SUPREME COURT OF NORWAY

On 4 March 2011, the Supreme Court gave judgment in

HR-2011-00476-A, case no. 2010/1716, civil case, appeal against judgment

Roger Frøholm (Counsel Anders Ryssdal)

v.

The Norwegian State, represented by the
Ministry of Agriculture and Food (The Attorney General/Erik Bratterud)

J U D G M E N T :

(1) Justice **Skoghøy**: The case before us concerns the validity of a decision of the Sogn & Fjordane County Board of Agriculture to reject an application for a concession to purchase an agricultural freehold property in circumstances where the concession obligation had been imposed as a consequence of breach of the statutory residence obligation attached to the property. The main reason why the application was rejected was that the purchaser did not intend to take up residence at the property.

(2) In 2004, the property with cadastral unit no. 91, property unit no. 1 in the municipality of Stryn in the county of Sogn & Fjordane was transferred to Roger Frøholm, who was born in 1965, from his father. The property is located in the village of Olden and his been in the ownership of the Frøholm family for many years. Frøholm has never actually lived at the property, but has spent many of his holidays there, both in his youth and in later years.

(3) The property covers a total area of 1590 acres. 330 acres of this are farmland and 1130 acres are productive forests. There has been some disagreement about what percentage of the farmland is crop land and what percentage is grazing land. The property includes a farmhouse and a barn that was built in the 1950s. Since 2003, the cultivated land has been rented out on a 10-year lease to a neighbour.

(4) Frøholm is married and has two children, who are 16 and 10 years old, and he lives in the town centre of Stryn. The distance between the property in Olden and Stryn town centre is approximately 20 km. Frøholm is a former car mechanic, but he has left this trade for health reasons. He now runs a bookshop owned by his wife. He is currently occupationally

disabled. Frøholm does not wish to move to the property in Olden permanently but wishes to use it as a holiday home.

(5) When the property was transferred to Frøholm in 2004, no concession was required. However, assuming that the property qualified as allodial land, a concession was not necessary only on condition that the property would be used as an all-year-round residence, see the Allodial Rights Act section 1 and section 2, cf. section 27 (2) and the Concession Act section 5 (1) no. 1 and 2, cf. section 5 (2), as these provisions were worded before a statutory amendment in 2009. The time limit for taking up residence at the property was 12 months from the date of the transfer. When the 12-month time limit expired, Frøholm applied for a five-year postponement pursuant to section 27a (1) of the Allodial Rights Act, as the provision was worded prior to the statutory amendment referred to above. The Municipal Council of Stryn rejected the application on 23 February 2005 and, at the same time, fixed a new time limit for taking up residence at the property to 1 January 2006.

(6) Frøholm appealed against the Municipal Council's rejection to the Sogn & Fjordane County Board of Agriculture. However, he withdrew the appeal after it was filed on the grounds that the property was not subject to a residence obligation because it did not have sufficient agricultural resources to justify such a residence obligation.

(7) When Frøholm did not take up residence at the property by 1 January 2006, the local authority addressed the question whether Frøholm had a residence obligation. On 31 January 2001, the Municipal Council of Stryn decided that thje size of the agricultural resources at the property brought it within the scope of the provisions of the Allodial Rights Act, which imposed an obligation to reside at the property and to operate it as a farm, and that Frøholm was in fundamental breach of the residence obligation. Consequently, Frøholm was ordered to apply for a concession. Frøholm appealed against this decision to the County Board of Agriculture. The County Board of Agriculture rejected the appeal on 16 August 2007.

(8) On 20 September 2007, Frøholm applied for a concession with a dispensation from the residence obligation. On 5 March 2008, a majority of the Stryn Municipal Council rejected the application with five votes against two. Frøholm was given a deadline until 1 June 2008 to transfer the property to someone who would satisfy the requirements for a concession or who did not need a concession. Frøholm appealed this decision to the County Board of Agriculture, but the appeal was rejected with five votes against two on 25 August 2008. At the same time, Frøholm was given a deadline until 1 March 2009 to transfer the property to someone who would satisfy the requirements for, or did not need, a concession.

(9) On 27 February 2009, Frøholm filed legal proceedings at the Fjordane District Court against the Norwegian state, represented by the Ministry of Agriculture and Food, challenging the validity of the County Board of Agriculture's decision dated 25 August 2008. Frøholm's principal argument was that the property did not satisfy the requirements for allodial land laid down in the Allodial Rights Act sections 1 and 2, and that a residence obligation could therefore not be imposed on him. In the alternative, he argued that the decision was invalid because the County Board had not properly considered and weighed up all of the relevant considerations. He also alleged that there were procedural errors and unjustified discrimination.

(10) On 19 October 2009, the Fjordane District Court gave judgment with the following ruling:

> **"1. Judgment is given in favour of the Norwegian state, represented by the Ministry of Agriculture and Food.**
>
> **2. Roger Frøholm is ordered to pay NOK 47 766 – fortyseventhousandseven-hundredandsixtysix – in legal costs to the Norwegian state, represented by the Ministry of Agriculture and Food, within 2 – two –weeks, together with interest pursuant to the Interest on Overdue Payments Act section 3 (1) from the due date until payment is made."**

(11) Frøholm appealed to the Gulating Court of Appeal, which gave judgment with the following ruling on 3 September 2010:

> **"1. The appeal is dismissed.**
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> **2. Roger Frøholm is ordered to pay NOK 50 775 – fiftythousandsevenhundredand-seventyfive - in legal costs to the Norwegian state, represented by the Ministry of Agriculture and Food, for the proceedings before the Court of Appeal, within 2 – two – weeks of the date of service of this judgment."**

(12) Frøholm has appealed the judgment of the Court of Appeal to the Supreme Court. He has appealed against the Court of Appeal's assessment of evidence and application of the law. In addition, Frøholm alleged that one of the members of the County Agricultural Board was incompetent on the grounds of partiality. On 30 November 2010, the Appeal Committee of the Supreme Court granted leave to appeal in so far as the appeal concerns the application of the law. In all other respects, leave to appeal was rejected.

(13) Before the Supreme Court, Frøholm has waived some of his earlier arguments, whilst other arguments have been elaborated on. A new legal argument put forward by Frøholm is that the residence obligation imposed on him is in violation of Norway's human rights obligations, and that the decision not to grant him a concession is also invalid pursuant to general principles of Norwegian law because it does not satisfy the guidelines in the former section 27 (a) (2) of the Allodial Rights Act and general principles of proportionality.

(14) Frøholm and his wife submitted written testimony to the Supreme Court. During the proceedings before the Court of Appeal, they gave oral testimony. Some new documentary evidence has been submitted before the Supreme Court, but this evidence does not contain new facts of any substance. On the whole, the facts of the case before the Supreme Court are the same as in the proceedings before the lower courts.

(15) In brief, the appellant, Roger Frøholm, has argued as follows:

(16) The decision to impose a residence obligation on Frøholm violates several of the provisions of international human rights treaties which, pursuant to section 2 cf. section 3 of the Human Rights Act, apply as Norwegian law and have priority over other legislation. The courts have full power to review whether there is a breach of human rights, including the power to review whether the decision was proportional in view of what is necessary in a democratic society.

(17) Firstly, the residence obligation violates Articles 6, 7 and 11 of the International Covenant on Economic, Social and Cultural Rights (CESCR). These provisions protect the right of the individual to make a living by work which he freely chooses or accepts, the right to a minimum fair wage and the right to an adequate standard of living. The residence obligation requires him to give up his present occupation as a bookseller. The farmhouse does not satisfy adequate living standards. As an agricultural property, it is most suited for sheep

farming. However, the agricultural resources of the property are so limited that it would not be possible to make a profit of more that about NOK 15,000 to NOK 20,000 per annum. In order to make this kind of profit, it would be necessary to work about 600 hours, which means that the hourly pay would be NOK 33.34. This is far below the minimum wage for farm work; see the Regulations on general application of wage agreements for agricultural and horticultural industries dated 20 September 2010 no. 1739. In the appellant's view, the rights embodied in Articles 6, 7 and 11 of the CESCR are sufficiently specific to be enforceable through legal proceedings before the courts.

(18) Secondly, an obligation on Frøholm to take up residence at the property violates Article 8 of the European Convention on Human Rights (ECHR) and Articles 17 and 23 of the International Covenant on Civil and Political Rights (ICCPR). Rules that decide where a person shall live interfere with the right to privacy, family life and home. According to the case law of the European Court of Human Rights (ECtHR), interference with these rights must be accompanied by adequate procedural legal safeguard. Personal circumstances must be considered and the interference must be proportionate. Frøholm has poor health, which prevents him from working on the farm. His children have special needs so that a move is inadvisable. If the family is required to move, and Frøholm would lose their livelihood, namely the bookshop in the town centre of Stryn. In other words, there is a lack of proportionality between the purpose of the residence obligation and the inconvenience imposed on Frøholm by the County Board's decision. The margin of discretion granted to national courts and administrative authorities by the ECtHR does not apply between national courts and the government administration. Furthermore, the administrative proceedings that have taken place have not taken into consideration Frøholm's personal circumstances and the special needs of his family. The state cannot in any event invoke a margin of discretion when the particular circumstances of the case have not been considered.

(19) Thirdly, the residence obligation violates Article 2 of Protocol No. 4 ECHR and ICCPR Article 12. These provisions guarantee the freedom of an individual to choose his or her residence. In a judgment dated 25 January 2007 in case no. C-370/05 (the Festersen case), the European Court has held that the Danish residence obligation interferes with the right of the individual to choose his or her place of residence pursuant to Article 2(1) of Protocol No. 4 ECHR. The residence obligation that is imposed on Frøholm must be viewed in the same light. There are no sufficiently weighty and legitimate reasons to justify imposing a residence obligation, and the obligation must therefore be set aside because it violates the said treaty provisions.

(20) Fourthly, the decision of the County Board violates ICCPR Article 24 and Articles 3, 5, 9, 16 and 27 of the UN Convention on the Rights of the Child. These treaties also impose on member states substantive obligations that are capable of enforcement through the courts. In order to comply with the residence obligation, Frøholm's children must move from their local environment and change schools. Taking up residence at the farmhouse, which is of very low standard, will have serious health implications for one of Frøholm's sons. These matters were not considered by the administrative authorities or the lower courts.

(21) Not only does the residence obligation imposed on Frøholm by the County Board violate international human rights conventions, it also violates general principles of Norwegian law. A condition for imposing a residence obligation is that the property qualifies as allodial land pursuant to the Allodial Rights Act sections 1 and 2, cf. the Concession Act section 5 (2), as these provisions were worded prior to the statutory amendment in 2009. The property has not been run as a farm since 1988. An operating profit of between NOK 15,000 and NOK

20,000 per annum is so little that it cannot be said to provide "a significant contribution to the maintenance of the family". This was a condition for a property to qualify as allodial land pursuant to the Allodial Rights Act section 1 ("used for agriculture"), as the provision was worded prior to the statutory amendment, see the case reported in Rt-1998-450. Since the property does not satisfy the conditions for allodial land, the County Board of Agriculture did not have the power to impose a residence obligation, see also the Concession Act section 5 (2).

(22) In any event, the County Board of Agriculture's decision is invalid because it does not satisfy the requirement of proportionality that applies to all administrative decisions. Prior to the statutory amendment in 2009, the Allodial Rights Act section 27 a (2) contained guidelines for the exercise of discretion when granting dispensation from the residence obligation. Certain circumstances were required to be given "special emphasis", whilst others should be taken account of in the total evaluation. The total evaluation undertaken by the County Board of Agriculture does not follow these guidelines. The courts are competent to review whether all relevant considerations have been considered and given the relevant weight required by statute.

(23) Roger Frøholm has entered the following plea:

> **"1. The decision of the County Board of Agriculture dated 25 August 2009 concerning the property with cadastral unit no. 91 and property unit no. 1 in the Municipality of Stryn is invalid.**
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> **2. The Norwegian state, represented by the Ministry of Agriculture and Food shall be ordered to pay Roger Frøholm's legal costs for proceedings before the District Court and Court of Appeal.**
>
> **3. Legal costs for proceedings before the Supreme Court shall be paid by the Treasury."**

(24) In brief, the respondent, the Norwegian state, represented by the Ministry of Agriculture and Food, has argued as follows:

(25) The conflicting interests in the case are Frøholm's interest in retaining the agricultural property without restrictions so that he can use it as a holiday home, and the public interest in sustaining settlement in rural areas, ensuring good utilization of natural resources and preserving the environment and cultural landscape. Frøholm has three choices: (1) he can sell the property, (2) he can keep it but sell the agricultural land, or (3) he can keep the property and live there for five years. The County Board of Agriculture's decision does not mean that Frøholm has to run the farm himself. He can rent out the agricultural land, as he has done already. The disadvantages that Frøholm has referred to are therefore a consequence of the choices he has made.

(26) The property satisfies the land requirements that were laid down in section 2 of the Allodial Rights Act before the statutory amendment in 2009. The relevant question is whether the property can be "used for agriculture", as this term was used in the Allodial Rights Act section 1 prior to the statutory amendment in 2009. The two fundamental conditions laid down in case law were that the property must be naturally suitable for agriculture, and that it must be realistic that someone would be interested in operating the property as an agricultural property with a view to making an economic gain for his or her labours, see the case reported in Rt-2001-561 at page 566 with references to earlier case law. There were no conditions regarding a particular profit, but the operation had to give a significant

contribution to the maintenance of the family. This condition had to be assessed objectively, without taking account of the particular acquirer's personal circumstances. The property in the present case is located in a traditionally agricultural area. The calculations made indicate that it would produce an operating profit of between NOK 15,000 and NOK 20,000 per annum. According to existing case law, this is sufficient to satisfy the requirement in the former section 1 of the Allodial rights Act.

(27) Apart from the requirements inherent in the general doctrine of abuse of authority, there is no general requirement of proportionality in Norwegian administrative law. The courts can review whether the administrative authorities have considered and given weight to the relevant considerations pursuant to the Concession Act sections 2 and 9, but they cannot review the exercise of discretion itself. The County Board of Agriculture has weighed the relevant considerations against each other - including circumstances related to Frøholm's personal situation - but has found that the public considerations must carry more weight. The County Board's decision is not particularly onerous for Frøholm, and the County Board was therefore not under a strict obligation to give reasons for its decision.

(28) The County Board of Agriculture's decision does not oblige Frøholm to move to the property; it obliges him to sell. Whether Frøholm takes up residence at the property depends on his own choice. The decision cannot therefore be construed as an interference with the freedom of the individual to choose his or her own place of residence, which is guaranteed in Article 2 of Protocol No. 4 ECHR and ICCPR Article 12. The decision only limits Frøholm's right to acquire an agricultural property and to use it as a holiday home.

(29) The purpose of Article 2 of Protocol No. 4 ECHR and ICCPR Article 12 is to protect liberty of movement, which is a prerequisite for personal freedom and development. The case law of the convention bodies demonstrates that the threshold for finding that there has been a violation of these provisions is high. The decision of the European Court of Justice in the Festersen case is irrelevant. The European Court used Article 2 of Protocol No. 4 ECHR as a supporting argument in its consideration of Article 56 EC. The decision cannot be understood to mean that the imposition of a residence obligation as a condition for acquisition of an agricultural property interferes with the right of the individual to choose his or her own place of residence pursuant to the ECHR.

(30) Even if the decision of the County Board of Agricultures does interfere with the right of the individual to choose his or her own place of residence pursuant to Article 2 of Protocol No. 4 ECHR, the interference is justified and not disproportionate. The margin of discretion granted to member states in this kind of evaluation is wide. When national courts review the application of the ECHR, they can allow the legislative and executive powers a corresponding margin of discretion; see the case reported in Rt-2004-1737 paragraph 75. The public interests which the decision of the County Board of Agriculture seeks to safeguard are legitimate and sufficiently important to outweigh the interests of Frøholm and his family. The procedural guarantees granted to Frøholm have also been adequate.

(31) The County Board of Agriculture's decision does also not interfere with the right to respect for private life, family or home pursuant to ECHR Article 8 or ICCPR Articles 17 and 23. Frøholm's home is in Stryn, and the decision does not interfere with his right or opportunity to remain there. If he moves to the property in Olden, it is a result of his own free choice. In any event, the decision is legitimately justified and proportionate.

(32) Similarly, the decision does not violate CESCR Article 6, 7 or 11. These provisions do not provide individually enforceable rights. In any event, the County Board of Agriculture's decision does not require Frøholm to work on the property. The obligation to run the property can be satisfied by renting out the land to someone else. The provisions in collective bargaining agreements regarding minimum wage in agriculture do not prohibit the owner of an agricultural property from working for a lower wage.

(33) The provisions of the Convention on the Rights of the Child do not affect the validity of the decision either. Article 3 of the Convention applies to actions "concerning children". In order for this to be the case, there must be a reasonable proximity between the decision and the child's situation. In this case, the parents' choice will determine what happens to the children. In any event, the interests of a child are only "a primary consideration". Other considerations may be determinative - and that must be so in the present case. Moreover, the decision cannot be deemed as intrusive to his children as Frøholm submits.

(34) The Norwegian state has entered the following plea:

> **"1. The appeal shall be dismissed.**
>
> **2. The Norwegian state, represented by the Ministry of Agriculture and Food shall be awarded legal costs for the proceedings before the Supreme Court."**

(35) My view of the case is as follows:

(36) The Concession Act section 2 provides that a concession is necessary for the acquisition of real property in Norway unless there is legal authority for a dispensation. Pursuant to the Concession Act section 5 (1) nos. 1 and 2, a concession is not necessary where the acquirer is related to the former owner in a certain way or has an allodial entitlement to the property. If the property is developed with buildings, and more than 250 acres of the area is "fully cultivated or surface cultivated land", or more than 5,000 acres of the area is "productive forest land", dispensation from the concession requirement is conditional upon the acquirer taking up residence on the property within one year and operating it himself for a minimum of five years, see the Concession Act section 5 (2). The land area limits that apply to the residence obligation correspond to the land area limits that apply for allodial land pursuant to section 2 of the Allodial Rights Act.

(37) The conditions for land to qualify as allodial land and the conditions for the residence obligation were amended by Act of 19 June 2009 no. 98. Before the statutory amendment, a fundamental condition for a property to be deemed allodial land was that it could be "used for agriculture". In addition, the "agricultural area" had to measure at least 200 acres, or the productive forest area had to measure at least 1,000 acres and have a productive value equivalent to 200 acres of agricultural land, see the Allodial Rights Act sections 1 and 2. The statutory amendment abolished the requirement that the property could be used for agriculture and adjusted the land area measurement limits.

(38) The term "agricultural land" in the Allodial Rights Act section 2 prior to the statutory amendment in 2009 included not only fully cultivated and surface cultivated land, but also fertilized grazing land. Fertilized grazing land falls outside the scope of "fully cultivated or surface cultivated land" in the Allodial Rights Act section 2 and the Concession Act section 5 (2) following the statutory amendment, see Ot.prp.no.44 (2008-2009) concerning an Act to amend the Allodial Rights Act, the Concession Act and the Land Act at page 116.

(39) Before the statutory amendment in 2009, the Allodial Rights Act section 27 a (1) contained a power to grant a dispensation from the residence obligation to a person with an allodial entitlement. Section 27 a (2) listed the matters that could be taken into account when exercising the discretion to grant a dispensation, and how the various matters should be weighed against each other. If an acquirer of property with allodial rights failed to comply with the residence obligation, the Allodial Rights Act section 29 (2) provided that the Ministry could fix a deadline for him to apply for a concession.

(40) The statutory amendment in 2009 abolished the power to grant a dispensation from the residence obligation to a person with allodial rights. Instead, the Concession Act section 13 (3) no. 4 now provides that the King in Council can fix a deadline for the acquirer to apply for a concession. However, the matters to be assessed in an application for a concession which arises as a result of breach of the residence obligation are different to the matters to be assessed in other cases where a concession requirement applies, see the Concession Act (4).

(41) The changes made by the statutory amendment in 2009 in the conditions for land to be deemed to be allodial land and in the conditions for the residence obligation entered into force on 1 July 2009, see Royal Decree dated 19 June 2009 no. 815. Pursuant to the transitional provisions of the statutory amendment, any breach of the residence obligation which took place before the new statutory provisions entered into force shall be dealt with pursuant to the new provisions, see paragraph IX (2) no. 10 of the statutory amendment and Ot.prp.no.44 (2008-2009) at page 111. However, the validity of an administrative decision made before the statutory amendment entered into force must be determined pursuant to the statutory provisions in force at the time the administrative decision was made. The validity of the decision of the Sogn & Fjordane County Board of Agriculture dated 25 August 2008 to reject Roger Frøholm's application for a concession must therefore be determined pursuant to the rules in force prior to the statutory amendment of 2009.

(42) As mentioned in my description of the facts above, Frøholm acquired the property with cadastral unit no. 91, property unit no. 1 in the Municipality of Stryn from his father in 2004. It is clear and undisputed that Frøholm has an allodial entitlement to the property if it qualifies as allodial land. The reason why he has been ordered to apply for a concession is that he has not satisfied the residence obligation which applied pursuant to the Allodial Rights Act section 27 (2) before the statutory amendment of 2009.

(43) I will deal with the question whether the property satisfies the former conditions for allodial land first.

(44) The Appeals Committee of the Supreme Court decided on 30 November 2010 to grant leave to appeal only in so far as Frøholm's appeal relates to the Court of Appeal's application of the law. The Court of Appeal found that the property comprises 330 acres of agricultural land. The land area conditions in the Allodial Rights Act section 2 prior to the statutory amendment of 2009 are therefore satisfied. The matter in dispute is whether the former condition in the Allodial Rights Act section 1, which provided that the property must be capable of being "used for agriculture" is satisfied. The Supreme Court has deliberated and elaborated on this condition in the cases reported in Rt-1987-1231 (Hjelmeland), Rt-1998-450 (Vesterøya), Rt-2000-1634 (Store Døvik), Rt-2001-561 (Nordtveiten), Rt-2002-112 (Gisløys) and Rt-2007-552 (Lid). The conditions laid down in these cases are that the natural conditions for farming on the property must be present, and that - based on the prevailing conditions or in the longer term – it must be likely that someone will be interested in acquiring the property to run it as a farm. Although it is not possible to lay down a

requirement that the operation of the property as a farm will provide a specific minimum return, it must be able to provide a contribution of importance to a family's subsistence.

(45) The property in question in the present case is located in a traditionally agricultural area where there are farms in operation today. It is most suited for sheep farming. The Court of Appeal held that it is possible to keep 30 sheep during the winter on the property, and that a realistic operating profit is between NOK 15,000 and NOK 20,000. The property is thus on the borderline of what can be considered an agricultural property pursuant to the former conditions in the Allodial Rights Act section 1. However, especially in view of the fact that the property is located in an area where agriculture is run, I find that this condition is met.

(46) The next question I will consider is whether the County Board of Agriculture's decision is invalid because it violates international human rights conventions.

(47) I find without doubt that the decision of the County Board of Agriculture to reject the application for a concession does not interfere with the rights protected by CESCR Articles 6, 7 and 11 – the right to work, the right to a minimum fair wage and the right to an adequate standard of living. These provisions are in substance very vague, and it is questionable to what extent they grant rights that are enforceable by legal action before the courts. However, I find it unnecessary to go into this. It is up to Frøholm if he wants to acquire the property with cadastral unit no. 91, property unit no. 1 in the Municipality of Stryn, and if he acquires the property, he is not obliged to run it personally. I cannot see that there is any basis for asserting that the right to work, the right to good working conditions and an adequate standard of living are violated if Frøholm is not granted a concession to acquire the property without having to reside there.

(48) Nor does the decision of the County Board of Agriculture, in my opinion, interfere with Frøholm's right freely to choose his place of residence pursuant to Article 2 of Protocol No. 4 ECHR and ICCPR Article 12. The decision does not force Frøholm to move. It only implies that Frøholm cannot acquire the property without having to settle on it and live there for five years. Frøholm does not live and has never lived on the property, and it is up to him whether he wants to acquire it. On this basis, the requirement that he must settle on the property in order to acquire it cannot be seen as an interference with the right freely to choose his place of residence. It is therefore not necessary to consider whether the residence obligation that has been imposed on Frøholm would have been proportional and necessary in a democratic society if it had constituted an interference.

(49) Frøholm has relied heavily on the ruling of the European Court of Justice dated 25 January 2007 in case no. C-370/05 (the Festersen case). In this case, the European Court held that Danish legislation which contains a residence obligation for agricultural properties is in breach of Article 56 EC on the free movement of capital.

In its ruling, the European Court stated (at paragraphs 36 and 37):

> **"Article 6(2) EU states that 'the Union shall respect fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, as general principles of Community law' (Case C-540/03 Parliament v Council [2006] ECR I-0000, paragraph 36).**
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> **Given that the residence requirement thus adversely affects a fundamental right guaranteed by the ECHR, it therefore turns out to be particularly restrictive. The question thus arises whether other measures less restrictive than that requirement could have been adopted."**

(50) The European Court referred in its evaluation in relation to Article 56 EC on the right of the individual pursuant to Article 2 of Protocol No. 4 ECHR freely to choose his or her place of residence. The European Court stated that legal provisions which impose a residence obligation "restrict" the right of individuals to choose their place of residence. However, there is in my view no basis on which to interpret the judgment of the European Court of Justice as meaning that the imposition of a residence requirement as a condition to acquire real property represents an interference with that right. I therefore find it unnecessary to consider the weight to be attached to a ruling of the European Court of Justice when interpreting the ECHR.

(51) According to ECHR Article 8, everyone has the right to respect for his private and family life, his home and his correspondence. Similar provisions are found in ICCPR Article 17 and Article 23. For the same reasons as the imposition of a residence requirements as a condition to acquire real property cannot be construed as an interference with the right freely to choose one's place of residence, the conditions cannot be seen as an interference with the right to respect for private life, family and home. There is therefore no cause to consider whether the residence obligation imposed on Frøholm would have been proportionate and necessary in a democratic society if it had constituted an interference.

(52) Frøholm has also invoked Articles 3, 5, 9, 16 and 27 of the UN Convention on the Rights of the Child. These provisions require member states to protect the interests of the child in various situations. The most binding of these provisions is Article 3, which states: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

(53) What is in the best interests of the children is not entirely clear, but I do not find it necessary to consider the matter further. In my view, the decisive issue is that the County Board of Agriculture has not compelled Frøholm to move to Olden. He can choose to sell the property that he has acquired there and continue to live in Stryn. To the extent that Frøholm's children are affected by the County Board of Agriculture's decision, it will be a consequence of the choice their parents make. In these circumstances, I cannot see that the Convention on the Rights of the Child prohibits the imposition of a residence obligation as a condition to acquire the property.

(54) I turn now to the question whether the decision is invalid pursuant to general principles of Norwegian administrative law.

(55) According to general principles of Norwegian administrative law, the administrative decision may be declared invalid on the grounds that the body that made the decision did not have jurisdiction to make it, or that the decision was based on erroneous facts, or that there was an error in procedure, or that the administrative body's exercise of a discretionary power was indefensible, or that the decision was influenced by an irrelevant consideration, or constitutes unjustifiable discrimination or that the content of the decision is manifestly unreasonable.

(56) Frøholm has alleged that an administrative decision can also be declared invalid if it does not satisfy certain requirements as to proportionality. Whilst it is correct that the courts in some areas of administrative law have power to overrule an administrative decision on the grounds that it is disproportionate, there is no general rule to this effect. Considerations of proportionality will quite certainly be relevant when considering whether an administrative

decision is manifestly unreasonable, but there is no basis on which to establish a general requirement of proportionality in the content of administrative decisions, see the case reported in Rt-2008-560 at paragraph 48.

(57) As mentioned earlier, prior to the statutory amendment in 2009 the Allodial Rights Act section 27 a (2) laid down the considerations that are relevant when determining whether a person with an allodial entitlement shall be granted a dispensation from the residence obligation, and how the different considerations should be weighted against each other. The provision stated:

> **"When determining an application for exemption from the residence obligation, special emphasis shall be given to the importance of sustaining permanent settlement in the area where the property is located, the strength of the applicant's connection to the property and the applicant's personal circumstances. Further, due regard shall be given to the size of the farm, the revenue potential that can be earned from the property and the standard of any housing on the property."**

(58) It follows from the provision that the agricultural authorities' discretion was partially a bounded discretion. In a decision reported in the Parliamentary Ombudsman's Annual Report for 2007 at page 384/386 (case no. 2006/1019 (Somb-2007-100)), the Parliamentary Ombudsman described the discretion to be exercised pursuant to the provision:

> **"The Act requires the agricultural authorities to undertake a broad and complex evaluation when a person applies for exemption from the residence obligation. The Act also distinguishes between factors which must be given 'special' emphasis, and factors to which 'only' due regard shall be given. I assume that matters within each 'class' must as a general rule carry equal weight. There does not therefore appear to be any basis for alleging that the importance of sustaining rural settlement, in general, shall carry more weight than the applicant's connection to the property or the applicant's personal circumstances.**
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> **The specification of the various discretionary factors in the Act means that the administration must consider the various factors and assess to what extent they are present in the individual case. It is thus conceivable that a factor which, according to the Act, must be given 'special' emphasis can carry less weight in an individual case than a factor which, according to the Act, shall only be given 'due regard'. This could be the case, for instance, where the importance of sustaining rural settlement only to a limited degree supports a strict application of the dispensation rules, while the revenue potential that can be earned from the property is so low and the standard of the housing is so poor that these factors indicate that a dispensation ought to be granted."**

(59) I find this description apposite. Section 27 a (2) lists which considerations shall carry weight, and it also provides guidelines for how the considerations shall be balanced against each other.

(60) Frøholm has alleged that the property with cadastral unit no. 91 and property unit 1 in the municipality of Stryn does not satisfy the conditions for allodial land. He has therefore not submitted a formal application for dispensation from the residence obligation pursuant to the Allodial Rights Act section 27 a, but has been ordered to apply for a concession because he has breached the residence obligation. However, in my view, this does not change the way in which the administrative authority must exercise its discretion. The order to apply for a concession is a means by which to compel compliance with the residence obligation. This has also influenced the procedure that has been applied to the concession application. In his administrative appeal to the County Board of Agriculture, Frøholm alleged, among other things, that it "would be wholly natural" that he should be "granted dispensation from the residence obligation in this case". He also referred to the fact dispensation from the

residence obligation has been granted to other people who have acquired properties with land that is more suitable to agriculture than his property. Notwithstanding the fact that the case has not formally been dealt with as an application for dispensation from the residence obligation, but as an application for a concession, the crucial issue in the evaluation of the concession has been whether Frøholm should be entitled to acquire the property without having to reside on it. In these circumstances, the question of whether or not to grant the application for a concession cannot depend on whether the general concession criteria in the Concession Act section 9 (1) are satisfied, but on whether the conditions in the Allodial Rights Act section 27 a (2) for exemption from the residence obligation are satisfied.

(61) As already described, the scheme whereby persons with allodial entitlements could apply for dispensation from the residence obligation was abolished by the statutory amendment in 2009. Following the statutory amendment, a person who wishes to acquire a property subject to a residence obligation must apply for a concession if he does not wish to reside on it irrespective of whether he has an allodial entitlement. However, the evaluation to be made in applications for concessions in such cases differs from the evaluation to be made in applications for concessions in other cases, see the Concession Act section 9 (4). This provision has inherited in a milder form some of the elements of the former section 27 a (2) of the Allodial Rights Act, see Ot.prp.no.44 (2008-2009) at pages 132-133 and pages 169-170. Following the statutory amendment in 2009, the Concession Act section 9 (4) provides that in cases where close relatives or persons with an allodial entitlement apply for a concession because they do not intend to satisfy the residence obligation, "emphasis shall be given, among other things, to the size of the property, its revenue potential and the housing conditions", and that the applicant's connection to the property and his personal circumstances "may be given weight as corrective factors". The decision of the County Board of Agriculture in the case before us was made before the new rules entered into force, and the validity of the decision must therefore be determined pursuant to the former rules. Since the question to be assessed when determining the concession application is whether Frøholm should be entitled to acquire the property without having to reside on it, the question whether he shall be granted a concession must be determined on the basis of the conditions in the Allodial Rights Act section 27 a (2).

(62) Among the considerations mentioned in section 27 a (2), the importance of sustaining settlement in Olden weighs in favour of imposing a residence obligation. This is one of the priority considerations. The other priority considerations – the applicant's connection to the property and his personal circumstances – weigh against imposing a residence obligation. Although Frøholm's connection to the property would have been stronger if he had been brought up there, it is sufficiently strong to be given "special emphasis" pursuant to the Act. The term "personal circumstances" refers to matters relating to health, family and social situation, work and education, see the Ministry of Agriculture Circular M-2/2004 Residence and work obligation – legal framework and procedure, at page 19. If the revenue potential of the property is so small that the owner must take work elsewhere in addition to running the farm, the disadvantages associated with commuting will fall within the scope of the term "personal circumstances". Both Frøholm and his wife have health problems and, according to the information submitted, so does one of the children. Although a commuting distance of 20 km would not be excessive for most people, an obligation for Frøholm to take up residence on the property could constitute an extra burden in his and his family's circumstances.

(63) The other considerations which are to be take into account pursuant to the Allodial Rights Act section 27 a (2) are the size of the farm, the revenue potential that can be earned from the property and the standard of the housing on the property.

(64) According to the facts set out in the judgment of the Court of Appeal, the agricultural land on the property covers 330 acres. There has been some disagreement as to how much of this is fully cultivated land and how much is fertilized grazing land. Frøholm has alleged that there are only about 240 acres of fully cultivated land, and the District Court did not find reason to doubt the land measurements that were submitted to it. The rest of the agricultural land is fertilized grazing land. It is unclear whether the Court of Appeal found that the fully cultivated land covers 240 or 250 acres. However, it is unnecessary to deliberate further on this. Following the amendment to the Allodial Rights Act section 2 in 2009, the fully cultivated or surface cultivated land must "exceed 250 acres" in order for a property to be deemed allodial land. Since fertilized grazing land falls outside the scope of the term "fully cultivated or surface cultivated land" in section 2 of the Allodial Rights Act, the property with cadastral unit no. 91 and property unit no. in the Municipality of Stryn does not satisfy the conditions for allodial land following the statutory amendment in 2009 – based on the land measurements cited in the Court of Appeal's judgment. The property satisfied the conditions that applied before the statutory amendment, but since the revenue potential was so small it was on the borderline of what could be considered an allodial property. Thus, both the size of the farm and the revenue potential are factors which weigh against imposing a residence obligation.

(65) As regards the standard of housing, Frøholm testified that the farmhouse is so poorly insulated that it cannot be used as permanent residence. There is running water in the house, but water is supplied from a spring. Because of the high bacterial content, the water quality is not satisfactory. The house has no bathroom or hot water. The cost of building a new farmhouse is estimated at NOK 1,000,000. Thus, it follows that the standard of housing weighs against imposing a residence obligation.

(66) The decision of the County Board of Agriculture is based on a recommendation from the Director of Agriculture. After citing the provisions in sections 1 and 9 (1) of the Concession Act, the Director of Agriculture gave the following reason for his recommendation:

> **"In its decision, the municipality has attached decisive weight to the importance of sustaining permanent settlement in the area. In addition, it has been pointed out that the plan to rent out the productive land to a neighbouring farm cannot be said to be the most socially advantageous situation or the best operational solution, see the Concession Act section 1 (1) and section 9 no. 3. In our view, this is a relevant factor that must carry significant weight in a case such as this. On the other hand, the background to the case indicates that some of the factors that are described in the application and in the complaint have been taken into account in the evaluation of whether to grant a concession, including the fact that the natural resources on the property are relatively moderate, that the applicant has ties to the property, and that the house needs renovating in order to be liveable according to modern standards.**
>
> **In our view, it must in general fall within the municipality's margin of discretion to give such high priority to the importance of sustaining settlement in an area - and the goal that a person who operates land should also own it - that the applicant's interests must give way. Statistics published by Statistics Norway and included in the regulation plan for the municipality show that the population of Olden and Oldedalen has declined over recent years. The municipality's decision will, as far as we can see, not conflict with established practice in the municipality and the decision does not, in our opinion, seem unreasonable even though the farm is small, the buildings middling and the applicant has family ties and allodial rights to the property. Weight should also be given to the fact that the driving distance from the property with cadastral unit**

no. 91 property unit no. 1 in the municipality of Stryn is not more than about 20 km. We believe therefore that the municipality has correctly alleged that that there would be interest in the market to purchase the property in order to settle there.

Frøholm wishes to use the property for recreational purposes. In several cases, the municipality has pointed out that such a desire can probably be accommodated by subdividing the house and farmyard, and selling the remainder of the land to a neighbour or neighbours. That way, the natural resources on one or more of the neighbouring properties would be increased, which may help to stave off further depopulation of the area. In our view, this would be a far better solution than the solution proposed by the applicant, viewed in the light of section 1 and section 9 of the Concession Act."

(67) It is apparent from the reasons cited here that the application for a concession was determined on the basis of the general concession criteria in section 9 (1) of the Concession Act, and not on the basis of the partially bounded discretion in section 27 a (2) of the Allodial Rights Act. According to the Allodial Rights Act section 27 a (2), the priority considerations that are to be given "special emphasis" include not only the importance of sustaining rural settlement, but also the applicant's connection to the property and the applicant's personal circumstances. In the Director of Agriculture's reason cited above, the importance of sustaining rural settlement is pushed to the forefront and given overriding weight. According to section 27 a (2), the applicant's connection to the property and his personal circumstances, both of which in the present case suggest that a concession should be granted, shall carry the same weight as the importance of sustaining settlement. In the Director of Agriculture's reasoning, however, these considerations are only mentioned as factors that "have been taken into account".

(68) As previously mentioned, the size of the farm, the revenue potential of the property and the standard of housing on the property all weigh against imposing a residence obligation. The Director of Agriculture's reasoning cited above mentions the size of the farm and the revenue potential, and also mentions that the buildings on the property "needs renovating in order to be liveable according to modern standards". In view of the information available about these matters, however, I consider it questionable whether they have been accorded sufficient weight in the evaluation.

(69) Since the County Board of Agriculture has not exercised its discretion according to the discretionary criteria specified in the Allodial Rights Act section 27 a (2), but according to the general concession criteria in the Concession Act section 9 (1), I find that the decision must be declared invalid.

(70) It remains to determine the matter of *legal costs*.

(71) Frøholm's appeal has succeeded. He was granted free legal aid for the proceedings before the Supreme Court, but not for the proceedings before the lower courts. In accordance with the principal rule in section 20-2 of the Disputes Act, Frøholm is awarded legal costs for the proceedings before the District Court and the Court of Appeal. In cases where a party has free legal aid and the other party is a Ministry or other publicly funded body, the legally aided party is not entitled to claim costs from the public purse, see the case reported in Rt-1999-901 at page 906. He is therefore not to be awarded costs for the proceedings before the Supreme Court.

(72) In accordance with the bills of cost that have been submitted to the Supreme Court, Frøholm's legal costs for the proceedings before the District Court and the Court of Appeal shall be fixed at NOK 413,035, of which NOK 198,956 excluding VAT is counsel's costs.

(73) I vote in favour of the following judgment:

1. The decision of the Sogn & Fjordane County Board of Agricultures dated 25 August 2008 to reject Roger Frøholm's application for a concession to acquire the property with cadastral unit no. 91 and property unit no. 1 in the Municipality of Stryn is invalid.

2. The Norwegian state, represented by the Ministry of Agriculture and Food shall pay the legal costs of Roger Frøholm for the proceedings before the District Court and the Court of Appeal in the amount of NOK 413,035 – fourhundredandthirteenthousandandthirtyfive no later than 2 – two – weeks from the date of service of this judgment.

3. No order for costs for proceedings before the Supreme Court.

(74) Justice **Webster**: I agree with Justice Skoghøy with regard to whether the property "can be used for agriculture", see the Allodial Rights Act section 1 as this provision applied at the date when the decision was made. I also agree that the decision does not interfere with human rights. However, I do not concur with the finding of Justice that the decision is invalid because it is not based on an evaluation in accordance with section 27 a (2) of the Allodial Rights Act.

(75) The decision which the Supreme Court is required to review is a decision pursuant to the Concession Act which was made as a consequence of the fact that Frøholm breached the residence obligation in the Allodial Rights Act section 27, cf. section 29 (2) and was therefore ordered to apply for a concession. He had previously applied for a provisional dispensation from the residence obligation pursuant to the Allodial Rights Act section 27 a, but his application was refused. He appealed against the refusal, but withdrew the appeal because he was of the view that the property did not satisfy the minimum conditions for allodial land in the Allodial Rights Act section 1 as it applied at that time.

(76) There were two main issues when the concession was considered: (1) whether the property is an agricultural and forestry property, see the Concession Act section 5 (2) as it applied at the time; and (2) if the first question was answered in the affirmative and the property was an agricultural and forestry property in the legal sense, whether a concession should be granted pursuant to the Concession Act section 9, cf. section 1.

(77) The definition of agricultural and forestry property was identical with the concept of "used for agriculture" in the Allodial Rights Act section 1. In both cases, the acquirer of property was subject to a residence obligation pursuant to the Allodial Rights Act section 27 and the Concession Act section 5 (2) respectively.

(78) The County Board of Agriculture had already considered whether the property was allodial land pursuant to the Allodial Rights Act section 1. After having considered whether new circumstances had come to light since its previous evaluation, the County Board of Agriculture concluded that the property must still be considered to be an agricultural and forestry property and that the transfer of the property required a concession pursuant to the Concession Act section 5 (2). Like the first voting justice, I am of the view that this complies with the law.

(79) Thereafter, the County Board of Agriculture considered whether there were grounds for granting a concession to acquire the property, taking into account the fact that Frøholm wished to use the property for recreational purposes.

(80) Section 9 of the Concession Act lists the circumstances to which special emphasis must be given:

> **"When deciding applications for concessions in respect of acquisition of property to be used for agricultural purposes, special emphasis shall be placed on the following**
> **1. whether the agreed price provides for a socially justifiable price development,**
> **2. whether the acquirer's purposes will take into account the interests of sustaining settlement in the area,**
> **3. whether the acquisition involves an operationally satisfactory solution,**
> **4. whether the acquirer is regarded as qualified to work the property, and**
> **5. whether the acquisition protects the interests of a holistic resource management and preservation of the cultural landscape."**

(81) The provision is not exhaustive and other factors can be taken into account. This is implicit in the words "special emphasis shall be placed on". It is apparent from the preparatory works that this was a conscious decision, see Ot.prp.no.79 (2002-2003) page 83:

> **"Subsection 1 concerns factors which are to be given special emphasis. The term 'special emphasis' is used to underline the fact that subsection 1 concerns the most important considerations in the evaluation of whether or not to grant a concession. This means that these factors may carry more weight than the factors that are mentioned in subsection 2 and subsection 3. The term 'special emphasis' also reflects the fact that other considerations can be relevant in addition to those which are specifically mentioned in the provision; see section 1 on the purpose of the Act which defines the framework for what is relevant in the evaluation."**

(82) It is apparent from section 1 of the Concession Act that it is intended to promote certain socio-political purposes:

> **"The purpose of this Act is to regulate and control the sale of real property in order to achieve an effective protection of agricultural production areas and such conditions of ownership and utilization as are most beneficial to society, inter alia, in order to safeguard:**
> **1. the needs of future generations**
> **2. agricultural industry**
> **3. the need for development sites**
> **4. protection of the environment, general interests of nature conservation and outdoor recreation.**
> **5. the interests sustaining rural settlement."**

(83) Although the preparatory works to the Concession Act state that section 1 provides a framework for what is relevant pursuant to section 9, this does not prevent account being taken of personal factors like the applicant's connection to the property, his personal circumstances, the revenue potential of the property, and whether a dispensation pursuant to the Allodial Rights Act section 27 a would have been granted if an application had been made, even though these factor are not so fundamental that they are to be given special emphasis pursuant to the Concession Act section 9. Especially in a case like the present one, where a dispensation could have been applied for and where personal circumstances are submitted as grounds for a concession, the County Board of Agriculture would have been obliged to take the submissions into account. However, I can see no justifiable reason why the validity of the decision to refuse a concession is conditional upon the public administration having specifically undertaken an evaluation pursuant to the Allodial Rights Act section 27 a. On the contrary, Frøholm intentionally withdrew his appeal against the

decision to refuse the application for a provisional dispensation pursuant to the Allodial Rights Act section 27 a.

(84) The considerations that Frøholm has put forward as arguments are therefore also relevant to the evaluation pursuant to section 9 of the Concession Act. In my opinion, the County Board of Agriculture has conducted an evaluation in which Frøholm's interests are adequately safeguarded. In reality, the evaluation is close to - if not completely in line with – the partly bounded discretion in the Allodial Rights Act section 27 a. In any event, the discretion complies with section 27 a in so far as the courts have the power to review it.

(85) The County Board of Agriculture emphasized that it had given decisive weight to sustaining settlement in the area. This is in line with the Concession Act section 9 (1) no. 2, and is also one of the considerations that is to be given special emphasis pursuant to the Allodial Rights Act section 27 a. Further, it appears that the personal matters that Frøholm highlighted in his complaint were considered in the evaluation, including the other especially important factors referred to in section 27 a (2) of the Allodial Rights Act, namely the applicant's connection to the property and his personal circumstances. I do not consider Frøholm's connection to the property to be particularly strong; he did not grow up on the farm and he has never lived there. He has only used the property for recreational purposes. It is in my view acceptable that this consideration is not given special emphasis, even if the evaluation should have been conducted pursuant to the Allodial Rights Act section 27 a (2). Similarly, I cannot see that Frøholm's personal circumstances - or the personal circumstances of his family - suggest that he should be entitled to acquire the property with land and forests for recreational purposes. In this regard, I also point out that it appears from the case documents that that the specific concerns relating to the children - which have received much attention in the Supreme Court – were not raised during the administrative proceedings. On the other hand, however, the administrative authorities highlighted more general considerations – like Frøholm's connection to the property, the children's schooling, the poor condition of the farmhouse and the longer journey to work. These factors were not discussed extensively in the decision, but I cannot see that this was necessary. During the administrative proceedings, Frøholm did not invoke any extraordinary circumstances to suggest that his situation was any different from the situation of most people who acquire such a property. On the contrary, the proximity of the property to Stryn suggested that the decision would be less onerous for Frøholm than such decisions normally are. It would also be possible for Frøholm to subdivide the agricultural land and keep the buildings and a suitable plot of land for recreational purposes. According to legal counsel for the state, this option is still available to Frøholm.

(86) The decision also mentions the less important factors that are to be taken into account pursuant to section 27 a (2), namely, the size of the farm, its revenue potential and the housing conditions. These factors suggest that Frøholm should be granted a concession without a residence obligation, but the County Board of Agriculture found that these factors did not outweigh the fundamental importance of sustaining settlement in the area. In my view, this must be acceptable even in an evaluation pursuant to the Allodial Rights Act section 27 a.

(87) According to the Allodial Rights Act section 27 a (3), another factor to be taken into account is whether neighbouring farms need additional agricultural land. This was considered, too. The decision stated that interested buyers exist. This factor is an argument against granting a concession to Frøholm.

(88) I find therefore that there is no error in the discretion exercised by the County Board of Agriculture pursuant to the Concession Act section 9, and that the decision is valid. I find therefore that the appeal must be dismissed.

(89) Justice **Noer**: I agree on the whole and in the result with the justice delivering the second opinion, Justice Webster.

(90) Justice **Øie**: I agree on the whole and in the result with the justice delivering the leading opinion, Justice Skoghøy.

(91) Justice **Gjølstad**: Likewise.

(92) After the passing of votes, the Supreme Court gave the following

J U D G M E N T :

1. The decision of the Sogn & Fjordane County Board of Agricultures dated 25 August 2008 to reject Roger Frøholm's application for a concession to acquire the property with cadastral unit no. 91 and property unit no. in the Municipality of Stryn is invalid.

2. The Norwegian state, represented by the Ministry of Agriculture and Food shall pay the legal costs of Roger Frøholm for the proceedings before the District Court and the Court of Appeal in the amount of NOK 413,035 – fourhundredandthirteenthousandandthirtyfive no later than 2 – two – weeks from the date of service of this judgment.

3. No order for costs for proceedings before the Supreme Court.