



Licence for wind power development on Fosen ruled invalid as the construction interferes with Sami reindeer herders' right to enjoy their own culture

Supreme Court judgment 11 October 2021, HR-2021-1975-S (case no. 20-143891SIV-HRET, case no. 20-143892-SIV-HRET and case no. 20-143893SIV-HRET)

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

II: Fosen Vind DA (Counsel Pål-Martin Abell and Counsel Johan Fredrik Remmen) v. Sør-Fosen sjiite (Counsel Andreas Brønner and Counsel Eirik Brønner) and Nord-Fosen siida (Counsel Knut Helge Hurum)

III: Sør-Fosen sjiite (Counsel Andreas Brønner and Counsel Eirik Brønner) v. Fosen Vind DA (Counsel Pål-Martin Abell and Counsel Johan Fredrik Remmen), the State represented by the Ministry of Petroleum and Energy (intervener) (Counsel Anders Blakstvedt)

Justices: Chief Justice Øie and Justices Skoghøy, Falkanger, Noer, Bull, Kallerud, Bergsjø, Falch, Østensen Berglund, Thyness and Steinsvik

The case concerned whether the construction of the Storheia and Roan wind power plants on Fosen peninsula interferes with the reindeer herders' right to enjoy their own culture under Article 27 of the International Covenant on Civil and Political Rights (ICCPR). A grand chamber of the Supreme Court unanimously found an interference with this right, and ruled the wind power licence and the expropriation decision invalid.

In 2010, the Norwegian Water Resources and Energy Directorate awarded a licence to Roan and Storheia wind power plants, among others. These plants are located within Fosen grazing district, where Sør-Fosen sjiite and Nord-Fosen siida keep their reindeer. The herders claimed that the construction interfered with their right to cultural enjoyment, but this was rejected by the Ministry of Petroleum and Energy in 2013. The issue was brought before the courts. Fosen Vind DA was nonetheless permitted to start construction, and the wind power plants were ready in 2019 and 2020, respectively. They are part of the largest onshore wind power project in Europe.

The main issue in the Supreme Court was whether the development interferes with the reindeer herders' rights under Article 27 ICCPR. The provision sets out that persons belonging to an ethnic, religious or linguistic minority shall not be denied the right, in community with the other members of their group, to enjoy their own culture. It is undisputed that reindeer husbandry is a protected cultural practice. Because the Court of Appeal had a better basis for its assessments than the Supreme Court, the Supreme Court relied on the Court of Appeal's findings on the project's consequences for the reindeer husbandry. The Supreme Court thus took as its starting point the Court of Appeal's conclusion that the winter pastures near Storheia and Roan are in practice lost for reindeer husbandry, and that the wind power development will threaten the reindeer industry's existence on Fosen unless remedy measures are implemented.

Pointing in particular to statements from the UN Human Rights Committee, the Supreme Court found that it will amount to a violation of Article 27 ICCPR if the interference has significant adverse effects on the possibility of cultural enjoyment. Although the interference alone may have so serious consequences that it amounts to a violation, it must also be considered in context with other projects, both previous and planned. The total effect of the development determines whether a violation has taken place. As a starting point, there is no room for a proportionality assessment balancing the minority's interests against other interests of society. However, a balance must be struck if the rights conferred by Article 27 conflict with other basic rights. The Supreme Court established that the right to a good and healthy environment might constitute such a conflicting right.

Based on the Court of Appeal's findings of fact, the Supreme Court established that the wind power development would have a significant adverse effect on the reindeer herders' possibility to practice their culture on Fosen. Against that background, the Supreme Court found that the herders' rights would be violated if satisfactory remedy measures were not implemented. The Supreme Court agreed with Fosen Vind DA that a "green shift" and increased renewable energy production are important factors. However, because there were other – and for the reindeer herders less intrusive – development alternatives that could maintain this consideration, this case did not involve a collision between environmental interests and the reindeers' right to cultural enjoyment.

In its ruling, the Court of Appeal stipulated a large compensation for the winter feeding of fenced-in reindeer, thus finding no violation of the right to cultural enjoyment. In the Supreme Court's view, such a solution is burdened with so much uncertainty that, at

THE SUPREME COURT'S RULINGS

The summary is not a part of the ruling. It is only meant to give an overview of the topics and issues dealt with.

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present, it cannot be significant in determining whether Article 27 ICCPR has been violated. The Supreme Court also found that the courts in any case cannot rely on such a measure as a part of the reindeer herders duty to adapt.

The judgment will be translated in its entirety.

[Read the whole judgment \(Norwegian only\)](#)