



# SUPREME COURT OF NORWAY

On 28 November 2017, the Supreme Court gave judgment in

**HR-2017-2247-A, (case no. 2017/426), civil case, appeal against judgment**

Reinøy reindeer grazing district

Margareth Anni Hansen

Herolf Andreas Hansen

Audhild Helene Hansen

Sigrunn Merete Hansen

(Counsel Knut Helge Hurum)

v.

The County Authority of Troms  
represented by the Regional Roads Office

(Counsel Johan Fredrik Remmen  
and Pål Martin Abell)

- (1) Justice **Kallerud**: The case concerns the validity of an administrative decision to implement a road project without an impact assessment. It is also a question whether the road project is contrary to Article 27 of the UN International Covenant on Civil and Political Rights (ICCPR) due to the consequences for Sami reindeer husbandry.
- (2) The project involves the building of a tunnel from Ringvassøy beneath Langsundet to Reinøy. Plans are also made for improvement and partial moving of the road from the tunnel's mouth on Reinøy to a new ferry landing in Sætervika north on the island. The ferry landing is to be used for ferries to Vannøy and Karlsøy in a "triangle connection" which will give shorter ferry distances than what is the case today with ferries departing from Hansnes on Ringvassøy. The project is often referred to as the Langsund connection.

- (3) *Reindeer husbandry on Reinøy*
- (4) Reindeer husbandry has been practiced on Reinøy for a long time, but it ended around 1922. The practice was resumed in 1970. Reinøy reindeer grazing district includes the entire island and is a summer pasture with two *siida*<sup>1</sup> units. The district has winter pastures in the western part of Finnmark. According to information provided, a total of seven adults and five children are currently involved in the reindeer husbandry. The maximum number of animals is stipulated to 600 in the summer herd. The actual number has increased, from 245 in 2004 to 439 in 2016/2017.
- (5) It is contended that the building of a new ferry landing in Sætervika will be detrimental to reindeer husbandry on the island. The road change near the village of Stakkvik is also held to affect the reindeer husbandry.
- (6) *Preparation of a municipal sub-plan*
- (7) In agreement with Karlsøy municipality, the Norwegian Public Roads Administration (the NPRA) started drafting a municipal sub-plan for the Langsund connection in 2003. The Norwegian Reindeer Husbandry Administration in Troms was among those asked to provide a preliminary statement regarding the necessity of an impact assessment. A letter from the Reindeer Husbandry Administration of 3 June 2003 includes a statement from Reinøy reindeer grazing district that "... we are not against a mainland connection between Reinøya and Ringvassøya, but we believe that one should use areas that are already populated for the purpose". The letter further states that, according to the reindeer agronomist, the municipal sub-plan "will affect important reindeer husbandry interests" if a ferry landing is built north on the island, which means that an impact assessment is required.
- (8) The NPRA turned down the request, holding among other things that no regulatory duty existed to carry out such an assessment, and that the NPRA at any would analyse the consequences.
- (9) In a letter of 2 February 2004, the Reindeer Husbandry Administration repeated its request for an impact assessment, pointing out once more that the planned ferry landing north on the island would disturb the activities of the reindeer industry. It was also held that the NPRA had interpreted the rules wrongly. With reference to the then Regulations on impact assessments, the Reindeer Husbandry Administration held that such an assessment had to be carried out because the ferry landing would affect an area that it considered crucial. No express answer from the NPRA has been presented to the Reindeer Husbandry Administration's renewed request for an impact assessment on these grounds.
- (10) In April 2005, the NPRA presented a draft municipal sub-plan for the Langsund connection. The plan has more than 100 pages and presents four possible ways of implementing the project. Two different locations for the tunnel are discussed. Furthermore – and regardless of the tunnel's location – the plan discusses whether the improved road should follow the existing route or be moved. The possible road change concerns a stretch of about five kilometres outside the village of Stakkvik. According to information provided, the changed route will go some hundred meters further up from the

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<sup>1</sup> A group of reindeer owners with joint herds.

sea than the existing road and pass the upper side of the village. Apart from that, the plan is to have the improved road follow the existing route.

- (11) Estimated costs for the four options varied from NOK 301 to 385 million, in 2004 currency.
- (12) The NPRA recommended a tunnel from Lanes on Ringvassøy to Rakkenes on Reinøy, arguing it would reduce the construction costs since the tunnel would be almost one kilometre shorter than in the alternative proposal, which would also reduce the travel distance to Tromsø.
- (13) The NPRA also recommended moving the road so that it would pass the upper side of Stakkvik. Stakkvik is the most densely populated village, and has a school, a supermarket, a sports ground and a fishing company. The advantage to the local community of having the road pass outside Stakkvik, was according to the NPRA "... so weighty that it should be decisive", although improving the existing road through the village would be better in a larger socio-economic perspective.
- (14) The option recommended by the NPRA had estimated construction costs of NOK 323 million in 2004 currency, with a 25-percent margin.
- (15) The draft municipal sub-plan contained an analysis of consequences in accordance with guidelines in *håndbok 140* published by the NPRA. The analysis was stated to contain a "systematic assessment of the advantages and disadvantages of the various options" and information on "the nature and scope of the consequences", for the reindeer industry among others. Yet, it did not meet the more comprehensive requirements for an impact assessment.
- (16) The NPRA's analysis of the consequences for reindeer husbandry stated that the construction work "mainly takes place near or along the current road net...", and that it "... will not create any major disadvantage to the reindeer grazing district". As for the new ferry landing, the analysis stated that the work would only demand a small area, and that large undeveloped areas would remain. Since ferries were no longer used for landing of reindeer, the NPRA found that having a specific place for that purpose could not be decisive.
- (17) In a statement of 8 June 2005 regarding the proposed municipal sub-plan, Reinøy reindeer grazing district repeated that it did not oppose the mainland connection, but that the building of a ferry landing near Sætervika would affect reindeer husbandry. The area is used for spring release; it is remote and a perfect place for calving. The district therefore found that the road should continue to pass through Stakkvik.
- (18) In an administrative decision of 8 June 2005, Karlsøy local council supported the option of placing the road outside Stakkvik.
- (19) In October 2005, the NPRA reviewed the comments made during the hearing, including those from Reinøy reindeer grazing district. The NPRA noted among other things that the place for rock mass mining for the building of breakwaters etc. had to be considered more closely in connection with the zoning plan, and that contact with the district was therefore desired "... to identify the areas that will least affect reindeer husbandry". It was also noted that a proposal was made during an inspection to reserve a part of the area on the

northernmost point of the island for hiking and reindeer husbandry, in order to protect it from development. The NPRA found that the municipality should implement these plans. As for the local community, the County Governor of Troms agreed that the best solution would be to have the road pass outside Stakkvik.

- (20) Following a balancing of conflicting considerations, the NPRA maintained its previous recommendation to choose the shortest tunnel and have the road pass outside Stakkvik.
- (21) In a letter of 27 March 2007, the reindeer grazing district agreed that the tunnel should go from Lanes to Rakkenes, but was still "highly critical" to having the road pass outside Stakkvik and to the establishment of a ferry landing in Sætervika.
- (22) On 12 December 2007, the local council made a final administrative decision concerning the municipal sub-plan in line with the NPRA's recommendations, i.e. having the road pass outside Stakkvik and establishing a ferry landing in Sætervika.
- (23) *The drafting of a zoning plan*
- (24) During the autumn of 2009, the NPRA started working on a zoning plan. Karlsøy municipality decided, in line with the NPRA's recommendation, that an impact assessment was still not required. A reference was made to the analysis of consequences that had already been made.
- (25) As the case has been presented, it must be assumed that the authorities in the initial phase of the zoning plan were still relying on the cost estimate in the municipal sub-plan. Converted to the currency value in 2010, the cost of the relevant option was estimated to NOK 490 million.
- (26) The Reindeer Husbandry Administration in Troms and Reinøy reindeer grazing district repeated their request for an impact assessment both in a letter of 30 October 2009 and at a meeting of 18 March 2010. The request was yet again rejected.
- (27) The draft zoning plan was presented on 26 March 2010. It was still proposed to have the road pass north of Stakkvik and to build the ferry landing in Sætervika. Again, both the Reindeer Husbandry Administration and the reindeer grazing district requested an impact assessment. The request was discussed at a meeting of 24 August 2010, at which it was proposed to make, from a reindeer husbandry point of view, "a professional and independent report of the consequences of the present development and the area plan considered in context".
- (28) During its review of the comments to the draft zoning plan on 6 December 2010, the NPRA stated that the case had already been subject to a thorough planning process involving both the Reindeer Husbandry Administration and the reindeer grazing district. The NPRA also held that a major part of the objections from the reindeer industry went beyond "... the physical contents of the zoning plan for the Langsund connection". Circumstances related to possible increased activity on the island and thus increased pressure on the areas were not part of the zoning plan, and these crucial issues had to be "... considered in connection with the review of superior plans such as the land-use element in the municipal master plan".

- (29) In accordance with the recommendation of the NPRA, Karlsøy local council adopted the zoning plan on 15 December 2010. At this point, the costs were estimated to NOK 530 million in 2010 currency.
- (30) The Reindeer Husbandry Administration and the reindeer grazing district appealed to the County Governor of Troms, insisting that an impact assessment ought to have been carried out. On 5 April 2011, the County Governor rejected the appeal from the Reindeer Husbandry Administration because the question whether an impact assessment should be carried out had been finally decided by a competent planning authority. However, the County Governor noted that the planning work "... appears to be thoroughly completed" and that a considerable amount of work had been invested in connection with the adoption of the municipal sub-plan in 2007 "... taking into account also reindeer husbandry interests."
- (31) On 14 April 2015, at the grazing district's request for a review, the County Governor set aside its previous decision of 5 April 2011. It had been concluded after a reassessment that the case should have been appealed to the Ministry. This time, in its cover letter to the Ministry, the County Governor expressed that an impact assessment should have been carried out.
- (32) On 17 June 2015, the Ministry of Local Government and Modernisation approved the zoning plan. In the Ministry's view, the outcome of the road development had been "...satisfactorily considered through the analysis of consequences carried out prior to the adoption of the municipal sub-plan". The Ministry also found that later reports shed further light on the relationship with the reindeer industry "... and also implies that there is no need for requesting further discussions at this point".
- (33) *Additional discussions and a new administrative decision after the district court's order*
- (34) In an order delivered on 18 January 2016, Nord-Troms District Court concluded that the zoning plan, on which the expropriation decision is based, was invalid. On 30 June 2016, against this background, the NPRA reassessed its recommendation to have the road pass outside Stakkvik. A mass meeting was also held on 3 May 2013 at which the locals were given the chance to express their views.
- (35) Following a reassessment, the NPRA concluded that the road should pass through Stakkvik. Among the reasons were that the school and the kindergarten had been closed, that the road through Stakkvik had already been significantly improved and that having the road pass through the village would be less costly. However, the NPRA found no reason to consider the effects on reindeer husbandry "... much differently from when the current route was chosen".
- (36) The councilman submitted an open recommendation to the local council. On 16 September 2016, based on an "overall assessment", the local council decided to maintain the zoning plan despite the additional report from the NPRA. The court of appeal's judgment sets out that the decision was made by a 10-7 vote.
- (37) *Reindeer husbandry reports*

- (38) After the adoption of the municipal sub-plan and the zoning plan, several reports were issued describing in detail how the road project would affect the reindeer husbandry. I will revert to some of these reports.
- (39) The first report was issued by Christian Nellemann on 20 September 2012. The report was commissioned by the NPRA, and it was primarily meant to be a basis for stipulating the compensation to the reindeer grazing district.
- (40) In 2012, commissioned by Karlsøy municipality, the research institute Norut Tromsø represented by Jan Åge Riseth and Britt Kramvig issued an "impact assessment for the reindeer husbandry" in Karlsøy municipality. The work was carried out in connection with the municipality's review of the area plan, and included "the reindeer husbandry's living conditions in a larger context". As for the Langsund connection, Nellemann's report was relied on to a large extent.
- (41) In 2016, commissioned by the NPRA, Norut Tromsø represented by Jan Åge Riseth, Bernt Johansen and Inge Even Danielsen issued an additional report regarding the Langsund connection and reindeer husbandry. The report was to serve as a supplement to Nellemann's report and focus on the various route options and the new ferry landing.
- (42) Erlend Bullvåg has issued a report titled "The reindeer husbandry on Reinøya: Economic status and viability".
- (43) On 23 October 2017, Geir Arnesen and Iulie Aslaksen issued a report on "Consequences of the planned Langsund connection for reindeer husbandry". The report was commissioned by Reinøy reindeer grazing district.
- (44) *The expropriation decision*
- (45) On 12 February 2014, the NPRA, Region North, made an expropriation decision with regard to the Langsund connection. The decision concerned "necessary interference with Reinøy reindeer grazing district's rights on Reinøya" and surrender of land by affected landowners. The decision was made "... in accordance with the zoning plan for the Langsund connection".
- (46) *History of proceedings*
- (47) On 20 May 2014, the County Authority, represented by the Regional Road Office, filed a petition for appraisal to Nord-Troms District Court. Such an appraisal was to stipulate compensation for the expropriation of land and rights for implementation of the zoning plan. The reindeer grazing district opposed the appraisal.
- (48) On 18 January 2016, Nord-Troms District Court delivered an order with the following conclusion:
- "1.       **The appraisal is not allowed.**
  2.       **The County Authority of Troms, represented by the Regional Road Office, is to pay costs to the defendants of NOK 1 100 000 – onemilliononehundredthousand – within 2 – two – weeks of service of this order."**

- (49) The district court found that an impact assessment ought to have been carried out because the estimated costs at the time of the decision exceeded the limit before an impact assessment is required by NOK 30 million. In the court's view, there was "a fair possibility" that the lack of an impact assessment would have affected the zoning plan decision, see section 41 of the Public Administration Act. The zoning plan was thus invalid according to the district court. When the planning decision was invalid, the expropriation decision was invalid also. The appraisal could therefore not be allowed.
- (50) The County Authority of Troms appealed to Hålogaland Court of Appeal, which heard the case as an appeal against judgment in accordance with section 48 subsection 2 of the Appraisal Procedure Act. On 2 December 2016, the court of appeal gave the following judgment:
- "1. The appraisal is allowed before the district court.**
  - 2. The County Authority of Troms represented by the Regional Road Office is to pay costs to Audhild Helene Hansen, Herolf Andreas Hansen, Sigrunn Merete Hansen, Margareth Anni Hansen, Sigvald Harald Hansen and Reinøy reindeer grazing district in the amount of NOK 425 440 – fourhundredandtwentyfivethousandfourhundredandforty – within 2 – two – weeks from the service of this judgment.**
  - 3. The costs estimated by the district court, item 2 of the conclusion, are set aside."**
- (51) According to the court of appeal, the estimated costs at the commencement of the zoning plan work triggered the duty to carry out an impact assessment. At this point, the costs were below the limit of NOK 500 million. The court did not consider whether a duty to carry out an impact assessment existed for other reasons because a possible error could not in any case impact the decision, see section 41 of the Public Administration Act. In the court of appeal's view, there was no basis for establishing violation of Article 27 of the International Covenant on Civil and Political Rights (Article 27 ICCPR).
- (52) Reinøy reindeer grazing district has appealed to the Supreme Court against the court of appeal's decision on the merits of the case. The other parties have appealed against item 3 of the conclusion of the court of appeal's judgment.
- (53) On 26 April 2017, the Supreme Court's Appeals Selection Committee granted leave to appeal on the issue of "whether the zoning plan, and thus also the expropriation decision, is invalid as a result of the lack of an impact assessment, and whether the expropriation decision is contrary to Article 27 ICCPR". Apart from that, leave to appeal was refused.
- (54) Although some new documents have been submitted before the Supreme Court, the case is by and large similar to that before the lower courts.
- (55) The appellant – *Reinøy reindeer grazing district* – contends:
- (56) The zoning plan, and thus the expropriation decision, is invalid because, contrary to the rules applicable at the time, no impact assessment was carried out.
- (57) The duty to carry out an impact assessment is primarily triggered by the estimated costs exceeding NOK 500 million. The date of the adoption of the zoning plan is crucial.

Alternatively, if the level of costs at the commencement of the zoning work is to be relied on, the cost estimate must be appropriate. That was not the case.

- (58) Secondly, an impact assessment is required because the road project may disturb reindeer husbandry. No other satisfactory reports have been issued suggesting that an impact assessment can be avoided.
- (59) The lack of an impact assessment is a procedural error that "may have had a decisive effect on the contents of the administrative decision", see section 41 of the Public Administration Act. Because no impact assessment was carried out, no professional statement was made on the negative consequences of the road project for reindeer husbandry. No overall assessment was made, and the reindeer industry was not adequately consulted. An impact assessment would have given the reindeer industry a solid professional basis on which to argue, and would have enabled a genuine dialogue with the authorities. The zoning plan would probably have differed if an impact assessment had been carried out.
- (60) The expropriation decision is contrary to Article 27 ICCPR. According to case law of the Human Rights Committee – despite its wording – it is not a requirement that the Sami are "denied" the right to practice reindeer husbandry. If the measure has "substantial impact", it is clear that it is contrary to Article 27. However, violation may also be the case if the measure has "limited impact". The adopted road project has serious consequences for the reindeer industry. The ferry landing is planned on the only area on the island suitable for calving and spring pasture. Placing of the road outside Stakkvik will occupy important grazing land. Profitability is already so low that there is a genuine risk that the road project will make it impossible to make a living from reindeer husbandry.
- (61) The appellant has submitted this prayer for relief:
- "1.        **Item 1 of Nord-Troms District Court's appraisal is to be upheld.**
  2.        **The County Authority of Troms represented by the Regional Road Office is to cover the full costs of Reinøy reindeer grazing district, Herolf Andreas Hansen and others before the district court, the court of appeal and the Supreme Court."**
- (62) The respondent – *the County Authority of Troms represented by the Regional Road Office* – contends:
- (63) An impact assessment is not required for this road project, neither because of the costs nor for other reasons. It is the commencement date for the zoning plan work that is crucial. Then, the costs were estimated below NOK 500 million. The consequences for the reindeer husbandry were adequately analysed without a formal impact assessment.
- (64) Should a procedural error nevertheless have been committed, it is of no relevance since the result would have been the same with an impact assessment.
- (65) The consequences of the road project for the reindeer husbandry industry are modest, and far from constituting a violation of Article 27 ICCPR.
- (66) The respondent has submitted this prayer for relief:

- "1.        **The appeal is to be dismissed.**



2. **The County Authority of Troms is to be awarded costs in the Supreme Court."**

- (67) *My view on the case*
- (68) *Should an impact assessment have been carried out?*
- (69) When the planning of the Langsund connection was commenced in 2003, the Planning and Building Act of 1985 was applicable as well as Regulations on impact assessments adopted in 1999 based on this Act. A new Planning and Building Act of 27 June 2008 entered into force on 1 July 2009. In accordance with section 4-2 subsection 3, the Ministry of Environment issued new Regulations on impact assessments on 26 June 2009. The Regulations entered into force simultaneously with the Act. The Regulations from 2009 have later been replaced, most recently on 21 June 2017.
- (70) As mentioned, the reindeer grazing district contends that the expropriation decision is invalid since the zoning plan is invalid, and succeeded on this point in the district court. I will therefore, for now, concentrate the discussions regarding the validity of the rules applicable during the zoning plan work from the autumn of 2009 and until its adoption on 15 December 2010.
- (71) The 2009 Regulations set out the following in section 1 subsection 2:
- "The purpose of the provisions on impact assessments is to secure that the protection of the environment and society is taken into account during the drafting of plans or measures, and in the assessment whether, and on which terms, plans or measures may be implemented."**
- (72) The duty to carry out an impact assessment is generally described in the Supreme Court judgment Rt-2009-661 (the embassy case), to which I will refer.
- (73) The following is stated in paragraph 55:
- "In the preparatory works to the amendment in 1995, it is stated that the purpose of impact assessments is to clarify the effects of measures that may have serious consequences for the environment, natural resources and society, see Proposition to the Odelsting no. 24 (1994-1995) page 8. There, it is also stated that the system is to ensure that such effects are considered in the developer's project planning, to obtain an open planning process with genuine possibilities to influence, to strengthen the decision basis and to increase knowledge with regard to the effects of major developing projects. To a large extent, the same is expressed in the wording of section 33-1 of the Planning and Building Act as it read after 1995, and in section 1 of the Regulations on impact assessments 21 May 1999 no. 502. In my perception, these superior goals are also the foundation of subsequent legislation in both Norway and within the EU."**
- (74) With regard to the embassy judgment, I also note that the rules "describe a formalised evaluation process that is to be completed before the practical aspects of a measure are dealt with, and that is to be included in the decision basis for the permissions the measure requires" (paragraph 57), and that the draft evaluation program "is .... to be concentrated on the issues that must be dealt with before one may determine whether, and on which terms, the measure may be implemented" (paragraph 58).
- (75) I will first discuss whether the *costs of the measure* implied that an impact assessment was required.

- (76) Under section 2 subsection 1 of the 2009 Regulations, an impact assessment was always required for zoning plans involving measures as described in an appendix to the Regulations. According to item 28 of this appendix, "[r]oads involving investment costs exceeding NOK 500 million" always required an impact assessment. As I have accounted for, the costs at the commencement of the zoning plan work were estimated to NOK 490 million while on the date of the decision, the estimate had increased to NOK 530 million. I am in no position to review the estimate made by the NPRA.
- (77) Like the court of appeal, I find that the purpose of impact assessments suggests that the outcome depends on the costs estimate at the commencement of the planning work. An impact assessment is primarily to secure that important environmental and societal consequences are considered in the planning and in the assessment of whether the relevant measure is to be implemented, if necessary in what manner. I refer to what I have just quoted from section 1 subsection 2 of the Regulations and from the embassy judgment. In order to fulfil this purpose, the impact assessment must be carried out before the date of the administrative decision.
- (78) Moreover, section 15 subsection 1 of the Regulations states that changes after the commencement of the planning work may trigger a duty to carry out an impact assessment. This, too, suggests that the need for an impact assessment must, as a starting point, be considered in the earliest phase of the planning work. However, this cannot be the case for any increase of costs implying that the threshold value is exceeded. I assume that it, in that case, concerns costs of a certain size that accrue as the project's character changes. In the case at hand, no information on any changes during the planning process has emerged triggering a duty to carry out an impact assessment.
- (79) Against this background, the reindeer grazing district cannot succeed with its contention that that an impact assessment had to be carried out due to the project's costs.
- (80) The next question is whether the road project's *consequences for the reindeer husbandry* triggered a duty to carry out an impact assessment.
- (81) According to section 3-1 subsection 1 c of the 2008 Planning and Building Act, "the natural basis for Sami culture, economic activity and social life" must be protected through planning work. Subsection 1 b of the same provision refers to safeguarding of the "land resources".
- (82) According to section 3 subsection 1 b of the 2009 Regulations, considered in conjunction with appendix II item 24, an impact assessment is required for plans and measures that
- "... may conflict with the Sami activity in outlying fields, or is located in the special value areas of the reindeer husbandry ... or may otherwise conflict with reindeer husbandry's need of land."**
- (83) It is undisputed that the zoning plan for the Langsund connection is covered by this provision.
- (84) However, in section 3 subsection 2, exemption may be granted from the duty to carry out an impact assessment if:
- "... the consequences of the relevant measure has been satisfactorily evaluated on a superior level where the zoning plan is in accordance with the superior level."**

- (85) The zoning plan was in accordance with the superior municipal sub-plan.
- (86) As I have already mentioned, the municipal sub-plan contained an analysis of the consequences, but no impact assessment.
- (87) In my view, the term "satisfactorily evaluated" in the Regulations cannot be interpreted to mean that the former evaluation had to meet the requirements for an impact assessment. As I see it, this follows from the structure as well as the varied use of words in the Regulations. Both section 2 and section 3 have a subsection 2 granting an exemption for zoning plans where impact assessments have been carried out earlier. While section 3 subsection 2 grants an exemption if the consequences have been "satisfactorily evaluated" earlier, exemption is granted in section 2 subsection 2 if the measure has been "subject to an impact assessment". The natural understanding of the various wordings is that different requirements apply to the former evaluation.
- (88) The conscious choice of words is confirmed by guidelines to the Regulations issued by the Ministry of Local Government and Modernisation. In the guidelines' reference on page 7 to the exemption in section 2 subsection 2, it is specified that an impact assessment is required under the Regulations. On page 8, however, it is stated that an analysis of consequences in accordance with the NPRA's *håndbok 140* is covered by the exemption in section 3 subsection 2.
- (89) Hence, the exemption in section 3 subsection 2 of the 2009 Regulations was not to be interpreted to mean that the earlier evaluation had to have been an impact assessment.
- (90) Hence, the next question was whether the NPRA's analysis of consequences included in the municipal sub-plan was covered by the exemption in section 3 subsection 2 and the wording "satisfactorily evaluated on a superior level". However, I do not find reason to consider whether an analysis of consequences in this case, based on Regulations repealed a long time ago, was sufficient. The reason is that I – like the court of appeal – have concluded that a possible error cannot under any circumstances invalidate the administrative decision.
- (91) *The validity assessment – section 41 of the Public Administration Act*
- (92) The zoning plan was a prerequisite for the expropriation decision that is the subject of review in the case at hand. As I have already stated, the expropriation decision was made "in accordance with the zoning plan for the Langsund connection". The issue of validity thus relates to the significance of the lack of an impact assessment on the date of the expropriation decision.
- (93) On the effects of procedural errors, the following is stated in section 41 of the Public Administration Act:
- "If the rules of procedure set out in this Act or Regulations made in pursuance thereof have not been observed in dealing with a case concerning an individual decision, the administrative decision shall nevertheless be valid when there is reason to assume that the error cannot have had a decisive effect on the contents of the administrative decision."**
- (94) The interpretation of this provision with regard to the lack of an impact assessment is thoroughly discussed in the Supreme Court judgment Rt-2009-661 (the embassy case).

- (95) It is sufficient with "a fair possibility" that the error has impacted the administrative decision, see paragraph 71 of judgment. Paragraph 72 reads:

**"The assessment depends on the specific circumstances in the case, including which errors have been committed and the nature of the administrative decision. If the procedural error has created an inadequate or incorrect decision basis on a point that is significant to the administrative decision, or the error otherwise entails abandoning fundamental conditions for proper procedure, it is often the case."**

- (96) This is referred to in the Supreme Court judgment Rt-2015-1388 (plenary case).
- (97) So, a procedural error may often impact an administrative decision. However, based on the specific circumstances in the case – the evidence – there must be a genuine chance that the error has influenced the contents of the decision.
- (98) With regard to the lack of an impact assessment, the following is set out in paragraph 72 in the embassy case:

**"In conjunction with the interests to be maintained through the rules on impact assessments, and the complex evaluation process that is to come, invalidity might quickly be result when the procedural error consists of the lack of or an inadequate impact assessment. But this is not automatic. In my view, a general presumed effect cannot be asserted, as the appellants have contended. Such a presumption would represent an unfoundedly strong emphasis on form rather than on content. It cannot be taken for granted that the considerations and interests to be maintained through the impact assessment rules cannot also be maintained in a specific case within the scope of ordinary planning. As for the effect criterion, one must therefore be specific, and have the investigation focus on each asserted deviation from the procedure that should have been followed if an impact assessment had been carried out in that particular case."**

- (99) The question is then whether there was a genuine chance that the local council would have made other decisions with regard to the route, the ferry landing or other circumstances impacting reindeer husbandry if an impact assessment had been carried out.
- (100) As already demonstrated, after the municipal sub-plan decision, a number of reports were issued by the reindeer industry. Whether or not the lack of an impact assessment may have influenced the administrative decision, must be assessed based on the findings in these reports.
- (101) As a general starting point for the individual assessment, I mention, as it has appeared from my presentation of the facts, that the reindeer grazing district throughout the entire planning work has been positive to the establishment of a mainland connection. Both the Reindeer Husbandry Administration and the reindeer grazing district have however strongly opposed the building of a road outside Stakkvik and the building of a ferry landing in Sætervika.
- (102) I will first look at *the ferry landing in Sætervika*.
- (103) The reasoned opinions of the reindeer husbandry industry are included in the analysis of consequences. The analysis sets out that the areas north on the island near Sætervika are reindeer calving areas. On the consequences, the analysis states that "... the scope can be set to medium negative". From my presentation of the analysis, I repeat for contextual purposes that the municipal sub-plan assumed that the ferry landing only demanded a

small space, and that there would still be large uninhabited areas. It was also taken into account that boats were no longer used for landing of reindeer, and that the possibility of disembarking the animals at one specific place could not be decisive.

- (104) As already described, the reindeer grazing district repeated during the hearing that the new ferry landing would conflict with the use of the area for calving and spring release, and with the need for quiet surroundings.
- (105) In the evaluation material from 2016, which absorbs some of the material from 2012, the following is said regarding a ferry landing in Sætervika:

**"The establishment of a ferry landing will "pierce" a currently inhabited area that appears undisturbed apart from a road passing through it near the coastal line. This is negative, and they will thus risk a reduced use of the area. The influence zone for a ferry landing will be rather large as the area does not have much natural demarcation."**

- (106) In my view, subsequent findings do not change what the local council knew about the consequences for reindeer husbandry when approving the building of the ferry landing in Sætervika.
- (107) In this regard, I add that subsequent documentation from the reindeer husbandry administration confirms that almost no reindeer have been transported by boat to Sætervika since 2005, as they have been landed elsewhere north on the island or taken there by car; which currently seems to be the common way of transport.
- (108) I also mention that it clearly appears from the documents in the case that placing the ferry landing in Sætervika has been regarded as the only realistic option in the total project since the initial phase of the planning. This has to do with practical and technical conditions that I do not consider relevant in the case at hand.
- (109) Based on what was known to the local council on the dates of the administrative decisions, I cannot see how an impact assessment could have resulted in the authorities choosing not to build a new ferry landing or deciding to build it elsewhere.
- (110) I will now turn to the *road change in Stakkvik*. The objections here are generally related to the loss of grazing land.
- (111) My previous presentation of the planning process shows that the decision-making authority – Karlsøy local council – consistently, repeatedly and over a long period has been in favour of building the road outside the village. The local council has all along been aware of the reindeer industry's objections and the reasons for them. The planning material shows that the choice of route was motivated by a wish to avoid new and increased traffic through the village of Stakkvik.
- (112) In the report from 2016, the following is stated on page 31:
 

**"Having the road go from Vollan and past Stakkvik will clearly affect reindeer husbandry. The building of a road will lead to a loss of grazing land, both directly and indirectly. Parts of a new route will affect this more than other stretches."**
- (113) As a matter of form, I mention that the appellant's objections to the lack of an impact assessment do not concern the parts of the road that follow the old route.

- (114) Based on what the local council knew about the consequences of a new route for reindeer husbandry, as was the case with the ferry landing, I cannot see how an impact assessment could have resulted in the authorities choosing not to build the road outside Stakkvik.
- (115) The local council's decision of 16 September 2016 confirms this. As I have already mentioned, the NPRA recommended as late as in 2016, after a reassessment, to improve the existing road instead of building a new one outside the village. Despite the NPRA's recommendation, and despite the reports made in the meantime, the majority of the local council maintained that the road had to go past Stakkvik. As I see it, the local council confirmed in the 2016 decision what had been its view throughout the entire planning process: the road should be built outside the village, despite any disadvantages to reindeer husbandry.
- (116) Against this background, my conclusion is that there is no real possibility that an impact assessment would have altered the decisions made. Thus, the lack of an impact assessment does not affect the validity of the expropriation decision.
- (117) *Is the expropriation decision in conflict with Article 27 ICCPR?*
- (118) Under Article 108 of the Constitution, the authorities "shall create conditions enabling the Sami people to preserve and develop its language, culture and way of life". This provision is based on Article 27 ICCPR, which reads:
- "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."**
- (119) As I will revert to shortly, there are several rulings from the UN Human Rights Committee that are interesting to the case at hand. As to the significance of the Committee's statements, I refer to the Supreme Court's grand chamber ruling Rt-2008-1764 paragraph 81.
- (120) It is clear, and undisputed, that Sami reindeer husbandry is protected under the provision.
- (121) Furthermore, according to the Committee's case law, it is relevant if, and to which extent, the minority has been allowed to speak and be included in the process. As I have already demonstrated, representatives of the reindeer industry have also been given the opportunity to present their views. This has taken place in writing, at meetings and during inspections.
- (122) The question in the case at hand is whether the measure is of such a scope and significance that it entails that the Sami have been denied rights under Article 27, the way "denied" has been interpreted by the Committee on Human Rights.
- (123) Three cases concerning interference with the rights of Finnish Sami are particularly relevant here.
- (124) In the case *Ilmari Länsman and others v. Finland* from 8 November 1994, the Committee established that "... measures whose impact amount to a denial of the right" would not be compatible with the Covenant. However, measures that had "... a certain limited impact on the way of life of persons belonging to a minority ... [would not] necessarily amount

to a denial of the right under article 27", see paragraph 9.4. Then, in paragraph 9.5, the Committee expressed that the question was whether the relevant quarry had such an impact in the area "... that it [did] effectively deny to the authors the right to enjoy their cultural rights in that region". It is then established that no measures, either implemented or planned, were of such a character that Article 27 had been violated.

- (125) The case *Jouni E. Länsman and others v. Finland* from 22 November 1996 confirms the line that was drawn in paragraph 9.4 in the case from 1994, see paragraph 10.3. The question there was whether the felling of trees that had already taken place, together with the felling that was planned was, "... of such proportions as to deny the authors the right to enjoy their culture in that area", see paragraph 10.4. In the individual assessment in paragraph 10.6, the Committee established that the felling in the area resulted in "... additional work and extra expenses ...." for the Sami, but that it "... does not appear to threaten the survival of reindeer husbandry".
- (126) In *Jouni Länsman and others v. Finland* from 15 April 2005, the subject was once again the consequences of felling of trees in Sami areas. The Committee stressed in paragraph 10.2 that one had to consider "... the effects of past, present and planned future logging ...". As in the earlier rulings, the Committee pointed at the fact that the low profitability of reindeer husbandry was due to other circumstances than the measure, see paragraph 10.3. Finally, the Committee concluded in this paragraph that the consequences of the logging "... have not been shown to be serious enough as to amount to a denial of the authors' right to enjoy their own culture in community with other members of their group under article 27 of the Covenant".
- (127) In a ruling from 24 April 2009 – *Ángela Poma Poma v. Peru* – the Committee formulated the core issue as follows in paragraph 7.5: "... the question is whether the consequences ... are such as to have a substantive negative impact on the author's enjoyment of her right to enjoy the cultural life of the community to which she belongs". The Committee concluded that Article 27 had been violated. It was held among other things that because of the measure, thousands of head of livestock were dead and that the complainant had been forced to abandon her land.
- (128) Overall, the case law of the Human Rights Committee shows that it takes a lot for a measure to become so serious that it constitutes a violation of Article 27. Against this background, and which I am now to explain, it is clear that the measures in the case do not constitute a violation of Article 27 ICCPR.
- (129) In my view, *the ferry landing in Sætervika* will have limited consequences for reindeer husbandry. As I have already demonstrated, documentation from the Reindeer Husbandry Administration during the period 2005 to 2015 shows that the reindeer were moved to an area near Sætervika only three times. During other periods, the reindeer were landed elsewhere north on the island or transported there by a lorry. Thus, it does not seem to be correct what the Nellemann's report from 2012 established, that the reindeer were generally landed in Sætervika from a boat. According to information provided to the Supreme Court, it is also unlikely that the planned ferry landing will block reindeer paths as Nellemann suggests in his report. In the Norut report from 2016, the problems connected to the ferry landing are somewhat toned down.
- (130) Among the measures to diminish the disadvantages for the reindeer industry, I mention that the appraisal conditions contain discussion routines before the reindeer arrive at

Reinøy in the spring, and that the development work must be stopped if landing of reindeer from a boat in Sætervika should be relevant, or from a lorry in the area. If calving is going on in the area adjacent to Sætervika, the development work must be stopped from 25 April to 10 June. As I mentioned in my presentation of the facts, the NPRA has expressed that rock mass mining is preferably to be carried out in consultation with the reindeer industry.

- (131) Moreover, I assume that *the road change in Stakkvik* may affect the reindeer industry. As it appears from my presentation of facts, it concerns only a limited area rather close to the existing road and village, and in the border area towards cultivated land.
- (132) In my view, the specific measures – the ferry landing and the road change in Stakkvik – are well below the threshold for what constitutes a violation of Article 27 ICCPR according to case law of the Human Rights Committee.
- (133) Nor has information been provided on any future measures that might constitute a violation of the Sami rights under Article 27. I repeat that possible increased pressure on areas for holiday houses etc. was to be assessed in connection with a review of the land-use element in the municipal master plan. Also, reindeer husbandry reports suggest measures to protect reindeer husbandry in the future. A particularly important measure seems to be that, in line with Norut's recommendation, the impact assessment from 2012 has adopted zones requiring special consideration, see section 11-8 of Planning and Building Act, for the three dominant valleys on the island.
- (134) Against this background, I have arrived at the *conclusion* that Article 27 ICCPR has not been violated.
- (135) Consequently, the appeal must be dismissed.
- (136) The County Authority of Troms has won the case, but with reference to section 20-2 subsection 3 c of the Dispute Act, I do not find that costs in the Supreme Court should be awarded.
- (137) There is no reason to change the court of appeal's ruling on the costs.
- (138) I vote for this

#### J U D G M E N T :

- 1. The appeal is dismissed.
- 2. Costs in the Supreme Court are not awarded.

- (139) Justice **Bergh**: I have arrived at a different result than Justice Kallerud.
- (140) In my view, the fact that no impact assessment was carried out before the adoption of the zoning plan is a procedural error. The analysis of consequences included in the NPRA's proposed municipal sub-plan in 2005, did not entail that one could consider the consequences for the reindeer husbandry "satisfactorily examined on a superior plan level" in connection with the zoning plan, see section 3 subsection 2 of the 2009



Regulations. The analysis in 2005 was brief, and the consequences for reindeer husbandry were presented only in the form of a letter from the reindeer grazing district. I agree with Justice Kallerud that the exemption provision in the Regulations had to be interpreted to mean that a formal impact assessment was not required. As I see it, an examination was nevertheless required with the foundation and depth necessary to meet the basic considerations behind the demand for an impact assessment.

- (141) I also find that the procedural error in question may have been significant for the contents of the zoning plan the way it was adopted. The zoning decision must then be deemed invalid, see section 41 of the Public Administration Act.
- (142) As pointed out by Justice Kallerud, according to section 41 of the Public Administration Act, it is sufficient that there is a fair possibility that the procedural error has had a decisive effect on the administrative decision. In my view, such a possibility exists.
- (143) Justice Kallerud has quoted the provision in the Regulations on impact assessments from 2009. This provision is in accordance with that in section 41-1 of the current Plan and Building Act and section 33-1 of the previous Act. Justice Kallerud has also quoted paragraph 55 of the Supreme Court judgment in Rt-2009-661 (the embassy case). As pointed out therein, the preparatory works emphasise that impact assessments are also to contribute to ensuring transparency giving various authorities, affected parties and interested parties real possibilities to influence the project planning and the decision to implement.
- (144) Furthermore, Appendix III to the 2009 Regulations included a requirement that an impact assessment must comprise an examination of a measure's "cumulative character compared to other implemented and planned measures in the influence area of the development project". The appendix also stated: "Where the interests of the reindeer industry are affected, the aggregate effects of the plans and measures within the individual reindeer grazing district must be assessed". The same provisions are found in later regulations.
- (145) In the case at hand, it is clear that with the adoption of the zoning plan, there was a genuine choice when it came to the road change in Stakkvik. This is evidenced by the fact that it has been considered, after the adoption of the plan, whether the road project described in the plan should be continued. During the discussions in 2016, the NPRA Administration wanted after all that the road pass through Stakkvik. The local council decided with a scarce majority to maintain the zoning plan.
- (146) In my view, there is a fair possibility that the local council, when the zoning plan was adopted in 2010, if the preceding discussions had been carried out satisfactorily with an impact assessment, would have chosen a different solution with regard to the road change in Stakkvik. An impact assessment would have given a broader decision-making basis than at the date of the administrative decision. An impact assessment would also, in line with what I have pointed out regarding the purpose of such an assessment, have given a more transparent planning process in which the reindeer industry could have had a better chance to participate in the discussions and influence the outcome.
- (147) The reindeer grazing district and others emphasised already early in the planning process that the project, including the planned road change in Stakkvik, would have unfortunate effects on reindeer husbandry. Such effects are identified and described in more detail in the reports issued after the adoption of the zoning plan. In my view, in connection with

the assessment under section 41 of the Public Administration Act, one cannot emphasise the fact that the local council in 2016, with knowledge about the reports present at the time, did not find reason to change the already adopted zoning plan.

- (148) If an impact assessment had been carried out, it is likely that the circumstances and assessments set out in the subsequent reports had appeared much the same, but then at a much earlier stage, before the planning decisions. This would have altered the process and preparations until the planning decisions completely. Thus, as I see it, there is also a clear possibility that the local council would have decided otherwise with regard to the road change in Stakkvik.
- (149) As for the ferry landing in Sætervika, no specific alternative placements have been presented, neither during the planning process nor later. It can nevertheless not be ruled out that an impact assessment would have made one consider alternative placements of the ferry landing. Since I have concluded that the conditions in section 41 of the Public Administration Act have not been met with regard to the road change in Stakkvik, I find no reason to consider whether the same applies for the placement of the ferry landing. My position entails in any case that the zoning plan, and thus the expropriation decision, is invalid.
- (150) As I have concluded that the zoning plan and expropriation decision are invalid, there is no need for me to address Article 27 ICCPR. Yet, I would like to express my agreement with Justice Kallerud's general interpretation of the provision.
- (151) Against this background, I vote in favour of upholding of the district court's ruling.
- (152) Justice **Arntzen:** I agree with Justice Bergh in all material respects and with his conclusion.
- (153) Justice **Matheson:** I agree with Justice Kallerud in all material respects and with his conclusion.
- (154) Justice **Matningsdal:** Likewise.
- (155) Following the voting, the Supreme Court gave this

#### J U D G M E N T :

1. The appeal is dismissed.
2. Costs in the Supreme Court are not awarded.