



# SUPREME COURT OF NORWAY

## J U D G M E N T

given on 10 October 2023 by the Supreme Court composed of

Justice Henrik Bull  
Justice Espen Bergh  
Justice Cecilie Østensen Berglund  
Justice Erik Thyness  
Justice Thom Arne Hellerslia

**HR-2023-1901-A, (case no. 23-004643SIV-HRET)**  
Appeal against Borgarting Court of Appeal's judgment 18 November 2022

I.  
The Norwegian Kennel Club  
The Norwegian Cavalier Club

A

B

C

(Counsel Anette Fjeld)

v.

The Norwegian Society for  
Protection of Animals

(Counsel Emanuel Feinberg)

II.  
The Norwegian Society for  
Protection of Animals

(Counsel Emanuel Feinberg)

v.

The Norwegian Kennel Club  
The Norwegian Bulldog Club

D

E

F

(Counsel Anette Fjeld)

- (1) Justice **Østensen Berglund:**

### **Issues and background**

#### *The issue in dispute*

- (2) The issue in dispute is whether breeding of the dog breeds Cavalier King Charles Spaniel and English bulldog is in violation of section 25 of the Animal Welfare Act. The case also raises the question whether the action is inadmissible, as it is argued that the conditions for bringing an action are not met.

#### *Parties to the case*

- (3) The action is brought by the Norwegian Society for Protection of Animals (NSPA). The organisation was incorporated in 1859 and is Norway's oldest society for animal protection. It has around 9 000 members and 27 local branches. The organisation's objective is to promote and secure the rights and welfare of animals. Dog breeding has been an important topic to NSPA for a long time.
- (4) There are currently around 400 dog breeds. Two of these are the Cavalier King Charles Spaniel (Cavalier) and the English bulldog. For these breeds, the breeding accentuates suitability for human companionship and certain exterior traits. In line with recommendations from the international kennel association, Federation Cynologique Internationale (FCI), the responsibility for the breed standards lies with the British organisation, The Kennel Club.
- (5) At a national level, the overall responsibility for dog breeding and dog breeds lies with the Norwegian Kennel Club (NKK). Approximately half of all Norwegian dogs are reportedly registered there. NKK has several subsidiary breed clubs, including the Norwegian Cavalier Club and the Norwegian Bulldog Club. The management of the individual dog breed is delegated to the respective breed clubs, whose tasks are to ensure ethically correct treatment of dogs and breeding in accordance with desired goals with regard to breed standard, usage and health. The breed clubs are responsible for drafting and updating their breed specific strategy (RAS). The strategies must be approved by NKK.
- (6) The private individuals acting as parties in the case at hand are breeders of Cavaliers or English bulldogs. It has been stated that these individuals follow best practices for their breeding strategies, and that they are parties to the case as representative of such breeders.

#### *Health problems in Cavaliers and English bulldogs*

- (7) It is undisputed that certain dog breeds are more prone to disease and illness than others, some due to breeding for specific traits. Traditionally, inbreeding has also been common, with the result that some breeds are more likely to develop certain diseases.
- (8) For a long time, it has been questioned, not only by NSPA, whether the breeding has come at the expense of animal welfare. In 2015, NKK approached the Norwegian Food Safety Authority to discuss possible measures related to the breeding of dogs with major respiratory problems, such as the English bulldog. In 2017, the Norwegian Veterinary Association published an appeal on dysfunctional breeding, with particular focus on the Cavalier.

- (9) For Cavaliers, the cause of debate is particularly the prevalence of the neurological conditions *Chiari-like malformation* and *syringomyelia*, as well as the heart valve condition *myxomatous mitral valve disease*. For English bulldogs, the primary concerns are the *brachycephalic obstructive airway syndrome*, which causes breathing problems, and the breed's ability to give birth naturally.
- (10) There are various degrees of these conditions, and although a dog is diagnosed, it will not necessarily develop clinical signs of pain or disease.
- (11) Nearly all dogs of the breed Cavalier suffer from *Chiari-like malformation (CM)*. This is described as follows by District Court, with the support of the Court of Appeal:
- “CM is a genetic, hereditary condition where the internal volume of the skull is too small for the volume of the animal’s brain and the elongated medulla. Parts of the cerebellum and the elongated medulla may form a hernia against the spinal cord. The condition is caused by the seams between the bones of the skull closing and growing together before the dog is fully-grown. In Cavaliers, the internal skull volume is reduced most at the front of the skull. There is too little space for the nerve tissue, which may lead to a pain syndrome (CM-P) and syringomyelia.”
- (12) CM can be detected and graded after MRI examinations. As can be seen from the quote, the condition is referred to as *CM-P*, which stands for “*Chiari-like malformation pain*”, if it causes pain or other clinical symptoms. The parties disagree on whether CM-P is a documented diagnosis, its prevalence, and the level of suffering it causes. Neither CM nor CM-P are fatal conditions. However, they are incurable, and CM-P is sometimes so painful for the dog that it must be put down.
- (13) *Syringomyelia (SM)* is a neurological condition described as follows by the Court of Appeal:
- “the dog develops cysts or fluid-filled cavities in the spinal cord, which over time can destroy nerve pathways ...”
- (14) SM can also be detected and graded through an MRI examination. The condition can cause clinical symptoms, including pain in the head and phantom itching. In the latter case, it is referred to as *symptomatic syringomyelia, SM-S*.
- (15) *Myxomatous mitral valve disease (MMVD)* is a widespread heart disease in dogs in general, but it occurs more frequently in Cavaliers. The condition is described by the Court of Appeal as follows:
- “MMVD is a heart valve disease that causes a thickening of the heart valves between the left atrium and ventricle. This may lead to leakage and backflow of blood from the left ventricle back to the atrium. The heart valves are exposed to wear and tear in both healthy and sick individuals, but in individuals with MMVD the wear and tear leads to injury or scarring that gradually worsens.
- Heart valve leakage is heard as a blowing sound (murmur) when using a stethoscope, and is graded from 1 – 6, where 6 is the loudest. Murmurs cannot be equated with clinical disease, but may develop over time and give symptoms and cause heart failure and death. Dogs with MMVD are born without signs of the disease, but develop clinical symptoms later in life.”

- (16) Most dogs can be treated for MMVD, and the preclinical phase – the period without symptoms – can then be extended by several years. However, in a later phase of the disease, a dog will tire easily during activity, and may experience breathing problems and cough due to fluid accumulation in the lungs. This is treated with oxygen and medicine, among other things.
- (17) *Brachycephalic obstructive airway syndrome (BOAS)* is a common condition in “*brachycephal*” breeds, i.e. dogs with a short and broad skull and a flat nose. Dog breeds are referred to as brachycephal when the skull breadth constitutes more than 80 percent of the skull’s length. The English bulldog is an example of such a breed.
- (18) The Court of Appeal supports the District Court’s description of BOAS:
- “Dogs normally breathe through the nose, but will breathe through the mouth during physical exercise, when it is excited or to get rid of excess heat (panting). As the name indicates, BOAS is a syndrome caused by reduced air passage through the upper airways, as they are more or less blocked by soft tissue – for instance in the compressed nose, through too long and too thick a soft palate, too small a diameter of the trachea, narrowed nostrils etc. Overweight may intensify BOAS. The relationship between the skull and the nose length (‘craniofacial ratio’) and neck circumference may also be significant for the impact of BOAS, but there is no clear connection since the impact may vary considerably between individuals with the same craniofacial ratio and neck circumference.”
- (19) The symptoms are often forced respiratory noise, snoring, respiratory arrest and reduced stamina. BOAS comes in different grades from 0 to 3, where 3 is the most severe.
- (20) Among other *health-related issues*, the proportion of caesarean sections in English bulldogs is central to the case at hand. The parties disagree on the prevalence of and possible reasons for this.

### ***The proceedings***

- (21) In November 2018, the dog show Dogs4All was held in Lillestrøm. After the event, NSPA notified the Food Safety Authority of possible violations of the Animal Welfare Act. The Food Safety Authority conducted inspections at several breeders, none of which resulted in any notice of decision.
- (22) NSPA then issued a writ against NKK, the two breed clubs and six breeders, as it believes that Cavaliers and English bulldogs have such serious health problems at a breed level that breeding is a violation of section 25 of the Animal Welfare Act.
- (23) In addition to requesting a judgment in their favour, the defendants replied that the action had to be ruled inadmissible, as the conditions for bringing an action were not met. In a separate order, Oslo District Court allowed the action.
- (24) On 31 January 2022, Oslo District Court, sitting with expert lay judges, ruled as follows:

“Towards the Norwegian Kennel Club:

1. Breeding of the English bulldog is in violation of section 25 subsections 1, 2 and 3 of the Animal Welfare Act.

2. Breeding of the Cavalier King Charles spaniel is in violation of section 25 subsections 1, 2 and 3 of the Animal Welfare Act.

Towards the Norwegian Bulldog Club:

1. Breeding of the English bulldog is in violation of section 25 subsections 1, 2 and 3 of the Animal Welfare Act.

Towards the Norwegian Cavalier Club:

1. Breeding of the Cavalier King Charles spaniel is in violation of section 25 subsections 1, 2 and 3 of the Animal Welfare Act.

Towards A, B and C:

1. Breeding of the Cavalier King Charles spaniel is in violation of section 25 subsections 1, 2 and 3 of the Animal Welfare Act.
2. A, B and C are prohibited from breeding the Cavalier King Charles spaniel.

Towards D, E and F:

1. Breeding of the English bulldog is in violation of section 25 subsections 1, 2 and 3 of the Animal Welfare Act.
2. D, E and F are prohibited from breeding the English bulldog.

Towards all defendants:

1. Costs are not awarded.”

- (25) The District Court gave its ruling after having heard, among others, eight expert witnesses. The Court found as a fact that Cavaliers’ predisposition to CM alone implied that continued breeding would be in violation of section 25 subsection 3 of the Animal Welfare Act. Furthermore, the Court emphasised that 15–20 percent of the dogs would develop CM-P. In the Court of Appeal’s view, continued breeding was also prevented by Cavaliers’ genetic predisposition to SM. For English bulldogs, the Court emphasised in particular that breeding of dogs with BOAS grade 1 and higher would be illegal, but also found as a fact that genes that may cause BOAS, in itself, implied that continued breeding would be in violation of section 25.
- (26) NKK and the other defendants appealed against the judgment to Borgarting Court of Appeal.
- (27) During the preparatory phase, the Court of Appeal addressed the possibility of requesting a judgment prohibiting continued breeding, see item 2 of the District Court’s conclusion. During the hearing in the Court of Appeal, the parties submitted coinciding requests that the Court find for the breeders on this issue.

(28) On 18 November 2022, Borgarting Court of Appeal ruled as follows:

- “1. The Court finds in favour of the Norwegian Bulldog Club and D, E and F.
2. The Court finds in favour of the Norwegian Kennel Club as concerns the breeding of English bulldogs.
3. The Court finds in favour of A, B and C as concerns item 2 of the District Court’s conclusion.
4. Otherwise, the appeal is dismissed.
5. Costs are not awarded in any instance.”

(29) The Court of Appeal, also, dismissed the request that the action be ruled inadmissible.

(30) The Court of Appeal heard nine expert witnesses. The Court found that the breeding of Cavaliers was illegal, since it considered it proven that 15 percent of the dogs have SM-S and CM-P. The serious symptoms caused by these conditions had to be regarded as clearly unnecessary strains for the dogs. As for the breeding of English bulldogs, the Court pointed out that BOAS comes in different grades, and that the grade can be determined by an activity test. The Court also emphasised that breeding programmes reduce the problem. The Court of Appeal therefore found that breeding of dogs with BOAS grade 0 or 1, possibly with one parent dog with BOAS grade 2, was lawful due to the low probability of offspring with severe BOAS.

(31) NKK, the Norwegian Cavalier Club, A, B and C have appealed against the judgment as concerns the issue of admissibility and the result related to the Cavalier. The appeal challenges the application of the law and the findings of fact.

(32) NSPA has appealed against the judgment for the parts concerning the English bulldog. This appeal, also, challenges the application of the law and the findings of fact.

(33) The Norwegian Farmers’ Association, the Norwegian Poultry Association and the Federation of European Companion Animal Veterinary Associations (FECAVA) have submitted written statements in the case, see section 15-8 subsection 1 of the Dispute Act. These are included as a part of the decision-making basis, see section 15-8 subsection 2 of the Dispute Act.

### **The parties’ contentions**

(34) *NKK, the Norwegian Bulldog Club, the Norwegian Cavalier Club, A, B, C, D, E and F* contend:

(35) The Court of Appeal’s interpretation of the conditions for bringing an action in section 1-3 of the Dispute Act is incorrect. The action is a borderline case, where an overall assessment indicates that the case is inadmissible. The dispute does not concern a legal claim, but an abstract issue: the interpretation of a statutory provision. The action is general and not related to an individual case. It is noted in particular that the action has been brought at breed-level and not on an individual level. NSPA also does not have a genuine need to have the claims decided. There are several other ways to try the issues in question, for instance through a

validity action, which would have given a better basis for deciding the case. In addition, regulations of significance to the issue are currently being drafted.

- (36) NSPA does not have a need to bring an action against the clubs and the breeders in question. In any case, it has no relevance to the clubs' activities, as the clubs have no impact on the actual breeding work.
- (37) Section 25 of the Animal Welfare Act gives no basis for banning specific breeds based on general health conditions. The provision requires an individual assessment, and there are variations within the breeds. Decisive for whether the breeding is illegal are characteristics or breeding combinations. The Act builds on a clear distribution of competence between the Food Safety Authority and the courts, where the latter supervises and makes decisions, while the courts control the validity of the decisions. It is illustrative that neither the legislature nor the specialist agencies have promoted a breed ban. Nor is this proposed in the draft regulations. Under any circumstance, section 25 is not a strong rights provision, and the courts must therefore show restraint in any review under the provision.
- (38) The Court of Appeal has set too low a threshold for when breeding is in violation of section 25 of the Animal Welfare Act. The threshold must be relatively high, as the strains must be unnecessary for there to be a violation. The threshold should be the same for production animals and pets, although the individual assessment may have different outcomes. There probability of genuine strains in the offspring must be high, and one must differentiate for graded diseases.
- (39) Section 25 of the Animal Welfare Act implies that breeding must be carried out in a way that most likely produces healthy offspring, but the provision does not prevent breeding with the aim of deselection of undesired traits. The precautionary principle is mainly applicable when research is scarce and in the assessment of whether measures have been made to reduce the risk of strains in the offspring. Such measures have been implemented by NKK and the breed clubs.
- (40) As concerns the findings of fact, NSPA carries the burden of proving that the current breeding in Norway is illegal. This has not been met.
- (41) Continued breeding of the Cavalier within the Norwegian population is not in violation of section 25 of the Animal Welfare Act. The goal of breeding is to produce healthy offspring, and a minimum age for breeding of three years has been introduced, as well as a requirement that sick dogs must not be bred. To avoid CM and SM, MRI scanning has been made compulsory, and only the best combinations according to a specific matrix may be used in breeding. The proportion of animals whose welfare is reduced is low. As far as MMVD is concerned, it is stressed that 92 percent of the dogs that are examined before breeding are registered without heart murmurs. MMVD can also be controlled with medication. No other conditions have been detected in Cavaliers of such a scope, or that are breed-specific to such an extent, that they are significant under section 25 of the Animal Welfare Act.
- (42) Continued breeding of the English bulldog will not be in violation of section 25 of the Animal Welfare Act. Based on NKK and the breed club's set of rules, there is no preponderance of probability of unnecessary stress or strains caused by BOAS. BOAS grade 0 and 1, with which 80 percent of English bulldogs in Norway are classified, gives no clinical signs of strains or pain. From 1 August 2023, such dogs only can be used for breeding.

Furthermore, the aim of the breeding rules is for all dogs to give birth naturally, and bitches that have had more than two caesarean sections are removed from breeding. Nor for the English bulldog are there other conditions that indicate a violation of section 25.

- (43) NKK, the Norwegian Bulldog Club, the Norwegian Cavalier Club, A, B, C, D, E and F ask the Supreme Court to rule as follows:

“Principally:

1. The action is inadmissible.
2. NKK and others are awarded costs in all instances.

In the alternative for the NKK, NCK and the Cavalier breeders:

1. The Court rules in favour of NKK and others.
2. NKK and others are awarded costs in all instances.

In the alternative for NKK, NBK and the breeders of bulldogs:

1. The appeal is dismissed.
2. NKK and others are awarded costs in all instances.”

- (44) *NSPA* argues in particular:

- (45) The Court of Appeal has correctly allowed the case to be heard. It concerns a legal claim connected to concrete acts, more specifically a request for a judgment declaring that a specific type of breeding is in violation of the Animal Welfare Act. The breeding is ongoing, which means that the relevance requirement is met. NKK and the breed clubs actively support the breeding and are crucial premise providers for breeds and the breed standards. The breeders carry out breeding on a continuing basis.

- (46) It follows from the Dispute Act and its preparatory works that private enforcement actions may be brought to establish the meaning of a general prohibition principle applied to individual factual circumstances. Within dog breeding, there is a need of clarification at a principal level, and there is no other appropriate way to bring the case. There is no administrative decision to challenge.

- (47) Section 25 of the Animal Welfare Act imposes obligations on both private individuals and organisations. It contains substantive restrictions on breeding and is applicable at a group level, which means that breeding of entire breeds may be illegal. The courts are fully competent to apply the provision.

- (48) The provision must be interpreted and applied in line with the principle of care in section 3 of the Animal Welfare Act. This forms the background for where the threshold should be under section 25. Whether or not the threshold is crossed will depend on an overall assessment.

- (49) The Court of Appeal’s ruling is correct for the part of the Cavalier. The breed is among those that are predisposed to the most, and most severe, diseases. Both CM and SM cause significant pain. In addition, MMVD occurs very early on in Cavaliers, and the condition demands lifelong medication. It must be characterised as severe. The breed is also predisposed to several other diseases.



(50) Breeding of the English bulldog is also in violation of section 25 of the Animal Welfare Act. The Court of Appeal has wrongly trusted that BOAS grade 1 is insignificant for whether the threshold has been crossed. Animals must be protected from unnecessary health problems, which BOAS grade 1 causes, for instance in the form of audible breathing and temperature regulation issues.

(51) The Court of Appeal's emphasis on the possibility to eliminate BOAS through breeding is in violation of the principle of care in section 3 of the Act, and it is not sufficiently documented that this will improve anything. In addition, the English bulldog is among the breeds with the highest prevalence of caesarean sections. Regardless of cause, this shows that the dog has difficulties giving birth naturally. Other forms of disorders come on top of that.

(52) *NSPA* asks the Supreme Court to rule as follows:

“The Norwegian Bulldog Club and D, E and F:

1. Breeding of the English bulldog is in violation of section 25 of the Animal Welfare Act.

NKK:

1. Breeding of the English bulldog is in violation of section 25 of the Animal Welfare Act.
2. NKK's appeal is dismissed.

The Norwegian Cavalier Club, A, B and C:

1. The appeal is dismissed

For all:

1. *NSPA* is awarded costs in the District Court and the Court of Appeal.
2. The public authorities are awarded costs in the Supreme Court.”

(53) *The Norwegian Farmers' Association and the Norwegian Poultry Association* have in their written submissions concentrated on commercial farming. They have stressed that the work on animal welfare should be carried out under the auspices of the public sector, in accordance with professional regulatory provisions. That best bring various interests to light, and it will be more expedient than private actions. This applies in particular when an action is brought with the aim of obtaining more general principles of unlawfulness, whose significance in practice will exceed far beyond the individual case.

(54) *The Federation of European Companion Animal Veterinary Associations (FECAVA)* has stated in its written submission that the breeding of Cavaliers causes unnecessary suffering and should be banned. For English bulldogs, the organisation has pointed out that 90 per cent of the dogs are more or less affected by BOAS, while 50 per cent are moderately to severely affected. It has also been pointed out that English bulldogs have difficulties with reproduction, and that the breed is prone to other diseases.

- (55) In connection with the Supreme Court hearing, additional statements have been submitted by several of the experts who gave evidence in the previous instances. New evidence has also been presented in the form of CM screening of the Norwegian population of Cavaliers and a new breeding program, which also includes new rules for SM, and a report on a pilot project for outcrossing. Documentation has been presented for changes in the breeding programme for English bulldogs and for statistics on the prevalence of BOAS in English bulldogs in Norway during the period 2019–2023.
- (56) The issue of inadmissibility due to the lack of a legal interest and the contention that the Animal Welfare Act gives no legal basis for banning the breeding of an entire breed have mainly been processed in writing in the Supreme Court.

## **My opinion**

### ***Subject matter***

- (57) The subject matter in dispute is the interpretation of section 25 of the Animal Welfare Act and whether the breeding of the Cavalier and English bulldog is in violation of this provision. Before I consider these issues, I will discuss whether the conditions for bringing an action are met in this particular case.

### ***Conditions for bringing an action***

- (58) According to section 1-4 of the Dispute Act, an organisation or foundation may bring an action in its own name in relation to matters that fall within its objective and natural area of activity. These conditions are clearly met for the part of NSPA, on which the parties agree.
- (59) It follows from section 1-3 of the Dispute Act that the subject matter in dispute must be a legal claim. Furthermore, there must be relevance linked to the claim – the claimant must demonstrate a genuine need for clarification of the law – and the parties must be connected to the subject matter. The latter implies that the claimant’s need to have its claim decided against the defendant must be worthy of protection. The various conditions are intertwined, and in the event of doubt as to whether one condition has been met, it may depend on an overall assessment whether the case should proceed. When assessing this, emphasis must be placed, among other things, on whether the case raises issues of principle, and whether clarification is more likely obtained through other types of action. The provision has been thoroughly dealt with in case law, for instance in the Supreme Court judgments HR-2021-417-P *Acer* and HR-2023-1044-A *The Mountain Act*. I confine myself to referencing these rulings for a closer understanding of the general legal starting points.

### ***Legal claims***

- (60) It is not disputed that private parties as a starting point may bring an action for enforcement of specific public requirements and future obligations when this is related to a specific fact, see for instance Proposition to the Odelsting no. 51 (2004–2005) on mediation and trial in civil disputes page 143 and Skoghøy, *Tvisteløsning* [dispute resolution], 4th edition, pages 412–413. The premise is that the action is not too abstract.

- (61) The abstractness of the case is exactly what NKK, the breed clubs and the breeders have stressed, contending that NSPA in reality is requesting regulations in the form of a judgment. They point out the many nuances in the case that may be difficult for the courts to capture. They also maintain that “dog breed” is an unmeasurable term, and that little evidence has been presented related to the Norwegian breed populations.
- (62) I agree that the action at first glance seems abstract. However, NSPA emphasises that it seeks clarification as to which consequences section 25 of the Animal Welfare Act have for the breeding of specific breeds, which means that the claim in the case relates to a concrete set of facts. Whether or not the claim could have been formulated more narrowly is not decisive for the existence of a legal claim.
- (63) Furthermore, it is clear that research on health problems, both in Norway and abroad, has to a large extent been carried out at a breed level. Hence, this is what constitutes the knowledge base. Whether or not the evidence presented is sufficient to establish that the action, in its present form, may succeed is not decisive for whether the requirements for a legal action are met.
- (64) Consequently, the condition that there must be a legal claim is met.

#### *Relevance*

- (65) As concerns the relevance requirement, I mention Cavaliers and English bulldogs are bred on a continuous basis. This suggests that there is a genuine need for clarification of the law.
- (66) NSPA has previously notified the Food Safety Authority of what it considers unethical breeding, but the Food Safety Authority has found no reason to intervene. Hence, there is no administrative decision to challenge. One of the reasons may be that the Food Safety Authority’s view of the interpretation of section 25 of the Animal Welfare Act differs from that of NSPA. As pointed out by both the Court of Appeal and the District Court, the Food Safety Authority seems mainly to emphasise conditions pertaining to the individual dog and less the research on the breed in general. As I see it, such a view is supported by a letter to NKK from the Food Safety Authority dated 26 October 2015. A private enforcement action claiming that the Food Safety Authority is not fulfilling its statutory obligations, is therefore unlikely to strengthen the courts’ basis for a review.
- (67) In 2019, work was initiated to draft regulations under section 25 of the Animal Welfare Act, which may support that the relevance requirement is not met after all, see HR-2023-1044-A paragraph 77. However, little progress seems to have been made, and the Food Safety Authority is reportedly awaiting the outcome of this case. Also, based on the draft regulations it is natural to assume that regulations will not give an answer to whether section 25 may be enforced at a breed level. It would therefore be useful to obtain clarification of a yearlong disagreement as to whether illegal breeding is being carried out. I add that the preparatory works to the Dispute Act, Proposition to the Odelsting no. 51 (2004–2005) page 143, state that bringing an action should also be possible where the general principle is normally expected to be concretised through an administrative decision.
- (68) The relevance requirement is therefore met.

### *Connection*

- (69) According to section 1-3 subsection 2 of the Dispute Act, both the claimant and the defendant must be sufficiently connected to the subject matter of the action (active v. passive capacity to sue). This requirement is clearly met for both NSPA and the breeders. Since NKK and the breed clubs manage the breed criteria and establish breeding strategies, the requirement is also met for them. I also note that section 25 of the Animal Welfare Act, according to its wording, is aimed at these parties. A ban aimed at the clubs will contribute substantially to a termination of any breeding that does not comply with the judgment, and the purpose of the action will thus be fulfilled. The connection requirement is also met.
- (70) NSPA is thus entitled to have its case tried in the form the action is brought, see section 1-4 and section 1-3 of the Dispute Act.

### ***The Animal Welfare Act***

#### *History*

- (71) In 1993, the first provision on animal breeding was added as section 5 of the Animal Protection Act from 1974. This took place in connection with the legal regulation of genetic engineering. The breeding provision prohibited modification of animals' genes by use of technology or by traditional breeding if this prevented normal behaviour in the animal, had "unfortunate effects" on physiological functions, caused unnecessary suffering, or if the modification caused ethical reactions from the public. Three years later, a new provision in section 5 subsection 2 also prohibited breeding of animals that had been changed as mentioned in subsection 1.
- (72) In 2002, Report to the Storting No. 12 (2002–2003) On animal keeping and animal welfare was issued. On page 11, it is stressed that fully functioning animals are a prerequisite for all types of breeding. It is also stated that there are examples of breeding that may be said to contravene the letter of the law, see page 52, where it is also stated that the favouritism of certain defects in companion animals have increased the risk of malfunctions and disorders. The report mentions various disorders in dogs that are connected to their exterior traits, but without further discussing whether such suffering may be illegal, see page 115.
- (73) The animal welfare report prepared the grounds for a new Act in the field, and in 2009, the Animal Protection Act was replaced by the Animal Welfare Act. It is set out in the *purpose provision* that the Act is to *promote good animal welfare and respect for animals*, see section 1.
- (74) In Proposition to the Odelsting no. 15 (2008–2009) On the Animal Welfare Act, it is stressed on page 8 that the bill builds on new and significant knowledge of animals' abilities and needs, together with high ethical goals for the treatment of animals. The Act provides standards to facilitate good animal welfare, and must be interpreted in the light of "society's at all times applicable ethical standards for animal keeping". It is also stated that the purpose is to "set a good example for the protection of animals' interests, also in an international context". By using the term "animal welfare" instead of "animal protection", the Ministry wished to stress that the primary objective of the Act is consideration for the animals, see statements on page 19.

- (75) Also in Recommendation to the Odelsting no. 56 (2008–2009) page 30, the Standing Committee on Industry and Trade relied on the idea of Norway as world leading on animal welfare. At the same time, the Committee pointed out the challenges of balancing this against the consideration for animal keepers, particularly those using animals for commercial purposes, such as in agriculture.
- (76) As I see it, the general statements in the preparatory works show that the Animal Welfare Act is based on an altered view on animals' status and rights, compared to previous legislation. Such a conception is also reflected in more recent case law, including in the Supreme Court judgment HR-2017-1250-A paragraph 27. This implies that statements in preparatory works to previous provisions have less weight, although the dilemmas may be the same today. With the Act from 2009, the threshold for what is acceptable treatment of animals was lowered, but as I read the Committee's statements, the individual practising of the threshold may allow for distinguishing between production animals and companion animals.

*Section 3 of the Animal Welfare Act*

- (77) Section 3 of the Animal Welfare Act reads:

“Animals have an intrinsic value which is irrespective of the usable value they may have for man. Animals shall be treated well and be *protected from danger of unnecessary stress and strains* (my italics).”

- (78) The provision establishes that animals have an intrinsic value, and gives general guidance on the treatment of animals.
- (79) As for the further understanding of section 3, I note that the Ministry did not aim for a provision that protects animals from any impact or burden. Certain strains are natural in animals' lives, see Proposition to the Odelsting no. 15 (2008–2009) side 23, and it is therefore a condition [for establishing a violation] that the strains are unnecessary or unacceptable. It is set out in the Proposition that section 3 covers less severe conditions “than what is normally understood as a disease”. It is further stated that, when assessing whether the treatment of animals is in accordance with the law, emphasis must be placed on the *impact that is caused by humans, the purpose and whether the act is generally accepted*.
- (80) It is set out in the same Proposition on page 94 that the principles in section 3 will be indicative for the interpretation and application of other statutory provisions. According to the works, the obligation to protect animals from unnecessary stress or strains calls for preventive measures. The following is stated about “risk”:
- “The term ‘risk of’ implies that one in areas where knowledge is scarce should act with care”.
- (81) I interpret the special comments to section 3 to mean that the aim is to operate with a high level of animal protection. The precautionary principle implies a requirement for preventive measures, and is also applicable in the event of uncertainty in the knowledge base.

*Section 25 of the Animal Welfare Act*

(82) Section 25 of the Animal Welfare Act reads:

“Breeding shall encourage characteristics which give robust animals which function well and have good health.

Reproduction, including through methods of gene technology, shall not be carried out in such a way that it:

- a. changes genes in such a way that they influence the animals’ physical or mental functions in a negative way, or passes on such genes,
- b. reduces the animals’ ability to practise natural behaviour, or
- c. causes general ethical reactions.

Animals with a genetic constitution as cited in the second article shall not be used for subsequent breeding.

The King may issue specific regulations regarding breeding of animals in conflict with the principles in this section.”

(83) Subsection 1 sets out that breeding must give “robust animals with good ... health”. Read in context with the purpose provision in section 1 and the general rule on treatment of animals in section 3, this provides guidance on the interpretation of the other parts of the provision. The reference to breeding organisations and breed clubs etc. was included in the Act in 2021 due to the legislature’s wish to clarify that these, too, were obligors under the provision, see Proposition to the Storting 128 L (2020–2021) pages 9–10.

(84) The provision’s subsection 2 prohibits certain types of breeding. The ban is central to the case at hand, where the question is whether Cavaliers and English bulldogs have such genetic constitutions as described in the Act. Subsection 3 prohibits continued breeding of animals as described in subsection 2, while subsection 4 gives a legal basis for issuing regulations on breeding, which for time being has not been used for dogs.

*Section 25 of the Animal Welfare Act – individual assessment or at a breed level*

(85) NKK, the breed clubs and the breeders contend that the courts cannot ban an entire breed for health reasons, as section 25 of the Animal Welfare Act requires an individual assessment. Such an assessment will be particularly relevant for instance to dogs with traits determined by several sets of genes – so-called polygenic traits – where breeding may give a number of different combinations, not only sick animals. According to NKK and others, one may only prohibit specific characteristics or breeding combinations. The provision may only be applied at a breed level if the relevant objections made concern any and all individuals.

(86) NSPA contends that it is not a question whether the provision may be applied at a breed level, but whether the courts may decide that a set of facts found to be in violation of section 25 of the Animal Welfare Act in fact concerns the entire breed. With polygenetic traits, healthily bred animals may have sick offspring, which supports the need for a ban at a breed level.

(87) I agree with NSPA’s general approach.

- (88) In my view, the way the Act is worded, with the terms “animals”/“animals”, it provides a legal basis for establishing by judgment that a specific type of breeding that is in violation of section 25, concerns the entire breed.
- (89) The fact that regulations may be issued also under subsection 4, does not change this. I mention nonetheless that the Act allows the regulator a larger margin of appreciation than what is the case for the courts in an individual dispute. I will return to this.
- (90) It is clear that the legislature is aware of health issues at a breed level for dogs. However, a possible ban at a breed level is not discussed, neither in Proposition to the Odelsting no. 15 (2008–2009) on animal welfare nor in Recommendation to the Odelsting no. 56 (2008–2009).
- (91) NKK and others contend that this is an indication that this is not the intended use of the provision.
- (92) I disagree. The preparatory works deal throughout with animal welfare at a group level, and nothing therein suggests that the provision is limited to individual animals. In an industrial context, an express example is given of a specific breed being prohibited also under a previous provision, namely Belgian Blue cattle, see Recommendation to the Storting no. 72 (1998–1999) page 20. It is also clear that the expertise agencies will be competent to issue such a ban for various animal breeds.
- (93) The question is then whether the fact that the expertise agencies thus far have not banned the breeding of specific dog breeds under section 25 of the Animal Welfare Act, prevents the courts from doing so. In 2019, the Ministry of Food and Agriculture asked the Food Safety Authority to discuss and draft regulations on dog breeding, with particular emphasis on measures to steer the breeding in the right direction. Although the Ministry was aware that some dog breeds have serious health problems, a possible ban on the breeding of specific dog breeds has not been further commented on. Nor is such a ban proposed in the draft regulations.
- (94) In my view, this cannot be decisive. Evidence presented shows that the Food Safety Authority has long believed that information and guidance are better suited to ensure healthy breeding, and that measures are mainly taken at an individual level. I also reference the results of the inspections carried out after the Dogs4all show and the letter to NKK from the Food Safety Authority dated 26 October 2015.
- (95) A stand-out question is whether the general principle in section 25 of the Animal Welfare Act applies to breeds that have existed virtually unchanged for many years, and that were also bred under the previous Animal Protection Act.
- (96) In my view, it cannot be ruled out that the threshold that must be set under section 25, and to which I will return in more detail, may be practised differently for existing breeds than for new breeds. For instance, subsection 4 might provide a legal basis for banning the breeding of new breeds, not least based on a combination of the conditions in section 25, which the courts would be reluctant to consider being in direct conflict with the provision. Therefore, the responsible authorities will be the first to draw up the guidelines in accordance with the Act, which is a premise in Proposition to the Odelsting no. 15 (2008–2009) page 70. However, although the public administration until now has relied on this approach, it cannot prevent the courts from deciding whether continued breeding of certain dog breeds will be illegal.

- (97) Furthermore, new breeds are more likely to cause “general ethical reactions”, see section 25 subsection 2 (c). Here, too, it is reasonable to assume that the regulator will have greater leeway than the courts. In addition, the principle of care will be particularly prominent when it comes to breeds that one has managed without thus far. As I see it, the statements in Proposition to the Odelsting no. 15 (2008–2009) pages 111–112 that the breeding of furless cats and blind hens that do not peck will be in violation of section 25, are examples of such assessments from the authorities. Here, the Ministry asserts all the options set out in section 25 subsection 2.
- (98) The wording of the Act does not provide a basis for a clearer and more systematic distinction between existing and new breeds, which would prevent the courts from applying section 25 where the courts consider continued breeding to be in violation of the terms of the provision. The preparatory works must make it clear that the provision must be read in this way, and I do not find sufficient support for this, although some statements may suggest it. It is set out in Proposition to the Odelsting no. 15 (2008–2009) page 70 that Norwegian hobby and companion animal organisations maintained that section 25 could lead to a ban on breeding of animals with health problems, despite the goal to eliminate undesirable traits over time, and that this in turn could lead to the extinction of old breeds. The Ministry’s response on page 72 must be read such that breeding must be assessed under section 25 regardless of such a goal, also where it may result in the extinction of old breeds. This implies, as I see it, that if a genetic condition is contrary to section 25 today, the Act does not, as a starting point, allow for continued breeding because over years or through generations of animals, it will be possible to eliminate the condition. In my view, this is a consequence of the increased emphasis on animal welfare rather than on traditional breeding. I also note that new research on the health of individual breeds may provide a different and better basis for establishing that the breeding is in violation of section 25, compared to when the Act was created. The research presented in the case at hand is primarily from after the Act was adopted. In cases where a type of breeding barely exceeds the threshold in section 25, breeding programmes demonstrated to improve animal health within a short period of time may gain momentum.
- (99) Despite the obvious relevance of the issue, the legislature has not commented on the breeding of dogs in particular. It is difficult to see that such lack of discussion means that breeding that was carried out essentially in the same way when the Act was adopted should be exempt from assessment under section 25 of the Animal Welfare Act. Such breeding, also, requires an individual assessment of the relevant conditions – in line with legislative guidelines. Although it is stated in the preparatory works, Proposition to the Odelsting no. 15 (2008–2009) page 69, that section 25 subsection 2 of the Animal Welfare Act maintains these principles, it is set out on page 70 that a new assessment must be carried out based on current knowledge. It is also stressed throughout that breeding programmes must focus more on animal health, see pages 67–68. In my view, therefore, it is not so that breeding that was essentially the same when the Act was adopted automatically falls under the threshold. It is thus not necessary to consider whether section 5 of the former Animal Protection Act covered breeding of well-known and established animal breeds.
- (100) Overall, I find that the courts have are competent to decide that a specific type of breeding that is in violation of section 25 concerns the entire breed, also established breeds, but that the threshold for well-known breeds may be different from the threshold for new breeds. I will return to this.



- (101) When it comes to the courts' individual assessment, NKK and others have argued that the Act in any event requires an expert evaluation, which the courts should be reluctant to review.
- (102) The starting point must be that the provision is enforced by the public administration. In that regard, the responsible authorities will have to clarify the meaning of the discretionary concepts, see Proposition to the Odelsting no. 15 (2008–2009) page 70. This does not mean, however, that the provision allows for free administrative discretion, nor has that been contended.
- (103) Generally, the application of section 25 of the Animal Welfare Act must be based on professional knowledge of animals, typically veterinary and genetic expertise, for instance when it comes to altered genetic constitutions or the ability to reproduce naturally. This is expressly laid down in the preparatory works, see Proposition to the Odelsting no. 15 (2008–2009) page 94, as concerns section 3, and must also apply to section 25. Any discretion exercised by expertise agencies will be significant to the courts. This will be part of the general findings of fact.
- (104) If, in the preparatory works, the legislature has in any way indicated where the threshold should be set for what is generally accepted, the courts must take this into account in the usual manner. Also here, the generally accepted view among expert may be particularly relevant. However, different experts may have different views.
- (105) Beyond this, I cannot see that there is a basis for limiting the review to be carried out by the courts. The courts must apply ordinary legal method and ordinary principles in their findings of fact.

*The threshold in section 25 subsection 2 of the Animal Welfare Act*

- (106) The wording of section 25 of the Animal Welfare Act is absolute, but there is no disagreement that a threshold must be interpreted into it, see section 3 of the Animal Welfare Act that protects animals from “unnecessary” strains. The threshold must be applied in the light of the precautionary principle that follows from the same provision.
- (107) NKK and others have stated that the threshold for establishing a violation of the breeding provision in section 25 must be high, and that it must be highly probable that serious diseases are continued. If the threshold is too low, it will affect healthy animals that also have rights under the Act. For animals that are genetically predisposed to stressful polygenetic conditions, the strict requirement must apply to the probability of the burden in the offspring.
- (108) NSPA has argued in favour of a lower threshold, stating that only a certain risk of serious diseases continued through breeding will constitute a violation of section 25. This will be the case for breeding of animals that are genetically predisposed to demanding polygenetic conditions.
- (109) When setting the threshold, the provision's subsection 2 is of interest, because the extent to which historical breeding has changed the genetic constitutions in violation of this provision is decisive for whether continued breeding is prohibited under subsection 3.
- (110) It appears from subsection 2 that breeding is prohibited in three types of cases, listed in items (a) to (c). Item (a) applies to breeding that changes genes in such a way that they affect the

animals' functions or passes on such genes, while (b) covers breeding that reduces animals' ability to practise natural behaviour. These terms will overlap to some extent. Item (c) covers breeding that causes general ethical reactions.

- (111) The wording in itself provides limited guidance on where to set the threshold, and nothing explicit is stated about any threshold in the preparatory works. However, the correlation between the legislation and the examples given in the preparatory works may shed some light on this.
- (112) As regards the expression “influence ... in a negative way” in (a), read in context with section 3 on protecting animals from danger, this must be interpreted to cover both the actual influence and the risk of influence. The wording indicates that this does not only cover pain, but also diseases in the breed's normal physical development. According to subsection 1, the breeding must produce “robust” animals, and the legislature has consciously used the terms “stress and strains” instead of “suffering” in section 3.
- (113) In Proposition to the Odelsting no.15 (2008–2009) page 111, it is set out that the need for routine medical or surgical treatment may indicate that the breeding is in violation of the provision. As I see it, this implies that the threshold under (a) is not meant to be particularly high. At the same time, a possible diagnosis that in fact does not influence animals in a negative way does not, alone, imply that continued breeding is affected.
- (114) Although the third option in subsection 2 (c) prohibits breeding that causes general ethical reactions, it is natural to interpret (a) as prescribing a threshold at a certain level.
- (115) In the same way as “influence”, the expression “passes on such genes” in (a) indicates that the prohibition covers more than cases where it is certain that the negative functions will pass on to the next generation, see, also here, section 3 of the Act on the protection from danger. For instance, in connection with polygenic inheritance, as I understand, a healthy offspring may be a carrier of traits that may reappear in the next generation.
- (116) As regards *item (b)* on natural behaviour, the assessment must be based on what is considered natural behaviour today. Through breeding, a dog breed may have changed its need for unfolding. For instance, the English bulldog has developed from being a bullfighting dog to a family dog.
- (117) The preparatory works to item (b) have a particular focus on commercial breeding. To me, these statements substantiate that the threshold for production animals will generally be higher than for pets. For instance, it is set out that the breeding of sterile fish, based on current knowledge, will not be in violation of the provision, see Proposition to the Odelsting no. 15 (2008–2009) pages 111–112.
- (118) According to *item (c)*, no breeding must be carried out that “causes general ethical reactions”. This requires a discretionary assessment, which according to Proposition to the Odelsting no. 15 (2008–2009) page 70, implies that “the opinion reflected in society must be seen in the context of an expert evaluation of whether the relevant act has unfortunate effects on animal welfare”. The provision promotes the significance of ethical reactions, based on solid expertise, when assessing whether the threshold has been crossed.

- (119) When interpreting section 25 subsection 2, emphasis must be placed, like under section 3, on the nature and scope of the stress and strains, and the extent to which this limits the breed's natural life unfoldment. How the condition occurred and why, should also be considered. For targeted breeding, it will always be due to human factors. Breeding that has been carried out or is being carried out with the aim of enhancing certain exterior traits in pets will not be worthy of protection. The other way around, the fact that the purpose of the stress or the strains is significant, means that the threshold will be higher for production animals than for pets. For (a) and (b), it will also have some significance whether the act is generally accepted based on informed knowledge of the stress or strains, although that is an independent condition under (c).
- (120) *In summary*, this implies that a broad overall assessment is required under section 25 of the Animal Welfare Act. This must be done on an individual basis, starting with what type of stress or strains is involved, purpose and cause. Knowledge of breeding and genetics will be central. One cannot set a single threshold that covers all breeding situations, but there is no evidence to conclude that a high degree of probability is required for the offspring to develop a genuine strain or show clinical symptoms. For production animals, the threshold will generally be higher than for pets.

### ***Findings of fact***

#### *General remarks*

- (121) As a starting point, NSPA carries the burden of proving that continued breeding of Cavaliers and English bulldogs is in violation of section 25 of the Animal Welfare Act. At the same time, the principle of care in section 3 of the Act implies that in the event of factual doubt – typically disagreement in the research – the standard of proof is slightly less strict.
- (122) The evidence presented in the case is largely based on foreign research. Like the Court of Appeal, I believe this is relevant to the assessment of the Norwegian populations. As pointed out by the Court of Appeal, the dogs that are bred in Norway originate from England. Furthermore, it appears from the breed-specific breeding strategy (RAS) for Cavaliers that the Norwegian Cavalier population “in its lineage and breeding material is almost identical to the genetic pool in England, Sweden and a number of other European countries”.
- (123) The expert witness, veterinarian PhD Astrid Indrebø, has pointed out in her written statement on caesarean sections in English bulldogs that although the breed originates from England, selection during breeding may lead to the breed developing differently in Norway than in England. Even when taking this into account, it is not a decisive argument against the presumption that foreign research is relevant.
- (124) The significance of Norwegian surveys balanced against foreign and more recent research compared to older research, will depend on the quality of these and possible publication in recognised journals, representativeness based for instance on the number of animals, as well as any connection to the parties.

#### *The Cavalier*

- (125) It is undisputed that Cavaliers are particularly prone to certain diseases, but the parties disagree about the prevalence and level of severity.

- (126) The condition *Chiari-like malformation* (CM) is a malformation where parts of the cerebellum and the medulla oblongata form a hernia – a protrusion – against the spine because the brain is too large for the skull. Almost all the animals in the breed have this malformation. The cause of the condition is that parts of the Cavalier’s skull are too short (brachycephalic). As described by the District Court, the internal volume of the skull is insufficient to accommodate the dog’s brain and the medulla oblongata. This is because the seams between the bone parts of the skull close and grow together before the dog is fully-grown. The dogs have a short nose with a straight angle in the transition between the forehead and the nose. Combined with the Cavalier’s brain being of the same size as dogs of twice the weight, this may, as described by the Court of Appeal, lead to the two pathological pain syndromes *Chiari-like malformation pain* (CM-P) and *syringomyelia* (SM).
- (127) The Court of Appeal has presented the clinical signs of CM with pain, referred to as CM-P. The dog may howl for no apparent reason during rest, sleep or movement, or when lifted under the chest. The dog may also be sensitive to touching on the spine and resist being scratched, it may have itches in the head or ear, as well as difficulty jumping or climbing stairs.
- (128) SM is a neurological condition where the cause may be a narrow braincase where nerve tissue is squeezed together, thus disrupting or blocking the circulation of spinal and brain fluid. This creates fluid-filled cavities or cysts in the spinal cord. Depending on the size of the cysts, SM is graded into SM 1 and SM 2. SM with clinical symptoms is called SM-S.
- (129) The clinical symptoms of SM-S are described as follows in the judgment of the Court of Appeal:
- “[the disorder] includes sensitivity and pain around and in the head, neck or shoulders, which is often expressed through phantom itching in the said area on one side of the body. The symptoms of SM-S can be reduced through medication and/or surgery, but the condition cannot be cured.”
- (130) Based on the prevalence of CM and SM, the Court of Appeal found that the prevalence of CM-P and SM-S was at least 15 per cent. The Court found that the serious symptoms of the diseases clearly had to be considered unnecessary stress and strains in the dogs affected. It was pointed out that surgery rarely reduces clinical signs. Pain and phantom itch can be reduced through medication, but not eliminated. Medication for CM-P often requires one to three doses daily, and many dogs need a combination of several drugs. It was also pointed out that CM-P in some cases causes such severe pain that the dogs must be put down. The Court of Appeal also emphasised that the conditions were genetic, and discussed the possibility of developing a more sustainable breeding through crossbreeding.
- (131) In its assessment, the Court of Appeal emphasised the research of Clare Rusbridge, professor of veterinary neurology at the University of Surrey, England, who has researched the Cavalier for many years. This has also been central to the Supreme Court, together with the statement from Doctor Paul Mandigers, veterinary specialist in neurology and internal medicine in Arnhem, the Netherlands, and professor of medical genetics at the Veterinary College, NMBU, Frode Lingaas.
- (132) NKK, the Cavalier club and the Cavalier breeders have mentioned that the research from Rusbridge concerns a smaller number of dogs, and that they can therefore not be given decisive weight. They have also pointed out that the material is relatively old. Furthermore,

they believe that foreign research is not representative of the Norwegian population, and that research in Norway shows that there is no basis for claiming that the prevalence of CM-P and SM-S is at least 15 per cent in this country.

- (133) It is difficult to find precise numbers for CM-P because the condition cannot be determined by a diagnostic test, but is a diagnosis of exclusion, reached after other causes have been ruled out. It may also act simultaneously with SM. The majority of dogs with SM-S also have CM-P, but are only registered with SM.
- (134) It appears from the research of Professor Rusbridge, which is partially based on a screening of 555 dogs in the United Kingdom and the Netherlands from 2011, that the SM diagnosis is very widespread among Cavaliers. In the mentioned screening, 25 percent of the dogs had SM at one year of age. This proportion increased to 70 percent among dogs that were 72 months or older. Professor Mandigers published a Dutch survey in 2017 where 1,020 dogs intended for breeding were screened. Most of the dogs were under three years of age, but the screening still showed a prevalence of CM of 100 per cent and of SM of 39 per cent. Although the studies are somewhat old, there is no information that the breed has changed in Norway since then. As the Norwegian breed criteria are based on international criteria, and the genetic pool is stated to be identical to that in other European countries, I find that the surveys must be given considerable weight.
- (135) NKK has mentioned that one of the underlying studies used by Rusbridge in her work shows numbers in populations that were brought to a veterinary, thus showing clinical signs already to begin with. Nonetheless, this does not change the overall picture provided by the surveys presented to the Supreme Court.
- (136) As for screenings of the Norwegian population, there is limited material available. What many of them have in common is that they are less accurate, have a low response rate and make little distinction between CM and SM, which means that they provide poor guidance. In 2023, however, a mapping of CM and SM in Norwegian dogs has been carried out. In this survey, 89 dogs used for Cavalier breeding were examined with MRI, and a distinction was made between SM 1 and SM 2 based on the size of the cysts and fluid-filled cavities.
- (137) Despite the fact that only the presumably healthiest animals were used, the survey showed that 43.8 percent of the dogs had SM 2, while 18 percent had SM 1. In addition, slightly less than half of the screened dogs diagnosed with SM 1 were between three and five years old, meaning that some of these are likely to get SM 2 later. Compared to the estimate from Rusbridge that 70 per cent of dogs will have SM with or without symptoms by the age of five, the numbers in the Norwegian survey do not seem to deviate much.
- (138) As mentioned, the Court of Appeal assumed that the prevalence of SM-S and CM-P was around 15 percent. In my view, the evidence before the Supreme Court does not indicate otherwise.
- (139) A particular issue in the case is the significance of new guidelines for breeding. From 2018, it has been a requirement that breeding animals must be at least three years old because SM develops over time. Furthermore, sick animals must not be used for breeding, and from 26 April 2023, MRI screening at three and five years of age is required. Breeding must take place in accordance with a matrix set up by the British Veterinary Association and the UK Kennel

Club, which, based on the grade of CM and SM in the female and the male dog, prevents the breeding of dogs with CM-P.

- (140) The possibility of limiting and eventually eliminating SM-S and CM-P through breeding of the current population will, however, “take lots of time”, according to the expert witness Mandigers. He has also stated that “[t]he current selection methods ... [in England] are not working very efficiently. Hence at this rate, it will take decades before any progress will be made.” It is somewhat unclear whether the British breeding programme fully corresponds to the Norwegian one, but it is nonetheless clear that breeding work to eliminate SM-S and CM-P will take years.
- (141) As can be read from the general comments above, the assessment of whether breeding is in violation of section 25 of the Animal Welfare Act must be based on the current situation. If there is doubt as to whether the threshold under the provision has been crossed, or if one is dealing with a borderline case, a breeding programme may be of significance. At the same time, regard must be had to a breeding programme’s potential to intensify other disorders because it generates too much inbreeding in the population.
- (142) I do not consider this a borderline case. Nearly all Cavaliers have CM, which means that the brain and the medulla oblongata are too big for the skull. A high number have SM, which means that there is too little space for the nerve tissue, and malformations may occur that prevent normal circulation of spinal and cerebrospinal fluid. In many cases, this gives chronic pains in the form of CM-P and SM-S. At the same time, the veterinary association through its appeal from 2017, and the Federation of European Companion Animal Veterinary Associations (FECAVA) in its written submission to the Supreme Court, have both been strongly critical towards continued breeding. In my view, this is essential.
- (143) A quicker way to reduce the sufferings will be outcrossing, where the Cavalier is bred with other breeds. This would give a new breed that looks like the Cavalier, but without the serious diseases. Such a pilot project has been initiated for 2023–2024 to improve the health situation. This took place after the breed club in 2018 – despite the request from NKK’s expert environment and, as I understand, positive signals during a meeting with the Kennel Club – chose not to proceed with it. Such an outcrossing project will not necessarily contravene a judgment in accordance with NSPA’s claim.
- (144) *Overall* – like the District Court and the Court of Appeal – I consider CM-P and SM-S to be serious conditions that have significant negative effects on the dogs’ physical and mental functions and reduce their possibility to practise natural behaviour. When at least 15 percent of Cavaliers get SM-S and CM-P, exclusively due to breeding to obtain specific exterior traits, it entails severe suffering in such a high number of dogs that continued breeding of Cavaliers, as it is currently carried out, will be a violation of section 25 of the Animal Welfare Act. I cannot see that the use of the matrix for breeding, or the restrictions imposed, may give any other result, since there is little concrete evidence of significant improvement in the short run.
- (145) Against this background, it is not necessary to elaborate on the significance of MMVD or other disorders. Yet, there is reason to stress that MMVD is a severe disease, and it may be questioned whether regular and heavy medication already from young age is in accordance with section 25 of the Animal Welfare Act.

- (146) For the sake of clarity, I add, like the Court of Appeal, that a judgment declaring illegal breeding is not the same as an order to have the dogs put down.

*English bulldogs*

- (147) The parties agree that English bulldogs are predisposed to *brachycephalic obstructive airway syndrome* (BOAS), a condition that is common in dogs with a short and broad skull, and a flat nose. However, the parties disagree on the significance of the different grades, particularly BOAS 1.
- (148) BOAS implies that the upper airways are partially blocked due to the compressed nose, narrowed nostrils or too small a diameter of the oesophagus. This means that the dogs are prevented from breathing normally. This is due to breeding that has given the combination of a short muzzle and too much soft tissue. Neck circumference, age and weight of the dog may also play a part. The District Court, with the support of the Court of Appeal, has described the symptoms as follows:
- “Clinical symptoms of obstructed airways include snoring sounds from the nose/nasopharynx, wheezing sounds from the pharynx, laboured or rapid breathing, reduced stamina, sleep problems and respiratory arrest. The dog must use more force to get air to the lungs and may struggle for enough air to breathe. Also, the soft tissue in the airways may expand due to the breathing difficulties, making the airways even narrower, which worsens the condition. In addition, dogs with BOAS tolerate heat and high humidity less well due to the reduced ability to regulate temperature via breathing, and the animals’ physical stamina is weakened for the same reason.”
- (149) BOAS may be categorised in grades from 0 to 3, in line with a scale prepared by veterinary Jane Ladlow, Director of Research (Clinical), University of Cambridge, who appeared as an expert witness in the District Court, the Court of Appeal and the Supreme Court, and who has researched airway functions in brachycephalic breeds for many years.
- (150) The impact on the dog will vary depending on how severely it is affected. A function test (stress test) is usually carried out to identify the BOAS grade. This test consists of a three-minute trot at 4 mph, which equals a distance of 321 metres.
- (151) With BOAS grade 0, the dog produces no audible breathing sounds or similar. With BOAS grade 1, whose significance the parties disagree on in particular, the dog may produce certain breathing sounds before exercise, from inaudible to mild snoring and/or moderately intermittent (that is, with certain interruptions) nasal snoring when sniffing. After exercise, there may be mild snoring and/or moderate intermittent snoring when sniffing and/or intermittent mild snoring when panting. The sounds are audible through a stethoscope. Other conditions such as syncope (sudden loss of consciousness) are not present. BOAS grade 1 may worsen as a result of progressive development, see additional statements to the Supreme Court from Ladlow and Rowena Packer of the Royal Veterinary College, London, who have a PhD on brachycephalic disorders.
- (152) BOAS grade 2 and 3 is more severe. With BOAS grade 2, a dog will produce mild to moderate snoring and have up to moderate inspiratory difficulty (that is, effort when breathing in) before exercise. This increases to moderate to loud inspiratory snoring after three minutes of exercise, and causes dyspnoea, i.e. heavy breathing or shortness of breath, which makes the dog unable to exert itself after exercise. BOAS grade 3 involves constant moderate to heavy

wheezing, or snoring, both before and after exercise, but so that it worsens after exercise. These dogs also have dyspnoea, and they may have cyanosis (blue colouration, typically visible on the tongue), which means that the blood has less oxygen than normal. They will also be predisposed to syncope.

- (153) Other symptoms of BOAS include sleep problems and problems with heat regulation, see Packer's additional statement to the Supreme Court.
- (154) As for the prevalence of BOAS in English bulldogs, a British survey from 2016 shows that 15.2 percent of the dogs had BOAS grade 3, while 28.8 percent had grade 2, which totals 44 percent. The survey involved 66 dogs. In a survey from 2017 involving 201 dogs, the numbers were 12.4 percent and 38.8 percent respectively. Before the Supreme Court, Ladlow presented updated numbers from 2022, where more than 700 selected dogs had been screened. This shows that 33 percent of the dogs were given grade 0 status, 49 percent grade 1 status, 16 percent grade 2 status and 2 percent grade 3 status. The improvement is reportedly due to increased awareness of which dogs are bred, and of the specific recommendations for this. Ladlow also points out that the breeders must be assumed to present their better dogs for a survey as that in question. The numbers are therefore probably better than one would expect from a random survey.
- (155) NSPA contends that the statistics subsequently showing improved numbers have sources of error, partially because the dogs that were tested were intended for breeding. This indicates, precisely, that the best dogs were used. Also, it cannot be ruled out that some of the dogs had undergone surgery for BOAS before testing, an issue that NKK pointed out to the Food Safety Authority as early as 2015. Nor do the numbers reflect the fact that BOAS is a progressive disease.
- (156) I agree with NKK that the surveys show a clear decrease in the number of dogs with BOAS, and particularly dogs that are more severely affected. This substantiates that it is possible to reduce the prevalence of BOAS. On the other hand, NSPA has made important objections that must be considered.
- (157) It appears from the Court of Appeal's judgment that out of 60 Norwegian dogs that were screened for BOAS from 2019 to 2021, 30 percent were given grade 0 status, 50 percent were given grade 1 status, 15 percent were given grade 2 status and 5 percent were given grade 3 status. Updated numbers for 121 graded dogs showed a similar distribution. Total numbers for the period 2019 to 2023 show the same distribution with regard to BOAS grade 2 and 3, while 28 percent are given grade 0 status and 52 percent are given grade 1 status. With regard to genetics, there is no doubt that BOAS is hereditary, see for instance the statement from expert witness Doctor Danika Bannasch of the University of California, Davis. However, it is a complex genetic disease, where the heritability of the various grades is unclear. The high occurrence of inbreeding also creates difficulties, as it gives little genetic variation in the breed. A breeding programme within the breed will therefore not necessarily be successful; it may even intensify other diseases in the breed.
- (158) In its ruling, the Court of Appeal found as a fact that various grades of BOAS in English bulldogs is hereditary, but that the probability of breeding dogs with severe BOAS is small when mating dogs with BOAS grade 0 and 1. As one of these grades is found in 80 percent of the dogs, the Court of Appeal found that continued breeding is possible without the genetic variation in the breed becoming too small. Although some offspring may have more severe



BOAS than its parents, the Court of Appeal concluded that continued breeding was acceptable.

- (159) The Court of Appeal largely relied on the research and statement from Ladlow, who believes that dogs with grade 0 or 1 must be considered clinically unaffected, and that the dogs can maintain a normal level of activity without a reduced quality of life. She bases this on the finding that these grades did not cause medical problems.
- (160) NSPA, on the other hand, contends that BOAS 1 is also severe, pointing out that that the dogs make breathing sounds even before exercise. During such limited exercise as a three minutes' light trot, the breathing problems intensify. BOAS 1 may also worsen as a result of progressive development. In addition, BOAS may, as mentioned, cause problems with sleep and heat regulation. NSPA's view is supported by the expert witness Packer.
- (161) In my view, BOAS 1 is more serious than what the Court of Appeal has concluded. As pointed out by NSPA, this grade, too, causes breathing difficulties after three minutes at a relatively low speed. Together with the other effects of BOAS, such as sleep problems and difficulties with regulating temperatures, this implies that one is approaching the threshold in section 25 subsection 2 of the Animal Welfare Act, particularly with regard to the principle of care in section 3. However, I cannot see based on current knowledge and the threshold currently applied, that there is a basis for concluding that section 25 is violated for dogs with BOAS grade 1, nor when taking other health issues into account.
- (162) BOAS grade 2 and 3 are so severe that continued breeding resulting in offspring with these disorders will be in violation of section 25 of the Animal Welfare Act. As a considerable number of animals are born with these grades in Norway today, it is essential to implement specific measures to reduce the risk to such an extent that the breeding does not violate section 25.
- (163) The Bulldog club has taken several measures to minimise the risk of sick offspring. It is set out in the club's ethical guidelines that breeding requires identified BOAS status, and only graded dogs can be registered in NKK. Only grade 0 and 1 can be used in breeding, as grade 2 was excluded from 1 August 2023. Breathing problems is a disqualifying error in the breed-specific breeding strategy (RAS).
- (164) The initiated breeding programmes in England seem to have contributed to a lower prevalence of the BOAS disorders. Yet, offspring are still being born with BOAS grade 3. While Packer finds that outcrossing or a total breeding stop is the only way to avoid a continuation of severe BOAS, Ladlow believes that a strict breeding programme may be sufficient. Bannasch agrees that it may be possible, but stresses that presently, there is no published research showing whether, or how quickly, it will work. In Ladlow's final additional statement to the Supreme Court, it is set out that the breeding programme solution is encumbered with some uncertainty, and that further research is necessary to finally conclude. As concerns the timeline, Ladlow estimates a five to ten years' perspective. In my opinion, this is too long. However, as I understand, both Bannasch and Ladlow discuss breeding programmes where animals with grade 2 status are still included to some extent. Such animals are, as mentioned, removed from breeding programmes in Norway.
- (165) In the light of the relatively high prevalence of BOAS grade 2 and 3 in offspring in Norway, and the fact that the desired changes under the breeding programme will take time and the

results are somewhat uncertain, I am, considering the precautionary principle in section 3 of the Animal Welfare Act, in some doubt as to whether the measures will remedy the violation of section 25. However, continued breeding at this point will probably give fewer animals with BOAS grade 2 and 3 in the next generations.

- (166) Before I finally conclude, I will take a closer look at other aspects pertaining to the English bulldog, as an overall assessment must be made according to section 25.
- (167) In its written submission to the Supreme Court, the Federation of European Companion Animal Veterinary Association (FECAVA) has highlighted that although BOAS is the biggest problem for the English bulldog, the breed suffers from several other serious health conditions. Among these, the ability to give birth naturally that has been at issue in the Supreme Court.
- (168) In my view, there is no doubt that the breed has large problems giving birth. Several international publications show that the English bulldog is among the breeds with the highest prevalence of caesarean sections. This is also clear from the expert witness Packer's statement. However, the reason for this is disputed. In Packer's opinion, it is due to physiological features, while the expert witness Indrebø has a different view. She points out that a number of dogs never have the opportunity to give birth naturally because the breeders prefer planned caesarean sections, and that complications during birth may be due to overweight in some dogs.
- (169) It has been reported to the Supreme Court that 49 per cent of all births take place by planned caesarean sections. For dogs that are initially given the opportunity to give birth naturally, 32.5 percent end up with an emergency caesarean section. Combined numbers for planned and unplanned caesarean sections show that 66 per cent of all litters in recent years have been born in whole or in part by caesarean section.
- (170) The number is high if compared to other dog breeds in general. At the same time, there are other short-skull breeds with a lower prevalence of caesarean sections, such as Pugs, while other breeds with a normal skull may have a high prevalence, such as Bernese Mountain Dogs.
- (171) Like the Court of Appeal, I therefore find it difficult to conclude that the proportion of English bulldogs born by caesarean section is solely due to breed-specific conditions.
- (172) The adopted breeding strategy aims at significantly reducing the number of caesarean sections. The goal is that births take place naturally, and planned caesarean sections will not be permitted. Bitches believed to be unable to give birth naturally must be removed from breeding. The same applies to bitches that have had two caesarean sections. In the case of one caesarean section, an assessment must be carried out of whether the dog should be removed. It is reasonable to assume that this strategy will involve a decrease in the number of caesarean sections. This must be given some weight. Therefore, as of today, there is no basis for concluding that the prevalence of caesarean sections means that section 25 subsection 2 of the Animal Welfare Act is violated if breeding takes place in accordance with the Bulldog club's breeding strategy.
- (173) Other health issues have been less clarified to the Supreme Court, and I will not elaborate any further on this.

(174) *Altogether*, the evidence presented to the Supreme Court shows that a high number of dogs have serious breathing problems in the form of BOAS grade 2 and 3, approximately 20 percent. BOAS is completely manmade, as a step in the breeding to obtain specific exterior traits. The breed also has problems giving birth in addition to other health issues. Considering the precautionary principle in section 3, I find that the suffering in animals with BOAS grades 2 and grade 3 overall exceeds the threshold in section 25 subsection 2 (a) and (b) of the Animal Welfare Act, regardless of the prevalence of caesarean sections. However, in the individual assessment of whether continued breeding is legal, due regard must be had to whether work has been initiated demonstrating that notably improved animal welfare is possible in the short run. In my view, that is the case here. I reference the verified reduction of severe BOAS internationally, and the introduction of even stricter criteria for breeding in Norway. I therefore believe that continued breeding of English bulldogs – in line with the recommendations from the Bulldog club – is not in violation of section 25 of the Animal Welfare Act. However, this assessment is based on the current situation, and may have a different result if the new breeding rules in the short run do not give a general reduction in BOAS grade 2 and 3 in English bulldogs. If the prevalence of caesarean sections remains high, this will also be significant in a future overall assessment.

### ***Conclusion***

(175) Neither of the appeals has succeeded, and they should therefore be dismissed. This means that continued breeding of Cavaliers King Charles Spaniel is in violation of section 25 of the Animal Welfare Act. Continued breeding of English bulldogs in line with NKK's breeding programme is not in violation of section 25 of the Animal Welfare Act.

### ***Costs***

(176) Neither of the parties has won the case in the whole or in the main. Nor is there a basis for awarding costs regardless of outcome. Costs are therefore not awarded.

(177) The Supreme Court's result must form the basis for the costs ruling in previous instances, see section 20-9 of the Dispute Act. Costs were also not awarded in the District Court and the Court of Appeal, and I find no reason to change this.

(178) I vote for this

## J U D G M E N T

1. The appeals are dismissed.

2. Costs are not awarded.

(179) Justice **Bergh**:

### **Dissent**

(180) I have reached a different result than Justice Østensen Berglund.

- (181) I agree that the conditions for bringing action are met, see section 1-3 and section 1-4 of the Dispute Act. I also agree that breeding is in violation of section 25 subsections 2 and 3 of the Animal Welfare Act when it has such effects as described in the provision. Then, it should also be possible to obtain a judgment declaring the breeding as described illegal. Like Justice Østensen Berglund, I consider this also to involve a ban at a breed level.
- (182) The decisive factor is the threshold for when the breeding of a specific, existing dog breed is in violation of section 25. The wording of section 25 and section 3 of the Animal Welfare Act, and certain general formulations in the preparatory works, may be interpreted to allow for an individual assessment of the traits in specific dog breeds balanced against the criteria of the Act, in order to establish whether continued breeding of these breeds crosses the threshold laid down in the Act. This is, as far as I understand, dominant in the elaborations of Justice Østensen Berglund. In my view, however, at least as concerns established dog breeds that have existed virtually unchanged for many years, is that one must consider more carefully whether it is possible based on the general principle in section 25 to establish that breeding is illegal.
- (183) It is a recognised fact that animal keeping, including breeding, may cause suffering to animals without this generally resulting in a ban. Already in the preparatory works to the Animal Protection Act 1974, the existing conflicting considerations are addressed. The following is set out in the Recommendation from the Standing Committee of Justice, annex to Proposition to the Odelsting No. 27 (1973–1974) page 29:

“The Committee is fully aware of, and finds it necessary to emphasise, that in certain situations it is unavoidable that animals suffer. This is a natural consequence of society exploiting the animals in its own interest, whether for purely nutritional reasons, for economic reasons or for the sake of welfare and entertainment. The Committee further stresses that, as far back as history can tell, humans have kept domestic animals for the aforementioned reasons, which at all times has caused the animals in question various degrees of deprivation of liberty, coercion and exploitation. This is generally accepted in all communities, and it is only the unnecessary strains that section 3 aims to cover. However, the question is which strains are ‘unnecessary’. Here, a wide range of conflicting interests and considerations come into play, as the assessments are based on incommensurable values: ethical, moral, religious, economic, emotional. The issue is extremely difficult to consider.”

- (184) As accounted for by Justice Østensen Berglund, in 1993 a provision was added in section 5 of the Animal Protection Act 1974 that had large similarities with section 25 subsection 2 in the current Animal Welfare Act. Subsection 2 was added to section 5 in 1996, and laid down a ban on breeding of animals that had been changed as described in subsection 1. This rule was very similar to section 25 subsection 3 of the Animal Welfare Act. The following was set out in the preparatory works to the amendment, Proposition to the Odelsting no. 78 (1994–1995) page 7:

“The proposal for a new subsection 2 in section 5 will not affect the traditional keeping of domestic animals as seen today. The addition is a natural follow-up to the prohibition of altering genetic constitutions under the current provision. According to its wording, this new provision will apply both to cases where animals have had their genes altered naturally, for instance by mutations, and where the genes have been altered by traditional breeding or genetic engineering methods.”

- (185) It is stated that the provision does not affect “the traditional keeping of domestic animals”. In accordance with the ordinary meaning of the term “domestic animals”, it is natural to interpret the statement to include both production animals in agriculture and other animals that are owned and bred by humans, including dogs. I therefore understand this to mean in 1996 the Ministry considered continued breeding of well-known and established dog breeds not to be in violation of the then Animal Protection Act.
- (186) Justice Østensen Berglund has referenced Report to the Storting No. 12 (2002–2003) on animal welfare. The wording on page 52, which she points out, reads:
- “In companion animals, the favouritism of certain defects or other character traits has correspondingly led to an increased risk of certain injuries and diseases. There are a number of examples of breeding that can be said to contravene the letter of the law, within both companion animals and production animals. Examples of this are discussed under the individual species.”
- (187) In other words, the Ministry states that many forms of breeding “can be said to contravene the letter of the law”. Such a wording can only imply that the Ministry found that many forms of breeding that were seemingly affected by the provision in the former Animal Protection Act were nonetheless legal. The Ministry thus points out a paradox that, to which I will return, is also found in the current Act.
- (188) My conclusion thus far is that section 5 of the Animal Protection Act 1974 did not affect continued breeding of well-known and established dog breeds.
- (189) The next question is whether section 25 of the Animal Welfare Act, whose wording is very similar to that in section 5 of the Animal Protection Act 1974, must be interpreted otherwise.
- (190) As emphasised by Justice Østensen Berglund, when the Animal Welfare Act was adopted, it was essential to establish standards for animal welfare with focus on the consideration for the animals. The question is nonetheless whether these general statements also gives a basis for interpreting section 25 of the Animal Welfare Act in a completely different manner than section 5 of the former Act when it comes to well-known and established breeding. In my view, there is nothing in the preparatory works to support that the Act was meant to entail such a change.
- (191) On the contrary, it is expressed that previously applicable law is continued. In Proposition to the Odelsting no. 15 (2008–2009), the breeding provisions in item 2.3.4 are discussed. Here, the Ministry references the consultation paper and stresses in item 2.3.4.2 that the draft subsection 2 to section 25 of the Act is “a continuation of the principles in applicable law”.
- (192) The following is set out in item 2.3.4.4 *The Ministry’s assessment and proposition*:
- “Several consultation bodies seek further clarification of what can be considered general ethical reactions and who should assess what falls under the term at any given time. In the same way as for other exercise of discretion in enforcing the Act, the responsible authorities will be the ones to assess what is covered by the term ‘general ethical reactions’. When it comes to what is to be considered to cause general ethical reactions, the perception reflected in society must be seen in the context of an expert assessment of whether the act in question involves unfavourable conditions in terms of animal welfare.”

(193) The Ministry stresses that with regard to both the criterion in section 25 subsection 2 (c) – general ethical reactions – and other exercise of discretion in the enforcement of section 25 and other provisions of the Act, the assessment must be made by *the responsible authorities*. I interpret this such that the Ministry expects that the individual application of section 25 subsection 2 primarily will be through regulations issued under section 25 subsection 4. The Ministry’s statements clearly advise against taking the provision to mean that the courts have the power, directly based on the general principle in section 25, to declare well-known and established breeding illegal.

(194) This is also supported by the Ministry’s further discussion in item 2.3.4.4 where, based on comments from certain consultation bodies, it is questioned whether the provision affects breeding of sterile fish:

“The Ministry assumes based on current knowledge that breeding of sterile fish will not be in violation of the draft provision, but points out that any control related to sterile fish can be enforced through regulations issued under the last subsection of the provision.”

(195) Sterile fish has undoubtedly had its basic physical function changed in a negative way, see the wording in section 25 subsection 2 (a) of the Animal Welfare Act. However, the Ministry stated that breeding of such fish based on the knowledge at that time was not in violation of the provision, pointing out the possibility of issuing regulations.

(196) The special remarks to section 25 are brief and provide limited clarification. Nonetheless, I have noted the following statement in the Proposition pages 111-112:

“In principle, breeding should not be intended to compensate for deficiencies in the environment or be used to adapt animals to tasks or environments in which they are not naturally suited to thrive. The possibilities for targeted breeding using both traditional and genetic engineering methods have gradually become very good. For example, furless cats and blind hens that do not peck have been bred abroad under strict terms. Such breeding will be in violation of this provision because it must be considered both to be able to affect the animal’s physical or mental functions negatively, reduce animals’ ability to behave naturally and cause general ethical reactions.”

(197) Here, the Ministry uses “furless cats” and “blind hens” as examples of breeding in violation of the provision. In my view, this clearly suggests that the intention has not been to target well-known and established breeding without a basis in regulations issued following further expert evaluation, see subsection 4.

(198) I also find solid support for my view in the preparatory works to the amendment in 2021, where breeding organisations and breed clubs entered as obligors under section 25. In Proposition to the Storting 128 L (2020–2021) the Ministry stated on page 9:

“The amendment proposal clarifies to animal keepers, breeders, breeding organisations and breed clubs that they have a responsibility to comply with section 25 of the Animal Welfare Act. The clarification of responsibility means that duties can be imposed through regulations. In the consultation paper, the Ministry wrote that there is a need for power to request that breeders draw up a breeding plan. Also, one should be able to make requirements for the content of the breeding plans, and for the manner in which the breeding plans comply with the Animal Welfare Act. The Ministry believes that the most expedient is that the Act provides a legal basis for more detailed provisions through regulations, partly because knowledge of breeding and genetics changes. The content of

possible regulations issued in accordance with the proposed amendment has not yet been clarified. At this point, such regulations have neither been discussed nor drawn up, and have therefore not been sent on consultation. The consultation bodies will have the opportunity to provide input when regulations issued under the proposed amendment have been sent on consultation.”

- (199) Here, the Ministry emphasises that the specific content of the obligations under section 25 of the Animal Welfare Act must be established through regulations issued with a legal basis in the Act. Among the reasons given is that knowledge of breeding and genetics is changing.
- (200) In my view, it would be contrary to the premises expressed as late as in connection with the amendments in 2021 if the courts, directly based on section 25 of the Animal Welfare Act, bans the breeding of the relevant dog breeds. As set out by Justice Østensen Berglund, we are dealing with well-established breeds. The health issues emphasised in the case have been known for a long time and are not much different from health issues seen in other breeds. Recent years’ development is not a deterioration. On the contrary, as Justice Østensen Berglund describes, work is actively being carried out to reduce the existing problems.
- (201) As concerns English bulldogs, Justice Østensen Berglund has concluded that continued breeding is legal. I agree, but from what I have pointed out, this conclusion could have been reached without such an extensive, individual assessment as that made by Justice Østensen Berglund.
- (202) It is also my opinion that continued breeding of Cavaliers is not in violation of section 25 of the Animal Welfare Act.
- (203) Against this background, I find in favour of NKK also when it comes to Cavaliers, and in favour of the Norwegian Cavalier Club and the Cavalier breeders. As concerns English bulldogs, I support a dismissal of the appeal. Also with my conclusion, I find that costs should not be awarded.
- (204) **Justice Thyness:** I agree with Justice Bergh in all material respects and with his conclusion.
- (205) **Justice Hellerslia:** I agree with Justice Østensen Berglund in all material respects and with her conclusion.
- (206) **Justice Bull:** Likewise
- (207) Following the voting, the Supreme Court gave this

## J U D G M E N T

1. The appeals are dismissed.
2. Costs are not awarded.