SUPREME COURT OF NORWAY

J U D G M E N T

given on 11 October 2021 by the Supreme Court composed of

Chief Justice Toril Marie Øie
Justice Jens Edvin A. Skoghøy
Justice Aage Thor Falkanger
Justice Ragnhild Noer
Justice Henrik Bull
Justice Knut H. Kallerud
Justice Per Erik Bergsjø
Justice Ingvald Falch
Justice Cecilie Østensen Berglund
Justice Erik Thyness
Justice Kine Steinsvik

HR-2021-1975-S, (case no. 20-143891SIV-HRET), (case no. 20-143892SIV-HRET) and (case no. 20-143893SIV-HRET)

Appeal against Frostating Court of Appeal's reappraisal 8 June 2020

I. Statnett SF	(Counsel Pål-Martin Abell Counsel Johan Fredrik Remmen)
v.	
Sør-Fosen sijte	(Counsel Andreas Brønner Counsel Eirik Brønner)
Nord-Fosen siida	(Counsel Knut Helge Hurum)
Fosen Vind DA	(Counsel Pål-Martin Abell Counsel Johan Fredrik Remmen)

II. Fosen Vind DA	(Counsel Pål-Martin Abell Counsel Johan Fredrik Remmen)
v.	
Sør-Fosen sijte	(Counsel Andreas Brønner Counsel Eirik Brønner)
Nord-Fosen siida	(Counsel Knut Helge Hurum)
III. Sør-Fosen sijte	(Counsel Andreas Brønner Counsel Eirik Brønner)
v.	
Fosen Vind DA	(Counsel Pål-Martin Abell Counsel Johan Fredrik Remmen)
The State represented by the Ministry of Petroleum and Energy (intervener)	(The Office of the Attorney General represented by Anders Blakstvedt)

(1) Justice **Bergsjø:**

Issues and background

(2) The case concerns the validity of decions on licensing and expropriation for wind power development on the Fosen peninsula. The key issue is whether the expropriation appraisal must be ruled invalid, as the development interferes with reindeer herders' rights under Article 27 of the International Covenant on Civil and Political Rights (ICCPR).

(3) On 7 June 2010, the Norwegian Water Resources and Energy Directorate issued licences to build four windfarms on the Fosen peninsula in Trøndelag County, including the two concerned in the case at hand: Roan and Storheia. The Directorate also issued a licence to build two power lines, including a 420 kV power line from Namsos, through Roan to Storheia. The latter licence was issued to Statnett SF (Statnett). Consent was also given to expropriation of land and rights.

(4) Licences for the building of Roan and Storheia windfarms were originally issued to Sarepta Energi AS and Statkraft Agder Energi Vind DA, respectively. The windfarm operation on Fosen was later reorganised, and in 2016, the licences were instead issued to Fosen Vind DA (Fosen Vind). Roan windfarm and related assets, rights and obligations have now been transferred to a new company, Roan Vind DA. However, it is agreed that Fosen Vind represents Roan Vind DA's interests during the trial. The ruling in the case will also be binding on Roan Vind DA under section 19-15 subsection 1 second sentence of the Dispute Act.

(5) Roan windfarm was put into operation in 2019 as Norway's largest with its 71 turbines. The planning area is 24.5 square kilometres, while access roads and internal roads constitute a distance of around 70 kilometres. The eastern part of the facility – Haraheia – is particularly harmful to reindeer husbandry in the area.

(6) Upon its completion in 2020, Storheia windfarm was the largest in Norway. The windfarm consists of 80 turbines and a planning area of nearly 38 square kilometres. Access roads and internal roads cover a distance of approximately 62 kilometres. The altogether six windfarms on Fosen are stated to be the largest onshore wind power project in Europe.

(7) Storheia and Roan windfarms are located within the area of Fosen grazing district. Two siidas practice reindeer husbandry in their respective parts of the district – Sør-Fosen sijte and Nord-Fosen siida. The siidas are often referred to as the south group and the north group, including in the case at hand. I choose nonetheless to use the full siida names. A siida – or "sijte" in the South Sami language – is according to section 51 of the Reindeer Husbandry Act a group of reindeer owners practicing reindeer husbandry jointly in specific areas. Each of the two siidas on Fosen consists of three siida units. According to section 10 of the Reindeer Husbandry Act, a siida unit is a family or individual practicing reindeer husbandry. The total number of reindeer for the district is stipulated in the rules of usage at a maximum of 2 100, equally divided between the two siidas.

(8) Fosen grazing district constitutes an area of around 4 200 square kilometres, divided on Nord-Fosen siida with 2 200 square kilometres and Sør-Fosen sijte with 2 000 square kilometres. Roan windfarm is located within the pasture of Nord-Fosen siida, while Storheia windfarm is

located within the pasture of Sør-Fosen sijte.

(9) The licence and expropriation decisions from 2010 were appealed by a number of organisations and private individuals. Nord-Fosen siida was one of the appellants against the Roan licence, while Sør-Fosen sijte appealed against the Storheia licence. On 26 August 2013, the Ministry of Petroleum and Energy decided to uphold the decisions, but with certain changes and on certain conditions. Among other things, parts of the Haraheia areas were removed from Roan windfarm's planning area. Sør-Fosen sijte also appealed against the licence decision for the Namsos−Roan−Storheia power line, without success.

(10) The Ministry of Petroleum and Energy assumed in its decision that the planning area of *Roan* windfarm was of "great value" to the reindeer herders. The consequences of a development were assessed to be "large negative" during both the construction and operation phase. It was also emphasised that the area could "be used for reindeer husbandry also after the development, even if it [would] demand more from the reindeer herders in the form of increased work". As concerned *Storheia* windfarm, the Ministry assumed that a development would "be negative" for reindeer husbandry, but that the area would not "be lost as winter pasture". The Ministry found that the wind power project would not "prevent continued operation for the south group".

(11) The windfarms were built and put into operation after a decision on advance possession. The Ministry of Petroleum and Energy's licence and expropriation decisions will hereafter mostly be referred to as the "licence decision".

The court proceedings

(12) On 25 August 2014, Fosen Vind brought an appraisal action for measure of damages to the siidas for the building and operation of, among others, Roan and Storheia windfarms. Nord-Fosen siida and Sør-Fosen sijte were among the defendants. Statnett brought an appraisal action for the power line Namsos−Roan−Storheia.

(13) Sør-Fosen sijte demanded that the appraisal be ruled inadmissible on the part of Storheia windfarm, principally because the licence decision was a violation of minorities' rights under Article 27 ICCPR to enjoy their own culture. The consequences of the 420 kV power line were included here. This part of the case was heard separately by Inntrøndelag District Court together with the appraisal procedure towards one of the landowners harmed by the power line. On 15 August 2017, the District Court found that that the building of Storheia windfarm with related infrastructure would not limit the Sami people's possibility to practice reindeer husbandry to such an extent that it amounted to a violation of Article 27 ICCPR. The appraisal was therefore allowed.

(14) The sijte requested a reappraisal to have the decision to allow the appraisal overturned. Frostating Court of Appeal turned down the request, and the second-tier appeal to the Supreme Court was dismissed. The reason was that a decision to allow an appraisal could not be challenged separately before an appraisal ruling is given.

(15) On 28 June 2018, Inntrøndelag District Court made a discretionary assessment of the measure of damages in connection with the expropriation of land and rights for the windfarms on Fosen and the power lines. Sør-Fosen sijte was awarded damages of nearly NOK 8.9 million

for the loss of pastures, feeding in years of crisis, extra work and costs for materials. For Nord-Fosen siida, total damages were measured to approximately NOK 10.7 million. The amount includes compensation for the windfarms at Kvenndalsfjellet and Harbakksfjellet.

(16) Statnett and Fosen Vind petitioned for a reappraisal, arguing that the damages were too high. Sør-Fosen sijte also petitioned for a reappraisal, demanding that the appraisal be ruled inadmissible. The sijte claimed that the development of Storheia was incompatible with Article 27 ICCPR, Article 1 Protocol 1 of the European Convention on Human Rights (ECHR), and Article 5 (d) (v) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

(17) Sør-Fosen sijte argued in the alternative that the decision by the Ministry of Petroleum and Energy be ruled invalid for procedural errors, as it was based on false premises and poorly prepared. The sijte also made alternative submissions regarding the measure of damages. Nord-Fosen siida demanded that the reappraisal court examine the validity of the licence and expropriation decisions by its own measure and that the reappraisal be ruled inadmissible for Roan windfarm. Nord-Fosen siida, too, made submissions regarding the various compensation issues in the case.

(18) Frostating Court of Appeal issued a reappraisal on 8 June 2020, allowing the appraisals for both Storheia and Roan windfarms.

(19) The Court of Appeal concluded that Storheia and Haraheia – the eastern part of Roan windfarm – were in practice lost as late winter pastures. It found that the loss could never be fully compensated by the use of alternative pastures, that the number of reindeer would ultimately have to be dramatically reduced unless remedy measures were implemented, and that the windfarms thus threatened the very existence of reindeer husbandry on Fosen. This was still not considered a violation of Article 27 ICCPR, as the Court of Appeal found that it was possible to introduce winter feeding of the reindeer – based on the damages measured by the Court of Appeal. The Court of Appeal discussed whether such an initiative was so remote from traditional reindeer husbandry that it, in itself, would violate the right to practice Sami culture, but concluded with "a certain doubt" that it would not.

(20) Furthermore, the Court of Appeal found that the decisions do not violate either Article 1 Protocol 1 of ECHR or Article 5 (d) (v) of ICERD. Due to the need of winter feeding, the damages for the loss caused by the windfarms exceeded by far those measured by the District Court – around NOK 44.6 million to each of the siidas. The three largest items are one-time investments in plant and equipment, annually capitalised feeding costs and annually capitalised costs for gathering and release. In the Court of Appeal's view, the one-time compensation for investments in facilities is justified by the necessity of more fenced-in areas demanding a total of 4 500 metres of fences. Fosen Vind and Statnett were held jointly and severally liable for the damages. The two siidas were awarded costs.

(21) Statnett has appealed the reappraisal to the Supreme Court (case 20-143891). The appeal challenges the application of the law and is limited to whether Statnett may be held jointly and severally liable for damages relating to the windfarms. During the preparatory phase in the Supreme Court, the parties have agreed that Statnett cannot be held liable together with Fosen Vind for damages for the windfarms, and prayers for relief on this point are concurrent.

(22) Fosen Vind has appealed against the Court of Appeal's measure of damages (case 20-

143892). The appeal challenges the application of the law and the procedure. Fosen Vind claims that the Court of Appeal has failed to link the damages to the siidas' financial loss and to consider the duty to adapt. The appeal against the procedure relates to the Court of Appeal's reasoning.

(23) Sør-Fosen sijte, too, has appealed against the reappraisal to the Supreme Court (case 20-143893). The appeal challenges the application of the law, more specifically the interpretation and application of Article 27 ICCPR and Article 5 (d) (v) ICERD. Sør-Fosen sijte requests that the appraisal be ruled inadmissible.

(24) Nord-Fosen siida has not appealed against the reappraisal, but requested that the appraisal be ruled inadmissible.

(25) In the following, I will discuss the various issues thematically, without making a clear distinction between the three appeals.

(26) On 23 November 2020, the Supreme Court's Appeals Selection Committee made this decision:

> "Leave to appeal is granted to Fosen Reindeer Grazing District, the south group and Statnett SF.
>
> Leave to appeal is granted to Fosen Vind DA as concerns the application of the law with regard to the financial loss and duty to adapt. Otherwise, leave to appeal is refused."

(27) Pursuant to section 15-7 subsection 1 (a) of the Dispute Act, the State represented by the Ministry of Petroleum and Energy acts as intervener for Fosen Vind in the Supreme Court in the issue concerning the admissibility of the appraisal. In the part of the case concerning the appeal from Fosen Vind, the State has acted in accordance with section 30-13 of the Dispute Act on the State's right to participate in cases involving the Constitution or international obligations. Apart from this and within the scope of the leave to appeal and the Supreme Court's jurisdiction, the case stands as it did in the previous instances.

(28) The Supreme Court has conducted a remote hearing in accordance with section 3 of temporary Act of 26 May 2020 no. 47 on adjustments in the procedural set of rules due to the Covid-19 outbreak etc.

The parties' contentions

(29) *Sør-Fosen sijte*:

(30) The development of Storheia violates the Sami reindeer herders' rights under Article 27 ICCPR and Article 5 (d) (v) of ICERD. The Ministry of Petroleum and Energy's licence decision is therefore invalid, and the appraisal must be ruled inadmissible.

(31) The determination of whether Convention rights have been violated requires an individual assessment based on the factual circumstances at the time of the judgment. One must establish whether the relevant decisions conflict with the substantive limits on administrative discretion, and the doctrine that the courts may only consider the adequacy of the public administration's forecasts is thus not applicable.

(32) The Court of Appeal's assessment of how the windfarms at Storheia affects reindeer husbandry in Sør-Fosen sijte is correct. The Supreme Court has a weaker basis for its assessments and should not diverge from the findings of fact in the reappraisal.

(33) Article 27 ICCPR confers rights on individuals to enjoy their own culture, and the question is thus, at the outset, whether the individual reindeer herder's rights have been violated. However, since reindeer husbandry is practiced collectively, a siida may also invoke rights under the Convention. In any case, the siida must be able to act as a party to the expropriation appraisal and assert a violation on behalf of its members.

(34) According to Article 27 ICCPR, a violation occurs not only when an interference entails a total denial of the right to cultural enjoyment, but also when it has a considerable impact. When the cultural practice is vulnerable to begin with, a violation occurs already when the interference has a "certain limited impact". Article 27 is violated if the possibility of benefiting from the practice is lost. It is sufficient that the practice is threatened, and the provision does not allow for a margin of appreciation or a proportionality assessment. Consultation with the minority is an important factor, but cannot in itself prevent violation if the negative effects are substantive. Indigenous peoples' connection to the land must be included in the assessment.

(35) The development of Storheia windfarm amounts to a violation of Article 27 CCR. The interference has the effect that Sør-Fosen sijte loses a crucial late winter pasture. The loss of Storheia will over time give a dramatic reduction of the herd and make it impossible to operate with a viable profit. One must take into account the particularly vulnerable South-Sami culture. Damages for winter feeding costs do not prevent a violation. Article 108 of the Norwegian Constitution has the same content as Article 27 ICCPR, and applies independently if it is concluded that the siidas cannot assert a violation of the latter on behalf of the herders.

(36) The licence decision also violates the reindeer herders' rights under Article 5 (d) (v) ICERD. Loss of land threatens the preservation and existence of the Sami culture. Such a loss cannot be compensated financially, as is the case for interference with the rights of others. If the Sami reindeer herders' right to pastures are dealt with in same manner as other people's rights to property, we are in practice not dealing with equality, but discrimination.

(37) If damages are to be measured, Sør-Fosen sijte supports Nord-Fosen siida's contentions in this regard. Sør-Fosen sijte agrees with Statnett that the latter is not jointly and severally liable for possible damages for the consequences of the windfarms.

(38) Sør-Fosen sijte requests the Supreme Court to rule as follows:

> "I. The appeal from Sør-Fosen sijte
>
> *Principally:*
> The appraisal is inadmissible.
>
> *Alternatively:*
> The reappraisal is set aside to the extent appealed.
>
> *In both cases:*

Sør-Fosen sijte is awarded costs.

II. The appeal from Fosen Vind DA

1. The appeal is dismissed.

2. Sør-Fosen sijte is awarded costs.

III. The appeal from Statnett SF

1. The reappraisal is set aside as concerns Statnett's liability for the windfarms.

2. Sør-Fosen sijte is awarded costs."

(39) *Nord-Fosen siida*:

(40) The building of Roan windfarm violates the siida members' rights under Article 27 ICCPR and Article 5 (d) (v) ICERD. The Ministry of Petroleum and Energy's licence decision is therefore invalid, and the appraisal must be ruled inadmissible.

(41) The violation issue is substantive. The courts must assess all evidence available at the time of the judgment, and are not to assess the adequacy of the public administration's forecasts. Moreover, this case does not involve assessing new legal facts, but new evidence. Thus, the Supreme Court has full jurisdiction.

(42) The Supreme Court must build on the Court of Appeal's findings of fact, also when assessing the impact Roan windfarm has on reindeer husbandry. Nord-Fosen siida supports Sør-Fosen sijte's contention that the Supreme Court should not diverge from the findings of fact in the reappraisal.

(43) Nord-Fosen siida agrees with Sør-Fosen sijte's general interpretation of Article 27 ICCPR. In the individual assessment of whether Article 27 has been violated, it must be taken into account that Nord-Fosen siida is the group of reindeer herders in Norway most harmed by the windfarms and related infrastructure. The building of Haraheia will have particularly negative consequences for the herding, as crucial winter pastures are lost. Compensation for winter feeding costs does not prevent violation. There has also been a violation of the rights under Article 5 (d) (v) of ICERD. On this point, Nord-Fosen siida supports the contentions from Sør-Fosen sijte.

(44) Alternatively, the appeal from Fosen Vind against the Court of Appeal's measure of damages must be dismissed. The Court of Appeal has not made an error in law, and neither the findings of fact nor the appraisal procedure may be reviewed. In its measure, the Court of Appeal has correctly assumed that the Sami interests enjoy particular protection, established by case law. Article 27 ICCPR is not applied as basis for damages in the reappraisal. The Expropriation Compensation Act is not applicable, and the provisions therein do not in any case preclude damages beyond the loss of proceeds. Under any circumstances, the Court of Appeal's measure of damages are in accordance with the principles of compensation for non-economic loss. The Constitution and the international law provisions on protection of Sami reindeer husbandry are relevant as interpretative factors and limitations, but may also form an independent basis for damages. The Court of Appeal has correctly considered the possibilities of reducing the loss.

(45) Statnett is right when stating that it is not jointly and severally liable for payment of possible compensation for the consequences of the windfarms.

(46) Nord-Fosen siida requests the Supreme Court to rule as follows:

> "In case 20-143892SIV-HRET (the appeal from Sør-Fosen sijte)
>
> 1. Principally: The appraisal is inadmissible.
>
> 2. In the alternative: The reappraisal is set aside as concerns the application of the law in the question of the appraisal's admissibility.
>
> 3. Nord-Fosen siida is awarded costs.
>
> In case 20-143893SIV-HRET (the appeal from Fosen Vind AS)
>
> 1. The appeal is dismissed.
>
> 2. Nord-Fosen siida is awarded costs.
>
> In case 20-143891SIV-HRET (the appeal from Statnett SF):
>
> 1. The reappraisal is set aside as concerns Statnett's liability for the windfarms.
>
> 2. Nord-Fosen siida is awarded costs."

(47) *Fosen Vind DA*:

(48) The Court of Appeal has correctly trusted that the licence decision is valid, and the appraisal is therefore admissible. This implies that the appeal from Sør-Fosen sijte must be dismissed. However, the reappraisal must be set aside because the damages are measured based on an error in law.

(49) The appraisal's admissibility is not to be examined for Nord-Fosen siida. The siida has not appealed against it, and for this group of reindeer herders, there is as a starting point no "dispute", see section 48 of the Appraisal Procedure Act. We are not dealing with a procedural condition automatically examined by the courts, but with a substantive issue that is only examined if disputed. The case is subject to unlimited rights of disposition. Admittedly, this issue may now change, with Nord-Fosen siida's request that the appraisal be ruled inadmissible.

(50) The assessment of the validity issue must be based on the facts at the time of the judgment. The question is whether the public administration's forecasts on how the development will affect reindeer husbandry on Fosen are adequate. New evidence may only be assessed to the extent it sheds light on the propriety of the licence decision at the time of the judgment.

(51) The Court of Appeal has made an error in fact. It is acknowledged that the herding in both siidas is disturbed by the windfarms, but the Court of Appeal has overestimated the negative consequences. Late winter pastures are not a so-called "minimum factor" for reindeer husbandry in the district – it is the availability of summer pastures that dictates how many animals the herders can have.

(52) The threshold for violation under Article 27 ICCPR is high, see the term "denied". The use of "threaten" in case law from the UN Human Rights Committee does not mean that merely a threat against a minority's culture is sufficient; the intereference must be so intrusive that it equals a total denial. Significant weight must be placed on consultations and involvement in the decision-making process. The States Parties may not exercise a margin of appreciation, but a balance should be struck against other interests of society.

(53) The wind power development does not violate the reindeer herders' rights under Article 27 ICCPR. The consequences are not so serious that they deprive the Sami of their right to enjoy their own culture on Fosen. The Ministry of Petroleum and Energy's assessments and forecasts are thorough and adequate in every way. The reindeer herders have been consulted in the process, while a balancing against other interests of society suggests that no violation has taken place. The significance of "the green shift" is massive. The development also does not violate Article 5 (d) (v) ICERD, see the State's contentions.

(54) The measure of damages in the reappraisal is based on an error in law. The Court of Appeal has failed to link the damages to the reindeer herders' financial loss. Article 27 ICCPR does not give a basis for derogating from general principles of measuring damages in expropriation law. Secondly, the duty to adapt has not been considered. Fosen Vind agrees that Statnett is not liable for the consequences of the windfarms.

(55) Fosen Vind DA requests the Supreme Court to rule as follows:

> "In case 20-143893 (the validity case):
>
> 1) The appeal is dismissed.
>
> 2) Fosen Vind is awarded costs in the Supreme Court.
>
> In case 20-143892 (the damages case):
>
> 1) The reappraisal is set aside."

(56) Fosen Vind's intervener – *the State represented by the Ministry of Petroleum and Energy* – supports the contentions from Fosen Vind and submits:

(57) Article 27 ICCPR protects physical persons only, not groups of individuals. Thus, no individual rights are conferred on Nord-Fosen siida and Sør-Fosen sijte. The siidas may also not appeal to the UN Human Rights Committee on behalf of its members. In a case like this, the siidas are not allowed under procedural law to represent their members in a lawsuit. Against this background, the request that the appraisal be ruled inadmissible cannot be considered.

(58) The siidas contention that their rights under Article 5 (d) (v) of ICERD have been violated cannot be heard. It is unclear whether the siidas' rights are protected under the Convention at all. In any case, the Convention does not contain other substantive requirements for the right to expropriation than equality. The public authorities have a positive right under the Convention to give special treatment to a group, but not a duty.

(59) The State represented by the Ministry of Petroleum and Energy has not requested a ruling.

(60) *Statnett SF*:

(61) The Court of Appeal's conclusion that Statnett is jointly and severally liable for the entire damages amount is an error in law. Statnett has only been awarded a licence and an expropriation permit for the establishment of a 420 kV power line and cannot be held accountable for the consequences of the windfarms.

(62) Statnett SF requests the Supreme Court to rule as follows:

> "The reappraisal is set aside as concerns Statnett's liability for the windfarms."

My opinion

The key issue and further discussions

(63) The key issue is whether the appraisal is inadmissible on the part of Roan and Storheia windfarms because the licence decisions by the Ministry of Petroleum and Energy are invalid. The two siidas in Fosen grazing district have invoked two bases for invalidity – violation of Article 27 ICCPR and violation of Article 5 (d) (v) ICERD. I will first present my view on the Supreme Court's jurisdiction in the validity issue. Then, I will discuss the findings of fact and the facts forming the basis for the discussion. Against this background, I will consider whether there has been a violation of the reindeer herders' rights under either ICCPR or ICERD.

The Supreme Court's jurisdiction in the validity issue

The scope of the examination under section 38 of the Appraisal Procedure Act.

(64) According to section 38 of the Appraisal Procedure Act, a reappraisal may only be appealed for "errors in law or procedure forming the basis for the ruling". It is established in case law that this limitation only applies to issues regarding the measure of damages. When it comes to whether the substantive criteria for bringing an appraisal action are met, the Supreme Court has full jurisdiction, see Rt-2006-1547 paragraph 46 with further references.

(65) The appeal from Sør-Fosen sijte in the validity case challenges the Court of Appeal's application of the law. However, the respondent Fosen Vind disputes the Court of Appeal's findings of fact. The respondent's contentions regarding the findings of fact cannot be precluded even if the appeal is limited to the application of the law, see HR-2017-2165-A paragraph 104 with further references. As emphasised in Rt-2014-1240, this is the consequence of the successful party in the lower instance lacking a legal interest in appealing, see section 29-8 subsection 1 first sentence. When the respondent exercises its right to challenge the findings of fact, the appellant may object by presenting its own view on the specific issue, see HR-2017-2165-A paragraph 104. These principles apply correspondingly in connection with an appraisal, see section 2 of the Appraisal Procedure Act. Consequently, the Supreme Court is to examine the findings of fact in the validity issue if warranted by Fosen Vind's contentions and the siidas' objections.

The Supreme Court's jurisdiction to review the facts

(66) Fosen Vind contends that the facts at the time of the judgment are decisive for the validity issue. The company also maintains that the Supreme Court may only consider the adequacy of the public administration's forecasts at the time of the licence decision.

(67) As set out in the plenary judgment Rt-2012-1985 *Long-residing children I* paragraph 81, the general starting point for the hearing of validity actions is that the review must be based on the facts at the time of the judgment. In my view, this limitation does not apply when the issue, like here, is the admissibility of an appraisal.

(68) First, I point out that if, during an appraisal procedure, a dispute arises on the rights or requirements related to expropriation, or on the expropriated property, the court is to resolve the dispute during the appraisal proceedings, see section 48 of the Appraisal Procedure Act. This includes disputes on the validity of the expropriation decision. If the court finds that the decision is invalid, the appraisal must be ruled inadmissible. On the other hand, if the court finds that the decision is valid, no separate ruling is required. The court is then to proceed with the case and measure the expropriation damages. However, the expropriation decision together with the appraisal criteria will form the factual basis for the court's measure of damages.

(69) Section 10 subsection 1 of the Expropriation Compensation Act establishes that "the time the appraisal was verified" forms the basis for the measure of damages. Section 10 second sentence makes exceptions for cases where the expropriation decision has already been effectuated. Then, the compensation must be measured based on the value at the time of the takeover. The case at hand illustrates the close proximity between the validity of the expropriation decision and the measure of compensation. It would be inexpedient if these issues were resolved based on facts at various points in time. If, after the time of the decision, new circumstances occur that may impact on the validity of the decision, the appraisal must be ruled inadmissible and the case sent back for new administrative processing.

(70) In this case, the time when the facts occurred is not a pronounced issue. It is nonetheless possible to present new evidence that may shed light on the situation at the time of the judgment, see paragraph 50 of *Long-residing children I*. Here, it has not been contended that new legal facts have occurred after the expropriation permit was granted, but new evidence has been presented through reports etc. Such new evidence may in any case be taken into account.

(71) As for the review of administrative discretion, case law establishes that to the extent the administrative decision is based on forecasts for future development, the court will only consider whether the forecasts were adequate at the time of the decision. Key in this regard is the Supreme Court judgment in Rt-1982-241 *Alta* page 266, also referenced in Rt-2012-1985 *Long-residing children I* paragraph 77. However, this cannot apply in our case, where the question is whether Article 27 ICCPR prevents the appraisal. The courts must then consider the effect of the interference based on independent findings of fact, and not limit their review to the adequacy of administrative forecasts. I note that the Supreme Court's review in HR-2017-2247-A *Reinøya* was not limited to this.

Is the Supreme Court to consider the admissibility of the appraisal also for Nord-Fosen siida?

(72) Nord-Fosen siida has not appealed against the reappraisal. This has raised the question whether the Supreme Court may consider the admissibility of the appraisal also for this siida.

(73) I start with section 48 of the Appraisal Procedure Act, which I have already mentioned. The provision reads:

> "If during the appraisal procedure presided over by a judge, a dispute arises on rights or conditions related to expropriation, or on the expropriated property, the dispute shall be resolved during the appraisal procedure."

(74) In its final pleading to the Supreme Court, Nord-Fosen siida requested that the appraisal be ruled inadmissible, disputing the validity of the expropriation and licence decisions. This has been maintained during the appeal hearing. Hence, a "dispute" exists on the right to expropriation under section 48. The Supreme Court must therefore, as a starting point, consider the validity issue also for Nord-Fosen siida.

(75) Fosen Vind has mentioned that the request for an admissibility ruling was made after the time limit for appeal had expired, and after the Supreme Court's Appeals Selection Committee had decided to allow the appeal. However, these objections are not decisive. The admissibility of the appraisal is not a claim in a procedural sense, but a substantive premise for the measure of damages. Nord-Fosen siida may therefore request that the appraisal be ruled inadmissible, although the siida has not appealed against it. It is not possible under section 30-7 of the Dispute Act to broaden the prayer for relief or submit new facts or evidence after leave to appeal has been granted. However, this rule is not absolute, as such broadening is prohibited "unless special grounds suggest otherwise". As the case stands, it must be assumed that the Appeals Selection Committee has accepted the broadening of Nord-Fosen siida's prayer for relief. This means that the Supreme Court is obliged under section 48 of the Appraisal Procedure Act to consider the admissibility of the appraisal also with regard to Nord-Fosen siida.

The findings of fact in the validity issue

Some starting points

(76) When assessing the validity of the licence decision, the key evidentiary issue is which parts of the siidas' late winter pastures near Storheia and Roan windfarms are lost, and the significance thereof for reindeer husbandry.

(77) Late winter grazing takes place from January to around Easter, over a period of approximately 90 days. A condition for late winter grazing is that the reindeer have access to lichens. Lichens are particularly accessible in bare rock areas with high wind-blown ridges, but this depends on the snow conditions in the relevant year. Only a small part of the total area referred to as late winter pasture allows the reindeer to graze. The turbines in the two windfarms are placed alongside the mountain ridges and thus in areas well suited for late winter grazing.

(78) In the case at hand, the direct presentation of evidence is of great importance, to which I will

also return. The Supreme Court has a poorer basis for assessing the consequences of the development than what the Court of Appeal had, and should as a starting point be reluctant to review the Court of Appeal's findings of fact. There are no limitations on Fosen Vind's possibility as a respondent to challenge the Court of Appeal's findings of fact. But, in my opinion, a respondent taking this opportunity has a particular responsibility to provide the Supreme Court with a solid basis for assessing the evidence. The Supreme Court must be allowed to concentrate on the objections made, and only examine the facts to the extent the objections give a reason for doing so.

The Court of Appeal's assessment of the development's impact on reindeer husbandry

(79) The Court of Appeal has concluded that the reindeer will avoid the windfarms in Storheia and Roan, and summarises this as follows in the reappraisal ruling:

> "Against this background, the Court of Appeal takes it that the reindeer will avoid the windfarms developed on Fosen, where Storheia and Roan (Haraheia) are the most important by far. The avoidance will in the Court's view be so significant that the areas must be considered lost as pastures. The avoidance zone may be assumed to be at least three square kilometres, but this is not a pronounced issue in this case. For late winter grazing, the mountain ridges are particularly valuable, and these will in any case be lost."

(80) The Court of Appeal also considers it "speculative" to assume that the reindeer will become used to the windfarms and start grazing in the areas at a later point in time.

(81) Based on these conclusions, the Court of Appeal discusses which consequences the lost pastures will have for reindeer husbandry. The Court of Appeal takes as its starting point that this depends on whether late winter pastures are a restrictive factor for the number of reindeer – a so-called minimum factor – so a loss thereof will inevitably give a reduced number of reindeer and/or lower slaughter weights.

(82) After disussing the evidence, the Court of Appeal concludes that the building of *Roan* windfarm will give a "dramatic loss of pasture for the North Group, which in the long run will lead to a reduction of the number of reindeer unless measures in the form of winter feeding are implemented".

(83) For *Storheia* and Sør-Fosen sijte, the Court of Appeal makes the following assessment of the development's consequences for reindeer husbandry:

> "Despite these the objections, the Court of Appeal assumes that Storheia, considered in the long term, is a late winter pasture the herders use and depend on. In this assessment, emphasis is placed on the area's objective suitability; it concerns significant and naturally demarcated areas, which due to their location in the heights and close to the coast are well suited for late winter grazing. With a more unstable climate, there is reason to assume that the significance of such areas will increase in the future. Moreover, it is clear in a historical sense that the area has been used, if not recently.
>
> Nonetheless, it is a separate question whether the South Group with its current number of reindeer can manage with Rissa and Leksvik late winter pastures, as it has indeed done since 2007. The Court of Appeal assumes that it eventually will be difficult to maintain the number of reindeer if Storheia is lost as late winter pasture. Partially because the other winter pastures, particularly Leksvik, at some point will need rest to avoid over-grazing.

> The Court of Appeal does not have secure information on the current wear and tear in these areas, but reindeer owner Jåma has explained that the areas are now marked by long-term grazing. Partially also because Storheia, due to the climatic conditions, is the only secure winter pasture in so-called years of crisis. Both Leksvik and Rissa may be exposed to icing with winter temperatures around zero degrees centigrade. However, Storheia is snowless along the mountain ridges and therefore much less exposed."

(84) When discussing the validity issue, the Court of Appeal states:

> "As mentioned, the Court of Appeal bases its assessment on the assumption that both Storheia and Haraheia in practice are lost as late winter pastures. Furthermore, the Court of Appeal has assessed the scope of the loss and the pastures in general, so that the loss cannot be fully compensated by use of alternative pastures. Without remedy measures, the development could have the effect that the reindeer herds must be dramatically reduced. Both sijtes have indicated up to a 50 percent reduction, but such an estimate is of course burdened with uncertainty and understandable pessimism.
>
> As mentioned, the number of reindeer is 1050 for each individual sijte, divided on 350 for each of the three sijte units (the families). Leif Arne Jåma from the South Group has stated that the annual profit from his herding practice in 2018 was just below NOK 300,000. With such rather marginal results, there is reason to believe that a dramatic reduction of the number of reindeer implies that the practice can no longer be operated with a profit, or at least so that the profit is no longer reasonably proportionate to the efforts. The costs will be more or less the same with a reduced number of reindeer. If the reduction has the result that one of the families quits, this will create operational problems for the two others; during slaughter and other gathering of the reindeer, it is necessary according to the herders to have at least three operational units. The Court of Appeal has no basis for doubting this.
>
> An isolated assessment implies, in the Court of Appeal's view, that the building of windfarms at Storheia and Haraheia will threaten the existence of reindeer husbandry on Fosen."

(85) In other words, the Court of Appeal accepts that the building of the windfarms in Storheia and Roan will threaten the existence of reindeer husbandry on Fosen, unless remedy measures are implemented. The question is whether the Supreme Court has reason to derogate from these assessments. I will first look at the basis for the Court of Appeal's findings of fact before I consider the objections from Fosen Vind.

Basis for the Court of Appeal's findings of fact

(86) The Court of Appeal heard the case with three legal judges as decided by the senior presiding judge, see section 34 of the Appraisal Procedure Act. The court was composed of four appraisal members, two of whom had reindeer husbandry expertise. The appraisal proceedings were held over 13 court days. Two days were spent on inspections, and according to the court records, both Roan and Storheia were inspected in detail. The Court of Appeal was also on a helicopter inspection above parts of the area. Ten expert witnesses were interviewed, while a significant number of research reports have been assessed. As I see it, the case has been thoroughly dealt with, and that the Court of Appeal has had a solid basis for its findings.

(87) In its assessment of the consequences of the windfarms, the Court of Appeal takes as its

starting point Report 1305 from the Norwegian Institute for Nature Research "Wind power and reindeer – a knowledge synthesis" (2017). The report is a compilation of various investigations on how the reindeer are affected by the windfarms and power lines. The Court of Appeal reproduces the report's summary on wind turbines and rotors, which sets out that variations in the findings are due to "topography, grazing conditions, closeness to other infrastructure as well as the design/completion of the various investigations". Against this background, the Court of Appeal takes the following starting point for its further discussion:

> "Although the conclusion is relatively open considering the effect of wind power plants, it is so that the transfer value from the various investigations on which the conclusion in the report is based to the situation on Fosen, varies. It is therefore necessary to assess more closely geographical and other premises for the various investigations."

(88) This is a sound approach, which is also not disputed. The Court of Appeal continues by assessing and commenting on six different reports. I will return to Fosen Vind's objections to the Court of Appeal's conclusions. The point here is that the Court of Appeal has been conscious of the somewhat divergent conclusions in the various research reports, discussed them and applied them to the conditions at Storheia and Roan.

(89) The Court of Appeal has placed significant weight on a presentation held by senior lecturer Anna Skarin from the Swedish University of Agricultural Sciences in Uppsala. Her conclusions have neither been commented on nor disputed by Fosen Vind in the Supreme Court. The Court of Appeal has also relied on several other expert witnesses and reindeer herders with experience from windfarm areas. No recorded evidence or written submissions have been presented from any of these.

(90) In the reappraisal ruling, the Court of Appeal also refers to GPS measurements of the reindeer's use of the Haraheia area before, during and after the building of Roan windfarm. In the Court of Appeal's view, the measurements support the conclusion that the reindeer will avoid the area. I cannot see that Fosen Vind has objected very strongly to these measurements.

(91) Also, the Court of Appeal makes several comments on the area's nature, including its suitability as late winter pasture and the significance of the visibility of the turbines for the reindeer. The assessment of what is lost for the reindeer herders is thorough and concrete. As I understand the reappraisal ruling, the Court of Appeal largely bases itself on its own observations during the inspection, which are in turned balanced against information from the expert witnesses among others.

(92) My overall impression is that the Court of Appeal has had a solid basis for its findings, and that they are adequate in every way. The Court's own observations and the direct statements from witnesses have been of great help to the understanding. As mentioned, the Supreme Court has a poorer basis for its assessment of the windfarms' impact on reindeer husbandry, and I refer to my previous comment that this suggests that the Supreme Court should be reluctant to review the findings of fact.

Fosen Vind's objections to the Court of Appeal's findings of fact

(93) A main objection from Fosen Vind is that the Court of Appeal has not considered alternative grazing resources. I do not agree. I have already mentioned that the Court of Appeal has

considered whether pastures at Storheia and Roan are minimum factors for the two siidas, and found that a loss thereof will lead to a reduction in the reindeer numbers and/or reduced slaughter weight. The possibility to use alternative pastures is necessarily included in this assessment. And for Sør-Fosen sijte's part, the alternative late winter pastures in Leksvik and Rissa are assessed more explicitly.

(94) In its discussion of whether the late winter pastures dictate the reindeer numbers, the Court of Appeal has relied on an impact assessment from 2008 and the rules of usage for the two siidas. Both suggest that winter pastures are not crucial for the operation. However, based on other evidence presented, the Court of Appeal has not considered this decisive in its assessment of the long-term effects of the measure. I have no basis for derogating from the Court of Appeal's findings here.

(95) Fosen Vind has also been critical to the Court of Appeal's interpretation and application of some of the research articles. The objections relate to the studies of Fakken, Gabrielsberget and Raggovidda windfarms. It may well be that not all the references to these investigations in the reappraisal are equally precise. However, on this point, also, the attack on the Court of Appeal's findings is not presented in such a way that I have a basis for saying that they are incorrect.

(96) In Fosen Vind's view, the Court of Appeal has no basis for stating that 44 percent of the reindeer need winter feeding. Nonetheless, the Court of Appeal has measured the damages based on this premise. As for the validity issue, the Court of Appeal has stated that the reindeer numbers must be "dramatically reduced due to the loss of pastures". The knowledge base currently available does not provide me with sufficient basis for derogating from this assessment.

(97) Overall, the objections from Fosen Vind are not sufficient for setting aside the Court of Appeal's findings of fact. I therefore rely on these findings when I turn to discuss the validity issue.

The question of violation of Article 27 ICCPR

Legal starting points

(98) Article 27 of the UN Convention on Civil and Political Rights (ICCPR) reads:

> "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

(99) Article 27 ICCPR must be viewed in context with Article 108 of the Constitution, which imposes a duty on the state authorities "to create conditions enabling the Sami people to preserve and develop its language, culture and way of life". The provision is based on Article 27 ICCPR and may constitute an independent legal basis where other sources of law give no answer, see HR-2018-872-A paragraph 39.

(100) Pursuant to section 2 (3) of the Human Rights Act, ICCPR applies as Norwegian law and thus sets limits on administrative discretion. In the event of a conflict, provisions in the

Convention take precedence over any other legislative provisions, see section 3. This implies that the licence is void if Article 27 ICCPR is violated.

(101) It is clear that the Sami people is a minority within the meaning of Article 27, and that reindeer husbandry is a form of protected cultural practice. I refer to HR-2017-2247-A *Reinøya* paragraph 120 and HR-2017-2428-A *Reindeer cull I* paragraph 55.

(102) When interpreting Article 27, statements from the UN Human Rights Committee will carry significant weight, see the Supreme Court's grand chamber judgment in Rt-2008-1764 paragraph 81.

Individual or collective protection – who may assert a violation?

(103) The State has principally contended that Article 27 ICCPR only protects individuals, not legal entities or groups of individuals. On this basis, the State has advocated that the protection cannot be invoked by the siidas. Two issues rise in this regard, and I will first take a closer look at who is protected under the provision.

(104) According to Article 27, the protection applies to "persons belonging to such minorities". This wording in the first part of the provision indicates that the protection is enjoyed by the individuals in a minority group. However, the provision further states that the individuals have the right to enjoy their own culture, etc. "in community with the other members of their group". This element was added to clarify the collective nature of the provision, see Nowak's ICCPR Commentary, 3rd edition, 2019 page 799–800.

(105) In line with this, the Supreme Court assumes in HR-2017-2428-A *Reindeer cull I* paragraph 55 that Article 27 protects the individual, but adds that the protection has "certain collective features". Furthermore, the UN Human Rights Committee does not always distinguish clearly between the protection of individuals in a minority and the group as such. Relevant here is *Lubicon Lake Band vs. Canada* (March 26, 1990, ICCPR-1984-167). The author is initially partially presented as "Chief Bernard Ominayak *and* the Lubicon Lake Band" and partially as "Chief Bernard Ominayak *of* the Lubicon Lake Band" (italics added). In paragraph 33, the Committee found that the interference threatened "the way of life and culture of the Lubicon Lake Band".

(106) Against this background, I find that Article 27 at the outset protects individuals in a minority. However, the minorities' culture is practiced in community, which gives the protection a collective nature. When it comes to reindeer husbandry, this is expressed by the fact that the Sami pasture rights are collective and conferred on each individual siida, see HR-2019-2395-A *Reindeer cull II* paragraph 51 with further reference to Rt-2000-1578 *Seiland*. A siida is a group of people practicing reindeer husbandry jointly in specific districts, see section 51 of the Reindeer Husbandry Act. Against this background, it is difficult to draw a sharp distinction between the individuals and the group.

(107) The issue is then whether the two siidas in the case at hand may invoke the minority protection in Article 27 in Norwegian courts. I take as my starting point section 2-2 of the Dispute Act, which regulates who has the capacity to sue and be sued. According to subsection 2, organisations other than those mentioned in subsection 1 have the capacity to sue and be sued to the extent justified by an overall assessment. Emphasis should be placed on

the factors listed in the subsection. The provision was intended to continue the previous rules on so-called limited capacity to sue or be sued, see Skoghøy, Dispute Resolution, 3rd edition, 2017 page 284 with further references to preparatory works and case law.

(108) In my view, it is clear that a siida may have a limited capacity to sue and be sued, which is also the conclusion in the Supreme Court judgment Rt-2000-1578 *Seiland*. Here, Justice Tjomsland states:

> "In this case, the interference affects only a group of the reindeer herders in the district, which means that this group must have access to make compensation claims, see NOU 1997: 4 Natural basis for Sami culture, page 337."

(109) Also, chapter 6 part II of the Reindeer Husbandry Act regulates in detail the siida's authority and organisation. Section 44 subsection 2 of the Act further states that the siidas may safeguard "their own special interests", also in lawsuits.

(110) The question of limited capacity to sue and be sued depends on an individual assessment. I find it clear that the siidas in Fosen grazing district have a limited capacity to sue and be sued in the issues to be considered by the Supreme Court, and that they must be able to invoke the individual rights of their members. As already pointed out, obligations under international law have great significance in this regard. I have also emphasised the collective nature of the cultural practice, and that a siida is in fact characterised by a group of persons herding reindeer jointly in specific areas. The siida is also, as mentioned, bearer of collective land rights to which reindeer husbandry is related, see HR-2019-2395-A *Reindeer cull II* paragraph 51. In a case dealing with such rights, a siida must then have the capacity to act as a party and invoke individual reindeer herders' rights under Article 27 on their behalf. Article 108 of the Constitution, which requires the public authorities to create conditions enabling the Sami people to preserve and develop its culture, supports this interpretation.

The term "denied" – what is the threshold for violation?

(111) Although Article 27 ICCPR contains the term "denied", it is clear that also interference that does not constitute a total denial may violate the right to cultural enjoyment. Already in the Human Rights Committee's general comment No. 23 (1994) paragraph 6.1, it was specified that a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. The same interpretation is applied in HR-2017-2428-A *Reindeer cull I* paragraph 55 with further references to Norwegian Official Report 2007: 13 A *The new Sami law*. On page 203, the Sami Law Committee establishes that a denial within the meaning of Article 27 will not only include "total denials" of the right to cultural enjoyment, but also "violations".

(112) As the Sami Law Committee states on page 202 in its Report, the wording in Article 27 implies nonetheless that the provision's scope is "relatively narrow". The question is where the threshold for violation lies.

(113) There are four rulings from the Human Rights Committee that clarify in particular what it takes before the right to cultural enjoyment under Article 27 is violated − *Ilmari Länsman and Others v. Finland* (26 October 1994, ICCPR-1992-511), *Jouni Länsman and Others v. Finland I* (30 October1996, ICCPR-1995-671), *Jouni Länsman and Others v. Finland II* (17

March 2005, ICCPR-2001-1023) and *Ángela Poma Poma v. Peru* (27 March 2009, ICCPR-2006-1457). In HR-2017-2247-A *Reinøya*, these rulings are accounted for in more detail. This judgment concerned, among other things, the question whether a road construction on Reinøya north of Tromsø was a violation of Article 27 ICCPR because of the consequences for Sami reindeer husbandry. Justice Kallerud states the following regarding the four rulings in paragraph 124 of the judgment:

> "(124) In the case *Ilmari Länsman and others v. Finland* from [26 October] 1994, the Committee established that "… measures whose impact amount to a denial of the right" would not be compatible with the Covenant. However, measures that had "… a certain limited impact on the way of life of persons belonging to a minority … [would not] necessarily amount to a denial of the right under article 27", see paragraph 9.4. Then, in paragraph 9.5, the Committee expressed that the question was whether the relevant quarry had such an impact in the area "… that it [did] effectively deny to the authors the right to enjoy their cultural rights in that region". It is then established that no measures, either implemented or planned, were of such a character that Article 27 had been violated.
>
> (125) The case *Jouni E. Länsman and others v. Finland* from [30 October] 1996 confirms the line that was drawn in paragraph 9.4 in the case from 1994, see paragraph 10.3. The question there was whether the logging of trees that had already taken place, together with the logging that was planned was, "… of such proportions as to deny the authors the right to enjoy their culture in that area", see paragraph 10.4. In the individual assessment in paragraph 10.6, the Committee established that the logging in the area resulted in "… additional work and extra expenses …." for the Sami, but that it "… does not appear to threaten the survival of reindeer husbandry".
>
> (126) In *Jouni Länsman and others v. Finland* from [17 March] 2005, the subject was once again the consequences of logging of trees in Sami areas. The Committee stressed in paragraph 10.2 that one had to consider "… the effects of past, present and planned future logging…". As in the earlier rulings, the Committee pointed at the fact that the low profitability of reindeer husbandry was due to other circumstances than the measure, see paragraph 10.3. Finally, the Committee concluded in this paragraph that the consequences of the logging "… have not been shown to be serious enough as to amount to a denial of the authors' right to enjoy their own culture in community with other members of their group under article 27 of the Covenant".
>
> (127) In a ruling from [27 March] 2009 – *Ángela Poma Poma v. Peru* – the Committee formulated the core issue as follows in paragraph 7.5: "… the question is whether the consequences … are such as to have a substantive negative impact on the author's enjoyment of her right to enjoy the cultural life of the community to which she belongs". The Committee concluded that Article 27 had been violated. It was held among other things that because of the measure, thousands of head of livestock were dead and that the complainant had been forced to abandon her land."

(114) Against this background, Justice Kallerud concludes as follows in paragraph 128 in the Reinøya judgment:

> "Overall, the case law of the Human Rights Committee shows that it takes a lot for a measure to become so serious that it constitutes a violation of Article 27."

(115) In the case at hand, there are particularly three factors in these rulings from the Human Rights Committee that have been discussed. The siidas have, in connection with the threshold issue, emphasised the statement in *Ilmari Länsman and Others v. Finland* (ICCPR-1992-511) paragraph 9.4 that "measures that have a certain limited impact on the way of life of the persons belonging to a minority will not necessarily amount to a denial of the right under article 27". As they present it, there will be a violation when a measure with limited effect work together with previous and planned measures, and thus create significant consequences for the cultural practice.

(116) I agree with the siidas that the measure must be considered in context with other measures affecting the cultural practice, to which I will return. However, in my view, this gives no indication as to where the threshold should be placed. I note that the Committee in paragraph 9.5 starts its individual assessment by asking whether the impact of the measure was so substantial that it effectively denied the authors their rights under Article 27.

(117) Secondly, the question is what lies in the term "threaten" in some of the decisions. In *Jouni Länsman and Others v. Finland I* (ICCPR-1995-671) paragraph 10.6, the Committee justifies its conclusion by stating that the measure "[did] not appear to threaten the survival of reindeer husbandry", see also *Lubicon Lake Band v. Canada* (ICCPR-1984-167) paragraph 33. In my view, these statements do not address the threshold for violation. In *Jouni Länsman and Others v. Finland I* paragraph 10.6, the term is used in the individual discussion, while the Committee uses "deny" and "denial" when referencing the threshold in paragraph 10.4 and 10.5. *Lubicon Lake Band v. Canada* does not discuss the threshold at all, and the issue of violation of Article 27 seems to have been secondary.

(118) The statement in *Ángela Poma Poma v. Peru* (ICCPR-2006-1457) paragraph 7.5, that the question is whether the measure has "a substantive negative impact" on the author's enjoyment of her culture, has been particularly important in the case at hand. This is the most recent statement regarding the threshold and therefore, in my view, essential to the interpretation. The term "substantive" in this context means "considerable" or "significant", which suggests that the threshold is high.

(119) Against this background, my *conclusion* is that there will be a violation of the rights in Article 27 ICCPR if the interference has a substantive, negative impact on the possibility of cultural enjoyment. The measure in itself may be so intrusive that it amounts to a violation. However, the effect does not need to be as serious as in *Ángela Poma Poma v. Peru*, where thousands of livestock animals were dead as a result of the measure, and the author had been forced to leave her area. The measure must also be seen in context with other measures, both previous and planned. It is the different activities taken together that may constitute a violation, see *Jouni Länsman and Others v. Finland I* (ICCPR-1995-671) paragraph 10.7.

The significance of consultation

(120) Although the consequences of the measure largely dictate whether the rights in Article 27 have been violated, it is also essential whether the minority has been consulted in the process. This is set out in several decisions from the UN Human Rights Committee. Both in *Ilmari Länsman and Others v. Finland* (ICCPR-1992-511) paragraph 9.6 and *Jouni Länsman and Others v. Finland I* (ICCPR-1995-671) paragraph 10.5, this aspect is considered in the individual assessment. The Committee has a more general approach in *Ángela Poma Poma v. Peru* (ICCPR-2006-1457) paragraph 7.6. Here, it is set out that the question of violation "depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures …". The Supreme Court has stressed the importance of consultation in HR-2017-2247-A *Reinøya* paragraph 121 and in HR-2017-2428-A *Reindeer cull I* paragraph 72.

(121) It appears from the Human Rights Committee's decisions and the mentioned Supreme Court judgments that whether and to which extent the minority has been consulted cannot be decisive. This is rather an aspect to be included in the assessment of whether the right to cultural enjoyment has been violated, see NOU 2008: 5 *The right to fishing in the sea off Finnmark* page 272. If the consequences of the interference are sufficiently serious, consultation does not prevent violation. On the other hand, it is not an absolute requirement under the Convention that the minority's participation has contributed to the decision, although that, too, may be essential in the overall assessment.

(122) I also mention that, with effect from 1 July 2021, provisions on consultation have been included in chapter 4 of the Sami Act. In Proposition to the Storting 86 L (2020–2021) paragraph 4.2, the Ministry accounts for the Sami right to self-determination and the significance of consultations. As the case stands, I see no reason for going into more detail on this topic.

Margin of appreciation and proportionality assessment

(123) In its reappraisal, the Court of Appeal has assumed that Article 27 does not prescribe "a balancing of interests in the form of a proportionality assessment or the like", but keeps the possibility of using discretion and balancing various interests open. In this respect, the Court of Appeal highlights the considerations of climate change and emission-free energy. Fosen Vind recognises that the State Parties do not have a margin of discretion – they are not given the freedom to interpret the Convention according to their own conditions. However, Fosen Vind contends that the purpose behind the measure should be included in the overall balancing of interests – a proportionality assessment. The siidas have rejected such an interpretation of Article 27. The legal sources concerning margin of appreciation and proportionality assessment are partly the same. I will therefore discuss the issues jointly, although we are dealing with two different matters.

(124) At the outset, the wording of Article 27 does not allow the States to strike a balance between the rights of indigenous peoples and other legitimate purposes. The rights appear to be absolute, however so that they can be derogated from in time of public emergency, see Article 4. On this point, Article 27 differs from a number of other rights provisions in ICCPR, including Article 12 on the right to freedom of movement, Article 18 on freedom of thought and religion, Article 19 on freedom of expression and Article 22 on the freedom of

association. These provisions expressly allow the States to limit the application on certain conditions, and a proportionality assessment is recommended. Nor is there anything in the wording of Article 27 that suggests that the States have a margin of appreciation.

(125) The Human Rights Committee established in *Ilmari Länsman and Others v. Finland* (ICCPR-1992-511) that the States do not have a margin of appreciation in their application of Article 27. The Committee states the following in paragraph 9.4:

> "A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27."

(126) Furthermore, in *Ángela Poma Poma v. Peru* (ICCPR-2006-1457) paragraph 7.4, the Committee specifies that economic development may not undermine the rights protected by Article 27.

(127) I line with this, it is stated in Norwegian Official Report 2008: 5 *The right to fishing in the sea off Finnmark* page 252 that a majority of the population should not have the possibility to limit the protection under Article 27, and that the States do not have a margin of appreciation. Correspondingly, the Sami Law Committee states in Norwegian Official Report 2007: 13 A *The new Sami law* page 195−196 that the States do not have an interpretation margin. The Committee continues on page 196:

> "Hence, this case concerns an absolute right, which protects minorities from the majority restricting their rights. This is a natural consequence of the reason for the provision. Its minority protection would soon become ineffective if the majority population were to be able to limit it based on an assessment of its legitimate needs."

(128) The Committee follows this up in the summary of the state of the law on page 210, emphasising that the rights conferred by Article 27 appear "absolute". Also in legal literature, it is assumed that these rights are absolute, and that no margin of appreciation or proportionality assessment is allowed for. I refer to Skogvang, *Sami Law*, 3rd edition, 2017 page 174, Nowak's *ICCPR Commentary*, 3rd edition, 2019 page 833–834 and Åhrén, *Indigenous Peoples' Status in the International Legal System*, 2016 page 94.

(129) Against this background, the clear starting point must be that no margin of appreciation is granted under Article 27, and that it does not allow for a proportionality assessment balancing other interests of society against the minority interests. This is a natural consequence of the reason for the provision, as the protection of the minority population would be ineffective, if the majority population were to be able to limit it based on its legitimate needs.

(130) However, in situations where the rights in Article 27 conflict with other rights in the Convention, the at the outset conflicting rights must be balanced against each other and harmonised. A possible outcome of this is that Article 27 must be interpreted strictly, see also Norwegian Official Report 2007: 13 A *The new Sami law* page 195. The Human Rights Committee further allows for a balancing in cases where the interests of an individual in a minority group stand against the interests of the group of as a whole, see *Ivan Kitok v. Sweden* (27 July 1988, ICCPR-1985-197) paragraph 9.8. In HR-2017-2428-A *Reindeer cull I* paragraph 76, the Supreme Court also prescribes a balancing of interests in such situations.

(131) As I see it, the same balancing of interests may be necessary if the rights in Article 27 conflict with other basic rights. In a given case, the right to a good and healthy environment may, in my view, be such a conflicting basic right. In other words, the consideration for "the green shift" may be relevant. However, as I will return to, the status of this case suggests that further elaboration on this is not needed.

The significance of continued profitability

(132) In some decisions, the Human Rights Committee has emphasised that the members of the minority must still be able to operate with a profit. In *Ilmari Länsman and Others v. Finland* (ICCPR-1992-511) paragraph 9.8, the Committee states that other economic activities in the area must be exercised so that the appellants "continue to benefit from reindeer husbandry". Correspondingly, the Committee stresses in *Ángela Poma Poma v. Peru* (ICCPR-2006-1457) paragraph 7.6 that the admissibility of measures depends on whether the members of the community in question "will continue to benefit from their traditional economy". Against this background, the siidas contend that it amounts to a violation if the interference prevents the minority from benefiting from its traditional trade.

(133) The sources do not give much guidance on how to interpret these statements from the Committee. The quote from *Ilmari Länsman and Others v. Finland* is commented in Norwegian Official Report 2007: 13 A *The new Sami law* page 198, but without contributing much to the interpretation. The issue is also addressed in HR-2017-2428-A *Reindeer cull I* paragraphs 69−71. In that case, however, the interests of a single reindeer herder were balanced against the interests of the herders as a group, and the judgment is therefore of less interest in the case at hand.

(134) In my view, the starting point must be that Article 27 aims at protecting the right to cultural enjoyment. As mentioned, reindeer husbandry is a form of protected cultural practice while at the same time a way of making a living. The economy of the trade is therefore relevant in a discussion of a possible violation. The relevance must be assessed specifically in each individual case and must depend, among other things, on how the economy affects the cultural practice. In my view, the rights in Article 27 are in any case violated if a reduction of the pasture deprives the herders of the possibility to carry on a practice that may naturally be characterised as a trade.

The individual assessment of whether the rights in Article 27 ICCPR have been violated

(135) The question whether the reindeer herders' rights under Article 27 have been violated, depends on the Court of Appeal's findings of fact and the interpretation of the provision I have now presented. I will first consider whether Storheia and Roan windfarms have a substantive negative impact on the Sami people's possibility to enjoy their own culture.

(136) As mentioned, the two windfarms are part of the largest onshore wind power project in Europe. Both were Norway's largest upon completion, and the planning areas cover a total of well above 60 square kilometres. The development has changed the character of the area completely. I line with the Court of Appeal's findings of fact, I take it that the effect of the measures is that the siidas' winter pastures are lost in important areas connected to reindeer husbandry − and thus to the reindeer herders' culture – in late winter. The development will

ultimately eradicate the grazing resources to such an extent that it cannot be fully compensated by the use of alternative pastures. As a result, the reindeer numbers will most likely have to be dramatically reduced.

(137) The reindeer herders on Fosen are already operating with small margins. I have previously quoted from the Court of Appeal's assessment of the development's consequences for the trade's economy. The Court of Appeal assumes that a dramatic reduction of the reindeer numbers will entail that the herders may no longer benefit from the trade, or at least that the profit will no longer be proportionate to the efforts. The Supreme Court has been presented with comparative figures in the reindeer herders' trading statements supporting the Court of Appeal's assessments on this point. Against this background, the interference will ultimately constitute a serious threat against the trade and thus against the cultural enjoyment.

(138) Fosen Vind has emphasised that the production income from reindeer husbandry has never been enough to make a living, and that it never would, regardless of the interference. The trade is dependent on government subsidies, and Fosen Vind therefore contends that the weakened economy threatening the practice may have other causes. I do not concur with such an approach. For a long time, the basis for reindeer husbandry in Norway has partially been operating income and partially various subsidies with the purpose of maintaining the practice. The reindeer herders in our case have managed with this; it is the interference that causes the negative effect on the economy.

(139) Fosen Vind also contends that meaningful reindeer husbandry may be practiced with a much lower number of reindeer. To this, I note that no documentation is presented supporting this contention. This is a question of evidence, and I rely on the Court of Appeal's conclusion that the development threatens the existence of reindeer husbandry on Fosen.

(140) I add that, according to information provided, the subsidies for both production and calving will be reduced if the reindeer numbers are reduced. This is a consequence of the calving subsidies depending on the number of slaughtered animals, while the production subsidies are based on turnover. The information is not disputed. This, too, shows that a reduction in the number of reindeer will considerably reduce the possibilities of benefiting from the trade.

(141) It is also a factor in the assessment that the South-Sami culture is particularly vulnerable. Traditional reindeer husbandry is what carries this culture and the South-Sami language. The interference does not imply a total denial of the reindeer herders' right to enjoy their own culture on Fosen. My view is nonetheless after an overall assessment that the wind power development will have a substantive negative effect on their possibility to enjoy this culture.

(142) The wind power development is a result of thorough investigations and assessments. Along the process, there has been a close dialogue with the herders, and certain adaptations and remedy measures have been implemented in accordance with their input. These factors have been important in the overall assessment, but they cannot in themselves be decisive.

(143) I do agree with Fosen Vind that "the green shift" and increased production of renewable energy are crucial considerations. But as mentioned, Article 27 ICCPR does not allow for a balancing of interests. As also mentioned, this may be different in the event of conflict between different basic rights. The right to a good and healthy environment may be relevant in such a context. However, no collision between basic rights has been demonstrated in the case at hand. I point in particular to the fact that the Norwegian Water Resources and Energy

Directorate considered a number of wind power projects on Fosen and in Namdal in 2009. Despite the constant highlighting of the negative consequences for reindeer husbandry, the choice fell on Roan and Storheia, among others. Fosen Vind has not disputed that the progress of the planning of each windfarm was a key factor in the selection. As the case has been presented to the Supreme Court, I must assume that "the green shift" could also have been taken into account by choosing other – and for the reindeer herders less intrusive – development alternatives. Then, the consideration of the environment cannot be significant when assessing whether Article 27 has been violated in this case.

(144) Against this background, I find that the wind power development will have a substantive negative effect on the reindeer herders' possibility to enjoy their own culture on Fosen. Without satisfactory remedy measures, the interference will amount to a violation of Article 27 ICCPR, which will render the licence decision invalid. I will now turn to assessing whether the decision nonetheless may be upheld if compensation is awarded for the winter feeding of the reindeer, as the Court of Appeal has done.

Compensation for winter feeding – remedy measures and duty to adapt

(145) In the reappraisal ruling, the Court of Appeal summarises its view on whether Article 27 ICCPR has been violated:

> "An isolated assessment suggests in the Court of Appeal's view that the building of windfarms at Storheia and Haraheia will threaten the existence of reindeer husbandry on Fosen. To which extent climate and pure energy considerations may be included in an overall assessment with the result that Article 27 has not been violated at any rate, is not at issue in the Court of Appeal. As it will appear below under the measure of compensation, the Court of Appeal finds that there is a basis for awarding compensation with a starting point in winter feeding of the reindeer. Such a measure, which surely is not ideal in a Sami-cultural perspective, will give the herders a guarantee for their herds' survival in late winter also in so-called years of crisis and during the periods where the available late winter pastures need rest. With some doubt, the Court of Appeal finds that wind power development in this perspective does not constitute a threat to reindeer husbandry against which it is protected under Article 27."

(146) Here, the Court of Appeal goes far as to say that the interference has so serious consequences that it violates the reindeer herders' rights under Article 27 ICCPR. Then, with some doubt, the Court of Appeal finds that a violation may be avoided by the award of compensation for winter feeding. As I understand the Court of Appeal, it relies on the siidas' duty – in return for compensation – to adapt, and that this duty is relevant in the assessment of whether Article 27 has been violated. The Court of Appeal carries on by establishing that such a remedy measure in itself does not constitute an interference with the Sami culture, but expresses doubt also here. When reading the Court of Appeal's ruling in context, it must also be interpreted to imply that other measures will not offer sufficient compensation.

(147) To this, I note that remedy measures by the authorities or the expropriator to minimise the disadvantages of an interference, must as a starting point be taken into account when assessing whether Article 27 has been violated. Depending on the circumstances, such measures may keep the interference below the threshold for violation. In the case at hand, the subsidies to Nord-Fosen siida's slaughter facility at Meungan, and subsidies for electronic reindeer marking and fences to Sør-Fosen sijte, are examples of relevant measures that may

determine whether a violation has taken place. I have considered these subsidies in my individual assessment.

(148) Furthermore, the reindeer herders have a duty under general expropriation-law principles to adjust their operation, provided that the very trade base remains intact, see the Supreme Court ruling in Rt-2000-1578 *Seiland* page 1585. To which extent the possibility of adaptation is also relevant in the assessment of whether Article 27 has been violated, has not been addressed. However, I will leave that question here, as I cannot at any rate see how the licence decision may be upheld with the reasoning provided by the Court of Appeal.

(149) Here, I point out first that winter feeding according to the Court of Appeal's model deviates considerably from traditional, nomadic reindeer husbandry. According to information provided, such feeding, where half the herd for around 90 days each winter must stay within a relatively small fenced-in area, has never been tried out in Norway. Nor has information been provided on the effect of such a model, or on animal welfare, based on experience from other countries. Also, the information provided to the Supreme Court demonstrates uncertainty as to whether such a system is compatible with reindeer herders' right to enjoy their own culture under Article 27 ICCPR. This issue has not been given a broad and thorough assessment, and general reindeer husbandry interests have not been heard.

(150) There are also regulatory issues related to the solution chosen by the Court of Appeal. According to section 24 subsection 2 of the Reindeer Husbandry Act, fences and facilities that are to remain longer than one season may not be built without the Ministry's approval. And the starting point in section 60 of the Act is that the number of reindeer is stipulated based on the pastures of which the siida disposes. The significance of a system with winter feeding in an fenced-in area to the applicability of this provision, has not been addressed.

(151) Against this background, the Court of Appeal's solution with compensation for winter feeding is burdened with so much uncertainty that it cannot determine whether or not Article 27 ICCPR has been violated, even if a duty to adapt should be relevant also under Article 27 ICCPR. My conclusion is therefore that the licence decision violates the reindeer herders' rights under the provision.

(152) I add that the courts, in my view, in any case may build on such a measure as part of the expropriated party's duty to adapt. Measures of this nature must alternatively be presented by the public administration as a condition for expropriation, or provisions on this may be included in the conditions for appraisal proceedings.

(153) Against this background, the licence decision is invalid. In my perception, the contention that the appraisal is inadmissible only concerns Storheia and Roan windfarms, not the damages for the consequences of Statnett's 420 kV power line. I will formulate my conclusion in line with this.

(154) The siidas' contention that Article 5 (d) (v) of ICERD has also been violated, relates to the fact that the Court of Appeal has emphasised the compensation for winter feeding in its validity discussion. With my conclusion regarding the validity of the licence decision, this issue is not relevant.

The appeal from Statnett

(155) The appeal from Statnett challenges the Court of Appeal ruling that the company is jointly and severally liable for *the entire* compensation amount. It has been claimed that Statnett is only liable for the part of the compensation amount relating to the 420 kV the power line, more specifically NOK 288 000 for the moving of calving land. The siidas and Fosen Vind agree with Statnett, and the siidas and Statnett have both requested that the reappraisal ruling be set aside as concerns Statnett's liability for the windfarms.

(156) I have concluded that the appraisal is inadmissible as concerns Storheia and Roan windfarms. Thus, Fosen Vind is not liable for the damages related to the windfarms. However, Statnett is not a party to the cases regarding the admissibility of the appraisal, and I therefore find in favour of the request that the Statnett case be set aside. The compensation of NOK 288 000 for the moving of calving land due to the power line has not been appealed and is not affected by the inadmissibility of the appraisal for Roan and Storheia.

Conclusion and costs

(157) Against this background, my conclusion is that the appraisal is inadmissible as concerns Storheia and Roan windfarms. The reappraisal is set aside to the extent it concerns Statnett's liability for the windfarms.

(158) Sør-Fosen sijte and Nord-Fosen siida have won the case. They are thus entitled to compensation for their costs in the validity case, see section 54 b second sentence, cf. section 54, of the Appraisal Procedure Act. According to section 54 b first sentence, cf. section 54, Fosen Vind is also liable for costs in the compensation case. Statnett is liable for the siidas' costs in the case regarding joint and several liability for the compensation amount, see section 54 b first sentence of the Appraisal Procedure Act, cf. section 54.

(159) Nord-Fosen siida has claimed costs of NOK 31 125 in the Statnett case, NOK 2 701 961 in the damages case and NOK 449 375 in the validity case. For Sør-Fosen sijte, the corresponding amounts are NOK 34 438, NOK 1 105 625 and NOK 2 626 875. Sør-Fosen sijte has stated that NOK 750 000 has been paid in advance in the damages case, and this amount must be deducted. The remaining amount in the damages case is thus NOK 355 625. The claims include VAT.

(160) Fosen Vind has submitted that the costs claimed in the damages case are too high. As I see it, the case has raised extensive and complex issues, and the claims do not exceed the necessary costs, see section 54 of the Appraisal Procedure Act. The claims are accepted.

(161) I vote for this

J U D G M E N T :

In case no. 20-143891SIV-HRET:

1. The reappraisal is set aside as concerns Statnett SF's liability for the windfarms.

2. In costs in the Supreme Court, Statnett SF will pay to Sør-Fosen sijte NOK 34 438

within two weeks of service of this judgment.

3. In costs in the Supreme Court, Statnett SF will pay to Nord-Fosen siida NOK 31 125 within two weeks of service of this judgment.

In case no. 20-143892SIV-HRET:

1. The appraisal is inadmissible as concerns Roan windfarm.

2. In costs in the Supreme Court, Fosen Vind DA will pay to Sør-Fosen sijte NOK 355 625 within two weeks of service of this judgment.

3. In costs in the Supreme Court, Fosen Vind DA will pay to Nord-Fosen siida NOK 2 701 961 within two weeks of service of this judgment.

In case no. 20-143893SIV-HRET:

1. The appraisal is inadmissible as concerns Storheia windfarm.

2. In costs in the Supreme Court, Fosen Vind DA will pay to Sør-Fosen sijte NOK 2 626 875 within two weeks of service of this judgment.

3. In costs in the Supreme Court, Fosen Vind DA will pay to Nord-Fosen siida NOK 449 375 within two weeks of service of this judgment.

(162) Justice **Skoghøy:** I agree with Justice Bergsjø in all material respects and with his conclusion.

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

(164) Justice **Noer:** Likewise.

(165) Justice **Bull:** Likewise.

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

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

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

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

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

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

(172) Following the voting, the Supreme Court gave this

J U D G M E N T :

In case no. 20-143891SIV-HRET:

1. The reappraisal is set aside as concerns Statnett SF's liability for the windfarms.

2. In costs in the Supreme Court, Statnett SF will pay to Sør-Fosen sijte NOK 34 438 within two weeks of service of this judgment.

3. In costs in the Supreme Court, Statnett SF will pay to Nord-Fosen siida NOK 31 125 within two weeks of service of this judgment.

In case no. 20-143892SIV-HRET:

1. The appraisal is inadmissible as concerns Roan windfarm.

2. In costs in the Supreme Court, Fosen Vind DA will pay to Sør-Fosen sijte NOK 355 625 within two weeks of service of this judgment.

3. In costs in the Supreme Court, Fosen Vind DA will pay to Nord-Fosen siida NOK 2 701 961 within two weeks of service of this judgment.

In case no. 20-143893SIV-HRET:

1. The appraisal is inadmissible as concerns Storheia windfarm.

2. In costs in the Supreme Court, Fosen Vind DA will pay to Sør-Fosen sijte NOK 2 626 875 within two weeks of service of this judgment.

3. In costs in the Supreme Court, Fosen Vind DA will pay to Nord-Fosen siida NOK 449 375 within two weeks of service of this judgment.

In case no. 20-143893SIV-HRET:

1. The appraisal is inadmissible as concerned Storheia windfarm.

2. In costs for the Supreme Court, Fosen Vind DA will pay to Sør-Fosen sijte NOK 2 626 875 within two weeks of service of this judgment.

3. In costs for the Supreme Court, Fosen Vind DA will pay to Nord-Fosen siida NOK 449 375 within two weeks of service of this judgment.