SUPREME COURT OF NORWAY

J U D G M E N T

given on 6 April by a division of the Supreme Court composed of

Justice Jens Edvin A. Skoghøy
Justice Henrik Bull
Justice Arne Ringnes
Justice Wenche Elizabeth Arntzen
Justice Espen Bergh

HR-2022-718-A (case no. 21-136017SIV-HRET)
Appeal against Borgarting Court of Appeal's judgment 7 June 2021

A
B
C
D
E
F (Counsel Hans Petter Graver)

v.

The State represented by
the Ministry of Health and Care Services (The Office of the Attorney General
Represented by Ida Thue)

(1) Justice **Bergh:**

Issues and background

(2) The case concerns the lawfulness of the entry quarantine requirement upon entry into Norway for Norwegian residents owning holiday properties in Sweden. The requirement was adopted in Regulations of 27 March 2020 no. 47 relating to infection control measures etc. in connection with the Covid-19 outbreak (the Covid-19 Regulations).

(3) At the time of adoption, section 5 of the Regulations read:

> "**Section 5. Duty to quarantine upon entry into Norway**
> Persons entering into Norway must quarantine for 14 days after arrival.
>
> A person in quarantine must stay at home or at another suitable place. The person may only leave home or the other suitable place if close contact with persons other than the members of his or her household can be avoided."

(4) This provision concerned entry quarantine and its objective was to avoid "import infection". The Regulations also contained rules on infection quarantine after contact with a person infected by Covid-19.

(5) Entry quarantine for travellers from Sweden was introduced by Regulations of 13 March 2020 no. 287, with effect from 17 March 2020. The requirement was continued until lifted with effect from 26 January 2022, but its specifics were amended several times. Among other things, the quarantine period was gradually reduced, first to 10 days and later to seven days on the condition of negative test results. The order of the various sections was also changed, for instance as the general quarantine requirement at some point was moved to section 4 subsection 1 (a) of the Regulations.

(6) The key issue in the case at hand is an entry quarantine exemption in the Regulations added by an amendment of 3 April 2020 no. 570. The provision, which then became section 6 subsection 4, read as follows:

> "Persons crossing the border between Sweden and Norway or Finland and Norway, after having carried out strictly necessary maintenance and inspection to prevent large material damage to private property in Sweden or Finland, are exempt from the quarantine requirement in section 5 upon return to Norway. The exemption does not apply if the person stays overnight on the property or elsewhere in Sweden or Finland before returning to Norway. The exemption does also not apply if the person in Sweden or Finland has visited supermarkets, shopping centres or similar or has been in close contact with persons other than his or her household members."

(7) The exemption was later moved to section 6a (b) and amended on certain points, but the key elements – that the purpose of the trip had to be strictly necessary maintenance and inspection, as well as the ban on overnight stay – were applicable until the quarantine requirement was lifted.

(8) On 4 December 2020, a group of Norwegian residents owning holiday properties in Sweden – also referred to as the cabin owners – brought a class action in Oslo District Court. The action challenged the possibility to limit the exemption from the quarantine requirement to day trips with the purpose of carrying out necessary maintenance and inspection. Upon the District Court's request, the class action was made into an ordinary action where the six persons who are acting as appellants in the Supreme Court, were claimants.

(9) On 5 February 2021, Oslo District Court ruled as follows:

> "1. Section 4 (a), cf. section 6a (b), of Regulations relating to infection control measures in connection with the coronavirus outbreak of 27 March 2020 (the Covid-19 Regulations) is invalid as to the requirements that the person arriving has not stayed overnight on the property and that the purpose of the trip was 'strictly necessary maintenance and inspection to prevent large material damage'.
>
> 2. The State represented by the Ministry of Health and Care Services is to pay costs to the claimants of NOK 650 000 and a court fee of NOK 9 592 within two weeks of the service of this judgment."

(10) The State represented by the Ministry of Health and Care Services appealed to Borgarting Court of Appeal, which on 7 June 2021 ruled as follows:

> "1. The Court of Appeal finds in favour of the State represented by the Ministry of Health and Care Services.
>
> 2. Costs are not awarded."

(11) A and others have appealed to the Supreme Court, challenging the Court of Appeal's application of the law. The issue to be considered by the Supreme Court is the entry quarantine requirement in the Covid-19 Regulations effective from 3 April 2020 until the Court of Appeal's judgment on 7 June 2021. The appellants have abandoned some of their submissions in the District Court and the Court of Appeal.

(12) Post hearing, the parties have filed written submissions regarding the relevance of a judgment from the European Court of Human Rights (ECtHR) of 15 March 2022 *Cgas v. Switzerland*.

The parties' contentions

(13) The appellants – *A and others* – contend:

(14) The requirement of a legal interest set out in section 1-3 of the Dispute Act is met although the appellants, being fully vaccinated, have been free since September 2021 to stay overnight on their holiday properties, and although the quarantine rules were lifted in January 2022. There is still a need for clarification of the law. The pandemic is not over, and the case raises issues of principle.

(15) The decisions on quarantine requirement were invalid to the extent they affected the appellants when travelling to their holiday properties in Sweden without using public transport, visiting shops or having close contact with any person apart from their travelling companions.

(16) The quarantine requirement does not have a legal basis, as the conditions in the Infection Control Act of "clear medical justification", "necessary for infection control purposes" and "suitable after an overall assessment" are not met. The two latter conditions prescribe an overall assessment to be made in the light of the European Convention on Human Rights (ECHR) and the EEA Agreement. The issue of a limited court review is thus not relevant, as the courts nonetheless review the interpretation and application of statutory provisions as far as international law applies.

(17) The decisions are contrary to the provisions on respect for someone's home in Article 102 of the Constitution and Article 8 of the ECHR. They interfere with the right to respect for home, and the interference is not proportionate. Moreover, the State's failure to carry out a proportionality assessment is a violation in itself.

(18) Purchase of property in another EEA country is movement of capital across borders, as regulated by Article 40 *et seq* of the EEA Agreement. The quarantine requirement is a limitation on the possibility to enjoy the proceeds and maintain the value of the investment that the properties in Sweden constitute. The State has not documented that the conditions made, such as avoiding overnight stay, are suitable, necessary and proportionate to maintain public health. They are thus contrary to the EEA Agreement.

(19) In the alternative, the entry quarantine decisions must be interpreted restrictively under Article 102 of the Constitution, Article 8 of the ECHR and Article 40 of the EEA Agreement, so that they are not applicable to the appellants when they travel to their cabins in Sweden and avoid public transport and close contact with anyone beyond their family or household members.

(20) Should the appellants' claim be dismissed on procedural grounds, it is contended that the quarantine requirement imposed on the appellants when they use their cabins in Sweden, amounts to a violation of their rights under Article 8 of the ECHR.

(21) A and others ask the Supreme Court to rule as follows:

> "Principally:
>
> Section 4 (a), cf. section 6a (b) of he Covid-19 Regulations of 27 March 2020 was invalid to the extent it at the time of the decisions of 3 April 2020, 14 September 2020 and 16 March 2021 impose a quarantine requirement after overnight stay on private property in Sweden and to the extent the exemption from the requirement only applied if the objective of the trip was 'strictly necessary maintenance and inspection to prevent large material damage'.
>
> In the alternative:
>
> 1. The quarantine requirement in section 4 subsection 1 (a), cf. section 6a (b) of the Covid-19 Regulations is not applicable to A, B, C, D, E and F to the extent it (1) is triggered by overnight stay on private holiday property in Sweden, and to the extent it (2) imposes a duty to quarantine after trips with other objectives than strictly necessary inspection and maintenance to prevent large material damage to real property.
>
> 2. The conditions in section 4 subsection 1 (a), cf. section 6a (b) of the Covid-19 Regulations, to the extent they imposed a quarantine requirement on A, B, C, D, E and F after overnight stay on holiday property in Sweden and exemption from

the duty to quarantine was only granted if the objective of the trip was strictly necessary inspection and maintenance to prevent large material damage to real property, amounted to a violation of Article 8 of the ECHR.

In both cases:
A, B, C, D, E and F are awarded costs in all instances."

(22) The respondent – *the State represented by the Ministry of Health and Care Services* – contends:

(23) The Supreme Court must assess whether a genuine need to have the claim decided still exists, see section 1-3 of the Dispute Act. The action concerns a past legal relationship. Such legal interest must primarily be established based on the presumed effects of a judgment in favour of the appellants. The key factor is whether it is likely that the entry quarantine rules will be reintroduced. The issues of principle the case raises are also important.

(24) The entry quarantine rules were within the scope of section 1-5 of the Infection Control Act. The conditions of "clear medical justification" and of the measure being "necessary for infection control purposes" were met.

(25) When it comes to the provision's final condition – that the measure must "appear suitable after an overall assessment" – the courts may not review the public administration's application thereof. Measures under the Infection Control Act may interfere with a number of interests. Some of these interests are protected under the Constitution, the ECHR or the EEA Agreement, while others are not. The concrete question whether a given measure appear suitable after an overall assessment therefore requires a broad and complex assessment, with focus on medical and political aspects. In any case, the condition is met in this case.

(26) The State agrees that a holiday property may fall within the term "home" in Article 102 of the Constitution and Article 8 of the ECHR. However, the entry quarantine rules do not interfere with the right to respect for someone's home. Interference, if any, may in any case be justified if its objective is to protect people's life and health.

(27) Article 40 of the EEA Agreement on free movement of capital is not applicable. These rules protect the movement of capital itself and not the right of ownership. The appellants already owned property in Sweden and have thus not been prevented from investing in real property. In the alternative, it is contended that the rules on free movement of people must in any case be decisive. Possible effects on other freedoms are inevitable consequences of the restriction on free movement of people; hence, these are the rules that apply. In the Supreme Court, the appellants have accepted that the entry quarantine requirement does not violate the right to free movement for people.

(28) In any case, the entry quarantine requirement has such an uncertain and indirect effect on the other freedoms that it does not constitute a restriction. A restriction, if any, may in any case be justified.

(29) The State represented by the Ministry of Health and Care Services asks the Supreme Court to rule as follows:

"1. The appeal is dismissed.

2. The State represented by the Ministry of Health and Care Services are awarded costs in all instances."

My opinion

Legal interest

(30) I will first discuss whether the appellants have sufficient legal interest in bringing an action.

(31) The starting point for this assessment is that since September 2021, the appellants have been fully vaccinated and thus allowed to travel freely to Sweden without undergoing quarantine upon return to Norway. Moreover, the entry quarantine requirement was lifted in January 2022. The contested rules in the case at hand thus no longer have a direct effect on the appellants.

(32) The principles of legal interest are described as follows in HR-2022-533-A paragraphs 31 and 32:

> "Section 1-3 subsection 2 first sentence of the Dispute Act sets out that the claimant must demonstrate a genuine need to have the claim decided against the defendant. The requirement of a legal interest in bringing an action is expressed by the term 'genuine need'. In addition, section 1-3 subsection 2 second sentence specifies that an overall assessment must be made of the claim's relevance and the parties' connection to the claim.
>
> The legal interest requirements must generally be met at the time the claim is brought to court, and continue to be met until a judgment is handed down. However, the requirement of a 'genuine need' to have the claim decided does not prevent the action from involving a past situation as long as a genuine need can be demonstrated. In such cases, emphasis must be placed on the extent to which it raises issues of principle, the progress of the case and the outcomes in the lower instances, see Proposition to the Odelsting no. 51 (2004–2005) page 365."

(33) In my view, in this case the appellants do have a general need to have the claim decided. It raises issues of principle on intrusive measures in the extraordinary situation created by the Covid-19 pandemic. This is the first case dealing with these issues that the Supreme Court hears. The Supreme Court's judgment may have significance both for the assessment of other Covid-19 related measures and for future implementation of intrusive measures in other serious situations.

(34) Infection control measures are by nature time-limited, which means that the individual legal interest is often lost before the lawfulness of the measure can be reviewed by the Supreme Court. It would be unfortunate if a Supreme Court hearing of such cases were generally precluded.

(35) Against this background, I find that the conditions in section 1-3 of the Dispute Act are still met.

The development in the entry quarantine rules as an infection control measure in connection with the Covid-19 pandemic and exemptions from the quarantine requirement related to use of holiday properties in Sweden

(36) At a press conference on 12 March 2020, the Government presented measures to combat the

Covid-19 pandemic, characterised by the Prime Minister as "the strongest and most intrusive measures imposed in Norway in peacetime". The measures included a full lockdown of schools and other educational institutions, cultural events and sports activities.

(37) On 14 March, the Ministry of Foreign Affairs issued advice against travel to all countries in the world. A 14 days' quarantine for travellers from outside the Nordic countries was imposed already on 12 March. The next day, on 13 March, the order was extended to apply to all countries apart from Sweden and Finland, and from 17 March, the quarantine requirement applied to travel from all countries.

(38) Already from the start, the quarantine requirement for travel from Sweden and Finland contained certain exemptions related to work and for persons with critical functions in society and necessary to fulfil the basic needs of the population. Nonetheless, the exemptions applied only during the actual work period or during transport to or from work. The exemptions have later been amended several times and to some degree extended.

(39) During the period from 17 March to 20 April 2020, the Government implemented what was referred to as a "national cabin ban". According to section 5 of Regulations of 15 March 2002 no. 294, it was prohibited for persons in Norway "to stay overnight on holiday properties in municipalities other than where the person is registered". Stays in connection with "[s]trictly necessary maintenance or inspection necessary to prevent large material damage", were permitted.

(40) On 27 March 2020, the various measures from the health authorities were compiled in the Covid-19 Regulations. In the preamble to the resolution, the proportionality requirement was described as follows:

> "It is a requirement in the Infection Control Act that the measures are proportionate and necessary based on an overall assessment. This means that the measures must be assessed on a continuous basis and lifted if the situation changes to the effect that the measures are no longer necessary. The Ministry of Health and Care Services will ask the National Institute of Health and the Directorate of Health for a continuous assessment of all measures included in the Regulations, to enable the Ministry to make swift amendments in line with various needs."

(41) Section 19 of the Regulations authorised the Ministry to "prolong, lift and amend provisions in the Regulations". The amendments I will discuss in the following were adopted by the Ministry of Health and Care Services.

(42) On 3 April 2020, the exemption from the quarantine requirement related to maintenance and inspection of holiday properties in Sweden or Finland, which I have already cited, was included in the Regulations. The background to the exemption is described in a memorandum of 2 April 2020 from the Health Law Department of the Ministry of Health and Care Services. The memorandum refers to the Regulations on the national cabin ban and the exemption provided. The following is then stated about the situation for Norwegian residents with holiday properties in Sweden or Finland:

> "These are not covered by the cabin ban and may freely travel to Sweden or Finland on holiday or to carry out maintenance or inspection. However, upon return to Norway, they have a duty quarantine under section 5 of Regulations 27 March 2020 no. 470 relating to infection control measures etc. in connection with the coronavirus outbreak (the Covid-19 Regulations). …

> In the Health Law Department's assessment, the current system may be perceived as unreasonable for the many Norwegians who own holiday properties in Sweden or Finland. Compared to owners of holiday properties in Norway, these may have the same need to carry out strictly necessary maintenance or inspection to prevent large material damage, such as removing snow from cabin roofs. Particularly in areas close to the border, it is just as common to own holiday property in Sweden or Finland as in Norway."

(43) Later during the spring of 2020, the infection situation improved in Norway, and the infection control measures were relaxed. Early June, relaxations to the quarantine requirement for travellers from the Nordic countries were assessed by the National Institute of Public Health (NIPH) and the Health Directorate upon request from the Ministry of Health and Care Services. The NIPH presented its results in a memorandum of 6 June 2020. On the situation in Sweden at that point in time, the NIPH stated:

> "Sweden has a much higher infection pressure than the other Nordic countries. Sweden also has a lower testing activity than the other Nordic countries."

(44) Against this background, the following assessment was made of a possible alternative involving lifting the quarantine requirement for travel from all Nordic countries:

> "Our medical assessment is that an approach involving a complete removal of quarantine from all Nordic countries will entail a clear increase in the risk of infection and of further spread within Norway due to the current infection situation in Sweden. This may change over time."

(45) Another alternative was allowing for a limited number of travellers to and from Sweden. This was described as follows:

> "Many Norwegians have property and relatives in the Nordic countries, particularly in Sweden. Travellers with their own lodging will have fewer contacts, as they will stay at the same place during the whole trip. Staying on one's own property also makes it easier to avoid restaurants and other places where many people gather. Lifting the entry quarantine requirement for this group will cover a limited volume of persons, which is also an important factor in the risk assessment. This alternative has already been partially implemented, as the Covid-19 Regulations exempt health personnel and other 'persons who are necessary to fulfil critical functions in society and the basic needs of the population' from entry quarantine from countries including Sweden."

(46) NIPH's medical assessment was that the amendment described would "entail a certain, but small, increase in the risk of infection and spread in Norway".

(47) The Health Directorate's recommendation of 7 June 2020 was to allow for a more large-scale travel to and from the Nordic countries. For Sweden, however, the Directorate stated the following:

> "We believe that, at this point, travel to and from Sweden should not be allowed."

(48) With a regulatory amendment that entered into force on 15 June 2020, the quarantine requirement was lifted for travel to and from Nordic countries, apart from Sweden. For Sweden, the lifting applied only to Gotland.

(49) With effect from 25 July 2020, the entry quarantine rules in the Regulations were generally amended to follow a traffic light system. This entailed that the quarantine requirement was

limited to travel from areas indicated as "red" according to fixed criteria. The non-Nordic countries were classified individually, while for the Nordic countries the classification was made according to region. The classification was evaluated on a continuous basis, in that countries or regions could be "red" in some periods, while not in others. As I will return to, the cabins of all the appellants are located in regions where the quarantine requirement was sporadically lifted in the summer and autumn of 2020. From late October 2020, however, the infection pressure had become so high that all Swedish regions were classified as "red".

(50) The quarantine rules were further assessed later in the summer and autumn of 2020. In a joint response of 22 August 2020 to a request from the Ministry, the NIPH and the Health Directorate expressed that the quarantine rules – both on infection quarantine and entry quarantine – should be coordinated and simplified. At the same time, the general rule should still be "that all people vulnerable to infection have a duty to quarantine, i.e. everyone who has had close contact with a sick person or has travelled in red countries".

(51) By an amendment of 14 September 2020, the exemption for necessary maintenance and inspection without overnight stay was moved to section 6a (b) of the Covid-19 Regulations and extended to include "boats, caravans and similar". The requirement to avoid supermarkets, shopping centres and similar was lifted, but close contact with persons outside one's household still had to be avoided.

(52) On 1 October 2020, the Ministry of Health and Care Services requested the Health Directorate, in consultation with the NIPH, to assess the entry quarantine exemption for strictly necessary maintenance of real property etc. in Sweden and Finland. The assessment was also to include whether it was medically justifiable to grant other exemptions, unrelated to maintenance, to persons owning holiday properties in the Nordic countries. A recommendation was issued on 26 October 2020, involving the following amendments:

> "The ban on overnight stay is lifted and replaced by a 72-hour time limit.
> …
> The requirement that the objective of the trip must be to carry out strictly necessary maintenance and inspection to prevent large material damage to real property, boats, caravans and similar is removed."

(53) The Health Directorate referenced the following summary from the NIPH:

> "The NIPH considers it medically justifiable to exempt persons from entry quarantine after a time-limited stay on holiday properties in the Nordic countries, as long as they avoid public transport and close contact with people other than members of their household. Any non-compliance with the stay requirements may increase the risk of import infection to Norway."

(54) During this period, there was a dramatic increase in the infection situation in Europe, including in Norway. On 30 October, the Ministry of Health and Care Services requested the Health Directorate, in consultation with NIPH, to give a renewed assessment of the proposed measures. On 2 November 2020, the NIPH responded:

> "The NIPH still finds that there is no infection risk related to time-limited stay on holiday properties in the Nordic countries, as long as one avoids public transport or close contact with persons other than members of one's household. At the same time, any non-compliance with requirements related to stay may increase the risk of import infection to Norway. During the past weeks, there has been a rapid increase in the number of cases in most European countries, including in Norway. A relaxation of measures in this area is

> probably not wise at present. Stricter measures are being prepared, including the possibility for additional measures to reduce unnecessary travel to areas with increased spread of infection.
>
> Conclusion: NIPH considers it inappropriate at present to relax the entry quarantine requirements for persons with holiday properties in the Nordic countries."

(55) The Health Directorate stated the following on 3 November 2020:

> "The Health Directorate agrees with the NIPH's medical assessment. In the light of the latest infection development both in Norway and in Europe and the intensification of measures this last week, we believe that now is not the time to make the previously recommended amendments to the Covid-19 Regulations in terms of exemptions from entry quarantine for users of private holiday properties in the Nordic countries."

(56) The Ministry followed these recommendations, and the exemption rule was maintained without amendments.

(57) During the time that followed, from November 2020 and the entire period covered by the Supreme Court case, the infection pressure was steadily high in most countries. The Minister of Health and Care Services at the time, Bent Høie, has confirmed in a testimony to the Supreme Court that this was why no relaxations in the entry quarantine rules were considered.

(58) For a short period in the winter of 2021, there was a general entry ban from Norway to Sweden.

(59) By an amendment of the Regulations of 16 March 2021, the entry quarantine requirements were intensified by a duty to stay at a quarantine hotel for a certain period for persons who could not document that they had been on a necessary travel.

The rules in the Infection Control Act

(60) The rules on entry quarantine in the Covid-19 Regulations were adopted with a legal basis in section 4-3 of the Act relating to control of communicable diseases of 5 August 1994 no. 55 (the Infection Control Act).

(61) The Infection Control Act has a wide purpose and a wide reach. The purpose is described as follows in section 1-1:

> "**Section 1-1. The purpose of the Act**
>
> The purpose of this Act is to protect the population from communicable diseases by preventing their occurrence and hindering them from spreading among the population, and by preventing such diseases from being brought into Norway or carried out of Norway to other countries.
>
> The Act shall ensure that the health authorities and other authorities implement the measures necessary to control communicable diseases and coordinate their efforts to control such diseases.
>
> The Act shall safeguard the legal rights of individuals who are affected by the measures to control communicable diseases pursuant to the Act."

(62) This provision alone expresses the need to prevent infectious diseases from being brought into Norway. At the same time, it generally emphasises that the Act is to safeguard the legal rights of those affected by infection control measures.

(63) The legal basis provision in section 4-3 read as follows at the start of the Covid-19 pandemic:

> "**Section 4-3. Quarantine provisions**
>
> The King may lay down regulations to prevent communicable diseases from being brought into the country or spread to other countries (quarantine measures), including provisions regarding measures in respect of persons, animals, means of transport, goods and objects which may conceivably transmit communicable diseases. In the regulations the King may also establish further requirements as regards examinations, removal of sources of contagion and documentation in connection with entry into and departure from Norway and in connection with the import and export of goods."

(64) Later, provisions on quarantine measures have been added in subsections 2 and 3, but these are less relevant to the case at hand.

(65) It is undisputed that section 4-3 of the Infection Control Act, considered in isolation, provided a legal basis for the entry quarantine rules we are dealing with. The question is whether they nonetheless were contrary to other, overriding rules.

(66) The Infection Control Act itself contains such an overriding rule in section 1-5:

> **"Section 1-5. Basic conditions for implementation of infection control measures**
>
> Infection control measures under this Act must be based on clear medical justification, be necessary for infection control purposes and appear suitable after an overall assessment. When implementing infection control measures, emphasis must be placed on voluntary participation from the person or persons affected by the measure.
>
> Coercive measures cannot be implemented when the nature of the case and the general situation otherwise suggest that the interference will be disproportionate."

(67) The provision was added by Act of 21 June 2019 no. 46. Subsection 2 concerns individual coercive measures and is not relevant to the issues at hand.

(68) It appears from the preparatory works, see Proposition to the Storting 91 L (2018–2019) page 10, that the purpose of the provision was to clarify and establish by law conditions that also previously applied to implementation of infection control measures. The conditions were characterised as "locking mechanisms to protect the individual citizen from administrative arbitrariness".

(69) The first condition in subsection 1 first sentence is that there must be *clear medical justification* for the measure. On page 10 of the Proposition, the Ministry stresses that the condition implies that the infection control measure must be "relevant for the disease concerned and that the measure alone or jointly with other measures has proven effective in similar situations". In the special remarks to the provision, on page 45 of the Proposition, it is stated:

> "The medical justification requirement should not be interpreted too restrictively, and there is no requirement of a scientifically proven effect. It must also be seen in the light of the infection threat and the intrusiveness of the measure. At a minimum, the infection

> control measure must be relevant to the disease concerned after a professional medical assessment."

(70) The second condition is that the measure must be *necessary* for infection control purposes. To exemplify the importance of this, the Ministry states on page 10 of the Proposition that situations may occur where there is an obvious risk of infection spread, but where the situation suggests that the measure serves no purpose.

(71) The third condition is that the requirement must *appear suitable* after an overall assessment. The Ministry continues on page 10:

> "The benefits must be balanced against possible inconvenience, damage or violation of a person's integrity that the measure may entail. If the benefits are small or questionable and the burdens of the measure are substantial, the measure should not be implemented. In other words, a proportionality assessment must be carried out."

(72) The conditions that the measure must be *necessary for infection control purposes* and that it must *appear suitable* are closely connected. Jointly, they constitute a condition that the measure must be *proportionate.* On page 45 this is elaborated as follows:

> "The condition that the measure must appear suitable after an overall assessment means that the measure must not cause unnecessary inconvenience or harm to the person or persons it affects. The benefit must be balanced against the burden the measure entails.
>
> Furthermore, the measure must be necessary for infection control purposes. This means that it must be suited to prevent or stop the spread of the relevant disease. The requirements of an overall assessment and an assessment of necessity will in most practical cases constitute a proportionality assessment."

(73) As I will return to, the proportionality requirements in the Infection Control Act must be considered in context with the requirements of proportionality when interfering with rights conferred by the Constitution and the ECHR.

(74) As pointed out, section 5 of the Infection Control Act is a provision protecting the individual from administrative arbitrariness. This implies that when an action is brought, the courts have full jurisdiction to review whether the conditions in the provision are met. I refer to the Supreme Court ruling included in Rt-1995-1427, stating on page 1433:

> "There is a general principle in administrative law that the courts may review not only the interpretation, but also the application of a statutory provision that interferes with the rights of the individual. This is considered an essential part of the rule of law. Although there are exceptions to this general rule, they must be justified in particular."

(75) Although the court has full jurisdiction, it should sometimes exercise a degree of restraint in its review. This is the case when the assessment requires special professional knowledge, such as medical expertise, see the Supreme Court ruling HR-2021-2276-A paragraph 26.

(76) The assessment of whether there is *clear medical justification* for a measure undoubtedly involves pure medical assessments, which the court should be reluctant to review. Similarly, the court should exercise restraint in reviewing medical assessments of whether a measure is *necessary for infection control purposes*.

(77) As mentioned, the condition that the measure must appear *suitable* constitutes jointly with the *necessity* condition a requirement of proportionality. If a proportionality assessment is needed, the court must conduct a full review, as is also the case for proportionality assessments under the Constitution, the ECHR and the EEA Agreement.

(78) The question of serviceability may however require an assessment of what is more appropriate, for instance by balancing several infection control measures that are all considered to meet the condition of medical justification and proportionality against each other. The choice of measures may sometimes depend on complex societal priorities. When it comes to reviewing this type of assessments, which will be of a political nature, the courts should exercise restraint.

The protection of human rights

(79) Measures under the Infection Control Act are intrusive on the individual and often interfere with human rights protected in the Constitution and international conventions. In connection with the adoption of the Infection Control Act in 1994, the Ministry referred in Proposition to the Odelsting no. 91 (1992–1993) page 19 to the ECHR and the International Covenant on Civil and Political Rights, emphasising that the ECHR confers rights that may "have a restrictive effect on which measures the Convention States may impose to combat infectious diseases".

(80) In Proposition to the Storting 130 L (2019–2020), presented on 5 June 2020, the Ministry of Health and Care Services accounted for the relationship between measures under the Infection Control Act and the requirement to observe human rights obligations. On page 9, the Ministry emphasised:

> "The measures imposed under the Infection Control Act are intrusive to people's life. Both provisions in the Constitution's chapter on human rights and various international agreements lay down obligations that the Proposition must fulfil. The European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights (ICCPR) and other conventions mentioned in section 2 of the Human Rights Act shall take precedence over any other legislative provisions that conflict with them, see section 3 of the Human Rights Act.
>
> The measures imposed with a legal basis in the Infection Control Act interfere with the exercise of human rights and constitutional rights. Such interference is possible if specific conditions are met.
> ...
>
> Article 106 of the Constitution also establishes the right to move freely within the borders of the kingdom and choose place of residence there. The ECHR has its equivalent in Protocol No. 4 Article 2, and the ICCPR in Article 12. The same possibility of interference as follows from the ECHR must be interpreted into Article 106 of the Constitution.
>
> Article 102 of the Constitution concerns the right to privacy. Article 8 of the ECHR concerns the right to respect for privacy and family life, and Article 17 of the ICCPR concerns the possibility of interference with private life. Article 8 (2) of the ECHR states that interference may take place when this is in accordance with the law and necessary in a democratic society (...) for the protection of health. The condition that the interference must be in accordance with the law consists partly of a requirement of a legal basis in national law. In addition, the national

> legal basis must be accessible for the person affected by the measure and have a sufficiently clear wording. The measure must also be necessary to fulfil its purpose and proportionate. In its case law, the Supreme Court has interpreted limitations into this right under Article 102 of the Constitution that are equivalent to Article 8 (2) of the ECHR."

(81) In my view, the Ministry here gives an adequate description of the general principles.

(82) In the case at hand, the appellants argue that there is a conflict between Article 102 of the Constitution and Article 8 of the ECHR.

(83) Article 102 subsection 1 of the Constitution reads:

> "Everyone has the right to the respect of their privacy and family life, their home and their communication. Search of private homes shall not be made except in criminal cases."

(84) Article 8 of the ECHR reads:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

(85) Article 102 subsection 1 of the Constitution and Article 8 (1) ECHR has practically the same content, see HR-2017-2376-A paragraph 53 with further references.

(86) As the Ministry emphasises in my citations from Proposition to the Storting 130 L (2019–2020), rights protected under Article 8 (1) may nonetheless be interfered with if the conditions in (2) are met. These conditions are that the measure must be established by law, it must have a legitimate purpose and it must be "necessary in a democratic society". Although Article 102 of the Constitution does not express a limitation similar to that in Article 8 (2) of the ECHR, it must be read in the same way, see the Supreme Court ruling in Rt-2014-1105 paragraph 28. The wording "necessary in a democratic society" must be understood as a requirement of proportionality, see HR-2020-661-S paragraphs 75 and 76.

(87) Measures to combat the Covid-19 pandemic have interfered with human rights in many areas, both in Norway and internationally. In Proposition to the Storting 130 L (2019–2020), the Ministry emphasises the freedom of movement protected under Article 106 of the Constitution and Protocol No. 4 Article 2 of the ECHR. It is undisputed that a number of measures, including the entry quarantine rules, have placed a restriction on the freedom of movement. The same applies in this context: restrictions may only be imposed if they are in accordance with law, have a legitimate purpose and are proportionate. This is expressed in Protocol 4 Article 2 (3).

(88) For the assessment of the proportionality of a national measure, the European Court of Human Rights (ECtHR) grants the Convention States a certain margin of appreciation. The scope of the margin of appreciation will vary. When it comes to measures to safeguard the population's health, the margin is wide. This is expressed in the ECtHR's Grand Chamber judgment of 8

April 2021 *Vavřička and others v. the Czech Republic*, which concerned a vaccination program for children, see paragraph 274. It will have no decisive effect if other States choose less presprictive measures, see paragraph 310:

> "The Court would clarify that, ultimately, the issue to be determined is not whether a different, less prescriptive policy might have been adopted, as has been done in some other European States. Rather, it is whether, in striking the particular balance that they did, the Czech authorities remained within their wide margin of appreciation in this area."

(89) The margin of appreciation that follow from ECtHR case law applies to the Convention States and is not transferable to a domestic court's review of measures imposed in that state, see the ECtHR judgment of 19 February 2009 *A. and Others v. the United Kingdom* paragraph 184, and judgment of 23 June 2015 *Nicklinson and Lamb v. the United Kingdom* paragraph 84. The Supreme Court will nonetheless, based on Norwegian law, exercise restraint in reviewing assessments that are largely medical or the result of a complex balancing of social considerations.

(90) Proposition to the Storting 130 L (2019–2020) concerned other measures than entry quarantine. In connection with the adoption of the rules concerned in the case at hand, the Ministry has emphasised the requirement of proportionality. However, no explicit assessment has been made as to whether provisions in the Constitution or the ECHR could be violated. However, this in itself cannot be decisive for the decisions' validity. The ECtHR's review is limited to the domestic authorities' compliance with the requirements in the ECHR. In this context, domestic courts are part of the authorities. If the requirements in the ECHR have been duly observed by the domestic courts, the ECtHR will not find a violation based on the domestic authorities' omission to consider explicitly the application of the ECHR before implementing a measure.

(91) Another issue is that the ECtHR in case of doubt will emphasise the justification given prior to the implementation, see for instance its Grand Chamber judgment of 22 April 2013 *Animal Defenders International v. the United Kingdom* paragraphs 114 to 116. This corresponds closely to the Supreme Court's starting point for constitutional review, see Rt-2010-143 (the shipping tax case) section 172.

(92) No rulings have been made by the ECtHR directly concerning the proportionality of interference with rights under Article 8 with regard to Covid-19 measures. However, in some rulings it has touched upon the significance of the pandemic while assessing other possible violations of the ECHR.

(93) In a non-final ruling of 1 March 2022 *Fenech v. Malta* paragraph 96, the ECtHR states, after having described the alleged violation in the preceding paragraph:

> "The Court notes that the limitations complained of occurred within a very specific context, namely during a public health emergency (…) and were put in place in view of significant health considerations, not only on the applicant but on society at large. Indeed, the Court has already had occasion to note that the Covid-19 pandemic is liable to have very serious consequences not just for health, but also for society, the economy, the functioning of the State and life in general, and that the situation should therefore be characterised as an 'exceptional and unforeseeable context' (see Terheş v. Romania (dec.), no. 49933/20, 13 April 2021)."

(94) At the bottom of the same paragraph, the ECtHR states the following with regard to the applicant's situation:

> "This was a situation endured by persons at liberty all over the world, and the applicant was no exception."

(95) It is natural to perceive these statements to imply that the ECtHR considers the Covid-19 pandemic an extraordinary, unpredicted and very serious situation, and that this will have significance in individual assessments of possible violations.

(96) The ECtHR's judgment of 15 March 2022 *Cgas v. Switzerland* concerned interference with the freedom of association under Article 11. The ECtHR found in a 4-3 judgment that the general ban on public gatherings applicable in Switzerland in the spring of 2020 amounted to a violation as it deprived a trade union of the right to demonstrate on 1 May. The majority emphasised that a general ban preventing a trade union to pursue its objectives, requires solid justification and a substantive legal review. A key element of the majority's reasoning was that the proportionality of the measure had not been reviewed by domestic courts. The judgment is not final.

The situation for the appellants

(97) The appeal to the Supreme Court is limited to the application of the law, which means that the Court of Appeal's findings of fact are to be relied on.

(98) The Court of Appeal states that "[a]ll the cabin owners in the case at hand use their cabins on a regular basis". It also mentions the description in the District Court's judgment of the cabin owners' attachment to and use of the cabins, a description stated to be adequate also after the presentation of evidence in the Court of Appeal:

> "The cabin owners have expressed that they use their cabins a lot and that they represent relaxation, safety and belonging. Several have explained that the cabin is an important place for the family to gather, and that they have far more space both inside and outside the cabin than they have at home in Norway.
>
> As an example, claimant F stated that his cabin is located on the island of Galtö in Tanum municipality about 35 km into Sweden from Svinesund. The island has about 20 permanent residents, and his property is situated completely by itself. F purchased the cabin because he has a chronic lung disease that worsens with poor air quality. He lives in Kolbotn in Nordre Follo municipality, but normally spends all weekends and holidays with his wife and sometimes his children and grandchildren at the cabin. He and his wife often go there on normal weekdays as well. F stated that the cabin is where they usually go to enjoy time together. On average, F visited the cabin around 120 days a year before the pandemic. According to F, it is demanding to be prevented from using the cabin during the pandemic, as he is part of the corona risk group. He knows that he would have been far less susceptible to infection in Galtö than he is in Kolbotn. Various obligations in Kolbotn makes it is difficult for him to undergo a 10-day quarantine upon return. F also stated that for him, it is out of the question to violate the regulations."

(99) As mentioned, a traffic light system applied from 25 July 2020 and later in the autumn of 2020. The Court of Appeal describes how this affected the appellants as follows:

> "All the cabins belonging to the parties to this case are located in areas that were subject to quarantine obligations as of 17 March 2020, and lifted for short periods during the summer and autumn of 2020, but so that all areas have been subject to entry quarantine since late October 2020 at the latest. This applies to all areas in Sweden."

(100) As I understand this, all the appellants had the opportunity, during one or more periods in the summer and autumn of 2020, to visit their cabins, and to stay overnight, without the purpose being maintenance or supervision. No information has been provided as to whether this was practically possible for the individual appeallant and actually carried out.

Did the quarantine requirement meet the conditions in section 1-5 of the Infection Control Act?

Starting points

(101) The appellants do not dispute that quarantine requirements upon entry into Norway from Sweden and other countries have generally been in accordance with the law and proportionate. This must imply that that they have no objections to the general assessment of the significance of entry quarantine expressed in the Court of Appeal's judgment:

> "The State has explained that the general quarantine requirement is justified in the interests of preventing import infection, with the effects this has on life, health and economy. Upon the introduction of the general rule, knowledge was scarce on both the virus and the infection pressure, and of the spread in various countries. Gradually, more knowledge has been gained about the virus, the infection pressure and spread in other countries. In the light of statements by directors general Guldvog and Stoltenberg in particular, the Court of Appeal assumes that the virus is most contagious before and immediately after the onset of symptoms. Some infected people do not get symptoms at all. Others experience severe symptoms with a possible fatal outcome. The incubation period of the virus allows the disease to develop after a negative test taken prior to entering the country. The most important means of stopping infection from people who do not know that they are infected is therefore social distancing. The health authorities consider import infection an important cause of outbreaks in Norway. There is also a particular concern that import infection could lead to new mutations of the virus being brought into the country. …
>
> Against this background, the Court of Appeal has no doubt that the general quarantine requirement for persons arriving from areas with a high infection pressure is, at the outset, a suitable, appropriate and legitimate rule for ensuring life, health and economy."

(102) What the appellants challenge, is the fact that the quarantine requirement has affected them after trips to private properties in Sweden without use of public transport and without visiting supermarkets or having close contact with persons in Sweden. They contend that section 1-5 of the Infection Control Act is not a legal basis for quarantine requirements of such a reach.

(103) The issue at hand whether larger exemptions should have been granted from a requirement that, at the outset, was in accordance with the law. In my view, this is important in the assessment, particularly as regards the period immediately following what was referred to as the shutdown of Norway in March 2020.

(104) As I see it, there is no doubt based on the situation in the spring of 2020 that there was clear medical justification for a quarantine requirement for travel from Sweden that was general, with as few exemptions as possible. Hence, there was also sufficient medical justification for imposing the same requirement on Norwegian residents who were owners of holiday properties in Sweden. The cabin owners were not in such an extraordinary position that the measure was disproportionate to them. The fact that there were some exemptions for work travel, critical functions in society etc. was not a basis for exemptions for travel to holiday properties.

(105) This is not changed by the fact that the situation of the owners of holiday properties in Sweden were considered to some extent in connection with the exemption granted on 3 April 2020 for maintenance and inspection. This exemption was related to a similar exemption from the national cabin ban applicable at the time. Despite such an exemption, the conditions in section 1-5 of the Infection Control Act for imposing a quarantine requirement were, in my view, still met.

Were the conditions met during the entire period concerned?

(106) Against this background, the question is primarily whether the conditions in section 1-5 of the Infection Control Act were still met as the infection situation gradually changed, other measures were relaxed and one had a better factual basis for making an assessment for individual groups, such as the cabin owners in Sweden.

(107) I note in this context that it is clear that the conditions in section 1-5 of the Infection Control Act must be met in order for an existing measure to be continued. The fact that the headline of the provision contains "conditions for implementation" cannot give any other interpretation. This implies that there is a requirement to assess, with certain intervals, already implemented measures.

(108) As I have accounted for, the amendments were assessed in June 2020, but then with emphasis on the infection pressure being much higher in Sweden than in Norway. In July 2020, the traffic light system was implemented. This gave a real possibility to grant exemptions, which, as I have pointed out, also benefitted the appellants. With a different and more positive infection development, it must be assumed that the traffic light system could have worked and generally functioned as a quarantine system in accordance with section 1-5 of the Infection Control Act over a certain period.

(109) In my view, the situation in the autumn of 2020 is particularly relevant. Then, the pandemic had lasted for half a year and the situation for Norwegian residents with holiday properties in Sweden had been presented to the authorities several times, including through letters and notices of action from the group that the appellants represent.

(110) As mentioned, on 1 October 2020, the Ministry asked the NIPH and the Health Directorate to assess whether there was still a basis for a quarantine requirement after overnight stays on holiday properties in Sweden without other exemptions than the highly limited exemption granted in April 2020. The response was a proposal to relax the requirement of strictly necessary maintenance and to lift the ban on overnight stays. The NIPH and the Health Directorate nonetheless proposed a 72-hour time limit.

(111) The proposal was based on the view that it was medically appropriate to travel to Sweden as long as one avoided public transport and close contact with people other than one's travel companions. At that time, the requirement to avoid supermarkets, shopping centres and similar had been lifted.

(112) It is worth noting that the NIPH and the Health Directorate maintained this assessment also early November 2020, despite a general increase in the infection pressure and after the Ministry had requested a new assessment.

(113) A possible conclusion based on these assessments is that there was no clear medical justification for upholding a virtually general entry quarantine requirement after stays on private holiday properties in Sweden. In that case, the conditions in section 1-5 of the Infection Control Act would entail that the quarantine rules could not be upheld without amendments.

(114) However, the NIPH and the Health Directorate also addressed the risk of non-compliance with the requirement of avoiding public transport and close contact. The compliance issue was discussed already in the Health Directorate's recommendation of 26 October 2020. The Directorate emphasised among other things:

> "The Health Directorate stresses however that an exemption for all types of travel to holiday properties etc., without specifying the requirement of a purpose, in reality will allow for extensive holiday travel to the Nordic countries. Norwegian citizens have more than 23 000 holiday properties registered in the Nordic countries, many of which are situated in short distance from the Norwegian border. The volume of travellers may therefore be considerable. This will increase the risk that a significant share of the travellers do not comply with the requirement to avoid public transport and close contact with people other than household members."

(115) The Directorate then supported the following report by the NIPH on the significance of compliance and control:

> "The exemption in section 6a (b) is currently largely based on trust. Upon an extension of the exemption, the conditions related thereto will be difficult to control while keeping it based on trust. In the event of non-compliance, allowing for longer stays on holiday properties in red areas will give a slightly increased risk of import infection to Norway.
>
> Conclusion: The exemption will be based on trust and any non-compliance with the requirements will increase the risk of import infection to Norway."

(116) I have already quoted the NIPH's assessment from 2 November 2020, which the Health Directorate endorsed. The NIPH's basic view was that there was no infection risk related to time-limited stays on private holiday property "as long as public transport and close contact with people other household members can be avoided". The assessment of the infection risk was based on this condition. The NIPH then turned to the risk of increased import infection in the event of non-compliance, emphasising the dramatic infection increase in Europe at that time.

(117) In my view, the risk of non-compliance must be part of the medical assessment required according to section 1-5 of the Infection Control Act. It would be an error to build on certain conditions without considering the likelihood of these conditions being met.

(118) The Court of Appeal states in this context:

> "It is reported that Norwegian citizens own about 12,400 cabins in Sweden. A conservative estimate that three people live in every household that owns a cabin means that around 37 000 people may visit cabins in Sweden. The number in itself increases the risk that someone within this group does not comply with the requirement to avoid close contact and public transport."

(119) I share the Court of Appeal's view.

(120) As I have emphasised, the statutory requirement of medical justification must, according to the preparatory works, "not be too strictly interpreted". On these grounds, I have concluded that sufficiently clear medical justification existed when the authorities, due to the risk of non-compliance and the infection situation early November 2020, decided not to extend the entry quarantine exemption for persons with holiday properties in Sweden.

(121) I note that the assessment relates to the situation at the relevant time. If, afterwards, there had been a steady improvement in the infection situation, there would probably no longer be clear medical justification for upholding the entry quarantine rules without amendments. In this context, I refer to the assessments by the NIPH and the Health Directorate in October 2020.

(122) However, a steady improvement did not take place. Based on my description of the further development, my opinion is that there was clear medical justification for upholding the entry quarantine rules throughout the period in question, without further exemptions for persons with holiday properties in Sweden.

(123) I also find that there was a basis for emphasising the risk of non-compliance when assessing whether the measure was necessary for infection control purposes.

(124) For the appellants, the further assessment of the proportionality of the measure must be based on my description of the use of the holiday properties. I assume that without the restrictions, the use would have been extensive with considerable significance for the welfare of the individual. As I will return to, there has also been an interference with the right to respect for someone's home under Article 102 of the Constitution and Article 8 of the ECHR.

(125) I emphasise however that the interference does not affect what must be considered the core of the right to respect for someone's home. The Court of Appeal states in this regard:

> "The cabin owners all have a primary home in Norway on which use there are no restrictions. There is also no prohibition against using the cabins. The cabin owners may freely travel to the cabins and stay there for as long as they want. However, if they stay overnight, and if the trip is not justified by strictly necessary maintenance and supervision to prevent serious material damage to real property, the cabin owners must quarantine upon return to Norway. The entry quarantine may vary from 7 to 10 days, and must generally, as of the regulatory amendment of 16 March 2021, be undergone at a quarantine hotel. This entails practical restrictions on the cabin owners' use of parts of their home and enjoyment of family life, but it does not interfere with the core of the rights."

(126) I endorse these observations.

(127) In the overall proportionality assessment, I find it significant that the pandemic was very serious and called for extensive infection control measures. Compared with other measures

imposed on Norwegian citizens, the entry quarantine for persons with holiday properties in Sweden did not appear overly strict. Entry quarantine was a general measure that did not affect this group more than others. The conditions that the appellants have challenged implied that they were considered on par with every one else who wished to travel abroad. During the period from November 2020 to May 2021, a large part of the Norwegian population experienced highly intrusive measures, including closed shops, bars and restaurants, strict regulation of the number of visitors in private homes and ban on events.

(128) The fact that the ban on using private cabins in Norway had been lifted after 20 April 2020 is not relevant for the overall proportionality assessment. In the light of the basic justification for the entry quarantine rules, it was not in itself disproportionate that persons with holiday properties in countries with a high infection pressure were affected differently than those with corresponding properties in Norway.

(129) My overall assessment is therefore that the conditions in section 1-5 of the Infection Control Act for continuing the quarantine requirement unchanged throughout the period concerned were met.

Were the decisions incompatible with Article 102 of the Constitution and Article 8 of the ECHR?

(130) I have already cited Article 102 subsection 1 of the Constitution and Article 8 of the ECHR. The appellants contend that the decisions on entry quarantine interfere with the right to respect for someone's "home" protected in these provisions.

(131) It follows from the ECtHR's judgment 31 July 2003 *Demades v. Turkey* paragraphs 31 and 32 that a secondary house may constitute a *home* under Article 8 of the ECHR. Based on the description given of the appellants' holiday properties and the use of the same, I take it that these are *homes* protected under Article 102 of the Constitution and Article 8 of the ECHR.

(132) The next question is whether the right to respect for someone's home has been *interfered with*. That is only the case the effects involved exceed a certain threshold.

The ECtHR states in its judgment 4 September 2014 *Dzemyuk v. Ukraine* paragraph 77:

> "However, in order to raise an issue under Article 8 the interference about which the applicant complains must directly affect his home, family or private life and must attain a certain minimum level if the complaints are to fall within the scope of Article 8."

(133) The appellants have been free to use their properties in Sweden provided they have undergone entry quarantine in accordance with the rules when returning to Norway. The quarantine requirement has nonetheless constituted a considerable burden and in practice prevented the cabin owners from using their properties in Sweden throughout the relatively long period concerned. In my view, there is thus an interference with the right to respect for someone's home protected under Article 102 of the Constitution and Article 8 of the ECHR.

(134) The key question is thus whether the interferences may be justified. As I have discussed, this requires that the measure is according to the law, has a legitimate purpose and is proportionate.

(135) I have concluded that the measures have a legal basis in section 4-3 of the Infection Control Act and meet the conditions in section 1-5 of the same Act. The measures are imposed for infection control purposes and thus to protect the public health. The requirements for a legal basis and a legitimate purpose are thus met. The key question is whether the measures are proportionate.

(136) In the Supreme Court, the appellants contend that the rules interefe with the respect for the right to a home in Article 102 of the Constitution and Article 8 of the ECHR. At the same time, as I have accounted for, the entry quarantine rules also restrict the freedom of movement. When no contentions in this regard have been made in the Supreme Court, the reason given is that this does not affect the appellants in particular – restrictions on the freedom of movement affect all. This must imply that the appellants acknowledge that the restriction on the freedom of movement meets the requirement of proportionality – also towards them. What they do contend is that they are in a special position as the measure, for them, also interferes with the right to respect for their home, and that this interference is not proportionate.

(137) As mentioned, section 1-5 of the Infection Control Act requires a proportionality assessment that largely corresponds to the same assessment under Article 102 of the Constitution and Article 8 of the ECHR. The aspects I have emphasised under my discussion of section 1-5 of the Infection Control Act are also crucial here.

(138) The starting point for the assessment, as I have emphasised, is that it did not involve interference with what must considered the core of the rights conferred by Article 102 of the Constitution and Article 8 of the ECHR.

(139) I have already commented that the health authorities did not expressly consider whether rights in the Constitution or ECHR might be violated. It would clearly have been an advantage if the authorities, when assessing the situation for the cabin owners in Sweden, had discussed the human rights requirements and the compliance with the same. When the NIPH, with the support of the Health Directorate, early November 2020 based its recommendation on the view that it was “not appropriate” to lift the entry quarantine requirement, it created doubt as to whether this conclusion was based on a sufficiently broad assessment.

(140) In any case, as I have stressed, it cannot be a requirement that the authorities have made an express assessment of the application of the Constitution and the ECHR, if it is clarified in a subsequent constitutional review that the conditions for interference were met.

(141) I also find it clear that the authorities, although they mentioned neither the Constitution nor the ECHR in particular, were aware of the requirements of proportionality and based their assessments on them. This was emphasised already upon the adoption of the Covid-19 Regulations of 27 March 2020. Proposition to the Storting 130 L (2019–2020), which concerned other measures than entry quarantine, contained a relatively broad discussion of the requirements relating to human rights. The recommendation of 26 October 2020 to replace the strictly necessary maintenance limitation with a 72-hour rule was based, among other things, on the NIPH’s statement that “[w]e note that the quarantine requirement after stays on private holiday properties is perceived by many as disproportionate”.

(142) The appellants emphasise that several exemptions from the entry quarantine were later granted in sections 6a to 6l of the Regulations. Most of them related to personell with critical

functions in society, business activities or work. Exemptions were also granted for parents and children with established visitation rights and for travel related to serious illness or funerals for closely related persons. The appellants argue that many of these groups, as opposed to themselves, do not enjoy any particular protection under the Constitution or the ECHR.

(143) I cannot follow that point of view. As I have pointed out, the entry quarantine rules constituted for a number of other groups a restriction on the freedom of movement, which is protected under Article 106 of the Constitution and Protocol 4 Article 2 of the ECHR. That means that a proportionality requirement applied also to them.

(144) The exemptions were largely justified by weighty societal interests and in some cases strong human considerations. I cannot see that the fact that the appellants were also protected under Article 102 of the Constitution and Article 8 of the ECHR entitles them to be treated better than or on par with other groups who are also in an extraordinary situation.

(145) Against this background, my overall view is that although there has been an interference with the right to respect for someone's home in Article 102 of the Constitution and Article 8 of the ECHR, this interference is proportionate and thus legal.

Did the decisions restrict the free movement of capital in the EEA Agreement?

(146) Article 40 of the EEA Agreement reads:

> "Within the framework of the provisions of this Agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in EC Member States or EFTA States and no discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested. Annex XII contains the provisions necessary to implement this Article."

(147) The appellants have emphasised that purchase of property in another EEA country constitutes movement of capital regulated by Article 40 of the EEA Agreement and subsequent provisions. This is undoubtedly correct. However, the issue at hand is whether the entry quarantine rules implied a restriction on such movement of capital. The appellants owned their holiday properties before the rules were implemented, and no information has been provided indicating that they have been prevented from investing in real property.

(148) However, according to case law from the European Court of Justice (ECJ) and the EFTA Court, rules that may deter potential investors from making investments in other countries may also constitute a restriction on the free movement of capital, see see the ECJ's judgment 13 May 2003 in Case C-463-00 *The Commission v. Spain* paragraph 61 and the EFTA Court's judgment 14 July 2000 in Case E-1/00 *State Debt Management Agency* paragraphs 27–28. The rulings assume that obstacles to the exploitation of a certain capital item may limit the sale of such items and that this creates an indirect restriction. In my view, this the situation we are dealing with.

(149) In the alternative, the State contends that possible effects on the free movement of capital in this case are inevitable consequences of the restriction on the free movement of persons, which means that only the last-mentioned rules are applicable. The State refers among other things to the ECJ's judgment 8 May 2013 in joint Cases C-197/11 and C-203/11 *Libert* paragraphs 62 and 63. I do not agree that the connection in this case is so close that such a

perspective is applicable.

(150) A restriction is thus placed on the movement of capital across borders, and the question is whether the restriction can *be justified*. This depends on whether the restriction is justified by overriding public interests, is suitable to attain the objective pursued and does not go further than necessary. I refer to the Supreme Court judgment HR-2021-1453-S (the *Nav* case) paragraph 169 with further references.

(151) It is undisputed that the consideration of the public health is a legitimate purpose that may justify restrictions on freedoms under the EEA Agreement. A central ruling in this area is the EFTA Court's judgment of 12 September 2011 in Case E-16/10 *Philip Morris Norway AS v. the Norwegian State*. The following is stated in paragraph 77:

> "According to settled case-law, the health and life of humans rank foremost among the assets or interests protected by Article 13 EEA. It is for the EEA States, within the limits imposed by the EEA Agreement, to decide what degree of protection they wish to assure."

(152) In paragraph 80, it is expressed that an EEA State has a certain margin of discretion with regard to the degree of protection.

> "In accordance with the case-law set out in paragraph 77 of this judgment, an assessment of whether the principle of proportionality has been observed in the field of public health must take account of the fact that an EEA State has the power to determine the degree of protection that it wishes to afford to public health and the way in which that protection is to be achieved. As EEA States are allowed a certain margin of discretion in this regard, protection may vary from one EEA State to another. Consequently, the fact that one EEA State imposes less strict rules than another does not mean that the latter's rules are disproportionate (see, for comparison, Case C-141/07 Commission v Germany [2008] ECR I-6935, paragraph 51)"

(153) The EFTA Court also emphasises that the uncertainty of the effect of a measure does not prevent its implementation. Paragraph 82 and 83 set out:

> "However, where there is uncertainty as to the existence or extent of risks to human health, an EEA State should be able to take protective measures without having to wait until the reality of those risks becomes fully apparent. Furthermore, an EEA State may take the measures that reduce, as far as possible, a public health risk (see, for comparison, Joined Cases C-171/07 and C-172/07 Apothekerkammer des Saarlandes and Others [2009] ECR I-4171, paragrph 30).
>
> It follows that, where the EEA State concerned legitimately aims for a very high level of protection, it must be sufficient for the authorities to demonstrate that, even though there may be some scientific uncertainty as regards the suitability and necessity of the disputed measure, it was reasonable to assume that the measure would be able to contribute to the protection of human health."

(154) As I have emphasised, it is clear that the entry quarantine rules were a suitable measure to limit the spread of Covid-19 infection.

(155) In regards to the suitability issue, the EU Court and the EFTA Court often require that the restrictive measure must be part of a consistent protection of the relevant public interest. In its judgment of 30 May 2007 in Case E-3/06 *Ladbrokes Ltd* paragraph 51, the EFTA Court stated that one had to consider whether "the State takes, facilitates or tolerates other measures which run counter to the objectives pursued by the legislation at issue", and that "[s]uch

inconsistencies may leady to the legislation at issue being unsuitable for achieving the intended objectives". As mentioned, several exemptions have been made to the entry quarantine provisions. However, when it comes to infection control, it is not so that an unlimited number of exemptions can be granted. Rather, one exemption will reduce the possibility of others if the overall infection pressure is to be kept below a certain level. When the cabin owners' wish to spend their free time at their cabins in our neighbouring countries is given a lower priority than the exemptions granted, this is not an expression of the lack of consequence and context in the entry quarantine rules, or unreasonable favouritism of other groups at the cabin owners' expense.

(156) The question is therefore whether the measure, as it affected the appellants, went further than necessary to attain this objective.

(157) This assessment must be based on the same principles as I have already discussed with regard to the conditions in section 1-5 of the Infection Control Act, Article 102 of the Constitution and Article 8 of the ECHR.

(158) As I have emphasised, the authorities' assessment in the autumn of 2020 was that it was medically appropriate to allow trips to holiday properties in Sweden if public transport and close contact with persons other than one's travel companions could be avoided. Provided full compliance, it was thus not necessary to uphold the entry quarantine requirement for trips to holiday properties in Sweden.

(159) However, I find it clear that also in the light of EEA law one must consider the risk of non-compliance. As pointed out in the EFA Court's judgment in the Philip Morris case paragraphs 82 and 83, some scientific uncertainty does not prevent a measure aiming to reduce a public health risk from being considered suitable and necessary. The Philip Morris case dealt with the effect a prohibition on the visual display of tobacco products would have on people's tobacco use. In other words, that case, too, dealt with the effect a measure would have on people's behaviour.

(160) During the Covid-19 pandemic, Norwegian authorities emphasised a high degree of protection. Due to the risk of non-compliance, which was stressed in particular, I do not find that the authorities went further than necessary to attain the objectives established to limit the spead of Covid-19 infection, when deciding to uphold the quarantine rules without granting further exemptions for travel to holiday properties in Sweden.

(161) The authorities' assessments are provided in the documents I have examined. In my view, it has been sufficiently clarified that the implemented measures were suitable, necessary and proportionate. The EEA rules do not lay down a requirement that the authorities, prior to implementing measures, expressly consider the application of the EEA Agreement, see for instance the ECJ's judgment of 28 February 2018 in Case C-3/17 *Sporting Odds Ltd*.

(162) Against this background, I have concluded that the entry quarantine decisions are not contrary to the EEA Agreement.

Conclusion and costs

(163) I thus find that the entry quarantine decisions are legal. The appeal against the merits of the

case must therefore be dismissed.

(164) The State has won the case. However, the case has raised issues of principle as to how far the authorities may go in imposing intrusive measures on private persons in an extraordinary situation. I therefore find that there are compelling grounds for exempting the appellants from liability for costs in all instances, see section 20-2 subsection 3 of the Dispute Act.

(165) I vote for the following

J U D G M E N T :

1. The appeal is dismissed.

2. Costs in the Supreme Court are not awarded.

(166) Justice **Arntzen:** I agree with Justice Bergh in all material respects and with his conclusion.

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

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

(169) Justice **Skoghøy:** Likewise.

(170) The Supreme Court then gave the following

J U D G M E N T :

1. The appeal is dismissed.

2. Costs in the Supreme Court are not awarded.