



SUPREME COURT OF NORWAY

J U D G M E N T

given 26 March by the Supreme Court composed of

Chief Justice Toril Marie Øie
Justice Jens Edvin A. Skoghøy
Justice Kristin Normann
Justice Ingvald Falch
Justice Espen Bergh

HR-2021-662-A, (case no. 20-055609SIV-HRET)
Appeal against Borgarting Court of Appeal's judgment 29 January 2020

I.

The State represented by the Ministry of
Climate and Environment

(The Office of the Attorney General
represented by Asgeir Nygård)
(Assisting counsel Elisabeth Stenwig)

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

(Counsel Bjørn Terje Smistad)

Utmarkskommunenenes Sammenslutning¹
(intervener)

(Counsel Stein Erik Stinessen)

v.

WWF Norway

(Counsel Carl Philip Funder Fleischer)
(Assisting counsel Erlend Haaskjold)

¹ TN: Association protecting the interests of outlying municipalities

II.

WWF Norway

(Counsel Carl Philip Funder Fleischer)
(Assisting counsel Erlend Haaskjold)

v.

The State represented by the Ministry of
Climate and Environment

(The Office of the Attorney General
represented by Asgeir Nygård)
(Assisting counsel Elisabeth Stenwig)

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

(Counsel Bjørn Terje Smistad)

Utmarkskommunenes Sammenslutning (intervener)
(Counsel Stein Erik Stinessen)

(1) Justice **Falch**:

Issues and background

- (2) The case concerns the validity of three individual decisions on licensed culling of wolves. Among the issues are whether the culling could be permitted to “prevent damage to ... livestock” and safeguard “other public interests of substantial importance”, or whether it might “jeopardise the survival of the population”, see section 18 of the Nature Diversity Act.
- (3) Two of the decisions were made by the Ministry of Climate and Environment on 1 December 2017 after an appeal against a decision made by the predator committees in the management regions 4 and 5. The culling was to be carried out during the winter 2017–2018.
- (4) In the *first* of the decisions – hereinafter *the free-roaming animal decision* – the Ministry called for the culling of up to 12 wolves mainly roaming outside the wolf zone and established territories. The purpose was to prevent damage to livestock, see section 18 subsection 1 (b) of the Nature Diversity Act. Here, the Ministry largely upheld the predator committee’s decision. Eight of the wolves were shot.
- (5) In the *second* decision, the Ministry called for the culling of up to 16 wolves that were also mainly roaming outside the wolf zone, but within the home territories of the wholly Norwegian groups Julussa and Osdalen. The purpose was to safeguard “other public interests of substantial importance”, see section 18 subsection 1 (c) of the Nature Diversity Act. Here, the Ministry restricted the predator committee’s decision to shoot up to 24 wolves. The committees’ decision also included the Slettås group, inside the wolf zone.
- (6) The *third* decision was issued by the Ministry of Climate and Environment on 7 February 2018. Here, it was decided to carry out an “extraordinary removal” of three pups in the Julussa and Osdal groups. This time, too, the purpose was as stated in section 18 subsection 1 (c). As no independent submissions have been made with regard to this decision, I will jointly refer to the second and third decision – including altogether 19 wolves – as *the group decisions*. All the wolves were shot.
- (7) The wolf was practically extinct on the Scandinavian Peninsula in the 1960s. The population currently present in Norway and Sweden is of Finnish-Russian origin and settled in South Scandinavia from the 1970s. From the 1990s, and particularly after 2000, this population increased significantly. During the winter of 2016-2017, the South Scandinavian population was estimated at 430 wolves. Out of these, 54–56 were in wholly Norwegian groups and nearly as many were crossing the national border. There are no genetic differences between the wolves present in Norway and Sweden. They move freely across the national border.
- (8) The wolf was listed as a protected species in Norway in 1971, and has been so ever since. It is also listed as “critically endangered” in the last edition of the Red List of the Norwegian Species Databank. This is the most critical category before the species is considered regionally extinct.
- (9) The wolf is also listed in Appendix II to the Bern Convention, the Council of Europe’s Convention of 19 September 1979 on the Conservation of European Wildlife and Natural

Habitats. The listing sets special requirements for the protection of wolves. Norway ratified the Convention in 1986.

- (10) The increase in the wolf population in Norway has created a conflict between the consideration of preserving the wolf in Norwegian nature on the one side and the consideration of a number of private and public interests on the other. Particularly the vast outlying pastures in Norway for cattle, sheep and domesticated reindeer have often conflicted with preservation consideration. This has had the result that the Norwegian wolf administration for a long time has applied a *differentiated management strategy*. The relevant decisions are largely based on this strategy, which was presented as follows already in Proposition to the Odelsting no. 37 (1999–2000), page 6:

“A basic objective of predator management is to ensure viable populations of the four big predators in Norway while preserving active agriculture with the possibility of letting cattle, sheep and domesticated reindeer graze in outlying pastures. This necessitates a *differentiated management*, balancing these considerations in the best possible manner. This involves preparation of certain delimited areas for reproducing populations of big predators. In these areas, the predator stocks are primarily to be managed through damage-mitigating permits and stock control measures such as licensed hunting and quota-free lynx hunting. Within special core areas and management zones for big predators, the Government will implement precautionary measures and adjustments to limit damage to cattle, sheep and domesticated reindeer. It may also be necessary to grant damage-mitigation permits within the core areas and delimited management zones, but here the threshold will be higher than on the outside.”

- (11) In other words, the target is have a wolf population in Norway. However, the population is only to live in certain designated areas, which requires a geographically differentiated management. The consequence of that is that the threshold for culling will be lower outside these areas than inside.
- (12) The *national population target* for wolves and the so-called *wolf zone* are specified in the Predator Regulations, adopted by a royal decree of 18 March 2005 no. 242. It was originally based on the Hunting Act, and is currently also based on the Nature Diversity Act. Both the population target and the wolf zone are fixed in accordance with a Storting decision, see Recommendation to the Storting 330 (2015–2016).
- (13) The national population target is the birth of “four to six annual pup litters”, of which three must have taken place “in groups located in their entirety in Norway”, see section 3 of the Predator Regulations. Where a part of the group’s territory lies in Sweden, a pup litter is to be included by a factor of 0.5. Until 2016, the population target was three pup litters.
- (14) The wolf zone is defined in section 2 (d). Briefly, it covers Oslo and the southeast parts of the counties of Viken and Innlandet. The wolf zone constitutes in total five percent of Norway’s land area. The zone lies in management regions 4 and 5, see section 4. The population target in both regions is the same as the mentioned national target. No population target has been stipulated outside the wolf zone.
- (15) Each management region has a predator committee with main responsibility for the management of wolves and other species in its region, see section 5. If the population in the region exceeds the national population target, section 7 authorises the committee to decide a quota for conditional damage-mitigating permits under section 8 and for licensed culling

under section 10. According to section 10 subsection 1, licensed culling can be decided “to limit the growth and/or the spread” of wolves. Section 10 subsection 2 provides that when culling is considered under section 18 subsection 1 (c) of the Nature Diversity Act “it must be emphasised whether the population targets stipulated by the Storting have been reached”. If the decision concerns wolves in management regions 4 and 5, the predator committees of these regions make the decision jointly, see section 10 subsection 3, as they did in this case. Appeals are decided by the Ministry of Climate and Environment, see section 18.

Court proceedings

- (16) WWF Norway brought an action against the State on 13 December 2017, requesting that the decisions of 1 December 2017 be ruled invalid. At the same time, WWF Norway requested a preliminary injunction to stop the licensed culling until a legally binding judgment was present. The request was later extended to include the decision of 7 February 2018.
- (17) Oslo District Court dismissed the request for a preliminary injunction in an order of 5 January 2018. WWF Norway appealed. Borgarting Court of Appeal partially set aside and partially refused to hear the injunction case in an order of 1 March 2018 as far as the group decisions were concerned. Those wolves had then been shot. The appeal was dismissed as far as the free-roaming animal decision was concerned.
- (18) In the main case, the Oslo District Court ruled as follows on 18 May 2018:
- “1. Judgment is given in favour of the State represented by the Ministry of Climate and Environment.
 2. WWF Norway will pay NOK 136 900 in costs to the State represented by the Ministry of Climate and Environment within two weeks of service of this judgment.
 3. WWF Norway will pay NOK 162 531 in costs to Utmarkskommunenes Sammenslutning within two weeks of service of this judgment.
 4. WWF Norway will pay NOK 155 000 in costs to the Norwegian Farmers’ Union, Norskog and the Norwegian Forest Owners’ Federation within two weeks of service of this judgment.”
- (19) WWF Norway appealed the judgment, and Borgarting Court of Appeal ruled as follows on 29 January 2020:
- “1. The Ministry of Climate and Environment’s decision of 1 December 2017 on licensed culling of wolves in the groups Julussa and Osdalen is invalid.
 2. The Ministry of Climate and Environment’s decision of 7 February 2018 on licensed culling of wolves in the groups Julussa and Osdalen is invalid.
 3. The appeal against item 1 of the conclusion of the District Court’s judgment is dismissed.
 4. In costs in the Court of Appeal, the State represented by the Ministry of Climate and Environment, Utmarkskommunenes Sammenslutning, Norskog, the

Norwegian Forest Owners' Federation and the Norwegian Farmers' Union will pay – jointly and severally – NOK 430 000 to WWF Norway within two weeks of service of this judgment.

5. In costs in the District Court, the State represented by the Ministry of Climate and Environment, Utmarkskommunenenes Sammenslutning, Norskog, the Norwegian Forest Owners' Federation and the Norwegian Farmers' Union will pay – jointly and severally – NOK 240 000 to WWF Norway within two weeks of service of this judgment.”

- (20) The Court of Appeal found – with dissenting opinions, and with some doubt – that the *group decisions* were invalid because the requirement in section 18 subsection 1 (c) of the Nature Diversity Act was not met. According to the majority, the Ministry had not adequately demonstrated that these wolves had been removed to safeguard other public interests of substantial importance.
- (21) One justice dissented. She found that also this requirement had been met. Another justice, who agreed with the majority's result, found that the group decisions were partially invalid also because the Ministry's reasoning under section 18 subsection 2 was inadequate as far as the Osdal group was concerned. The provision sets a condition for culling that the survival of the population is not jeopardised.
- (22) When it comes to the *free-roaming animal decision*, the Court of Appeal unanimously ruled it valid, but, also here, with some doubt. The culling could be permitted to prevent damage to livestock and domesticated reindeer, and the target could not be reached otherwise.
- (23) WWF Norway has appealed item 3 of the conclusion of the Court of Appeal's judgment, concerning the free-roaming animal decision, to the Supreme Court. The appeal covers both the application of the law and the findings of fact.
- (24) The State has appealed against items 1 and 2 of the conclusion of the Court of Appeal's judgment, concerning the group decisions and the costs ruling, to the Supreme Court. That appeal, too, covers both the application of the law and the findings of fact.
- (25) As for the previous instances, Utmarkskommunenenes Sammenslutning, the Norwegian Farmers' Union, the Norwegian Forest Owners' Federation and Norskog act as interveners for the State. Neither of the parties has disputed the intervention.
- (26) On 18 May 2020, the Supreme Court's Appeals Selection Committee granted leave to appeal. In all material respects, the case stands as it did in the Court of Appeal.
- (27) In the Supreme Court, the case has been heard by video-link, see section 3 of temporary Act of 26 May 2020 no. 47 on adjustments to the procedural set of rules due to the Covid-19 outbreak etc.

The parties' views

- (28) *WWF Norway* contends:

- (29) *All decisions* are invalid as they “jeopardise the survival of the population”, see section 18 subsection 2 of the Nature Diversity Act. The requirement must be interpreted in accordance with the Bern Convention, under which Norway is required to keep a minimum stock. This means that the wolf population must be strong enough to survive in Norway, which is significantly better than “critically endangered”, which is the classification in the Norwegian Red List. This also calls for the use of a safety margin, see sections 6 and 9 of the Act. A reference to the national population target is then insufficient. This target is not based on any expert assessment.
- (30) There are also inadequacies in the decisions’ assessment of the total Norwegian-Swedish stock. The immigration factor is particularly overseen, as concluded by the minority of the Court of Appeal. Several genetically important wolves were shot.
- (31) The *free-roaming animal decision* is also invalid because the prevention of damage condition in section 18 subsection 1 (b) of the Nature Diversity Act is not met. No specific danger is demonstrated related to the individual wolf, and according to the Act and the Bern Convention, the wolves’ presence outside the wolf zone is irrelevant. In addition, it must be assessed whether the culling quota is proportionate to the damage potential and population status. This has not been done, and no such proportionality exists, at least not for all the wolves.
- (32) The *group decisions* – as the Court of Appeal correctly concluded – are also invalid due to the lack of “other public interests of substantial importance”, see section 18 subsection 1 (c). The condition must be interpreted to mean that the considerations emphasised by the Ministry – for differentiated management, conflict reduction, hunting and similar – are irrelevant by far, and at any rate insufficient. The decisions provide no assessment of how these considerations protect these wolves in particular. In addition, the exception rule is narrow, and the provision does not allow for accumulation of various interests suggesting culling.
- (33) All decisions are under any circumstances invalid, as the condition in section 18 subsection 2 that the purpose cannot be achieved in any other satisfactory manner is not met. Among other things, the Ministry should have considered whether it was sufficient only to shoot a few of the wolves.
- (34) Finally, all decisions are invalid due to *procedural errors*. Incomplete and unclear reasons have been given, and the decisions are based on inadequate information. No impact assessment has been carried out, and the focus on population targets and zone management is too narrow. Article 112 of the Constitution is particularly relevant to the procedural requirements.
- (35) WWF Norway has requested the Supreme Court to rule as follows:

“In case I. The State represented by the Ministry of Climate and Environment with interveners v. WWF Norway:

1. The appeal is dismissed.
2. WWF Norway is awarded costs in the Supreme Court.

In case II. WWF Norway v. The State represented by the Ministry of Climate and Environment with interveners:

1. The Ministry of Climate and Environment's decision of December 2017 on licensed culling outside established territories in regions 4 and 5 is invalid.
2. WWF Norway is awarded costs."

(36) *The State represented by the Ministry of Climate and Environment* contends:

(37) The Norwegian population target and the zone management balance the considerations on which section 18 of the Nature Diversity Act is based, i.e. the objective of protecting the wolf in Norwegian nature against other public interests of substantial importance.

(38) The Court of Appeal correctly concluded that the decisions do not jeopardise the survival of the population, see section 18 subsection 2. The condition lays down requirements for the South Scandinavian population, which is not jeopardised. But, also, the decisions do not, under any circumstances, jeopardise the part of the population present in Norway. They are based on extensive expertise on the wolf on both the Norwegian and the Swedish side.

(39) The State supports the Court of Appeal's assessment of *the free-roaming animal decision*. The administrative decision provides a sufficiently individual assessment of the prevention of damage condition, and it is not required under section 18 subsection 1 (b) to carry out such a proportionality assessment as argued by WWF Norway.

(40) The wording in section 18 subsection 1 (c) is wide and provides a legal basis for *the group decisions*. The provision allows for a broad balancing of interests, which the Ministry has carried out. The decisions are rooted in the Storting's superior guidelines, which implies that the threshold has been reached.

(41) In the light of the Storting's guidelines, among other things, the purpose of the respective decisions cannot be fulfilled in any other satisfactory manner.

(42) No procedural errors have been made. The decision-making bases and reasoning were comprehensive.

(43) The State represented by the Ministry of Climate and Environment has requested the Supreme Court to rule as follows:

- "1. The District Court's judgment is upheld.
2. The State represented by the Ministry of Climate and Environment is awarded costs in the Court of Appeal and the Supreme Court."

(44) The intervener *Utmarkskommunenes Sammenslutning* supports the State's submissions. It has stressed, among other things, that the conflict level in the predator management is reduced when the Ministry complies with broad democratic settlements on population targets, zone management and decentralised management. This management has its legal basis in section 18 of the Nature Diversity Act.

(45) *Utmarkskommunenes Sammenslutning* has requested the Supreme Court to rule as follows:

- "1. The District Court's judgment is upheld.

2. Utmarkskommunenes Sammenslutning is awarded costs in the Court of Appeal and the Supreme Court.”

(46) The interveners *the Norwegian Farmers’ Union, Norskog and the Norwegian Forest Owners’ Federation* also support the State’s submissions. The organisations have emphasised, among other things, that the wolf management affects industrial interests and conditions of life in areas where wolves are present. Management in accordance with the democratically adopted management system ensures predictability, legitimacy and compliance.

(47) These organisations have requested the Supreme Court to rule as follows:

- “1. The District Court’s judgment is upheld.
2. The Norwegian Farmers’ Union, the Norwegian Forest Owners’ Federation and Norskog are awarded costs in the Court of Appeal and the Supreme Court.”

My opinion

(48) *I have concluded* that all three decisions subject to review are valid. The Supreme Court must therefore rule in favour of the State.

(49) I mention initially that the conditions for action in section 1-3 of the Dispute Act are met, although the culling periods allowed in the decisions have expired a long time ago and most of the wolves have been shot. The action is nonetheless sufficiently relevant because it must be considered likely that the removal authority will be exercised again, see Rt-2001-1413 page 1424 and Rt-2008-873 paragraph 29. This is not disputed by the State.

Legal regulation

(50) The relevant administrative decisions are based on section 18 of the Nature Diversity Act. Subsections 1 and 2 read as follows on the dates of the decisions:

“Section 18 (other removal of wildlife and salmonids and freshwater fish after assessment by the authorities)

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

- (a) to protect naturally occurring plants, animals and ecosystems,
- (b) to prevent damage to crops, livestock, domesticated reindeer, forest, fish, water or other property,
- (c) to safeguard general health and safety interests or other public interests of substantial importance,
- (d) for capture for the purpose of restoring stocks,
- (e) for capture for the purpose of lawful breeding and farming,
- (f) for research, teaching or taxonomic purposes, or
- (g) which are alien organisms.

Decisions under the first paragraph (a) to (f) may only be made if the removal does not jeopardise the survival of the population and the purpose cannot be achieved in any other satisfactory manner.”

- (51) The provision is structured to reflect that at least one of the alternative conditions in subsection 1 (a)–(f) must be met. In addition, the two conditions in subsection 2 must be met. In that case, culling – removal – of wolves “may” be permitted. In the case at hand, no errors in the Ministry’s application of the “may” discretion have been asserted.
- (52) The purpose of the Nature Diversity Act is that nature’s “diversity” – including its biological diversity – must be “maintained through conservation and sustainable use”, see section 1. The management objective is, according to section 5, “to maintain species and their genetic diversity for the long term and to ensure that species occur in viable populations in their natural ranges”. At the same time, section 14 states that “[m]easures under this Act shall be weighed against other important public interests”.
- (53) The removal provision in section 18 must therefore be interpreted, through the somewhat discretionary terms provided therein, to balance the consideration of preservation of the species against other important public interests. In my opinion, this balancing objective is relevant in the further interpretation and application of the provision, to which I will return.
- (54) Article 112 of the Constitution protects the environment and gives a right to “an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained”. I cannot see that section 18 of the Nature Diversity Act is incompatible with Article 112 of the Constitution, which has also not been contended by the parties. Nor can I see from the wording of the Nature Diversity Act and the Predator Regulations that Article 112 is a significant interpretative factor in the case at hand.
- (55) The Nature Diversity Act aims at implementing the *Bern Convention*, see Proposition to the Odelsting no. 52 (2008–2009) side 20 and 21. The objective of the Convention is according to its Article 1 “to conserve wild flora and fauna and their natural habitats, especially those species and habitats whose conservation requires the co-operation of several States”. As concerns species listed in Appendix II of the Convention, including the wolf, Article 6 lays down a prohibition against “all forms of deliberate capture and keeping and deliberate removal”.
- (56) However, exceptions can be made from this prohibition under Article 9 (1), which reads:
- “Each Contracting Party may make exceptions from the provisions of Articles 4, 5, 6, 7 and from the prohibition of the use of the means mentioned in Article 8 provided that there is no other satisfactory solution and that the exception will not be detrimental to the survival of the population concerned:
- for the protection of flora and fauna;
 - to prevent serious damage to crops, livestock, forests, fisheries, water and other forms of property;
 - in the interests of public health and safety, air safety or other overriding public interests;
 - for the purposes of research and education, of repopulation, of reintroduction and for the necessary breeding;
 - to permit, under strictly supervised conditions, on a selective basis and to a limited extent, the taking, keeping or other judicious exploitation of certain wild animals and

plants in small numbers.”

- (57) Section 18 subsections 1 and 2 of the Nature Diversity Act is largely modelled on Article 9 (1) of the Bern Convention and must be interpreted in accordance with the obligations laid down therein. The interpretation of the Convention must follow the principles of the Vienna Convention on the law of treaties, which implies that great emphasis must be placed on the wording. I confine myself to mentioning the Supreme Court ruling HR-2019-282-S paragraph 48 (the “snow crab case”) with references. I will return to the Bern Convention with regard to the further interpretation and application of the relevant conditions in section 18 of the Nature Diversity Act.
- (58) To some extent, the parties have also addressed the EU’s Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora. The Directive is not part of the EEA Agreement, and has a slightly different wording than the Bern Convention and the Nature Diversity Act. The Directive therefore has no particular relevance as an interpretative factor in the case at hand.

Jeopardising of the survival of the population – all decisions

The content of the condition

- (59) According to section 18 subsection 2 of the Nature Diversity Act, removal may only be permitted if it “does not jeopardise the survival of the population”. The corresponding wording in Article 9 (1) of the Bern Convention is that the removal “will not be detrimental to the survival of the population concerned”.
- (60) The term “population” is defined in section 3 (b) of the Nature Diversity Act as “a group of individuals of the same species living within a delimited area at the same time”. The term “species” is defined in (a) as “a group of living organisms distinguished according to biological criteria”. In aggregate, this points towards a biological population concept, which here implies that the Norwegian-Swedish wolf population must be considered as one. The interpretation has support in the preparatory works, see Proposition to the Odelsting no. 52 (2008–2009) page 130. In the special notes to section 18, the following is stated on page 388:
- “In cases where the population extends beyond the country’s borders, the survival of the population shall not be assessed in isolation, but be assessed in relation to the total spread of the population.”
- (61) In other words, it is a requirement that the individual decision on culling does not jeopardise the survival of the *South Scandinavian wolf population*. So far, the parties agree.
- (62) WWF Norway contends that the threshold must be set in the light of section 5 of the Nature Diversity Act, setting out that the management objective is that “the species occur in viable populations”. According to the preparatory works, this means that “one is seeking to maintain or achieve a good condition”, see Proposition to the Odelsting no. 52 (2008–2009) page 376. However, section 5 “does not impose any direct duties”, see the Proposition’s pages 81 and 375. It is merely a guideline for the interpretation of the Act and the exercise of discretion, which must be weighed against other important public interests, see section 14. This implies that it is possible to carry out removals under section 18 even if the management objective in

section 5 is not reached, see the Proposition's page 376. I cannot see that this interpretation is incompatible with the Bern Convention.

- (63) WWF Norway further contends that when setting the threshold under section 18 subsection 2, one must use a safety margin taking into account, among other things, the uncertainty attached to the population's future development. The precautionary principle in section 9 requires that "adequate information" form the basis for a decision. As I will return to, the information available in this case was solid, which implies that special safety margins were not called for. However, I do agree with WWF Norway that the uncertainty regarding the future development is relevant and that a certain margin is implicit in "jeopardises the survival of the population". The general duty of care in section 6 suggests the same.
- (64) As mentioned initially, the wolf is listed as "critically endangered" on the Red List of the Norwegian Species Databank. The Red List is prepared by experts in line with the guidelines of the International Union for Conservation of Nature. However, since the classification relies on the number of reproducing individuals present in *Norway*, the Norwegian Red List is not decisive for whether the South Scandinavian stock is threatened.
- (65) It is not possible to give a general description of the risk level for the survival of the population that precludes culling under section 18 subsection 2 of the Nature Diversity Act. Nor is the formulation "not be detrimental" for survival in Article 9 (1) of the Bern Convention particularly instructive in this regard. An individual assessment is required in each case, and in my opinion, it is not necessary to set a more precise limit for acceptable risk. It may also vary, depending on the basis for the removal and the knowledge base, among other things.
- (66) WWF Norway contends that section 18 subsection 2 is not only to safeguard the South Scandinavian population, but also the *Norwegian population*. The legal basis is Article 2 of the Bern Convention:
- "The Contracting Parties shall take requisite measures to safeguard the population of wild flora and fauna at, or adapt it to, a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements and the needs of sub-species, variants or forms at risk locally."
- (67) This implies that Norway has an obligation to take certain measures to maintain the population of wild flora and fauna, including the wolf. This obligation – within its reach – is absolute according to Article 9 of the Convention. The Secretariat of the Bern Convention expressed the following in a letter to the Directorate for Management of Nature of 17 June 1996, referred in Recommendation by the Storting no. 301 (1996–1997) page 6:
- "All Nordic countries are obliged to preserve populations of all species present in their territory, without prejudice to the positive preservation measures taken by neighbouring countries."
- (68) This formed the basis for the said Recommendation to the Storting. And the "predator compromise" from 2011, supported by all parties in the Storting, set out that "Norway is obliged under the Bern Convention to ensure the survival of all the big predators in Norwegian nature", see Representative Proposition (2010–2011) page 1. Roughly the same was set out in Recommendation to the Storting 330 (2015–2016) page 8. I agree that Norway

is obliged under international law to ensure the wolf's survival in Norwegian nature. Norway cannot leave it to Sweden alone to safeguard the South Scandinavian population.

(69) The scope of this obligation is, however, uncertain. The wording in Article 2 of the Convention is not specific, as the level must correspond to ecologic, scientific and cultural requirements, among others. It must nonetheless be clear that it is not required that the Norwegian part of the population is so big that it is viable in itself. Nor can I see that Article 2 imposes a responsibility on the individual Contracting Party for a specific part of a population, provided that the survival of the aggregate population is not jeopardised.

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(70) This obligation under international law is not expressly incorporated in section 18 of the Nature Diversity Act. I will not elaborate on this, as I believe that the obligation is incorporated in section 7 of the Predator Regulations. The provision limits the jurisdiction of the predator committees to permit culling only in cases where “the population of each species exceeds the national population targets for the region”. The national population target in section 3 is set to four to six annual pup litters, of which three must be wholly Norwegian. The same target is set in the relevant regions 4 and 5, see section 4 (d) and (e).

(71) I find it clear that Norway is not in breach of Article 2 of the Bern Convention as long as the Norwegian part of the population is so big that it reaches the Norwegian population target. As I will return to, I consider the information forming the basis for that target adequate.

Individual assessment

(72) I will first consider whether the permitted removals jeopardised the survival of the *South Scandinavian* wolf population.

(73) The decisions are based, among other things, on an updated wolf population status in Scandinavia during the winter 2016–2017. It showed that the population was increasing and stipulated to 430 individuals. In 2016, pups litters were documented in 43 out of 46 family groups. The figures emerge after highly thorough and regular surveys, both on Norwegian and Swedish side. From a total level of 430 wolves during the winter 2016–2017, there would, when the decisions were made, have been a legal and an illegal reduction, as well as an increase in the form of new litters during the spring of 2017.

(74) The Swedish Environmental Protection Agency estimated in a report from 2015 that at least 300 wolves were needed to constitute a “favourable preservation status” in Sweden. The premise was that Norway had at least 40 wolves. The report was based on a statement from an expert group, setting out that these figures “are well above a ‘MVP’”; that is, well above a minimum viable population. The level of in total 340 wolves is conditional on the population every five-year period getting at least one new reproducing immigrant from Finland or Russia.

(75) The Ministry's decisions are based on the conclusion of the Directorate of Environment in its recommendation 30 November 2017, which reads:

“The Directorate of Environment has, based on the Swedish Environmental Protection Agency's evaluations of what is a favourable preservation status, the present decisions on licenced culling, completed damage-mitigating culling, as well as historical and ongoing surveillance materials, assessed whether this year's planned removal of wolves in

Norway and Sweden in aggregate jeopardises the survival of the South Scandinavian population. Based on the Swedish Environmental Protection Agency's assessment of the number of individuals necessary for a favourable preservation status, the Directorate of Environment considers it unlikely that the survival of the population is jeopardised by the planned removals in Norway and Sweden. The aggregate removal is not expected to cause the population as a whole to come below the Swedish Environmental Protection Agency's recommended reference value of 340 individuals. It cannot be ruled out that the population is reduced or stabilised after the removal.

The conclusion is based on available information, and presupposes that new genes are added to the population by the establishment of immigrants from the Finnish-Russian population. This is paramount for the Scandinavian survival of the population in a long-term perspective.”

- (76) In the case at hand, no information has been provided forming a basis for setting aside this professional assessment.
- (77) As I see it, the uncertainty as to whether the immigrant premise was fulfilled at the time of the decisions is not decisive. Firstly, the mentioned Swedish population target is higher than necessary to avoid jeopardising the survival of the population. Secondly, the decisions set out that the wolves that were ordered shot were not considered genetically valuable. This applies in particular to the wolves in the group decisions, in which genetic data were provided. I do not have a basis for setting aside this assessment, either. Thirdly, the premise for the Directorate of Environment's recommendation was that the wolf population would be managed “in the upper part of the interval” of the Norwegian population target, to compensate for the risk of inbreeding. Fourthly and finally, if the immigrant premise should turn out to fail in the years to come, it was likely that the survival of the population nonetheless could be ensured by restricting – and if necessary avoiding – culling in later years.
- (78) Against this background, I conclude that the decisions on licensed culling did not jeopardise the *South Scandinavian* survival of the population, see section 18 subsection 2 of the Nature Diversity Act.
- (79) As concerns the question whether the decisions constituted a threat to a minimum of the *Norwegian population*, I note that the national population target was reached, see section 7 of the Predator Regulations. The target was reached in seven of the eight last years. During the spring of 2016, pup litters were documented in 7.5 family groups, and during the spring of 2019, at least nine pup litters related to Norway were documented. In its recommendation of 28 November 2017, the Directorate of Environment based its recommendation, as mentioned, on the wolf population being managed in the upper part of the population interval and found that the quota for licenced culling adopted by the Ministry, “[would] not prevent reaching of the population target after the licensed culling”.
- (80) This implies that the decisions also did not exceed the minimum requirement for the Norwegian part of the population under section 7 of the Predator Regulations and Article 2 of the Bern Convention.

The free-roaming animal decision

The prevention of damage condition

- (81) The free-roaming animal decision is made based on section 18 subsection 1 (b) of the Nature Diversity Act “to prevent damage to ... livestock”.
- (82) The term “prevent” implies that culling may be carried out as a precautionary measure, see Proposition to the Odelsting no. 52 (2008–2009) page 389. In the light of the wording in Article 9 of the Bern Convention (1) second indent – “prevent serious damage” – certain minimum requirements for the gravity and scope of the damage must be met.
- (83) The Ministry writes the following in its decision:
- “The Ministry refers to the secretariat’s report, setting out that damage caused by wolves is registered annually. Against this background, the Ministry assumes that grazing animals are lost to wolves at a certain scope and that the terms of the law are complied with on this point. It has also been observed that this applies to licensed culling outside the zone where the threshold for culling must be lower.”
- (84) WWF Norway contends that this is not sufficiently concrete, that the Ministry cannot emphasise that the culling takes place outside the wolf zone, and that a proportionality assessment should have been carried out.
- (85) I cannot see that the reasoning is not sufficiently concrete. The decision is based on years of historical experience, which has demonstrated that there is a genuine risk that free-roaming animals, as dealt with here, will cause damage to livestock grazing in the area.
- (86) The way section 18 subsection 1 (b) is worded, the threshold for culling is in principle the same outside and within the wolf zone. But in *reality*, there is a significant difference: Within the wolf zone, various precautionary measures have been taken to prevent damage to livestock, including by reducing and isolating grazing animals.
- (87) The provision continues the previous section 12 of the Wild Animals Act. Its preparatory works are thus still of relevance, see Proposition to the Odelsting no. 52 (2008–2009) page 388. The following is stated in Proposition to the Odelsting no. 37 (1999–2000) page 14:
- “Article 9 of the Bern Convention further provides that the damage to be prevented must be *serious*. With the core area categorisation/zoning that will apply for predator management in Norway, the threshold for considering damage to cattle, sheep and domesticated reindeer caused by wild predators serious is much lower outside the core areas/management zones than inside. Within these selected zones, the threshold for considering the damage as serious is much higher, considering the aim of ensuring the survival of the population. The purpose of core areas or management zones is, in fact, to carry out a weighing of interests in advance, which then constitutes the scope of each culling permit. The Bern Convention’s requirement of *serious damage* is thus integrated in the principle of differentiated management and selection criteria for the different areas.”
- (88) Section 18 subsection 1 (b) of the Nature Diversity Act is therefore based on the presumption that the establishment of the wolf zone is *in itself* a balancing of interests before an individual decision is made. A consequence of a differentiated management strategy is that the damage

will mainly occur outside the zone. Thus, the threshold for obtaining damage-mitigating permits will in reality be lower outside the zone than inside, see also the latter Proposition page 49.

- (89) I add that zone management under these guidelines will not conflict with the Bern Convention. Admittedly, Article 4 requires that the Contract Parties take measures to ensure the conservation of the habitats of the species. However, these habitats may be restricted under Article 9 (1).
- (90) Nor can I see that section 18 subsection 1 (b) of the Nature Diversity Act requires an assessment in each individual decision of whether the licensed culling is proportionate to the damage potential and the population status. Neither the wording of the provision nor the second indent of Article 9 (1) of the Bern Convention indicates that this is the case. I add that it follows from what I have already said that the legislature must be deemed to have carried out such a proportionality assessment by facilitating a differentiated management of a surviving population.
- (91) This implies that the prevention of damage condition in section 18 of the Nature Diversity Act subsection 1 (b) was met.

Alternative measures

- (92) The Nature Diversity Act section 18 subsection 2 also requires that “the purpose cannot be achieved in any other satisfactory manner”. This corresponds with the condition “there is no other satisfactory solution” in Article 9 (1) of the Bern Convention. From the wording, it follows that an assessment is needed to determine whether another solution is “satisfactory”.
- (93) Also in its assessment of this condition, the Ministry relied on the differentiated wolf administration. The resources required to implement mitigating measures are mainly applied within the wolf zone, not outside. The idea is that concentrating the precautionary measures to the wolf’s central areas of living may have a larger aggregate effect on the survival of the population in Norway than spreading the measures, see Proposition to the Odelsting no. 37 (1999–2000) side 14.
- (94) I cannot see that section 18 subsection 2 requires that particular measures must be taken also outside the wolf zone, for instance in the form of fencing-in of grazing cattle and sheep, restricting the number of such animals or other methods to prevent attacks. Hence, the Ministry’s assessment does not contain any serious flaws.
- (95) This condition in section 18 subsection 2 of the Nature Diversity Act was therefore also met.

The group decisions

The significance of “other public interests of substantial importance”

- (96) The group decisions are based on section 18 subsection 1 (c) of the Nature Diversity Act, “to safeguard general health and safety interests or other public interests of substantial importance”. The condition is modelled on the third indent of Article 9 (1) of the Bern

Convention, “in the interest of public health and safety, air safety or other overriding public interests”.

- (97) The concept “other public interests” is wide, and contain few restrictions per se. However, the wording gives no clear answer as to whether these interests must be of the same nature as the health and safety considerations that are expressly mentioned. Nor do the original preparatory works further specify their content. They are brief and mainly provide examples unsuited to clarify the delimitation, see Proposition to the Odelsting no. 52 (2008–2009) page 389.
- (98) Nor do sources related to Article 9 of the Bern Convention provide any guidance of significance. The Convention’s Standing Committee states the following in Annex 2 to Revised Resolution No. 2 (1993):
- “13. The purpose of the exception indicated in the third indent of paragraph 1 of Article 9 raises a very difficult problem, namely the interpretation of the expression ‘other overriding public interests’.
14. With regard to the definition of the scope of similar concepts, e.g. ‘public order’, experience with other international Conventions (including the European Convention on Human Rights) has in fact shown that it is extremely difficult, if not impossible, to find a general, prior interpretation of such concepts.”
- (99) Here, the Committee emphasises the difficulties of limiting the content of the Convention’s concept “other overriding public interests”. In continuation of the quoted passage, the Committee states that the content of the term must be assessed in each case.
- (100) WWF Norway contends that section 18 subsection 1 (c) of the Nature Diversity Act must be read as a safety valve only to be used in extraordinary cases. However, neither the wording of the Act nor the Committee’s statement on the interpretation of the Convention suggests anything like this.
- (101) As I see it, the key limitation is that the public interests must be of “substantial importance”. Particularly in the light of the term “overriding” in the third indent of Article 9 (1) of the Bern Convention, a reasonable interpretation is that the public interests must be so substantial that they outweigh the preservation considerations. In other words, this is more similar to *balancing of interests*, where various public interests are considered in context – cumulated – on each side. In my opinion, the wording implies that one overall balance of all interests is required.
- (102) The significance of the condition was discussed by the Storting in the spring of 2017. The question is which importance should be attributed to the Storting’s views in the interpretation of the Act.
- (103) In Proposition to the Storting (bill) 63 (2016–2017), the Government proposed adding a new subsection 2 to section 18 of the Nature Diversity Act that would permit “under strictly supervised conditions, on a selective basis and to a limited extent, the taking of certain individuals of wolverine, bear and wolf in small numbers”. The formulation was modelled on the fifth indent of Article 9 (1) of the Bern Convention. This was occasioned by the Storting requesting the Government in 2017 to refer a case to the Storting on how, by law, culling could be permitted to a larger extent than what the Ministry had previously considered possible. In the Proposition on page 55–56, the Government assumed that section 18 subsection 1 (c) – particularly the requirement that the public interests must be of “substantial

importance” – significantly restricts the possibility to permit culling of wolves. Among other things, this could not be decided “solely based on fear is local communities”. According to the Government, the Act had to be amended in order for the Storting’s wish to be fulfilled.

- (104) The Storting did not accept the Proposition, as the majority found that the existing section 18 subsection 1 (c) already sufficiently allowed for licensed culling, and to a larger extent than what the Government had found. The Storting instead asked the Government to amend the Predator Regulations. This is set out in Recommendation to the Storting (bill) 257 (2016–2017).
- (105) The majority of the Committee of the Storting expressed on page 9–10 that “district policy considerations must be considered a public interest of substantial importance”, and that they cover “the grazing industry, other industry, hunting, the safety of the local community and general psychosocial conditions”. Overall, the Storting’s majority must be understood to express that, as a starting point, there is a presumption that wolves roaming outside the wolf zone may be shot under section 18 subsection 1 (c) if the national population target is reached. However, the majority emphasised that the assessments must be carried out individually.
- (106) As the provision was not amended, the Storting’s statements must in principle be considered complementary works, which are normally only relevant in connection with interpretation. However, what is striking here is that the Storting’s view emerges in connection with a parliamentary bill and, then, as an argument against amending the Act. In this situation, I believe that the statements should be given greater weight than complementary works are usually given. The weight should then be more in line with that given to preparatory works by the Storting. In situations such as the present, the Storting cannot be required to adopt a statutory provision once again.
- (107) However, the premise must be that the Storting’s statements are within the wording of the provision, and that the Bern Convention is not violated if the statements are complied with. In the light of what I have already said, I consider both these premises to be met, the latter at least if both the third and fifth indent of Article 9 (1) are taken into account. Nor is it a question of extending the authorities’ power to interfere with the citizens’ rights or liberties.
- (108) Overall, this suggests that section 18 of the Nature Diversity Act subsection 1 (c) allows for including a broad spectre of public interests. However, culling can only be decided if these interests in aggregate substantially outweigh the preservation considerations. The assessment must be concrete, but the emphasis must be placed on what the Storting referred to as district policy considerations.

Individual assessment

- (109) It is set out in the group decision of 1 December 2017 that the Ministry placed great emphasis on the principle of geographically differentiated wolf management, as this was highlighted by the Storting in the mentioned Recommendation to the Storting 257 (bill) (2016–2017). The Ministry added:

“The principle is based on a balance between the consideration of grazing animals and the preservation of predators. This means that wolves must have priority within the wolf zone, and the threshold for culling must be high. Outside the wolf zone, other interests will carry more weight, and the threshold for removal must be low. It is the Ministry’s

opinion that this distinction may be practiced clearly as long as the survival of the population is not jeopardised, which is not the situation in the case at hand. Therefore, in the present case, the Ministry finds that there is a substantial public interest in minimising the number of wolves roaming outside the wolf zone.”

- (110) As already stressed, the predator management involves a form of balancing of interests in advance. It appears that the consideration of preserving the wolf in Norwegian nature thus prevails, and to the effect that wolves within the wolf zone are spared to a larger extent than they would otherwise have.
- (111) The Ministry specifies the considerations forming the basis for the decision as follows:
- “- protecting grazing industry interests and reduce losses of grazing animals in prioritised areas, while predators are ensured protection in areas reserved for predators
 - ensuring predictability and minimising conflicts within the management
 - enhancing the trust in predator management
 - protecting the interests of other industries and societal interests in grazing areas, while protecting predators in areas reserved for predators.”
- (112) Based on what I have already said, these considerations are relevant.
- (113) However, the decision sets out that the *first* and partially also the *fourth* consideration did not apply particularly strongly. According to information provided, no sheep were grazing in the area, and there was only a minor risk of damage to cattle. It is also stated that the relevant wolves affected regular hunting of other species only to a limited extent, but that there were conflicts related to the possibility to hunt with unleashed dogs. In addition, it was “difficult to see” that the wolves in question disturbed human settlement in the area. It was accepted, however, that the local communities are burdened by the constant presence of predators.
- (114) The *second and third* considerations are linked and viewed as “crucial” by the Ministry. In my opinion, they should be emphasised. In a democratic society such as ours, a basic popular trust in the authorities’ predator management – also from those living close to the predators – will be significant in the end to reach key preservation targets in predator policy. It must be assumed that management predictability and other conflict mitigation measures will contribute to strengthen this trust. With regard to both enjoyment of human life and investments, it may be of essence that those living and working outside the wolf zone, are able to trust that the wolves will not settle there permanently.
- (115) The interests emphasised by the Ministry calling for removal of the wolves concerned, are, admittedly, of a rather general nature. It may be difficult to demonstrate specifically how these interests apply to certain people, groups of people and various activities. However, this cannot be decisive. The interests emphasised are legitimate under section 18 subsection 1 (c), which must influence how the balance of interests is struck in such cases. Because the interests are very different, pointing out the overriding one will ultimately depend on an assessment.
- (116) From what I have said, it appears that by exercising such an assessment, considerable emphasis must be placed on the interpretive guidelines issued by the Storting in 2017. Hence, in my opinion, there is no reason to set aside the Ministry’s balancing of the interests in the group decisions.

- (117) This implies that the conditions in section 18 of the Nature Diversity Act subsection 1 (c) are met.

Alternative measures

- (118) As previously mentioned, section 18 subsection 2 of the Nature Diversity Act requires that “the purpose cannot be achieved in any other satisfactory manner”.
- (119) Also in its application of the provision in the territory decision, the Ministry stressed the principle of differentiated management.
- (120) It must be clear that the public interests implying that the condition in section 18 subsection 1 (c) is met, cannot be satisfactorily maintained by other means than by culling the wolves in the two territories. Once it is assumed that such removal will strengthen the trust in predator management and provide increased predictability for people outside the wolf zone, it is difficult to see how this may be achieved in any other satisfactory manner.
- (121) WWF Norway contends that the culling should at least have been limited to only a few of the wolves. In my opinion, such a limitation would not sufficiently meet the public interests justifying the culling.
- (122) Hence, also this condition in section 18 subsection 2 of the Nature Diversity Act was met.

Procedural errors

- (123) WWF Norway contends that the decisions contain procedural errors in the form of inadequate decision-making bases and unclear and weak arguments.
- (124) It is unnecessary for me to elaborate on the applicable procedural rules. It appears from what I have already said that both the decision-making bases and the reasoning were sufficient to assess whether the conditions in section 18 of the Nature Diversity Act were met.
- (125) I mention in particular that the factual basis for assessing the survival of the population was very solid. Norwegian and Swedish authorities had information and data on nearly every wolf, including DNA profiles. In addition, the information regarding the development of the wolf population covered a long period of time. I cannot see that the Ministry can be required to carry out a special impact assessment of the removals’ effect on the population in the long run. In my opinion, it was sufficient to rely on the previously mentioned Swedish reports and the recommendations by the Directorate of Environment to the Ministry.
- (126) The contention of procedural errors can thus not succeed.

Conclusion and cost

- (127) Against this background, the State’s appeal has succeeded, and WWF Norway’s appeal has not. Item 1 of the conclusion of the District Court’s judgment is therefore upheld.

- (128) The State and its interveners are as a starting point entitled to full compensation for their costs, see section 20-2 subsection 1 of the Dispute Act. However, I believe there are compelling reasons to exempt WWF Norway from liability for the State's and the interveners' costs, see section 20-2 subsection 3.
- (129) Firstly, the relative strength between the parties justifies exemption, see section 20-2 subsection 3 (c). WWF Norway is a non-profit organisation pursuing non-profit purposes. Secondly, the case has raised several legal issues of principle that have not previously been clarified. This clarification will benefit the State and its interveners at least as much as it will benefit WWF Norway.

I vote for this

J U D G M E N T :

1. Item 1 of the conclusion of the District Court's judgment is upheld.
2. Costs are not awarded in any instance.

Justice Skoghøy :	I agree with the justice delivering the leading opinion in all material respects and with his conclusion.
Justice Normann :	Likewise.
Justice Bergh :	Likewise.
Chief Justice Øie :	Likewise.

Following the voting, the Supreme Court gave this

J U D G M E N T :

1. Item 1 of the conclusion of the District Court's judgment is upheld.
2. Costs are not awarded in any instance.