



BORGARTING COURT OF APPEAL

VERDICT

Given on: 25.02.2021

Case no.: 20-172267ASK-BORG/04

Judges:

Court of Appeal Judge
Court of Appeal Judge
Court of Appeal Judge

Nils Ihlen Ramm
Lisa Vogt-Lorentzen
Ingvild Mestad

Appellant Jillen-Njaarke reindeer grazing district Counsel Svein Steinfeld Jervell
Counsel Pål Gude Gudesen

Respondent Øyfjellet Wind AS Counsel Morten Plesner Smørdal
Respondent Eolus Vind Norge Holding AS Counsel Paul-Martin Abell

No restrictions on access to public disclosure

The case concerns an application from the Jillen-Njaarke reindeer grazing district for an interim injunction requiring a halt to construction work on the development of Øyfjellet wind power plant.

Facts of the case

The Court of Appeal refers to Oslo County Court's account of the facts of the case on page 2–14 of the appealed verdict. To cite the description, on page 3–5 of the verdict, of the planning area for development, the affected reindeer grazing district and reindeer herding in the area:

On 13.11.2014 Øyfjellet was granted permission from the Norwegian Water Resources and Energy Directorate (NVE) to build and operate Øyfjellet wind power plant in Vefsn Municipality. On the same day, Fred. Olsen Renewables AS's application for a licence for Mosjøen wind power plant was rejected. The decision was upheld by the Ministry of Petroleum and Energy (OED) in their decision of 16.11.2016.

The planning area for Øyfjellet wind power plant is located in the mountainous area west of Mosjøen town centre in Vefsn Municipality.



The map above shows the reindeer grazing district inside the black line. Winter pastures are indicated in grey, and migration routes in yellow. The planning area

for the wind power plant is within the purple area.

Reindeer herding has taken place in the Jillen-Njaarke reindeer grazing district since the 17th century.

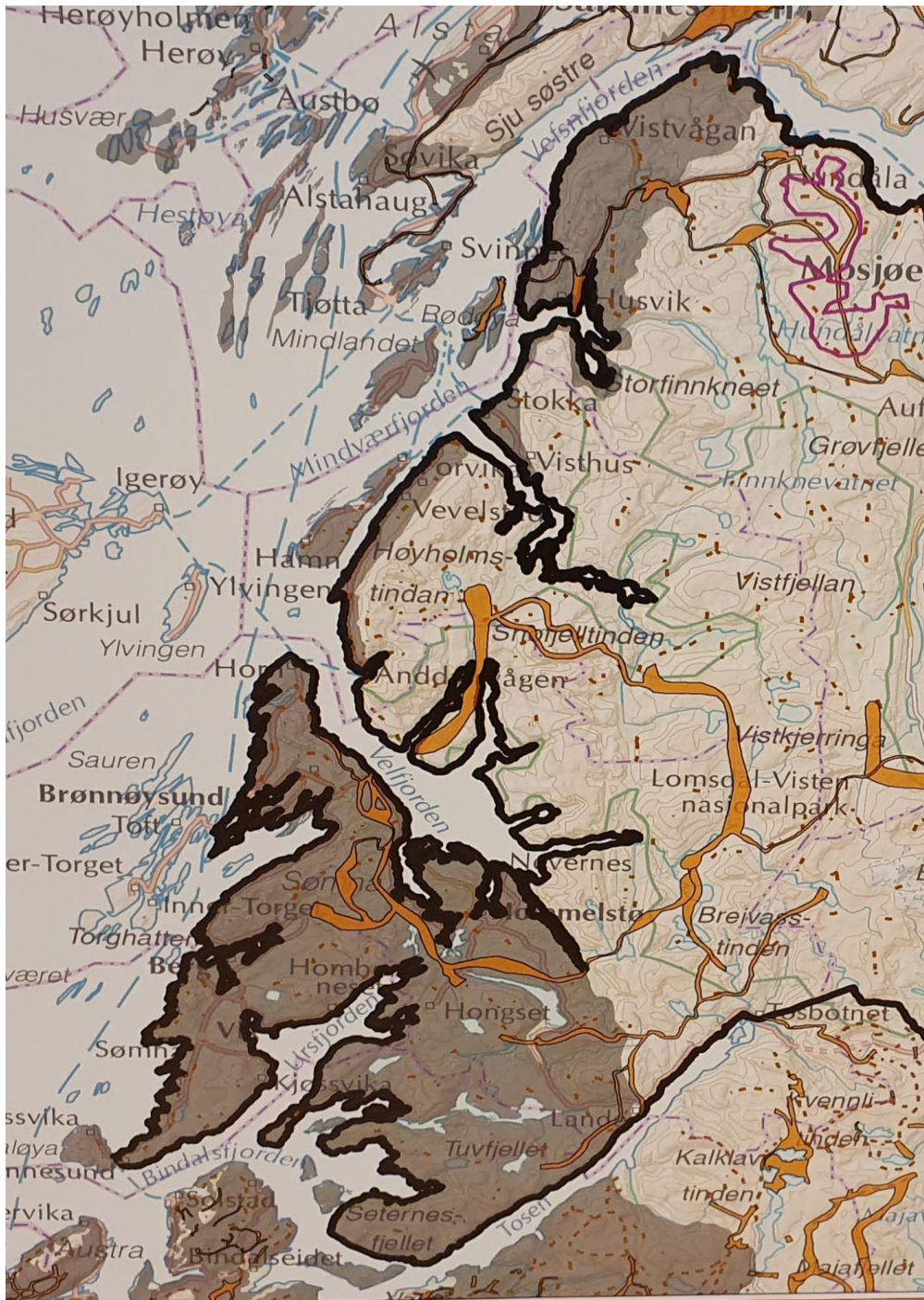
The reindeer grazing district is 4162 km². The number of reindeer is capped at 2200 animals. These are divided into 1800 for the eastern *siida* and 400 for the western *siida*. *Siida* is defined in more detail in Section 51 of the Reindeer Husbandry Act. The Jillen-Njaarke reindeer grazing district was created in 1999 by a merger of the former Brurskanken reindeer grazing district and the Brønnøy/Kvitfjell Reindeer Grazing District, today corresponding approximately to eastern *siida* and western *siida*, respectively. Reindeer herding in the western *siida* was discontinued in 2012, but resumed after a decision by the reindeer grazing district on 26.11.2013. After a long processing period and several reversals, the verdict has now been upheld through a reversal decision of 17.06.2020.

Reindeer grazing rights in the area are affected by the development of wind power at Øyfjellet. Reindeer graze in different areas at different times of year, and are highly land-intensive animals. Reindeer herding operates with eight seasons. Rotation is crucial for the grazing areas, so that the vegetation recovers and there is no over-grazing. In summer, the reindeer diet consists of about 50% lichen, while in winter it is almost 100%. Climatic conditions render winter pastures along the coast favourable, because of less snow.

Winter grazing is divided into five zones. Winter grazing zone 5, which is the subject of the present case, is located in the far north, and west of the planning area facing the coast, i.e. Hundåla, the Husvik area and Visten surrounded by Sørfjorden, Vefsnfjorden and Halsfjorden. The migration route from this winter pasture runs north from Fjellskardet and through the planning area to Demmeldalen and Håndåla, respectively. There is an alternative migration route over Håndålvatnet, which is outside the planning area. Poor ice conditions and drainage of the water, however, render the ice unsafe. One migration route is the migration corridor between different grazing areas.

The reindeer herding district is committed to securing the possibility of future use of winter grazing zone 5. For the last two winter seasons, reindeer have been gathered at Sjømoen east of Vefsna and transported to winter grazing zone 5 by truck and ferry. In the spring of 2019 and 2020, the animals were herded back to the areas east of Vefsna.

The other four winter grazing zones are on the coast, south of winter grazing zone 5. Grazing zones 1 and 3 are located in Brønnøy and Sømna municipalities. Grazing zone 2 is located on Brønnøyhalvøya peninsula with an eastern border running from Velfjorden to Ursfjord. Grazing zone 4 is located in inner Velfjord, and the areas towards Harrangsfjorden/Bindalsfjorden.



The use of the reindeer grazing area is regulated by district plans and rules of use. The district plan was adopted in 2016 and is the governing document for the authorities pursuant to Section 62 of the Reindeer Husbandry Act of 2007. Existing rules of use, see Section 57 of the Reindeer Husbandry Act, which is an internal document, were adopted in 2011. There have been no rules of use for the district previously.

During the licensing process, the original planning area was reduced both in the east and south from about 55 km² and installed output of up to 330 MH corresponding to an annual production of over 1 TWh, to currently an area of about 47 km² and installed power of up to 400 MW corresponding to an annual production of about

1.2 TWh. Annual power production in Norway is about 149 TWh. The project consists of 72 wind turbines.

On 8 July 2020, the Jillen-Njaarke reindeer grazing district filed an interim injunction against the state represented by the Ministry of Petroleum and Energy (OED) and Øyfjellet Wind AS (Øyfjellet) requesting an immediate halt to construction work on the development of Øyfjellet wind power plant. The application contained the following statement of claim:

1. Further construction work/development of Øyfjellet wind power plant is halted pending a legally enforceable judgement in the lawsuit over the validity of the licencing decision for the development.
2. The Jillen-Njaarke reindeer grazing district is required to file a lawsuit over the matter within three months. If this does not occur, the injunction will cease to be valid.
3. Øyfjellet Wind AS and the Ministry of Petroleum and Energy are ordered to pay legal costs.

In written pleadings of 20 July 2020, Eolus Vind Norge Holding AS (Eolus) entered into the case, see Section 15-3 of the Disputes Act, see Section 13-2 and the principle of Section 32-8. Oslo County Court has given the following account of the background for this:

It was pointed out that Eolus transferred all of its shares in Øyfjellet to Aquila Capital in December 2019. At the same time, an agreement was entered into between Eolus and Øyfjellet that Eolus should manage and be responsible for the development of Øyfjellet wind power plant on behalf of Aquila Capital. It was pointed out that the agreement entails that Eolus would take the primary risk of deviations from the agreed assumptions about the progress and development costs of the project and thus bear the primary economic risk in the event of a halt to the project as a result of the application, and that Eolus would be affected both economically and directly by having to halt the development of the wind power plant. There were no objections from the parties in the case to the entry as a defendant.

The case against the state was adjourned on 1 September 2020, after the claimant had withdrawn the application against the state.

The Sami Reindeer Herders' Association of Norway (NRL) made a third-party intervention in favour of the claimant through written pleadings on 15 September 2020, see Section 15-7, first paragraph (b) of the Disputes Act, see Section 15-7, third paragraph. NRL has not exercised any form of third-party intervention before the Court of Appeal.

Oslo County Court convened an oral negotiation, which was held over four days starting 21 September 2020. During the court hearing, the Jillen-Njaarke reindeer grazing district made the following amended statement of claim:

Principally:

1. Further construction work/development of Øyfjellet wind power plant is halted pending a legally enforceable judgement in the lawsuit over the validity of the development in accordance with the licencing decision of 16.11.2016.
2. The Jillen-Njaarke reindeer grazing district is required to file a lawsuit over the matter within three months. If this does not occur, the injunction will cease to be valid.

Alternatively:

1. Further construction work/development of Øyfjellet wind power plant will be halted pending a final decision on the diversion of the migration route pursuant to Section 22(2) of the Reindeer Husbandry Act.

In all cases:

1. Øyfjellet Wind AS and Eolus Vind Norge AS are ordered to pay legal costs.

The County Court issued a verdict on 8 October 2020 with the following conclusion:

1. The application for an interim injunction is rejected.
2. The Jillen-Njaarke reindeer grazing district will pay legal costs to Eolus Vind Norge AS amounting to NOK 1,202,000, within two weeks of the announcement of this verdict.
3. The Jillen-Njaarke reindeer grazing district will pay legal costs to Øyfjellet Wind AS amounting to NOK 565,374, within two weeks of the announcement of this verdict.

The reindeer grazing district filed a timely appeal on November 9, 2020. Eolus and Øyfjellet both filed respondent's notices on 26 November 2020. The parties have submitted further written pleadings, no later than 1 February 2021 from the Appellant.

The Appellant, **Jillen-Njaarke reindeer grazing district**, has briefly argued:

Oral hearings are required in the appeal case.

The appeal relates to the County Court's application of law and assessment of evidence. The appeal is limited to the alternative claim before the County Court. This entails that the basis for the claim is mainly limited to the mandatory protection of migration routes

pursuant to Section 22 of the Reindeer Husbandry Act. In addition, an appeal is made over the legal costs decision.

The reindeer grazing district has substantiated the principal claim and the basis for security, and the construction work shall be halted pending a lawful decision on the diversion of the migration route.

The legal reality is that a migration route runs through the area, and closing off the migration route is illegal under Section 22 of the Reindeer Husbandry Act. Since migration routes cannot be closed off, the only legal access to the development is through a diversion of the migration route. This is done by application to the County Governor of Nordland, who will process the application before a final decision is made by the Ministry of Agriculture and Food in accordance with delegated competence. Throughout the licensing process, guidelines have been made for an application to divert the migration route, and it is only during the previous year that the developer and the licensing authorities have chosen to ignore this. The reality is that the migration route through the planning area is currently closed, and no mitigation measures have been decided on.

The County Court has incorrectly concluded that the migration route is not closed, cf. Section 22 of the Reindeer Husbandry Act.

The gist of the matter is whether the right to move the reindeer "freely and without hindrance" along traditional migration routes has been violated by the development of the wind power plant. If the reindeer cannot be moved freely and without hindrance along the migration route, the migration route is closed. The migration route is clearly closed if it is replaced with a truck stage. If the migration route can be replaced with truck stages, the protection pursuant to Section 22 of the Reindeer Husbandry Act will appear almost illusory as it will usually be possible to pass through closed migration routes by using a truck, provided internal roads are established. The County Governor of Nordland has repeatedly made it clear that the migration route is considered illegally closed as a result of the development.

To the extent that the inconvenience caused can be solved by mitigation measures, this entails a diversion of the migration route. The decision that reindeer herding is to take place by truck will not be a mitigation measure that the NVE or the OED can implement, since this would in reality be a diversion. Decisions concerning a diversion of the migration route must be made pursuant to Section 22, second subsection of the Reindeer Husbandry Act.

No specific mitigation measures have been established on which the reindeer herding industry can derive rights in order to secure the right to move via the migration route. On the contrary, the developer finds it "unreasonable" to "facilitate, and finance, eastern

siida's new use of winter grazing zone 5, for example through truck transport back from winter grazing zone 5".

Based on the County Court's assessment, the content of the protection of migration routes would be non-existent.

The court's conclusion that the migration route has not been closed is contrary to the evidence before the court and without any actual basis in fact. All of the expert witnesses before the court spoke out about whether the migration route could be considered closed as a result of the started development, both during the construction and operational phases. Three out of four experts were clear that the migration route had been closed.

All research from the last 5–6 years unambiguously concludes with elusive effects of wind power plants. The research that finds no or only moderate effects from infrastructure interventions has largely been funded by the industry. The Respondent's own experts have also recently publicly moderated their previous statements based on their latest study in Raggonvidda wind farm.

The County Court makes an artificial distinction between moving through a grazing area and sheer grazing, where the consequences of the wind turbines are apparently greater on sheer grazing. This is a serious error in the court's assessment for two reasons. First of all because a migration route also involves grazing. Second, because the court's assessment is directly contrary to the special protection of migration routes in Section 22 of the Reindeer Husbandry Act. The reason for the special protection of migration routes, compared to other grazing areas, is that the migration routes are far more vulnerable to disturbances. This is because they have a critical and fundamental function for the reindeer herding industry in connecting different seasonal pastures. The function of a migration route is traditional relocation, not round-the-clock herding of reindeer through a construction area with the help of two helicopters and an extensive ground crew. The spring migration in 2020 led to great losses, and a few hundred reindeer are still believed to be lost as a result of the migration.

The closure of the migration route disturbs the very commercial basis for the reindeer grazing district, and the protection in Section 22 of the Reindeer Husbandry Act has an international basis in Article 27 of the UN International Covenant on Civil and Political Rights (ICCPR). Based on the presumption principle, an interpretation of Section 22 of the Reindeer Husbandry Act that is in violation of international law would be unlawful.

The decision on an ETCP plan (environmental, transport and construction plan), granting the legal right to commence the development of the wind power plant, is invalid, as it is contrary to Section 22 of the Reindeer Husbandry Act. A decision should have been made on diverting the migration route before a decision was made on the ETCP plan. Only the Ministry of Agriculture

and Food, by delegated jurisdiction, can make decisions on diverting migration routes. This has not been done, and it should have been done before the decision on an ETCP plan was adopted. Throughout the licensing process, guidelines have been made for an application to divert the migration route. The decision to approve the ETCP plan without any plan for the migration route, neither during the construction period nor the operating period, is in violation of Section 22 of the Reindeer Husbandry Act, as the NVE did not have the personnel jurisdiction to make a decision that caused a de facto closure of the migration route.

The development is under any circumstances illegal as it entails an illegal situation when the migration route is closed. The development is therefore in violation of inviolable rights in Section 22 of the Reindeer Husbandry Act. This in itself forms the basis for a temporary injunction, cf. Section 34-2 of the Disputes Act. It is argued that the protection of migration routes under Section 22 of the Reindeer Husbandry Act includes the right to move with reindeer in the traditional way.

The Respondent's argument that it is not possible to obtain a verdict for the Appellant's claim is based on a misguided legal premise. It has not been left to the public administration's free discretion whether to make a decision on diversion. Section 22 of the Reindeer Husbandry Act stipulates that the only legal way to close the migration route is through a decision on a diversion, made by the Ministry of Agriculture and Food. Since the migration route cannot be used and is therefore closed, this means that the development is illegal as it is in violation of Section 22 of the Reindeer Husbandry Act, because there is no valid decision on a diversion of the migration route.

There is basis for security. The damage will be irreversible, and there is a real risk that the area's reindeer herding industry will have to close down, since access to the winter pastures constitutes a prerequisite for continued reindeer herding in the reindeer grazing district. There is also basis for security since the migration route is currently closed as a result of the construction work.

The wind power plant is supposed to be operational by 1 January 2022. It will not be possible to carry out a complete ordinary processing of the claim within that time.

Considerable legal precedent exists where the Supreme Court has concluded that the beginning and continuation of construction work can contribute to significantly raising the threshold for the principal claim without regard to the principal claim's lawfulness. The financial investments made in this case indicate that it is highly likely that the pursuit of the principal claim will be significantly disadvantaged by the realisation of the wind power plant.

The principal claim is to stop a unlawful act. Although the developer has significant financial interests at their disposal, this does not grant them the legal

authority to violate the Reindeer Husbandry Act and the statutory protection of traditional migration routes.

When a proportionality assessment is made, it must also be taken into account that the migration route is protected as a crucial "operating asset" in traditional Sami reindeer herding. The loss of the migration route and the winter grazing area could have disastrous consequences for reindeer herding, and over time lead to a violation of the right to enjoy one's own culture, granted by Article 27 of the ICCPR.

It is unclear why the Respondent believes that a decision on a temporary injunction would entail a permanent shutdown of the site. The site shutdown only lasts until a legal diversion of the migration route has potentially taken place.

The district had no alternative to entering into the agreement with Eolus for the use of winter grazing areas other than zone 5, as the district was not allowed to move to winter grazing zone 5, nor was it allowed to use the migration route. The Respondents' previous premise in the case has been that the migration route is not closed, partly because the reindeer grazing district carried out an emergency relocation in the spring of 2020. Given the new information that the reindeer grazing district has been denied use of the migration route, it seems clear that this argument cannot be maintained in any case, and that the developer has closed the migration route.

With regard to the appeal over the legal costs – in case the Court of Appeal should conclude that there is no basis for an interim injunction – it is argued that the exclusionary provisions of Section 20-2, third paragraph (a) and (c) of the Disputes Act apply. The reindeer grazing district shall therefore be principally completely, alternatively in part, exempted from any legal costs liability.

The following claim has been made:

1. Further construction work/development of Øyfjellet wind power plant will be halted pending a final decision on the diversion of the migration route pursuant to Section 22(2) of the Reindeer Husbandry Act.
2. Øyfjellet Wind AS and Eolus Vind Norge AS are ordered to pay legal costs before both the District Court and the Court of Appeal.

Respondent 1, **Øyfjellet Wind AS**, has briefly argued:

Oslo County Court has arrived at the right result, and the application of law and assessment of evidence in the ruling are essentially correct. Neither the principal claim nor the basis for security has been substantiated.

The interpretation of Section 22 of the Reindeer Husbandry Act, which the reindeer grazing district advocates in the appeal, is incorrect. A correct interpretation of the provision means that the construction of Øyfjellet wind farm, with the mitigation measures stipulated by the NVE and the OED, cannot be regarded as a closure of the migration route.

As long as it is still physically possible to herd the reindeer, the migration route cannot be considered closed. The threshold for considering a migration route closed is high. The court has interpreted the provision correctly when the topic of assessment in the case is formulated as whether the reindeer will evade the wind farm so that herding cannot be carried out. The decisive factor in the assessment of whether a migration route is closed pursuant to Section, 22 second paragraph, is accordingly whether it is possible to herd reindeer along the migration route, or if migration is impossible. If the conditions for expropriation exist, closure may nevertheless be permitted. The fact that a migration route is affected in such a way that herding becomes more difficult than before is not sufficient grounds to establish a breach of the provision.

The County Court has correctly concluded that it has not been substantiated that the reindeer will avoid the migration route at Øyfjellet to such an extent that the migration route must be considered closed, and that it is possible to herd reindeer along the migration route at Øyfjellet wind farm both during and after the construction phase, using mitigation measures. This was confirmed e.g. by the spring migration in April 2020. Oslo County Court's decision is based on a solid factual basis. Overall, the research presented on reindeer and wind farms suggests that herding through wind farms is more demanding, but possible.

Based on this, the construction of the wind farm is lawful, the ETCP decision is valid, and the reindeer grazing district has not substantiated any principal claim.

There is no basis for security in the case. The reindeer grazing district does not need a halt in the construction work until a decision is potentially made on the diversion of the migration route.

The reindeer grazing district has access to a number of winter grazing areas, not just winter grazing zone 5. Nor is this area the most central of the reindeer grazing district's winter pastures. It is possible to use other winter pastures until the principal claim is settled. It should also be mentioned that the reindeer grazing district has a general obligation to make adjustments, to minimise damage as far as possible until the principal claim has been settled.

If the reindeer owners nevertheless choose to use winter grazing zone 5 until a diversion decision is potentially made, the period in question for use of the migration route, and

thereby the temporal extent of any difficulties with the herding, will in any case be very limited. It would only be a matter of a few days in the spring. The reindeer grazing district has already herded reindeer on foot, for three days in April 2020. Construction work will be halted during the migration. In extreme cases, it will in any case be possible to move the reindeer by truck. The district has used trucks extensively to move reindeer in recent years. If the reindeer are transported by truck, it will have no effect on reindeer herding if construction continues until a diversion decision is potentially made. Even if this is considered less than optimal, any inconvenience of such a transportation method is far from the law's criteria for "significant harm or inconvenience".

Overall, this shows that an interim injunction is neither necessary nor suitable to avert any form of significant damage or inconvenience to the reindeer grazing district. The district has secured access to winter pastures. There is clearly no risk that the reindeer herding industry will have to be shut down until the principal claim has been settled.

Eolus and the reindeer grazing district have entered into an agreement that the district will use other winter pastures next spring to avoid herding reindeer through the planning area during the construction phase. In any case, the fact that the district will not move the reindeer through the planning area for the next period confirms that there is no need for an interim injunction and therefore that there is no basis for security.

Imposing a halt to construction work would in any case be disproportionate. An interim injunction would in reality have very limited significance for the reindeer grazing district until any decision on a diversion has been made, if any significance whatsoever. Furthermore, suspending the construction work would have very serious consequences for Øyfjellet. The company has been granted permission to start construction work, and it has made preparations relying on this permit.

There is an obvious discrepancy between the disadvantages that the reindeer grazing district may experience for a few days a year until any principal claim has been decided, compared with the significant consequences a permanent shutdown of the site would have for Øyfjellet. It is also relevant to look at the public interest in general and the interests of the local community. Norway needs additional renewable energy production to reach its obligations under the Paris Agreement. Øyfjellet Wind will make an important contribution towards this goal. The project enjoys broad support from the general local community, especially since the power will go to Mosjøen's cornerstone company.

If an injunction were to be imposed in accordance with the appeal's request, the consequence would be that the security is given legal effects even after the principal claim has been finalized. Øyfjellet will then in reality be forced to apply for a diversion, regardless of the outcome of a main lawsuit. The reality is therefore that the claim in the appeal is a requirement for a permanent halt to the construction work, and that such an

injunction will in real terms entail an implementation of the principal claim.

In the event of an interim injunction, it is requested that security be required for compensation as a condition for entry into force and implementation.

It was correct by the County Court to impose liability for legal costs on the reindeer grazing district. The following claim has been made:

1. The appeal is dismissed.
2. Øyfjellet Wind AS is awarded full legal costs for the case before Oslo County Court and Borgarting Court of Appeal.

Respondent 2, **Eolus Vind Norge Holding AS**, has briefly stated:

The consideration of proper administrative procedures does not imply that oral proceedings must be held in the Court of Appeal.

The reindeer grazing district has not substantiated the principal claim or basis for security.

The County Court has correctly concluded that the migration route is not closed. It is not correct, as argued in the appeal, that disturbances and inconveniences during herding are illegal and entail a closure of the migration route. The wording "closed" indicates that the decisive factor is whether it is possible to move through.

It has not been documented that the reindeer will evade the area of the wind farm altogether during the construction or operation period. The written research material in the case does not support the district's claim that it is impossible to drive a herd of reindeer past a wind power plant. The County Court's conclusion is in accordance with the research material presented. This is in line with a number of recent Supreme Court decisions in which the emphasis has been on the weight of documentary evidence closely related to the events compared to witness statements.

In any case, it is the migration route's function that is protected, i.e. access to winter grazing zone 5, and this function has been safeguarded. The district has several alternative means of moving, including by ferry or car. These are means that have traditionally been used by the district in the past.

Should the court nevertheless agree with the district's argument that the migration route will be closed when the wind power plant is put into operation, Eolus argues that the legal effect of such a closure would not be that the development is illegal. In such a situation,

there are initially at least two options that must be considered by the relevant authorities: 1) the migration route is expropriated, and 2) the migration route is diverted, see Section 22, second subsection of the Reindeer Husbandry Act. Even if one were to assume that the construction roads established in the mountains entail a closure of the migration route (unlike all the other roads the district passes), halting construction work would not open the migration route. Consequently, there is no connection between the argument about the closure of the migration route and the claim made.

Like everyone else affected by expropriation interventions, reindeer herders have a duty to adapt. The duty to adapt goes significantly further than the district claims in the appeal. In the present case, the district has chosen not to adapt. The OED has been clear that it is not necessary to use winter grazing zone 5 during this period since there is access to other and more important winter pastures further south. Not only did the district choose to use the area in the winter of 2019–2020, but prior to the spring migration of 2020, the district did not provide any concrete information on the preparations for, or start of, the spring migration.

In any case, Eolus argues that the district's claim in the case is based on a claim for which one cannot be convicted, and for which therefore an interim injunction cannot be made either. The claim made entails an assumption that a decision will be made on a diversion of the migration route. The competence to decide whether a decision will be made on a diversion of the migration route rests with the King, see Section 22 of the Reindeer Husbandry Act. This authority has been delegated to the Ministry of Agriculture and Food. It is a fundamental principle of Norwegian law that the court cannot pass judgment on the reality of questions that are subject to the administrative authorities. The question of the need for a diversion of the migration route has already been assessed by the licensing authorities in the case, and the administration has concluded that such a need does not exist. Neither party has requested a diversion, nor has a diversion process been initiated at the agricultural authorities.

There is no basis for security.

An injunction to halt the work pending a decision on a diversion of the migration route means that the Court of Appeal must conclude that the development closes the migration route pursuant to Section 22 – only then, a diversion will be required. The consequence of the injunction is in reality a permanent closure of the construction work. Such an injunction would anticipate the decision on the principal claim on closure of the migration route pursuant to Section 22. An interim injunction cannot then be anchored in Section 34-1, first paragraph (a) of the Disputes Act.

It is not until the spring of 2022 that it will be relevant for the district to herd reindeer past an operational wind power plant. There is clearly no basis for security

on such grounds at the moment, regardless of the alternative for securing presented.

It is an undisputed fact that the central winter pastures in the district are located to the southwest and are unaffected by the wind power plant, and that it is only during the last two years that the district has adopted the winter pastures to the northwest for large parts of the reindeer herd. Here they have moved by truck and ferry, which is also undisputed. It follows from the ETCP plan that the developer must halt the construction work when the migration requires it. As mentioned above, if the established construction roads themselves close the migration route, this will not be reopened by halting construction work. Construction roads in the mountains can in any case be reversed and reallocated. The work therefore does not establish a basis for security.

In Christmas 2020, the parties entered into an agreement that entails, among other things, that the district will use its main winter pastures in the south in the winter of 2020–2021. The district will receive financial support for this and for the retrieval of the reindeer they claim remain in winter grazing zone 5. The district will therefore not use areas affected by the wind farm this winter. The agreement does not oblige the district to withdraw the injunction claim, but the information is obviously relevant to the issue of the basis for security.

A halt to construction work will clearly be disproportionate. Such a halt would cause major financial problems for the project.

If the district wants to try the legality of Øy fjellet wind power plant, the district can bring a case over the validity of the license from 2016. The district has failed to do so, but this does not establish grounds for an injunction.

If the district were to win through with the claim for an interim injunction, it is requested that it is set as a condition for the entry into force and implementation that security is provided for compensation, see Section 34-2, first paragraph, of the Disputes Act.

As regards the appeal over the legal costs decision, the County Court has correctly imposed legal costs liability on the reindeer grazing district.

The following claim has been made:

Principally:

1. The appeal is dismissed.
2. Eolus Vind Norge Holding AS is awarded legal costs before the Court of Appeal.

Alternatively:

3. The plaintiff is ordered to furnish security as determined at the court's discretion.

The Court of Appeal has concluded that the application for an interim injunction does not succeed, but on a different basis than the County Court.

The case is dealt with in writing in accordance with the main rule of Section 29-15, first subsection of the Disputes Act, whereby the consideration of a proper and fair trial does not entail that oral proceedings are held before the Court of Appeal, see Section 29-15, second subsection of the Disputes Act. With regard to the reindeer herding issues in the case, the Court of Appeal believes that the County Court's summary of the witness statements, as well as the written research reports, provide an adequate basis for assessing the case, particularly with regard to the Court of Appeal's decision basis.

In principle, an application for an interim injunction can only be decided on if the claim for which an injunction is sought (the principal claim), and the basis for security have been substantiated, see Section 34-2, first paragraph, first sentence of the Disputes Act. It has not been argued that the "delay poses a risk", cf. the second subsection. The requirement for proof is preponderance of the evidence, see Flock, *Midlertidig sikring, Arrest og midlertidig forføyning* [Temporary Security, Arrest and Temporary Injunction], 2011, page 224. In addition, it is a condition that the damage or inconvenience incurred by the defendants is not in obvious discrepancy with the interest the plaintiff has in the injunction being implemented, see Section 34-1, second paragraph, of the Disputes Act.

The principal claim

The Court of Appeal cannot see that the reindeer grazing district has clearly clarified in the appeal what the principal claim is. It has been argued that the commenced development of the wind power plant is illegal. In support of this, it has been argued that the decision on the ETCP plan, which grants the legal right to commence the development, is invalid. This argument is based on the fact that the development is claimed to constitute a violation of the protection of migration routes pursuant to Section 22 of the Reindeer Husbandry Act, since the development leads to the closure of the migration route. At the same time, it has been argued that the development itself is illegal as it is in violation of Section 22 of the Reindeer Husbandry Act, because there is no valid decision to divert the migration route. The Court of Appeal therefore assumes that the essence of the claim invoked in the appeal case, as the basis for the application for an interim injunction, is that the development is illegal as contrary to Section 22 of the Reindeer Husbandry Act.

The Court of Appeal notes that a claim that an administrative decision allowing a business activity is invalid constitutes a legal claim, see Section 1-3 of the Disputes Act. The same

applies to a claim that the activity is illegal or unlawful, see Schei et al., *Tvisteloven* [The Disputes Act], 2nd edition page 27. The Court of Appeal therefore assumes that the reindeer grazing district has invoked a principal claim that, in its nature, can provide a basis for an interim injunction.

Section 22 of the Reindeer Husbandry Act states the following:

Reindeer herders are entitled to freely and without hindrance herd and move their reindeer in the parts of the reindeer grazing area where the reindeer may legally roam and are also entitled to move with reindeer along traditional migration routes. Migration routes also include permanent loading and unloading sites for transportation of the reindeer.

The migration routes of the reindeer herders must not be closed, yet the King may consent to divert migration routes and open new migration routes if legitimate interests provide grounds for doing so. Any damage resulting from the diversion of a migration route or the opening of a new migration route shall be compensated through a decision by the Land Consolidation Court. The King may also decide that the detailed specification of the new migration route shall be left to a discretionary assessment.

Whether the development is illegal as contrary to Section 22 of the Reindeer Husbandry Act, because the development entails the closure of the migration route in question, this raises questions of both a legal and factual nature. When interpreting Section 22 of the Reindeer Husbandry Act, there are questions about what is meant by the right to "freely and without hindrance herd and move their reindeer", see the first subsection, and what is meant by migration routes not being "closed", see the second subsection. Secondly, there is the question of whether the development of the wind power plant will have such actual effects that it is in violation of the provision. Central to the case are research reports and expert assessments of the consequences of wind power development for reindeer herding. The County Court has thoroughly accounted for this research material and assessments from expert witnesses in the ruling, see page 29 f. On the basis of the expert assessments presented, and the circumstances in general, the County Court found "it difficult to conclude that reindeer will evade the migration route on Øyfjellet to such an extent that it must be considered closed", and the County Court concluded that there was no violation of the rights under Section 22 of the Reindeer Husbandry Act, see pages 35 and 47 of the ruling.

The Court of Appeal notes that the assessment of the question of whether the development involves an illegal closure of the migration route seems a difficult one, both legally and factually. As the Court of Appeal sees it, it is at least unclear whether the reindeer grazing district has substantiated this. Since the Court of Appeal has concluded that an interim injunction would be disproportionate, even if it is assumed that the principal claim has been substantiated, the Court has not found it necessary to conclude whether the principal

claim has been substantiated.

Basis for security

Section 34-1, first paragraph, of the Disputes Act stipulates the requirements for security reasons as follows:

Interim injunctions may be granted:

- a) when the defendant's conduct makes it necessary to provisionally secure the claim because the action or execution of the claim would otherwise be considerably impeded, or
- b) when it is necessary to make a temporary arrangement in a disputed legal issue in order to avert considerable loss or inconvenience, or to avoid violence which the conduct of the defendant gives reason to fear.

The reindeer grazing district has argued before the Court of Appeal that the reason for securing pursuant to the provision has been substantiated, without specifying which alternative(s) they invoke. Based on the content of the argument, the Court of Appeal assumes that both (a) and (b) are applied.

Even if it is assumed that the development entails a closure of the migration route, the Court of Appeal believes it is doubtful whether an interim injunction can be deemed necessary to avert "significant injury or inconvenience", see (b). The Court of Appeal points out that the reindeer grazing district has alternative winter grazing areas – at least on a temporary basis. The Court of Appeal here refers to the OED's precondition in the licensing process that winter grazing in the district constitutes a minimum factor and that collectively they are a prerequisite for continuing reindeer herding. The Court of Appeal also refers to the possibility of mitigation measures; for more on this during the proportionality assessment, see below.

Under the same condition, in the opinion of the Court of Appeal, there may be better reason to consider the reason for securing pursuant to the alternative in (a), fulfilled. If the development is completed, it would be natural to assume that the implementation of a claim for continued use of the relevant migration route pursuant to Section 22 of the Reindeer Husbandry Act would be "substantially disadvantaged".

Nor, with regard to grounds for security, does the Court of Appeal find it necessary to conclude, since the court – as mentioned above – nevertheless believes that the interim injunction requested would be disproportionate.

Proportionality assessment

An interim injunction cannot be implemented if the damage or inconvenience incurred by

the defendant is in obvious discrepancy with the interests of the plaintiff in the injunction being implemented, see Section 34-1, second subsection of the Disputes Act. The fact that there is no such obvious discrepancy is an independent condition for being able to decide on an interim injunction.

In its deliberation, the Court of Appeal has emphasised the interests of the reindeer grazing district. In assessing the weight of these, the Court of Appeal has considered the fact that the establishment and operation of the wind power plant will intervene in a migration route and not with the winter pasture itself. The migration route in question provides access to winter grazing zone 5. For this winter pasture, Bioforsk has recommended a cap of 298 reindeer. In the County Court's presentation of the case, it is stated that the highest number for the reindeer grazing district is 2 200 animals. Winter grazing zone 5 is one of a total of five winter grazing areas that the reindeer grazing district has at its disposal. The migration routes to the other winter pastures are not affected by the wind farm. Øyfjellet has stated that until the spring of 2019, today's reindeer herders had not used winter grazing zone 5 since the 1980s. This information does not appear to be contested by the reindeer grazing district. In the opinion of the Court of Appeal, the proportionality assessment must therefore consider the reindeer grazing district's ability to use winter grazing areas other than winter grazing zone 5 for a period of time, and that this grazing area does not appear to be the most central of the winter pastures.

In its assessment, the Court of Appeal has also – in addition to the possibility of using alternative winter grazing areas – emphasised the possibility of using mitigation measures that can secure access to winter grazing zone 5. NVE has assumed that once access and internal roads have been established, herding will take place by truck through the planning area, unless otherwise agreed. Øyfjellet has stated that the reindeer grazing district has used trucks extensively when moving reindeer in recent years. This information does not seem to be contested either. The Court of Appeal does not consider it probable that the use of truck transport – whenever it may be necessary to use winter grazing zone 5 – will entail such disadvantages and harm to the reindeer herders that it will not be an option. The Court of Appeal therefore assumes that the use of truck transport could be a real alternative to herding reindeer in the traditional way through the migration route in the planning area.

The Court of Appeal has in its assessment of what significance it should have to the proportionality assessment that the reindeer grazing district has the opportunity to use alternative winter grazing areas, and that mitigation measures could ensure access to winter grazing zone 5, taken into account that the reindeer herding industry has an adaptation obligation, see Rt-2000-1578, page 1585.

On the basis of the aforementioned option, the Court of Appeal cannot see that the

reindeer grazing district has substantiated its submission that the reindeer herding industry in the district is in danger of having to shut down as a result of the establishment and operation of the wind power plant. Nor can the Court of Appeal consider it substantiated that the facility could constitute such an intervention in reindeer herding or Sami culture that there is an infringement of Article 27 of the ICCPR.

The reindeer grazing district has argued that the use of trucks as a method of transport actually entails a diversion of the migration route, which must be decided by the agricultural authorities. If this should be accepted, the Court of Appeal notes that the reindeer grazing district has had, and still has, the opportunity to apply for such a change. This is an opportunity that the reindeer grazing district has so far not made use of.

In its proportionality assessment, the Court of Appeal also emphasises that any financial losses suffered by the reindeer grazing district as a result of the wind power plant will be compensated at discretion.

When emphasising the reindeer grazing district's interests, the Court of Appeal has also considered the time that has passed without the district filing a lawsuit to have its principal claim settled. NVE's licensing decision was confirmed by OED in November 2016. The decision has not been brought before the courts. In the ongoing appraisal case before Alstadhaug District Court, the district has not claimed that appraisal must be refused due to the licence being invalid. The ETCP plan was approved in December 2019, and construction work began right before Christmas the same year. An application for an interim injunction was submitted on 8 July 2020. The application announced that a lawsuit "will be filed in the aftermath of this application." The application also claimed that the reindeer grazing district should be required to file a lawsuit over the matter within three months, and that – should this not happen – the injunction should be dropped. The Court of Appeal notes that now, seven months later, it has still not been announced that a lawsuit has been filed, or when it is meant to be filed. In the opinion of the Court of Appeal, the fact that the reindeer grazing district has not simultaneously with, or by a reasonable time after, the application for an interim injunction taken steps for a judicial clarification of the principal claim, weakens the weight of the considerations invoked in support of the application. The court would here also like to point out that an interim injunction is an extraordinary measure aimed at temporarily securing a claim, pending a judgement in the dispute.

In its proportionality assessment, the Court of Appeal has also emphasised the consequences the requested shutdown would have for Øyfjellet. The company has described these as follows:

Suspending the construction work would at the same time have very serious

consequences for Øyfjellet. Øyfjellet Wind has been granted permission to start construction work, and has made preparations relying on this permit. Large amounts have been invested in the construction project, and all essential contracts have been signed. The project is already significantly delayed as a result of vain attempts to enter into an agreement with the reindeer herding district. A halt now would result in significant losses of several million every single day.

In addition, specific delivery windows have been agreed with the suppliers, and the coordination between these is crucial for the progress of the project. For example, road networks must be built and foundations must be in place before the turbines can be delivered. If the project is halted now and planned milestones are not reached as intended, this could have repercussions for a long time to come and jeopardize the entire project.

The licence also has a starting deadline, which is set for 31 December 2021. Even a minor delay could result in this deadline being exceeded. A delayed startup of the wind farm will also result in Øyfjellet Wind being forced to default on the power purchase agreement entered into with Alcoa's smeltery in Mosjøen. In addition, the project will probably lose the right to receive electricity certificates, which also has a deadline of 31 December 2021. The right to electricity certificates has a value of tens of millions of kroner.

This description has not been disputed by the reindeer grazing district, which has also acknowledged that the developer has significant financial interests. The Court of Appeal bases its decision on this description. The reindeer grazing district has not offered to provide security for potential compensation to the Respondents. Nor has the district provided any details that would make it possible to assess whether the district will be able to provide such security.

The Court of Appeal agrees with the Respondents that also more significant public interests are relevant to the proportionality assessment. In this regard, the Respondents have stated that the wind power plant will provide approx. 1 TWh of new renewable power production, and that the plant will also benefit local businesses.

On the basis of an overall assessment, the Court of Appeal believes that the damage or inconvenience the Respondents will suffer by the requested interim injunction is clearly disproportionate to the interest that the reindeer grazing district has in the injunction being granted.

The appeal is therefore rejected over the County Court's ruling, item 1 of the decision.

Legal costs

The respondents have won the case and are in principle entitled to have their legal costs covered, see Section 20-2, first and second paragraph of the Disputes Act. If there are

multiple parties on the same side, the rights and duties pertaining to costs in relation to the opposite party shall be assessed separately for each such party, see Section 20-6, first paragraph, of the Disputes Act. The Court of Appeal may review the County Court's legal costs decision, see Section 20-9, first paragraph of the Disputes Act, and bases its determination on its own ruling, see Section 20-9, second subsection of the Disputes Act.

The reindeer grazing district has stated that there are weighty reasons that make it reasonable for the reindeer grazing district to be completely or partially exempted from the liability for legal costs, see Section 20-2, third subsection of the Disputes Act. This provision reads as follows:

The court can exempt the opposite party from liability for legal costs in whole or in part if the court finds that compelling grounds justify exemption. In particular, the court shall take into account:

- a) whether there was just cause to have the case heard because the case was doubtful or because the evidence was clarified only after the action was brought,
- b) whether the successful party can be reproached for bringing the action or whether the party has rejected a reasonable offer of settlement, or
- c) whether the case is important to the welfare of the party and the relative strength of the parties justifies an exemption

The Court of Appeal believes that the case has not offered such doubt that it provides a basis for exempting the reindeer grazing district from the legal costs liability. Nor can it be seen that the significance of the injunction case for the district entails weighty reasons for exemption, or that this case has fundamental aspects to justify this. It can therefore not be argued that the possible need for clarification of the legal issues raised by the principal claim should justify exemption from the cost liability in the injunction case, as this case stands. Nor does an overall assessment of these factors justify an exception to the main rule, in the opinion of the Court of Appeal.

The appeal over the District Court's legal costs decision is accordingly also rejected.

The Court of Appeal finds no reason to make changes to the district court's assessment of the necessary legal costs, see Section 20-5 of the Disputes Act, neither for Øy fjellet nor Eolus.

Eolus has before the Court of Appeal claimed reimbursement for NOK 158,080 in legal costs, which constitute fees. The amount does not include value-added tax. The Court of Appeal considers these costs necessary, see Section 20-5 of the Disputes Act, and allows the claim.

Øy fjellet has submitted a request for coverage of NOK 170,150 in legal costs before the Court of Appeal, which constitute fees. The amount does not include value-added tax. The Court of Appeal considers these costs necessary, see Section 20-5 of the Disputes

Act, and allows the claim.

The ruling is unanimous.

CONCLUSION

1. The appeal is dismissed.
2. In legal costs before the Court of Appeal, the Jillen-Njaarke reindeer grazing district will pay Eolus Vind Norge Holding AS NOK 158,080 – one hundred and fifty-eight thousand and eighty – within two weeks of the pronouncement of this ruling.
3. In legal costs before the Court of Appeal, the Jillen-Njaarke reindeer grazing district will pay Øyfjellet Wind AS NOK 170,150 – one hundred and seventy thousand one hundred and fifty – within two weeks of the pronouncement of this ruling.

Nils Ihlen Ramm

I confirm that the other members of the court have approved the content of the decision, see provisional act of 26 May 2020 no. 47 Section 8 second subsection.

Nils Ihlen Ramm

Document in accordance with signed original
Oda B. Eidem Pettersen (signed electronically)