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BORGARTING COURT OF APPEAL

JUDGMENT

Pronounced:	23 January 2020	
Case no.:	18-060499ASD-BORG/03	
Judges:	Appeal Presiding Judge Court of Appeal Judge Court of Appeal Judge	Eirik Akerlie Hedda Remen Thom Arne Hellerslia

Appellants	Natur og Ungdom and Föreningen Greenpeace Norden	Advocate Cathrine Hambro Advocate Emanuel Feinberg <u>Co-Counsel</u>: Associate Attorney Dagny Ås Hovind
Interveners	Besteforeldrenes Klimaaksjon and Naturvernforbundet	Advocate Cathrine Hambro Advocate Emanuel Feinberg <u>Co-Counsel</u>: Associate Attorney Dagny Ås Hovind
Respondent	The Government of Norway, represented by the Ministry of Petroleum and Energy.	Advocate Fredrik Sejersted <u>Co-Counsels:</u> Advocate Anders Flaatin Wilhelmsen Advocate Ane Sydnes Egeland

The case involves the question of whether the decision taken by the Royal Decree of 10 June 2016 on awarding production licences for petroleum on the Norwegian continental shelf in Barents Sea South and in Barents Sea South-East, the “23rd Licensing Round” is invalid. The decision was taken pursuant to the Norwegian Act of 29 November 1996 No. 72 relating to Petroleum Activities, Section 3-3. More specifically, the issues in the case are whether the decision is contrary to Article 112 of the Norwegian Constitution, whether the decision is contrary to Article 2 or Article 8 of the European Human Rights Convention, as well as Article 93 or Article 102 of the Norwegian Constitution, and whether the decision is invalid because of procedural errors. The case raises in particular questions regarding the interpretation of Article 112 of the Norwegian Constitution related to whether, and the extent to which, the provision grants rights, and how the provision may be applied to emissions of greenhouse gases.

I

Case background

During the proceedings before the District Court, the parties prepared an agreed presentation of some of the facts in the case. The presentation is dated 30 October 2017 and was included in the District Court's judgment as part of the basis for decision in the case, see Section 9-9, subsection 1, second sentence, of the Norwegian Dispute Act. The parties continue to agree on relying on this presentation of some of the facts in the case, and it is therefore included in its entirety:

> 1 THE FRAMEWORKS FOR NORWEGIAN PETROLEUM ACTIVITIES AND THE 23RD LICENSING ROUND
>
> 1.1 Introduction
> On 10 June 2016, the Norwegian Government reached a decision by Royal Decree on awarding production licences in the 23rd Licensing Round pursuant to Section 3-3 of the Norwegian Petroleum Act. This case involves the validity of this decision.
>
> Ten production licences were awarded for a total of 40 blocks or sub-blocks. The production licences are called “Production Licences”, abbreviated as “PLs”. The ten production licences are called respectively PL 609C, 851, 852, 853, 854, 855, 856, 857, 858 and 859. The production licences indicate precisely where petroleum production may occur. Seven of the production licences (14 blocks) are located in Barents Sea South and three of the production licences (26 blocks) are located in Barents Sea South-East. All the blocks are located north of Norway between 71° 30’ and 74° 30’ North latitude, and from 20° 40’ East longitude to the delimitation line facing the Russian Federation.
>
> 1.2 Opening of maritime areas for petroleum activities
> Prior to a decision on awarding production licences, a so-called “opening” of maritime areas for petroleum activities occurs, see section 3-1 of the Norwegian Petroleum Act. The provision imposes a requirement to weigh the various interests that apply in the area in question. For use in this weighing, “an assessment shall be made of the impact of the petroleum activities on trade, industry and the environment and of possible risks of pollution, as well as the economic and social

effects that may be a result of the petroleum activities". The opening process means in practice that the Norwegian Ministry of Petroleum and Energy conducts an impact assessment for the area on the Norwegian continental shelf that is planned to be opened, see Norwegian Regulations of 27 June 1997 No. 653 relating to petroleum activities (the Petroleum Regulations), Chapter 2. Effects on the environment and nature are among the impacts that are to be assessed. The opening of a new area for petroleum activities is submitted to the Storting, see section 6d of the Petroleum Regulations. An explanation must be provided in the case presentation of how the effects from opening a new area for petroleum activities and the submitted consultation statements have been evaluated, as well as the significance that has been assigned to these. The Storting decides on opening an area for petroleum activities on the basis of the submitted impact assessment. Barents Sea South (BS) was opened for petroleum activities in 1989. The impact assessment was submitted to the Storting in Report No. 40 (1988–1989), which the Storting concurred with in the consideration of Recommendation to the Storting No. 216 (1988–1989). A number of production licences have subsequently been awarded in Barents Sea South, and there are two areas in production: Snøhvit and Goliat. In addition, several discoveries have been made, including "Johan Castberg", "Wisting" and "Alta/Gohta".

Barents Sea South-East (BSE) was opened for petroleum activities in 2013. The basis for this was the treaty with the Russian Federation from 2010 concerning maritime delimitation and cooperation in the Barents Sea and the Arctic Ocean (the Delimitation Agreement). Among other things, the treaty meant that the maritime area east of the already opened Barents Sea South became available for Norwegian petroleum activities. The impact assessment was presented to the Storting in Report to the Storting No. 36 (2012–2013) and the supplementary report to this, Report No. 41 (2012–2013), and the Storting concurred during the consideration of Recommendation to the Storting No. 433 (2010–2011).

The opening of Barents Sea South-East for petroleum activities is the first opening of a new area in 19 years. It is the first opening of a new area in the Barents Sea in 24 years.

1.3 Production licence and actual production of petroleum

As mentioned, the case involves the validity of decisions to award production licences in Barents Sea South and Barents Sea South-East.

A production licence grants the licensee exclusive rights to conduct surveys and search for and produce petroleum within the geographic area covered by the licence. The licensee becomes the owner of the petroleum that is produced. The licence also governs rights and obligations which the holders of a production licence have towards the Norwegian national government. The production licence supplements the provisions in the legislation and imposes detailed conditions for the activities.

If commercially exploitable discoveries are made under a production licence, the process to facilitate actual production of the discovery in question is started. This process is governed by Chapter 4 of the Norwegian Petroleum Act and Chapter 4 of the Norwegian Petroleum Regulations. Among other things, a licensee must have a plan approved for development and operation, based on an impact assessment, before development and operation can be commenced, see Section 4-2 of the Petroleum Act.

Norwegian petroleum activities must occur in line with what is laid down in the management plan for the maritime area where the activities will take place. The purpose of the management plan is to provide a framework for creation of wealth through sustainable use of resources and ecosystem services, while maintaining the ecosystems' structure, mode of operation, productivity and natural diversity. The applicable plan for the Barents Sea is in Report to the Storting No. 10 (2010–2011).

1.4 Particulars regarding 23rd Licensing Round

The 23rd Licensing Round was started in August 2013. The then Government invited the companies on the Norwegian continental shelf to nominate areas they wished to include in the 23rd Licensing Round. The deadline for nominating areas expired in January 2014. The oil companies presented through the nomination process their view on which blocks they considered the most geologically promising. Forty companies submitted proposals for blocks they wished to include in the 23rd Licensing Round. The nominations comprised 160 blocks, of which 140 blocks were in the Barents Sea and 20 were in the Norwegian Sea. Eighty-six blocks were nominated by two or more companies.

In February 2014, proposals for blocks to be included in the 23rd Licensing Round were sent out for consultation. It was proposed to announce in the 23rd Licensing Round a total of 61 blocks, divided into 7 blocks in the Norwegian Sea, 34 blocks in Barents Sea South-East and 20 blocks in the rest of Barents Sea South. For the newly opened area in Barents Sea South-East, the only input requested related to whether new, significant information had appeared after the Storting considered Report to the Storting 36 (2012–2013) and Report to the Storting No. 41 (2012–2013). For other areas, the only input requested was that related to whether new, significant information had appeared after the respective management plan was adopted, see Report to the Storting No. 28 (2010–2011). After the expiry of the consultation deadline, the Ministry of Petroleum and Energy considered the statements received. A proposal to the government was prepared regarding which areas should be included in the announcement and on what terms, together with an assessment of the consultation statements. The 23rd Licensing Round was announced in January 2015. The round comprised 57 blocks or parts of blocks. These were divided into 34 blocks in Barents Sea South-East, 20 blocks in Barents Sea South and 3 blocks in the Norwegian Sea.

At the expiry of the application deadline in December 2015, 26 companies had submitted applications to the Ministry to be allocated a new area. After the application deadline, the applications were handled in the usual manner and were assessed by the Norwegian Petroleum Directorate, the Norwegian Petroleum Safety Authority, the Ministry of Labour and Social Affairs and the Ministry of Petroleum and Energy. The negotiation meetings with the companies were held in March 2016, and then the Government decided which companies would receive offers of ownership interests and operatorships including terms and conditions and work programmes. The offers were sent out in May 2016. The exploration and production licences were subsequently awarded on 10 June 2016.

2 INTERNATIONAL CLIMATE COOPERATION

Norway has participated in the international climate cooperation since this was first put on the agenda. The overarching international legal framework is the UN Framework Convention on Climate Change (UNFCC), which was adopted in Rio de Janeiro in 1992. Norway ratified this agreement on 11 June 1993, see

Proposition to the Storting No. 36 (1992–93). The Kyoto Protocol is an agreement under the Convention on Climate Change, adopted in 1997 and ratified by Norway in 2002 during the Storting's consideration of Proposition to the Storting No. 49 (2001–2002). The agreement entails numerically set emission commitments for Norway and other industrialised countries. The Kyoto Protocol's system allows the emission commitments to be met with flexible implementation mechanisms and cooperation between countries as a supplement to national measures.

The Kyoto Protocol entered into force in 2005. The first commitment period was from 2008 to 2012 and was reported in 2015. The Kyoto Protocol's second commitment period, adopted at the meeting of the parties to the Convention on Climate Change in Doha in 2012, applies for the period 2013 to 2020. The Doha amendments have not yet entered into force, see Articles 20 and 21 of the Kyoto Protocol, but Norway is following the agreement nevertheless in line with the Vienna Convention.

For the period leading up to 2020 Norway has commiteed itself to reducing emissions by thirty per cent compared with its emissions level in 1990. The target was part of the climate settlement in the Storting in 2012, see Recommendation to the Storting No. 390 (2011–2012), which in turn builds on the climate settlement from 2008.

The Paris Agreement was negotiated in Paris in December 2015 and is the most recently adopted protocol to the UN Framework Convention on Climate Change. It is intended that the Paris Agreement's regulations take over when the Kyoto Protocol's second commitment period expires in 2020. A goal of the Agreement and its mechanisms is to hold the increase in the global average temperature to well below 2°C compared with the pre-industrial level and to strive to limit the temperature increase to 1.5°C above the pre-industrial level, see Article 2. The states which have signed and ratified the Paris Agreement are obligated to determine and communicate "nationally determined contributions", see Article 4, No. 2, first sentence. The national contributions shall be reported or updated every five years, see Article 4, No. 9. Each update shall build on the preceding, successive contribution, see Article 4, No. 2, and entail an increasing level of ambition, see Article 4, No. 3. Furthermore, states are obligated to obtain necessary information concerning the national contributions, see Article 4, No. 8, account for the national contributions, see Article 4, No. 13, and report under a special mechanism for transparency, see Article 13.

Norway ratified the Paris Agreement on 20 June 2016 based on Proposition to the Storting No. 115 (2015–2016) and Recommendation to the Storting No. 407 (2015–2016). The Paris Agreement entered into force on 4 November 2016. Norway has communicated to the UN a conditional commitment for an emissions reduction of at least forty per cent in 2013 compared with 1990, see Report to the Storting No. 13 (2014–2015) New emission commitment for Norway for 2030 – towards joint fulfilment with the EU and Recommendation 211 (2014–2015).

The UN's climate change panel (the Intergovernmental Panel on Climate Change, IPCC) was appointed by the World Meteorological Organization (WMO) and the United Nations Environment Programme (UNEP) in 1988. The purpose is to provide the nations of the world with the best possible scientific basis for understanding climate changes and potential effects on humans, the environment

> and society. In 1989, the General Assembly of the United Nations decided to assign the IPCC the task of preparing a report which described climate status. This was later followed up by the first conference of the parties under the Convention on Climate Change (the Conference of the Parties, COP). Today it is standard practice for the Conference of the Parties to receive the IPCC's reports. The IPCC submitted its Fifth Assessment Report in 2013–2014. The Assessment Report consists of three sub-reports from three working groups ("The Physical Science Basis", "Impacts, Adaptation, and Vulnerability" and "Mitigation of Climate Change") and a summary of the findings in these (the "Synthesis Report"). The presentation contains an error in Section 1.2. The Storting concurred in the opening of Barents Sea South-East in the consideration of Recommendation to the Storting No. 495 (2012–2013), not Recommendation to the Storting 433 (2010–2011).

For specific details concerning the facts of the case, see the judgment of the District Court and the comments of the Court of Appeal below.

On 4 January 2018, Oslo District Court issued its judgment with the following decision:

1. The Government of Norway through the Ministry of Petroleum and Energy is found not liable.
2. Föreningen Greenpeace Norden, Natur og Ungdom and Besteforeldrenes klimaaksjon are jointly ordered to pay within 2 – two – weeks legal costs of 580,000 – five hundred eighty thousand – Norwegian kroner to the Government of Norway through the Ministry of Petroleum and Energy.

Föreningen Greenpeace Norden and Natur og Ungdom have appealed the judgment to Borgarting Court of Appeal. Besteforeldrenes klimaaksjon and Naturvernforbundet have declared themselves to be interveners in connection with the appeal. The appeal was heard on 5–14 November 2019 at the Borgarting Court of Appeal. The parties and the interveners appeared through their party representatives and with their counsel. Representatives for the appellants and the interveners gave evidence, and four expert witnesses were heard. Pursuant to Section 15-8 of the Norwegian Dispute Act, the District Court had received three written submissions, from The Environmental Law Alliance Worldwide (ELAW), the Allard K. Lowenstein International Human Rights Clinic and the Center for International Environmental Law (CIEL), which were also submitted to the Court of Appeal. See the court record for other aspects of the presentation of the evidence.

The judgment has not been issued within the deadline in Section 19-4, fifth paragraph of the Dispute Act. This is because a considerable quantity of documentary evidence and legal materials has been reviewed during the appeal proceedings, which has resulted in the work on the judgment having been extensive and requiring time.

II

The appellants, Föreningen Greenpeace Norden and Natur og Ungdom, have primarily argued, with the concurrence of the interveners Besteforeldrenes klimaaksjon and Naturvernforbundet:

The decision in the 23rd Licensing Round on awarding production licences is invalid because it is contrary to Article 112 of the Norwegian Constitution. The decision is invalid under Article 112, first paragraph, under both an absolute and a relative threshold. The decision is also invalid under the duty to take measures in the third paragraph.

Article 112 of the Norwegian Constitution must be interpreted as a rights provision. This is already established by the wording, which refers to a “right”. The term “principles” is incapable of justifying a different understanding. The preparatory works also indicate that the provision grants rights to individuals. This applies to both the preparatory works for the predecessor in Article 110 b of the Norwegian Constitution and the preparatory works in connection with the constitutional revision in 2014, when the provision with some changes was moved to Article 112. Both the Lønning Commission's report and the consideration in the Storting support such an understanding. Policy considerations of fairness, justice and feasibility support the same understanding. Norwegian jurisprudence has primarily understood the provision as a rights provision.

With respect to the specific content of the right, the first paragraph of Article 112 must be understood to provide an absolute and a relative threshold. The provision is dynamic and must be adapted to the serious climate crisis. The assessment of harmful effects cannot be limited to the harmful effects resulting from an individual decision, as this will result in a fragmentation in conflict with the purpose of the provision. The Government's measures under the third paragraph must be appropriate and necessary. The duty to take measures under the third paragraph will result under the circumstances in a duty to refrain from decisions that will violate the right in the first paragraph.

The Storting's involvement in the 23rd Licensing Round does not mean in itself that the decision is not contrary to Article 112. The Storting has not expressly assessed the decision under Article 112. Nor can decisive weight be assigned to the Storting's decisions in climate policy and petroleum policy in general, as Article 112 is intended specifically to grant the courts an opportunity for judicial review.

An overall assessment must be made of the environmental harm, including the risk of traditional environmental harm, emission of greenhouse gases in connection with the production and emission of greenhouse gases in connection with the combustion. The latter is also covered by Article 112 if this occurs abroad. The extraction of petroleum occurs in Norway, and it will conflict with the purpose of the provision if 95 per cent of the emissions are not covered. The circumstance that the Paris Agreement primarily regulates national emissions does not provide a basis for restrictive interpretation.

Global warming will have catastrophic consequences if drastic measures are not taken. In such a situation, licences cannot be granted for further exploration and production. The fossil fuel resources for which there is “room” if the Paris Agreement is to be met have already been found. The emission reductions have still not started in Norway, and Norway's national target is too conservative in any event – the total reported national

contributions under the Paris Agreement are far from sufficient to meet the 1.5C target. Norway's responsibility must be assessed on the basis that Norway is a major petroleum exporter and has the resources to reposition itself. Through the 23rd Licensing Round, Norway is opening a new area and “a new chapter” in the production of petroleum. If Article 112 is understood to provide a relative limit, production cannot be justified on the basis of socio-economic gain, as updated analyses show that petroleum production in this area will be unprofitable on a socio-economic basis. There is no real opportunity to halt the process later, in connection with approval of plans for development and operation. The production licences have been granted in a particularly valuable area from an environmental perspective, related to the polar front and the ice edge, and both the Norwegian Environment Agency and the Norwegian Polar Institute advised against awarding some blocks. The area is particularly vulnerable to oil spills and emissions of “black carbon”.

Secondly, the decision is invalid because it is contrary to Article 93 of the Norwegian Constitution and Article 2 of the European Convention on Human Rights (hereinafter ECHR) on the right to life and Article 102 of the Norwegian Constitution and ECHR Article 8 on the right to private and family life. The procedural requirement in ECHR Article 34 that a claimant must be a “victim” is not an issue here, and the appellants have a legal interest in this part of the legal action as well.

The ECHR protects collective rights, as they are claimed in this legal action. This conclusion has been adopted by Dutch courts in the Urgenda case, where the Government of the Netherlands – after a lawsuit from the environmental foundation Urgenda – has been ordered to initiate measures to ensure emissions reductions of at least 25 per cent by the end of 2020, compared with 1990. The legal basis for the order is ECHR Articles 2 and 8. It was conclusive for the court that there was a “real and imminent threat”. The climate crisis affects and will affect people in Norway, and there is undoubtedly a “real threat”. The threat must also be considered to be “imminent”.

Thirdly, the decision is invalid because of procedural errors. The decision has not been sufficiently examined and justified. Article 112 of the Norwegian Constitution and Section 17 of the Norwegian Public Administration Act supplement the procedural rules of the Norwegian Petroleum Act. This is particularly relevant for the licensing decision, since at this stage no requirement is imposed for an impact assessment. The process concerning the opening must also be assessed, either as a stage in the proceedings related to the production licences or when a preliminary decision is made on whether the opening decision is valid. The circumstances that result in the decision being substantively invalid – emissions of greenhouse gases and the risk of local environmental harm – should have been more closely investigated and justified. There is also a failure to investigate associated with the socio-economic assessments prior to the opening, in that the figures for Government revenues have not been discounted to present value. There are also errors related to employment effects and CO2 costs. Using the correct method results in a socio-economic loss. The mentioned circumstances also mean that there are incorrect facts.

The following prayer is submitted:

1. That the Royal Decree of 10 June 2016 on awarding production licences on the Norwegian continental shelf "the 23rd Licensing Round" be declared wholly or partially invalid.
2. Föreningen Greenpeace Norden, Natur og Ungdom, Besteforeldrenes klimaaksjon and Naturvernforbundet be awarded legal costs for the Court of Appeal and the District Court.

The Respondent, the Government of Norway, represented by the Ministry of Petroleum and Energy, has primarily argued:

The decision is not contrary to Article 112 of the Constitution. Article 112 of the Norwegian Constitution does not grant substantive rights for individuals that can be enforced by the courts. Even if the provision assigns the authorities some duties in the third paragraph, it does not grant corresponding rights. This is the result of the construction and wording of the provision, see the term "principles" in the third paragraph. Otherwise the first paragraph would have had a wide scope, without any exceptions being provided. The preparatory works for the predecessor in Article 110 b do not provide sufficient grounds for an intention to grant rights, nor was it employed as a rights provision. Furthermore, there are not sufficient grounds for the provision having changed its nature with the constitutional revision in 2014, which in such case would have triggered greater debate. Weighty policy considerations point in the same direction: the consideration of a legally manageable and predictable rule, the consideration of division of powers and democracy, and the consideration of which questions are suitable for decision by the courts.

The third paragraph assigns the Government a duty to take measures, but this involves positive, not negative, measures and cannot result in a duty to refrain from a decision. It follows from the preparatory works that the courts shall not be able to review the Storting's choice of measures. In any event, a breach of the duty to take measures cannot result in an individual decision being invalid.

If the provision is interpreted expansively to grant rights, a number of new interpretation questions arise, including whether the provision contains a threshold. If applied to greenhouse gases, additional questions are raised. The provision is not suited to, nor is it intended for, regulating greenhouse gas emissions. In any event, the provision cannot be understood to set limits for Norwegian petroleum exports. The emissions from combustion of Norwegian petroleum occur outside Norwegian jurisdiction, and both international and national climate policy are based on each state being responsible for its national emissions.

Secondly, the decision does not entail any violation of Article 112, whether the threshold is absolute or relative. With respect to traditional environmental harm, various measures have been put in place, and no such environmental harm has occurred to this point. Emissions of

greenhouse gases that occur in connection with the production will not result in any net increase in greenhouse gas emissions, as such emissions are included in the EU's emissions trading system. In any event, emissions related to the 23rd Licensing Round are uncertain and will be marginal. In addition, a number of measures have been put in place under the third paragraph, and additional measures might be put in place if commercially exploitable discoveries are made. Neither with respect to emissions from combustion after export is it possible to know what emissions the decision will entail, and in any event these will be marginal from a global perspective. It is the effect on the climate in Norway that is appropriate to assess. The net effect of having to reduce Norwegian exports of oil and gas is unclear and disputed. Measures have also been put in place under the third paragraph related to global emissions.

With respect to ECHR Articles 2 and 8, the environmental organisations are not entitled to bring legal action, as they are not a “victim”. In any event, the provisions have not been contravened, based in part on the requirements for a threshold and causal relationship. Neither have Articles 93 and 102 of the Norwegian Constitution been contravened.

There are no procedural errors, either in the decision on opening or the decision on awarding production licences. The case processing system in the Norwegian Petroleum Act meets the procedural requirements stated in Section 17 of the Norwegian Public Administration Act and Article 112 of the Norwegian Constitution. The opening was based on a comprehensive process in which environmental concerns were also assessed. With respect to the lack of discounting to present value of estimates of the Government's revenues, the amounts stated do not lend themselves to being discounted. In any event, future revenues are extremely uncertain at this stage. Any errors in the process prior to the opening are also only important if they lead to the decision on opening not being valid, which is not the case. With respect to the licensing stage, there is no requirement for an impact assessment, nor is it appropriate, as it is uncertain whether commercially exploitable discoveries will be made. The requirement in Section 4-2 of the Norwegian Petroleum Act for approval of a plan for development and operation provides sufficient opportunity to take into account environmental and socio-economic considerations if commercially exploitable discoveries are made. The climate effect of national emissions from producing petroleum is investigated at an overarching level. The climate effect of combustion of Norwegian petroleum is assessed during the ongoing political debate. In any event, the Storting has upheld the decisions after having assessed all objections the appellants now raise.

The following prayer is submitted:

1. The appeal is to be dismissed.
2. The Government of Norway through the Ministry of Petroleum and Energy is to be awarded legal costs for the Court of Appeal.

III

The Court of Appeal's comments

1. Summary

The Court of Appeal has arrived at the same result as the District Court, but partly with a different justification.

The Court will first review the question of whether the decision on awarding production licences in the 23rd Licensing Round is contrary to Article 112 of the Norwegian Constitution. The question gives rise to a closer interpretation of the content of Article 112, see Section 2 below, before the interpretation result is applied to the decision in question, see Section 3. The Court of Appeal has concluded that Article 112 of the Norwegian Constitution must be understood to mean that the provision grants substantive rights that can be reviewed before the courts and that it applies to all environmental harm that has been cited – local environmental harm, greenhouse gas emissions that occur in connection with the production of petroleum and greenhouse gas emissions that occur in connection with combustion. The environmental harm must be assessed against the measures taken, and the threshold for review will be high. The Court of Appeal has concluded that the threshold in this instance has not been exceeded.

The Court will then undertake a review of whether ECHR Articles 2 or 8, or the corresponding constitutional provisions in Articles 93 and 102, may mean that the decision is invalid, see Section 4. Finally, the Court will assess whether there are procedural errors that lead to the decision being invalid, see Section 5. None of these reasons succeeds. The appellants are referred to in the following as "the Environmental Organisations". "The Decision" refers in the following to the Royal Decree of 10 June 2016 on awarding production licences in the 23rd Licensing Round in Barents Sea South and Barents Sea South-East.

2. Article 112 of the Norwegian Constitution as a basis for review by the courts

2.1 Introductory comments on Article 112 of the Norwegian Constitution

Article 112 of the Norwegian Constitution reads as follows, in the Bokmål version:

> 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 thes principles.*

The provision was given its current wording and placement in the constitutional revision in 2014.

The provision is based on the former Article 110 b, which was adopted in 1992. A particular reason for establishing a constitutional right to an environment at this time was the Brundtland Commission's report “Our common future” from 1987, which pointed out the need for legal reforms in order to ensure sustainable development, see Annex I regarding proposals for legal principles for protection of the environment. Several other countries introduced environmental provisions in their constitutions at this time. The right to an environment can be seen as part of a third generation of human rights, see Møse, Menneskerettigheter (“Human Rights”) (2002), page 90. However, the right to an environment has not been established by a convention, and Article 112 therefore has no model in an internationally binding provision, unlike the rights in the ECHR and the United Nations conventions on human rights.

The environmental provision has previously been used only sporadically in cases before the courts, and then essentially to reinforce the basis for the authorities' environmental measures, see for example, Rt-1993-528 (Lunner Pukkverk). There is no clarifying case law on the interpretation questions the Court must decide in this case.

2.2 Does Article 112 of the Norwegian Constitution grant substantive rights?

The Government is of the opinion that Article 112 of the Norwegian Constitution does not grant substantive rights for individuals that can be enforced by the courts pursuant to Article 89 of the Norwegian Constitution.

The wording does not provide any clear answer. On the one hand, the expression “right” is used in the first sentence of the first paragraph. The terminology is continued in the second paragraph. According to the second paragraph, citizens have a right to knowledge about environmental effects, “[i]n order to safeguard their right” under the first paragraph. The terms “every” and “citizens” indicate that individual rights are involved, rather than collective legal benefits. On the other hand, the third paragraph points to the “principles” that follow from the first and second paragraphs. The meaning of the term is somewhat unclear, but it can be understood as somewhat less precise than a right and more in the direction of a general principle. The broad wording of the first paragraph, without exceptions, supports such an understanding. However, the term “principles” also refers to the second paragraph, which in a clearer manner provides a defined right – “citizens have a right to knowledge about ...” In the opinion of the Court, the wording when viewed in its entirety points in the direction of the first paragraph providing a substantive right.

The placement of the provision in Chapter E on human rights points in the same direction. The other provisions in this chapter use the term “right to” about rights that can be enforced before the courts. Provisions that primarily impose obligations on the state, such as the provision in Article 108 regarding the Sami population and the provision in Article 110 on the right to work, have a different formulation, that the state's authorities shall “create conditions ...”. Similar wording is used in Article 100, sixth paragraph, and Article

104, third paragraph, second sentence. On the other hand, the structure of Article 112 has similarities with provisions that impose duties on the state after the right is first defined, see Articles 93, 95, 100 and 104.

The background and preparatory works for the provision do not provide any clear answer, either. However, there are several bases for the Storting having intended for the provision to grant certain rights.

The proposal that was adopted as Article 110 b in 1992 was presented by Storting Members Liv Aasen and Einar Førde, see Document no. 12 (1987–88), Proposal no. 15. It appears that the background for the proposal was that several proposals for an environmental provision had been rejected "either because they have been pure statements of principle without legal effect, or because they have gone extremely far in providing citizens rights that can be enforced in the courts pursuant to direct authorisation in the Norwegian Constitution", see page 1. The following is stated regarding the legal status of the proposal, see pages 1–2:

> The constitutional rule will have legal effect in several ways. The Constitution takes precedence over other legislation if there is a conflict It will also have great weight in the interpretation of ordinary legislation. A rule concerning environmental protection will also provide guidance for administrative practice.
>
> All three of our alternatives entail a duty for the authorities to provide specific rules that are necessary to implement the principle in the constitutional statement. […] Where rules are provided, it is therefore the Storting's interpretation of the constitutional statement that normally will determine what kinds of rights citizens have. In those instances where concern for the environment is not incorporated in the legislation, individuals or organisations with a legal interest under ordinary procedural rules should nevertheless be able to have their rights reviewed in the courts pursuant to direct authorisation in the Constitution.

The Standing Committee on Foreign and Constitutional Affairs expressed itself in a similar manner regarding the legal significance of the proposal, see Recommendation to the Storting No. 163 (1991–92), page 6:

> The Committee points out that the principles in the first and second paragraph of the constitutional proposal will have legal significance in several ways. It will be a constitutionally-established guideline for the Storting's legislative authority in this area, and it will also be an important factor in the interpretation of the regulations which the Storting itself has adopted or authorised. The principles will also put restraints on the administration by providing guidance when an administrative body exercises discretionary authority. The principles will also be those to be applied when it comes to environmental problems which the legislators have not taken a position on.
>
> The constitutional proposal's third paragraph means that the authorities will adopt specific provisions to implement the principles in the first and second paragraphs. The Committee points out that this means that the specific substantive requirements for environmental measures will be determined through the Storting's

> lawmaking and other rulemaking.

In the discussion of the second paragraph on environmental information, the Committee states at the same place that the proposal "entails a right for the individual citizen".

The Committee pointed out that the Storting, through a study carried out by Professor Inge Lorange Backer at the request of the Ministry of the Environment, had been given "a good basis for considering the question of possibly establishing the environmental protection in the Constitution", see page 5, second column. In Backer's report of 20 March 1988, four variants of constitutional establishment are set up, which respectively provide clear rights, only impose duties on the state, only provide a programme declaration or involve an intermediate solution. Based on the similarities in the formulations, there is reason to suppose that the proposal from Aasen and Førde was based on the last-mentioned alternative, and the discussion of the legal significance of the proposal apparently also stems from Backer's report. The report discusses the role of the courts in this proposal as follows, see page 30:

> It can accordingly be said that this alternative gives popularly-elected bodies an opportunity to play the main role in ensuring satisfactory environmental quality and that it gives the courts a more restrained role without excluding them.

The proposal in the report was otherwise structured so that the second and third paragraphs had the opposite sequence, and "principles" referred therefore only to the first paragraph.

In the negotiations in the Storting, the spokesperson emphasised the Committee's statement that the first paragraph is to be applied to environmental problems on which the legislature has not taken a position. The reason for specifying this was that the Norwegian Progress Party's special comment seemed to be based on the proposal only being a declaration of principle, see Proceedings and Debates of the Storting (1991–92), page 3736.

As the Court sees it, based on the background and the preparatory works for Article 110 b, it must be assumed that the provision could be invoked directly in areas where there were no "specific provisions" under the third paragraph, and for the right to information under the second paragraph, but it was unclear whether the provision granted rights beyond this.

The provision was carried forward in connection with the constitutional revision in 2014, but with some changes in the third paragraph.

Prior to the constitutional revision in 2014, the Storting's Presidium appointed a commission to consider the constitutional establishment of human rights, led by Inge Lønning. The report from the Lønning Commission was submitted to the Storting as Document 16 (2011-2012). The Commission states the following on the state of the law under the then-applicable Article 110 b, see page 243:

> The Storting also assumed that private citizens or organisations in a given case can proceed with their environmental rights under Article 110 b before the courts. This was

> presumed in the original constitutional proposal and seems to have been assumed by the Standing Committee on Foreign and Constitutional Affairs and by the Storting. However, it is not clear under what circumstances such direct requirements can be asserted, which may have weakened the importance of the provision.

The Commission then points out that Article 110 b has been little used in practice and states:

> It cannot be ruled out that the wording of the third paragraph of Article 110 b of the Constitution may be a contributing reason for the provision's limited importance in practice. The statement that "The State Authorities shall issue further Provisions for the implementation of these Principles" can be imagined to be invoked as a basis for arguments on considerable discretionary freedom for the authorities when legislation is to be drafted. Such an argument harmonises poorly, however, with the provision's human rights basis and the statements in the preparatory works that the constitutional provision shall be binding on the Storting and others, and, in the event of a conflict, shall take precedence over other legislation. The fact that the general norm in the first paragraph of Article 110 b of the Norwegian Copnstitution must in practice be made operational in the form of legislation is one thing, see Recommendation to the Storting No. 163 (1991–1992), page 6, column 2. For this reason, a duty rests with authorities to adopt laws. However, the idea that they would be more or less unrestricted when formulating such legislation by the command in first paragraph of Article 110 b of the Norwegian Constitution is contrary to the wording and the purpose of the provision.
>
> Article 110 b of the Norwegian Constitution is formulated as a rights provision to a greater degree than Articles 110 and 110 a. Articles 110 and 110 a open with "It is the responsibility of the authorities of the State to create conditions enabling" various rights, while Article 110 b specifies that there is a "right to an environment that is conducive to health". This linguistic difference and the clear statements in the preparatory works indicate that the provision must be regarded as a rights provision.
>
> When the Commission consequently made its assessments, the starting point was "whether the right to an environment that is conducive to health should be strengthened in the Constitution, and if so, how this can be done", see page 245. The Commission concluded that the wording of the first paragraph of Article 110 b was satisfactory – "As the Storting sees it, the provision is intended to represent a legal restriction for the authorities, while it has a human rights basis at the same time". However, the third paragraph in the provision should be given a more appropriate wording, "primarily to clarify the duty for the authorities to comply with the principles in the first paragraph regarding taking appropriate and necessary measures to protect the environment". The wording was therefore changed from the State authorities shall "issue further Provisions" to "it is incumbent on the State Authorities to take Measures". The change is discussed as follows on page 246:
>
> The Commission wishes to recommend that the third paragraph be replaced with a wording that the authorities of the state have a duty to take measures to implement the first and second paragraphs of Article 110 b of the Constitution. This will clarify that the authorities have an active duty to take care of the environment through various forms of measures. There will still be plenty of room for political discretion with respect to which measures are put in place and at which times. However, the preparatory works (Recommendation to the Storting, page 4) state that one of the main purposes of the current constitutional provision was to link legal effects to the

> fundamental environmental principles that were originally formulated by the Brundtland Commisson. This premise was also repeated during the Storting's debates. In accordance with this and case law from the European Court of Human Rights, the authorities cannot be passive witnesses to major environmental destruction but must take measures that can assist in ensuring a healthy environment for this and future generations. This should be more clearly expressed in the Norwegian Constitution.

In the recommendation from the Standing Committee on Scrutiny and Constitutional Affairs, Article 112 was discussed in common with economic, social and cultural rights, see Recommendation to the Storting 187 (2013–14). The majority recommended adopting the proposal to carry Article 110 b forward with the change to the third paragraph, see page 25:

> The majority believes that there is a need to clarify the duty for the authorities to comply with the principles in the first paragraph regarding taking appropriate and necessary measures to protect the environment. The proposal that is made below must be read as an active duty for the authorities to take measures to look after the environment. Which measures will be up to each Storting to adopt.

The Committee's members from the Norwegian Conservative Party made the following separate comment, see pages 25–26:

> The Committee's Members from the Conservative Party point out that the provision regarding a right to an environment conducive to health already exists in the Constitution and that the expansion is so marginal that these Members can assent to the proposal for a new Article 112. The constitutional provision in question is intended to be a rights provision, and after the amendment in the third paragraph this will appear more clearly, in the view of these Members.

The majority did not comment on the separate comments from the Conservative Party's Members, which would have been natural if there were disagreement in the view on a rights provision. Neither did the majority comment on the Lønning Commission's understanding of Article 110 b as a rights provision.

During the debate in the Storting, Conservative Party Member Michael Tetzschner referred to the "Article 110 series" as a mixture of actual and fictitious legal norms and stated that "there we have Articles 110 and 110 a, which do not grant rights, in contrast to Article 110 b, which could be invoked as a concrete rights provision for an individual", see Proceedings and Debates of the Storting 2014, page 2477. Neither did this view encounter opposition.

The Court of Appeal will also point out that the change in the third paragraph meant that it bore less of an impression of being a provision to make the first paragraph operational through statute and regulation – "issue further provisions" – and more that of an independent duty to protect the environment – "take measures". Viewed that way, the change meant a strengthening of the first paragraph as a provision that stands on its own. The circumstance that the Lønning Commission considered removing the third paragraph, see page 246, supports this.

As the Court of Appeal sees it, the Lønning Commission seems to have had a somehat thin basis for its clear understanding of Article 110 b as a rights provision. However, it must be assumed that the Storting relied on such an understanding of Article 110 b in the further consideration of the proposal. Viewed that way, the preparatory works for Article 112 also bear the mark of being follow-up work to Article 110 b. Taken as a whole, the Court of Appeal views the background and the preparatory works as indicating that Article 112 must be understood to be a rights provision.

There are weighty policy considerations in both directions. If Article 112 is a rights provision, this gives rise to difficult interpretation questions regarding the specific content of a right that is broadly worded. This is not an issue unique to Article 112, and it can be identified for several of the other rights provisions in the Norwegian Constitution. But without an international model, such as the traditional human rights, it is more difficult to develop criteria for its application. Another objection relates to the suitability of the courts for making decisions in environmental questions that often require broad, thorough balancing based on multidisciplinary insights.

Decisions in cases involving fundamental environmental issues often entail political balancing and prioritisation as well. Democratic considerations indicate that decisions requiring such assessments should be made by populalrly elected bodies and not by the courts. Judicial review in this area might juridify topics that are at the centre of the political debate. In this case, this consideration comes to the fore, in that Norway's most important industry from a socio-econiomic perspective – the petroleum activities – and what many will believe is the most important environmental challenge the world is facing – climate change – are arrayed against each other. Both the Committee recommendation and the Storting debate on the constitutional revision show that the Storting in general was aware that inscribing rights in the Norwegian Constitution could result in a juridification, see for example, Recommendation to the Storting No. 187 (2013–2014), page 14. In that regard, the Court of Appeal points out the rule of law considerations indicating that the courts must be able to set a limit as well for a political majority when the matter involves protecting constitutionally established values. The environment is fundamental in the broadest sense for humans' living conditions, and when compared with other rights the courts have been assigned to protect, it does not seem unnatural to understand Article 112 to mean that in this area as well, the courts must be able to set a limit on the Government's actions. The Lønning Commission states the following about this on page 245, after having pointed out some of today's environmental problems:

> It is against this background that a question must be raised whether the right to a healthy environment is at least as important for the individual's existence and self-realisation as the other human rights that naturally belong in the Constitution, and whether this constitutional protection should not be made more rigorous.

The Court of Appeal also points out that the second sentence of the first paragraph of Article 112 stipulates that natural resources are to be managed in a way "that will

safeguard this right for future generations as well". The fact that the right is to be safeguarded across generations has an aspect of the concern for democracy, in that future generations cannot influence today's political processes.

Other sources of law cited by the parties have less importance, in the opinion of the Court. The tendency in jurisprudence seems to be that Article 112 is a rights provision, see for example, Bugge, "Lærebok i miljøforvaltningsrett" ("Treatise on Environmental Administrative Law") (fifth edition, 2019), pages 165 et seq., and Thengs "En standardtilnærming til Grunnloven § 112" ("A standard approach to Article 112 of the Constitution"), Tidsskrift for Rettsvitenskap (TfR) 1/2017, pages 28 et seq. However, this is not an agreed view, see for example, Eivind Smith, "Miljøparagrafen – kritisk lest" ("The environmental article – read critically"), in Fauchald/Smith, "Mellom jus og politikk" ("Between Law and Politics"). Article 112 of the Norwegian Constitution (2019). Comparative law can say little about the understanding of Article 112 and is irreoncilable in any event.

Taken as a whole, the Court of Appeal has concluded that Article 112 of the Norwegian Constitution grants rights that can be reviewed before the courts.

2.3 The substance of the rights under Article 112 of the Norwegian Constitution

When determining the substance of the rights, the starting point must again be the wording. Other sources of law are sparse.

The first paragraph of the Norwegian Constitution is entirely general in its wording, without any exception being provided. However, it must be presumed that not all environmental harm is covered. Therefore, a threshold must be added, as is also common for other rights in the Norwegian Constitution, see in comparison Rt- 2015-93, paragraph 60, as regards Article 102 of the Constitution. The severity of the environmental harm will thus be the key criterion, based on the significance for human health and the productive capacity and diversity of the natural environment, see the wording in the first paragraph. Based on the purpose, it cannot be required that these values are already affected – a risk must be sufficient, which is in keeping with the precautionary principle in environmental law. If measures are not taken under the third paragraph, only the first paragraph will govern the substance of the right, see Document no. 12 (1987–88), page 2, first column, cited above. Measures for safeguarding environmental considerations are currently incorporated in nearly all sectors, so this is no longer a particular practical issue.

If measures have been taken under the third paragraph, this is not in itself sufficient for compliance with Article 112, see the Lønning Commission report, page 243, cited above, regarding the fact that the Storting was not more or less unrestricted under the former Article 110 b in the formulation of specific provisions under the third paragraph. Policy considerations also support such an understanding, as the Government otherwise could have avoided review with any minor measures whatsoever. A specific assessment of the measures must therefore be undertaken.

The measures will naturally be assessed on the basis of the degree to which they are suited to reducing the environmental harm. The Lønning Commission and the Standing Committee on Scrutiny and Constitutional Affairs used the criteria of "appropriate and necessary" measures, see the citations included above. The key, as the Court of Appeal sees it, is whether the measures are sufficient in light of the severity of the environmental harm. In other words, it involves a "net assessment", i.e. what environmental harm remains after measures have been taken. The Court of Appeal finds support for such an understanding in Bugge, "Lærebok i miljøforvaltningsrett" ("Treatise on Environmental Administrative Law") (fifth edition, 2019), page 169. However, environmental problems and measures to combat them are normally composed in such a way that a simple subtraction of the importance of the measures is not possible. The review of the measures will thus have to take place under an overall assessment.

The Court of Appeal assumes that the authorities have a great amount of discretion in choosing measures. The reason for the predecessor in Article 110 b was, as indicated above, to introduce a provision that lay between a wide-reaching rights provision and a programme declaration. The way in which this was resolved was to insert a separate paragraph stating that specific provisions were to be provided. In this way, the responsibility for the implementation of the rights would lie primarily with the authorities. Even though the change to the third paragraph in 2014 meant a certain shift in this starting point, see above, the fundamental starting point remains in place. The Lønning Commission stated that there "will still be plenty of room for political discretion with respect to which measures are put in place and at which times", see page 246. The majority of the Standing Committee on Scrutiny and Constitutional Affairs stated that which measures are to be taken "will be up to each Storting to adopt", see Recommendation to the Storting No. 187 (2013–2014), page 25.

In the authorities' balancing of whether an encroachment on the natural environment is to be permitted, and which measures are to be taken, the societal considerations behind the encroachment on the natural environment and the societal costs of the measures are key. Such considerations will therefore also enter into the overall assessment the courts are to undertake. The question is how broad a margin for discretion the authorities have. This can also be formulated as a question of where the threshold for review lies. As the Court of Appeal sees it, the threshold must lie relatively high. This is based on both the background for the provision as an intermediate solution and on weighty policy considerations, as reviewed above, and then particularly democratic considerations and the suitability of the courts to set limits in this area.

It has been argued that the provision is a legal standard in line with Article 97 of the Norwegian Constitution, see the above-mentioned article by Thengs. An alternative may be to draw parallels to the authorisations for interference in the ECHR, or the requirement with respect to the economic, social and cultural rights regarding a certain minimum level. The Court of Appeal finds no basis or reason for inferring criteria for how to determine the specific limit beyond the provision having a core which the courts, pursuant to Article 89 of the Norwegian Constitution, have a right and duty to protect.

The issue of a threshold is closely related to, but different in principle from, the issue of

the intensity of review. In the opinion of the Court of Appeal, there are grounds to be more restrained when reviewing decisions that have been the subject of political processes in the Government or the Storting than decisions made by subordinate administrative bodies.

2.4 Application of Article 112 to emissions of greenhouse gases from the petroleum activities

Climate is part of the environment, see Article 112, first paragraph. Climate changes are thus also mentioned by the Lønning Commission as an example, see Document 16 (2011–2012), page 245. However, application of the provision to greenhouse gas emissions, and more specifically to greenhouse gas emissions from the petroleum activities, raises particular interpretation questions.

An initial question is whether the emissions resulting from the decision being challenged are to be assessed in isolation from or together with other emissions that in total contribute to the climate changes. The issue related to the combined effect from multiple discharges is not limited in principle to greenhouse gas emissions but applies in general where multiple discharges to the same recipient are involved, for example multiple discharges to the same river. The Norwegian Pollution Control Act is based on an environmental law principle that a combined assessment must be made, see Section 6, second paragraph of the Norwegian Pollution Control Act. The same applies to protection of natural diversity, see Section 10 of the Norwegian Nature Diversity Act. The requirement to carry out a combined assessment under Article 112 of the Norwegian Constitution is also supported by the wording in the first paragraph, which refers to the natural environment's productive capacity and diversity and states that natural resources are to be managed on the basis of comprehensive long-term considerations which will safeguard the right for future generations as well. However, the climate changes offer an extreme variant of the issue: Not only each individual emission in Norway, but also the total emissions from Norwegian petroleum activities, are marginal when compared with the total global emissions. Article 112 of the Norwegian Constitution will lose its function as a limit for this type of emissions if the harmful effects are only assessed in isolation for each instance that is challenged. Concern for effective protection therefore indicates that even though the starting point must be emissions resulting from the decision being challenged, the total effect on the climate and how the emissions are included in other emissions must also be examined. In a situation where the total greenhouse gas emissions must be reduced, a position that there will be "room for" the emissions that are being challenged will depend on the existence of measures directed at other emissions and an overall strategy for the measures. There is no reason to conceal the fact that such an exercise can be difficult, in purely practically terms as well as in terms of demarcation of what should remain political processes. A separate question is whether such an assessment means that any decision with climate consequences can be challenged irrespective of how significant the isolated consequences of the decision might be. This case does not provide a reason to clarify this question. It must be assumed that it is challenges such as those mentioned here that are

behind the formulation of the Norwegian Climate Change Act. The Act does not grant rights, only duties, see Proposition to the Storting 77 L (2016–2017), page 34, and Recommendation to the Storting 329 L (2016–2017), page 5. The committee majority warns in the recommendation against a juridification of climate policy, see page 6. As the Court of Appeal sees it, when applying Article 112 to emissions of greenhouse gases, it must be assumed that the Storting and the Government have a considerable margin for discretion and that the courts should exhibit restraint when reviewing prioritisations made through thorough political processes in these bodies.

Even though individual emissions cannot be assessed in isolation, the assessment must nevertheless be based on the emissions that will result from the decision being challenged, in this instance emissions related to licences for production of petroleum in the 23rd Licensing Round. The parties disagree on whether it is only emissions related to the production that are relevant, or emissions from combustion after export must also be taken into account.

The Court of Appeal points out that there is a clear relationship between the production and the combustion. Petroleum is produced in order to be used as an energy source. By far, the greatest emissions occur in connection with the combustion – the emissions associated with the combustion are about twenty times greater than the emissions in the production. The effect on the climate, including the climate in Norway, depends on whether the emissions occur during the production or the combustion, and whether the petroleum is burned in Norway or abroad. We can also cite in this regard Article 112, first paragraph, second sentence, regarding the need for comprehensive consideration out of concern for future generations. This supports the application of Article 112 to the CO2 emissions from the combustion after export as well.

It is correct as pointed out by the Government that the international climate agreements, including the Paris Agreement, are based on each state being responsible for emissions of greenhouse gases from its territory. However, it is difficult to see that this can justify a restrictive interpretation of Article 112 of the Norwegian Constitution. Firstly, Article 112 must be interpreted autonomously at the outset with respect to intergovernmental agreements. Secondly, the international regulation of greenhouse gas emissions is based on practical considerations and not an inherent legal limitation. For purposes of comparison, it can be pointed out that ozone-reducing substances are regulated with export prohibitions, see EEA Regulation No. 1005/2009, Article 17, and the Norwegian Product Regulation, Section 6-2.

The Court of Appeal therefore concludes that emissions from combustion after export are also relevant in the assessment.

The international aspect of the climate issue leads to another question: Is it only the effects of the climate change in Norway that are relevant, or the global effects as well? The question has been presented to the Court of Appeal to a lesser degree than the other questions.

The wording – "every person has the right to an environment …" – is entirely general in nature. It is obvious at the same time that the Norwegian Constitution does not grant global rights but instead has a limited scope of application – jurisdiction, both personal and territorial. Other provisions in the human rights chapter also use terms such as "every person" and "no person", while at the same time it is clear that some form of association with Norway is required before the provisions can be invoked, see for example, Articles 93, 102 and 109, and – for comparison – ECHR Article with respect to Article 112, it can be noted that the rights in the second paragraph, which are linked to the rights under the first paragraph, are limited to "citizens". The term "every person" appears to have been chosen to show that the provision can be invoked by individuals, see the Lønning Commission report, page 45. Based on the general scope of application of the Norwegian Constitution, in the opinion of the Court of Appeal it must be assumed that Article 112 of the Norwegian Constitution protects against the consequences environmental harm may have for human health and the productive capacity and diversity of the natural environment in Norway.

It can be questioned whether the scope of application is expanded for actions that are based in Norway but result in environmental harm in other countries. The international law "no harm" principle means that a state is obliged to prevent environmental harm in neighbouring countries and possibly provide compensation for it. The principle has been made applicable in Norwegian environmental law, see for example, the Norwegian Pollution Control Act, Section 2, No. 6. However, the principle has been developed with the intention of assigning responsibility for harmful actions, whereas Article 112 of the Norwegian Constitution involves an individual's right to an environment. Domestic legal provisions stating that environmental harm beyond a country's boundaries is to be taken into account can also be seen as an expression of a solidarity principle, see Backer, Innføring i naturressurs- og miljørett ("Introduction to natural resources and environmental law") (2012), pages 64–65. This involves, in the same way as the principle regarding solidarity across generations, a moral principle that can have major significance in the work on reducing climate changes. However, in contrast to the principle on solidarity with future generations, the principle has not been expressed in the wording of Article 112, nor have any clear references been made to the principle in the preparatory works. The key will therefore have to be the effects arising in Norway. In that the threshold under Article 112 is relative to some degree, in the opinion of the Court of Appeal it could nevertheless be a relevant element regarding actions based in Norway that also contribute to environmental harm outside Norway.

As mentioned, Article 112 of the Norwegian Constitution must be interpreted independently of international agreements, such as the Paris Agreement. At the same time, international agreements will be crucial for solving global environmental problems, which the review above demonstrates. International agreements will therefore be able to contribute to clarifying what is an acceptable tolerance limit and appropriate measures. Whether a decision or measure will be contrary to such agreements could therefore be an important element in the overall assessment.

3. Is the decision on awarding production licences contrary to Article 112 of the Norwegian Constitution?

3.1 Global warming as an environmental problem

There is broad agreement that global warming is one of the greatest challenges humanity is facing. The warming of the planet is caused by emissions of greenhouse gases, primarily carbon dioxide (CO2), to the atmosphere. CO2 is released into a natural cycle and absorped by plants and the ocean. In the case of anthropogenic emissions, such as from combustion of fossil energy sources, more CO2 is released than the natural cycle can absorp and remains in the atmosphere. The knowledge about the climate changes is based to a large degree on reports from the UN's climate panel – the IPCC.

To this point in time, the emissions have resulted in an average temperature increase of around one degree Celsius compared with the pre-industrial era. If the emissions continue in line with the climate policy that is currently being conducted in the world, the warming will continue to 3–4 degrees towards the end of the century, see the Norwegian Climate Risk Commission's report NOU 2018: 17 "Klimarisiko og norsk økonomi" ("Climate risk and the Norwegian economy"), page 39. The emissions occurring today will remain in the atmosphere for a long period, and the matter therefore involves changes that can have an effect several hundred years into the future.

The risk picture for global warming includes heat waves, drought, extreme precipitation, extreme wind, sea level rise and ocean acidification. This will in turn have consequences for food production and biodiversity. Extreme climatic conditions, such as heat waves, might also result in loss of human lives. The risk of such consequences will depend to a large degree on the extent of the warming.

The climate changes and the effects of these are distributed unevenly around the world. The risk picture for Norway's part was assessed by the Norwegian Climate Risk Commission. The consequences for Norway have been assessed on the basis of a high-emission scenario that results in a global temperature increase of 4.3C towards the end of the century compared with the pre-industrial era. The estimated consequences for Norway are uncertain. It is estimated that the temperature increase in Norway will be somewhat greater than globally – as much as 5.5C compared with the pre-industrial era, i.e. approximately 4.5C warmer than today. It is estimated that the temperature increase for the Arctic, including Svalbard and parts of Finnmark, will be even greater. Seen in isolation, a warmer Norway will mean a longer growing season, but also more drought, a higher tree line and increased risk of forest fires. Norway will become wetter with more frequent heavy precipitation, and the heavy precipitation will become even heavier. The flood pattern will change, the snow pattern will change and the glaciers will contract. The ocean off Norway will become warmer and more acidic. There are large gaps in knowledge regarding the actual effect of a warmer and more acidic ocean, but this can result in major consequences for marine species and ecosystems and displace marine species northwards. The sea level around Norway will rise from 15 to 55 cm, i.e. less than other places in the

world. The sea level rise will result in increased consequences from storm surges. For Norway's part, there will thus be a particular risk of flooding and slides, as well as various types of property damage caused by extreme precipitation. In ecological terms, life in the sea will be affected the hardest.

Under Article 2 of the Paris Agreement, the parties agree to "holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels". The same article states that the Agreement is based on "the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances". The Agreement is based on each state reporting nationally determined contributions (NDC), see Article 3. The contributions are to be reported every five years, and they are to represent a progression and express the state's highest possible ambition, see Article 4, No. 3. Norway's current NDC is a 40 per cent reduction before 2030 compared with 1990. This is a common solution with the EU. However, the combined emissions targets that have been reported are clearly too low to achieve the goal in the Agreement of limiting the warming to 1.5ºC, see NOU 2018: 17, page 46. Actual global emissions still show an increasing trend.

The IPCC has prepared a so-called carbon budget. Various models for this yield somewhat different answers. It is estimated that from 1870 to 2018, approximately 2,200 gigatonnes of CO2 (GtCO2) have been emitted. In order to reach the 1.5 degree goal with 50 per cent probability, only another 580–770 GtCO2 can be emitted, see NOU 2018: 17, page 47. With annual emissions of approximately 42 GtCO2, this means that there is only room for approximately 15 years of today's emissions before the world must switch to zero net emissions, i.e. not emitting more than the natural environment can absorb. With a gradual reduction, it will be approximately 30 years before the switch is required. Total discoveries of coal, oil and gas represent approximately 3,500 GtCO2, of which coal clearly represents the largest share, followed by oil. Of today's global emissions of approximately 42 GtCO2, coal is responsible for the largest share, then oil and then gas.

An alternative to a reduction in use of fossil energy sources is carbon capture and carbon storage, as well as removal of CO2 from the atmosphere. However, there are currently no large-scale technical solutions available for this, apart from using nature's own methods, such as forestation.

Norwegian emissions in recent years have remained relatively stable between 50 and 60 megatonnes of CO2 equivalents (MtCO2e) per year. Per inhabitant, this represents something under 10 tonnes per year, i.e. clearly more than the average in the world of approximately 5 tonnes per year, and also somewhat more than the average in the EU. The largest source of emissions in Norway is production of oil and gas. According to Statistics Norway, production of oil and gas in 2015 was responsible for approximately 15 MtCO2e – in comparision, land-based industry was responsible for 12 and road traffic for 10 MtCO2e. The emissions from combustion of oil and gas produced in Norway are far greater and are between 400 and 500 MtCO2. The emissions from combustion of

Norwegian oil and gas thus represent approximately 1 per cent of global emissions. Emissions of CO2 are closely tied to the global economy, and in the same way that global demand for Norwegian petroleum is important, Norwegian demand for goods whose production and transport result in emissions is important in the big picture. The climate settlements from 2008 and 2012, see Recommendation to the Storting No. 145 (2007–2008) and Recommendation to the Storting No. 390 (2011–2012), meant that Norway set an internal target of cutting national emissions by 30 per cent by 2020 in relation to the 1990 level, compared with the expected emissions path, and that approximately 2/3 should be cut internally. It does not appear that the targets will be achieved.

It must be emphasised that the scope of the climate changes and the consequences of these are uncertain and may be more extensive than the scenarios currently considered most likely. There is particular uncertainty related to the risk of greater self-reinforcing effects at so-called tipping points, which are presumed to apply to ice melt in Greenland and the Antarctic.

3.2 The consequences of the decision for emissions of greenhouse gases from the production in Norway

A production licence grants exclusive rights to conduct surveys and to search for and produce petroleum within the geographic area covered by the licence, and the licensee becomes the owner of the petroleum that is produced, see Section 3-3, third paragraph of the Norwegian Petroleum Act. The production licences awarded in the 23rd Licensing Round involved 10 licences related to 40 blocks, of which 7 licences and 14 blocks were in Barents Sea South and 3 licences and 26 blocks in Barents Sea South-East. The emissions of climate gases can be divided roughly into two: emissions related to the production and emissions related to the combustion at the end user, where the latter for all essential purposes takes place abroad after export. The Court of Appeal will look first at emissions related to the production.

At present, commercially exploitable discoveries have not been made in the blocks in question, and it is highly uncertain whether oil or gas will be found in such quantities that production will be profitable. The production licences thus involve only potential later emissions. Any production will not take place for 10–15 years. The exploration activity involves some emissions of greenhouse gases, but so marginally that it has no significance for the assessment under Article 112 of the Norwegian Constitution.

It is also the case that even if commercially exploitable discoveries were to be made, a production licence does not grant an unlimited right to production. Any commercially exploitable discoveries cannot be produced unless the licensee has an approved plan for development and operation (PDO) pursuant to Section 4-2 of the Norwegian Petroleum Act. An impact assessment will normally be carried out which will also cover air emissions, see Section 22 a of the Norwegian Petroleum Regulations. The Ministry can deny approval or set conditions for approval.

The parties disagree on whether denial, or approval of conditions which in practice mean a denial, is a real alternative. At this stage, a licensee will normally have incurred costs in connection with exploration, on the basis of an assumption of being able to cover these if commercially exploitable discoveries are made.

The Court of Appeal points out that the Act requires approval, without setting criteria for the decision. A licensee is granted an exclusive right to production through the production licence, but this is predominantly negative in nature, in that no others may be granted such a right, and it does not grant an unconditional right to produce, see Hammer et al., Petroleumsloven ("The Norwegian Petroleum Act") (2009), pages 41–42. A licensee is therefore not entitled to approval of a PDO. At the same time, a denial cannot really be seen to entail a reversal of the production licence, see Hammer et al., page 98. On the other hand, Section 4-2 of the Norwegian Petroleum Act must be read in connection with Article 112 of the Norwegian Constitution. The authorities must therefore be able to decide not to approve a plan for development and operation if environmental considerations at the time of the decision cannot adequately be taken care of through the plan. Nevertheless, a licensee must comply with the general frameworks for petroleum activities at the time of production. Emissions allowance trading price, the level of CO2 tax and any other requirements imposed based on climate considerations may have developed so that the threshold for producing oil and gas discoveries is too high.

Before commercially exploitable discoveries are made, only rough estimates can be made of possible emissions from the production itself. In the impact assessment that forms the basis for the opening of Barents Sea South-East, two estimates have been made of discoveries in this area, respectively 45 million standard cubic metres (Sm3) of oil and 120 billion Sm3 of gas in a high scenario, and 15 million Sm3 of oil and 30 billion Sm3 of gas in a low scenario. It is noted that this applies to all of Barents Sea South-East, i.e. a larger area than the blocks awarded in this area in the 23rd Licensing Round, while the blocks in Barents Sea South fall outside. Economics professors Mads Greaker and Knut Einar Rosendahl have calculated the CO2 emissions from such production at respectively 22 million tonnes and 4.5 million tonnes, which will be distributed over the production period. In the impact assessment, the CO2 emissions are calculated 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 Impact Assessment, page 60. Compared with total annual emissions from the Norwegian Continental Shelf of approximately 15 million tonnes (2015), or total Norwegian emissions of 50–60 million tonnes, this represents a minor contribution. Compared with the global emissions, the emissions are of even less importance.

This must then be measured against the actions taken.

A key measure is Norway's accession to the EU's emissions allowance trading system, see the Norwegian Greenhouse Gas Emission Trading Act, which in brief is based on buying and selling allowances for CO2 emissions within a total allowance quantity that is reduced annually. The emissions allowance trading system is intended to contribute to emissions reductions occurring where it is most beneficial from a socio-economic perspective.

Assuming a well-functioning emissions allowance trading system, this means that increased emissions from the Norwegian Continental Shelf will not affect the total emissions within sectors required to surrender allowances in the EU. The Court of Appeal also points out that the Paris Agreement accepts regional emissions allowance trading systems and other flexible mechanisms, see Article 4, No. 16, and Article 6. Such mechanisms mean that a country can go a long way towards "buying itself out of" national cuts. It can be asserted that the schemes are to a certain extent at odds with the Paris Agreement's burden-sharing principles and the requirement for a highest possible level of ambition. As the Court of Appeal sees it, at this point we are talking about choices of measures that lie outside a review under Article 112. The Court of Appeal assumes that the emissions allowance trading system is significant for the net effect of the emissions and therefore represents a relevant measure under the third paragraph of Article 112.

There are also measures for reducing the national emissions from the Norwegian Continental Shelf. A CO2 tax has been introduced, see the Norwegian CO2 Tax Act on Petroleum Activities, which has worked as an incentive to reduce the emissions, see in particular Recommendation to the Storting 382 (2014–2015), p. 12. Various restrictions have been issued on emissions, such a prohibition on burning off excess gas, and work is being carried out to electrify the continental shelf.

Emissions that can be related to the decision in the 23rd Licensing Round must also be viewed in connection with other emissions, see Section 2.4 above regarding the interpretation of Article 112.

The Environmental Organisations have claimed that Norway on an overall basis already emits too much CO2 – Norway is not in a position to meet its own emission targets, and the emission targets have been set too low in any event. Therefore, in their view, neither can permission be granted to search for new discoveries. These views will apply similarly to later licensing rounds and therefore mean in reality a controlled phasing out of Norwegian petroleum activities.

The Court of Appeal finds that fulfilment of the targets in the Paris Agreement requires drastic cuts in emissions. Total reported national contributions are too low to fulfil the Paris Agreement's targets, and therefore a progression must occur in the contributions. The burden-sharing principles in the Agreement are suited to strengthening Norway's responsibility. This is directly in opposition to searching for new discoveries.

However, it is not the case that other Norwegian emissions are fixed. An ongoing technical and political assessment is being carried out of where cuts will be made and how these can be achieved. A gradual reduction of emissions in line with the 1.5 degree target will also provide room for some emissions that may be prioritised, including in a low-emissions society. In addition, it is possible as mentioned to use flexible mechanisms, such as emissions allowance trading schemes. Which national emissions are appropriate to prioritise is beyond the power of the courts to review under Article 112.

As mentioned under the review of Article 112 in Section 2.4 above, the view that there is room for the emissions presumes that measures will be taken to reduce total national emissions that can provide such room. A number of measures have been taken for various sectors to reduce national emissions, see for example, the summary in the Norwegian national budget, Report to the Storting 1 (2018–2019), pages 86 et seq. It is presumed there that the measures will have reduced the emissions by 20-23 million tonnes for 2020. Despite these measures, national emissions have been at approximately the same level in recent years, and the measures therefore have essentially prevented an increase in the emissions. However, Norway will be able to use flexible mechanisms. In addition to emissions from petroleum activities, emissions from land-based industry, major energy installations and aviation within the EEA – in all, about half of Norwegian emissions – are subject to the EU's emissions allowance trading system. Under the plan, the annual reduction in the quantity of allowances will lead to an emissions reduction of 43 per cent by 2030 in the sector required to surrender allowances compared with 2005, see Report to the Storting 41 (2016–2017), page 27. With respect to the sector not required to surrender allowances, the states that are part of the EU scheme share efforts among themselves with flexible mechanisms, such as the opportunity to convert emissions allowances from the emissions allowance trading system and trading in emissions units. As mentioned, the Court of Appeal assumes that flexible mechanisms represent a measure under the third paragraph of Article 112, as these are significant for net emissions. There is also an overall strategy for reduction of national emissions, which is specifically regulated through the Norwegian Climate Change Act, see particulars under Section 5.3 below.

The Environmental Organisations have cited comparative law, and the Urgenda case in the Netherlands in particular. However, the case involved a declaratory judgment action for the total extent of emissions reduction, in which the appellate court upheld the judgement of the court of first instance that ordered a 25 per cent reduction from the state by the end of 2020, compared with 1990. The appellate court states that it is up to the state how the emissions are reduced, see paragraph 74, and therefore no position is taken on the prioritising of emissions. The judgement was appealed to the Supreme Court of the Netherlands, and a judgment was rendered after this case was taken up for decision. As the Court of Appeal understands it, the result at the Supreme Court of the Netherlands was the same as in the previous instances

The Environmental Organisations have also pointed out that stopping the awarding of production licences will have a substantial signal effect, and especially because it will be important for the transition to an emissions-free economy. For the Court of Appeal, this is too vague to be relevant for the review.

The Court of Appeal points out that the consequences for national emissions of a continuation of the petroleum activities is the subject of ongoing political debate and voting in the Storting, see citations included in Sections 3.3 and 5.3 below. The prioritisations in climate policy involve socio-economic and political balancing in the core area for what the courts should be constrained in reviewing.

As the Court of Appeal sees it, possible future emissions related to the production licences awarded in the 23rd Licensing Round do not bear such importance for the national emissions, when the measures taken are also considered, that the threshold under Article 112 has been exceeded.

3.3 The consequences of the decision for emissions of greenhouse gases from combustion abroad

As mentioned, it is uncertain whether the production licences will at all be followed up with production of petroleum and thereby lead to emissions, and in that event how much. If commercially exploitable discoveries are made, the largest emissions will occur through combustion after export. It is estimated that up to 5 per cent of the emissions occur in connection with the production and at least 95 per cent in connection with the combustion. The high and low scenarios for Barents Sea South-East as a whole, see above, have thus been calculated by Greaker and Rosendahl to be respectively 370 and 100 million tonnes CO2 over the period the combustion of these resources will occur. This represents a minor part of the total emissions that can be tied to the combustion of Norwegian oil and gas, which annually are 400–500 million tonnes of CO2. This represents in turn a small share, approximately 1 per cent, of total annual global emissions. When the emissions from the combustion are also included, the significance will therefore be marginal in comparison with total global emissions.

Measures to combat global emissions are – from a legal perspective – more difficult. However, in the opinion of the Court of Appeal it is natural to view Norway's role as a driving force internationally for binding agreements on emissions reductions as a measure under the third paragraph of Article 112. The same applies to measures based on reducing clearing of the rainforest, see Norway's International Climate and Forest Initiative, as well as support for adaptation for developing countries. Compared with such measures, shutting down or reducing Norwegian petroleum activities may prove less cost-effective.

The emissions from the combustion must also be assessed in a wider context, against the total emissions. The targets in the Paris Agreement mean that the total global emissions must be reduced dramatically and in the course of a brief time. The Environmental Organisations have stressed in connection with this that more fossil resources have already been discovered than can be burned within the remaining carbon budget if the targets in the Paris Agreement are to be achieved, and therefore awarding licences for exploration for additional fossil resources cannot be defended.

In the view of the Court of Appeal, this perspective is too narrow. The largest share of today's CO2 emissions comes from coal, then oil and then gas. The largest reserves are also coal, then oil and then gas. Emissions from fossil energy sources will have to occur during a transition period, and then preferably from the most CO2-efficient sources. A low-emissions society will also have to make room for certain emissions. In the same way as for the internal emissions, there will also have to be room for the emissions from the

combustion. This view assumes that the total global emissions will be reduced in line with the Paris Agreement. Unlike the internal emissions, Norway has no control over the prioritisation of emissions internationally. Norway's accession to the Paris Agreement, which is based on each country reducing its own emissions, can nevertheless be seen as a strategy directed at global reduction of emissions. However, the measure is only effective to the extent the Paris Agreement functions according to its purpose.

The alternative will be a gradual phasing-out of Norwegian exports of oil and gas. However, this does not necessarily mean that the world's energy requirements as a whole will be covered in a more climate-friendly manner. If gas is replaced by coal, cuts in gas exports will have a negative CO2 effect. If gas is replaced by alternative energy sources, the effect will be positive. If the gas competes with gas from other suppliers, the effect might be nil. With respect to oil, cuts in Norwegian production might quickly be replaced by oil supplied from other countries. If Norwegian oil or gas is used within the sector required to surrender emissions allowances, total emissions will not necessarily be affected. The actual significance of Norwegian exports of oil and gas for global emissions is therefore complicated and controversial, and there are few investigations into the question. In the article "Parisavtalen og oljeeksporten" ("The Paris Agreement and Oil Exports") by Taran Fæhn et al. in Samfunnsøkonomen no. 3 2018, it is estimated that the net effect of cutting exports of Norwegian gas will be nil and that the net effect of cutting Norwegian oil will be around a third of the gross emissions. The conclusions are controversial, in both directions. Geological surveys have shown Barents Sea South-East to be the place where gas is most likely to be found, see Section 5.2 below. At the same time, there is a greater likelihood that cuts in production will actually be significant the further into the future these arise, as it must be assumed that alternative energy sources will constitute a steadily larger competitor. If, despite these uncertainties, the estimated emissions related to Barents Sea South-East are adjusted according to the conclusions in the referenced article, the high and low scenarios result in 40 and 13 million tonnes of CO2, respectively.

The Court of Appeal also points out that even if the significance of the global emissions is dramatic, it will be the environmental effects in Norway that are the key issue for the assessment under Article 112 of the Norwegian Constitution, see Section 2.4 above. The effects in Norway may be serious enough, but they appear to be more limited and of a different nature than the global effects. A number of measures have been put in place to limit the effects in Norway.

The Storting on several occasions has taken a position on proposals for entire or partial phasing out of Norwegian petroleum activities based on the significance for global greenhouse gas emissions. All the proposals have been rejected with a broad majority. Proposals have been advanced to stop awards in the 23rd Licensing Round on the basis of such a justification, see Recommendation to the Storting No. 206 (2013–14), see Document 8:39, and Recommendation to the Storting No. 274 (2015–2016), see Document 8:49 – the first-mentioned proposal was also defeated a short time after Article 112 of the Norwegian Constitution was adopted. Several proposals have also been presented independently of the

23rd Licensing Round, see for example, Recommendation to the Storting No. 258 (2016–2017), Recommendation to the Storting No. 130 (2017–2018), Recommendation to the Storting No. 253 (2017–2018), Recommendation to the Storting No. 368 (2017–2018) and Recommendation to the Storting No. 321 (2018–19). The rejection of the proposals relies in part on the importance of the petroleum activities for the Norwegian economy and the fact that in a low-emissions society there will also be room for oil and gas, see for example, Recommendation to the Storting No. 258 (2016–2017), page 3.

The Court of Appeals wishes to emphasise that it is particularly when emissions are also included from the combustion that the climate-related consequences come to the fore. However, the threshold for finding a violation of Article 112 of the Norwegian Constitution is high, and the matter involves socio-economic and political balancing on which positions are continuously being taken in the Storting and which is in the core area for what the courts should be constrained in reviewing. It is also an element in the assessment of such emissions under Article 112 that the Paris Agreement is based on each country taking measures against its own national emissions. On the basis of an overall assessment of the elements that have been reviewed, the Court of Appeal cannot see that the threshold under Article 112 has been exceeded.

3.4 The consequences of the decision for local environmental harm

The Barents Sea is a particularly rich maritime area. Natural conditions have resulted in an area that is rich in plankton and an important reproduction area for large populations of fish, which in turn provide a basis for animal life upwards in the food chain. A unique ecosystem occurs at the ice edge, with extensive production of plankton in the spring. The polar front, i.e. the area where cold water from the Arctic Ocean meets warm water from the Atlantic Ocean, also results in a unique ecosystem. Both the ice edge and the polar front are particularly vulnerable to oil spills and have therefore been identified as particularly valuable and vulnerable areas from an environmental perspective. The ice edge is in motion throughout the year, and the extent varies from year to year. The climate changes mean that the ice edge and the polar front are generally retreating.

In addition to oil spills, the area is particularly vulnerable to emissions of "black carbon", which increases the ice melt. It is particularly in the event of mishaps or accidents that result in burning of oil that major emissions of black carbon will occur. Burning off excess gas also results in emissions.

The designation of areas as particularly valuable and vulnerable areas is determined in management plans. Report to the Storting No. 8 (2005-2006) Om helhetlig forvaltning av det marine miljø i Barentshavet og havområdene utenfor Lofoten ("Integrated Management of the Marine Environment of the Barents Sea and the Sea Areas off the Lofoten Islands (Management plan"), states on page 123 that petroleum activities will not be started at the ice edge and the polar front. In the update to the management plan in Report to the Storting

No. 10 (2010–2011), the same is said on page 132, but limited so that such activities will not be started during the Storting period in question. In the next update in Report to the Storting No. 20 (2014–2015), a redefinition of the ice edge was proposed to take account of the fact that the ice edge has retreated because of climate changes. The report was returned to the Government, and the Government was asked to start work on a regular comprehensive revision of the management plan, see Recommendation to the Storting No. 383 (2014-2015). A new management plan is expected in 2020.

The production licences in the 23rd Licensing Round include some blocks inside the polar front and the ice edge as these are defined in Report to the Storting No. 10 (2010–2011). The licences also include blocks that are closer to the polar front and the ice edge than previous licences. During the consultation round, both the Norwegian Environment Agency and the Norwegian Polar Institute advised against announcing blocks inside or close to particularly valuable and vulnerable areas. Of the blocks that were awarded, fourteen blocks were advised against by both bodies and another six by the Norwegian Environment Agency. The advice from the Norwegian Environment Agency to refrain related in particular to the need for a thorough technical process to define a boundary for the ice edge that also covers more extreme years. Emergency response problems were also cited. The Norwegian Polar Institute cited in particular the need for more knowledge, the risk with oil activities in this area and the question of whether the emergency response is adequate.

Local environmental harm has not occurred to this point. However, the risk relates particularly to the production of oil and gas that will take place if commercially exploitable discoveries are made. A number of measures have been taken to protect against local environmental harm. There is a strict safety regime on the Norwegian Continental Shelf, with comprehensive regulations for protecting against local discharges. In addition, several individual licences are required, such as a licence for the individual exploration, where special conditions can be imposed. If commercially exploitable discoveries are made, a new impact assessment will be made in connection with an application for approval of a PDO, where once again conditions can be imposed, see Section 4-2 of the Norwegian Petroleum Act. An example of a specific measure is a prohibition on burning off excess gas with a possibility for a waiver. A supplement to Report to the Storting 36 (2012–2013), Report to the Storting No. 41 (2012–2013), states that drilling period limitations will be imposed, including a prohibition on drilling in areas closer than 50 kilometres from the actual and/or observed ice edge during the period from 15 December to 15 June.

Calculations have been made in the Impact Assessment of the risk for blow-outs that result in environmental harm, which are summarised on page 8 of the European Convention on Human Rights, see page 97. It is indicated that during the development and operating phase, the probability of a blow-out resulting in moderate environmental harm to sea birds is one occurrence per 4,000 years, and for moderate environmental harm to the ice edge it is one occurrence per 20,000 years. The probability of serious environmental harm is even lower. With respect to the exploration phase, it is concluded that if three exploratory wells

are drilled per year, one occurrence of serious and moderate environmental harm to sea birds can be expected every 15,000 and 6,000 years, respectively, and one occurrence of serious and moderate environmental harm to the ice edge every 11,000 and 7,500 years, respectively. Accordingly, the Court of Appeal concludes that even if the consequences of oil spills can be dramatic, the risk is low.

The Court of Appeal also points out that a broad majority of the Storting has concurred in the 23rd Licensing Round, with knowledge of the mentioned environmental risks, see Recommendation to the Storting No. 495 (2012–2013) on the opening of Barents Sea South-East, based on the Impact Assessment. We will also point out that a number of initiatives to stop the 23rd Licensing Round for the blocks most exposed to the risk of local environmental harm have been rejected with a broad majority, see Recommendation to the Storting No. 383 (2014–15), Recommendation to the Storting No. 274 (2015–2016) and Recommendation to the Storting No. 326 (2017–2018).

As the Court of Appeal sees it, the risk of local environmental harm is so low that the decision is not contrary to Article 112 of the Norwegian Constitution.

3.5 Overall assessment of the decision's significance for the environment. Socio-economics

The parties agree that an overall assessment is to be made of the environmental impacts.

The Environmental Organisations have pointed out that the purpose that justifies the decision – a net socio-economic benefit – is based on incorrect premises and cannot be assumed. The Court of Appeal is satisfied here with referring to the review below related to the proceedings. There is no basis to review the assessment that development and operation are highly likely to result in a net socio-economic benefit. Nor can the Court of Appeal see under an overall assessment that the decision exceeds the threshold under Article 112 of the Norwegian Constitution. The total greenhouse gas emissions, i.e. from both the production and the combustion, must be assessed against the serious climate changes. However, the matter involves uncertain and unique future emissions, and the measures under the third paragraph of Article 112 that could provide room for the emissions can best be assessed at the time the emissions are imminent, i.e. in connection with any approval of a plan for development and operation. There is also an element, which is not in itself determinative, that all consequences for the environment that have been reviewed above, as well as the objections to the socio-economic assessments, have been considered by the Storting several times but the decision nevertheless has been upheld with a broad majority.

4 Is the decision contrary to ECHR Articles 2 or 8 or Articles 93 or 102 of the Norwegian Constitution?

4.1 The issue of dismissal

The Government has questioned whether the Environmental Organisations can act as plaintiffs in claiming that the decision is invalid because of ECHR Articles 2 and 8, as they cannot be a "victim". If they are unable to do so, it must lead to this part of the lawsuit being dismissed.

Under ECHR Article 34, any person, organisation or group of individuals claiming to be subject to violations (a "victim") of a violation of the rights set forth in the Convention may bring the matter before the European Court of Human Rights. Under Section 1-3 of the Norwegian Dispute Act, there is a requirement for a party's connection to the claim in order to bring a legal action. Section 1-4 of the Norwegian Dispute Act expressly provides that organisations may bring legal actions but requires that the conditions in Section 1-3 are met.

The Court of Appeal finds no reason to go further into whether there is a basis for dismissing this part of the lawsuit, as it finds it clear in any event that the Government must also be held not liable as regards this basis, see Section 9-6, third paragraph of the Norwegian Dispute Act, see Section 29-12, third paragraph.

4.2 The issue of invalidity

ECHR Article 2 protects the right to life. The provision also provides for positive duties for the authorities, including for hazardous industrial activities, see for example, the judgement of the European Court of Human Rights in Öneryildiz v. Turkey, 30 November 2004, which involved a waste dump. It is required that the risk of loss of life is "real and immediate", see the mentioned judgement at paragraphs 100–101, and Kjølbro, Den europæiske Menneskerettighedskonvention – for praktikere ("The European Human Rights Convention – for Practitioners") (fourth edition, 2017), page 212, which uses the expression "aktuell og nærliggende risiko" ("real and immediate risk").

The Court of Appeal cannot see that the decision on awarding production licences involves the right to life in a manner that is protected by ECHR Article 2. The consequences of climate changes globally are beyond the State of Norway's obligations under the ECHR, see ECHR Article 1 regarding the requirement that a state shall secure the rights of "everyone within [its] jurisdiction". With respect to the consequences of climate changes in Norway, it cannot be ruled out that these will result in loss of human life, for example through floods or slides in areas that are particularly exposed to this. However, the relationship between the production licences in the 23rd Licensing Round and loss of human life does not clearly fulfil the requirement for a "real and immediate" risk. The Court of Appeal refers to the review in Section 3.1-3.3 above, where it is indicated that it is uncertain whether emissions will occur based on the decision, and that these will in any event be marginal when compared with total global emissions. If emissions based on the decision are also viewed in connection with other greenhouse gas emissions, the decision does not result in a "real and immediate" risk of loss of life for inhabitants of Norway in general.

ECHR Article 8 protects the individual's private life, family life and home. Case law from the European Court of Human Rights shows that the provision implies positive duties for the state which in certain cases may result in a duty to protect the environment. The provision has primarily been applied to local environmental contamination, and the European Court of Human Rights has not decided any climate cases. In the judgment Atanasov v. Bulgaria of 2 December 2010, the European Court of Human Rights states the following, see 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.

The latter means that the effects must exceed a certain threshold, see the statements in the European Court of Human Rights' decisions in the cases Hatton et al. v. United Kingdom (expanded panel), 8 July 2003, paragraph 96, Kyrtatos v. Greece, 22 May 2003, paragraph 54, and Fadeyeva v. Russia, 9 June 2005, paragraph 69. The requirements mean that a great deal is required before future contamination is affected, see the dismissal decision in Asselbourg et al. v. Luxembourg, 29 June 1999. As the Environmental Organisations have brought the case, serious consequences are required for private life, family life and home for the inhabitants of Norway at a general level, in contrast to if the lawsuit had been individualised, such as to inhabitants in specific areas who are particularly exposed. As the Court of Appeal sees it, there is clearly no "direct and immediate link" between the emissions that might result from the decision and serious consequences for the rights under Article 8 for the inhabitants of Norway at a general level. The Court of Appeal also refers here to the review in Sections 3.1-3.3 above. Neither can such a direct and immediate connection be shown regarding emissions that might result from the decision when seen in connection with other greenhouse gas emissions. The decision, therefore, is not affected as such by Article 8 of the European Convention on Human Rights. The Environmental Organisations have cited in particular the Urgenda case from the Netherlands, which is based on ECHR Articles 2 and 8. There is no doubt that the decision breaks new ground for the application of the ECHR. However, in the opinion of the Court of Appeal, the decision has little transfer value as it involved issues regarding general emissions targets and not, as in this case, specific future emissions from individual fields that might eventually be put into production in the future. There is no conflict between the result the Court of Appeal has arrived at in this case and the result in the Urgenda case.

The Environmental Organisations have also pointed out that the European Court of Human Rights, when determining the substance of the rights, can rely on international agreements that constitute "common ground" between the Member States, see Demir and Baykara v. Turkey, 12 November 2008, paragraphs 85–86, and the fact that the Paris Agreement and the reports from the UN's Intergovernmental Panel on Climate Change can be brought in, in connection with this. However, the doctrine can hardly be used in the same manner in the environment area when the ECHR has no separate environmental provision. Irrespective of this, it has not been shown that the production licences will be contrary to the Paris Agreement, see Section 3.2 above.

The Court of Appeal will note that if the decision nevertheless were to be considered a "real and immediate" risk of loss of life, or be in a "direct and immediate" relationship with serious encroachments on the right to a private life, family life or home, a closer review would have to be made of whether the Government has met its positive obligation to protect the rights. This will entail an assessment of the measures from the Government in a manner similar to Sections 3.2 and 3.3 above. The Government will have a discretionary margin in that regard. There is nothing to indicate that the result of such an assessment will be different under ECHR Articles 2 and 8 than under Article 112 of the Norwegian Constitution.

Accordingly, the decision is not contrary to either ECHR Article 2 or Article 8.

The Environmental Organisations have also claimed that the decision is contrary to the corresponding provisions in Articles 93 and 102 of the Norwegian Constitution. The Court of Appeal cannot see that these extend any further than the ECHR in this area. This is particularly the case since the Norwegian Constitution, unlike the ECHR, has its own environmental provision. It is also noted that the UN's Human Rights Committee adopted on 3 September 2019 a General Comment on Article 6 of the International Covenant on Civil and Political Rights on the right to life. In paragraph 62, it is pointed out that climate changes represent one of the most serious threats to "the ability of present and future generations to enjoy the right to life". It is also pointed out that a state's international obligations in the environmental area should influence the substance of Article 6 of the International Covenant on Civil and Political Rights, and that a state should ensure sustainable use of natural resources. The comment is formulated on this point as encouragement instead of obligations, and the text is too general in any event to have any significance in this case.

Neither can the Court of Appeal see that the pleadings in support that have been submitted pursuant to Section 15-8, and which essentially deal with international obligations, in part under the ECHR and in part under general international law principles, contain anything suited to providing a different conclusion.

5. Is the decision invalid because of procedural errors?

5.1 Introduction

The Environmental Organisations have claimed that there are procedural errors in the form of deficient assessment and deficient justification and that the decision is based on incorrect facts. The alleged failures are closely related: In that the assessment has been deficient, this has resulted in a deficient justification and incorrect facts. The Court of Appeal will therefore primarily concentrate the review on the issue of violations of the duty to assess.

The proceedings under the Norwegian Petroleum Act have three main stages: Opening of a new area, see Section 3-1, awarding of production licences, see Section 3-3, and approval of a plan for development and operation (PDO), see Section 4-2. There are requirements for assessment of environmental impacts in the form of an impact assessment when opening a new area and when approving a PDO, see Sections 6 c and 22 a of the Norwegian Petroleum Regulations, but not when awarding production licences.

Some of the procedural errors claimed relate to the decision on opening Barents Sea South-East in 2013. This involves, therefore, only the production licences for blocks in Barents Sea South-East. The parties have disagreed somewhat on the significance any procedural errors in the opening process have for the validity of the production licences. The decision on opening does not determine rights and duties and is therefore not an individual decision. Nevertheless, the Act has set up a separate process regarding the opening, which is intended to conclude in a specific decision. As the Court of Appeal sees it, this involves an independent decision which in itself can be invalid. If this decision is invalid, it might be relevant for the validity of later awards of production licences. The Court of Appeal therefore finds it necessary as a preliminary matter to decide whether the opening decision is valid. Neither can it be ignored that procedural errors in connection with the opening that have not resulted in the opening decision being invalid may nevertheless be relevant for the issue of the validity of later production licences. In such case, there must be errors involved that affect the decision on production licences, even with the presumption that the decision on opening is valid.

The procedural requirements resulting from the Norwegian Petroleum Act and the Norwegian Petroleum Regulations could be supplemented by Section 17 of the Norwegian Public Administration Act regarding the duty to investigate. Article 112 of the Norwegian Constitution may also be relevant, see in particular the second paragraph. The requirements for assessment and justification have an important function as a procedural safeguard of the substantive rights under the first paragraph of Article 112, see the wording of the first paragraph. There is no reason that the bases the Court of Appeal has set for the substantive review against Article 112 of the Norwegian Constitution, related to threshold and intensity of review, should apply in the same manner to the procedural review. The Environmental Organisations have referred to deficient assessment of three different circumstances: Socio-economic benefit, climate effects and local environmental impacts.

5.2 Investigation of socio-economic benefit

The allegation of deficient assessment of socio-economic benefit relates in particular to the proceedings prior to the opening. The first paragraph of Section 3-1 of the Norwegian Petroleum Act reads as follows:

> Prior to the opening of new areas with a view to granting 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 impact of the petroleum activities on trade, industry and the environment and of possible risks of pollution, as well as the economic and social effects that may be a result of the petroleum activities.

It is the Government that decides on opening a new area for petroleum activities under Section 3-1 of the Norwegian Petroleum Act, but prior to a decision the matter must be submitted to the Storting, see Section 6d of the Norwegian Petroleum Regulations.

Under Chapter 2a of the Norwegian Petroleum Regulations, an impact assessment is to be made before opening new areas, in which the topics mentioned in Section 3-1 of the Norwegian Petroleum Act are elucidated in greater detail, see Section 6a. The preparatory works for the Norwegian Petroleum Act indicate that even though the assessment before opening is to cover all stages, including the operating phase, it is not possible at the time opening is assessed to have a clear opinion of whether commercially exploitable discoveries will be made, so it is primarily the effects of the activities in the exploration phase that will have to be investigated, see Proposition to the Odelsting No. 43 (1995–96), page 34. Similar views appear in Hammer et al., Petroleumsloven ("The Norwegian Petroleum Act") (2009), pages 27–28. New and more precise economic assessments will be made in connection with an application for approval of a PDO, see Section 4-2 of the Petroleum Act.

In the impact assessment from 2012 on opening Barents Sea South-East, calculations have been made for future net national revenues from the area, on the basis of a high and a low scenario, see the Impact Assessment, page 40, which are based on a report from the Norwegian Petroleum Directorate. The stated revenues, of respectively NOK 280 billion and NOK 50 billion, have not been discounted to present value. Neither were the estimates discounted in connection with the presentation to the Storting, see Report to the Storting No. 36 (2012–2013), page 25, which adopted the figures, see Recommendation to the Storting No. 495 (2012-13), page 9.

The Government has asserted that the figures have never been presented as amounts expressed as a present value. As the Court of Appeal sees it, the figures are at least unclear, as it is not evident that they do not represent present value. In the view of the Court of Appeal, it has to be expected that quantifying of revenues far into the future is discounted to present value in order to express the actual value. This applies even more when, as here, the matter involves net revenues and where the costs will be incurred first. The impact assessment for opening Barents Sea South from 1988 contained current value calculations, in comparison.

At the same time, it is obvious that it is not possible at the opening stage to provide precise

estimates for future revenues, as the resources have not been made clear. At the stage for impact assessment, the basis was particularly weak, in that the Norwegian Petroleum Directorate's report on the resource base, based on a geological survey, was still not available. The report provided a basis for suspecting more extensive resources than the impact assessment's high scenario, see Report to the Storting, page 25. Neither does such a geological survey provide a basis for clarifying the resources. It is therefore stated on the same page in the Report to the Storting that it "is only by opening areas for petroleum activities and subsequent drilling of exploration wells that the resource base will be clarified". The impact assessment thus refers to the figures as an expression of "an entirely overarching assessment" and specifies that these types of calculations are uncertain, see page 40.

The main point, as the Court of Appeal sees it, was to bring out that an opening of Barents Sea South-East included a clear potential for revenues for the Government. A discounting would also have resulted in positive figures, based on the price of oil that was assumed at the time, including for the low scenario. The geological surveys showed that the high scenario was most realistic and set somewhat low. It must be assumed that the Government understood and accepted that the matter involved rough estimates, which might turn out to be wrong in either direction. Importance was also placed on other considerations, such as economic activity in Northern Norway and security policy considerations. When viewed in total, the Court of Appeal cannot see that there is any real opportunity that a failure to discount, or a failure to specify that the figures had not been discounted, was relevant for the decision on opening.

The Environmental Organisations have pointed out that the tax regime on the continental shelf means that the commercial interests do not correspond with the Government's interests, and that there is therefore a risk of loss for the Government: As exploration costs are subject to extremely favourable tax terms, commercially exploitable discoveries of a certain size must be made before the Government recoups this in the form of tax revenues from the petroleum production. However, the exploration-friendly nature of the tax regime was a known circumstance for the Government and the Storting and a subject that is considered at an overall level in the national budget, quadrennial perspective reports and ongoing political debate. The Court of Appeal cannot see that it constitutes any procedural error that this was not highlighted in connection with the opening of Barents Sea South-East.

With respect to effects on value creation and employment, Report to the Storting No. 36 (2012–2013) states on page 26 that these are "ripple effects that are in addition to the revenues from sales of oil and gas". This is imprecise, in that the calculation methods mean that there is a certain overlap between the increase in GDP and increased revenues from sales of petroleum. Neither can the Court of Appeal see that this had any relevance for the decision on opening. The matter also involves uncertain estimates, and a key element was that opening would provide a potential for positive employment effects in Northern Norway.

The socio-economic costs of CO2 emissions were not calculated, but as the Court of Appeal understands it, there were no requirements for such calculation at this stage. However, the possible relevance of climate policy for the price of petroleum in the future was presented, see Report to the Storting No. 36 (2012–13), pages 7–8.

The objections to the socio-economic assessments reviewed above are described in greater detail in the report "Petroleum activity in Barents Sea South-East – climate, economics and employment", prepared in 2017 by Professors Mads Greaker and Knut Einar Rosendahl. The report was made known to the Government, without this leading to a new assessment. In Recommendation to the Storting No. 368 (2017–2018) from the Standing Committee on Energy and the Environment, a proposal with a reference to the mentioned report is presented by representatives from the Norwegian Socialist Left Party and the Norwegian Green Party to stop awarding licences until the Storting has received correct information. The proposal was defeated with a broad majority in the Storting. This supports the conclusion that the errors have not affected decision-makers on the substance of the decision.

Neither can the Court of Appeal see, for the same reasons, that there is any error in the justification that is relevant for the validity of the opening. Neither, in the opinion of the Court of Appeal, is there any error in the factual basis for decision or are there any indefensible prognoses assumed that can have affected the decision-makers on the substance of the decision.

In the opinion of the Court of Appeal, there are accordingly no errors in the socio-economic assessments that mean the decision on opening is invalid. To this point, the decision on awarding production licences is based on a valid decision on opening. The system under the Norwegian Petroleum Act does not include any requirement for new socio-economic assessments at the stage of awarding production licences. What could have provided in this instance a particular basis for renewed assessment was that the price of oil and gas in the meantime had declined drastically. However, this was also a known circumstance at the time of decision. Furthermore, it was also not possible at this stage to assess the extent of commercially exploitable discoveries or the price of oil in the future. The Court of Appeal therefore believes that it was not wrong not to make new socio-economic assessments.

5.3 Investigation of the climate effects

Section 6c, first paragraph, letter e of the Norwegian Petroleum Regulations states that the impact assessment in connection with opening a new area shall also describe the effects on the climate. The same is indicated in the EU's Planning Directive, see the Planning Directive, Article 5, no. 1, see Annex I, which has been implemented in Norwegian law in the Norwegian Regulations on Impact Assessments, see Section 21 regarding environmental effects, which also mentions greenhouse gas emissions. Section 6c, first paragraph, letter b of the Norwegian Petroleum Regulations requires that the impact assessment also account

for the relationship to relevant environmental goals. Furthermore, Section 20, fourth paragraph of the Norwegian Environmental Information Act means that the justification for the decision shall state how the public's right to be heard has been attended to. The impact assessment prior to the opening of Barents Sea South-East includes a calculation of emissions of CO2 for the two scenarios, see page 60, see also pages 15 and 179 regarding the relationship to the climate obligations. It is indicated that the emissions in the year with the highest emissions will be 568,000 and 286,000 tonnes in the high and low scenarios, respectively. This is then compared with total annual emissions from the continental shelf in 2011 of 12.3 million tonnes. It is further stated that the emissions are in the sector required to surrender emissions allowances and therefore do not affect total emissions within the sector required to surrender emissions allowances.

As mentioned earlier, at the time of opening an area it is uncertain what commercially exploitable discoveries will be made, and consequently it is also uncertain which greenhouse gas emissions the opening of an area will lead to. This is relevant for the degree of detail that may be required. Section 6c, first paragraph of the Norwegian Petroleum Regulations states that the assessment "shall be adapted to the issue in question with regard to content, size and detail. Further, the impact assessment shall to the extent possible be based on existing knowledge and necessary updates of such knowledge". Reference may also be made to Planning Directive Article 5, no. 2, which specifies that the assessment of environmental impacts "shall include the information that may reasonably be required". In light of this, the impact assessment contains – in the view of the Court of Appeal – a sufficient assessment of the national emissions that may be expected to result from the opening.

With respect to the relationship to the national emissions targets, and which emissions are to be prioritised, it is most appropriate that such assessments are made at an overall level and not in connection with an individual decision. At the time of opening Barents Sea South-East, such assessments appeared in Report to the Storting No. 21 (2011–2012) Norsk klimapolitikk ("Norwegian Climate Policy") and Recommendation to the Storting No. 390 (2011–2012), the so-called climate settlement.

The impact assessment does not include any assessment of emissions in connection with combustion that occurs after export of oil and gas. Such emissions constitute a more indirect impact. However, Section 21, second paragraph of the Norwegian Regulations on Impact Assessments states that the description of environmental impacts "shall include positive, negative, direct, indirect, temporary, permanent, short-term and long-term effects". Emissions of greenhouse gases after export of oil and gas fall under this. This is reinforced by the fact that Article 112 of the Norwegian Constitution covers such emissions, see above. It would have been simple to calculate such emissions on the basis of estimates for the high and low scenarios. This could have been done to advantage. At the same time, the matter involves a general outcome of Norwegian petroleum activities, and the more general aspects of this are more natural to deal with at an overall level instead of in the individual impact assessment, see similar perspectives from the Norwegian

Parliamentary Ombudsman in SOMB-1999-2.

Nevertheless, the Court of Appeal cannot see that deficient assessment of emissions in connection with combustion that occurs after export of oil and gas could have been relevant for the substance of the decision. Emissions from the combustion are a known consequence of production, the net effect is simultaneously complicated and disputed, and the question of cuts in the petroleum activities is the subject of ongoing political debate, see Section 3.3 above. During the consideration by the Standing Committee on Energy and the Environment of the opening report, the representative of the Norwegian Christian Democratic Party opposed the opening, out of concern for global emissions, see Recommendation to the Storting No. 495 (2012–2013), page 6. The topic was also taken up during the Storting debate, see Proceedings and Debates of the Storting 2013, page 4699, but a broad majority supported the decision on opening.

With respect to the decision on awarding production licences, no separate assessment has been made, not of climate effects or national or international emissions.

Section 3-3 of the Norwegian Petroleum Act imposes no requirements for assessment of climate effects. if discoveries are made, normally an impact assessment will be made in connection with an application for approval of a PDO, see Section 4-2 of the Norwegian Petroleum Act and Section 22 a of the of the Norwegian Petroleum Regulations, which according to Section 22 a, first paragraph, letter b shall also include a description of emissions to air and possible measures.

It can be asked whether a requirement for assessment of climate impacts at the award stage as well can be deduced from Section 17 of the Norwegian Public Administration Act or Article 112 of the Norwegian Constitution. Recommendation to the Storting No. 163 (1991–92), page 6, first column, states that the second paragraph in the proposal for Article 110 b "secures the right to information in environmental matters, including the important environmental law principle on assessment of the environmental impacts of measures in question". At the same time, the Committee stressed on page 6, second column, that the second paragraph "must be understood to mean that the right to knowledge and information applies to existing information", and that "the question of obtaining new information must be resolved on the basis of the legal rules regarding a duty to assess". Nevertheless, it seems to have been assumed that the then-applicable
Article 110 b of the Norwegian Constitution, and in the same manner Article 112 of the current Norwegian Constitution, entails a certain requirement for assessment of environmental impacts. This has been assumed by the Norwegian Parliamentary Ombudsman in SOMB-1999-2, by the Administrative Law Commission in NOU 2019: 5 Ny forvaltningslov ("New Public Administration Act"), page 322 and by the legal department of the Ministry of Justice in an opinion of 14 April 2015, see page 4 with additional citations to jurisprudence. Irrespective, Article 112 of the Norwegian Constitution is an argument for interpreting Section 17 of the Norwegian Public Administration Act in such a way that environmental impacts must also be assessed, see Backer, Innføring i

naturressurs- og miljørett ("Introduction to natural resources and environmental law") (2012), page 61. The preparatory works for the Norwegian Petroleum Act justify the assessment requirements at the opening stage and the stage for approval of a PDO through Article 110 b of the Norwegian Constitution, see Proposition to the Odelsting No. 43 (1995-96), pages 39 and 41, but they say nothing about the award stage in reference to Article 110 b.

In this instance, the decision on awarding production licences came in a relatively short time – about three years – after the decision on opening. However, it is not always a given that it will always take a short time – for the blocks in Barents Sea South the opening decision was close to 30 years old. If conditions change or significant new information becomes available after the opening decision, it can be asked whether the Norwegian Petroleum Act's system, where no assessment requirement is imposed at the award stage, is sufficient to fulfil the requirements for assessment that can be deduced from Article 112 of the Norwegian Constitution and Section 17 of the Norwegian Public Administration Act. The Court of Appeal finds no reason to go into greater detail in this, as the Court cannot see in any event that there are procedural errors for production licences in the 23rd Licensing Round that may have been significant to the substance of the decision.

So long as there are no discoveries of oil and gas, the matter will continue to involve rough estimates for greenhouse gas emissions. There was no new information at the time of decision in this instance, so it still would have been the estimates from the opening process that would have to have been relied on.

With respect to the general aspects of national and international emissions, as mentioned these are dealt with most appropriately at an overall level. Between the opening and the awarding, Norway had acceded to the Paris Agreement. This agreement also accepts emissions allowance trading systems.
The Paris Agreement led to a more stringent national monitoring system through the adoption of the Norwegian Climate Change Act. Under Section 5 of the Norwegian Climate Change Act, a review is to be carried out of climate targets every five years, and under Section 6 annual accounts must be prepared in the budget propositions on how the climate targets are to be reached, see the most recent Report to the Storting 1 (2018–2019), Chapter 3.7. Such assessments are also made in other contexts, such as the quadrennial perspective reports, see Report to the Storting No. 29 (2016–2017), Chapter 4, in addition to representing a central element in the ongoing political debate.

For the same reasons, the Court of Appeal cannot see that there are errors in the justification that may have influenced the opening decision or the decison on production licences.

5.4 Local environmental effects – overall assessment

The Court of Appeal has concluded in Section 3.4 above that the local environmental effects resulting from the Royal Decree of 10 June 2016 do not represent an infringement of Article 112 of the Norwegian Constitution. The issue here is whether these environmental effects have been sufficiently assessed and whether the decision is

sufficiently justified with respect to these circumstances.

The Environmental Organisations have pointed out that the decision means that petroleum activities will take place further north than ever and partially into the variable ice edge and the polar front. According to the Environmental Organisations, this imposes special requirements for the assessment of environmental problems related to these areas. Particular reference is made to the consultation round statements of the Norwegian Environment Agency and the Norwegian Polar Institute.

As the Court of Appeal understands it, a broad assessment was made of the risk of local environmental harm prior to the decision of 10 June 2016.

In November 2011, a programme for impact assessment under the Norwegian Petroleum Act was sent out for consultation "for the previously disputed area west of the demarcation line in Barents Sea South". The impact assessment for BSE was sent out for consultation in October 2012. Extensive consultation statements were received from a number of expert bodies, including the Norwegian Environment Agency and the Norwegian Polar Institute, which both referred to the need for additional knowledge regarding species and ecosystems in the areas in question.

The consultation statements were considered by the Ministry and the Government before the decision on opening was made. In Report to the Storting No. 36 (2012–2013) on page 36, it states:

> It is the Government's assessment that the impact assessment and the consultation statements received indicate that it is prudent to open Barents Sea South-East for petroleum activities with the frameworks stated below.

In connection with the consideration in the Storting, the committee majority stated in Recommendation No. 495 to the Storting no. 495 (2012–2013):

> A majority of the Committee, all except the member from the Christian Democratic Party, are of the opinion that the Ministry has conducted a thorough and lawful management of the opening process.
> […]
>
> In the updated management plan for the Barents Sea and the maritime areas off the Lofoten Islands (Report to the Storting No. 10 (2010–2011)), the Government decided that the area to be opened did not differ significantly from other parts of the Barents Sea. *It is therefore reasonable that the Government used as a starting point the general knowledge from the work on the management plan in the work on the impact assessment.*
>
> The Committee has noted that the greatest environmental impacts are particularly in the northern part of the area to be opened, towards the ice edge and all the way south towards land. The Committee points out that the Ministry also outlines a need for new technology and new solutions for oil spill response in the northern part of the area to be opened.

After it was decided to open Barents Sea South-East, the relationship to the ice edge and the polar front was assessed by the Ministry and the Government in connection with the consultation round concerning the 23rd Licensing Round that was started by the Ministry of Petroleum and Energy letter of 14 February 2014: it is indeed correct that only input related to "new significant information" was invited.

The Storting has also considered the argument after the opening of Barents Sea South-East. In connection with the consideration of Report to the Storting No. 20 (2014–2015), the Norwegian Christian Democratic Party, the Norwegian Liberal Party, the Norwegian Socialist Left Party and the Norwegian Green Party presented two proposals concerning petroleum activities in and at the ice edge and the polar front. In Recommendation No. 383 to the Storting (2014–2015), it is stated that the Storting should ask the Government to ensure that petroleum activities would not be commenced in the areas along the ice edge and the polar front. The other proposal involved the Storting asking the Government to refrain from awarding specified blocks in the 23rd Licensing Round in line with the consultation input from the Norwegian Polar Institute and the Norwegian Environment Agency. Neither of the proposals were adopted.

The Court of Appeal assumes that there is a need for additional knowledge relating to both oil pollution in ice and the special ecosystems in the area. This does not mean, however, that decisions cannot be taken before more complete knowledge is obtained, if it is possible to take into account the risk of environmental harm in a proper manner, see the precautionary principle. The key to the opening stage and the licensing stage will be the risk resulting from exploratory drilling. If commercially exploitable discoveries are made, approval of a PDO is required as mentioned, see Section 4-2 of the Petroleum Act. A new impact assessment will normally be carried out then which also includes local environmental harm and measures that can prevent or reduce this, see Section 22 a of the Norwegian Petroleum Regulations. The Court of Appeal also refers to the review in Section 3.4 above.

Accordingly, the Court of Appeal cannot see that there are deficiencies in the investigation of local environmental effects that can lead to the decision being invalid – entirely or partially – or that the decision is insufficiently justified on this point. Nor does an overall assessment of the claimed procedural errors – discussed in Sections 5.2, 5.3 and 5.4 – provide a basis for a different conclusion.

6. Legal costs

The Government has entirely won the case and as a general rule is entitled to have its legal costs covered, see Section 20-2, first paragraph of the Norwegian Dispute Act. Entire or partial exceptions may be made from the liability for compensation if compelling reasons make it reasonable, see the third paragraph.

Section 20-2, third paragraph mentions some elements to be given special weight in the assessment of whether it is reasonable to make an exception. None of the elements the Act

mentions are directly relevant here. The Court of Appeal will mention in connection with this that the decision has not presented such doubt as provides a basis for waiving liability for compensation.

Nevertheless, the Court of Appeal has concluded that there are compelling reasons that make it reasonable to release the Environmental Organisations from the liability for costs, for both the District Court and the Court of Appeal. The case involves key values related to the environment and citizens' future living conditions. Issues related to the interpretation and application of Article 112 of the Norwegian Constitution are of principal importance. This applies to whether the Article grants substantive rights to individuals that can be enforced by the courts, to the substance of the rights and to their application to environmental harm – including greenhouse gas emissions – as a result of Norwegian petroleum activities. The issues have not previously been reviewed before the courts. The same applies to the issues related to ECHR Articles 2 and 8 and Articles 93 and 102 of the Norwegian Constitution. The decision could therefore have significance beyond this particular case. it must be assumed that the Government too has an interest in obtaining a clarification of the principal aspects of the case. Taken as a whole, the Court finds that there were good reasons to have the issues reviewed before the Court. The overarching standard – compelling reasons – therefore justifies an exception from the general rule.

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The judgment is unanimous.

DECISION

1. The appeal is to be dismissed.
2. Legal costs are not awarded, neither for the District Court nor the Court of Appeal.

Eirik Akerlie — Hedda Remen — Thom Arne Hellerslia

Document is in accordance with the signed original:

Ingerid Helene Sandberg (signed electronically)