural rules, to assert their rights in court directly based on the Constitution. …"

(109) This largely coincides with what Professor Backer wrote regarding the legal consequences of his proposition.

(110) The Standing Committee on Foreign and Constitutional Affairs discussed the bill in Recommendation to the Storting no. 163 (1991–1992). As I have cited, the Committee referenced the former constitutional bill with Backer's assessments and proposals as a clear starting point. Here, it is stated that the legal implication of constitutionalisation "is that a constitutional provision will take precedence over ordinary legislation in the event of conflict", see page 5. The alternative proposed by the Storting, which was adopted, was very similar to that recommended by Backer. The difference was that in Backer's proposal, the sentence on the authorities' duty was last in subsection 1, before the provision on the right to information.

(111) The Storting Committee's own remarks are provided in Recommendation to the Storting no. 163 (1991–1992) page 5–6. The Committee mentioned initially that the Storting, among other things through Backer's report, had obtained "a solid basis for assessing possible constitutionalisation of environmental protection". The Committee then pointed out that constitutionalisation would be an important signal both nationally and internationally, that it would function as a political guideline to facilitate promotion of environmental protection measures and as a message to the private sector that the Storting emphasises environmental protection. The Committee also mentioned that rights in this area that may asserted in court should be regulated by statute to obtain the necessary level of precision. Finally, the Committee stressed that it was a matter of constitutionalising principles that were partially already laid down in Norwegian law, including "the principles on the right to a certain environmental quality" and the duty to avoid adverse environmental deterioration and damage.

(112) The Standing Committee on Foreign and Constitutional Affairs made many similar remarks to the legal effect of the bill, see Recommendation to the Storting no. 163 (1991–1992) page 6.

> "*The Committee* points out that the principles in subsections 1 and 2 of the constitutional bill will have legal significance in many ways. They will function as a constitutional guideline for the Storting's legislative authority in this area, and an important factor when interpreting regulations adopted or approved by the Storting itself. The principles will also restrain public administration by being normative for an administrative body's

> discretionary exercise of power. The principles will also be applicable to environmental issues that the legislature has not considered.
>
> Subsection 3 of the constitutional bill implies that the authorities adopt further provisions to implement the principles in subsections 1 and 2. *The Committee* mentions that this implies that further substantive requirements for environment measures will be laid down through the Storting's legislation and other regulation.
>
> …
>
> *The Committee* would like to stress that where the Storting has provided such rules, these are the ones to apply in possible court cases."

(113) In other words, the Storting assumed, in the same manner as Backer and the proposers Aasen and Førde, that the constitutional provision was to have several legal effects. The provision was to function as a constitutional guideline for the legislative work, in addition to a factor in the interpretation of the law and a mandatory consideration for administrative discretion. Finally, the principles were to apply to environmental issues that the Storting had not considered.

(114) The Committee mentioned specifically the right to have one's rights reviewed by a court, but that this may be done only *once* – and that legal rules must form the basis for the court's assessment when such rules exist. In my view, it is natural to interpret this in line with the proposers – as a right to a review by a court directly based on the Constitution, primarily when environmental considerations *are not* incorporated in legislation.

(115) I note that nothing else was said in the Storting debate with relevance to the issue at hand. The spokesperson emphasised the Committee's statement that Article 110 b subsection 1 is to apply to environmental issues that the legislature has not considered. The reason for specifying this was that the spokesperson found that the special comment from the Progress Party seemed to assume that the bill was only a declaration of principle, see Storting Documents (1991–1992) pages 3736–3737.

(116) I agree with the State that based on the preparatory works to Article 110 b of the Constitution, it is clear that the provision did not establish a *general* substantive right, as the environmental groups argue. On the same day as Article 110 b was adopted, the Storting rejected a constitutional bill from Eva Funder Fleischer, submitted by Osmund Faremo two Storting periods earlier, and submitted anew by Kjellbjørg Lunde and Theo Koritzinsky in the preceding period, stating that everyone is entitled to a court's assessment of whether a reasonable cleanness level has been crossed.

(117) Based on the background and the preparatory works to the former Article 110 b, it must, as I see it, be assumed that the provision in any case may be invoked directly in court both with regard to the right to information under Article 110 b subsection 2 and the area in which no "further provisions" existed, see subsection 3. Where substantive rules *did* exist, these were to form the basis for the assessment. The courts were not to have the possibility review the measures chosen by the legislature for environment protection purposes.

(118) The question is whether Article 110 b subsection 3 of the Constitution also functioned as a safety valve against serious violations of the principles in subsection 1 – since the

Constitution is *lex superior* and therefore takes precedence over other legislation in the event of conflict.

(119) As mentioned, it was emphasised several places in the preparatory works that constitutional provisions take precedence before ordinary legislation in the event of conflict. However, the further implications of this are uncertain. The principle of rank is not expressly discussed in the Storting Committee's own comments to Article 110 b, but are, as mentioned, noted by the Committee in its discussion of the bill, see Recommendation to the Storting no. 163 (1991–1992) page 5. The Committee was thus aware of the principle.

(120) It was emphasised that Article 110 b was a constitutional guideline for the Storting's legislative power. Although the starting point was that the Storting should determine which measures to implement, it is just as much a question whether the Storting should be *completely free* to issue statutory provisions clearly in conflict with the protection Article 110 b of the Constitution was intended to give.

(121) In a judicial study of Article 110 b of the Constitution, Ole Kristian Fauchald summarised this as follows in *Forfatning and miljøvern – en analyse av Grunnloven § 110 b* [Constitution and protection of the environment – an analysis of Article 110 b], in *Tidsskrift for Rettsvitenskap*, 2007 as follows on page 35:

> "Against this background one must conclude that setting aside Storting decisions based on Article 110 b is only exceptionally feasible. It may be done where the Storting's decisions entail a direct and serious deterioration or undermining of the environmental standards prescribed in Article 110 b."

(122) Similar views were expressed by Inge Lorange Backer in *Innføring i naturressurs- and miljørett* [Introduction to the law of natural resources and environment], 2012, page 60:

> "One may say that the constitutional provision leaves it to the Storting to choose which path to take to protect the environment. However, should the development be the opposite, a general deconstruction of environmental safety, the courts may have legitimate cause to interpret Article 110 b as a limitation."

(123) As I see it, the background and preparatory works to the former Article 110 b do not substantiate such views. However, the views have – at least to a large extent – support in superior norms: Should the Storting be free to set aside its duties without the courts interfering at any level, it would be contrary to general rule of law principles. That would be alien to our democracy based on the rule of law, and the Storting had no reason, when adopting Article 110 b of the Constitution, to address this issue.

(124) On the other hand, I cannot see that the mentioned sources of law give any reason for the courts to monitor more closely that the duties in the provision are complied with in connection with decisions made or endorsed by the Storting, as the environmental groups argue. I mention in particular that rights were to be implemented by statute, that one did not wish to leave wide assessments to the courts, and that one did not wish to confer extensive individual rights that could be asserted in court.

The preparatory works to Article 112 of the Constitution

(125) Before the constitutional revision in 2014, the Storting's presidency appointed a commission to assess constitutionalisation of human rights. The Commission was headed by Inge Lønning. The report from the Storting's Human Rights Committee (the Lønning Commission) was presented to the Storting as Document 16 (2011–2012).

(126) Based on the report from the Lønning Commission, Article 110 b of the Constitution was moved to Article 112. The language in subsections 1 and 2 was modernised, but no express substantive changes were made. The content of subsection 3 was, however, slightly amended. Instead of "shall issue", it now says "shall take measures". Also the scope of the duty was expanded from "further provisions"; that is, legislation, to "measures". This is a wider and more general term. The question is which effect the amendments, and the preparatory works, have for the interpretation of the current Article 112.

(127) The adoption of Article 112 of the Constitution was a step in a broad reformation process. The parts of the preparatory works concerning Article 112 are nonetheless rather brief.

(128) The right to a healthy environment is dealt with in chapter 40 of the report from the Lønning Commission. The Commission opens its discussion of Article 110 by stating that it has examined the provision "with a view to whether and possibly how environmental rights may be strengthened in the Constitution", see Document 16 (2011–2012) page 243. Following a short introduction, the Commission describes what it found to be applicable law, i.e. The understanding of the then Article 110 b. The Committee writes the following on page 243:

> "It is clear that this provision from the Storting was meant to be a legally binding provision and not merely a manifesto."

(129) The Lønning Commission also refers to Recommendation to the Storting no. 163 (1991–1992) page 5, which I have cited, that a constitutional provision will take precedence over ordinary legislation in the event of conflict. The Commission then points out what I have also cited from page 6 that the principles "will be legally significant in many ways". From references in footnotes, it appears that the Lønning Commission was thinking of situations where the legislature had not taken a stand. The Commission concludes that private citizens and organisations could invoke Article 110 b of the Constitution in court, but stresses that it is unclear in which situations such direct claims could be made. To this point, this is nothing new to me.

(130) In Document 16 (2011–2012) page 244, the Lønning Commission stresses that the Storting cannot be more or less free, and refers to statements in the preparatory works to Article 110 b of the Constitution on provisions being *lex superior* and a guideline for the legislature as well. The Commission then concludes that Article 110 b must be read as a rights provision.

(131) Even so, it is unclear what the Commission actually read into this right, and at which level one could build law directly on Article 110 b of the Constitution, outside the "legal void", and thus set legislation aside in cases before the court. However, the statement that the Storting cannot be more or less free in the legislative process implies that the Commission found that the right could be asserted to a certain extent. As mentioned with regard to the sources of Article 110 b, I find that there was a basis for claiming that certain minimum requirements should be laid down for the Storting's environmental legislation and measures. In my view, there is nothing fundamentally new to this, either. But it strengthens a principle that already existed in the sources.

(132) After a brief look at the constitutions of some other countries, the Commission's own assessments and draft are made in Document 16 (2011–2012) page 245–246:

> "To the Commission, the question is whether the right to a healthy environment should be strengthened in the Constitution, and, if yes, how this may be done. The background to the question is that humanity will be facing large environmental challenges in the future, both globally and nationally. Some of these environmental problems are undoubtedly man-made. For other environmental challenges, such as climate change, there is some disagreement as to how many of these problems are caused by human activity. However, it is clear that environmental challenges may have serious effects such as desertification, extreme weather etc. These effects may in turn lead to extinction of species, shortage of water and food, migration, spread of epidemics etc.
>
> Against this background, it must be questioned whether the right to a healthy environment is not just as important for the individual's existence and self-realisation as other human rights that are naturally incorporated in the Constitution, and whether this constitutional protection should be further strengthened.
>
> In the Commission's opinion, the wording of Article 110 b subsection 1 of the Constitution is satisfactory. It is in accordance with the World Commission's recommendations on 'legal principles for environmental protection and sustainable development'. The Storting's intent is that the provision should represent a legal impediment for the authorities, while being founded on human rights at the same time.
>
> The Commission therefore believes that the wording of Article 110 b subsection 1 should be upheld.
>
> The Commission has no comments to the provisions in subsection 2.
>
> However, the Commission has considered whether subsection 3 of the provision should be given a more fitting wording, primarily to clarify the authorities' duties under subsection 1 on implementing adequate and necessary measures to protect the environment. This is presumed to be the primary motivation for the provision, as it currently reads. Nonetheless, the provision could have been more precise with regard to the authorities' duty to follow up the right to a healthy environment. Subsection 3 might for instance read:
>
> > 'The State authorities shall have the authority to implement measures to enforce these principles.'
>
> An alternative would be to repeal subsection 3 without replacing it with any new wording.
>
> The Commission recommends replacing subsection 3 by a statement that the State authorities have a duty to implement measures for implementation of Article 110 b subsections 1 and 2 of the Constitution. This will clarify the authorities' active duty to protect the environment through various forms of measures. There will still be a large room for political discretion as to which measures to implement at which time. However, it is set out in the preparatory works (Recommendation to the Storting [no. 163 (1991–1992)] page 4) that a part of the principal objective of the current constitutional provision was to attach legal effects to the fundamental environmental principles once formulated by the Brundtland Commission. This condition was also repeated during the Storting's discussions. In line with this and case law from the European Court of Human Rights, the

> authorities cannot be passive witnesses to major environmental damage, but must implement measures that may contribute to securing a healthy environment for current and future generations. This should be more clearly expressed in the Constitution.
>
> In line with the Commission's proposal to include a separate human rights chapter in the Constitution's part E, Article 110 b is proposed moved to the new Article 112."

(133) Here, the Lønning Commission raises the issue of strengthening the constitutional protection, but without expressly concluding. The Commission presents subsection 1 as a legal impediment, but does mention rights for the individual. The Commission proposes to amend subsection 3 to "clarify" the duty, but does not say whether this involves a strengthening. The Commission also refers to this as a duty to implement "adequate and necessary measures", but without further explaining the implications.

(134) My overall perception is that *the duty* of the authorities is the principal motivation for the provision as it currently reads in Article 112 subsection 3. The Commission proposed a specification and expansion of the wording, to express more clearly that the authorities have a duty to secure the right to a healthy environment, either through legislation or other general provisions, or by authorising other administrative bodies to determine individual measures. The Commission emphasised the Storting's active duty to protect the environment through various actions. The emphasis on discretion as to which measures to implement, and when, suggests all the same that the Commission found that the Storting should not operate completely on its own.

(135) In Constitutional Bill 31 (2011–2012), amendments to the Constitution were proposed based on the Commission's report. Here, the draft Article 112 is cited without further discussion; the intention was to deal with it after the next parliamentary election, as prescribed in Article 121, previously Article 112, of the Constitution.

(136) After the new Storting had been elected, the Standing Committee on Scrutiny and Constitutional Affairs addressed the bill to a certain degree in Recommendation to the Storting 187 (2013–2014) pages 25–26. The draft bill is referred to as a continuation of Article 110 b. The Committee also writes that Article 110 b must be interpreted as a "legally binding provision", and that it takes precedence over ordinary legislation. Next, the Committee states:

> "*The majority* finds that there is a need to clarify the authorities' duty to comply with the principles in subsection 1 on implementation of adequate and necessary measures to protect the environment. The draft bill below must be read as an active duty for the authorities to implement measures to protect the environment. Which measures will be up to each Storting."

(137) Again, the clarification of the duty to implement adequate and necessary measures is emphasised. The duty is active, but it is up to the authorities to choose the measures.

Summary and conclusion

(138) Article 112 subsection 1 of the Constitution is undoubtedly important for the interpretation of statutory provisions and for administrative discretion. Moreover, subsection 1 is a guideline

for the Storting's legislative power and other measures from the authorities under Article 112 subsection 3.

(139) The wording does not clarify which other legal relevance Article 112 has for decisions made or endorsed by the Storting. However, it is obvious from background and preparatory works that the authorities as a starting point decide which measures to implement under subsection 3. Article 112 may nonetheless be asserted directly in court when it concerns an environmental issue that the legislature has not considered. However, the further implications of a possible delimitation against cases where the legislature *has* considered an issue may be unclear, since his is a well-legislated area. Moreover, a distinction between when one *has* considered an issue and when one has *not,* may be difficult to handle in practice.

(140) It is repeatedly expressed in the preparatory works to Article 112 that it was intended to have legal significance – that it was to function as a guideline for the legislature, that it would be *lex superior* and give clear duties in subsection 1 second sentence and subsection 3, see subsection 1 first sentence. These are among the few factors pointed out by the Standing Committee on Scrutiny and Constitutional Affairs in 2014 – in prolongation of the statement that Article 112 is legally binding. However, the Committee was otherwise silent on this topic, and the scope of the statement is uncertain. In my view, this implies that the Storting to some degree agreed to be bound, but was generally reluctant to renounce its political leeway.

(141) 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 constitutionalised values. On the other hand, decisions involving basic environmental issues often require a political balancing of interests and broader priorities. Democracy considerations also suggest that such decisions should be made by popularly elected bodies, and not by the courts.

(142) 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 decision, the latter must have grossly neglected its duties under Article 112 subsection 3. The same must apply for other Storting decisions and decisions to which the Storting has consented. Consequently, the threshold is very high.

(143) Against the background of the parties' contentions before the Supreme Court, I mention that these duties may involve both positive and negative measures. The purpose of the constitutional provision would largely be lost if the provision does not also involve a duty to abstain from making decisions violating Article 112 subsection 3.

(144) In other words, Article 112 of the Constitution is not merely a declaration of principle, but a provision with a certain legal content. However, one can only to a limited extent build directly on a constitutional provision in a case before the court.

(145) For an administrative decision in which the Storting has *not* been involved, Article 112 of the Constitution will have relevance as an interpretative factor and as a factor in the exercise of discretion. Apart from this, the case gives no cause to elaborate further on how thoroughly such decisions should be reviewed.

Some particular interpretation issues

(146) The application of Article 112 of the Constitution when it comes to greenhouse gas emissions raises some particular interpretation issues.

(147) First, with reference to a comment from the State, there is no basis for claiming that climate is not covered by Article 112 of the Constitution. On the contrary, climate is mentioned by the Lønning Commission as an example of what the provision is meant to cover, see my previous citations from the report.

(148) For decisions involving climate, typically those dealing with greenhouse gas emissions, the question is whether the effect of the decision should be considered in isolation or together with other emissions. We know the principle of requiring an overall assessment from section 6 subsection 2 of the Pollution Control Act and section 10 of the Nature Diversity Act. In my view, a validity challenge must take the specific decision as its starting point. On the other hand, the decision cannot be considered in isolation, but as a part of a whole. Yet, it cannot be so that when contesting individual measures, one may challenge the environment, climate or petroleum policy as a whole.

(149) A final question is whether it is relevant to consider greenhouse gas emissions and effects outside Norway. Is it only emissions and effects on Norwegian territories that are relevant under Article 112 of the Constitution, or must the assessment also include emissions and effects in other countries? Article 112 does not provide general protection against actions and effects outside the realm. However, if Norway is affected by activities taking place abroad that Norwegian authorities may influence directly on or take measures against, this must also be relevant to the application of Article 112. An example is combustion of Norwegian-produced oil or gas abroad, when this causes harm also in Norway.

Is the decision invalid?

Factual circumstances

(150) The damaging effects presented by the environmental groups as a consequence of the decision in the 23rd licensing round are partially related to greenhouse gas emissions from national exploration drilling and petroleum production, partially to emissions nationally and globally in connection with combustion of petroleum, and partially to the risk of local environmental damage because of the petroleum production.

(151) The Court of Appeal found that emissions from the exploration drilling were so marginal that they could be precluded in the assessment under Article 112 of the Constitution. This has not been disputed by the appellants. The issue is thus limited to the emissions from *possible future petroleum production.*

(152) At the time of the decision, it was uncertain whether one would find oil or gas in such magnitudes that production would be profitable. Before profitable discoveries are made, one may therefore not quantify, but only estimate, possible emissions. Some estimates from the production itself are provided the Court of Appeal's judgment paragraph 3.2:

> "Professors in economy Mads Greaker and Knut Einar Rosendahl have estimated the CO_2 emissions from such production at 22 million tonnes [high scenario] and 4,5 million tonnes [low scenario] respectively, that will be distributed over the production period. In the environmental assessment, the CO_2 emissions are estimated at 568 000 tonnes in a

> high scenario and 286 000 tonnes in a low scenario, in the year with the highest emissions, see the environmental assessment page 60. Compared with total annual emissions from the Norwegian continental shelf of approx. 15 million tonnes (2015), or total Norwegian emissions of 50–60 million tonnes, it concerns a minor contribution. Compared with global emissions, the emissions are of even less significance."

(153) This estimate was based on the impact assessment for the opening of the southeast Barents Sea; that is, a larger area than the blocks awarded in the 23rd licensing round. In addition, blocks in the south Barents Sea fell outside this estimate.

(154) The decision must be reviewed based on the factual situation at the time the decision was made. Yet, subsequent development may shed light on whether the assessment of facts was adequate at that time. The areas awarded under two of the production licences were later returned. Furthermore, an application has been made for a return of 62 percent of the area under the latter licence. This illustrates the uncertainty in the estimates made in the licensing rounds. The parties have not presented updated information to give a more complete picture.

(155) Around 95 percent of greenhouse gas emissions from petroleum production are mostly from *combustion abroad after export*. The effects on the climate are thus particularly relevant when combustion emissions, that mainly take place abroad, are included. As mentioned, Article 112 of the Constitution only covers the environment in Norway. Although we do not have figures demonstrating to which extent combustion emissions abroad cause damage in Norway, there is no doubt that global emissions will also affect Norway.

(156) It has not been contended that there is a risk of *local environmental damage* due to the 23rd licensing round. However, the impact assessment contains calculations of *the risk* of uncontrolled blowout causing environmental damage. For the exploration phase, it is concluded that if three exploration wells are drilled per year, one may expect one occurrence of serious environmental harm for seabirds per 15 000 years or moderate environmental harm per 6 000 years. For the ice edge, the figures are one event per 11 000 and 7 500 years, respectively. During the development and operational phase, the likelihood of blowout causing moderate environmental harm for seabirds is one occurrence per 4 000 years, and moderate environmental harm for the ice edge is one occurrence per 20 000 years. Although the consequences of oil spill may be dramatic, the risk is low.

The individual assessment

(157) When a production licence follows directly from the Storting's endorsement of the opening of the relevant areas, there is little left for the Supreme Court to control. The decision may then only be invalidated under Article 112 of the Constitution when the duty under subsection 3 is seriously neglected. I find it clear that this strict condition is not met, and will therefore only briefly comment on the measures implemented in the climate and environment area:

(158) A number of general and individual measures have been implemented to reduce *the national greenhouse gas emissions*. Among them are the levy of CO_2 tax, investment in renewable energy, support of technology for carbon capture and storage, support of green technology and green transition in general, and not least the joining of the EU Emissions Trading System.

(159) When it comes to *greenhouse gas emissions from combustion abroad* after Norwegian petroleum export, I believe one must accept that the Storting and the Government build their

Norwegian climate policy on the division of responsibilities between states in accordance with international agreements. Here, the clear principle is that each state is responsible for combustion on its own territory.

(160) A number of measures have been taken to prevent *local environmental harm*. A strict safety regime applies to the Norwegian continental shelf. For instance, a separate licence is required for each exploration drilling, in which special conditions may be laid down. If profitable discoveries are made, as mentioned, a new impact assessment will be prepared in connection with applying for approval of a PDO, which may also be subject to special conditions. In Report to the Storting 41 (2012–2013) page 2, it is set out that the drilling time will be subject to restrictions, for instance that no drilling may take place less than 50 km from the ice edge between 15 December and 15 June.

(161) As mentioned, when challenging a decision's validity, one must use that decision as a starting point. The appellants do not argue within such a scope. Their arguments are largely connected to the existing petroleum production. A key point for the environmental groups is that Norway must take a proportionally larger share of the climate cuts than other countries, because we produce oil and gas creating large emissions, and because we have the economic capacity to do so. Norway must therefore, they claim, cut at least 60 percent of the greenhouse gas emissions within 2030. The environmental groups also contend that until a detailed legal framework and climate accounts are in place, the authorities cannot commence production in new areas. It is held that the tolerance limit must be clearly stated in the planning – and that a system is required to prevent that this limit is not exceeded.

(162) It is unlikely that the courts, when assessing an individual decision, may lay down such specific requirements based on Article 112 of the Constitution. The arguments of the environmental groups imply that crucial parts of 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 shutdown of Norwegian petroleum production. This aspect is not a subject matter in this case.

(163) In addition, the Storting has stipulated specific targets for cuts in the greenhouse gas emissions. They are now provided in the Climate Change Act. As mentioned, the Storting and the Government have also implemented and planned several measures in order to reach the targets. At the same time, possible emissions from the southeast Barents Sea will not occur for a long time yet. As already pointed out, we are not dealing with serious negligence under Article 112 subsection 3 of the Constitution.

Is the decision incompatible with Article 2 or 8 of the ECHR, or Article 93 or 102 of the Constitution?

(164) The European Convention on Human Rights – ECHR – does not contain a separate provision on protection of the environment. Depending on the situation, Articles 2 and 8 of the ECHR may nonetheless apply in matters involving the environment. The same applies to the corresponding provisions in Articles 93 and 102 of the Constitution.

(165) The ECHR has been incorporated into Norwegian law with precedence over other legislation, see sections 2 and 3 of the Human Rights Act. It is clearly within the objective and activities of the environmental groups to protect environmental and climate interests. Although the

groups may not have a right to submit an application to the European Court of Human Rights for violation of Articles 2 and 8, the groups may assert violations of the ECHR in Norwegian courts under section 1-4 of the Dispute Act. The same applies to violations of the corresponding provisions in Articles 93 and 112 of the Constitution.

(166) Article 2 of the ECHR protects the right to life. The Article may impose positive duties on the authorities, including when it comes to hazardous business activities. However, the risk of loss of life must be "real and immediate", see the Grand Chamber judgment 30 November 2004 *Öneryıldız v. Turkey* paragraph 100–101. Jon Fridrik Kjølbro, *Den Europæiske Menneskerettighedskonvention – for praktikere* [the European Convention on Human Rights – for practitioners], 5th edition, 2020, page 238 uses the expression "relevant and imminent risk of life".

(167) 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.

(168) In my view, the answer is no. First, it is uncertain whether or to which extent the decision will actually lead to greenhouse gas emissions. Second, the possible impact on the climate will be discernible in the more distant future. Although the climate threat is real, the decision does not involve, within the meaning of the ECHR, a "real and immediate" risk of loss of life for citizens in Norway. Thus, no violation of Article 2 of the ECHR is found.

(169) Article 8 of the ECHR protects private life, family life and the home. Case law from the Court of Human Rights shows that the Article imposes positive duties on the State. In certain cases, this may have the result that the State has a duty to protect the environment. The Article has primarily been invoked in connection with local pollution of the environment. The Court stated the following in judgment 2 December 2010 *Ivan Atanasov v. Bulgaria* paragraph 66:

> "In today's society the protection of the environment is an increasingly important consideration... However, Article 8 is not engaged every time environmental deterioration occurs: no right to nature preservation is included as such among the rights and freedoms guaranteed by the Convention or its Protocols... Indeed, that has *been noted twice by the Council of Europe's Parliamentary Assembly, which urged* the Committee of Ministers to consider the possibility of supplementing the Convention in that respect (see paragraphs 56 and 57 above). The State's obligations under Article 8 come into play in that context only if there is a direct and immediate link between the impugned situation and the applicant's home or private or family life... Therefore, the first point for decision is whether the environmental pollution of which the applicant complains can be regarded as affecting adversely, to a sufficient extent, the enjoyment of the amenities of his home and the quality of his private and family life."

(170) The Court thus pointed out that that Article 8 cannot be applied to any environmental harm, and that a right to protection of the environment in itself is not included in the rights and liberties guaranteed under the ECHR with protocols. The Court also mentioned that the Council of Europe's Parliamentary Assembly had twice urged the Committee of Ministers to consider the necessity of supplementing the ECHR – without success. The State's obligations under Article 8 therefore only come into play if there is a direct and immediate link between the impugned situation and the applicant's home or private or family life. The Court then listed, in paragraphs 67–73, a number of cases concerning local environmental harm.

Common for these cases is that they dealt with hazardous activities a few hundred meters to a few kilometres away from private homes. In addition, the environmental threat in these cases has been immediate.

(171) To this point, the Court of Human Rights has not assessed applications related to climate. However, the Court has recently communicated an application from six youths against Norway and 32 other countries. The case concerned the failure to cut emissions with particular reference to forest fires and heatwaves in Portugal in 2017 and 2018. Nonetheless, there is nothing in present case law to suggest that the subject matter in climate cases will differ from that in cases concerning environmental harm in general. With the significance the Court until now has ascribed to "direct and immediate", I find it clear that the effects of possible future emissions due to the licences awarded in the 23rd licensing round do not fall within Article 8 of the ECHR.

(172) During the appeal hearing, particular attention has been given to the Urgenda case from the Netherlands. In this case, a declaratory judgment was sought by the Dutch environmental organisation Urgenda against the Dutch State. Urgenda requested a judgment affirming that the Dutch state had a duty within 2020 to reduce greenhouse gas emissions by 40 percent, or at least 25 percent, compared with 1990. The Dutch Supreme Court – *Hoge Raad* – upheld in a judgment 20 December 2019 (ECLI:NL:HR:2019:2007, unofficial English translation) the rulings of the lower instances, ordering the Dutch state to reduce greenhouse gas emissions by 25 percent within 2020, compared with 1990. Among other things, Hoge Raad cited Articles 2 and 8 of the ECHR.

(173) The judgment from the Netherlands has little transfer value to the case at hand. First, the Urgenda case questioned whether the Dutch government could reduce the general emission targets it had already set. It was thus not a question of prohibiting a particular measure or possible future emissions. Secondly, it was not a question of challenging the validity of an administrative decision.

(174) The environmental groups have finally mentioned that the Court of Human Rights may identify the content of the rights on the basis of international agreements constituting "common ground" between the Member States, see the Grand Chamber judgment 12 November 2008 *Demir and Baykara v. Turkey* paragraphs 85–86. Such a principle may hardly be applied to environmental issues, as the ECHR does not have a separate environment provision. In any case, it has not been demonstrated that the production licences constitute a breach of our international obligations.

(175) I add that most of the supporting documents that have been submitted and added to the case in accordance with section 15-8 of the Dispute Act, generally relate to international obligations, both under the ECHR and international law in general. These contain nothing that changes my assessments.

(176) Against this background, the decision is not a violation of Article 2 or 8 of the ECHR.

(177) The environmental groups have also contended that the decision is a violation of the corresponding provisions in Articles 93 and 102 of the Constitution. In the present case, the scope of these provisions does not extend beyond that of Articles 2 and 8 of the ECHR. This is particularly true, since the Constitution, as opposed to the ECHR, has a separate provision on the environment.

(178) Against this background, the decision is also not a violation of Article 93 or 102 of the Constitution.

Is the part of the royal decree concerning the southeast Barents Sea, invalid due to procedural errors?

Introduction

(179) The procedural errors asserted by the appellants, relate to the decision to open the southeast Barents Sea with a view to awarding production licences, see section 3-1 of the Petroleum Act. It has not been claimed that the same errors were made when awarding the licences in the Barents Sea south. First, the appellants claim that the information presented to the Storting on the economic prospects of opening the southeast Barents Sea, contained errors. Second, they claim that there were errors in the assessment of the potential climate harm related to opening of the area for petroleum production. In addition, they claim that the oil price dropped so dramatically from the opening decision was made until the licences were awarded that a new assessment of the economy should have been carried out.

(180) The opening decision is not decisive for rights and duties of private persons, see the Public Administration Act section 2 subsection 1 (a), and is therefore not an administrative decision within the meaning of the Public Administration Act. The opening decision is yet crucial to the process leading up to the production licences awarded under section 3-3 of the Petroleum Act. Procedural errors at the opening decision may therefore affect the validity of subsequent licensing. This is an issue for preliminary ruling.

(181) The alleged procedural errors relate to the opening process for the southeast Barents Sea in 2013. The south Barents Sea was opened already in 1989, and no procedural errors have been asserted relating to this decision. The procedural issue thus only concerns the most recently awarded area in the southeast Barents Sea from the 23rd licensing round, since two of the three areas have been returned to the State.

The Constitution's requirements of procedure and judicial review

(182) The body permitting an encroachment on nature is responsible for implementing the measures and assessments required in Article 112 subsection 3 of the Constitution, see subsection 1. As I have already described, the courts must exercise restraint in reviewing the political balancing of interests. However, 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 before implementing "measures" according to Article 112 of the Constitution subsection 3, see subsection 1. A number of procedural rules are laid down to ensure this, to which I will return.

(183) Article 112 subsection 2 of the Constitution contains a procedural requirement. The decision-making body must ensure that the right conferred on the citizens under the provision is fulfilled. The citizens have a right to information on the environmental effects of a planned encroachment on nature. The objective of the knowledge is to ensure that the citizens may exercise the right under Article 112 subsection 1, see the wording finally in subsection 2. This may for instance take place through public consultation rounds during the further process. The

provisions set quality standards to the procedure. The larger effects an administrative decision has, the stricter the requirements for clarification of consequences. Correspondingly, the assessment of the procedure must be more thorough the larger the impact of the measures.

(184) For the petroleum activities, the constitutional procedural requirements have been regulated through the Petroleum Act and the Petroleum Regulations. When these rules are interpreted and applied, it must be in the light of Article 112 of the Constitution. Petroleum activities have many consequences, which all have a great impact on society. The procedure of opening of new areas must thoroughly clarify the upsides and the downsides of the opening.

Procedural requirements in petroleum legislation

(185) As mentioned, the rules of procedure for opening of new marine areas for petroleum production follow from the Petroleum Act and the Petroleum Regulations. Moreover, the procedural requirements may be supplemented by the principle of the duty to clarify the case in section 17 of the Public Administration Act, even if the Act does not apply directly to the Storting, see section 4 subsection 4. In addition, Council Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment, the "SEA Directive", contains requirements for an environmental assessment of projects. The SEA Directive has been incorporated into Norwegian law, including in sections 6 a–6 c of the Petroleum Regulations.

(186) Section 3-1 subsection 1 of the Petroleum Act, which I have already quoted, requires a broad assessment and balancing of various interests and possible effects of the petroleum production: commercial effects, environmental effects, risk of pollution and economic and social effects. The assessment must include all stages of the petroleum production, see section 1-6 (c), from exploration to development, extraction, transport, exploitation and termination. In other words, the operational phase is included, even if it is primarily the effects from the exploration phase that must be clarified under section 3-1, see Proposition to the Odelsting no. 43 (1995–1996) page 33–34. The provisions do not regulate which interests are more important, but are meant to ensure a solid fact base for the assessment of whether a new area should be opened for petroleum production.

(187) According to section 3-1 subsection 4 of the Petroleum Act, the Ministry determines the procedure in the individual case. Although the Ministry has a wide leeway when it comes to which investigations and assessments to carry out, it must be borne in mind that the purpose of the assessment is to provide the Government and the Storting with a solid basis for decision making. In this respect, it must be emphasised that petroleum extraction has a large impact on society in general, that various interests clash, and that the views among the political parties and among people vary. This implies that the assessment tends to be more extensive than what is the case for other decisions.

(188) It follows from chapter 2 of the Petroleum Regulations that an impact assessment must be prepared before new areas are opened for petroleum production. Among other things, the assessment must address "relevant environmental targets", "important environmental factors", "the effects of opening" on the environment and possible remedies, see section 6 c subsection 1 (b), (d), (e) and (j) of the Petroleum Regulations. The impact assessment shall be subject to broad public consultation, see section 6 c subsection 3.

(189) As mentioned, these rules contribute to implementing the SEA Directive in Norwegian law. The objective of the SEA Directive is to provide for a high level of protection of the environment by requiring an environmental assessment early in the decision-making process, before the scope of individual decisions is set, see the Ministry of Petroleum and Energy's published comments to the Regulations on amendments to the Petroleum Regulations 20 January 2006, item 3 (I). Article 7 of the SEA Directive sets out that if a project in a Member State "is likely to have significant effects on the environment in another Member State", this other Member State must be notified. In other words, the SEA Directive is not drafted with a purely national perspective on the environmental effects of a project. Article 7 has been implemented in section 22 c of the Petroleum Regulations, in chapter 4 concerning

extraction. Nonetheless, the provision applies to the extent it fits the opening phase, see section 6 a subsection 3 first sentence.

(190) An impact assessment is not required in connection with awarding of production licences. Here, the usual criterion in section 17 subsection 1 of the Public Administration Act applies, that the case is "clarified as thoroughly as possible" before a licensing decision is made. Considered in context, the consequence of section 17 of the Public Administration Act is that the impact assessment made before the opening decision must also address the natural consequence of that decision – that production licences are awarded.

(191) If a discovery is suitable for development, the licensee must prepare a plan for development and operation of the petroleum discovery – a PDO – see section 4-2 of the Petroleum Act. The project must be approved by the Ministry. The applicant must carry out an impact assessment addressing, among other things, the effects the development and operation of the discovery will have on the environment, see section 22 a subsection 1 (a) of the Petroleum Regulations.

(192) It would be most natural to clarify and assess environmental issues related to the development and operation of the specific discoveries in connection with the impact assessment for the PDO, see also Proposition to the Odelsting no. 43 (1995–1996) page 33–34. However, the condition is that this excludes issues affecting the overall assessments that are mandatory at the opening decision.

Were the economic effects of possible future petroleum production inadequately assessed at the opening of the southeast Barents Sea?

(193) Section 3-1 of the Petroleum Act establishes that before new areas are opened, the possible economic effects of the petroleum production must be assessed. Petroleum production is defined in section 1-6 (c) as all activities related to subsea petroleum discoveries, including the exploitation thereof. This implies that also the economic aspects of the operational phase must be clarified and balanced. At the same time, one does not know at the opening stage what reserves will be found, and all estimated economic effects will be highly uncertain. The requirement in section 3-1 of the Petroleum Act must therefore be that, to the extent possible, a realistic picture is presented of the *potential* scope of the economy during the operation phase.

(194) It is mentioned in Report to the Storting 36 (2012–2013) page 13 on the opening of the southeast Barents Sea that the resource estimate for the southeast Barents Sea "shows significant anticipated recoverable resources and a large upside potential". On page 25, the anticipated recoverable resources are quantified.

> "Anticipated recoverable resources for the southeast Barents Sea is estimated to 300 mill. Sm^3 o.e., with a downside of 55 mill. Sm^3 o.e. [standard cubic meters oil equivalents] (P95) and an upside of 565 mill. Sm3 o.e. (P05). De anticipated extractable resources are distributed on 50 mill. Sm^3 fluid and 250 billion. Sm^3 gas, respectively."

(195) The estimates were based on seismology from 2011 and 2012 and discoveries in adjacent areas. At the same time, it is emphasised several times that the resource estimates are uncertain, and that exploration wells must be drilled to demonstrate petroleum deposits. The scope of the anticipated recoverable resources is probably the most relevant factor to describe

the possible socio-economic consequences. The future oil and gas prices are so uncertain that estimating the profitability is exceedingly difficult.

(196) Item 6.1 of the opening report presented the main results from the impact assessment. On pages 25–26, the anticipated economic effects of opening the southeast Barents Sea are commented as follows:

> "If profitable discoveries are made, petroleum production in the southeast Barents Sea may give significant profitable production. Oil and gas resources in the scenarios were estimated to have a net value of NOK 280 billion in a high scenario and NOK 50 billion in a low scenario. The scope will be closely linked to the amount of extractable resources demonstrated in the area. The efforts made for recovery of these resources give grounds for repercussions. Repercussions will be created in all phases of the business.
>
> On a national level, it is estimated that the activity will give an annual added value of up to NOK 10 billion and an annual net employment effect of 1 200 persons. For the low scenario, the corresponding figures are approximately NOK 3 billion and 500 persons. These repercussions are in addition to the income from the sale of oil and gas."

(197) This information was taken into account by the Storting, see Recommendation to the Storting 495 (2012–2013) page 9.

(198) The environmental groups contend that the information provided in the opening report contains several errors. First, it was not stated that the estimated net value in the two scenarios were summarised figures for the entire economic life and not a calculated current value based on discounting. Furthermore, there are errors in the assessment of repercussions. Finally, failing to consider it was an error not to consider the price of CO_2.

(199) The information on the profitability of possible discoveries has been obtained from the Petroleum Directorate. Late February 2012, the Ministry of Petroleum and Energy asked the Petroleum Directorate for estimates on "gross production value, undiscounted and discounted profitability, exploration costs, operation costs and investment costs". On 8 March the same year, the Directorate had made calculations showing that "profitability expressed in net present value (NPV) in a high activity level is around NOK 35 billion, while NPV is around NOK 0 billion in the low activity level", provided a discounting with a real interest of 4 percent. Net undiscounted cash flow was NOK 135 billion and NOK 15 billion, respectively. These figures were submitted to the Ministry on 12 March 2012.

(200) There was disagreement between the Ministry of Petroleum and Energy and the Petroleum Directorate as to whether the income should be presented with discounted figures. The appellants claim that it appears from an internal e-mail in the Directorate of 13 March 2012 that the Ministry perceived the figures as too negative. The appellants also claim that the documentation shows that the Ministry wished to present opening of the southeast Barents Sea as attractive by, among other things, excluding figures updated by the Directorate in February 2013.

(201) I will not take a stand as to whether or not the figures presented in the opening report should have been discounted to begin with, since this is also a question of what is more instructive. Undiscounted figures says little bout profitability, but when they – like here – are submitted in the currency value at the time, one might say that they give a clearer picture of the likely overall gross production value during the economic life of the area than discounted figures.

Discounted figures could make the profitability seem more precise, and thus more certain for readers than there is a genuine basis for, since the calculations are based on loose estimates. The reason why the figures were presented as they were is unclear, but I will not elaborate further on this.

(202) What was undoubtedly unfortunate was the failure to clearly state in the opening report that figures were presented in currency value at the time, but not discounted. The risk of misinterpretations could have been easily avoided by explaining the calculation method.

(203) The environmental groups have asserted that the economic analysis also has other weaknesses, including the calculation of the repercussions. The State has acknowledged that the value added is too high, and that the correct figures would be around one third of the figures presented. The error lies in the same income partially being counted several times. The environmental groups contend that the error is significant. Although it concerns billions of kroner, which is a lot in itself, I do not consider it much compared to the total figures.

(204) Finally, it has been presented as an error that the price of CO_2 has not been considered with regard to either extraction or combustion. CO_2 pricing is part of the international efforts to reduce climate emissions. It is uncertain how the CO_2 price will develop in the period ahead. In a written submission to the Supreme Court, Professor Knut Einar Rosendahl has stated that it is uncertain, and debatable, with which CO_2 price one should operate. It is therefore difficult to see how this should have been considered in the impact assessment in any other way than by highlighting the issue – which ought to have been done.

(205) A reader with economic insight would probably have seen that the figures were not discounted – or would at least have raised some questions. When this was not done by any of the consultation bodies or by the Storting, it suggests that such economic views were not prominent. Also, there is no indication that the Ministry believed that the extraction would be non-profitable if discounted figures were used as a basis. The State chose to have direct ownership through direct economic engagement with the petroleum activities in the three production licences awarded in the southeast Barents Sea, managed by Petoro AS.

(206) Considerations other than profitability, such as keeping exploration drilling on the Norwegian continental shelf at a certain level, district considerations and security policy considerations, also seem to have been contributory factors, see Recommendation to the Storting 495 (2012–2013).

(207) Overall, I can therefore not see that the lack of discounting or the omission to specify that the figures were not discounted, or the other inaccuracies in the information, may have had a decisive effect on the decision to open the southeast Barents Sea. Therefore, this can also not imply that the decision to award production licences in the 23rd licensing round is invalid, see the principle in section 41 of the Public Administration Act.

Were the climate effects of possible future petroleum activities inadequately assessed at the opening of the southeast Barents Sea?

(208) The impact assessment for the opening of the southeast Barents Sea addressed the national greenhouse gas emissions from petroleum production. However, the emissions created by combustion of exported Norwegian oil and gas were not specifically mentioned.

(209) The environmental groups contend that the impact assessment at least should have identified and considered the combustion effect abroad. The issue is thus whether an impact assessment should have been made for possible combustion emissions if a production licence were awarded and the PDO approved after the opening, and in that case, whether that constitutes an error that invalidates the later decision to award production licences.

(210) Section 6 c subsection 1 (e) of the Petroleum Regulations sets out that an impact assessment in connection with an opening of a new area must also describe the climate effects. Section 6 c subsection 1 (b) requires that the impact assessment describes the relevant environmental goals. The same requirements are found in Article 5 (1) of the SEA Directive, see Annex I (f). A footnote sets out that the information on environmental effects "should include secondary, cumulative, synergistic, short, medium and long-term permanent and temporary, positive and negative effects". A similar duty is included in section 21 subsection 2 of Regulations on impact assessments. The European Court of Justice writes the following in judgment 10 September 2015 in Case C-473/14 *Dimos Kropias Attikis* paragraph 50:

> "Given the objective of Directive 2001/42, which consists in providing for a high level of protection of the environment, the provisions which delimit the directive's scope, in particular those setting out the definitions of the measures envisaged by the directive, must be interpreted broadly (judgment in Inter-Environnement Bruxelles and Others, C-567/10, EU:C:2012:159, paragraph 37). Any exceptions to or limitations of those provisions must, consequently, be interpreted strictly."

(211) The standpoint of the European Court of Justice suggests that the provisions in the SEA Directive will be interpreted according to purpose, and that there is no basis for interpreting the wording strictly. However, considering the other aspects of the case, I find it unnecessary to discuss whether this implies that the consequences of greenhouse gas emissions after combustion of exported oil and gas, in EU/EEA countries or other countries, also fall within the duty in the SEA Directive.

(212) The preparatory works to the Petroleum Act must be interpreted to mean that assessments of possible global greenhouse gas emissions primarily require a consent of the plan for development and operation (PDO), see Proposition to the Odelsting no. 43 (1995–1996) page 33–34.

(213) The scope of the assessment and time for assessing individual factors, are also, according to the SEA Directive, dependent on an assessment of what is reasonable and appropriate, see Article 5 (2) of the SEA Directive.

> "The environmental report prepared pursuant to paragraph 1 shall include the information that may reasonably be required taking into account current knowledge and methods of assessment, the contents and level of detail in the plan or programme, its stage in the decision-making process and the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment."

(214) I will first consider *when* the climate effects must or should be assessed. The issue at hand is when the assessment of global climate effects should be made in an ongoing process. It is closely linked to the question of when the authorities have obtained the knowledge otherwise required for the assessment to fulfil its purpose – and be included as a natural part of a decision-making basis.

(215) The parties agree that possible petroleum extraction with a legal basis in the licence awarded in the 23rd licensing round will take place in 2030 at the earliest. That would be 17 years after the opening decision and 14 years after the decision to award production licences.

(216) When the opening decision was made in 2013, the climate effects of petroleum extraction in the southeast Barents Sea were highly uncertain – as one did not know if oil or gas would be found. The uncertainty related to whether petroleum would be found at all, or whether it would be found in such a scope that it would be profitable. This uncertainty still prevails. To this point, no profitable discoveries have been made, and I reiterate that areas under two out of three licences have been returned and that an application has been made to return 62 percent of the area under the third and final licence. As mentioned, this sheds light on the situation when the southeast Barents Sea was opened. Against this background, the time of possible approval of the PDO must clearly be the time most suited to assess the specific global climate impact of the extraction to be considered then.

(217) In my view, it is also crucial that there will be no significant global environmental consequences of the opening or the exploration. The effects will not occur until profitable discoveries have been made, and an application have been sent and licences have been awarded for development and operation.

(218) I emphasise that a production licence, despite its 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, see section 22 (a) of the Petroleum Regulations. Emissions into the air comprise greenhouse gas emissions. The authorities will thus have to consider greenhouse gas emissions when assessing the application.

(219) The Ministry may refuse to approve a PDO, or set conditions for the approval. The appellants nonetheless believe that a refusal of a PDO or approval subject to conditions that virtually implies a refusal is unrealistic, such that an impact assessment will lose its function. They mention in particular that the licensee – and indirectly the State – at this stage normally will have incurred large exploration costs, based on the assumption that these will covered by the development of a profitable discovery.

(220) The legal starting point is clear: Extraction requires an approved PDO. The law does not lay down criteria for the approvals. Admittedly, the licensee is ensured an exclusive right to extraction through a production licence, but the effect of this is primarily that no one else may extract. Before the PDO is approved, the licensee may not enter into significant contracts or commence any building without the consent of the Ministry, see section 4-2 subsection 5 of the Petroleum Act. This is to ensure that companies do not incur too large expenses or commitments during the exploration phase. The preparatory works stress that such a consent is also not instructive to subsequent processing of an application for a PDO, see Proposition to the Odelsting no. 43 (1995–1996) page 43. This emphasises that the licensee does not have a legal claim for approval of its PDO.

(221) Also, within the scope of section 4-2 of the Petroleum Act and general public administration law, there is nothing to prevent the authorities, when approving a PDO, from laying down so strict requirements that the licensee chooses not to proceed with the project.

(222) I agree with the Court of Appeal that section 4-2 of the Petroleum Act in any case must be interpreted in the light of Article 112 of the Constitution. If the situation at the extraction stage has become such that allowing the extraction would be incompatible with Article 112, the authorities will have both a right and a duty not to approve the project.

(223) In other words, the situation is that, at the opening of the southeast Barents Sea it was highly uncertain whether petroleum would be found, or how much. Neither the opening nor the exploration will have significant global environmental effects. And the authorities will have a right and an obligation to disprove the PDO if the general consideration for the climate and environment at the time so indicates. I find that this, considered in aggregate, must be essential for the establishment of the requirements for calculation of global greenhouse gas emissions due to possible recovery and export of petroleum 17 years ahead.

(224) There is also reason to say something about the *content and the scope* of the assessment of the global climate impact.

(225) An impact assessment is to map environmental effects of the measure – cause and effect. The relevant environmental issues to be clarified will vary based on the type of measures and the geographic placement. For instance, in the Barents Sea, the special challenges relating to the ice edge and the polar front must be clarified. The climate effect of the measures are in a special position, since they are not geographically limited. The effect of greenhouse gas emissions and other greenhouse gasses is in principle the same irrespective of where on Earth the emissions take place. In my view, this is a completely basic feature to be emphasised when determining the contents of the duty to identify the likely effects on the environment, see also Article 5 (2) of the SEA Directive.

(226) It has not been contended that oil or gas from the Barents Sea is in a special position, or that the impact assessment must contain extensive research. However, the environmental groups claim that the impact assessment should have addressed and considered the combustion effect abroad. This is only a question of using available science on a chosen future fact. It is therefore difficult to see what an assessment in connection with a decision to open the southeast Barents Sea in 2013 should contain – apart from known effects of petroleum combustion.

(227) Admittedly, it would have been easy, considered in isolation, to *calculate* the greenhouse gas emissions based on estimates for a high and low recovery scenario respectively. This is done according to guidelines adopted by the IPCC, see 2006 IPCC Guidelines for National Greenhouse Gas Inventories. These have subsequently been updated. The greenhouse gas emissions are derived from potential production volumes. Thus, it does not involve a professional discussion of climate effects based on various possible causes, but a calculation operation based on estimated figures. I agree that it would give a more comprehensive picture if such examples, in the form of a calculation, were presented in the impact assessment, but that would not have provided any knowledge or insight to significantly strengthen the decision-making basis.

(228) Here, I emphasise that despite the specific emissions not being calculated in detail, the effects of global greenhouse gas emissions were essential in the basis for the administrative decision. At the time of the opening, there was no doubt that, if petroleum was found and later extracted, the known climate effects of production and combustion of oil and gas would occur.

(229) Although the effects of combustion of Norwegian oil and gas from the southeast Barents Sea after possible export were not specified in the impact assessment itself – or later in the opening report – the relevance of the opening for the global climate was high on the political agenda. The climate effects were identified and commented on in several turns during the process and included in the decision-making basis of the Storting and the Government:

(230) During the public consultation following the impact assessment, a number of organisations, including Nature and Youth and Greenpeace, addressed in a joint consultation round statement the global greenhouse gas emissions. Among other things, they mentioned that "the UN's climate panel established that the emissions of greenhouse gasses must be reduced by up to 85 percent within 2050, and 40 percent within 2020 to avoid temperature increase of more than 2 °C", and that it would be "to choose the wrong path" to open the areas "in a time where the world's emissions must be reduced". The organisations further pointed at the weaknesses of the international emissions trading system and the fact that the International Energy Agency (IEA) had demonstrated that 75 percent of the discovered fossil resources in the world must remain if one is to reach the two-degree target.

(231) The environmental assessment and the comments thereto from the consultation round were gathered in an appendix to the Storting report on the opening of the southeast Barents Sea, Report to the Storting 36 (2012–2013). The statements from the consultation round are commented by the Ministry in the appendix.

(232) In response to the consultation statements from Nature and Youth and Greenpeace and others, it is mentioned that the opening of the southeast Barents Sea is assessed under general regulations in accordance with the Government's overall climate targets and with the climate report – Report to the Storting 21 (2011–2012) – that formed the basis for the "climate settlement" in the Storting in 2012, see Recommendation to the Storting 390 (2011–2012). The report is based on the IPCC reports that provide a thorough account of climate change due to global greenhouse gas emissions and the necessity of reduced emissions.

(233) The Ministry also mentioned in appendix to the Report to the Storting 36 (2012–2013) that Norway is bound by the European emissions trading system, stating that "this will for the period 2012–2020 reduce the total emissions from Norway and EU by around 11 million tonnes of CO_2 in 2020".

(234) Combustion emissions abroad are a general effect of Norwegian petroleum production and petroleum policy. At the same time, the net effect of the combustion emissions is complicated and controversial, since it is linked to the global market and the competition situation for oil and gas. If gas is replaced by coal, cuts in the gas export will have a negative CO_2 effect. If the gas competes with gas from other providers, the effect may be zero. Cuts in Norwegian oil production may be replaced by oil from other countries. And the total emissions will not necessarily be affected if Norwegian oil or gas is used within the sector subject to an emission trading system. To me, it is here sufficient to mention that the net effect of Norwegian export of oil and gas for the global emissions is complicated and controversial. There is clearly a need to consider all emissions from Norwegian petroleum production as a whole. In my view, it would have been up to the Ministry and the Government to decide whether it was appropriate to refer to and to discuss the question of climate effects on a superior level – i.e. as a part of the Norwegian climate policy – rather than addressing them in the individual environmental assessment.

(235) It is set out in the opening report for the southeast Barents Sea, Report to the Storting 36 (2012–2013) page 36, that the Government built on the conclusions from the consultation rounds, in addition to the environmental assessment. During the discussion of the report in the Standing Committee on Energy and Environment, the representative from the Christian Democratic Party voted against the opening due to the global emissions, see Recommendation to the Storting 495 (2012–2013) page 6. The subject was also addressed during the debate in the Storting, see *Stortingstidende* (2012–2013) page 4699. A broad majority supported the opening decision.

(236) The Storting has on a number of occasions discussed bills for complete or partial out-phasing of the Norwegian petroleum production due to the global greenhouse gas emissions. All propositions have been rejected with a broad political majority. Propositions have been made to stop the awarding in the 23rd licencing round with such reasoning, see Recommendation to the Storting 206 (2013–2014) and Recommendation to the Storting 274 (2015–2016). The first of these bills was rejected shortly after Article 112 of the Constitution was adopted.

(237) To give a complete picture, I mention that several bills have been made also after the 23rd licensing round, see for instance Recommendation to the Storting 258 (2016–2017), Recommendation to the Storting 130 S (2017–2018), Recommendation to the Storting 253 (2017–2018), Recommendation to the Storting 368 (2017–2018) and Recommendation to the Storting 32 (2018–2019). The bills were rejected with reference to the role the petroleum production plays for Norwegian economy, and the fact that oil and gas production will also be possible in a low-emission society, see for instance Recommendation to the Storting 258 (2016–2017) page 3.

(238) As demonstrated, global effects of combustion were thoroughly assessed at the opening of the southeast Barents Sea and repeated several times during the years that followed and until today. The climate report, which is based on the reports from the IPCC that thoroughly account for climate change due to global greenhouse gas emissions and the necessity of cuts, was an important factor in the assessments. I cannot see that the fact that the assessments were more general and not based on specific – but highly uncertain – calculations of global greenhouse gas emissions from an imagined petroleum export from the area – provided a poorer basis for decision-making – rather on the contrary.

(239) Therefore, when I consider the discussion of the opening of the southeast Barents Sea in context, it is difficult to see that it is an error that the impact assessment did not give examples of greenhouse gas emissions based on one or several production volumes, and thereby the climate effects of possible combustion of Norwegian petroleum abroad considered in isolation.

(240) This applies to more than the net effect of predicted future recovery. In addition, an assessment of the net effect of the global emissions would have to be based on an exemplification of distinct political priorities abroad and home, such as recovery and combustion of gas versus recovery and combustion of coal.

(241) My conclusion is that no procedural errors were made relating to the climate effects under the impact assessment for the opening of the southeast Barents Sea in 2013. The climate effects are politically assessed on a regular basis – and the consequences will be clarified with a

possible PDO application. Hence, this cannot have the effect that the decision to award production licences in the 23rd licensing rounds in 2016 is invalid on this basis.

(242) Without it being decisive for my view, I add that possible errors in the impact assessment cannot in any case invalidate the decision.

(243) Impact assessments must include identification of the political balancing issues that the authorities must consider. In the case at hand, the appellants seek the assessment of the combustion effect abroad. The Storting has considered this issue on a number of occasions, as I have already mentioned. Possible errors in the environmental assessment can therefore not have been relevant for the decision to open the southeast Barents Sea. Considerations other than the effect on the climate were nonetheless decisive. The authorities' policy was that measures to reduce global greenhouse gas emissions and the damaging effects thereof would be implemented by other means than stopping future petroleum production. The decision to award production licences in the 23rd licensing round is thus in any case valid, see the principle in section 41 of the Public Administration Act.

(244) The European Court of Justice gave judgment on 25 June 2020 in Case C-24/19 *A. and Others*, concerning among other things the legal effects of breach of the SEA Directive. The Court establishes that Member States have a duty to ensure that environmental assessments are in accordance with the SEA Directive, when this is applicable. In the event of breach, national authorities and national courts have a duty to take measures, see paragraph 83:

> "Under the principle of sincere cooperation provided for in Article 4(3) TEU, Member States are required to eliminate the unlawful consequences of such a breach of EU law. It follows that the competent national authorities, including national courts hearing an action against an instrument of national law adopted in breach of EU law, are therefore under an obligation to take all the necessary measures, within the sphere of their competence, to remedy the failure to carry out an environmental assessment. That may, for a 'plan' or 'programme' adopted in breach of the obligation to carry out an environmental assessment, consist, for example, in adopting measures to suspend or annul that plan or programme (see, to that effect, judgment of 28 July 2016, Association France Nature Environnement, C-379/15, EU:C:2016:603, paragraphs 31 and 32), or in revoking or suspending consent already awarded, in order to carry out such an assessment (see, to that effect, judgment of 12 November 2019, Commission v Ireland (Derrybrien Wind Farm), C-261/18, EU:C:2019:955, paragraph 75 and the case-law cited)."

(245) I will not consider whether Article 3 of the EEA Agreement, corresponding to Article 4 (3) of the Treaty on the European Union, on sincere cooperation, implies a duty for the courts to remedy breach to the extent possible under national law.

(246) I mention all the same that in the case at hand, neither the opening in 2013 nor the awarding of licences in 2016 has led to greenhouse gas emissions. The authorities will thus be able through the further process to remedy a failure to assess the combustion effect abroad of future petroleum recovery in the southeast Barents Sea before the opening in 2013. As mentioned, this will primarily take place at the PDO stage through the environmental assessment forming the basis for the authorities' decision whether to award licences for development and operation, on what conditions. However, it may also take place through a general political decision to downscale the petroleum activities if the Storting deems it appropriate. This must clearly be sufficient under the requirements laid down by the European Court of Justice. The basic intent behind the rules is to ensure that the environmental effects

are adequately clarified and assessed before possible implementation. This is reflected in the assessment regime applicable in this area, as a PDO cannot be approved until after an environmental assessment. In other words, the authorities are not in full control of whether or not the environmental effect will occur.

Should the issue of opening have been reconsidered after the drop in the petroleum prices?

(247) The environmental groups have finally contended that the oil price dropped so drastically from the opening decision until the production licences were awarded, that a new assessment of the economy should have been prepared.

(248) As already mentioned, a new assessment at this stage is not required under the Petroleum Act or the Petroleum Regulations. In principle, extraordinary circumstances might have the effect that Article 112 of the Constitution, or general public administration principles, implied that a new assessment was required of factors that had already been assessed prior to the opening decision.

(249) All the same, I cannot see that the oil price changes between the opening decision and the awarding of production licences constitute such an extraordinary circumstance. The oil price has always fluctuated. And the economic calculations were highly uncertain, since one did not know whether profitable discoveries would be made. At the same time, one was aware that the oil price was low at the time of the decision. The economy of a possible development is in any case assessed later, when companies apply for a PDO approval. As mentioned, it follows from section 4-2 subsection 2 of the Petroleum Act, cf. section 21 of the Petroleum Regulations, that the plan is to present the economic aspects of the development. Therefore, an economic assessment at the stage of the awarding of licences is less required.

(250) My conclusion is consequently that there were also no procedural errors that may result in invalidity in connection with the awarding of licences; that is, at the time the royal decree was granted.

Conclusion

(251) Against this background, the appeal must be dismissed. The State has not claimed costs.

(252) I vote for this

J U D G M E N T :

The appeal is dismissed.

(253) Justice Webster:

Dissenting opinion

Introduction

(254) I agree with Justice Høgetveit Berg in all material respects as regards the interpretation and application of Article 112 of the Constitution. I also agree with him that the 23rd licensing round does not amount to a violation of Articles 2 and 8 of the ECHR.

(255) As concerns the procedure, I mainly support Justice Høgetveit Berg's presentation of the procedural requirements for opening of new areas for petroleum activities. The provisions on procedure in petroleum legislation must be read in the light of Article 112 of the Constitution. The impact assessment is to provide information to – and create a basis for participation from – the public in the decision-making process. The assessment must therefore be objective and sufficiently comprehensive and complete to give the public real insight into the effects of the planned encroachments.

(256) As mentioned by Justice Høgetveit Berg, the courts should not exercise restraint when it comes to reviewing the procedure. Since the courts' review of the Storting's decision against the substantive contents of Article 112 of the Constitution is modest, there is even more reason to review the adequacy of the procedure.

(257) I am somewhat more critical than Justice Høgetveit Berg to the economic information that was presented in the environmental assessment. Despite this reservation, I have concluded that I agree with Justice Høgetveit Berg's result on this point.

(258) However, as for the assessment of the climate impact from combustion, I find that procedural errors have been committed, and that the production licences awarded in the 23rd licensing round in the southeast Barents Sea are therefore invalid.

Assessment of the climate impact

(259) Two types of climate effects have been addressed in the case: greenhouse gas emissions from petroleum production in Norway (production emissions) and emissions from combustion of the exported petroleum (combustion emissions). The latter mainly takes place abroad because the large majority of the recovered petroleum is exported.

(260) I agree with Justice Høgetveit Berg that both types of emissions, as a starting point, fall within Article 112 of the Constitution. In my view, both types are also comprised by the duty to carry out an impact assessment. This follows from the Petroleum Act with pertaining regulations and the SEA Directive.

(261) As concerns the Norwegian rules, I refer to Justice Høgetveit Berg's elaborations. The rules in sections 6 a to 6 c of the Petroleum Regulations implement the SEA Directive and must be interpreted in accordance therewith.

(262) According to its Article 2, the SEA Directive applies to plans and programmes subject to preparation or adoption by the authorities. According to Article 3, an environmental

assessment shall be carried out for plans "which set the framework for future development consent of projects", including projects involving extraction of petroleum, see the reference in Article 3 to Directive 85/337/EEC Annexes II (2) (f) and (g). In its comments to the amendments of the Petroleum Regulations in 2006, the Ministry of Petroleum and Energy assumes that the SEA Directive for offshore petroleum activities "[will be] applicable in connection with opening of new areas". In that regard, it is also stated that the PDO phase is regulated by Council Directive 85/337/EEC – currently Directive 2011/92/EU on the assessment of effects of certain public and private projects on the environment, the "EIA Directive".

(263) The combustion emissions from Norwegian petroleum production are an environmental consequence of our petroleum industry. The emissions affect the global climate, including in Norway and in the EEA. The effects on the climate are "environmental effects of the petroleum production", see section 3-1 of the Petroleum Act, cf. section 1-6 (c), see also sections 6 c (d) and (e) of the Petroleum Regulations. Correspondingly, the global climate impact of the combustion of Norwegian petroleum is undoubtedly comprised by the term "environmental effects" in Article 5 of the SEA Directive, see Annex I (e) and (f). I also refer to the footnote in the Annex quoted by Justice Høgetveit Berg, stating that this includes secondary, cumulative and long-term environmental effects.

(264) Section 6 c (e) of the Petroleum Regulations requires, at the outset, a description of all effects on the climate. The duty to clarify is not limited to the most significant effects. According to the SEA Directive, it is only "the likely significant effects", including climatic factors, which must be clarified according to Annex I (f). Climate change is a consequence of the total global emissions over time. It may therefore be questioned whether possible emissions from production and combustion of petroleum that might be extracted in the southeast Barents Sea will have a sufficiently significant environmental effect.

(265) However, it follows from the European Court of Justice's judgment 24 November 2011 in Case C-404/09 *The European Commission v. Kingdom of Spain* paragraph 80, on the application of the EIA Directive, that an isolated assessment of the environmental impacts is not appropriate. The assessment must also include an analysis of the cumulative effects on the environment. This is not likely to be different under the SEA Directive, which in its footnote to Annex I contains the same formulation on "cumulative" effects as the corresponding footnote in the EIA Directive interpreted by the European Court of Justice. This means that the climate impact of opening the southeast Barents Sea cannot be assessed in isolation. Moreover, it is hard to envisage that any of the plans under the SEA Directive, see Article 3, in themselves may be deemed to have an adverse effect on the climate, if the SEA Directive is interpreted in this manner. Nonetheless, "climatic factors" are expressly mentioned in the SEA Directive among the environmental effects to be identified. I also refer to the European Court of Justice's judgment in Case C-473/14 paragraph 50, which is cited by Justice Høgetveit Berg, in which the Court states that the provisions that delimit the directive's scope must be interpreted broadly, and that any limitations of those provisions must be interpreted strictly.

(266) Based on the production levels the authorities pictured at the opening of the southeast Barents Sea, I find that the climate impact of the production and combustion emissions – both individually and jointly – would be so considerable that it should have been assessed according to the SEA Directive. The production emissions alone are quantified in the Storting

Report to be between 600 000 and 300 000 tonnes of CO_2 per year in a high emissions scenario.

(267) My conclusion is that under both the Petroleum Regulations and the SEA Directive, possible climate effects of combustion emissions must be "identified, described and evaluated" in connection with the opening decision, see Article 5 (1). This assessment must account for *environmental protection objectives* "at international, Community or Member State level which are relevant to the plan or programme" see Annex I (e). This includes an assessment of the plan's significance for Norway's national and international climate commitments and targets.

(268) Furthermore, it follows from Annex I (g) that the information must describe "the measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment", see also section 6 c subsection 1 (i) of the Petroleum Regulations. In other words, the possibilities to limit the climate effects if the combustion emissions should have been assessed.

(269) Finally, the environmental assessment must be carried out as early as possible in the process. The objective is that the assessment may influence the decision. It is, in fact, at this early stage that "the various alternatives may be analysed and strategic choices may be made", see the European Court of Justice's judgment 7 June 2018 in Case C-671/16 *Inter-Environnement Bruxelles ASBL* paragraph 63.

(270) However, Article 5 (2) of the SEA Directive, stating that the environmental report shall include the information that may "reasonably be required", limits the duty to clarify. The assessment must reflect the level of detail in the plan. The plan could therefore be adjusted to the level of uncertainty at the opening stage. Apart from that, I do not envisage that the assessment must be more comprehensive than the assessment Justice Høgetveit Berg presupposes may be carried out at the PDO stage.

(271) However, Article 5 (2) 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. That would be incompatible with the SEA Directive's objective. I reiterate that the strategic choices are made at this early stage.

(272) The State acknowledges that the climate effects of combustion emissions have not been clarified and considered in the impact assessment. The combustion emissions have also not been assessed particularly for the southeast Barents Sea in other contexts. As far as I can see, the climate report, i.e. Report to the Storting 21 (2011–2012), does not address combustion emissions. It is correct, as pointed out by Justice Høgetveit Berg, that the combustion emissions have been addressed during the opening process, by the environmental groups among others. Despite this, the climate impact of the combustion has not been clarified to the extent required in the SEA Directive. Other assessments may thus not compensate for the lack of an impact assessment in connection with the opening decision.

(273) Identifying and assessing the climate impact of combustion prior to the opening decision are also most compatible with Article 112 and the former Article 110 b of the Constitution. The protection of the environment in Norway under Article 112 is a perpetual obligation for the State and applicable at all stages of the process, from the opening of a new marine area for petroleum activities to a possible production is terminated and the area returned. The duty to

clarify the case does not prevent the authorities from making the desired political decisions, but ensures compliance with the obligations in Article 112, including the citizens' right to information under subsection 2. Hence, there is every reason to ensure that the climate considerations are adequately assessed already before the opening decision. If, at this stage, it can be questioned whether extraction of possible discoveries may affect the climate, this should be clarified in connection with the opening of the area. Correspondingly, at the same stage, it is natural to consider possible measures to prevent adverse environmental effects of the combustion, see section 6 c subsection 1 (i) of the Petroleum Regulations and Article 3 of the SEA Directive Article 3, cf. Annex I (g).

(274) In my view, the omission to identify, describe and assess the climate impact of combustion of petroleum that might be produced in the southeast Barents Sea was a procedural error. As it was uncertain prior to the opening decision which petroleum resources would be found, an overall analysis would have sufficed. The so-called scenarios could have been taken as a starting point. The assessment would have had to meet the requirements, and contain a description of environmental targets and remedies/precautions within the scope of Article 5 (2) of the SEA Directive.

(275) This conclusion does not prevent the State from opening the southeast Barents Sea for petroleum activities, but it requires that the climate is considered in the assessment.

The consequence of the lack of a climate impact assessment

(276) The starting point in Norwegian law is that an administrative decision is valid unless there is reason to assume that a procedural error may have had a decisive effect on the contents of the the decision, see the principle in section 41 of the Public Administration Act. The decision will be invalid if there is a fair possibility that the error has affected the decision, see HR-2017-2247-A paragraph 93 et seq.

(277) I do not rule out that the political debate in society in general and within the Government and the Storting, could have been different if the impact assessment had included the effects of combustion emissions.

(278) On the other hand, climate, climate measures and emissions from the petroleum sector have been discussed on a regular basis in the Storting during the two last years. I refer to Justice Høgetveit Berg's account. There has been a clear majority in the Storting for continuing the petroleum activities on the Norwegian continental shelf despite the combustion emissions' adverse effects on the climate. It therefore seems unlikely that the outcome would have been different if the effects on the climate had been included in the impact assessment for the opening of the southeast Barents Sea. At the same time, it is futile to speculate on how political processes could and would have advanced had the impact assessment had a different content.

(279) In my view, considering cause and effect only in the case at hand would be too narrow an approach. It is set out in the preparatory works to section 41 of the Public Administration Act that the assessment may also include other considerations, see Recommendation to the Odelsting no. 2 (1966–1967) page 16:

> "The proposed wording is not intended to imply any change of case law and public administration theory as it leaves the more specific demarcation to the courts. The provision gives to a certain extent a right to consider other circumstances – e.g. The effect of invalidity and the significance of the particularly strict enforcement of the procedural rules in the relevant area."

(280) There are two circumstances in particular that in my opinion imply that the procedural rules must be strictly enforced in this case:

(281) First of all, the duty to carry out an impact assessment under section 3-1 of the Petroleum Act meet the requirements under Article 112 subsection 2 of the Constitution, see Proposition to the Odelsting no. 43 (1995–1996) page 33. The provisions in the Petroleum Regulations, including the requirement of a climate impact assessment, must be seen in the light of this. Article 112 is to ensure that the citizens are informed of the effects of planned encroachment on the nature. The objective is to protect their rights under subsection 1. As clarified by Justice Høgetveit Berg, this concerns to a limited extent rights that may be asserted in court. The right to information under subsection 2, however, extends beyond the substantive rights of the individual under subsection 1. Subsection 2 gives an independent right to information – and the information has value beyond the individual decision made. Article 112 subsection 2 of the Constitution therefore implies that an ordinary assessment cannot be made of whether the error may have had an effect according to the principle in section 41 of the Public Administration Act. That might undermine the objective of the constitutional provision.

(282) Secondly, the error relates to the implementation of Norway's international commitment under the SEA Directive. It follows from the European Court of Justice's judgment in Case C-24/19 paragraph 83, as cited by Justice Høgetveit Berg, that the public authorities in such cases "are [therefore] under an obligation to take all the necessary measures, within the sphere of their competence, to remedy the failure to carry out an environmental assessment". That may consist, for example, in "adopting measures to suspend or annul that plan or programme".

(283) I disagree with Justice Høgetveit Berg that it would be sufficient to *postpone* the assessment until after the area has been opened and production licences awarded. To move the environmental assessment from the opening stage to the PDO stage would conflict with the SEA Directive's objective of integrating environmental considerations in the drafting and adoption of plans and programmes, see Article 1.

(284) In addition, the approval of a PDO is covered by a different directive on environmental assessment, namely the EIA Directive – Directive 85/337/EEC, currently Directive 2011/92/EU. It follows from Article 11 of the SEA Directive that an environmental assessment under that directive cannot replace an assessment under the EIA Directive. It is reasonable to assume that this also applies the other way around – that a future environmental assessment according to the requirements of EIA Directive cannot replace an assessment under the SEA Directive. In judgment 22 September 2011 in Case C-295/10 *Genovaitė Valčiukienė* paragraph 59 the European Court of Justice stated that "an assessment of the effects on the environment carried out under Directive 85/337 is without prejudice to the specific requirements of Directive 2001/42 and cannot dispense with the obligation to carry out an environmental assessment pursuant to Directive 2001/42 in order to comply with the environmental aspects specific to that directive".

(285) Such a postponement will thus not "remedy" the failure to prepare an environmental assessment already at the opening stage. A significant objective of the SEA Directive is to

ensure that plans and programmes are subject to an environmental assessment "when they are prepared and prior to their adoption" see the judgment in Case C-671/16 paragraph 62. As mentioned, it follows from the next paragraph that the environmental assessment is supposed to be prepared as soon as possible to ensure that it has the intended effect. In my view, it is therefore not sufficient that the assessment has been made before the effect occurs.

(286) Article 3 of the EEA Agreement states that the Contracting Parties shall ensure fulfilment of their obligations under the Agreement. This implies a duty for the courts to remedy violations of the SEA Directive's environmental assessment provisions to the extent possible under national law.

(287) The cited statement in the preparatory works to section 41 of the Public Administration Act shows that there is room for interpreting the provision in the light of Norway's international commitments following from the SEA Directive. The provision must be interpreted in accordance the requirements laid down in the SEA Directive. I refer to Rt-2000-1811, where an account of the "presumption principle", i.e. that Norwegian law is presumed to be in conformity with international law, is provided on pages 1830–1831. In addition, the duty of loyalty in Article 3 of the EEA Agreement suggests the same.

(288) The oil companies that were awarded the production licences in the southeast Barents Sea in the 23rd licensing round are not parties to the case. The outcome of the judgment will thus not have immediate effects on them. The consequence of invalidating the 23rd licensing round is that the opening of the southeast Barents Sea must be reconsidered based on a new impact assessment. Under any circumstances, in such a situation, the licensees' interests do not decisively rule out invalidation of the licences. I have therefore concluded that the result of the inadequate assessment of the climate impact must be invalidity.

(289) Justice **Bull:** I agree with Justice Webster in all material respects and with her conclusion.

(290) Justice **Falch:** Likewise.

(291) Justice **Østensen Berglund:** Likewise.

(292) Justice **Skoghøy:** I agree with Justice Høgetveit Berg in all material respects and with his conclusion.

(293) Justice **Matheson:** Likewise.

(294) Justice **Falkanger:** Likewise.

(295) Justice **Normann:** Likewise.

(296) Justice **Kallerud:** Likewise.

(297) Justice **Ringnes:** Likewise.

(298) Justice **Bergh:** Likewise.

(299) Justice **Thyness:** Likewise.

(300) Justice **Steinsvik:** Likewise.

(301) Chief Justice **Øie:** Likewise.

(302) Following the voting, the Supreme Court gave the following

J U D G M E N T :

The appeal is dismissed.