



SUPREME COURT OF NORWAY

J U D G M E N T

given on 16 May 2023 by the Supreme Court composed of

Justice Hilde Indreberg
Justice Kristin Normann
Justice Henrik Bull
Justice Ingvald Falch
Justice Knut Erik Sæther

HR-2023-936-A, (case no. 22-144944SIV-HRET)
Appeal against Borgarting Court of Appeal's judgment 6 July 2022

The State represented by
the Ministry of Climate and Environment

(The Office of the Attorney General
represented by Asgeir Nygård)

Utmarkskommunenes Sammenslutning¹ (USS)
(intervener)
The Norwegian Farmers' Union (intervener)
The Norwegian Forest Owners' Federation
(intervener)
Norskog (intervener)

(Counsel Stein Erik Stinessen)

v.

NOAH – for Animals' Rights

(Counsel Berit Svensli Solseth)

¹ TN: Association of outlying municipalities

(1) Justice **Falch:**

Issues and background

- (2) The case concerns the validity of a decision on licensed culling of wolves within the wolf zone. The main issue is whether or not culling could be decided “to safeguard ... other public interests of substantial importance”, see section 18 of the Nature Diversity Act.
- (3) The culling decision was made by the Ministry of Climate and Environment on 31 December 2019, following an appeal against decisions made by the predator committees in management regions 4 and 5. The Ministry’s decision calls for the culling of up to six wolves in the Letjenna group, in Åmot municipality in the county of Innlandet. The intention was to cull all the wolves in the group. Four wolves were culled before the hunt was called off.
- (4) In addition, the predator committees had decided on the culling of all the wolves in the Mangen and Rømskog groups, totalling up to 17 wolves in three groups. The Ministry set aside the predator committees’ decisions on culling in the two latter groups.
- (5) The non-governmental organisation NOAH – for Animals’ Rights, hereafter referred to as NOAH, brought an action against the State, requesting that the Ministry’s culling decision be ruled invalid. On 9 July 2021, Oslo District Court ruled as follows:
- “1. The decision by the Ministry of Climate and Environment of 31 December 2019 is invalid.
 2. The State represented by the Ministry of Climate and Environment will pay NOK 639,783 in costs to NOAH – for Animals’ Rights within two weeks of the service of the judgment.”
- (6) The State appealed, and on 6 July 2022, Borgarting Court of Appeal ruled as follows:
- “1. The appeal is dismissed.
 2. The State represented by the Ministry of Climate and Environment will pay NOK 1,000,000 in costs in the Court of Appeal to NOAH – for Animals’ Rights within two weeks of the service of this judgment.”
- (7) Both the District Court and the Court of Appeal ruled the culling decision invalid because the condition in section 18 subsection 1 (c) of the Nature Diversity Act – “to safeguard ... other public interests of substantial importance” – was not met. Therefore, neither the District Court nor the Court of Appeal considered NOAH’s contention that the purpose could have been achieved in another satisfactory manner, see section 18 subsection 2.
- (8) The State has appealed to the Supreme Court. The appeal challenges mainly the application of the law.
- (9) In the Supreme Court, Utmarkskommunenenes Sammenslutning (USS), the Norwegian Farmers’ Union, the Norwegian Forest Owners’ Federation and Norskog have acted as interveners in favour of the State. USS intervened also in the Court of Appeal.

The parties' contentions

- (10) The appellant – *the State represented by the Ministry of Climate and Environment* – contends:
- (11) The Court of Appeal errs in interpreting 18 subsection 1 (c) of the Nature Diversity Act to lay down a requirement that particular disadvantages or extra strains caused by the relevant wolves must be demonstrated to give a legal basis for their removal within the wolf zone. When the national population target is reached, the provision allows for removal, provided this takes place in accordance with adequate, controlled and rational population management.
- (12) The relevant decision meets these criteria. It complies with the Storting's adopted predator policy and guidelines provided in the preparatory works to the Act. This ensures predictability in the predator management, which in turn increases the public's trust and contributes to mitigation of conflict. The preservation considerations are sufficiently safeguarded when the population target is reached. This balancing of interests does not allow for strict judicial review.
- (13) The purpose of the removal cannot be achieved in any other satisfactory manner, see section 18 subsection 2 of the Nature Diversity Act.
- (14) The State asks the Supreme Court to rule as follows:
- “1. The Supreme Court finds in favour of the State represented by the Ministry of Climate and Environment.
 2. The State represented by the Ministry of Climate and Environment is awarded costs in the District Court, the Court of Appeal and the Supreme Court.”
- (15) The interveners – *USS, the Norwegian Farmers' Union, the Norwegian Forest Owners' Federation and Norskog* – endorse the State's view and emphasise in particular:
- (16) The Court of Appeal's judgment contains several errors. Among other things, the Court builds on a different criterion than what the Supreme Court did in HR-2021-662-A *wolf culling I*. The criterion is the same within and outside the wolf zone, with the only difference that the population target must be reached within the zone. The population target is the central steering tool, which provides more predictability particularly to those living and operating within the wolf zone. The Court of Appeal's interpretation of the law induces conflicts in society.
- (17) The interveners ask the Supreme Court to rule as follows:
- “1. The Supreme Court finds in favour of the State represented by the Ministry of Climate and Environment.
 2. USS is awarded costs in the Court of Appeal.
 3. USS, the Norwegian Farmers' Union, the Norwegian Forest Owners' Federation and Norskog are awarded costs in the Supreme Court.”

- (18) The respondent – *NOAH – for Animals’ Rights* – contends:
- (19) The Court of Appeal’s reasoning is correct, with a few exceptions: It is incorrect that the courts must exercise some constraint in their review, and it is incorrect that due weight must be given to the fact that the population target is reached. Although this is an important factor, it does not carry significant weight.
- (20) Section 18 subsection 1 (c) of the Nature Diversity Act prescribes a broad balancing of interests. The zone management system implies that the wolves have much stronger protection within the wolf zone than outside. The establishment of the zone is the result of a prior balancing of interests. Hence, if culling is to be executed, it requires something more, some extra strains beyond the predictable disadvantages of having wolves within the wolf zone. The preservation considerations are in practice safeguarded within the zone only. The fact that the population target is reached reduces the weight of the preservation consideration, but it is not zeroed out.
- (21) The decision demonstrates no concrete disadvantages, strains or problems connected to the wolves in the Letjenna group. It builds only on general observations related to the establishment of the wolf zone, and on mere postulates on trust and conflict mitigation. No regard has been had to the potential conflict created by the removal, which will weaken the trust in the predator management.
- (22) The purpose of the culling could in any event have been achieved in another satisfactory manner, for instance through targeted mindset work, professional knowledge dissemination or possibly with grant schemes.
- (23) NOAH asks the Supreme Court to rule as follows:
- “1. The appeal is dismissed.
 2. NOAH – for Animals’ Rights is awarded costs in the Supreme Court.”

My opinion

Section 18 subsection 1 (c) of the Nature Diversity Act

The law

- (24) According to section 15 of the Nature Diversity Act, “harvesting and other removal of animals that occur naturally in the wild shall be authorised by statute or decision pursuant to statute”. The culling decision is authorised by section 18 subsection 1 (c), see subsection 2, reading as follows:

“The King may make regulations or individual decisions permitting the removal of wildlife and salmonids and freshwater fish

...

c. to safeguard general health and safety interests or other public interests of substantial importance,

...

Decisions under the first paragraph (a) to (f) may only be made if the removal does not jeopardise the survival of the stock and the purpose cannot be achieved in any other satisfactory manner. When assessing possible removal of predators under subsection 1 (c), weight must be attributed to whether the population target determined in the Storting is reached.”

- (25) The last sentence in subsection 2 was added by an amendment in 2020, after the culling decision had been made. I will return to the significance of this.
- (26) The Supreme Court applied section 18 subsection 1 (c) in HR-2021-662-A *wolf culling I*, where the rule was described as follows in paragraphs 101 and 108:

“As I see it, the key limitation is that the public interests must be of “substantial importance”. Particularly in the light of the term “overriding” in the third indent of Article 9 (1) of the Bern Convention, a reasonable interpretation is that the public interests must be so substantial that they outweigh the preservation considerations. In other words, this is more similar to *balancing of interests*, where various public interests are considered in context – cumulated – on each side. In my opinion, the wording implies that one overall balance of all interests is required.”

“Overall, this suggests that section 18 of the Nature Diversity Act subsection 1 (c) allows for including a broad spectre of public interests. However, culling can only be decided if these interests in aggregate substantially outweigh the preservation considerations. The assessment must be concrete, but the emphasis must be placed on what the Storting referred to as district policy considerations.”

- (27) In other words, a balancing of interests must be carried out. The “district policy considerations” cover “the grazing industry, other industry, hunting, the safety of the local community and general psychosocial conditions”, see paragraph 105.
- (28) It is clear from the Supreme Court’s individual assessment of whether the condition was met in *wolf culling I* that that decision concerned wolves roaming *outside* the wolf zone. Norwegian predator management is differentiated, which means that the wolves in principle move freely only within certain delimited areas – in the wolf zone – see for instance its paragraphs 10 and 11. In paragraph 105, it is stated that, as a starting point, there is a presumption that wolves roaming outside the wolf zone may be culled under section 18 subsection 1 (c) if the national population target is met.
- (29) The question in the case at hand is whether the balancing of interests in practice becomes different when the wolves concerned roam *within* the wolf zone. In the light of the State’s contentions and the wording of the culling decision, a key sub-question is which significance should be given to the fact that the Storting’s adopted population target was reached.

The significance of that the population target is reached

- (30) It follows from section 3 of the Predator Regulations that in Norway, that the target is “four to six annual pup litters”, of which three must have taken place in groups located in their entirety in Norway. Where a part of the group’s territory lies in Sweden, a pup litter is to be included

by a factor of 0.5. According to section 4 (d) and (e), this population target must be reached in management regions 4 and 5, which under section 2 (d) constitutes the wolf zone.

- (31) The population target was decided by the Storting in connection with Report to the Storting 21 (2015–2016), see Recommendation to the Storting 330 S (2015–2016). The objective is that the wolf population “is managed to correspond as much as possible to the nationally established population target”. However, it is also specified that the wolf population “must be managed within the scopes of the Bern Convention and the Nature Diversity Act”, see the Recommendation pages 4 and 8. The actual population target interval was determined in the light of the Swedish population target and with an aim to meet the requirements in the Convention and the Act, see the Storting Report pages 109–116. On page 8 of the Recommendation, the majority of the Parliamentary Committee accounts for the principles on which the Norwegian wolf management is based:

“The majority stresses that we must preserve the wolf in Norwegian nature, and the wolf has an intrinsic value like other natural diversity. The majority notes that the wolf is a listed species in Norway, it is scarce and classified as critically endangered in the 2015 Red List of the Norwegian Species Databank. The majority finds that the wolf management must not prevent active use of the resources on uncultivated land and thriving local communities, and that Norway takes an independent partial responsibility to ensure a viable Scandinavian wolf population within Norway’s borders. The majority acknowledges that living close to predators may be burdensome to both individuals and the local community.

The majority stresses that the management of the wolf tribe must strive to create trust and respect in people and seek to mitigate the level of conflict.”

- (32) The stipulated population target therefore builds on a general *balancing of interests* between the preservation interests on the one side and various other public interests on the other. Overall, this balancing is rather similar to that prescribed in section 18 subsection 1 (c) of the Nature Diversity Act.

- (33) In Recommendation to the Storting 257 L (2016–2017) page 10, which is emphasised in *wolf culling I* paragraph 106 in line with preparatory works to the Act, it is set out that the balancing of interests under section 18 subsection 1 (c) “must be of a dynamic nature”. Then the Parliamentary Committee states:

“According to the majority, this means that in periods where the population exceeds the population target, the threshold must be lowered in order to meet the conditions for culling for public interests purposes. The majority emphasises that the authorities must, when deciding on removal, show how the balancing of interests is carried out and that it is rationally justified.”

- (34) I believe that this conforms to how section 18 subsection 1 (c) must be applied. When the wolf population exceeds the population target, the preservation considerations are weaker than they otherwise would have been. For the balancing of interests this has the effect that the requirements for other public interests are lowered. However, I emphasise that there is still a threshold. The culling condition is not met solely because the population target is reached.
- (35) One consequence of the differentiated wolf management in Norway is that the preservation considerations must be met primarily within the wolf zone. The preservation considerations

cover in this respect the purpose of protecting biological diversity in section 1 of the Nature Diversity Act, the management objective in section 5 and the precautionary principle in section 9. In the said Recommendation to the Storting 257 L (2016–2017) page 10 a different Parliamentary Committee majority expresses that “the wolf must be more protected within the wolf zone than on the outside”, however not to the extent that it prevents settlement and ordinary commercial and recreational activities within the zone.

- (36) This implies that when applying section 18 subsection 1 (c), it is essential whether or not the population target is reached. The addition to section 18 subsection 2 in 2020 – that “weight must be attributed to whether” the population target is reached – is thus merely an assertion and clarification of what already applied.
- (37) The State contends, particularly with a reference to the proponents’ reasoning in Representative Proposition 67 L (2019–2020) that the supplement to the Nature Diversity Act clarifies that *significant* weight must be given to whether or not the population target is reached. That is not how I read the supplement.
- (38) The Proposition did not have the majority’s support in Recommendation to the Storting 297 L (2019–2020). However, this changed in the parliamentary debate, when the governing parties endorsed it. The reason was, as formulated by the representative of the Conservative Party speaking on behalf of the governing parties, that the supplement “will be largely in line with current practice, but is nonetheless an important clarification, which should be included in the Act”, see the discussion of Case no. 10 of 3 June 2020 in St.tid no. 89 (2019–2020) page 4024. Another aspect is that the weight of the population target being reached may vary and in practice become substantial when the target is reached with a good margin over time.

Summary of the norm

- (39) Also when it comes to culling of wolves within the wolf zone, section 18 subsection 1 (c) of the Nature Diversity Act requires a balancing of interests as described in *wolf culling I* paragraphs 101 and 108.
- (40) The population target is based on a general balancing of relevant interests that, when the target is reached, lowers the threshold for culling. Therefore, the natural starting point would be whether or not the target is reached, and if so to which extent. However, an individual assessment must in any event be made based on an updated factual basis. This implies that the decision-making authority – also when the population target is reached – must identify the public interests in favour of culling before striking a balance against the relevant preservation considerations.
- (41) As mentioned, it is set out in *wolf culling I* paragraph 105 that outside the wolf zone, as a starting point, there is a presumption that wolves roaming outside the wolf zone may be removed if the population target is reached. In the light of what I have said, I cannot see that the same presumption is applicable within the wolf zone, since the wolves have stronger protection within the zone than on the outside. Within the zone, the individual circumstances in each case will be decisive to a larger extent.

Individual assessment

- (42) The Ministry asserts in its culling decision that the population target *was reached* in the preceding year: In 2018/2019, eight pup litters were registered, five of which in groups located in their entirety in Norway, and in six groups partially also located in Sweden. In 2017/2018, the total number was 10.5 pup litters, in 2016/2017 there were 7.5 pup litters and in 2015/2016, there were nine. In all of the four last years prior to the decision, the population target of four to six annual pup litters, at least three of which in wholly Norwegian groups, was therefore reached by a relatively large margin.
- (43) This implies that the threshold for culling in section 18 subsection 1 (c) of the Nature Diversity Act had been lowered. The fact that the margin to the population target over time had been relatively large implies that the preservation considerations were relatively weak. However, this is corrected by the fact that the population “was characterised by inbreeding and ... challenges related to illegal hunting”. The Ministry therefore followed the Environment Agency’s advice to manage the wolf population “in the upper part of the national interval target”.
- (44) The Ministry then analyses the likelihood of the population target being reached in *the years to come*, provided that the Letjenna, Mangen and Rømskog groups are all removed, as decided by the predator committees. Here, the Ministry endorses the Environment Agency’s assessment that sufficient pup litters “most likely” would be born, so that the population target would also be reached in 2019/2020. It is also stated that the Letjenna group did not include genetically important individuals. NOAH has not contested these assessments.
- (45) Next, the Ministry analyses the “other public interests” – *district policy considerations* – in favour of culling of the wolves in the Letjenna group. The conclusion is that consideration for the grazing industry, hunting and the safety of the local community and psychosocial conditions has limited, but generally “some” weight.
- (46) NOAH has objected that these interests are described in general terms only, without pointing out any special features related to the Letjenna group. According to NOAH, the interests are none other than those following from the fact that a wolf zone is established.
- (47) I agree that, on this point, the decision refers to rather general conditions. However, in the light of the lowered threshold for culling due to the population target being reached over time by a relatively large margin, and the likelihood that the population target would also be reached after the culling of the Letjenna wolves, I consider these district policy considerations relevant in the balancing of interests.
- (48) In its final assessment, the Ministry addresses the consideration of *conflict mitigation and trust*. The Ministry notes that the disadvantages of wolves in the Letjenna group “are amplified by the fact that the group has been stable for a long time, with a relatively high number of animals”, which “contributes to upholding the conflict in the predator management”.
- (49) To this, NOAH has objected that stable packs create predictable usage of and behaviour in the area, and that new wolves tend put the territory into use after culling. However, such special features and effects are uncertain. Also, stable groups may over time be perceived as

burdensome at a local level, which means that the Ministry's view in any event must have weight in a conflict mitigation perspective.

(50) Finally, the Ministry states:

“The Ministry finds that the level of conflict related to the wolf population in Norway over some years has been so substantial that reducing it must be considered a significant national interest that is covered by district policy considerations. Reducing the wolf population when the population target has been reached over some years, will, in the Ministry's assessment, contribute to conflict mitigation and thus safeguard district policy interests, and contribute to maintaining the trust in the predator management.”

- (51) NOAH has not contested that the level of conflict had been high before the relevant decision was made, but contends that culling of the wolves will not reduce it – on the contrary, it will increase the conflict for some people. However, I have no reason to doubt that the balancing of interests on which the culling decision is based, and which is in line with the Storting's adopted conditions, increases predictability in the predatory management and, overall, has a conflict-mitigating effect.
- (52) I consider it nonetheless a weakness that the Ministry in its decision fails to identify and balance more clearly the relevant preservation considerations. However, it sets out that the removal did not concern genetically important individuals, and that preservation considerations were decisive for the decision not to cull also the Møgen and Rømskog groups. I also mention that in the part of the decision discussing the survival of the populations, it appears and account is taken of the facts that the wolf is an endangered species in Scandinavia, and that the Norwegian partial population is listed as critically endangered. Furthermore, the knowledge base for the contested decision appears solid. I therefore read the decision, in reality, to be based on a balancing between the preservation considerations and the said public interests.
- (53) As set out in *wolf culling I* paragraph 115, the interests that are balanced are of very different characters. Therefore, “pointing out the overriding one will ultimately depend on an assessment”.
- (54) Overall, in the light of the specific situation, there is no basis for discarding the balancing of interests made by the Ministry in its decision. The condition in section 18 subsection 1 (c) of the Nature Diversity Act was therefore met.

Section 18 subsection 2 of the Nature Diversity Act

- (55) Section 18 subsection 2 of the Nature Diversity Act requires that “the purpose cannot be achieved in any other satisfactory manner”.
- (56) In my opinion, it must be clear that the purpose of safeguarding the public interests justifying that the condition in section 18 subsection 1 (c) is met, cannot be reached in any other satisfactory manner than by culling the wolves in the group. The broad balancing of interests already carried out has included the fact that culling is a suitable means to satisfy the relevant public interests.

- (57) In its culling decision, the Ministry discusses whether the relevant disadvantages can be remedied through alternative measures, such as information, knowledge dissemination, precautionary measures and financial subsidy arrangements. In the Ministry's view, such measures may neither remedy the disadvantages nor mitigate the level of conflict. I do not object to this assessment.
- (58) This condition in section 18 of the Nature Diversity Act subsection 2 first sentence was therefore met.

Conclusion and costs

- (59) The State's appeal has succeeded. The Supreme Court must therefore find in favour of the State.
- (60) The State and the interveners are in principle entitled to have their costs compensated, see section 20-2 subsection 1 of the Dispute Act. However, I find that there are strong reasons for exempting NOAH from liability for costs in all instances, see section 20-2 subsection 3.
- (61) In this case, the relative strength between the parties suggests it. NOAH is a non-profit organisation. The case has raised issues of principle that have previously not been clarified. The clarification will benefit the State and the interveners in at least the same extent as it benefits NOAH.
- (62) I vote for this

J U D G M E N T :

1. The Supreme Court finds in favour of the State represented by the Ministry of Climate and Environment.
2. Costs are not awarded in any instance.

- (63) Justice **Normann:** I agree with Justice Falch in all material respects and with his conclusion.
- (64) Justice **Bull:** Likewise.
- (65) Justice **Sæther:** Likewise.
- (66) Justice **Indreberg:** Likewise.

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

J U D G M E N T :

1. The Supreme Court finds in favour of the State represented by the Ministry of Climate and Environment.
2. Costs are not awarded in any instance.