SUPREME COURT OF NORWAY

O R D E R

issued on 28 October 2020 by the plenary of the Supreme Court composed of

Chief Justice Toril Marie Øie
Justice Magnus Matningsdal
Justice Jens Edvin A. Skoghøy
Justice Erik Møse
Justice Bergljot Webster
Justice Wilhelm Matheson
Justice Aage Thor Falkanger
Justice Kristin Normann
Justice Henrik Bull
Justice Knut H. Kallerud
Justice Arne Ringnes
Justice Ingvald Falch
Justice Espen Bergh
Justice Cecilie Østensen Berglund
Justice Borgar Høgetveit Berg

HR-2020-2079-P, (case no. 20-051052SIV-HRET)
Appeal against Borgarting Court of Appeal's judgment 23 January 2020

Nature and Youth Norway Greenpeace Nordic The Norwegian Society for the Conservation of Nature (third-party intervener) The Grandparents Climate Campaign (third-party intervener)	(Counsel Emanuel Feinberg Counsel Cathrine Hambro)
v.	
The State represented by the Ministry of Petroleum and Energy	(The Office of the Attorney General represented by Counsel Fredrik Sejersted) (Third-party intervener: Counsel Anders Flaatin Wilhelmsen)

(1) Justice **Høgetveit Berg:**

Background

(2) The case questions whether four Supreme Court justices must step down during the plenary hearing of case no. 20-051052SIV-HRET – in the so-called climate lawsuit.

(3) On 20 April 2020, the Supreme Court's Appeals Selection Committee granted Nature and Youth Norway and Greenpeace Nordic leave to appeal against Borgarting Court of Appeal's judgment 23 January 2020 in case no. 18-060499ASD-BORG/03 against the State represented the Ministry of Petroleum and Energy. On the same day, the Chief Justice referred the appeal to the plenary of the Supreme Court, see HR-2020-846-J. The Norwegian Society for the Conservation of Nature and the Grandparents Climate Campaign have declared third-party intervention for Nature and Youth Norway and Greenpeace Nordic.

(4) The appeal raises issues regarding the legitimacy of an administrative decision in the form of a royal decree of 10 June 2016 to allow oil exploration on the Norwegian Continental Shelf – the 23rd Round. The appellants mainly contend that the decision in incompatible with Article 112 of the Constitution and Articles 2 and 8 of the European Convention on Human Rights (ECHR), and that three of the production licences, which are granted in the southeast part of the Barents Sea, are invalid due to procedural errors.

(5) It became clear during the preparatory phase that Justice Arntzen must step down, while the qualification (*habilitet*) of Justices Indreberg, Noer and Steinsvik has also been questioned due to participation in legislative work, organisational activities and family relations, respectively. Prior to the hearing of this issue on 19 October 2020, the parties and the third-party interveners received written statements from the three justices on the relevant circumstances.

(6) During the hearing on 19 October 2020, the court was composed of the justices whose qualification could not be questioned, apart from Justice Bergsjø who is on a leave of absence. Justice Møse was also present, though he will not participate in the main hearing due to his retirement on 1 November 2020. As the plenary thus consisted of 16 justices, the one with the shortest seniority – Justice Thyness – had to withdraw in accordance with section 5 subsection 5 second sentence of the Courts of Justice Act.

The parties' view

(7) The appellants – *Nature and Youth Norway and Greenpeace Nordic* – contend that neither Justice Indreberg, Justice Noer nor Justice Steinsvik needs to step down.

(8) To earn the public's trust, the plenary of the Supreme Court must be diversely composed of justices with their own ethical principles. The threshold for having to withdraw under section 108 of the Courts of Justice Act must therefore not be too low in a case involving issues of great public interest.

(9) As for Justice Indreberg, the appellants contend that her participation in legislative work in itself is not sufficient for her to step down. The case at hand differs from that in Rt-2007-705

on several crucial points. The general justification for disqualification due to participation in legislative work does not apply. The issue at hand is the interpretation of a legal provision – and not its compatibility with the Constitution.

(10) As for Justice Noer, her former membership in organisations that are acting as both parties and third party-interveners in the case cannot be decisive when the activity dates many years back. A judge's general views on society and commitment cannot dictate whether he or she may serve. This also includes Justice Noer's current association with the World Commission on Environmental Law (WCEL) and the Global Judicial Institute on the Environment (GJIE) – whose work is scientific and not political.

(11) When it comes to Justice Steinsvik, whose father-in-law is a member of the third party intervener, the Grandparents Climate Campaign, it is sufficient to refer to the Supreme Court ruling in Rt-2010-321. When that case gave rise to doubt, it is clear that Justice Steinsvik should not be disqualified.

(12) The respondent – *the State represented by the Ministry of Petroleum and Energy* – contends that Justice Indreberg must step down and that Justice Steinsvik may serve. When it comes to Justice Noer, the State is less certain. The State agrees that the threshold for having to step down must not be too low.

(13) When it comes to Justice Indreberg, the State refers to her membership on the Lønning Committee, and that the interpretation of the report from the Lønning Committee is crucial for the interpretation of Article 112 of the Constitution. Against this background, Justice Indreberg should withdraw.

(14) As for Justice Noer, the State contends that her former memberships in Nature and Youth and the Norwegian Society for the Conservation of Nature considered in isolation are not enough to disqualify her. However, importance must be attached to the level of involvement of the organisations WCEL and GJIE in such legal issues as are raised in the case at hand and to Justice Noer's role in these organisations.

(15) The respondent agrees with the appellants that Justice Steinsvik may serve.

My opinion

(16) Justice Arntzen is married to appellate judge Eirik Akerlie, who served in the case in the Court of Appeal. Justice Arntzen must therefore withdraw according to section 106 (9) of the Courts of Justice Act.

(17) The three other justices must be assessed under section 108 of the Courts of Justice Act, which reads:

> "Nor may a person serve as a judge or juror when other special circumstances exist that are capable of undermining confidence in his or her impartiality. This applies in particular when a party demands that he or she withdraw from the case on these grounds."

(18) Section 108 of the Courts of Justice Act must be applied in accordance with the requirements of an independent and impartial court laid down in Article 95 subsection 1 of the Constitution and case law from the European Court of Human Rights (ECtHR) regarding ECHR Article 6

(1), see the Supreme Court ruling HR-2016-2311-P paragraph 13. According to general practice, the assessment has a subjective and an objective side. In Rt-2013-1570 paragraph 20, the requirements are summarised as follows:

> "Section 108 of the Courts of Justice Act sets out that a person may not serve as a judge in a case when 'special circumstances exist that are capable of undermining confidence in his or her impartiality'. This primarily implies that there can be no factors rendering the judge incapable of making an impartial decision without leaning on irrelevant considerations based on a subjective perspective. Secondly, there can be no circumstances linking the judge to a party in such a manner that the parties and the public may question the judge's impartiality. This objective approach – how it looks from the outside – has been given increased weight in recent years' case law, see Rt-2011-1348 paragraph 46. This has generated stricter rules on who may or may not serve, which implies that older case law will not always instructive for the current status of the law."

(19) It is the objective approach that is at issue. It must be determined whether the special circumstances in the case, in an objective perspective, give an outside observer a fair reason to question the judge's impartiality, see HR-2016-2311-P paragraph 15. If any of the parties have requested that the justice withdraw, this may be relevant to the assessment under section 108 second sentence of the Courts of Justice Act, see HR-2020-1133-A paragraph 15.

(20) I will first consider whether Justice Indreberg should step down.

(21) Justice Indreberg was a member of the Storting's Human Rights Committee (the Lønning Committee). The Lønning Committee's report with proposed constitutional amendments has been included in Document 16 (2011–2012). The constitutional reform adopted by the Storting in 2014, was based on these propositions. Among other things, Article 112 of the Constitution on the right to a clean environment and nature was adopted in accordance with the Committee's proposition.

(22) The main rule is that a judge is not disqualified from deciding issues related to legal provisions of which he or she has participated in the drafting, see Rt-2008-1451 paragraph 18:

> "First, I would like to stress that the clear main rule must be that a judge is not disqualified from deciding issues related to legal provisions with which he or she had dealings in a previous position in a Ministry or in other functions. This is also the case if the person has participated in the preparatory phase. If such a linkage should affect the person's possibility to sit as a judge, special circumstances must exist. I mention as an example that doubt has been raised as to the proposition's constitutionality. Such cases may have a large political impact for the government making the proposition. If the person in question has participated as a premise provider for the view that is promoted in the proposition, this may suggest that he or she should be disqualified from deciding the disputed matter as a judge. I consider the Supreme Court's order Rt-2007-705 paragraphs 22–25 an effect of such an approach".

(23) The Supreme Court order Rt-2007-705 disqualified Justice Indreberg due to her legislative work related to amendments in the Ground Lease Act. Although her participation had been short-term and not particularly extensive, the Supreme Court emphasised that Justice Indreberg had been involved in the drafting of a discussion paper that not only described the legal questions at hand but was also argumentative with regard to the issues that could become central during the Supreme Court hearing. This was particularly related to the Storting's position on the constitutional issue.

(24) The starting point that a judge may participate in a case relating to legal provisions of which he or she has been involved in the drafting, also applies if the judge has prepared bills as a member of a legislative committee, see Rt-2009-769 paragraphs 14 and 15. There, the participation in the Dispute Act Committee disqualified neither Chief Justice Schei nor Justice Bårdsen in a grand chamber case dealing with reasoning requirements for decisions under section 29-13 subsection 2 of the Dispute Act. The Supreme Court argued that the Committee's report was extensive, and that it had not addressed the issue that the grand chamber was to examine.

(25) The Lønning Committee's mandate was to "examine and make proposals for a limited revision of the Constitution to strengthen the position of the human rights in national law by giving them constitutional rank", see Document 16 (2011–2012) page 18. As a step in this work, the Lønning Committee was to carry out "a principled and overall assessment of the human rights' place in the Constitution, including the application of the Human Rights Act's precedent rule and the question whether it should be possible to invoke these rights in court", see page 18. In line with this mandate, the Committee expressed its views on the interpretation of the former Article 110 b of the Constitution, including whether it should be considered a legal obligation and not merely a policy statement, see pages 243–244. The Committee further proposed to continue subsections 1 and 2 of the former Article 110 b unaltered, but to amend subsection 3. The Committee also commented on those parts of the constitutional provisions that were proposed to be maintained.

(26) During the revision in 2014, the Constitution's provisions on nature and environment were moved to Article 112. What *kind* of provision Article 112 is one of the key issues to be considered by the plenary of the Supreme Court. The State will contend that the description given by the Lønning Committee on the former Article 110 b is either inaccurate or directly misleading. In the case at hand, the Court of Appeal stated that the Committee's clear interpretation of Article 110 b is somewhat poorly founded, but that it had to be assumed that the Storting based its further discussions on the said interpretation of Article 110 b.

(27) Although one party's arguments may not automatically determine whether or not a judge should serve, I believe in this case – after an objective assessment – that an outside observer may have a justifiable reason to question Justice Indreberg's partiality as she, however indirectly through her work on the Lønning Committee, has expressed her view on one of the key issues of the case. This is particularly true when these views have been subject to criticism. I also attach some importance to the fact that Justice Indreberg has stated that she is "likely to agree" that it may so appear.

(28) My overall opinion is therefore that "special circumstances" exist with the effect that Justice Indreberg must leave her seat, see section 108 of the Courts of Justice Act.

(29) I will now turn to the question whether Justice Noer must do the same.

(30) Justice Noer was a member of the working committee of Nature and Youth for about a year in the early 1980s. During this period, she also took part in the campaign to save the river Alta and received a fine of NOK 1 500. During the period 1991–1994, she was one of the editors of the Norwegian Society for the Conservation of Nature's magazine "*Nature and Environment*".

(31) Justice Noer has been a member of the steering committee of the World Commission on Environmental Law (WCEL) since 2015. WCEL is one of six commissions subject to International Union for Conservation of Nature (IUCN). The latter is a non-political organisation whose members are states and organisations, including the Ministry of Climate and Environment. WCEL's members also include individuals. Since 2016, Justice Noer has also been on the steering committee of the Global Judicial Institute on the Environment (GJIE). Both WCEL and GJIE are engaged with climate lawsuit issues among others, and such lawsuits have been discussed in various fora within the organisations.

(32) In a pleading of 13 October 2020, the State pointed out that the circumstances relating to Justice Noer are not, individually, sufficient for demanding her withdrawal, but that they may give rise to doubt seen as a whole. A further clarification of Justice Noer's roles in WCEL and GJIE was therefore requested – and whether these organisations have an express view on what the law should be in climate lawsuits, and whether they believe that rights related to environment and climate may be interpreted into the existing human rights treaties. Justice Noer prepared a supplementary statement that was sent to the parties on 14 October 2020. Based on this supplementary statement, the State has maintained during the hearing that it will not take a final stand as to whether Justice Noer should withdraw, and that it is a case of doubt.

(33) As to the assessment of memberships in organisations with a specific societal purpose under section 108 of the Courts of Justice Act, I refer to the majority in the Supreme Court ruling Rt-2010-321 paragraphs 8–10:

> "It is clear that a judge's general views on society or political opinions are not alone sufficient for disqualification under section 108 of the Courts of Justice Act. This also applies where the judge's position is expressed through a membership in an organisation. On the other hand, it is equally clear that such a membership under certain circumstances may disqualify the judge from serving in a case where the organisation is a party. A membership in a non-profit organisation does not only express a view on a specific societal issue, but also support of the organisation's work.
>
> Whether or not disqualification occurs when the judge is a member of an organisation that is party to the case, depends on an overall assessment. The relevant judge's engagement in the organisation's activities is, of course, an important factor in this assessment. But a more passive membership might also prevent the judge from serving if the outcome of the case directly touches the heart of the organisation's objective and field of action. Although a member does not need to share the organisation's views through and through, the member will be easily identifiable with the organisation – which may be one of the reasons why a person becomes a member in the first place.
>
> The case at hand concerns the right to environmental information, and during the hearing in the Supreme Court, the Norwegian Society for the Conservation of Nature itself has described the relevant information as a condition for the organisation's ability to fulfil its objective. This will create a situation where considerable doubt may be raised as to whether a judge who is a member of the organisation, should participate in the hearing. Hence, decisive for my opinion in the qualification issue is that a party has requested that Justice Coward step down, see section 108 second sentence of the Courts of Justice Act."

(34) Justice Noer's active memberships in Nature and Youth Norway and the Norwegian Society for the Conservation of Nature date so many years back that it does not disqualify her in the

case at hand, despite these organisations acting as party and third-party intervener, respectively. The same applies to her participation in the Alta river campaign.

(35) Her current memberships in various organisations engaging in environmental issues may clearly also not disqualify her from serving in a case dealing with such issues.

(36) Neither WCEL nor GJIE, in which Justice Noer is a member today, acts as party or third-party intervener in the case. Nor have the organisations made any written submissions in accordance with section 15-8 of the Dispute Act, and they are thus not directly connected to the case.

(37) The objective of GJIE is, as described on its website, "to support the role of judges, courts, and tribunals to respond to pressing environmental crises". The implications of this may be somewhat unclear, but I will leave it at that. In any case, due to the relatively low activity in the organisation at this point, the membership cannot disqualify Justice Noer from serving in the case at hand.

(38) The objective of WCEL is described as follows on its website:

> "The World Commission on Environmental Law (WCEL) advances environmental law around the globe by providing specialized knowledge and assistance to strengthen the legal foundations of the conservation of nature and sustainable development through the conceptual advancement of environmental principles, norms, and laws, and by building the capacity of communities to benefit from the environmental rule of law."

(39) The steering committee, where Justice Noer sits, is the highest body in WCEL between the general assemblies. Two factors relating to the steering committee are particularly relevant to the plenary hearing.

(40) The first factor I would like to highlight is that WCEL in 2016 was involved in the IUCN World Declaration on the Environmental Rule of Law. The work process for this declaration is described as follows on IUCN's website:

> "The IUCN World Declaration on the Environmental Rule of Law was drafted by a team of World Commission on Environmental Law (WCEL) members at the 1st IUCN World Environmental Law Congress in April 2016 in Rio de Janeiro, Brazil, on the basis of a wide range of consultations prior to and during the Congress. It was adopted by consensus in the final stages of the Congress, and later finalized by the Steering Committee of the IUCN World Commission on Environmental Law. As noted in a postscript to the Declaration, it 'does not represent a formally negotiated outcome and does not necessarily reflect the views of any member of the Steering Committee or any individual, institution, State, or country, or their institutional positions on all issues.'"

(41) This declaration contains an item stressing among other things the principle that the authorities, including the courts, when in doubt must rely on the result that is best for the environment– *in dubio pro natura*:

> "In cases of doubt, all matters before courts, administrative agencies, and other decision-makers shall be resolved in a way most likely to favour the protection and conservation of the environment, with preference to be given to alternatives that are least harmful to the environment. Actions shall not be undertaken when their potential adverse impacts on the

> environment are disproportionate or excessive in relation to the benefits derived therefrom."

(42) As I understand it, the declaration and the mentioned principle were drafted by a sub-committee under WCEL's direction and adopted with consensus at the IUCN's world congress in Rio de Janeiro in April 2016. Then, the declaration was completed by the steering committee of WCEL. Admittedly, an afterword states that the declaration is not a formally negotiated result and does thus not necessarily reflect the views of all members of the steering committee on all counts. However, since no information on a deviating position exists, it is at least not unlikely that an outside observer may assume that Justice Noer endorses the contents of the declaration. Whether or not that be the case is of less importance, as long as it may be perceived as such by an outside observer.

(43) The second factor I consider relevant, is that there is a special subgroup in WCEL working on a project involving climate issues. The headline of this project on WCEL's website is "Fighting climate change: a best practice guide for Judges and Courts". Its objective is described as follows:

> "The fight against climate change will require the involvement of all three 'pillars of power': the legislative, in designing adequate and effective laws; the executive, in implementing and administering climate-effective governance; and the judicature, for reviewing government policies, solving disputes, giving authoritative legal statements on the interpretation of laws and clarifying rights and responsibilities. In the face of the (current) general reluctance of the first two to take leadership roles in some countries, courts and judges can play decisive roles in holding governments and actors accountable for effectively addressing climate change."

(44) Here, it is emphasised that when the legislative and the executive authorities are reluctant to take leadership roles in the climate change issue, courts and judges can play decisive roles in holding governments and others responsible for effectively addressing climate change. The statement aims at "some countries". The lack of specification of which countries, makes the statement seem relatively general nonetheless.

(45) This goes to the heart of one of the key issues in the case, namely the distribution of roles between the state powers when applying Article 112 of the Constitution. Furthermore, as I read the quote, it addresses directly the contents of the court's rulings – that is, how one should judge in individual cases.

(46) On WCEL's website, it is set out that the project is approved by the steering committee, of which Justice Noer is a member. A natural interpretation of this is that the steering committee, and hence Justice Noer, supports the quoted description of the courts' preferred role in climate lawsuits.

(47) It will not in itself form a basis for disqualification that a judge has supported statements on political issues, nor if it concerns normative issues on how the law ought to be. My opinion is nonetheless that the two quotes go beyond this. The statements clearly express what the result should be in court cases dealing with environment and climate change. In my opinion, this is different from, and more than, a mere wish for legal rules with a certain specific content. I find that the quotes, applied to the case soon to be heard by the plenary, must at least be read as a wish that certain considerations are given particular weight.

(48) A judge who in advance is linked to a principle that has not been developed by the court itself, that judges may hold other state powers responsible when they have been reluctant with regard to climate change, may be perceived as lacking sufficient distance where this issue seems to constitute the heart of the case. Overall, I therefore believe that WCEL's manifesto and opinions on climate lawsuits – measured objectively – may give an outside observer a fair and justifiable reason to question Justice Noer's impartiality in the case.

(49) Against this background, I find – under some doubt – that "special circumstances" exist that preclude Justice Noer from serving, see section 108 of the Courts of Justice Act.

(50) Finally, I will consider the case of Justice Steinsvik.

(51) Justice Steinsvik's father-in-law, Thorbjørn Berntsen, is a member of the Grandparents Climate Campaign. As a former minister for the environment and prominent environmental politician, he has been employed in the marketing of the organisation. However, according to information provided, he has not held any leading positions or played any active part in the organisation counting some 4000 members. Nor has he been involved in the case at hand.

(52) This case does not deal with "special circumstances" with the effect that Justice Steinsvik may not serve, see section 108 of the Courts of Justice Act.

(53) Against this background, I vote for the following

O R D E R :

Justices Arntzen, Indreberg and Noer must step down. Justice Steinsvik may serve.

(54) **Justice Falch:**

Partially dissenting opinion

(55) I agree with Justice Høgetveit Berg in all material respects and with his conclusions when it comes to Justices Arntzen, Indreberg and Steinsvik. However, I find that Justice Noer should be allowed to sit in the case.

(56) I follow Justice Høgetveit Berg's reasoning up to where he discusses the significance of the declaration adopted by IUCN on its World Congress in 2016. As I see it, the declaration particularly expresses a principle that courts and other decision-making bodies in cases of doubt must choose what is best for the environment.

(57) *First*, I believe that Justice Noer cannot be considered closely linked to this principle. She is not herself a member of IUCN, but of WCEL's steering committee, which is a subcommittee of IUCN dealing with environmental law. As I understand, WCEL has advised in the drafting of the declaration, but primarily through a subcommittee in which Justice Noer is also not a member. In addition, it is set out in the reservations attached to the declaration, and referred to by Justice Høgetveit Berg, that the declaration does not reflect the views of any member or person. I attach more importance to this reservation than Justice Høgetveit Berg. It is not

known whether Justice Noer endorses the content of the declaration, nor do I find that she may be perceived to do so.

(58) *Secondly*, I find that the declaration in any case merely formulates a possible doctrine of sources of law and/or a precautionary principle. If a judge in one specific context had supported such principles, I cannot see that the he or she should be excluded from a case where the principles might become relevant. The principles are aimed at all decision-making bodies, and must be considered in a natural context with the rules to which the relevant body is otherwise bound.

(59) Justice Høgetveit Berg also emphasises that WCEL is currently working on a best practice guide for judges and courts. The work itself is carried out by a subcommittee where Justice Noer is not a member. It appears from the subcommittee's objective, as quoted by Justice Høgetveit, that because the authorities "in some countries" are reluctant to take leadership roles in the combat against climate change, courts and judges "can" play decisive roles.

(60) To me, this is a rather general point of view. For instance, it is not expressed whether Norway is among the countries where the authorities are reluctant. And, when it is held that the courts can play a vital role, it suggests that it is a *possibility*. The word used is "can" and not "should". Under which circumstances the courts, in that case, should or must play a vital role, is not expressed.

(61) I therefore disagree with Justice Høgetveit Berg that Justice Noer may be linked to a principle on how a judge *should* reason in individual cases. That would be reading more into the statements from WCEL than I believe there is reason to.

(62) However, I agree with Justice Høgetveit Berg that Justice Noer may be linked to a principle that judges *can* hold the other authorities responsible for reluctance in climate matters. In my opinion, there is nothing extraordinary in this. Review is also possible in in our country, because the Supreme Court, as we know, examines whether legal provisions and administrative decisions are compatible with the Constitution. I therefore disagree with Justice Høgetveit Berg that a judge that may be linked to WCEL's declaration may be perceived to lack sufficient distance to a key issue in the case. As already mentioned, the statement is not normative.

(63) What remains for me to say is that Justice Noer, through her former and current participation in various organisations, has expressed dedication in matters relating to climate and environment. This is not sufficient to preclude her from serving, see Rt-2010-321 paragraph 8, as Justice Høgetveit Berg has quoted and endorsed. Her dedication cannot be particularly associated with the case now to be heard by the plenary of the Supreme Court.

(64) My opinion is therefore that Justice Noer is not disqualified under section 108 of the Courts of Justice Act.

(65) Justice **Falkanger:** I agree with Justice Falch in all material respects and with his conclusion.

(66) Justice **Bull:** Likewise.

(67) Justice **Ringnes:** Likewise.

(68) Justice **Østensen Berglund:** Likewise.

(69) Justice **Matningsdal:** I agree with Justice Høgetveit Berg in all material respects and with his conclusion.

(70) Justice **Skoghøy:** Likewise.

(71) Justice **Møse:** Likewise.

(72) Justice **Webster:** Likewise.

(73) Justice **Matheson:** Likewise.

(74) Justice **Normann:** Likewise.

(75) Justice **Kallerud:** Likewise.

(76) Justice **Bergh:** Likewise.

(77) Justitiarius **Øie:** Likewise.

(78) Following the voting, the Supreme Court issued this

O R D E R :

Justices Arntzen, Indreberg and Noer must step down. Justice Steinsvik may serve.