

[...]

6.10 Conclusion

When assessing what infringements the Government may make on the rights of minorities pursuant to SP (Covenant on Civil and Political Rights) Article 27, the UN Human Rights Committee does not apply any discretionary margin of interpretation. Consequently, the provision constitutes a material limit to infringements with regard to the exercise of cultural rights.

The Court of Appeal has concluded that the decision that is challenged by the action in this case is partly based on a wrong understanding of the facts of the case, and partly on an incorrect understanding of what represents violation of Article 27 in the Covenant on Civil and Political Rights.

In the opinion of the Court of Appeal the decision of the Norwegian Reindeer Husbandry Board of 26 February 2013 is based on incorrect facts since it has been concluded that there will be a basis for continued operation of this siida share after a reduction of 35.6 per cent. The way the Court of Appeal understands the decision, this is the fundamental argument for concluding that Article 27 in the Covenant on Civil and Political Rights has not been infringed on. In the view of the Court of Appeal it will not be possible to run this siida share at a profit with a reindeer number of 75, and refers to the specific assessment above.

The decision of the Ministry of Agriculture and Food of 10 March 2014 is understood also to be based on the assumption that there will be a basis for continued operation of the siida share led by Sara with reindeer number of 75. In its decision the Ministry expresses the opinion that an order of proportional reduction does not imply that Sara loses the right to conduct reindeer husbandry. As mentioned above, Sara risks losing the right to conduct reindeer husbandry if his earmark is no longer used due to the liquidation of the siida share. The loss of the right to conduct reindeer husbandry, however, is not a condition for infringement of Article 27 in the Covenant on Civil and Political Rights.

In the view of the Court of Appeal, the essential thing is that Jovsset Ánte Sara will not be secured continued financial gain from conducting reindeer husbandry after the reduction of the number of reindeer. Even though the provisions of the Reindeer Husbandry Act relating to the number of reindeer and the reduction of the number of reindeer has a reasonable and objective justification based on the object of the reindeer Husbandry Act, the Court of Appeal has concluded that there is a threshold for when an infringement is regarded as legitimate also in connection with the Government's regulation of the reindeer husbandry, and that the threshold for illegal infringement has been transgressed in this case. There is no legitimate justification for the infringement based on conflicts of interest between Jovsset Ánte Sara and the affected group of indigenous people. On the contrary, consultations with the reindeer herders and the Sami Parliament prior to the adoption of the Reindeer Husbandry Act show that there is a concurrence of interests.

The Court of Appeal also refers to the decision of the Ministry of Petroleum and Energy of 11 November 2016 in an appeal concerning Kalvatnan wind power plant in the municipalities of Bindal and Namsskogan, which illustrates that an infringement may exceed the upper threshold for what is allowed towards a minority group pursuant to Article 27 of the Covenant on Civil and Political Rights.

The case applied to an appeal from two reindeer grazing districts against NVE's (The Norwegian Water Resources and Energy Directorate) decision that granted concession to construct and operate the wind power plant, and where the Ministry concluded that there was no basis for granting concession. Among other things, the Ministry stated the following on Article 27 of the Covenant on Civil and Political Rights:

The Ministry refers to the above account where it appears that Article 27 of the Covenant on Civil and Political Rights establishes that the individual reindeer herder cannot be refused the right to conduct reindeer husbandry. Even though a principle of proportionality applies in international law, international law sets an absolute limit to what measures may be permitted. Where there is a reasonable doubt as to whether a measure may be implemented within the material protection of indigenous people laid down in international law, a general social weighing may not form the basis for whether concession is to be granted.

The present case applies to the right of cultural exercise for an individual. It may contribute to lowering the threshold for what is to be considered as an infringement. It requires much less to consider an individual to have been refused the right to exercise his/her culture than considering a larger or smaller minority group to have been refused this right, cf. NOU (Official Norwegian Reports) 2007: 13, volume A, *The new Sami law (Den nye sameretten)*, page 195.

Following this, the Court of Appeal concludes that the decision of the Ministry of Agriculture and Food of 10 March 2014, where the siida share of Jovsset Ante Sara is ordered to reduce the number of reindeer in the spring herd of the siida share from 116 to 114 animals by 31 March 2013, from 114 animals to 94 animals by 31 March 2014 and from 94 to 75 animals by 31 March 2015, is invalid since the decision implies an infringement on Sara's right to exercise his culture, cf. Article 27 of the Covenant on Civil and Political Rights.

With the above result arrived at by the Court of Appeal, it is not necessary to make a thorough assessment of whether the decision also represents an infringement on the protection of property pursuant to the European Convention on Human Rights PI-1 (Protocol 1). Such an assessment will not result in a change of the decision, nor will it have any legal consequences other than what follows from the assessment of the Court of Appeal related to Article 27 of the Covenant on Civil and Political Rights.

7. Costs

Jovsset Ánte Sara has been granted assistance by way of representation before the District Court and the Court of Appeal. Where a party has assistance by way of representation and the opposing party is a ministry, the party that has assistance by way of representation shall not require that the costs be paid to the public, cf. Rt-2012-667, paragraph 32. Consequently, costs are not awarded.

The judgement has not been pronounced within the time limit stipulated by law due to a strong pressure of work at the Court.

The judgement is unanimous.

DECISION

The appeal is rejected.

Nils Asbjørn Engstad (signed)

Brynhild Salomonsen (signed)

Kristin Farstad (signed)

The document is in correspondence with the signed original

Cecilie Kaknes (signed)