



THE SUPREME COURT OF NORWAY

On 21 December 2017, the Supreme Court gave judgment in

HR-2017-2428-A (case no. 2017/981), civil case, appeal against judgment

The state represented by
the Ministry of Agriculture and Food

(The Attorney General represented by
Counsel Stein-Erik Jahr Dahl)
Assisting counsel: Marius Emberland)

v.

Jovsset Ante Iversen Sara

(Counsel Trond Pedersen Biti)

V O T I N G :

- (1) Justice **Bergsjø**: The case concerns the validity of a decision ordering a young Sami reindeer herder, the owner of a *siida unit*, to cull his herd. It questions whether the provision on proportionate reduction in the Reindeer Herding Act section 60 subsection 3, as applied on this *siida unit*, is contrary to the UN International Covenant on Civil and Political Rights (ICCPR) article 27 and/or the European Convention on Human Rights Protocol 1 article 1 (ECHR P1-1).
- (2) The respondent, Jovsset Ante Iversen Sara, is 25 years old and leader of a *siida unit* in herding district no. 20, Fálá. Pursuant to the Reindeer Herding Act section 51, a *siida* is a group of reindeer herders working together on specific pasture areas. In the case at hand, the herding district coincides with the *siida*. A *siida unit* is a family group or an individual being part of a *siida* and operating under the management of a *siida* leader, see the Reindeer Herding Act section 10. The summer pastures of Fálá herding district are on the island of Kvaløya in Finnmark.
- (3) Sara's grandfather and father practiced reindeer husbandry in the same herding district until they stopped in 2001/2001 and 2003/2004, respectively. When the grandfather phased out the business, he transferred reindeer to his daughter, Marit Ravna Sara. She, in turn, transferred her *siida unit* to her nephew Jovsset Ante Iversen Sara in 2010. At the time of the transfer, the unit counted 71 reindeer.

- (4) The Reindeer Herding Act was adopted on 15 June 2007 and entered into force on 1 July the same year. Section 60 contains provisions on the number of reindeer. Pursuant to subsection 1, a maximum number of reindeer must be set for each summer siida based on the pasture area the siida controls. Subsection 3 contains provisions on herd reduction in cases where the number of reindeer exceeds the maximum number set in accordance with subsection 1, setting out that the siida is obliged to prepare a culling plan. If the siida does not prepare a plan or fails to implement it, each siida unit must reduce its excess number of animals proportionally.
- (5) After the adoption of the Reindeer Herding Act, a process was initiated for setting the maximum number of reindeer. **Rights of usage** for Fálá herding district were adopted by the district's annual meeting of 2 July 2011, at which the district applied for permission to herd a maximum of 2,000 reindeer. On 8 December 2011, the Reindeer Husbandry Board set the maximum number for the district's spring herd to 1,700. Following an appeal, on 23 January 2013 the Ministry of Agriculture and Food increased this maximum number to 2,000.
- (6) By the year-end 2011, a maximum number had been set for all herding districts, after which the Norwegian Reindeer Husbandry Administration notified the districts and the siidas of an order to prepare culling plans. On 2 July 2012, a notification was also sent to Jovsset Ante Iversen Sara. In the letter, the Reindeer Husbandry Administration assumed that the Reindeer Husbandry Board – before the hearing of the appeal – had set the maximum number of reindeer in the spring herd of Fálá herding district to 1,700, while the district, as of 31 March 2012, had 3,105. The Reindeer Husbandry Administration then referred to the provisions on herd reduction in the Reindeer Herding Act section 60 subsection 3, pointing out that the siida was obliged to prepare a culling plan, possibly within 1 September 2012. Sara was notified that the Reindeer Husbandry Board would carry out a proportionate reduction of his herd in accordance with the Reindeer Herding Act section 60 subsection 3 if a culling plan was not prepared. By the Reindeer Husbandry Administration's decision of 6 August 2012, the district was given until 10 September 2012 to prepare a culling plan.
- (7) The herding district failed to agree on a culling plan. However, four of its six siida unit leaders entered into an agreement on 8 September 2012, under which the four were jointly to herd 4/6 of the total number of reindeer in the herding district. The agreement sets out that "not all the siida units in the district managed to agree on a joint culling plan that would spare the herds of Jovsset Ante Sara and Ragnhild J.A. Buljo from a proportionate reduction". The Reindeer Husbandry Administration did not accept the agreement as a culling plan, and on 1 October 2012, it notified Sara that the Reindeer Husbandry Board would decide on a proportionate reduction of the herds of the siida units in the district.
- (8) At a meeting 7 February 2013, the Reindeer Husbandry Board discussed a proportionate reduction of Sara's herd, but postponed its decision. At a meeting 26 February 2013, however, the Reindeer Husbandry Board decided to order Sara to cull the spring herd of his siida unit. The representatives appointed by the Sami Parliament voted against this. The decision reads as follows:

"In accordance with the Reindeer Herding Act section 60 subsection 3, the siida unit of Jovsset Ante I. Sara is ordered to cull the herd from 116 to 114 reindeer within 31

March 2013, from 114 to 94 within 31 March 2014 and from 94 to 75 within 31 March 2015.

Reason for the order:

The maximum number of reindeer in the spring herds of Fálá herding district was set to 2,000 in an order from the Ministry of Agriculture and Food of 14 December 2012. Based on the numbers set out in a publicly approved report on reindeer husbandry as of 31 March 2012, the order has not been followed. The herding district had the opportunity to prepare a culling plan within a certain period of time, which was not done. Hence, each siida unit is ordered to reduce its herd by 35.6 percent down to the legal size in accordance with the cull order of 14 December 2012. The Reindeer Husbandry Board considers a deadline of three years, which means completion by 31 March 2015, to be sufficient to carry out the cull and at the same time maintain the interests of the siida unit. Otherwise, please refer to the comments on this deadline in the presentation of the case. The Reindeer Husbandry Board has also considered the relationship to the Constitution article 110a and international law provisions, and refers to the presentation of the case also in this regard."

- (9) Sara appealed the cull order, and the case was reviewed by the Reindeer Husbandry Board on 20 November 2013. The appeal was dismissed, but forwarded to the Ministry of Agriculture and Food to be reviewed there.
- (10) During the Ministry's review of the appeal, the herding district was given a new deadline until 20 February 2014 to prepare culling plan. No such plan was prepared. The Ministry of Agriculture and Food decided on 10 March 2014 to dismiss the appeal.
- (11) The Reindeer Husbandry Board decided on 16 September 2015 to order Jovsset Ante Iversen Sara to cull his reindeer herd in accordance with the cull order of 10 March 2014. At the same time, a compulsory fine was imposed pursuant to the Reindeer Herding Act section 76 of NOK 2 for each reindeer per day that exceeded the maximum number. In the Ministry's decision of 15 December 2015, Sara's appeal was dismissed.
- (12) By a writ of summons of 22 May 2015 to Indre Finnmark District Court, Sara brought an action against the state represented by the Ministry of Agriculture and Food claiming that the Ministry's cull order of 10 March 2014 was invalid. On 18 March, the district court gave judgment concluding as follows:

"The Ministry of Agriculture and Food's cull order of 10 March 2014 regarding the siida unit of Jovsset Ante I. Sara, is invalid."

- (13) The district court held that the cull order was a violation of the protection of property pursuant to ECHR P1-1. In its assessment, the district court stressed among other things that Sara is one of very few reindeer herders who are strongly affected by the reduction, that its purpose could have been fulfilled otherwise and that it affects in particular young herders in their establishment phase.
- (14) The state represented by the Ministry of Agriculture and Food appealed the judgment to Hålogaland Court of Appeal. The appeal concerned the findings of facts and the application of the law. The court of appeal gave judgment on 17 March 2017 concluding as follows:

"The appeal is dismissed."

- (15) The court of appeal held that the cull order violated the provision on the protection of indigenous peoples in ICCPR article 27. For that reason, the court did not address ECHR P1-1. As to whether ICCPR article 27 had been violated, the court added that it is impossible to earn a profit with a herd counting only 75 reindeer. The court also held that the cull order was illegitimate, as the authorities during the law-making process did not follow the instruction from the Sami Parliament to spare the smallest units.
- (16) The state represented by the Ministry of Agriculture and Food has appealed the judgment to the Supreme Court. The appeal concerns the application of the law. The case remains mainly in the same position before the Supreme Court as before the lower instances.
- (17) The appellant – *the state represented by the Ministry of Agriculture and Food* – has contended the following:
- (18) The cull order of 10 March 2014 contains no errors that could render it invalid. The Reindeer Herding Act section 60 subsection 3 second sentence is in accordance with both ICCPR article 27 and ECHR P1-1, and there is no basis for a restrictive interpretation of the provision on proportionate reduction of the number of reindeer.
- (19) The proportionate reduction does not imply that Sara is "denied the right, in community with the other members of [his] group, to enjoy [his] own culture", cf. ICCPR article 27. In this case, the individual rights clash with the collective minority rights. The issue of violation thus depends on whether the cull is in the interest of the group as a whole, and whether it is objectively and reasonably justified. ICCPR article 27 does not grant Sara a right to earn a profit from reindeer husbandry.
- (20) In the individual assessment, it must be emphasised that Sara is not deprived of his right to conduct reindeer husbandry. He acquired a unit with 71 animals in 2010, and this number will be more or less the same after the cull. Reducing the herds is in the interest of the siida – it was necessary to implement measures against overgrazing. The cull order is also based on reasonable and objective concerns. The provision on proportionality is fair, as it imposes all herders to cull. It also implies that the largest units must carry out the largest culls. Sparing of the smallest units would have contributed to an unfortunate commercial structure. The siida units themselves could have decided on the distribution of reindeer among them. The duty of consultation has been observed as the Sami Parliament and the Sami Reindeer Herders' Association of Norway have been heard during the law-making process.
- (21) The cull order is also not a violation of ECHR P1-1. The statutory requirement has been met, and the measure maintains a legitimate concern. It is the **control rule** that becomes applicable in a case like this. The cull order is proportionate, as it does not entail an "individual and excessive burden". In this regard, it is crucial that Sara is treated in the same way as others in the same situation, while the internal autonomy and the purpose of the cull must also be considered.
- (22) The state represented by the Ministry of Agriculture and Food submitted this prayer for relief:

"1. Judgment is to be given for the state represented by the Ministry of Agriculture and Food.

2. The state represented by the Ministry of Agriculture and Food is to be awarded costs before the district court, the court of appeal and the Supreme Court."

- (23) The respondent – *Jovsset Ante Iversen Sara* – has contended the following:
- (24) The court of appeal has correctly concluded that the cull order is a violation of ICCPR article 27, and the judgment reflects a correct application of the law in all aspects.
- (25) When assessing the protection of minorities pursuant to article 27, focus must be on the individual representative of a culture. Once an indigenous individual has established a specific cultural practice, government policy cannot exclude him or her from such practice. Article 27 is violated if the individual is deprived of the possibility of a continued economically sustainable cultural practice. The provision does not only comprise general denials, but also violations. Interference with an individual's cultural practice may only take place if deemed necessary to protect the minority as a whole.
- (26) Article 27 involves a requirement that the minority must be allowed genuine and effective participation in the decision-making process. This means that the right of participation must have influenced the content of the decision – it is not sufficient that the minority has been consulted. ICCPR article 1, the ILO Convention 169 articles 6 and 7 and UN's Declaration on the Rights of Indigenous Peoples article 3 are included as important aspects of interpretation.
- (27) It is a crucial aspect in the individual assessment that it is impossible to practice economically sustainable husbandry with 75 reindeer and that there is a genuine risk of compulsory liquidation. The interference does not sufficiently protect the interests of young herders in the establishment phase. Overgrazing could have been prevented by other means, and the measure is thus not necessary. Also, the authorities have disregarded the clear and unambiguous advice from the Sami Parliament and the Sami Reindeer Herders' Association of Norway that siida units counting less than 200 reindeer must be spared from culling. The requirement for effective participation is thus not met.
- (28) The district court has correctly concluded that the cull order violates ECHR P1-1, and the judgment reflects a correct application of the law. The requirement for legality and the requirement for purpose are met, but the measure is disproportionate. Sara belongs to a small group of reindeer herders that are affected unreasonably harshly – an "individual and excessive burden" has been imposed on him. After having invested his career and future in reindeer husbandry, he is now deprived of the possibility to carry on. In the assessment, the authorities' failure to assess the consequences of the cull must be given weight.
- (29) Jovsset Ante Iversen Sara has submitted this prayer for relief:
- "The appeal is to be dismissed."**
- (30) *My view on the case*
- (31) The proportionate reduction of the number of reindeer has been ordered in accordance with the Reindeer Herding Act section 60 subsection 3 second sentence. The validity of the order depends on whether this provision is in conflict with the provision on the

protection of minorities in ICCPR article 27 and/or the protection of property in ECHR P1-1. Both provisions have been incorporated in the Human Rights Act section 2, and according to the Act section 3, they prevail over other legislation in the event of conflict. As regards ICCPR article 27, I also refer to the Reindeer Herding Act section 3.

- (32) In order to assess whether Sara's rights under these provisions have been violated, it is necessary first to examine the provisions on herd reduction in the Reindeer Herding Act and the legislative process until the Act was adopted in 2007.
- (33) *The Reindeer Herding Act's provisions on herd reduction*
- (34) The Reindeer Herding Act is, according to its section 1 subsection 1 first sentence, to "arrange for ecologically, economically and culturally sustainable reindeer husbandry based on the Sami culture, tradition and customs in the interest of the herders and society in general". As I have already mentioned, pursuant to the Reindeer Herding Act section 57 subsection 1, rules must be implemented for the management and usage of the herding district's resources. Pursuant to subsection 2, the rules are to "ensure an ecologically sustainable exploitation of the district's grazing resources". The authority to implement rules of usage lies with the district board pursuant to section 58, and the district board is elected by and among the herders pursuant to section 43 and onwards. The rules are to be approved by the county administrator pursuant to section 58 subsection 1 first sentence.
- (35) The Reindeer Herding Act section 60 provides rules on the maximum number of reindeer for the siidas. Subsections 1 – 4 read as follows:

"The rules of usage pursuant to section 57 must set a maximum number of reindeer for the individual summer siida. The number is to be based on the grazing area that the siida controls. The rules of usage must account for the assessment in terms of operation and grazing making basis for the number set. If necessary to obtain sustainable usage of the winter pasture areas, a maximum number can also be set for each of the winter siidas.

A winter siida or a different group may ask that a separate maximum number be set for them.

If the number of reindeer in the siida exceeds the maximum number pursuant to subsection 1 or 2, the siida must prepare a culling plan. If the siida fails to do so, or is not able to implement such a plan, each siida unit must reduce its herd proportionally. The Reindeer Husbandry Board will see to that the cull is carried out. Deadlines are to be set for the preparation of a plan and for the completion of the cull.

A maximum number of reindeer can be set per siida unit. A reduction of the siida's herd pursuant to subsection 3 must, in that case, be carried out by the siida units whose herds exceed the maximum number of reindeer first culling their herds to the number of reindeer set."

- (36) Hence, when the number of reindeer in the siida exceeds the maximum number pursuant to subsection 1, the siida itself must in principle prepare a culling plan, see subsection 3 first sentence. In this way, the Act allows for local self-determination. However, a cull order requires unanimity, and in the case at hand, the siida units did not reach an agreement. The provision on proportionate reduction in subsection 3 second sentence is only applicable in cases where the siida does not prepare a culling plan, or such a plan is not implemented.

- (37) Pursuant to subsection 4, a maximum number of reindeer can be set for each siida unit. My interpretation of this provision is that the district board holds this authority, and that the maximum number of reindeer per siida unit is set through an amendment of the rules of usage, see sections 57 and 58 of the Act. Pursuant to sections 58 and 48, the district board's decisions are made by a simple majority, but the rules of usage must be approved by the County Administrator. Thus, subsection 4 allows to some extent sparing of the smallest siida units, to which I will revert.
- (38) *The lawmaking process*
- (39) As I have mentioned, the lawmaking process is also of interest in the assessment of whether the provision on proportionate reduction in section 60 subsection 3 second sentence violates any rights under ICCPR article 27 and/or ECHR P1-1. I use as a starting point the report by the Committee preparing the Reindeer Herding Act in Norwegian Official Report (NOU) 2001: 35 *Proposed amendments to the Reindeer Herding Act*. The Committee's proposed amendments regarding the reindeer cull was included in section 9-4 of the draft. Subsection 4 reads as follows, see the report page 202:
- "If the number of reindeer in the siida exceeds the maximum number pursuant to subsection 1 or 2, each responsible unit holding more than 200 reindeer must reduce its herd proportionately. If no siida unit exceeds 200 reindeer, a proportionate reduction must be carried out in all siida units."**
- (40) According to this proposal, a proportionate reduction was to be made; however, so that units counting less than 200 reindeer were spared. The Committee did not intend that the siida itself was to decide on the distribution of the reduction among the units.
- (41) In section 9-4 subsection 5 of the draft, the majority of the Committee also proposed a rule for the setting of the maximum number of reindeer per siida unit. The following is stated on page 110 of the report:
- "The rule is meant to prevent that the district's reindeer husbandry is practiced only by a few siida units with large herds, where the workers are primarily hired employees. A maximum number of reindeer set for each siida unit may allow the establishment of more siida units, and thus give young people the opportunity to operate their own. This would in turn secure recruitment to the trade. In order for reindeer husbandry to persist as a trade with all its culture and Sami traditions intact, it is necessary that many people are involved. Reindeer husbandry only practiced by a few will have problems promoting its interests in competition with other user interests, and will in itself weaken the basis for a vigorous Sami culture."**
- (42) The Ministry of Agriculture and Food requested a more extensive report on the issue of the siida's place in the Reindeer Herding Act. Pending such a report, the Ministry proposed in Proposition to the Odelsting no. 99 (2004–2005) the implementation of a subsection 5 of the Reindeer Herding Act 1978 section 2. The two first sentences of the proposition were generally in accordance with the Committee preparing the Reindeer Herding Act's draft section 9-4 subsection 4, thus implying that units with less than 200 reindeers were to be spared in the first round from the proportionate reduction.
- (43) In the Proposition, the Ministry explained that the scarcity of the grazing resources was difficult for parts of the reindeer husbandry in Finnmark, and that this called for "lawful measures that in the short run may contribute to preparing for ecologically sustainable

reindeer husbandry, which in turn is a condition for economic and cultural sustainability", see page 1. However, the Proposition was dropped due to the parliamentary election.

- (44) On 11 May 2005, an agreement was entered into between the Ministry of Local and Regional Government and the Sami Parliament on consultation procedures in cases that "may affect Sami interests directly". In the continued work on the Reindeer Herding Act, seven consultations were held between the authorities and the Sami Parliament, and there was close contact on an administrative level, see Proposition to the Odelsting no. 25 (2006–2007) page 9–10.
- (45) The Sami Parliament prepared so-called position memorandums in connection with the consultations. In Position Memorandum 2 of 10 February 2006, the Sami Parliament supported the concept of sparing the smallest units from proportionate reductions, but wanted more flexibility than what the limit of 200 animals could give. The Sami Parliament wanted a rule that rendered possible "specific overall assessments allowing differences between the herds' composition, geographic conditions and other conditions that are natural to consider".
- (46) Following the consultations, the Ministry prepared a new draft where no provision was included on sparing the smallest units from culling. The proposition was forwarded to the Sami Parliament and heard in plenary session on 26 – 28 September 2006. The Sami Parliament adopted the following wording on 27 September:
- "In accordance with the proposition of the Committee, a provision must be implemented regarding sparing of units with an average or smaller number of reindeers, in connection with cull orders pursuant to section 64 of the draft. The siidas must set a minimum number of reindeer. This must take place by unanimity in the siida. Each responsible unit with a number of reindeer exceeding the minimum, set by the siida, must reduce the excess number proportionately. If the siida cannot unanimously agree on the smallest number of reindeer, the Committee's proposal of 200 animals will apply. This will contribute to protecting young reindeer herders in the establishment phase and ensure economic sustainability for all reindeer herders.**
- (47) Nevertheless, the Ministry held that it was not desirable to implement a rule sparing the smallest units. In Proposition to the Odelsting no. 25 (2006-2007), the Ministry presented a draft bill in which section 60 corresponds to the final provision. On pages 43-44 of the Proposition, the Ministry stresses that adjusting the number of reindeer to the actual resource base had been a challenge for years. The Ministry continues by stating that the number of reindeer in many Finnmark areas is "materially higher than what the authorities deem sustainable considering the resource base".
- (48) In the Proposition, the Ministry also discusses the structure of the reindeer husbandry, referring among others to statements in Parliament Report no. 13 (1974–75) that there has been "an unfortunate pile-up of reindeer herders", and that "there are too many units for the natural resources available."
- (49) On page 45 of the Proposition, the Ministry presents as the main challenge the "drafting of rules that combine commercial self-determination with control systems and sanctioning options which enable the authorities to maintain their responsibility for sustainable reindeer husbandry and for other social concerns". On page 46, the Ministry endorses the Committee preparing the Reindeer Herding Act's proposal to implement a provision in the Act on proportionate reduction of the number of reindeer, and then states:

"The Ministry supports the Committee's proposal to implement such a model, but suggests that the siida itself is given the opportunity to complete the necessary adjustment of its herds within a certain period of time. The reduction model will thus only be applicable if the siida refuses or fails to carry out the cull. This proposal is new compared to the Committee's proposal, and was made by the group behind the siida report, see chapter 8.7. However, the Ministry does not support the Committee's proposal that the reduction is only applicable to the units with more than 200 reindeer. The Committee suggested this limit to spare smaller units in the first round. For several reasons, the Ministry is reluctant to set a lower limit. First, the principle in the Act of a proportionate reduction will imply that the largest units must carry out the largest part of the cull. If, in addition, a lower limit is set for the participation of a siida unit, the result in the long run will be an unfortunate commercial structure weakening both the total and the average profitability in the siida. In other words, the possibilities of conducting economically sustainable reindeer husbandry may be undermined. This view deviates from that set out in Proposition to the Odelsting no. 99 (2004-2005), but is a result of a renewed assessment of this issue."

- (50) The Proposition also states that not only the Sami Parliament, but also the Sami Reindeer Herders' Association of Norway, supported the Committee's proposal to spare the siida units with the lowest number of reindeer from reduction, see page 46.
- (51) The Parliament Standing Committee on Trade supported in Recommendation to the Odelsting no. 72 (2006–2007) the Ministry's proposal. On page 11 of the Recommendation, the Committee states that the proposed amendments must be "considered in context with the Government and the Storting's goals for an economically, ecologically and culturally sustainable reindeer husbandry". Next, it is stated that reindeer husbandry is dependent on biological resources, and that the "use thereof must be sustainable in a long-term perspective".
- (52) *ICCPR article 27 – general remarks on the interpretation*
- (53) Jovsset Ante Iversen Sara has primarily asserted that the cull order is a violation of ICCPR article 27. He has not asserted that the Constitution article 108 provides a wider protection than the Covenant, on which I agree.
- (54) I will first consider the requirements set in ICCPR article 27 in a case like the one at hand, and start with the wording of the English original text:

"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 practise their own religion, or to use their own language."

- (55) According to its wording, the article protects the individual. Nevertheless, the protection has certain collective features, see the passage that no individuals "shall be denied" the right to enjoy their culture etc. "in community with the other members of their group". It is clear that the Sami constitute a minority within the meaning of the provision, and that reindeer husbandry is a form of protected cultural practice, see the Supreme Court judgment HR-2017-2247-A para 120. Although the wording uses the term "denied", the provision is interpreted to mean that also interferences that do not constitute a general denial may violate the right to enjoy one's culture, see NOU 2007: 13 *The new Sami law*, page 2013.

- (56) The Supreme Court has examined ICCPR article 27 in earlier rulings. However, these rulings concern violations of reindeer husbandry interest based on the needs of the greater society, more specifically hydropower development, protection of an area and building of roads etc., see the Supreme Court judgments Rt-1982-241, Rt-2004-1092 and HR-2017-2247-A. Thus, in my view, they are of limited interest to the case at hand, where the policy is meant to secure the resource base and sustainability of the trade. I mention nevertheless the statement of the justice delivering the leading opinion in the latter judgment para 128 that "it takes a lot before the interference becomes so serious that it violates article 27".
- (57) Statements by the UN Human Rights Committee are crucial in the interpretation of ICCPR. In the Supreme Court's grand chamber ruling Rt-2008-1764 para 81, the justice delivering the leading opinion states that an "interpretation of the Convention by the UN Human Rights Committee must weigh heavily as a source of law". Thus, it is natural to find support for the interpretation from the Committee's General Comments and from its case law in appeals from individuals.
- (58) The Human Rights Committee discusses ICCPR article 27 in General Comment no. 23. It is set out in paras 6.1 and 6.2 that the states have an obligation to implement positive measures when deemed necessary to protect the minority. In para 6.2 the Committee continues:
- "In this connection, it has to be observed that such positive measures must respect the provisions of articles 2.1 and 26 of the Covenant both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population. However, as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria."**
- (59) My understanding of this is that measures for protection of the minority must respect the Covenant's provisions on protection against discrimination. As long as the measures aim to improve the minority's possibilities of enjoying its culture etc., they may be deemed legitimate as long as they are based on reasonable and objective criteria.
- (60) In para 7, the Committee specifies that the term "culture" also comprises ways of living and traditional activities such as fishing and hunting. The Committee states in that respect that "[t]he enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them". Here, the Committee stresses once again that the states do not only have an obligation passively to accept the minorities – they may also have an obligation actively to implement measures to protect them. The minority group also has a right to be consulted. I will revert to the implications of this right.
- (61) As mentioned, the case law of the Human Rights Committee in appeals from individuals may also contribute to an understanding of article 27. The case at hand does not concern a violation of the reindeer herders' interests based on other concerns, but a policy that is meant to maintain the reindeer husbandry. It is natural to make an assessment based on the case law of the Committee in appeals that have raised the same issues, and I will first consider which *assessment criteria* must be made.

- (62) I will first mention the Committee's statement of 30 July 1981 in *Lovelace v. Canada*. The appellant was a Maliseet Indian who had lost her rights in the minority group because she had married a man outside of the group. Due to Canadian legislation, she was not allowed to move back to the reserve. This policy is to restrict the access to the reserve for purposes of "protection of its resources and preservation of the identity of its people", see para 15. On this, the Committee states the following in para 16:

"In this respect, the Committee is of the view that statutory restrictions affecting the right to residence on a reserve of a person belonging to the minority concerned, must have both a reasonable and objective justification and be consistent with the other provisions of the Covenant, read as a whole."

- (63) In the individual assessment, the Committee then states that it was "necessary to preserve the identity of the tribe", see para 17.
- (64) The Committee's statement in *Kitok v. Sverige* of 27 July 1988 is also of great interest. The case concerned a Sami who, in accordance with Swedish legislation, had lost his right to membership in a "Sami town" after having worked outside the reindeer husbandry for more than three years. The purpose of the policy in question seems to have been to restrict the number of herders "for economic and ecological reasons and to secure the preservation and well-being of the Sami minority", see para 9.5. The Committee accepted the purpose as reasonable and in accordance with article 27, but due to the absence of ethnical criteria in the legislation, it doubted whether the article had been violated, see paras 9.6 and 9.7. In para 9.8, the Committee states:

"In resolving this problem, in which there is an apparent conflict between the legislation, which seems to protect the rights of the minority as a whole, and its application to a single member of that minority, the Committee has been guided by the ratio decidendi in the Lovelace case (No. 24/1977, *Lovelace v. Canada*), namely, that a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued sustainability and welfare of the minority as a whole."

- (65) Hence, the Committee found guidance in the Lovelace ruling, but emphasised that the restriction had to be necessary out of concern for the minority. The Committee's conclusion was that Kitok's rights under article 27 had not been violated. In that respect, the Committee seems to have emphasised the fact that Kitok – although he was denied membership in the Sami town – was permitted to "graze and farm his reindeer, to hunt and to fish", see para 9.8.
- (66) I will also mention the statement of 27 October 2000 in *Mahuika and others v. New Zealand*. The case concerned regulation of commercial fishing that affected the Maori community. Maori representatives had entered into an agreement with the authorities that they believed served the interests of the minority. A smaller group of Maori had a different view claiming that the regulation and the settlement violated their rights under article 27. Hence, the rights of one group of Maori were in conflict with the rights of another, or with the minority as a whole, see para 9.6.
- (67) In this regard, the Committee held that in such a case one must assess whether the limitation is "in the interests of all members of the minority and whether there is reasonable and objective justification for its application to the individuals who claim to be

adversely affected". Hence, the Committee did not make any express requirement that the measure must be necessary of concern for the group as a whole.

- (68) This means that there are nuances in the wording of the assessment criteria in the said rulings, without these nuances being further explained. Both the Lovelace case and the Kitok case may support a requirement that the measure must be necessary out of concern for the minority as a whole. The absence of similar statements in the Mahuika case may suggest a development of the law. In such a situation, weight will normally be placed on the latest statement. However, considering the situation in the case at hand, I do not see a need for finally concluding whether such a necessity criteria needs to be implemented.
- (69) The court of appeal has interpreted article 27 to mean that reindeer herders are entitled to *a financial profit* from the husbandry, referring to the Human Rights Committee's statements in the cases *Poma Poma v. Peru* of 24 April 2009 and *Länsman and others v. Finland* of 8 November 1994. In addition, the court of appeal has found guidance in NOU 2007: 13 *The new Sami law* page 198.
- (70) I have a different view on this issue. In the Poma Poma case, the appellant was a farmer who had practiced breeding of alpaca and lama. A governmental water supply project resulted in the drying out of 10 000 hectares of pasture land and the death of a large number of animals. The Committee concluded that the project destroyed the appellant's basis of existence completely. The Länsman case also concerned encroachment of nature, but not with the same damaging effect for the appellants as in the Poma Poma case. Also the discussions by the Committee preparing the Reindeer Herding Act in its report on page 198 concern encroachment of nature, see the heading section 5.5.3.7 on page 197.
- (71) In the case at hand, it is not the greater society's interference with a minority interest that is to be balanced against ICCPR article 27. It concerns a regulation meant to protect the interests of the Sami herders, which raises issues on how the burden of the reindeer cull is to be distributed among them. Legal principles in cases concerning encroachment of nature cannot automatically be applied in such a case. The cases involving this type of internal conditions, – the Lovelace case, the Kitok case and the Mahuika case – do not involve a requirement that each individual is entitled to a financial profit. In line with the Human Rights Committee's statements in these cases, I do not find that article 27 secures the Sami herders' right to proceeds or profit in an event like this. On the other hand, the financial consequences for the herder must be part of the overall assessment.
- (72) When assessing whether article 27 has been violated, it is crucial to identify whether the minority "has had the opportunity to make a statement and been included in the process", see the Supreme Court judgment HR-2017-2247-A para 121. Hence, the authorities have a *duty of consultation*, and the question is what this duty actually entails.
- (73) In its judgment, the court of appeal has considered it a requirement that the participation has influenced the content of the decision. Guided by the Poma Poma ruling, the court of appeal also seems to have gone even further, as it has indicated that an informed prior consent must be obtained. I do not support the court of appeal's view on this point either.
- (74) The Poma Poma case concerned interference by the authorities that completely ripped off the basis of existence of the appellant and the other members of the minority community to which she belonged. In such a case, it is clear that violation has taken place if no prior

consent had been obtained from the minority. But this is not analogous to the case at hand. The Human Rights Committee stated in the *Mahuika* case that the relevant members of the minority must have had the "the opportunity to participate", see section 9.5. In the *Lovelace* case and the *Kitok* case, the issue of consultations was not addressed, which implies, at least, that it cannot be an unconditional requirement that the participation of the minority has influenced the decision.

- (75) In General Comment no. 23 item 7, the Human Rights Committee states that "measures [are required] to ensure the effective participation of members of minority communities in decisions which affect them". A similar wording is used in the *Mahuika* case para 9.5. Against this background, I conclude there is a requirement for effective participation by the minorities. As stated by the Sami Law Committee in NOU 2007: 13 *The new Sami law* on page 207, the implications of such participation will vary in each case. In a case primarily concerning conflicts of interest between individuals or groups within the minority, I do not see a basis for requiring that the minority has actually influenced the decision. It must be sufficient that the minority has been consulted due to a wish to come to an agreement.
- (76) Against this background, I summarise the test according to ICCPR article 27 as follows: Each case must be assessed separately based on the effect the measure has on the individual. In the case at hand, it must be considered whether the measure is in the interest of the minority as a whole, and whether it is reasonably and objectively motivated towards the individual. Some statements may suggest that the measure must be necessary out of concern for the minority as a whole. A requirement for effective participation in the decision-making process is included in the assessment.
- (77) *ICCPR article 27 – the question whether Sara's rights have been violated*
- (78) Based on my general views on the interpretation of ICCPR article 27, I will turn to the individual assessment of whether Sara's rights under the provision have been violated. As I have already demonstrated, I consider the cull order primarily to be part of a regulation of the relationship between the Sami herders. Thus, my starting point is different from that of the court of appeal.
- (79) The question is primarily whether the proportionate reduction of the number of reindeer pursuant to the Reindeer Herding Act section 60 subsection 3 has been ordered *in the interest of the reindeer herders* when viewing them as a group.
- (80) In this regard, I will return to my review of the lawmaking process, a process showing the necessity of reducing the number of reindeer based on the scarcity of resources. Overgrazing has been a problem for several decades. In Proposition to the Odelsting no. 99 (2004–2005) page 1, the Ministry states that it was necessary to implement lawful measures to prepare the grounds for "ecologically sustainable reindeer husbandry, which in turn is a condition for economic and cultural sustainability". As I have already mentioned, a similar wording is found in Proposition to the Odelsting no. 25 (2006–2007), see pages 43–44. The Sami Parliament has also agreed that the number of reindeer must be reduced. It cannot be doubted that the set of rules governing such a reduction is generally provided in the interests of the Sami herders.

- (81) This also forms the background when assessing the rule on proportionate reduction in section 60 subsection 3 second sentence more specifically. The cull was necessary out of concern for the reindeer husbandry. To obtain this, the authority had to implement a rule that allowed effective enforcement. Equal treatment in the form of proportionate reduction was thus a natural solution.
- (82) The solution is expressly motivated by the concern for the reindeer husbandry. In Proposition to the Odelsting no. 25 (2006–2007) page 46 – from which I have already quoted – the Ministry stressed that sparing the smallest siida units might give an unfortunate commercial structure and a weakening of the total as well as the average profitability. The Ministry held that the possibilities of conducting economically sustainable reindeer husbandry might be undermined. Against this background, I find that the provision on proportionate reduction is in the interest of the herders.
- (83) The next question is whether the cull order has a *reasonable and objective motivation*, alternatively that it is also *necessary* out of concern for the herders as a group. The assessment must be made based on the *effects* the reduction will have for Sara, which I will now consider.
- (84) As mentioned, when Sara became leader of the siida unit in 2010, the unit counted 71 reindeer. According to the court of appeal's judgment, this number increased to 94 in 2011 and then to 116 in 2012, when the prior notice of reduction was given. At the time of the decision in 2013, the unit counted 150 reindeer, while the number had gradually increased to approximately 350 reindeer at the time of the court of appeal's judgment. The operation yielded a minor profit in 2010 and 2011, but far from enough to make a living. From 2012, the operation has suffered a deficit.
- (85) The Ministry's order implies that Sara must cull his herd down to 75 reindeer. Referring to expert opinions, the court of appeal has given a thorough account for the possibilities of a profit with such a number, concluding that Sara "will not be able to profit from reindeer husbandry". I take this into account.
- (86) The court of appeal has also emphasised that such a small reindeer herd entails a genuine risk of forced liquidation, referring to the Reindeer Herding Act section 16 subsection 4, stating that a siida unit must be liquidated if its herd has counted less than 50 reindeer for five years. As I see it, this is a hypothetical problem. Whether a forced liquidation could be the result depends on a number of uncertain conditions, such as the choices with respect to regulation the siida and the authorities will make when the number has been reduced to 2 000. I therefore do not deem this relevant to the issue of whether Sara's rights have been violated.
- (87) Irrespective of the risk of forced liquidation, it is evident that the cull order will have a large impact on Sara. But the picture must be nuanced to some extent. Also prior to the cull order, Sara's reindeer herd was so small that he could hardly profit from the activity. The working group appointed in connection with negotiations of the Reindeer Husbandry Agreement in 2012-2013 held, according to the court of appeal, that "a 200-300 strong spring herd could hardly constitute an acceptable basis of existence for a family in the current society". The effect of the cull order is thus not that Sara will be deprived of the possibility to continue with a profitable activity. The effect is rather that he, at least for a period, will not have the possibility to develop his business to make it profitable in the

future. As I see it, Sara could not have had a legitimate expectation to extend his herd to a large one: When he became a siida leader, there were already too many reindeer in the district.

- (88) Another important aspect of the assessment is that the provision on proportionate reduction affects all the siida units. Siida units with large herds must carry a larger part of the burden, which in the long run may result in equalisation. From that point of view, the regulation seems objective and reasonable. On the other hand, sparing the smallest herds could have the result that several of the large herds are reduced to a critically low number of reindeer. Such a regulation could lead to questions as to whether the rights of the large herders have been violated. In my opinion, this means that a possible necessity criterion must also be deemed fulfilled.
- (89) As already mentioned, it has also been important to assess whether the duty of *effective participation in the decision-making process* has been fulfilled. I refer to what I have said about the implications of this requirement.
- (90) Seven consultations were held between the authorities and the Sami Parliament during the preparation of a new Reindeer Herding Act, and there was close contact on an administrative level. It is thus clear that the Sami community has been heard and given a chance to influence the contents of the rules.
- (91) At the same time, it is clear that the Sami representatives have not succeeded in their wish to spare the smallest siida units from culling. In this regard, I mention once more the Sami Parliament's plenary ruling of 27 September 2006. The Sami Parliament then wanted to implement a rule that the siidas were to set the minimum number of reindeer for each unit, and that the proposal by the Committee preparing the Reindeer Herding Act regarding a "basic allowance" of 200 reindeer would apply if the siida did not reach an agreement. It may be held that the central authorities in this regard should have listened to the Sami representatives who must be assumed to have first-hand knowledge of their own trade and culture.
- (92) To me, however, this is not decisive in the overall assessment. First, I mention the fact that the primary solution in the law is that the siida itself prepares a culling plan. This solution was not part of the proposal by the Committee preparing the Reindeer Herding Act. Thus, the Sami community's wish for self-determination has been heard. In the case at hand, the siida has – twice – been asked to prepare a culling plan.
- (93) I also emphasise the possibility of sparing the smallest siida units pursuant to the Reindeer Herding Act section 60 subsection 4. As mentioned, the provision implies that a maximum number of reindeer can be set for each siida unit. If such a maximum number is set, the cull must primarily be carried out in the units with the highest number of reindeer, see subsection 3, thus sparing the smallest units. Since the district board is composed of representatives from the reindeer herders, this means that the herders themselves may influence the distribution of the burden among the siida units.
- (94) In summary, I find that the proportionate reduction maintains the reindeer herders' interests as a group. The regulation affects everyone and in such a manner that the owners of the largest herds must cull the largest number of reindeer. The system seems objective, reasonable and necessary to maintain the interests of the reindeer herders as a group. It

does deprive, at least for a period, Sara of the possibility to develop his business into a profitable one. In that way, he is strongly affected, but his herd was too small to yield an acceptable income to begin with. Although the Sami Parliament has not succeeded with its view on all points, the rules implement a substantial degree of self-determination. Against this background, I have concluded that Sara's rights under ICCPR article 27 have not been violated.

(95) *The question whether Sara's rights under ECHR P1-1 have been violated*

(96) I will now turn to considering whether the cull order is in conflict with Sara's rights under ECHR P1-1. The provision reads as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

(97) This provision is clearly applicable in the case at hand – the cull of reindeer is a deprivation of Sara's possessions. Occasioned by the submissions in particular before the lower instances and by the district court's judgment, I remark that it is primarily the existing property interests that are protected by ECHR P1-1, see the grand chamber judgment by the European Court of Human Rights (ECtHR) of 28 September 2004 *Kopecký v. Slovakia* para 35 (b) and Kjølbro, *Den Europæiske Menneskerettighedskonvention – for praktikere* [The European Convention on Human Rights – for practioners], 4th edition 2017, page 1198. But also so-called "legitimate expectations" on future economic interests may enjoy protection, provided that the requirements set by ECtHR are met. In the Supreme Court plenary judgment Rt-2013-1345 para 144, the theory on legitimate expectations is summarised as follows:

"In the ECtHR judgment of 28 September 2004 [ECtHR-1998-44912] *Kopecký v. Slovakia* para 47, ECtHR referred to cases where the requirement for 'legitimate expectation' was deemed met when the expectation 'based on a reasonably justified reliance on a legal act which has a sound legal basis and which bears on property rights'. In the Supreme Court judgment Rt-2008-1747 *Hopen*, ECtHR case law is summarised to imply that "the provision, in addition to rights falling within the scope of the traditional protection of property term, also includes legal positions where the owner must be deemed to have had a reasonable expectation that his legal status could be exploited as assumed'."

(98) The parties agree that the cull order must be assessed based on the so-called control rule in subsection 2, which I endorse. The key point is whether the cull order is disproportionate. Here, it is natural to start with the summary of the legal status in ECtHR's dismissal of 30 April 2013 in *Lohuis and others v. the Netherlands* para 56. ECtHR holds that there must be a "'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights." The court further states that there must be a "reasonable relationship of proportionality between the means employed and the aim pursued". That is not the case if the person in question is ordered to carry an "individual and excessive burden". In the

Supreme Court grand chamber judgment HR-2016-304-S para 45, this final expression is translated by "*individuell og overdreven byrde*", a standard I will apply in the following.

- (99) ECHR P1-1 protects the right to property, which implies that the minority aspect is not relevant here, as opposed to with regard to ICCPR article 27. Many of the aspects I have addressed with regard to article 27 are nevertheless relevant to determine whether ECHR P1-1 has been violated. I refer to the more thorough discussion above and confine myself to stressing what I deem most important in the assessment of proportionality.
- (100) The cull order's *effects* for Sara are essential. He is not deprived of the right to own reindeer, but he must reduce the number. Considering the fact that he may sell the slaughtered animals, this does not imply an immediate loss. The consequences will be noticeable nevertheless, as he will have a clearly poorer basis for continuing his trade.
- (101) On the other hand, with reference to my account of ECtHR's case law on legitimate expectations, I cannot see that his expectations of increasing his herd count in the assessment. Since Sara's expectations lack a legal basis, they cannot, in my view, be protected.
- (102) Also, the *purpose* of the measure must be considered. As I have demonstrated, the purpose of the cull of reindeer is to maintain herders' interests. It has been crucial to implement rules on protection of the resource base that allow effective enforcement. As for the principle on a proportionate reduction, this also has to do with a wish for a more useful commercial structure. I assume that the convention states are at liberty to apply a high level of discretion when assessing policies based on such purposes, see the ECtHR judgment of 15 December 2015 *Matczyński v, Polen* para 106.
- (103) It must also be emphasised that the provision on proportionate reduction of the number of reindeer have a *democratic legitimacy*. It has been adopted by the Storting after a thorough process, hearing the arguments of all parties involved. Seven consultations have been held with the Sami Parliament, and there has been regular contact on an administrative level. The primary solution of the law is, moreover, that the siida itself may decide on how to carry out the cull.
- (104) Finally, to me it is crucial that Sara, in connection with the proportionate reduction, is not treated differently from other herders in the same position. I can thus not see that he will carry an "individual burden", or, as phrased in the Lohuis ruling para 58: He has not been "singled out for special treatment". Here, I have accepted that he – as one of relatively few herders with a small herd – is affected more harshly than the grand majority.
- (105) Against this background, I have concluded that the cull order is also not contrary to ECHR-P1-1. Consequently, the appeal by the state has succeeded.
- (106) *Costs*
- (107) The state has won the case on all counts, and is in principle entitled to compensation for costs, see the Dispute Act section 20-2 subsection 1. Due to the great significance of the case and the relative strength between the parties, I have concluded that costs should not be awarded in any instance, see section 20-2 subsection 3.

(108) Consequently, I vote for this

J U D G M E N T :

1. Judgment is given in favour of the state represented by the Ministry of Agriculture and Food.
 2. Costs are not awarded in any instance.
- (109) Justice **Falch**: I have, like the court of appeal, concluded that the Ministry's cull order is contrary to ICCPR article 27, and thus invalid.
- (110) My view is that under this provision, two aspects must be considered in a case like the one at hand: First, it must be determined whether the state has interfered in a manner equivalent to *denying* Sara the right to enjoy his culture in the form of reindeer husbandry. In the affirmative, it must then be determined whether the denial is *justified*. The latter must be determined since the state has motivated its measure with regard to the minority itself.
- (111) I find support in the UN Human Rights Committee's case law for this interpretation of the provision. The fundamental case is *Lovelace v. Canada* from 1981. As I understand it, the Committee accepts as a starting point in para 15 that a denial within the meaning of the provision was established, as Lovelace was not allowed to live in the reserve where the other members of her minority lived.
- (112) Then, in paras 16 and 17, the Committee discusses whether there was a "reasonable and objective justification" for the denial, as Canada had argued that the measure was justified for the reason of preserving the reserve's resources and protecting the minority concerned. Canada did not succeed, and the Committee concluded that Lovelace had been subjected to "an unjustifiable denial" of her rights under article 27. In my view, this line of reasoning has – with varying wordings and adjustments – been followed in subsequent Committee case law where the states have argued similar justifications.
- (113) Thus, I will first consider whether the interference to which Sara was subjected is sufficient to conclude that he has been *denied* the right to enjoy his culture in the form of reindeer husbandry.
- (114) In its judgment HR-2017-2247-A (the Reinøy judgment) the Supreme Court refers to case law by the UN Human Rights Committee in paras 121 to 127, and concludes in para 128 that "it takes a lot before the interference becomes so serious that it violates article 27". I share that view.
- (115) The said cases concern all interferences made to the advantage of others than to the minority itself. But I cannot see that the threshold in principle is different in a case like the one at hand. Article 27 requires in all cases that the person in question must have been *denied* the right to enjoy his or her culture. I also refer to the UN Human Rights Committee's case *Mahuika and others v. New Zealand* from 2000, where the interests of the other members of the minority were argued as basis for the measure. In para 9.4, the

Committee refers to the threshold as it is set in a case concerning interference in the interest of the greater society, without specifying the threshold further.

- (116) According to the case law referred to in the Reinøy judgment, the question is whether the effects of the interference are so substantive that it "effectively deny" the appellant the right to enjoy his culture in the form of reindeer husbandry in the relevant area. This may typically be the case if the interference "threaten[s] the survival" of the reindeer husbandry. But if there are other reasons for poor profitability, such as economic or ecologic conditions, the conclusion may be another.
- (117) The Ministry's order implies that Sara must cull his herd by 35.6 percent. The court of appeal, to which I am here bound, concluded that his spring herd would then be reduced to 75 reindeer, which would make it "impossible" for him to earn a profit, and where there is "a genuine risk that he will be forced to dissolve his reindeer husbandry". In that respect, I mention that although the cull order is applicable for three years only, the County Governor is obliged, pursuant to Regulation no. 856 for 2016, to freeze the number of reindeer in each siida if the number thereafter increases by five percent.
- (118) On these grounds, I agree with the court of appeal's starting point that the consequences for Sara are so large that the interference – which is relatively large in itself – is equivalent to denying him the right to enjoy reindeer husbandry. Herding is a way of making a living. If the herder is deprived of the possibility to earn a profit, the business must be dissolved if it is not otherwise funded. The latter appears not to be an option in Sara's case.
- (119) On the other hand, it is correct that Sara has been conducting economically marginal reindeer husbandry since he started with 71 reindeer in 2010. He increased the number gradually in the years that followed, while he must have been aware that the grazing resources in the herding district were scarce and nearly fully exploited. Already in 2011, Fálá herding district and the Reindeer Husbandry Board decided on a maximum number of reindeer in the district, which implied that a cull had to be carried out.
- (120) One may therefore ask if it is the scarce grazing resources – and not the Ministry's cull order - that is the cause of Sara's problems. I have concluded that the cull order, as a starting point, is an interference equivalent to denying Sara the right to practice reindeer husbandry. It is the order that directly imposes Sara to cull his reindeer herd, and it is uncertain what would be the consequences for the district without this order. The significance of the scarcity of the grazing resources will, moreover, be a part of the discussion I will now turn to.
- (121) The next aspect in the assessment of whether ICCPR article 27 has been violated is whether the interference can be *justified*.
- (122) The UN Human Rights Committee has worded this consideration somewhat differently. In the said *Lovelace* case, the Committee holds in para 17 that denying her the right to live in the reserve was not "reasonable, or necessary to preserve the identity of the tribe". In the case *Kitok v. Sweden* from 1988, the Committee refers to the "ratio decidendi" in the *Lovelace* case, and states the following in para 9.8:

"... a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued sustainability and welfare of the minority as a whole".

- (123) My understanding of this is that the interference is justified if demonstrated to be a reasonable and necessary measure for the continued sustainability and welfare for the minority as a whole. The minority's sustainability and welfare thus prevail over the rights of an individual member. In accordance with the wording of section 9 in the UN Human Rights Committee's General Comment no. 23 from 1994, the reason is – as I see it – that article 27

"... is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned ..."

- (124) As demonstrated by Justice Bergsjø, the UN Human Rights Committee uses a somewhat different wording in the *Mahuika* case from 2000. It concerned a settlement agreement that was concluded after extensive consultations between the state and the minority concerned, and the agreement was supported by a majority of the minority. The Committee states in para 9.6 that "[i]n such circumstances" criteria must be applied which may indicate a somewhat less intense judicial review than the one that follows from previous case law. In para 9.8, the Committee concludes that the state had "taken the necessary steps to ensure" that the settlement was compatible with article 27. I therefore interpret the wordings in the *Mahuika* case as situational, in the sense that the Committee does not generally change the criteria that follow from previous case law. And on this point, the situation was different from that in Sara's case. As I will revert to, the cull order is given in conflict with what the minority itself has argued.
- (125) My view is therefore that the case at hand must be assessed in accordance with the criteria described in the *Lovelace* case and in the *Kitok* case. In that respect, I remind that the premise is that a denial of a right protected by article 27 is established as a starting point, and that the question here is whether the denial can be justified. In such cases it is, in my view, innate to require that the denial should be reasonable and necessary for the continued sustainability and welfare of the minority concerned. This criterion can be derived from the overall purpose of article 27, which is directed towards ensuring the survival and continued development of the minority's cultural identity.
- (126) I will now consider whether the cull order issued to Sara meets this criterion.
- (127) It is clear – and not disputed – that the very reduction of the total number of reindeer in Fálá herding district to 2,000 was reasonable and necessary to ensure the sustainability of Sami reindeer husbandry in that area. The question is therefore only whether the *distribution* of the burden among the siida units meet the criterion. The Ministry's order is based on each herder having a proportionate obligation to cull, an obligation that follows directly from the Reindeer Herding Act section 60 subsection 3 second sentence.
- (128) During the preparatory works, all the Committee preparing the Reindeer Herding Act, where a majority of the members were reindeer herders, the Sami Parliament and the trade association Sami Reindeer Herders' Association of Norway argued to spare the small units and to set the limit to 200 animals. Such a rule would be similar to the rule under the Reindeer Herding Act of 1897 section 10 and in substance similar to the rule

under the Reindeer Herding Act of 1933 section 8. The Reindeer Herding Act of 1978 lacked such a rule on individual reduction.

- (129) In justification for its proposal that later became the Reindeer Herding Act section 60 subsection four, the said Committee held that the purpose was to “prevent the reindeer husbandry from becoming concentrated on a few large siida units”. If the number of herders becomes too low, “it will be hard to maintain the reindeer husbandry as an industry under the pressure of other user interests”, see NOU 2001: 35 page 179. I read this reasoning also to motivate the Committee’s proposal to spare siida units with less than 200 reindeer in cases state authorities issue culls orders. The Sami Parliament held in particular that such sparing of small units “will contribute to securing young herders in their establishment phase and to secure an economically sustainable reindeer husbandry for all herders”. I therefore read the Sami Parliament's view to imply that it will be detrimental to the development of Sami reindeer herding if the smallest units are not spared.
- (130) The Ministry held in its proposition to the Storting that such sparing of small units “in the long run may result in an unfortunate commercial structure” weakening the profitability in the siida. The Ministry also mentioned that the siidas will be autonomous, in the sense that they are free to agree upon the distribution of the burden. This was adopted by the Storting without particular debate on this point.
- (131) In a case such as this regarding the distribution of a burden within the reindeer husbandry, I find it natural to start with the view that is clearly expressed by the Sami community itself. The minority will in such issues have material insight into what serves the sustainability, and development, of its own culture. The Sami Parliament is a representative body for and by the Norwegian Sami population and its central task is to work for enabling the Sami people to safeguard and develop their culture, see the Sami Act sections 1-1 and 2-1. This clear view expressed by the Sami community in such an internal affair suggests in my view that it is for the state to demonstrate that the relevant measure is nevertheless reasonable and necessary for the sustainability of Sami reindeer husbandry.
- (132) I find that this also follows from the obligation to consult as the UN Human Rights Committee has derived from article 27. It is to be "effective", see General Comment no. 23 item 7 and for instance the *Mahuika* case para 9.5. Effective consultation will in my view be ensured if the state, in the event of an identified disagreement as was the case here, demonstrates that this criterion is met.
- (133) It is an undisputed fact that the profitability of Sami reindeer husbandry has been partially low, and that better profitability, viewed in isolation, will strengthen the sustainability of the industry. But a concentration of fewer herders, as the consequence will be, may on the other hand make the husbandry more vulnerable.
- (134) In a report issued in November 2012 by a working group with participants from several ministries, the Sami Parliament and the Sami Reindeer Herders' Association of Norway, it is stated that in Western Finnmark – where Fálá reindeer herding district is located – 15 out of the 157 siida units had less than 200 reindeer before the culls. They owned about 2.5 percent of the total number of animals there. After the cull, the number of siida units that small will have increased to 25 and their share of the total reindeer stock will have

increased to 5.6 percent. Against this background, it is hard for me to see that the sustainability of Sami herding is threatened if the small siida units are spared. For most of the larger siida units, the effect of sparing small units would be limited – at least in the short and medium long run.

- (135) Based on the material presented before the Supreme Court, I cannot see that it has been demonstrated that the measure against Sara was reasonable and necessary to ensure a continued sustainability of Sami herding in the area.
- (136) I agree with the state that there is a need for a rule that effectively contributes to the culls being carried out on an individual level. But the rule will be just as effective in this respect if the smaller siida units are spared – for instance as proposed by the Committee preparing the Reindeer Herding Act. Moreover, the state has referred to the siidas' autonomy in how to carry out the cull. But once the state interferes, as in the case at hand, the measure must meet the criteria set out in ICCPR article 27. Thus, the autonomy option itself does not contribute to meeting the criteria for interference.
- (137) Against this background, I have concluded that the ordering of Jovsset Ante Iversen Sara to reduce his spring herd to 75 reindeer within March 2015 is invalid since it is contrary to ICCPR article 27.
- (138) It is thus not necessary for me to address ECHR P1-1, but I mention nevertheless that I, on that point, agree with Justice Bergsjø in all material aspects and with his conclusion.
- (139) Consequently, I vote for a dismissal of the appeal.
- (140) Justice **Bergh:** I agree with the justice delivering the leading opinion, Justice Bergsjø, in all material aspects and with his conclusion
- (141) Justice **Webster:** Likewise.
- (142) Justice **Indreberg:** Likewise.
- (143) Following the voting, the Supreme Court gave this

J U D G M E N T :

1. Judgment is given in favour of the state represented by the Ministry of Agriculture and Food.
2. Costs are not awarded in any instance.

