NORGES HØYESTERETT

On 23 October 2013, the Supreme Court delivered judgment in

HR-2013-02200-P, (case no. 2012/1548), civil case, appeal against judgment

The State represented by the Ministry of Fisheries and Coastal Affairs	(The Attorney General of Civil Affairs represented by Advocate Ida Hjort Kraby) (The Attorney General of Civil Affairs represented by Advocate Ketil Bøe Moen – Assistant Counsel) (The Attorney General of Civil Affairs represented by Advocate Marius Emberland – Assistant Counsel)
v.	
Volstad AS	(Advocate Stein Owe) (Advocate Ingvald Falch – Assistant Counsel)

V O T I N G :

(1) Justice Tønder: The case concerns the validity of the time limit in section 7 subsection 1 of Amendment Regulation from 2007 relating to the structural quota system etc. for the deep-sea fishing fleet – the Structural Quota Regulation. From the coming into force of the Structural Quota Regulation in 2005, there was no limit on the number of years for which the structural quotas could be allocated, while the amendment in 2007 introduced a time limit of 20 years for new structural quotas and 25 years for the vessels which had been allocated structural quotas from 2005. The question is whether the time limit for vessels that had already been allocated structural quotas is in contravention of the prohibition against

retroactivity in Article 97 of the Constitution or the peaceful enjoyment of possessions in Article 1 of Protocol 1 of the European Convention on Human Rights – ECHR P1-1.

(2) The backdrop to this case is the licence and quota systems which according to the fisheries legislation regulate the right to commercial fishing. These systems are part of a management scheme, the purpose of which is as stated in section 1 of the Marine Resources Act "to ensure sustainable and economically profitable management of wild living marine resources and genetic material derived from them, and to promote employment and settlement in coastal communities".

(3) The fishing fleet consists of various gear and vessel groups and is divided into the coastal fishing and the deep-sea fishing fleets. The vessel F/T Volstad which is owned by Volstad AS – hereinafter Volstad – belongs to the cod trawl group of the deep-sea fishing fleet. Every year, the authorities determine how many tons of fish the individual groups of the fishing fleet are allowed to catch and the volume varies from year to year.

(4) The Norwegian total quota is the result of negotiations with other countries based on available fish resources. The state distributes this quota among the various vessel groups and the mutual distribution among the vessels in the same group is determined by means of quota factors. The quota factors serve as distribution keys internally within the group.

(5) For the cod trawl group there is a total in rounded figures of 87.9 quota factors distributed among 38 vessels as at 31 December 2012. The F/T Volstad has factor 1 in basic quota and factor 2 in structural quota, a total of 3 quota factors. The vessel was therefore in 2012 allocated 3/87.9 parts of the number of tons of cod and haddock which were allocated to the cod trawlers as the total quota.

(6) Already the Trawl Act of 1939 laid down licence rules and regulations which limited the right to fish and stipulated requirements for special permission to engage in trawl fishing in Norway.

(7) Today, section 4 of the Participation Act of 26 March 1999 no. 15 stipulates a requirement for a commercial licence as a basic condition for participating in commercial fishing. The licence is given to the owner of the vessel for a specific vessel. A commercial licence only gives the right to fish and catch in accordance with the provisions laid down in or pursuant to legislation from time to time.

(8) In addition, a special permit – licence – is required if it is a question of fishing for certain species or with special gear, cf. section 12. Fishing with trawl for cod requires such permission, cf. section 12 subsection 1 a. Like the commercial licence, a special licence is also given to the owner of the vessel for a specific vessel. The F/T Volstad has both a commercial licence and a special licence; what is known as a cod trawl licence.

(9) On the granting of a commercial permit and licence a vessel is also given a quota factor in the fisheries to which the licence applies. No detailed information has been disclosed as to how the quota factors were originally determined in the group to which the F/T Volstad belongs. Like the court of appeal, I am assuming that the description in Rt. [1] 1993 page 578 is adequate. It transpires from the judgment that the Ministry of Fisheries – now the Ministry

[1] Publication of Supreme Court judgments

of Fisheries and Coastal Affairs – has since 1974 determined quotas for Norwegian arctic cod. In 1976, the individual vessel was allocated a quota factor, which meant that each vessel within the group acquired equal quotas – basic quotas. Later, adjustments of the quota factors among the various trawler groups were made, but no information has come to light that the Ministry has redistributed quota factors among vessels in the same group.

(10) A table at 31 December 2012 shows that the basic quota factors in the cod trawl group vary between 1 and 0.35. The majority has basic quota factor 1. A quota factor lower than 1 was originally allocated smaller vessels.

(11) Until the Marine Resources Act of 2008, the detailed regulation of the right to commercial fishery and the conduct of commercial fishery followed from the Act relating to Sea Water Fisheries of 1983, which was in force when the Structural Quota Regulation of 2005 and the Amendment Regulation of 2007 were issued. Section 4 of the Act Relating to Sea Water Fisheries authorised the Ministry to issue regulations relating to "total allowable catch, including catch allocated by regions and gear". Section 5 subsections 1 and 2 provided:

> **"If the total allowable catch has been fixed for a particular stock pursuant to section 4, or if so required in the interest of economic and rational exploitation of a particular stock, the Ministry may lay down regulations governing quotas for the vessels participating in the fishery for specific periods and per trip.**
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> **Limits on catch may be made applicable to one or more gear classes, vessel classes or size classes."**

(12) For several decades there has been an overcapacity in the Norwegian fishing fleet, and it has been an agreed political goal to reduce the number of vessels in order to achieve better profitability in the industry by adaptation to the resource basis.

(13) In 1963, a main agreement was entered into between the state and the fishing industry for economic support of the industry. Annual negotiations were conducted between the state and the Norwegian Fishermen's Sales Organisation. The point of departure was that the State was to cover the deficit in the industry. In the 1970s and 1980s, the State eventually demanded that an increasingly larger part of the state subsidies go to reducing capacity in order in this way to reduce the deficit. Contributions were made for condemnation and sale of vessels out of the country while at the same time the licence rules and regulations authorised the combining of licences from two vessels when one of them was taken out of the fishing fleet. In many ways, this became the first round of structuring.

(14) The special statutory authority for special quota systems, section 5 a of the Act Relating to Sea-Water Fisheries, was introduced in 1984. The authority was originally limited in time to 1 January 1988, because an improved resource situation for Norwegian arctic cod was envisaged from 1987/88. However, in 1988 it turned out that improvement would be a long time in coming, and a new section 5 a without a time limit was enacted, cf. Rec.O. no. 20 (1988-1989). The first and second sentences of the provision read as follows:

> **"As part of an adaptation of the trawler fleet to the resource situation, the total quota can be split into a number of equal quotas which may be larger than the number of participating vessels in the group of vessels concerned. Such quotas are called unit quotas and may be distributed unequally among the participating vessels within the group."**

(15) In 1990, the Ministry of Fisheries issued a regulation, based on section 5 a of the Act Relating to Sea- Water Fisheries, relating to such unit quotas for the cod trawl group. The system entailed that a shipping company that owned, or became the owner of, two or more vessels and which took a vessel out of the fishing fleet, could be allocated a larger share of the fishing rights on the remaining vessel for a certain number of years. Unit quotas were first allocated for up to five years and from 1997 for up to 13 years. From 2000, the period was extended to 18 years if the vessel that was taken out was also condemned.

(16) The same year, a separate merger system for small trawlers in the cod trawl fleet was introduced – for trawlers with a quota factor lower than 1. Although this had a different purpose from the unit quota system, it still functioned as a structural system. However, this system was not limited in time.

(17) After a prior hearing by the Storting, cf. report to the Storting no. 20 (2002–2003), a structural quota system for the coastal fishing fleet was introduced by Regulation of 7 November 2003 no. 1309– regulation relating to special quota systems for the coastal fishing fleet. Nor was this system subject to any time limit. During the hearing by the Storting there was disagreement on this issue, the representatives of the Labour Party, the Centre Party and the Liberal Party claiming that the system should be limited in time, cf. recommendation S. no 271 (2002–2003) page 12.

(18) In spite of the fact that there was still a significant overcapacity in the cod trawl group, there were few shipping companies that structured according to the unit quota system. This issue was raised with the industry, for example in the speech delivered by Under-Secretary of State Janne Johnsen to the general meeting of the Association of Norwegian Trawler Owners on 19 June 2003 and in Minister Svein Ludvigsen's talk to the Committee of Shareholders' Representatives of the Norwegian Fishing Vessel Owners Association on 21 January 2004. The Association of Norwegian Trawler Owners is an association under the Fishing Vessel Owners Association, which is in turn a member of the Norwegian Fishermen's Sales Organisation. The industry was invited to contribute to a solution to achieve a further reduction in the number of vessels.

(19) On 26 November 2004, the Ministry of Fisheries sent out a consultative paper which set out that the structural adaptation in the groups that had significant overcapacity should be implemented more quickly than under the system in force at the time. In the Ministry's view, it was not sufficient to extend the period in order to meet the needs of the industry. The suggestion in the consultative paper was therefore to remove the predetermined time limit in the unit quota system. Following discussions at the meeting of the committee of representatives of the Fishing Vessel Owners Association in January 2005, a compromise was reached which was unanimously adopted and which supported the proposal in the consultative paper.

(20) The regulation relating to structural quota system etc. for the deep-sea fishing fleet, the Structural Quota Regulation, was issued by order in council on 5 March 2005 no. 193. Its purpose is "to contribute to an adaptation of the individual group of vessels to the resource basis and an improved operational basis for the individual vessel by paving the way to reducing the number of vessels in the group", cf. section 2. The regulation applies to vessels that have a cod trawl licence, purse seine licence, saithe trawl licence or industrial trawl licence. This also applies to vessels that have the right to participate in shrimp trawl fishery

off Greenland and to participate in the group of conventional vessels of 28 metres or over, cf. section 1 of the regulation.

(21) The cod trawl group is subject to the system for cod, haddock and saithe north of 62 degrees north. When notice is given for a vessel to be struck off the register of fishing vessels and is declared a constructive total loss, and licences and rights to participate linked to this vessel have been surrendered, another vessel in the same group belonging to the same shipping company may be allocated a structural quota equivalent to the basic quota for the surrendered vessel, cf. sections 5 and 6 of the structural regulation.

(22) The regulation of 2005 – hereinafter the 2005 regulation – did not contain any time limit as to the number of years for which the structural quota could be allocated. Section 7 subsection 1 read as follows:

> **"The structural quota is allocated for one year at a time. A verification that the conditions for allocation are satisfied shall be made before the first allocation. Subsequent allocations are not subject to any new verification, unless information has come to light indicating that the conditions are not met after all or there are other reasons making it necessary to subject the matter to a new review."**

(23) In the same way as for the structural quota system for the coastal fishing fleet the proposal to remove the predetermined time limit met with significant political resistance from representatives of the Labour Party, the Centre Party and the Liberal Party. This is clear from questions during the oral question time on 2 March 2005 from Marit Arnstad to Prime Minister Bondevik and from questions during question time on 16 March 2005 from Odd Roger Enoksen to the Minister of Fisheries. The questions also expressed dissatisfaction that the matter was not submitted to the Storting.

(24) Volstad structured to the maximum limit under the 2005 system by condemning two vessels, one of which had been acquired with a view to condemnation and at a significantly lower value than the company's other vessels. At the same time, the company was given an undertaking that these vessels' basic quotas for cod, haddock and saithe north of 62 degrees north would continue as structural quotas on a third vessel, the F/T Volstad. The total quota factor was accordingly 3, which is the maximum quota factor that a vessel can be allocated, cf. section 8 subsection 4 of the structural regulation.

(25) The fishery in the cod trawl group also comprises saithe in the North Sea and Greenland halibut north of 62 degrees north and off Greenland. The regulation does not open the door to the allocation of structural quotas for fishing for these species of fish. In connection with the structuring Volstad therefore had to relinquish two saithe quotas in the North Sea, two rights to participate in the Greenland halibut fishery off Greenland and two Greenland halibut quotas in the Norwegian Sea, north of 62 degrees north. However, the shipping company kept the quota of saithe and Greenland halibut fishery which belonged to the remaining vessel, the F/T Volstad.

(26) After the parliamentary election in 2005, there was a change of government. The Stoltenberg II government wanted to review the structural measures for the fishing fleet. In a press release on 20 October 2005, the new Minister of Fisheries announced a stop to the hearing of applications for the allocation of structural quotas from and including that same day, while applications already received would be heard. Volstad had applied for and been

promised structural quotas before this time. Later, the deadline was extended to applications post marked not later than 31 December 2005.

(27) The government set up a public committee, the Structural Committee, which presented the report NOU 2006:16 Structural Measures in the Fishing Fleet. Subsequently, the government prepared report to the Storting no. 21 (2006-2007) – the 2007 White Paper. Here the government expressed the opinion that the structural system should be maintained, but that a predetermined time limit should be introduced as suggested by the majority of the Structural Committee. It was furthermore stated that a time limit should be introduced also for already allocated structural quotas. There was disagreement on this issue in the Standing Committee on Business and Industry, cf. Rec. S. no. 238 (2006-2007) pages 9–10 and page 26. A minority consisting of representatives of the Progress Party, the Conservatives, the Christian Democrats and the Liberals submitted a motion that "the Storting requests the government not to introduce retroactivity regarding the length of already structured quotas ". The motion was not carried.

(28) Prior to the submission of the 2007 White Paper, the Ministry of Fisheries obtained an opinion from the law department of the Ministry of Justice about the constitutionality of the regulatory amendment for structural quotas already allocated, incorporated as attachment 4 to the report to the Storting. Both the government and the majority of the standing Committee on Business and Industry endorsed the assessment of the law department that the regulation was not in violation of Article 97 of the Constitution, cf. Rec. S. 238 (2006–2007) page 26.

(29) The White Paper presupposes that after expiry of the term the structural quota will be reallocated internally in the vessel group thereby becoming part of the vessels' basic quota.

(30) The time limit was introduced by Amendment Regulation of 8 June 2007 no. 586, which applies to both regulation on special quota systems for the coastal fishing fleet and regulation on structural quota systems etc. for the deep-sea fishing fleet – hereinafter called the 2007 Regulation. Structural quotas may pursuant to the amendment only be allocated for up to 20 years. According to section 7 subsection 1 second sentence "structural quotas allocated for the first time before 2007, … may be allocated for up to 25 years from and including 2008". A similar provision was included in a regulation on special quota systems for the coastal fishing fleet.

(31) On 3 June 2010, Volstad issued a writ to the Oslo District Court submitting a statement of claim that the time limit in section 7 subsection 1 second sentence of the structure regulation is invalid as regards structural quotas allocated for the first time before 2007.

(32) On 7 January 2011, the Oslo District Court delivered judgment with the following conclusion:

> **1. The time limit in section 7 subsection 1 of Regulation of 4 March 2005 no. 193 is invalid for the structural quotas currently applicable to Volstad AS's vessel the F/T Volstad, allocated the first time for the period 4 March 2005 until 8 June 2007.**

2. The State represented by the Ministry of Fisheries and Coastal Affairs is ordered to pay costs to Volstad AS in the amount of NOK 498 656 – fourhundredandninetyeigththousandsixhundredandfiftysix – Norwegian kroner within 14 – fourteen – days.

(33) The District Court held that the regulatory amendment was in violation of Article 97 of the Constitution and that the introduction of a predetermined time limit for Volstad's structural quotas allocated before the regulatory amendment in June 2007 was accordingly invalid. In this light the District Court did not find it necessary to go into the question of whether the introduction of the time limit with retroactivity was also in violation of P1-1 of the ECHR.

(34) The State represented by the Ministry of Fisheries and Coastal Affairs appealed against the judgment to the Borgarting Court of Appeal, which on 6 June 2012 delivered judgment with the following conclusion:

"1. The appeal is quashed.

2 By way of costs before the Court of Appeal the State represented by the Ministry of Fisheries and Coastal Affairs shall pay NOK 310 000 – threehundredandtenthousand – Norwegian kroner to Volstad AS within 2 – two – weeks from service of the judgment."

(35) In the same way as the District Court, the Court of Appeal decided the case on the basis of article 97 of the Constitution.

(36) After delivery of the Court of Appeal's judgment, Volstad obtained a replacement permit for the vessel Volstad M-1-A, which is the subject of the District Court's conclusion. This has now been replaced by a newly built vessel, the TNB Volstad 3YYB, with the same name without this giving rise to any special issues in the matter.

(37) The State has appealed to the Supreme Court. The appeal concerns the application of the law and the assessment of evidence.

(38) By a decision of 23 October 2012, the appeal was allowed to go forward. After the case had been argued, the Supreme Court decided in chambers on 15 March 2013 to transfer the case to a reinforced court, cf. section 6 subsection 2 second sentence, cf. section 5 subsection 4, of the Courts Act. Acting Court President, Judge Gjølstad, subsequently decided that the case was to be heard by all the Supreme Court justices in plenary session, cf. section 6 subsection 2 third sentence of the Courts Act.

(39) The Supreme Court's letter to the parties of 24 April 2013 stated that Chief Justice Schei considered himself incompetent in the matter because his daughter had delivered the District Court's judgment.

(40) At the start of the appeal proceedings, the Court decided by an interlocutory order of 13 August 2013 (HR-2013-01804-P) that Chief Justice Schei was to recuse himself, cf. section

106 no. 9 of the Courts Act. Judge Utgård is on leave for study purposes and did not participate in the proceedings. Under section 5 subsection 5 second sentence of the Courts Act the judge who has the lowest seniority shall step down whenever this is necessary in order for the number of judges in connection with the voting not to be divisible by two. This means that judge Bergsjø will step down in the voting.

(41) The appellant – *the State represented by the Ministry of Fisheries and Coastal Affairs* – has briefly submitted:

(42) Structural quotas are allocated for one year at a time, and the authorities decide based on a discretionary assessment whether quotas shall be allocated. The State agrees that an expectation of future allocations has been created, but this is of a political nature. No legal position that enjoys protection under the Constitution has been established.

(43) The authorities have a limited right to bind their regulatory authority. Furthermore, no advance binding undertaking has been given for the allocation of eternal quotas. The fact that the industry became involved in the process up until the adoption of the structural quota regulation does not mean that an agreement was entered into with Volstad.

(44) Assuming that Volstad has obtained a protected legal position, it is submitted that the time limit will have effect so far into the future that it would be difficult to allege that the regulatory amendment has retroactivity

(45) Under any circumstances, the protection in Article 97 of the Constitution is only aimed at unfavourable or harmful retroactivity. The question whether the shipping company has suffered harm must be answered on the basis of a broad assessment where all direct and indirect financial effects of the regulatory amendment are taken into account. As a result of the fact that the structural quota system was made time limited, these quotas are now subject to depreciation rules, which the shipping company has also taken advantage of. The fact that Volstad as a result of group contributions is not in a tax position allowing the company to take advantage of the tax deductions cannot carry any weight. It is disputed that a decrease in the present value of the company's assets constitutes a disadvantage. The shipping company has a long-term perspective and the company has no intention of selling its fishing rights. It has not been documented that Volstad's loan conditions have changed. In the event of a lifting of the time limit in 2033, the structural quotas will devolve to the cod trawl group as a whole. Because so many have structured, this will entail that for Volstad the change becomes insignificant.

(46) If the Supreme Court should conclude that there is harmful retroactivity, the State will submit that this is a question of interference with established legal positions – "apparent retroactivity". In such cases only "particularly unreasonable unfair retroactivity" will be affected, cf. the norm in the plenary judgement in Rt. 1996 page 1415 Borthen.

(47) The plenary judgment on shipowners' tax in Rt. 2010 page 143, should not be perceived as part of a stepwise development, as the Court of Appeal appears to allow. If the norm "strong societal considerations" was to be applied, it would entail a clear evolution of the law. But also that law must be considered to be met here. The Storting's assessment of the constitutionality issue must carry significant weight.

(48) In the assessment of the question of whether the retroactivity is in violation of the Constitution, a key point must be that Volstad's position is based on a public license in an area with extensive regulations. Such a position enjoys a more limited protection than what applies to right under private law. The time limit will not take effect until way into the future and will have relatively limited effects for the individual concerned. Considerations of equality suggest that no one is entitled to a right unlimited in time to be allocated structural quotas and that everyone in the group should be treated equally. The shipping company had no justifiable expectations that the structural quotas would have eternal effect. Strong societal considerations suggest that the public administration be given extensive controlling possibilities in fishery politics.

(49) The regulatory amendment in 2007 is furthermore not in violation of P1-1 of the ECHR. It is principally submitted that there is no protected "possession". It is neither a question of a current nor a future property interest which is based on a justified expectation.

(50) P1-1 of the ECHR is under any circumstances not violated. Case law shows that the question must be decided on the bases of the control rule. Regardless of whether the matter is decided under the surrender rule or the control rule, this is not a disproportionate encroachment.

(51) The State represented by the Ministry of Fisheries and Coastal affairs have submitted the following statement of defence:

"The Court to find for the Ministry of Fisheries and Coastal Affairs"

(52) The respondent – *Volstad AS* – has briefly submitted:

(53) The District Court and the Court of Appeal's judgements are correct and the respondent essentially endorses the rationale given by the Court of Appeal.

(54) Voldstad has been allocated structural quotas without any time limit and these are of financial value. The shipping company has thus acquired a legal position which by its nature enjoys protection under the Constitution.

(55) Section 97 of the Constitution applies to harmful retroactivity. This case concerns a regulation which has deliberately been given retroactivity to detriment of Volstad. Whether the retroactivity is detrimental must be assessed individually, cf. the plenary judgement on

Arves Trafikkskole in Rt. 2006 page 293 paragraph 50. The present value of the shipping company's assets is reduced as an intended effect of the time limit. The depreciation possibilities do not represent any tax advantage for Volstad in the foreseeable future. It is furthermore unclear whether the structural quota will devolve back to the cod trawl group upon termination in 2033 and the shipping company will, regardless, get a smaller share of the group's quota than today.

(56) Since the regulatory amendment in 2007 ties legal consequences to acts and events that have already taken place, it is here a question of "real retroactivity". It is doubtful whether there is any "unreal/quasi element" in the matter. The plenary judgement in Rt. 2006, page 293, *Arves Trafikkskole* and in Rt. 2010 page 143, ship owners' tax, have under any circumstances significant similarities to this matter. The choice of norm must in principle be made based on a broad assessment according to the degree of retroactivity and the nature and extent of the encroachment.

(57) In line with the authorities' stimulation measures, Volstad has irrevocably condemned two vessels and relinquished fishing quotas. The introduction of structural quotas or the clear impression of an agreement, which created a strong and justified anticipation with the shipping company that also these quotas apply without any time limit. The retroactivity affects vessels in one and the same group of vessels differently, and this implies an unreasonable and unfair discrimination.

(58) The authorities have not referred to any strong societal considerations that could justify retroactivity for Volstad. The White Paper on structural policy for the fishing fleet states that the introduction of the time limit merely has modest societal consequences. Were the time limit not applied to Volstad, this would not imply any time limits to an environmentally sound management. The structural quotas may still be subject to regulation in line with the basic quotas. The agreement impress of the system and the sacrifices which Volstad made as a condition for being allocated structural quotas are strong indicators that the authorities cannot encroach on the shipping company's position with retroactive force

(59) The Storting's view in this matter cannot carry much weight. The assessment was summary and not linked to any decision by the Storting. Furthermore, the Storting relied on an incorrect norm.

(60) The retroactivity is also in violation of the protection of the peaceful enjoyment of possessions in P1-1 of the ECHR. The convention provision operates with a broad and autonomous concept of possession. The structural quota is a "possession". The quota factors have relevant financial value in that they increase the value of the F/T Volstad. Furthermore, the shipping company has a justified expectation of obtaining structural quotas without time limit. Public licences of financial value may be a "possession"; cf. Rt. 2006, page 1382.

(61) As a consequence of the fact that the structural quota will lapse after 25 years, the matter must be decided according to the deprivation rule. But, regardless of whether the matter is assessed according to the deprivation or the control rule, the proportionality requirement is not met.

(62) Volstad AS has submitted the following statement of claim:

> **"1. The appeal to be quashed.**
>
> **2. Volstad AS to be awarded costs before the Supreme Court."**

(63) *I have reached the conclusion* that the State's appeal must be upheld.

(64) The question is whether on the introduction in 2007 of a general maximum term for the allocation of structural quotas it was a violation of Article 97 of the Constitution that a maximum term was also set for those who had structured according to the 2005 Regulation. What Volstad claims constitutional protection of is to be allowed to keep two structural quotas as long as the quota is allocated according to quota factors. In other words, what Volstad claims is equality in treatment of the structural quotas and the basic quotas.

(65) I will first look at the legal nature of the structural quotas which Volstad was allocated.

(66) As mentioned, the 2005 Regulation switched from the system of time-limited unit quotas for the deep-sea fishing fleet to structural quotas that were designated as "non-time-limited".

(67) That the structural quota became "non-time-limited" must be seen in the light of the fisheries management system. According to section 12 of the Participation Act fishing with trawl is subject to a special licence in accordance with the provisions laid down in or pursuant to the law from time to time. This reflects the fundamental principle that conducting fishery is not a right, but depends on a permit from public authorities.

(68) As mentioned, until 2009, the detailed regulation of the right to fish and how to conduct fishery followed from the Act Relating to Sea-Water Fisheries, which was then superseded by the Marine Resources Act. I will hereinafter rely on the Act Relating to Sea-Water Fisheries, since this was the act in force when the 2005 and 2007 Regulations were issued. Section 4 of the Act Relating to Sea-Water Fisheries provided a right for the Ministry to issue regulations regarding total allowable catch, and section 5 of the act provided authority for the Ministry to issue regulations regarding quotas for the participating vessels "for certain periods of time and per trip". These regulations providing the legal basis are followed up in annual regulatory regulations for various species of fish which for example determine the size of the quotas for the individual vessel groups and vessels. The fact that the regulatory regulations are annual means that the right to fish with the set quotas applies for one year at a time.

(69) The annual allocation of quotas also applies to the structural quotas. This follows from the 2005 as well as the 2007 Regulation, cf. section 7 of the Regulations which provides that "structural quotas are allocated for one year at a time". The difference between the 2005 and the 2007 Regulation is that the latter explicitly stipulates how many structural quotas can be allocated to the individual vessel, whereas the 2005 Regulation does not give such a time limit. This does not mean that the structural quota under the 2005 Regulation was "eternal", which it has been described as by some, but merely that the Regulation itself has not set any limit as to the length of time for which a structural quota can be allocated. However, it follows from section 7 that the verification of whether the conditions are met shall take place in connection with the first allocation and that a new allocation shall as a main rule take place without any new verification.

(70) An amendment to the rules relating to the regulation of fishery does not in principle imply an interference with a right protected by the Constitution. As early as by the seine purse judgment in Rt. 1961, page 554, the Supreme Court established that a prohibition against fishery was not an interference with a constitutional right. This must also be the point of departure today when amendments are made to provisions providing a right to fish – also if the amendment concerns the relative share of the fishery resources of the individual concerned. The quota system has remained unchanged over a long period of time and is practised such that if the basic conditions for participation in fishery are satisfied, one may expect to be allocated a vessel quota in accordance with the established quota factors. However, this is a consequence of an agreed political goal for stable framework conditions for the fishing fleet, and not a reflection of a right in the ordinary sense.

(71) That this point of departure also applied to structural quotas allocated pursuant to the 2005 Regulation follows from the presentation to the order in council which laid down the 2005 Regulation:

> **"However, the total quota is changed if research-based management advice so suggests, and the assumptions may also change as a result of the redistribution among groups and as a result of a change of distribution keys for the quota distribution internally within a group. The individual vessel's quota share may also be affected by an increase in the number of vessels in the group, either as a result of a new allocation of licences or an amendment of the conditions for participating in a limited group.**
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> **Such changes or amendments may still be carried out within the framework of the authorities provided in the Act Relating to Sea-Water Fisheries for fishery with vessels that satisfy the conditions laid down in or pursuant to the Participation Act."**

(72) In continuation of the above quoted, it is pointed out that "the structural quota systems, both in the coastal fishing fleet and the deep-sea fishing fleet, are nevertheless based on a political assumption of stability in the long-term distribution of the resources".

(73) The question will accordingly be whether there is nevertheless in this matter a special circumstance that may establish a legal position for Volstad's structural quotas which can block the State's right to subject the allocation to a time limit.

(74) We are looking at a system which presupposes performance and adjustments on the part of the shipowners, both in the form of condemnation of vessels and in the form of surrender of quotas. There is no doubt that the renunciation of such assets was made on the assumption that structural quotas would be given without any predetermined time limit, an assumption also the State has accepted.

(75) The situation has certain similarities to the situation in both Rt. 1992 page 1235 fishing quota and Rt. 1985 page 1355 Philips. However, in both these cases there was a more concretely rooted assumption of mutuality in the relationship between the private party and the State than in our case. In the latter case concrete negotiations had furthermore been conducted between the State and Phillips concerning the detailed terms set out in the production licence.

(76) It is difficult to give a general answer to the question of whether such a mutual assumption can constitute grounds for binding the future exercise of administrative authority – as pointed out in Rt. 1992 page 1235. In a number of areas there are examples of the State wishing through subsidy schemes to stimulate measures that presuppose activity, for example in the form of investments – either in the short or the long term – on the part of the private sector. It would be too far-reaching a consequence if this were as a general rule to bind the State to maintain the subsidy scheme as a result of the investment having been made on the basis of an expectation that the subsidy would continue.

(77) In Rt. 1992 page 1235, the first-voting judge addresses this issue in more detail on page 1240:

> **"I restrict myself to saying that this probably varies between the various management sectors. If it is considered necessary or desirable in order to promote the purpose of the relevant act providing the legal basis, I find it difficult to see any decisive counterindications to the principle that it should be possible to a considerable extent to bind the exercising of administrative authority through agreements or undertakings in special areas. This is not unknown in administrative practice. Accordingly, I do not rule out the possibility that the Ministry of Fisheries and Coastal Affairs could within the framework drawn up in Act of 16 June 1972 no. 57 relating to the regulation of fishery, legally undertake to allocate fishing quotas according to certain rules for a certain period of time."**

(78) I agree with what is stated here. Even if we in our case are not looking at a concrete offer aimed at the private party, the situation is to a significant extent the same. In order for both the State and the industry to achieve their goals, it is a prerequisite that the private party ensures that vessels are taken out of the fishing fleet. Here, the allocation of the structural quotas must together with the condemnation and the renunciation of fishing quotas, be

regarded as coordinated parts of the same measure. In order for the system to work, the shipping companies must be able to rely on the assumption that structural quotas will be given. A total appraisal of the situation accordingly suggests that the shipping companies have established a legal position which may be protected by Article 97 of the Constitution.

(79) This is not a position which affords the structural quotas a better protection against change than the basic quota. The question which our case gives rise to is whether the State – in spite of this position – had the right to limit in time the allocation of structural quotas even if the basic quota is maintained as before. The form of retroactivity is of crucial importance.

(80) This brings me to the question of what should be the norm for the assessment of constitutionality in this case.

(81) In Rt. 2010, page 143, shipowners' tax, paragraph 153, the first-voting judge states:

> **"The question as to whether an act that links effect to earlier events or interferes with established legal positions is in violation of Article 97 of the Constitution depends on how strong the retroactivity element is. If the act links weighty legal effects directly to older events, the act is as a main rule unconstitutional. If, on the other hand, the act only provides rules as to how an established legal position shall be exercised in the future, the main rule is the opposite."**

(82) What the first-voting judge is referring to here is the distinction between actual and apparent retroactivity, concepts that have been used in legal theory and case law. Actual retroactivity is what we have when the law links burdens *directly* to earlier acts or events, i.e. acts or events that have been concluded and which in time are prior to the law in question. In cases of apparent retroactivity, the effect is on the contrary aimed at the future exercise of established legal positions.

(83) In case of interference with established legal positions, the Supreme Court has in Rt. 1996 page 1415, Borthen, formulated the norm for constitutional protection on page 1426 to the effect that retroactivity which is "particularly unreasonable or unfair" will be unconstitutional:

> **"In accordance with our legal tradition the provision – with its general wording that "no law must be made retroactive" – establishes a prohibition which may well be given a more precise content in specific legal areas, but which must otherwise, for example in this present legal area where we are, be considered to target a particularly unreasonable or unfair retroactivity."**

(84) We find the classic example of actual retroactivity in criminal law – acts which at the time of perpetration were exempt from punishment will by a new law be made punishable also with effect for earlier acts. Section 97 of the Constitution stipulates an absolute prohibition against such legislation.

(85) Also in the financial field there are examples of legislation which clearly reflect actual retroactivity. I would first mention Rt. 2006 page 293, *Arves Trafikkskole*, which concerned a new law relating to an amendment of the duty to pay value added tax. In that case the amendment to the law was also made effective for past – concluded – transactions in that the tax authorities ordered the trader to reverse incoming value added tax which had lawfully been recorded as tax deductible before the law was adopted. After having pointed out that in criminal law there is an absolute prohibition against retroactivity, the first-voting judge states about the constitutional protection in the situation in question:

> **"(69) In my view, these points of departure concerning the impact of the Constitution suggest that the norm in Article 97 opens the door to compromises between an absolute prohibition and an evaluation of the totality of the circumstances where only particularly unreasonable and unfair retroactivity is prohibited. The Golden Clause judgment in Rt. 1962 page 369 is an example of such a compromise: Extensive private financial rights had to yield to compelling societal interests.**
>
> **(70) In our case *Arves Trafikkskole* was deprived of a financial right. In its effect it is a question of linking financial burdens to an earlier act. This is an area where the constitutional prohibition against retroactivity has a strong position, but we are not at the innermost core of the prohibition. In my view, it is not possible in this area to lay down an absolute prohibition against retroactivity. But, because we are so close to the core area of Article 97, it would require a great deal for retroactivity to be acceptable."**

(86) It is my perception that the compromise in question lies between the retroactivity prohibition under criminal law and interference with established legal positions where the prohibition, as mentioned, is aimed at particularly unreasonable or unfair retroactivity. As the first-voting judge expresses it, this concerns legislation which "in its effect is a question of linking financial burdens to an earlier act", i.e. actual retroactivity in the financial area. For the situation in question the first-voting judge concluded that "a new transaction tax can only be imposed on an earlier act if strong societal considerations come into play". The minority, on the contrary, regarded this as a case of apparent retroactivity.

(87) Another example is Rt. 2010, page 143, shipowners' tax, where new and stricter rules relating to the accruals concept for earlier income years were made applicable to earlier income years – earned up to ten years prior to the law.

(88) The first-voting judge gives a description of the tax increase by comparing the former tax rules – which were intended to represent a lowering of taxes – with the new rules. On this point it is stated in paragraphs 127-129:

> **"(127) From this it is clear that the tax relief consisted in it being up to the shipping company itself to choose "when the return on investments in ships is to be taxed". This meant that "to a certain extent they determined themselves their tax level calculated in net present value while this tax level "becomes lower the longer the tax payments are deferred by omitting to take dividends".**
>
> **(128) The transitional system before the 2007 system provides that not less than two thirds of the untaxed funds from and including the fiscal year 2007 shall be subject to taxation with not less**

> **than 10 per cent per year. Up to one third is "exempt from taxation" provided that an amount equivalent to 28 per cent thereof is used for environmental measures.**
>
> **(129) With these transitional rules it is no longer up to the shipping company itself to determine a low tax level on the income by "omitting to take dividends". The immediate subjection to income taxation, with the time limits that follow from the transitional system, leads to an increase of the tax level for this income compared with the situation under the 1996 system."**

(89) In paragraphs 135 to 136 the first-voting judge subsequently addresses the nature of the retroactivity:

> **"(135) To sum up, I will at this point say that at the time of the transitional system, the shipping company had a latent tax debt with a present value. This latent tax debt has been replaced by+ an actual debt as embodied in the transitional system. The replacement implies an increase of the tax debt…**
>
> **(136) This tightening-up concerned untaxed income included in the 1996 system when the company first joined the system and earnings during the individual revenue years that the shipping company was part of the 1996 system. These are years where it was laid down in the law that earned income only became liable to taxation if and when it was taken out. This implies a marked retroactivity which is linked to earlier tax years with fixed tax positions."**

(90) The first-voting judge describes the norm for the constitutional assessment in paragraph 153. What is of relevance in our context is the emphasis on the parallel to *Arves Trafikkskole*, which I find reason to quote:

> **"And we are in a retroactivity situation that has clear parallels to the case of *Arves Trafikkskole*. For the years up to and including 2006 the basis for the assessment and the conditions for taxation were fixed and final when the 2007 system was adopted. To me it seems obvious that it was events and dispositions that took place in earlier years that have been subject to more extensive taxation due to the transitional rules."**

(91) The first-voting judge characterises the case as a "transition stage" between linking onerous effects to older acts and issuing rules determining how an established legal position shall be exercised. Given that the discussion of the norm is closely linked to the discussion in *Arves Trafikkskole*, I assume that the term shall be understood in the same way as the term "compromise" in this judgment. There were very strong elements of actual retroactivity – the act placed more onerous tax burdens on the shipping companies for "events and dispositions that took place in earlier years" – which was predominant when the first-voting judge concluded by applying the same norm as in *Arves Trafikkskole*, viz. that there must be "strong societal considerations" in order to allow such retroactivity. Also here the minority concluded that the matter must be regarded as a case of apparent retroactivity.

(92) A third example of actual retroactivity is found in Rt. 2005, page 855, Allseas. After having established that the situation in that case was different from Rt. 2001, page 762, *Bjørnenak*, where the norm from the *Borthen* judgment was applied, the Supreme Court concluded that this was in violation of the Constitution, citing that "the coming-into-force provision of the

regulation in such cases means that increased burdens are added to the company's failure to make salary payments several years earlier". There was no further discussion of the norm.

(93) As I have shown here, significantly different norms have been established for cases of actual and apparent retroactivity or interference with established rights or legal positions. The examples I have mentioned, and which, as I read the judgments, were *de facto* regarded as actual retroactivity required "strong societal considerations" in order for the law to prevail over Article 97 of the Constitution. Even if the reference to the Gold Clause judgment does not necessarily suggest that the need for retroactivity must be of the same compelling nature as in that case, both the formulation of the norm and this exemplification indicate a narrow possibility for the legislator to issue rules with such an effect in this type of legislation. I do not take a stand on the question of whether there is a basis for stipulating such strict requirements for accepting each and every case of actual retroactivity.

(94) In cases of interference with established legal positions it is, however, as pointed out in the *Borthen* judgment, particularly unreasonable or unfair retroactivity that is affected – elsewhere in the judgment referred to as "clearly unreasonable or unfair". This indicates a significantly broader possibility for the legislator to enact laws with apparent retroactivity than in the examples of actual retroactivity that I have referred to. An example of this broader possibility is Rt. 2006, page 262, spouse's pension, paragraph 82, which is a case that gave rise to several of the same issues as in our case. The case concerned the question of a divorced spouse’s right to survivor's pension. Here the pension had been earned before the amendment to the law which altered the conditions with the result that the person concerned was not entitled to a pension after all when her divorced spouse died. Here it was a question of interference with an existing legal position which – based on a relative assessment – represented retroactivity which it may be alleged had a relatively strong adverse effect on the claimant relatively. This judgment was delivered two days before Rt. 2006, page 293, *Arves Trafikkskole*.

(95) In my opinion, there are good reasons for establishing different norms for constitutional protection against actual and apparent retroactivity, as has been done in case law. In principle, there is a fundamental difference between these situations:

(96) To take the example from the shipowners' tax judgment. – The revenue allocations during the relevant fiscal years were made in the light of the law in force at the time and could not be altered. Due to the fact that the law was made directly retroactive, as I interpret the majority, there was no possibility of any alternative allocations to meet the new regulation. As will appear from the quotation from paragraph 136 of the judgment, the first-voting judge characterised the situation as "marked retroactivity" which was "linked to earlier fiscal years with fixed tax positions". In such a situation the Supreme Court found that the constitutional protection had to be strong and that the need for retroactivity, at least in this case, had to yield, unless circumstances were of such a nature that the condition "strong societal considerations" is satisfied.

(97) Also an existing legal position will be based on an act in the past carried out according to the state of the law at the time. An interference here may therefore, depending on the circumstances, hit an individual hard. However, legislation that regulates future exercise of achieved legal positions presents a decisive difference compared with actual retroactivity in that it will normally to a greater or lesser extent be possible to adjust. Such retroactivity will accordingly and normally be of a less radical nature. The need to be able to regulate ongoing activities is also normally stronger than the need to intervene in an activity that has been concluded. The threshold for intervening in the Storting's own assessment of the need to make the act retroactive must therefore be higher than in the case of actual retroactivity. That such a threshold applies for the courts to set their assessment of the reasonableness of the law above that of the Storting was reflected in the norm as this was formulated in the *Borthen* judgment in that it is aimed at interventions that are "particularly" or "clearly" unreasonable or unfair. However, this assessment must take into consideration both the effect of the interference on the party affected and the need for and the general effect of the measure.

(98) In a number of cases, however, interference with an existing legal position may have effects which – even if they are aimed at the future – have clear common denominators with those of actual retroactivity. I am thinking in particular of cases where the legal position is a result of a financial or other measures. Both our case and Rt. 2006, page 262, spouse's pension – where the claimant had established her legal position long before the amendment of the law – are examples of this. Such circumstances may be of significance in connection with the actual application of the norm.

(99) Our case concerns a future alteration of an established legal position – instead of being allowed to the retain the structural quotas for as long as the basic quota system is in effect, the former will lapse after 25 years. It is thus not a question of linking burdens to earlier acts, but of a regulation of an already obtained benefit. Volstad nevertheless submits that a constitutional norm such as the one that was relied on in the *Arves Trafikkskole* and shipowners' tax cases shall apply. I do not agree. How the interference affects and individual becomes – as I have just pointed out – relevant in the concrete proportionality assessment, which forms a natural part of the decision as to whether the interference is particularly unreasonable or unfair. The effect of the interference cannot in itself provide a basis for applying a norm other than the one which otherwise applies to apparent retroactivity.

(100) In the light of the decision in Rt. 2007, page 1281, *Øvre Ullern Terrasse*, the question may be raised of whether it is correct to base the constitutionality assessment in cases of apparent retroactivity on the norm as it was formulated by the Supreme Court in the *Borthen* judgment and the spouse's pension judgment. In the *Øvre Ullern Terrasse* judgment the Supreme Court relied on an interest-based weighing of the pros and cons even though it concerned apparent retroactivity. However, the reason given for this was that it was a question of two parties – lessor and lessee – each with their separate interest in the property, cf. paragraph 101. This does not mean that the Supreme Court has, generally speaking, set

aside the norm from the *Borthen* judgment, cf. that the first-voting in paragraph 100 of the judgment relating to *Øvre Ullern Terrasse* cites that it is clear from the *Borthen* judgment that financial rights comprise "highly different categories". On page 1431 of the *Borthen* judgment the Supreme Court repudiated the argument hat the decision must depend on a weighing of interests where *the public* interest must yield if it does not exceed the interests that will suffer by virtue of the new law. As the Supreme Court emphasised there, such a norm will "be of a marked political nature and not very well suited as a legal norm".

(101) I will not rule out that the norm in other cases concerning interference with existing legal positions may be given another and more apt formulation which in a better way encompasses what the constitutionality shall be tested against than what the *Borthen* norm does. But I do not find any reason in this case to go into any more detail on this point. Also in the *Borthen* judgment a relative norm is established, which is flexible and discretionary. It is well suited for application to this case, where Volstad's submission seems to be precisely that the company has been treated unreasonably and unfairly.

(102) Concerning the detailed application of the norm, the *Borthen* judgment states the following on page 1430:

> **"The weighing of interests will include which rights or positions the interference concerns, what basis an individual or a group has for their expectations, whether the interference is sudden or significant and whether the distribution of the burdens affects an individual or a group particularly hard."**

(103) I will hereinbelow make an assessment of the constitutionality based on the factors which the Supreme Court has listed here.

(104) I will first take a look at the basis for Volstad's expectations. As mentioned, they are based on an assumption of mutuality. When Volstad has fulfilled the conditions, the company will be allocated structural quotas in line with the basic quota. Although I am of the opinion that this expectation does not come under contract law, the circumstances which in my opinion justified the view that this may be a position protected by the Constitution suggest that, objectively speaking, it is a question of a strong expectation that was breached by the 2007 Regulation. This calls for putting the reasonableness of the 2007 Regulation to the test.

(105) The last element in the enumeration – as to whether the distribution of the burdens affects an individual or a group – points in the same direction to a certain degree . When the structural quota term is over, the shipowners in the cod trawl group who have not structured may be said to have gained an advantage from the structuring in that Volstad's structural quotas devolve to the communality.

(106) What significance this shall have in the weighing of interests in relation to the constitutionality norm will depend on the other elements of the evaluation of the totality of circumstances.

(107) Volstad's situation at the time of the amendment of the Structural Quota Regulation can be described as follows:

(108) Volstad was given 25 years from 2008 to fish with three quota factors linked to one vessel, i.e. the company is allowed to use the structural quotas for a total of 27 years. The Ministry, with the endorsement of the standing committee on business and industry of the Storting, assumed that a term of 20 years already affords sufficient assurance that the investments and the assets which the shipping company has surrendered in connection with the structuring will be recovered, cf. the White Paper, pages 95–97, and Rec. S. no. 238 (2006–2007) page 26. The extent of the new structuring that has taken place under the 2007 Regulation also goes to show that many have found it profitable to structure with a time limit of 20 years. The number of cod trawl licenses has thus dropped from 61 at 31 January 2006 to 38 at 31 January 2012.

(109) An element in this connection is that Volstad and the others who structured under the 2005 Regulation are allowed to fish with their structural quotas for up to five years after the structural quotas of the shipping companies who have structured under the 2007 regulation have devolved to the communality. The last five years were also intended as a special compensation for the measures taken by those who structured under the 2005 Regulation, cf. Rec. S. no. 238 (2006–2007) page 26, where the committee states:

> **"The committee majority, …supports the Government's proposal to introduce a time limit of 25 years for already allocated structural quotas. Already allocated structural quotas are accordingly given longer duration than what is suggested by new structural quotas. The majority is interested in the authorities in this way safeguarding the consideration for the measures already taken by the shipping companies. At the same time such a long quota period gives sufficient security for investments made. This is further compensated for by the fact that time limited structural quotas can be depreciated. The majority further agrees that the term of 25 years shall take effect from and including the quota year 2008."**

(110) The question is then to what extent the regulatory amendment entails a loss for Volstad compared with what the company would have earned with non-time-limited structural quotas, i.e. the potential magnitude of the deterioration of the company's position in commercial terms. It is thus the situations before and after the regulatory amendment which need to be compared here. That the introduction of a time limit, seen in isolation, means a reduction in the present value of the structural quotas is obvious.

(111) The loss can be calculated in two alternative ways – either as a reduction in the present market value of the quotas or as the present value of the income loss from 2033. I will confine myself here to the latter alternative – there shall be no cumulation.

(112) For the first 25 years there will be no interference with Volstad's structural quotas. Volstad's loss is accordingly linked to the period after 2032. The calculation of the present value of this loss in 2007 must take into account the foreseeable quota share for Volstad during the

years from and including 2033. In this connection it is natural to take for a starting point the clearly stated assumption that after expiry of the time limit, the structural quotas shall be distributed among the participants in the group, cf. the White Paper, pages 62 and 103. On page 62 the Ministry thus states:

> **"A stable distribution among the groups of vessels is therefore also a fundamental prerequisite for the structural measures in the various groups to achieve the intended effect. Structuring must take place within a predictable, long-term framework for the quota distribution, and the structural profits must devolve to the vessels in the relevant group. Only then will the individual trader be able to properly assess his alternative possibilities."**

(113) In the White Paper the Ministry has on the basis of a discount rate of 6 per cent calculated the relative reduction of the present value of Volstad's quota basis from and including 2033 – i.e. a reduction of the present value of gross catch revenues – to be 10.66 per cent based on the structuring that had taken place at the time.

(114) It is my opinion that also the intended consequences of the 2007 Regulation that structuring would continue within the group must be taken into consideration. As I have touched on, this has also proved true. The consequence of this is that the value of Volstad's basic quota will increase further when the other vessels' structural quotas lapse. The 2007 Regulation will thus generate a further distribution effect beyond the one on which the Ministry based its calculation of loss when the time limit kicks in.

(115) The question is then to what extent the loss of income is compensated for by the fact that the right to depreciation, which follows from the determination of a maximum period for the structural quotas, implies a tax saving, cf. section 14-50 of the Tax Act. This was a factor which the Storting considered important, cf. page 103 of the White Paper and what I have quoted above from Rec.S. no. 238 (2006–2007), page 26. The depreciation possibility means that Volstad can depreciate the value of the quota rights based on straight line depreciation during the "life" of the structural quotas and achieve a 28 per cent tax reduction as a result.

(116) Volstad submits that in the detailed constitutionality assessment the right to depreciation cannot carry much weight because Volstad has not taken any advantage of this due to carry forward loss in the group of which Volstad is a part. It is further argued that the uncertainty that follows from the advantage of the depreciation system presupposes an otherwise taxable profit.

(117) Although it is in principle the effect for an individual that must be assessed, it is also in my opinion necessary to take into consideration the normal effects of the regulatory amendment. The fact that the right to depreciation will normally be advantageous for the shipping companies affected is not disputed. This must be sufficient for the right to depreciation to carry weight in the assessment. It must furthermore be *Volstad's* tax position that is assessed – not the group's.

(118) That this company will on a regular basis generate a profit which corresponds at least to the depreciation on the book value of the structural quotas is the basis for Volstad's assumption that the company has lost on the change-over in 2007 and must automatically be taken for a basis. In my opinion, the depreciation possibility must therefore be taken into consideration in full when calculating Volstad's loss even though Volstad may not so far have taken advantage of it. It furthermore appears from the accounts that the value of the depreciation, based on a quota value of NOK 61 million, is recorded as an expenditure in Volstad's accounts for the years 2008 to 2011.

(119) A decisive factor in determining to which degree the right to depreciation outweighs the loss of income is the choice of discount factor and the value which it is assumed that structural quotas had in 2007. Volstad has emphatically submitted that the book value of NOK 61 million does not reflect the actual value. No attempt has been made before the Supreme Court to prove this submission, nor has the company mentioned the value it claims the structural quotas had. However, even if a higher value is assumed, the depreciation will result in a significant reduction of the loss. This is first and foremost due to the fact that the loss of income does not occur until from and including 2033, while the tax savings are obtained already from and including 2008. A significant effect is also caused by the fact that the Tax Act allows depreciation of the entire established value of the structural quotas, even if it is foreseeable that parts of the structural quotas from and including 2033 will be carried over in the form of an increase of the basic quota.

(120) In this light it cannot be assumed that the loss – relatively speaking – is of any significant extent. This is consistent with the conclusion in annex 1 to the Annual Report from the Norwegian Fishing Vessel Owners Association 2010, page 320, which reads:

> **"The secretariat is of the opinion that the Fishing Vessel Owners Association shall continue to argue in favour of reintroducing a non-time-limited system in spite of the fact that under the current political regime it may be politically difficult for this argument to succeed. At the same time, the secretariat wishes to note that with the current tax rules such a request is not financially rational, but this is perhaps a price the industry must be willing to pay in order to obtain better predictability."**

(121) It is clear from the above that the secretariat of the Fishing Vessel Owners Association concluded that it failed to see any financial reasons for challenging the time limit, but pointed out that there may be reason to object on a political basis. This must necessarily mean that the present value of the tax deduction is, generally speaking, considered to offset the present value of the loss which the shipping companies suffer by the lapse of the structural quotas after 25 years. I can see no grounds for setting this assessment aside.

(122) My conclusion is accordingly that even though when the structuring took place Volstad might have had might have had strong expectations, objectively speaking, of being allowed to retain the structural quotas on a par with the basic quota, the regulatory amendment has not meant that the company has, financially speaking, been placed in an essentially more disadvantageous position. This weakens the weight of this factor in the overall assessment.

(123) In the same way it is necessary to nuance the significance of the fact that the lapse of Volstad's structural quotas in 2033 becomes an advantage for those who have not structured. This has to do with the fact that structuring is something that the entire group benefits from and is thus first and foremost in the best interests of the group itself. As mentioned, there has been considerable structuring in the cod trawl group. As of today, there are only five trawlers out of 38 that have not been allocated structural quotas and out of a quota basis of 87.9 quotas, the structural quotas constitute 53.6. When the structuring period has expired, all shipping companies will benefit from the structural quotas, also Volstad. It will therefore be wrong if in the assessment of reasonableness only the structural quotas which Volstad must renounce are considered without taking into account the increase in value that devolves to the shipping company as a result of the general structuring.

(124) In addition to the fact that the time element is a factor in the calculation of the financial effect of the intervention for Volstad, it also has a more general significance in the constitutionality assessment that it is a question of interference where the thrust of the effect does not occur until well into the future. In this connection I refer to the plenary judgment in Rt. 1990, page 284, *Selsbakk*, where the Supreme Court states on page 295:

> **"Ground lease agreements are assumed to have a very long duration. Anyone who enters into agreements that are to have an effect in a distant future must be prepared that the legislator's view of what would be fair or acceptable may change and that also developments in general may be different from what was assumed. The consideration for the parties having predicted the situation therefore does not carry quite the same weight here as in contract life in general."**

(125) A similar point of view is presented in Rt. 2007, page 1281, *Øvre Ullern Terrasse*, paragraph 107.

(126) These considerations must also have a bearing on our case. Within the time perspective relevant in this case, Volstad has no guarantee against measures from the fishery authorities which would alter the relative value of the quotas. I refer to the presentation of the order in council from 2005, which I have quoted earlier, and which furthermore emphasises that the structural quota system is based on a "political assumption of stability in the long-term distribution of resources".

(127) What was stated here is in line with the earlier statements of the government and the Storting in the public documents relating to the long-term view of the fishery policy measures.

(128) This must also be seen in the light of the fact that there are huge variations in the way the fishery industry is conducted in our country, which is in turn reflected in highly different interests within the industry. To this should be added that the management of fishing resources must also serve other central societal considerations, for example "securing settlement and jobs in the coastal districts" and "paving the way for the population to

continue to benefit from the harvesting of the marine resources"; cf. section 1 of the Participation Act on the objects clause of the Act.

(129) It will therefore be a central task for the fishery authorities to strike a balance between stability of the framework conditions and the need for political freedom of action. This will first and foremost depend on a political evaluation. Although stability and predictability are important factors in the fishery industry, legislation is based on the principle that these considerations must yield if other fishery policy objectives so suggest, cf. page 101 of the White Paper.

(130) Since the decisions will to a significant extent have to depend on political considerations, it must also be taken into account that different governments may have differing views when it comes to choice of fishery policy. This view is emphasised in the preparatory works of section 19 of the Participation Act, cf. Proposition to the Odelsting no. 67 (1997–98), page 51, which read:

> **"Pursuant to this provision, the King in Council may revoke or limit all special licences issued for certain types of fishing or catch (a concession group). The rationale is that changing governments need to be relatively free when it comes to framing the fishery policy they wish to conduct, also as regards which types of fisheries shall be allowed."**

(131) This brings me back to the listing of elements in the *Borthen* judgment. The first element mentioned is that regard shall be had for the rights or positions that are interfered with. As I have shown, fisheries management is a field with a particularly active exercise of authority and with far-reaching measures that are intended to safeguard several central societal considerations. A high degree of political freedom of action is both authorised by legislation itself and is continuously indicated outwardly by the government as well as the Storting. Developments may take different directions depending on the political goals which the incumbent government wishes to promote from time to time. This obviously cannot deprive the operators in the fishing industry of any and all protection under Article 97 of the Constitution – as mentioned, I have concluded that in our case a legal position has been established which may be protected by the Constitution. But this goes to show that we are in an area where the State should have considerable freedom of action to regulate the content of the framework conditions of the fishing fleet, cf. similar reflection in Rt. 2006, page 262, spouse's pension, paragraph 81. This is also of importance in terms of what operators in the fishing industry can expect as regards the long-term validity of the measures that are initiated. Both of these factors must in turn impact on the strength of the constitutional protection.

(132) The amendment to the 2007 White Paper reflects the Stoltenberg II Government's desire to conduct a different policy from the Bondevik II Government in this area. It is clear from several Storting documents - most recently in connection with the Storting's deliberations in 2003 on the introduction of non-time-limited vessel quotas for the coastal fishing fleet – that

there have been differing views on the question of whether there should be time-limited or non-time-limited vessel quotas, and that the lack of agreement has followed political divisions.

(133) The considerations that formed the basis for the Stoltenberg II Government's changing of the system and decision that the change should also be made effective for structural quotas allocated under the 2005 Regulation, come into the assessment of whether the measure was particularly unreasonable or unfair. This is described in more detail in the White Paper.

(134) The main objectives were to counter the concentration of quotas in the hands of a few, to counter a rise in prices in connection with the sale of fishing boats – having particularly in mind recruitment to the fishing fleet – and to ensure the community's control possibilities in line with the objectives of fisheries policy as expressed in the Storting's decisions. These are relevant considerations, the importance of which it must in principle be up to the political authorities to determine.

(135) Consideration must also be given to the potential consequences if structural quotas that were allocated under the 2005 Regulation should remain in effect as non-time-limited. Whereas the shipping companies that structured in accordance with the 2007 Regulation would lose their structural quotas after 20 years, those shipping companies that had structured under the 2005 Regulation could continue fishing in accordance with their structural quotas. This is the background to the Government's view that such an arrangement could contribute to creating an A-team and a B-team in the fishing fleet - as described on pages 112-113 of the 2007 White Paper. It may also be argued that such a system could prevent other shipping companies from structuring; cf. the minority in the Structure Committee, who state on page 110 of Official Government Report NOU 2006: 16:

> **"If the authorities introduce time-limited quotas, the participants in the industry will not be treated equally. The authorities will then be creating an A-team and a B-team in the fleet: those that have already structured, and are left with an increased non-time-limited quota base, and those who will have a time-limited quota base for the future. The latter will be the losers, in terms of both profitability and competition for labour. In the longer term, they will be phased out of the industry."**

(136) Considerations of this nature must be of significance in the constitutionality assessment with respect to interference in existing legal positions; see Rt. 1996 p. 1415 Borthen on page 1432.

(137) I have accordingly concluded that there are no grounds for maintaining that the amendment of the 2005 Regulation from non-time-limited to time-limited allocation of structural quotas represents particularly or clearly unreasonable or unfair interference with respect to Volstad. A fact of major importance is that the change cannot be assumed to have led to extensive losses, particularly when the option of depreciation is taken into account. A material aspect of the overall evaluation is also that this is an area where it is generally difficult to predict developments in a time perspective as long as the one in this case. The fisheries industry is subject to a regulatory regime where, because fishing rights are allocated annually, there is a constant possibility of the framework conditions

changing. The changes may be due to the resource situation, but they may also be a result of different views on the fisheries policy that should be conducted. I also attach weight to the fact that the change was carefully managed, giving reasonable consideration to the assets that the shipping company had to surrender in that Volstad and the others who structured under the 2005 Regulation were allocated structural quotas for 25 years, compared with 20 years for the others.

(138) I have been in no doubt as to the result, and have therefore found no reason to examine the significance of the Storting's view of the constitutionality issue, which is consistent with my own.

(139) I have accordingly concluded that the 2007 Regulation is not in conflict with Article 97 of the Constitution, and that the Government's appeal must be upheld on this point.

(140) It remains to be decided whether the 2007 Regulation is in breach of Article 1 of the first supplementary Protocol to the European Convention on Human Rights (ECHR).

(141) The Article reads:

> **"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.**
>
> **The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."**

(142) In Norwegian the article reads: [Norwegian translation omitted]:

(143) It is "the peaceful enjoyment of his possessions" that is protected from certain interferences under ECHR P1-1. According to the practice of the ECtHR, withdrawal of a government licence of importance to one's economic interest in pursuing an activity is regarded as such interference, cf. the ECtHR's judgment of 7 July 1989 Tre Traktörer Aktiebolag v. Sweden, paragraph 53. In addition to existing property interests, the provision also protects future utilisation of the possessions – according to ECHR practice called "legitimate expectation".

(144) In the ECtHR's judgment of 28 September 2004 Kopecký v. Slovakia, paragraph 47, the ECtHR referred to cases where the requirement of "legitimate expectation" was found to be fulfilled when the expectation was "based on a reasonably justified reliance on a legal act which has a sound legal basis and which bears on property rights". In Rt. 2008 page 1747 Hopen the ECtHR's practice is summarised such that "the provision in addition to rights that come under the traditional concept of property rights, also includes legal positions where the owner must be said to have a reasonable expectation that it will be possible to use the legal position as anticipated".

(145) The first question is accordingly whether restricting access to structural quotas, with the content they had pursuant to the 2005 Regulation, may be infringement of the right of ownership, as ECHR P1-1 has been interpreted as meaning. It is difficult to find comparable practice, but given the interpretation of the provision that has been assumed, I find it correct to assume at the outset that this is the case.

(146) The parties disagree as to whether it is the provision in the first paragraph, second sentence – the deprivation rule – or the second paragraph – the control rule – that is applicable. Volstad has pointed out that there is a deprivation factor in that structural quotas lapse after 25 years. However, the shipping company still has a right to take part in fishing and will benefit from the increased basic quotas when the structural quotas lapse. This makes the interference more in the nature of government regulation, which implies that the assessment of whether there is a violation must be made on the basis of the control rule. I find support for this in the ECtHR's judgment of 12 June 2012 Lindheim and others v. Norway paragraphs 75-78 and the ECtHR's dismissal decision of 30 April 2013 Lohuis and others v. the Netherlands paragraphs 47-61.

(147) The control rule requires that there be a legal basis for the interference, and that it be in accordance with the general interest of the community. In light of what I have said about the amendment to the Regulation and the underlying considerations, I find that there is no doubt that these conditions were fulfilled. The crucial question is whether the change from non-time-limited to time-limited allocation – which is a control measure in the sense of ECHR P1-1 – satisfies the requirement of proportionality. In the ECtHR's judgment of 23 September 1982 Sporrong and Lönnroth v. Sweden paragraph 69 this is formulated such that "the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights". The formulation is repeated in a number of subsequent judgments.

(148) The question is thus whether the amendment that was made by means of the 2007 Regulation has inflicted a disproportionate burden on Volstad.

(149) I will refer by way of introduction to the factors of which an account has been given under the constitutionality assessment. They apply with full force also in connection with the assessment of proportionality pursuant to ECHR P 1-1. I wish additionally to add:

(150) I have concluded that Volstad has a position that gives the company a justified expectation that structural quotas will be treated in the same way as the basic quota. This expectation was shattered by the 2007 Regulation, in that the shipping company will have to surrender its structural quotas after the 2032 season.

(151) The question of how hard this will affect Volstad is pivotal to the proportionality assessment. However, as I have shown, the loss incurred by the shipping company will already very largely be compensated for by the depreciation due to the fact that the structural quotas are time-limited. It cannot be argued that the economic loss according to a relative assessment is particularly great. It must be borne in mind that in assessing the loss, it is the situation before and after the regulatory amendment that must be compared.

(152) Of particular importance is the fact that Volstad, and the others that structured under the 2005 regulation, have been able to retain their structural quotas for the past five years, after other shipping companies have gradually had to surrender theirs during this period. As mentioned previously, this special transitional arrangement is intended as compensation for the interference. With regard to the significance for the proportionality assessment of the fact that a special transitional arrangement or compensation is given, I refer for example to the ECtHR's judgment of 18 February 1991 Fredin v. Sweden paragraph 54 and indirectly to paragraphs 128 to 135 of the Lindheim judgment.

(153) In its decision of 29 November 1991 in the case Pine Valley Developments Ltd and others v. Ireland, paragraph 59, the ECtHR maintains that the fact that the applicants" were engaged on a commercial venture which, by its very nature, involved an element of risk" was also a factor. The fact that one is engaged in an area that involves risk implies that one must be prepared for developments not to be as expected, and that one cannot have the same secure expectations of one's position as someone who bases his expectations on a position without risk. As I mentioned, Volstad is engaged in an activity with a number of unknowns and, accordingly, a high level of risk. It is difficult, not least, to predict what framework conditions will apply in the longer term. The shipping company must be expected to have allowed for risk in its operations, and the interference accordingly becomes less onerous. The decision in the Pine Valley Developments Ltd case shows that this is a relevant factor in the proportionality assessment.

(154) Along the same lines, the ECtHR stressed that the applicant must understand that there was a good possibility that it would not be possible to implement the plan, partly because of political opposition to the measure; cf. paragraph 59. In my view, weight must also be attached to this factor in our case. I refer to my account of the clear political disagreement regarding the introduction of non-time-limited structural quotas prior to the 2005 Regulation. This created uncertainty about the duration of the structural quotas, which is liable to weaken their protection.

(155) Volstad has referred to three judgments in which the ECtHR placed great emphasis on the retroactive nature of the interferences; see judgment 20 November 1995 Pressos Compania Naviera S.A. and others v. Belgium, judgment 6 October 2005 Draon v. France and judgment 8 November 2005 Kechko v. Ukraine. The first two judgments concerned statutory amendments that reduced the liability for compensation compared with previous law, and which had been brought to bear for actions triggering compensatory damages prior to the entry into force of the law. The last judgment concerned a statutory amendment that reduced the State's obligation to pay teachers for work already

carried out. The legal effects of the law were in all three cases directly linked to actions that had been completed prior to the entry into force of the law, and the effects commenced immediately and inevitably. These were thus typical cases of actual retroactivity where the norm, also pursuant to Article 97 of the Constitution, is stringent. I refer to my previous account. As mentioned, we are dealing in the present case with interference of a different nature. I can therefore not see that the aforementioned judgments provide any particular guidelines for our case.

(156) Finally, Volstad referred to ECtHR judgment 14 May 2013 N.K.M. v Hungary, which states in paragraph 75 that "those who act in good faith on the basis of law should not be frustrated in their statute-based expectations without specific and compelling reasons.. Therefore the measure cannot be held reasonably proportionate to the aim sought to be realised". The fact that the word "compelling" is used here must be viewed in conjunction with the nature of the case. Under new taxation rules for a certain group of public servants, a surtax of 98 per cent was imposed on statutory severance pay, the amount of which was dependent on years of service. This gave the applicant an overall tax rate of 52 per cent, which was more than three times as high as the ordinary tax rate. It was pointed out that the tax was substantially higher than that applying when the right was earned, paragraph 74, and that the statutory amendment came at a time when the applicant had no opportunity to prepare for the situation, paragraph 70, and that it applied to a performance "serving the special social interest of reintegration", paragraph 75. Thus I also fail to see that this judgment has a bearing on the requirements made of proportionality in a case like ours.

(157) With regard to the considerations underlying the time limitation and the grounds for also making the time limitation applicable to those who structured under the 2005 Regulation, I refer to my account under the constitutionality assessment.

(158) The emphasis on page 113 of the Structure Report on the effect a general time limit has on the community's means of control with respect to fishery policy objectives refers firstly to the future possibility of a distribution of fisheries resources in line with fisheries policy. As I have shown, the interests of settlement and industrial development along the coast are key objectives of the fisheries legislation. Reference is therefore also made to the importance of fisheries policy for general regional and settlement development.

(159) It is a question here of the considerations that are generally regarded as of major societal importance, and to which considerable weight must therefore be attached in the proportionality assessment.

(160) I refer also to page 114 of the White Paper on Structure, where the government summarises the considerations underlying its conclusion that time limits must also apply to those that structured under the 2005 Regulation.

(161) On the basis of an overall assessment, I have concluded that the interference fulfils the requirement of proportionality pursuant to ECHR P1-1. I would add that the fact that the financial loss suffered by Volstad is not a very substantial one, and that the compensation implicit in a five-year longer allocation of structural quotas for those who structured under the 2005 regulation than for the others, implies that the result must be the same if the evaluation is made on the basis of the deprivation rule.

(162) I vote for the following

JUDGMENT :

The Court finds in favour of the Norwegian Government represented by the Ministry of Fisheries and Coastal Affairs.

(163) Justice **Normann:** I have concluded that the appeal has not succeeded.

(164) Like the first-voting judge, I take as my starting point that what Volstad AS requires constitutional protection for, is to be able to retain two structural quotas as long as quotas are allocated according to quota factors. The shipping company has not contested before the Supreme Court the State's freedom to stipulate annually the total allowable catch on the basis of available resources. Nor does it contest the right - within certain limits – to distribute this quantity among different groups of vessels, prohibit fishing of particular varieties of fish, introduce a distribution system other than the use of quotas or include new vessels in the cod trawl group.

(165) I will consider first *whether in connection with the structuring in 2005, Volstad AS attained a legal position that by its nature may be protected by Article 97 of the Constitution*.

(166) I agree with the first-voting judge that the shipping company has achieved a legal position which by its nature may be protected by the Constitution, but I base this on a broader assessment. I do not agree with him that the annual allocation of vessel quotas in accordance with the established quota factors is purely a reflection of a political desire for stable framework conditions.

(167) In the Structural Quota Regulation, section 7 first paragraph first sentence, it does state that structural quotas are "allocated for one year at a time". However, it also follows from the provision that the verification of whether the conditions are met shall be done in connection with the first allocation, and that later allocations shall in principle take place without repeated verification; cf.

section 7 second and third sentences, as the provision read in 2005. Today this emerges from the second paragraph of the provision.

(168) The starting point in section 7 on allocation of structural quotas for one year at a time must be interpreted in the light of the fact that the authorities stipulate the total allowable catch per year on the basis of available resources. The number of tonnes per quota is stipulated in the regulatory regulation for the year in question. The individual vessel's quota for the year is found from the regulation in question in combination with the quota factor specified in the original individual decision; cf. for example Regulation no. 1752 of 21 December 2007 on regulation of fishing for cod, haddock and saithe north of 62 degrees north in 2008. Thus, under the regulatory system, the quota factor remains fixed from year to year.

(169) Other factors also militate against annual regulation of the structural quota factor as such. For example, in a consultation paper of 26 November 2004 on a structural quota system for the deep-sea fishing fleet, it is stressed on page 22 that one feature of the fisheries industry is that many of the participants have a long-term perspective on operations; a perspective that extends over several generations. The Ministry assumes that this has independent significance over and above the interest that an investment should be profitable in business terms. Particularly in view of the industry's "need for long-term security", the Ministry concludes on page 23 that it would not be sufficient to extend the period of the unit quota system - the time limitation must be removed. In my view, this strong emphasis on the need for security indicates that it could not have been intended that it should be up to the authorities whether structural quotas should form the basis for distribution in the individual year. The irrevocable and extensive sacrifices the shipping companies had to make in order to be allocated structural quotas point the same way.

(170) Section 5 of the Order in Council of 4 March 2005 states that the distribution of the resources must remain unchanged in order to take account of the interests of stability and the trust that are necessary in order to carry out the structuring. Report no. 21 (2006–2007) to the Storting on structural policy for the fishing fleet – The White Paper on Structure 2007 – also states on page 15 that the distribution of quotas among vessels within a group must "be immutable". The same view forms the basis for the statement from the Legal Department on 22 September 2006. This latter also states that the rules for the annual distribution can most naturally be perceived as a description of a "practical approach to calculating structural quotas over time" as the annual quotas "must inevitably" vary.

(171) As stated on page 13 of the Structure White Paper, the structural quota system is "basically" simple: Someone who owns two vessels can "on certain terms, combine the quotas for each vessel and then fish both quotas using just one vessel". A structural quota is thus in reality one vessel's basic quota to which is added *another* vessel's basic quota. There is no legal regulation of basic quotas corresponding to that for structural quotas, but it is clear that basic quotas are not time-limited; cf. page 92 of the 2007 Structure White Paper.

(172) An administrative practice of long duration additionally shows that allocation of quota factors takes place once. The basic quotas were allocated in the 1990s and have remained unchanged; cf. Official Norwegian Report NOU 2008: 5 p. 220 (on the right to fish in the ocean off Finnmark county - translator's clarification.) The first-voting judge has singled out some statements in official documents as support for the claim that any expectations regarding allocation of quotas can only be based on policy constraints. Special reference is made to the presentation of the Order in Council laying down the 2005 Regulation. My understanding of what is said about "distribution keys for quota distribution within a group" can be changed, is that this refers to a restructuring of the whole system, including the basic quotas. I cannot see that any particular weight can be attached to these statements.

(173) Report no. 58 (1991–92) – the 1992 Structure White Paper – states that when a licence is granted to fish with a particular vessel, "an expectation is created that can form the basis for a claim for compensation under Article [97] and Article 105 of the Constitution". Thus the fishers' expectation of a continued right to fish is based, according to the authorities themselves, not exclusively on a political basis - it also has a certain legal basis. I assume that this is the reason why the different types of time-limitation of quotas have generally been included in the individual regulation serving as a legal basis. Moreover, if the fishery authorities should be free not to use the structural quotas as the basis for the annual allocation, I have difficulty in seeing a need to time-limit the system.

(174) I accordingly do not agree with the State that the only thing that is allocated once and for all is an approval of the applicant's fulfilment of the basic conditions for annual allocation of structural quota factors. In my view, we have to do with a decision regarding a distribution key that remains unchanged from year to year.

(175) However, legal positions that are based on government licences are not automatically protected by Article 97 of the Constitution against new legislation. Whether or not a right is protected depends on the nature of the right, its content and foundation; cf. the plenary decision in the Borthen case in Rt. 1996 page 1415 on page 1424. And even if a right is protected by its nature, this does not necessarily mean that the interference is unconstitutional. This depends on a more detailed evaluation - a point to which I shall return.

(176) Rights to fishing quotas are subject to sale, together with the vessel, and when such quota rights are sold, substantial amounts are paid. This suggests that such rights should have constitutional protection.

(177) The State has argued that constitutional protection for quota factors is inconsistent with marine resources belonging to society as a whole; cf. section 2 of the Marine Resources Act. The content of this legal principle is not clear, however, and has not been regarded as an obstacle to the reserving of participation in some parts of fisheries for those who already have a special association with the

fishery. In the Structure White Paper of 2007, the Government stresses on page 14 that the introduction and use of such individual permits has served as a means of safeguarding communal rights and exercising communal responsibility, and that there is no "conflict between the use of individual permits and communal ownership of the fish resources".

(178) A key factor in this connection is that it is *not* a question of giving a specific group *ownership* of the fish resources in the sense that they have a lasting right to be allowed to fish particular quotas irrespective of which fishing licence system applies. It is merely a matter of protecting a distribution key within the group of fishers in question as long as allocation of fishing rights takes place on the basis of the current quota system.

(179) The State has applied different measures over the years to reduce the overcapacity of the fishing fleet by reducing the number of vessels. The structural quota scheme is both an instrument for increasing efficiency and a means of reducing capacity at the same time. It replaced earlier unit quota schemes, and in Proposition no. 76 (2001–2002) to the Odelsting, page 2, the unit quota systems in the deep-sea fishing fleet are described as in reality "privately financed structural and condemnation schemes". In other words, the reason for the introduction of structural quotas was to get the industry into a system that the authorities believed benefited both society and the industry itself.

(180) The earlier unit quota system, where the quotas were made time-limited, was not attractive enough for a sufficient number of shipping companies to want to use it. The Structural Quota Regulation of 2005 was adopted after close contact between the authorities and the industry. The purpose was precisely to introduce a system with broad support from the shipping companies. This was necessary to ensure that the system would have the desired effect. The industry reached agreement on a compromise that had essentially the same content and was then laid down in the Structural Quota Regulation of 4 May 2005.

(181) Structuring was admittedly voluntary, but this does not alter the fact that the terms were laid down by the authorities in order to promote a system in the best interests of the community and the industry as a whole. The aspect of reciprocity gave Volstad AS a strong expectation, meritin0067 protection, that the system would not be changed.

(182) Against this background, I find it clear that given the structural quota factor that Volstad AS was allocated, a position was established that by its nature may be protected by Article 97 of the Constitution.

(183) The first-voting judge assumes that the amendment regulation has retroactive effect. I agree with this.

(184) Article 97 of the Constitution focuses only on *detrimental* retroactivity. My view is that the point of departure must be an individual evaluation of the direct detrimental effects that Volstad AS incurred as a result of the amendment; cf. the plenary judgment on *Arves Trafikkskole* in Rt. 2006 page 293 sections 50, 53 and 54, and on shipowners' tax in Rt. 2010 page 143, sections 130-136. Other and more indirect consequences of the regulatory amendment may be of importance, but they are primarily included in the broader assessment of whether the retroactivity is unconstitutional; cf. the judgment on *Arves Trafikkskole*, section 55. In this case, the indirect effects of the regulatory amendment apply particularly to the depreciation rules that are applicable as a result of the fact that the structural quotas were made time-limited. I will return to the significance of this point.

(185) I find it clear that the introduction of time-limitation has negative economic consequences for Volstad AS, even though it is difficult to quantify them exactly. The holder of non-time-limited rights will be in a better position than if the rights were time-limited. There can be no doubt that Volstad AS is very likely to have a reduced income base in the future compared with the situation if the shipping company had been allowed to retain non-time-limited structural quotas.

(186) The first-voting judge concludes that it cannot be assumed that the shipping company's loss is a very large one. He bases this conclusion on, *inter alia*, "the clearly expressed assumption [on page 103 of the 2007 Structure White Paper] that on the expiry of the time limitation, the structural quotas are to be distributed among the participants in the group"; cf. section 112. If this happens, the value of Voldstad AS's residual quota factor will increase in 2033. But whether such a distribution will take place on the termination of time-limited quota factors in 2033 is highly uncertain. The State has given no legal guarantee for this. In such a situation, Volstad AS will also be in a worse position than if the company had elected not to structure and had retained three basic quota factors. I therefore cannot see that this assumption is of particular importance.

(187) It must also be clear that the value of a vessel with structural quotas that are not time- limited is greater than when the structural quotas are time-limited. The Government itself held in 2007 that a "predetermined time limit in the structural quota system appears likely to reduce the selling prices of vessels for continued operation"; cf. page 101 of the 2007 White Paper. When structural quotas were made time-limited, they could be subject to depreciation. The fact that reference was made to this in the 2007 White Paper is an acknowledgement on the part of the authorities that a fall in value occurs.

(188) My conclusion is that the retroactivity is to the detriment of Volstad AS.

(189) I shall now consider *whether this retroactivity is affected by Article 97 of the Constitution*. Against the background of the first-voting judge's line of reasoning, I will first say something about the constitutional norm itself. I will then consider how strong the retroactivity factor is, before examining in more detail the considerations in the proportionality assessment.

(190) The Supreme Court has expressed in a number of plenary judgments that in the event of interference in economic rights a factor-based balancing of interests must be made, with proportionality assessments at the centre; cf. the plenary judgment on shipowners' tax in Rt. 2010 page 143 section 150. One important question will then be how strong the retroactivity factor is; see judgment section 153.

(191) The first-voting judge builds his discussion of the constitutional norm largely on the distinction between actual and apparent retroactivity. This distinction may well be appropriate as a pedagogical instrument, but my view is that in today's legal situation it is not crucial to the choice of constitutional norm. Neither in the plenary judgment in the *Arves Trafikkskole* case in Rt. 2006 page 293 nor in the plenary judgment in the shipowners' tax case in Rt. 2010 page 143 is the distinction used by the majority, and the distinction has been criticised in legal theory; cf. *inter alia* Moltumyr Høgberg, *Ban on retroactive laws* [Norwegian text] (2010) pages 270-275 with further references and in *Tidsskrift for Rettsvitenskap* (TfR – periodical on Nordic jurisprudence) 2010 page 694 ff. on page 712.

(192) The first-voting judge regards these two judgments as examples of actual retroactivity. I do not agree with this classification. As the judgments make clear, they concerned apparent retroactivity - but with definite similarities to actual retroactivity. In the case of *Arves Trafikkskole*, the right to charge incoming value-added tax as a deduction was lost - the driving school was thus deprived of a financial right; see section 70 of the judgment. But the Supreme Court placed great emphasis on the fact that *the effect* of the statutory amendment was to impose new financial burdens on an earlier action. In the shipowners' tax case, no new and stricter material tax law rules had been introduced, as the first-voting judge in our case appears to be indicating. On the other hand, the date when already incurred tax obligations fell due was brought forward, and it was no longer up to the shipping companies to decide when the tax should be paid. It is clear from section 153 of the judgment that the majority did not believe that this was a case where the law directly linked onerous legal effects to old actions, but an intermediate form. It states here:

> **"…. If the law directly links onerous legal effects to older events, the law is as a general rule in violation of the Constitution. If, on the other hand, the act only issues rules for how an established legal position shall be exercised in the future, the general rule is the opposite. There are two transitional forms between these extremes. In our case, we are dealing with one such transitional form. …"**

(193) Both the *Arves Trafikkskole* judgment and the shipowners' tax judgment show that there is a gradual transition between actual and apparent retroactivity. This underscores that the distinction is not appropriate as a criterion for choice of constitutional norm.

(194) The retroactive effect in the case now to be decided by the Supreme Court does not link onerous legal effects directly to older events. But the 2007 regulation altered the fundamental assumptions

for the dispositions Volstad AS made with final effect when the shipping company applied for structural quotas; cf. plenary judgment on the shipowners' tax case, sections 162–164.

(195) Volstad AS made extensive and irrevocable sacrifices in the form of condemning boats and surrendering fishing quotas as conditions for being allocated structural quotas. If Volstad AS had chosen not to structure, on the lapse of the structural quota system in 2033 the shipping company would still have retained the two basic quotas and quotas for saithe and Greenland halibut which had to be given up as part of the structuring.

(196) The shipping company had justified expectations – over and above what is usual with government licences – that the structural quota factors would in exchange not be time-limited. The system came into being after close cooperation with the industry, and the Structural Quota Regulation has essentially the same content as the compromise arrived at by the industry after internal deliberations – a compromise it was strongly urged to reach by the Ministry's policy department.

(197) Crucial in this respect is that the purpose of the authorities was precisely to get the fishing boat owners to act as Volstad AS did; cf. section 162 of the plenary judgement in the shipowners' tax case. In order for the structural quota system to have the desired effect, a sufficient number of fishing boat owners had to structure. The time limitation was revoked because the earlier unit quota system had not been effective enough; cf. the Ministry of Fisheries and Coastal Affairs' consultation document of 26 November 2004, page 23. Many shipping companies would simply not have gone in for the system if it had been time-limited. The revoking of the time limitation was accordingly at the very heart of the authorities' stimulation package.

(198) This is moreover an area where the need for predictability is particularly strong; cf. section 71 of the plenary judgment on *Arves Trafikkskole*. Fishing participation requires substantial investments, and on page 14 of the 2007 Structure Report other factors are also stressed that underscore the importance of predictability in the industry:

> **"There is a certain risk and uncertainty associated with all commercial activity. However, few industries live with greater uncertainty than the fisheries. In addition to the ordinary business risk, investment in fisheries is also characterised by uncertainty regarding future stock developments, the availability of the fish, environmental factors and risk of damage and injuries. This type of risk reduces predictability in this industry. It is therefore important that the framework conditions laid down by the authorities are predictable and stable."**

(199) As mentioned, it is difficult to calculate the exact financial effects for Volstad AS of the structural quota system being made time-limited. The conclusion of the first-voting judge is that the loss is not particularly extensive.

(200) In my view, the size of the shipping company's loss is not crucial. In the plenary judgment on the *Arves Trafikkskole* case in Rt. 2006, page 293, the driving school incurred a loss of NOK 40 000; cf. section 53 of the judgment. And section 76 states that the loss "[must] be of limited significance nonetheless in the constitutionality assessment". I make a similar assumption the basis for my assessment.

(201) In accordance with the authorities' own assessment in connection with the amendment regulation in 2007, I find that the shipping company has been harmed both through a reduction in the net present value of the vessel F/T Volstad with associated structural quotas, and through the fact that the company will have a reduced income basis in the future compared with the situation if the shipping company had been able to retain the structural quota without a time limit.

(202) The first-voting judge bases his assessment of the loss that the regulatory amendment means for Volstad AS on the net present value of the income loss from 2033. Since this has no bearing on my view of the case, I will not consider in more detail whether this approach is correct.

(203) The State has argued that weight must be attached to the advantages Volstad AS and others in a similar situation have enjoyed as a result of the time limitation, and stresses in particular that the time limit implies a tax benefit in the form of the right to annual linear depreciation of the value of the structural quotas over a 25-year period.

(204) I agree that the more indirect effects resulting from the retroactive provision, and that are strongly attributable to it, can also be taken into account; cf. Rt. 2006 page 293 *Arves Trafikkskole* section 54. In our case, the right to write-offs is not a part of the amendment Regulation, but a consequence of the fact that the structural quotas have been made time-limited. With the introduction of the time limitation, the right to write-offs was made a prerequisite; cf. page 103 of the 2007 White Paper.

(205) In this case, no particular importance can be attached to the possibility of write-offs, however. Even if the industry is considered as a whole, it will vary as to whether a shipping company has a taxable surplus that enables it to benefit from the depreciation rules. In my view, the conclusion of the secretariat of the Norwegian Fishing Vessel Owners' Association, which is quoted by the first-voting judge, cannot be taken as meaning that the secretariat is of the view that all parties in the industry will benefit financially from the depreciation rules. The secretariat's conclusion is that the association should continue to argue for the re-introduction of a non-time-limited system in order to ensure predictability.

(206) Volstad AS is a subsidiary of the Volstad Shipping AS group, which has suffered some quite heavy losses for a number of years. The group has therefore not been in a tax-paying position since 2007.

According to what we are told, the total depreciation of quotas belonging to Volstad AS at 31 December 2011 amounted to NOK 9.7 million. The depreciation has nevertheless been of limited practical importance to this company, because it would have paid considerable group contributions to the parent company irrespective of this right. This information is not contested by the State, and the Supreme Court must therefore take it into account.

(207) In the view of the first-voting judge, the group contributions must be disregarded, because it is the tax-paying position of Volstad AS – and not the group – that is to be assessed. As I see it, it is Volstad AS's tax-paying position that is being assessed, even if account is taken of the group contributions. 'Group contributions' is understood to mean a real transfer of assets from one group company to another. Thus it is not merely a matter of an accounting entry for tax purposes. In my view, the possibilities for tax adjustment available within the group must be taken into account, and tax savings only amount to 28 per cent of the amount written off, under any circumstances.

(208) Weight must also be attached to the fact that retroactivity may have different effects on vessels in one and the same group. Only vessels that have structured lose parts of their quota factors. Conversely, vessels that have not structured may have their quota basis increased, even though they have not made any sacrifices with final effect. This differential treatment appears unfounded.

(209) The first-voting judge argues that it would have an unreasonable impact on those that structured pursuant to the 2007 Regulation – and that will have lost their quotas after 20 years – if those that structured pursuant to the 2005 regulation should nevertheless be allowed to retain their structural quotas without a time limitation. Those who structured pursuant to the 2007 regulation knew that the structural quotas were subject to a time limitation, however. And as I have already mentioned, they had no legal guarantee that the structural quotas would be transferred back to the group in the form of increased basic quotas. This group accordingly had a weaker legal foundation for their expectations than the group that structured pursuant to the 2005 regulation.

(210) The State has referred to the fact that Volstad AS's structural quotas do not lapse until 2033 and has argued that considerable weight must be attached to the long time perspective.

(211) I agree that as a general principle weight should be attached to this factor. However, it is a different matter when the authorities' stimulation package was precisely to allocate quotas without time limitations, because the time-limited system had not had sufficient effect.

(212) The State has referred, moreover, to the fact that we are in a strictly regulated area where there is a need for extensive control possibilities, and that these are tied up for a long time ahead if the time limitation is revoked.

(213) The authorities' need for freedom of manoeuvre is naturally of general importance. But as I pointed out earlier, the authorities will have the key instruments at their disposal under any circumstances. What Volstad AS is demanding, is that the company's quota factor be maintained as long as the quota system exists. This does not affect the right to change other aspects of the system. Nor does the Constitution preclude the revoking of the right to structural quota factors, but this can only take place within the framework laid down by Article 97.

(214) The State has also argued that – because of the control possibilities that the authorities have at their disposal regardless – there is so little predictability in this area that the legal position is very uncertain under any circumstances. As I see it, however, this uncertainty makes it even more important for Volstad AS to attain precisely the predictability that the non-time-limited structural quota system should secure the company.

(215) In my view, the fact that there was lack of political consensus on the question of revoking the time limitation, and that the industry was aware of this, does not place the case in a different perspective. The shipping company had a strong and justified expectation that changes in the established order with retroactive effect would not be made after a short period of time solely because of a different political viewpoint. This is precisely the kind of position Article 97 of the Constitution is intended to protect.

(216) The first-voting judge refers in various connections to Rt. 2006 page 262 on spouse's pension for divorced spouses, which in his view has a number of similarities to our case. In my view, it is a different situation altogether. It was a matter of a derived legal position, where there was great uncertainty associated with the question of if and when the right would take effect. I find no reason to go into this in more detail.

(217) On the basis of an overall consideration, I have concluded that the retroactivity factor in this case is so strong that it is natural to compare it with the plenary judgments on *Arves Trafikkskole* in Rt. 2006 page 293, and on shipowners' tax in Rt. 2010 page 143. This implies that there must be strong societal considerations before the structural quota factors allocated to Volstad AS in 2005 can be made time-limited. How strong the societal considerations need to be in order to create the necessary preponderance of interests normally depends on the impact of the retroactivity in question. In my view, the retroactivity in our case is somewhat weaker than in the two aforementioned plenary cases. As a result, it requires less in terms of well-founded societal considerations for it to be regarded as constitutional.

(218) The question is then whether the societal considerations are sufficiently strong in the present case.

(219) I take as my starting point the considerations the Government itself made the basis for the introduction of the time limitation in 2007. Page 114 of the 2007 White Paper states that the change from structural quotas without time limitation to time-limited structural quotas was regarded as important for fisheries management as a whole and was of "substantial importance with respect to fisheries, industrial and regional policy." On page 113 of the 2007 White Paper it is also concluded that the "best solution" would be for the time limitation also to apply to structural quotas that were originally allocated without a time limitation. Detailed reasoning for this latter conclusion is presented on pages 112-114 of the White Paper. In my view, it is the specifics of what is said there that are of interest to the constitutionality issue. The objectives that have been singled out by the Government are:

- The objective of not creating an A team and a B team in the fishing fleet
- The objective of maintaining spread and equality in ownership
- The objective of marking fisheries resources as communal property
- The objective that the community's control possibilities will be improved if the whole quota basis is subject to the same overarching framework conditions.
- The objective that a time limitation may have the effect of dampening prices when vessels are sold for continued operation.
- The objective of ensuring that the fleet continues to be fisher-owned as a result of the price-dampening effect.

(220) I find no reason to consider whether the courts can review these objectives, because the question is not a key one in this case. As I will now show, the Government itself has indicated that the considerations that dictate retroactivity are of limited weight.

(221) The weight of the argument of avoiding an A team and a B team in the fishing fleet is evaluated as follows on pages 112-113:

> **"It has .... been argued that if a predetermined time limit is introduced for new allocations of structural quotas, without making this applicable also to those who had already acquired structural quotas for the first time during the 2003-2005 rules, this will create an A team and a B team in the fishing fleet. In assessing the weight of this argument, however, it must be taken into account that a number of decisions through the years have actually resulted in vessels that appear identical externally, now having different quotas."**

(222) Pages 109 and 112 explain that the geographical effect of introducing a predetermined time limit for already allocated structural quotas will be "very limited", and that the change will lead to small changes in the distribution between industry-owned and fisher-owned cod trawlers.

(223) As regards the objective of avoiding increased ownership concentration, rules on ownership concentration in the deep-sea fishing fleet were issued by Regulation no. 1157 of 13 October 2006. The general rule is that an owner may not hold cod trawler licences for more vessels than the number of vessels that together would be allocated nine quota factors; cf. section 2-4 of the regulation. This corresponds to around 10 per cent of the total number of vessels in the group.

(224) Page 92 reads that "the significance a predetermined time limit for the structural quota might have as a means of marking fishery resources as communal property, is...limited".

(225) It is assumed on page 113 that a predetermined time limit, also for already allocated structural quotas, may have the effect of dampening prices when the vessels are sold for continued operation. And in line with this that "such dampened prices would ... also be favourable for ensuring that the fleet continued to be owned by fishers", and that this would also "make it easier to recruit new vessel-owners among the fishers." On the other hand, page111 indicates that the redistribution between industry-owned and fisher-owned cod trawlers – which is the group of vessels the case concerns – will be modest, to the disadvantage of the former group.

(226) From this review, I cannot see that the Government has believed that there are strong societal interests here.

(227) As I see it, this is crucial to the question of what weight should be attached to the Storting's view of the constitutionality issue. Page 26 of Recommendation no. 238 to the Storting (2006-2007) makes it clear that the majority of the Standing Committee on Business and Industry merely endorsed the Government's assessment of whether the retroactivity was unconstitutional. As my review of the 2007 White Paper will have demonstrated, the Government has indicated that the considerations pointing to retroactivity are of limited weight.

(228) I accordingly conclude that the introduction of predetermined time limits for structural quotas allocated to Volstad AS prior to the regulatory amendment of 8 June 2007 is in conflict with the retroactivity prohibition in Article 97 of the Constitution, and as such is invalid.

(229) The factors in my examination of the constitutionality aspect will also occupy a central place in a consideration of the relationship with ECHR P1-1. Given my conclusion of unconstitutionality, however, it is not necessary to decide whether there is also a breach of the ECHR.

(230) I accordingly vote to quash the appeal and for Volstad AS in accordance with the general rule in section 20-2 of the Disputes Act to be awarded legal costs before the Supreme Court.

(231) Justice **Skoghøy**: I have arrived at the same result as the second-voting judge, Justice Normann, and in all essentials support the reasons she has given.

(232) An established interpretation of Article 97 of the Constitution is that it not only prohibits the linking of new penalties to earlier offences or events, but also provides protection against disproportionate interference or burdensome interference in established legal positions. The protection provided by Article 97 of the Constitution against interference in established economic legal positions is largely consistent with the protection pursuant to ECHR Protocol 1 Article 1, and in my view the time limitation introduced by means of the regulatory amendment in 2007 on the right to allocate structural quotas to vessels that prior to the regulatory amendment had been allocated structural quotas, is also a breach of this provision. Although it is not necessary, given my view of Article 97 of the Constitution, to consider whether there is a breach of ECHR Protocol 1 Article 1, I find it desirable also to adopt a stance on this.

(233) According to the ECtHR's practice, Protocol 1 Article 1 protects not only existing rights to possessions, but also legitimate expectations of obtaining rights to property; see Stig H. Solheim, *Eiendomsbegrepet i Den europeiske menneskerettskonvensjon* [The concept of ownership in the European Convention on Human Rights], 2010, page 218 ff. and Jon Fridrik Kjølbro, *Den Europæiske Menneskerettighedskonvention – for praktikere* [The European Convention on Human Rights – for practitioners], 3rd edition 2010, pages 928 ff. Both the question of whether there is an existing possession, and whether there is a legitimate expectation, must be decided on the basis of national law.

(234) There is no doubt that licences for commercial activities, fishing licences and allocated fishing quotas must be regarded as existing rights to property. Fishing quotas are allocated for one year at a time, and quota factors are used as a basis for the allocation of quotas within each group of vessels; see Regulation no. 193 of 4 March 2005 on the structural quota system etc. for the deep-sea fishing fleet (the Structure Regulation of 2005) section 7; cf. section 3, subsection 2. This also follows from a consistent administrative practice. When quota rights are transferred in connection with vessel structuring, the increase in the quota factor of the individual vessel is fixed the first time structural quotas are allocated. In our case, it is a question of whether the increased quota factor Volstad AS was allocated in connection with the structuring in 2005 is protected by Protocol 1 Article 1.

(235) When structuring is carried out, the quota factors of the individual vessels are registered with the Directorate of Fisheries. Since the annual quotas are allocated on the basis of the registered quota factors, the quota factors provide a basis in all cases for legitimate expectations of obtaining rights to

property. However, as rights to quota factors are subject to sale along with the vessels, and the market is willing to pay substantial amounts for these rights, registered quota factors should in my opinion be regarded as existing rights to property. As the first-voting judge explained, the quota factor for F/T Volstad in connection with the structuring in 2005 increased from 10 to 3, and in Volstad AS's accounts the value of this increased quota factor was entered as NOK 61 million. The substantial amounts that are paid for quota factors are a result of the function that the quota factors have pursuant to the Structural Quota Regulation and consistent administrative practice in connection with the allocation of the annual fishing quotas, and the market value of the quota factors indicates strongly that they should be regarded as existing rights to property.

(236) The treatment for tax purposes of quota factors points the same way. According to established practice, quota rights shall be treated in connection with tax assessment as intangible fixed assets; see the *Lignings-ABC* 2012, pages 533-534 Non-time-limited quota rights can only be depreciated if the loss in value is apparent; see section 6-10 subsection 3 first sentence of the Norwegian Tax Act. Quota rights that are time-limited can be written off over the life of the right in equal annual amounts; see section 6-10, subsection 3 second sentence of the Tax Act; cf. section 14-50. The treatment for tax purposes of quota factors shows how the authorities perceive the function of the quota factors in connection with the allocation of fishing quotas, and supports the fact that quota factors must be viewed pursuant to Norwegian law as existing rights to property.

(237) Since rights to quota factors under any circumstances give rise to a strong and well-founded expectation of being allocated fishing quotas, there is no doubt that the factor increase Volstad AS gained in connection with the structuring in 2005 is protected by Protocol 1 Article 1.

(238) When F/T Volstad's quota factor was increased from 1 to 3 in 2005, there was no time limitation for the factor increase. The regulatory amendment in 2007 placed a time limitation of 25 years on the factor increase, starting in 2008. Making non-time-limited quota factors time-limited is a clear infringement of the rights to possessions or expectations associated with the quota factors. For such infringement to be consistent with Protocol 1 Article 1, the interference must be founded in legitimate interests and satisfy the requirements Protocol 1 Article 1 makes with respect to proportionality.

(239) Both the first- and the second-voting judges have given an account of the considerations invoked by the Government in connection with the regulatory amendment in 2007 as a basis for placing a time limit on structural quotas and giving the time limitation retroactive effect. There is no doubt that these considerations are legitimate, and this is not contested by Volstad AS. The question is therefore whether these considerations are sufficiently weighty to justify infringement of Volstad AS's rights to property.

(240) Protocol 1 Article 1 distinguishes between deprivation of and regulatory interference with rights to property, and according to the ECtHR's practice, more is required to justify deprivation of rights

than regulatory interference. In recent practice, however, the ECtHR has had a more nuanced approach. If it is a question of regulatory interference, the effects of which are close to deprivation, the classification will be of minor importance; cf. Solheim, op. cit. pages 74-75. This is consistent with recent Norwegian Supreme Court practice with respect to the protection Article 97 of the Constitution provides against interference in established legal positions. How weighty the societal interests are required to be in order for it to be possible to interfere in established legal positions depends on how strong the retroactivity factor is; cf. Rt. 2006 page 283 (*Arves Trafikkskole*) and Rt. 2010 page 143 (the shipowners' tax case). I refer to the second-voting judge's account of this.

(241) In the EHCR's judgment of 12 June 2012 in the case of Lindheim and others v. Norway, it was a question *inter alia* of whether conversion of time-limited ground lease agreements to non-time-limited should be judged according to the deprivation rule or the rule on regulatory interference (the control rule). The ECtHR concluded that the interference must be assessed according to the control rule. In my view, the introduction of time limitation on non-time-limited quota factors must be judged in the same manner. The facts that the increased quota factor lapses after 25 years, and that it was assumed according to the regulatory amendment of 2007 that the quota that thereby becomes available would be distributed among all those entitled to quotas, mean, however, that the interference also contains a definite element of deprivation, which must be taken into account in the proportionality assessment.

(242) In order for interference in a protected interest to be proportionate, the interference must be designed to and necessary for achieving the purpose of the interference. It is additionally required that in carrying out the interference, the authorities have struck a reasonable balance between the State's interests and the general interests of the citizens. If the interference appears as an encroachment or as disproportionately burdensome for the citizens, there is breach of Protocol 1 Article 1; see Kjølbro, op. cit. page 942 and Solheim, op. cit page 81 ff. with further references.

(243) As the second-voting judge has explained, the time-limitation that was introduced in 2007 on originally non-time-limited quota factors interferes with a mutually burdensome system. The increased quota factor acquired by those fishing boat owners who have structured according to the Structural Quota Regulation of 2005 is countered by the fact that they have had to condemn the vessel to which the quota factor was originally attached, and the shipping company has had to relinquish the fishing rights that were associated with it. For Volstad AS, it was a clear condition that the increased quota factor acquired by the company in connection with the structuring replaced the basic quotas for the condemned vessels. On the part of the authorities, the increased quota factor acquired by the shipping companies in connection with the structuring pursuant to the 2005 Regulation prior to the amendment in 2007 was deliberately made non-time-limited. By offering non-time-limited increases in quota factors, the authorities succeeded in speeding up a shipping company-financed reduction in the fishing fleet. In such a situation weighty societal grounds must be required for the State to be able to cancel the obligations it undertook in connection with the structuring system.

(244) I cannot see that any such grounds were invoked in this case. As the second-voting judge has explained, the societal benefits of placing a time limit on the originally non-time-limited structural quota factors appear fairly minor.

(245) As an argument for accepting the time limitation on originally non-time-limited quota factors, the first-voting judge has attached weight to the fact that the effect will not come into force before 2033, and that the size of the annual quotas depends on a number of uncertain factors.

(246) In my view, it is not correct that the effect will not come into force until 2033. The question of how long Volstad AS can count on keeping the allocated quota factor will determine how operations up to 2033 are planned, and this also has a bearing on the market value of the vessel and what it is possible to obtain by selling the quota rights. It is incontestable that in principle a non-time-limited right is worth more than a time-limited right.

(247) However, the first-voting judge is correct in that the size of future quotas depends on a number of uncertain factors. In my view, however, this cannot be a valid argument for the State not needing to keep its promise of non-time-limited quota factors. On the contrary, the fact that there are many uncertainty factors in the fisheries industry is an argument for not subjecting the fisheries industry to further uncertainty by changing the quota factors.

(248) As an argument for claiming that the effect of introducing time limitation is limited, the State has referred to the fact that the shipping companies were given the right in connection with the introduction of the time limit to write off the value of the quota factors for tax purposes. For shipping companies operating at a profit, the tax saving will amount to 28 per cent of the amount written off.

(249) I agree that the tax saving that fishing boat owners gain by being able to write off the value of quota rights is not merely a relevant factor in the proportionality assessment pursuant to Article 97 of the Constitution, but also in the proportionality assessment pursuant to ECHR Protocol 1 Article 1. Whether the shipping companies will make any tax saving depends on a number of factors, however. Among other things, it is dependent on the shipping company having a taxable profit. If the shipping company is part of a group, the possibilities for tax adjustment within the group must be taken into account, as the protection of property cannot be dependent on whether the business enterprise is organised as one or more companies. Under any circumstances, the tax saving only amounts to 28 per cent of the amount written off.

(250) Volstad AS has maintained emphatically that the depreciation options have been of no value to the company and the State has not contested this. This is a fact that the Supreme Court must take into account; see section 11-2, subsection 1, second sentence, of the Norwegian Disputes Act; cf. Section 11-1, subsection 3. As pointed out by the second-voting judge in her consideration of the

constitutionality aspect, no particular weight can therefore be attached in this case to the depreciation option.

(251) The State has also referred to the fact that pursuant to the fisheries legislation, it has power to allocate quotas to new vessels, and that the value of previously allocated quota factors can be reduced in this way. The fact that the State in principle has the power to do this is correct, but in a situation where there is overcapacity in the fleet, it is not really a relevant option.

(252) Nor, in my view, can weight be attached to the fact that the State can change the quota regulations in other ways. Amendments must take place within the general framework for official exercise of authority, and the fact that the State can change other aspects of the rules is no argument, regardless, for the State being able to make originally non-time-limited quota factors time-limited.

(253) The question of whether the interference has an element of differential treatment is also a factor in the proportionality assessment. In my view, the time limitation for previously allocated structural quota factors that was introduced through the regulatory amendment in 2007 is clearly such an element. Whereas those who chose to structure pursuant to the 2005 Regulation prior to the 2007 amendment will have their quota factors reduced after 2033, those who did not structure will still have their quota factors.

(254) It is clear that those who structured prior to the regulatory amendment in 2007 will not suffer compared with those who structured later. On the contrary, those who structured before the regulatory amendment will have quota factors that last five years longer. However, those who structured after the regulatory amendment have done so in the knowledge that the increased quota share was time-limited. They can therefore not be compared with those who structured before the regulatory amendment. The fact that structural quotas according to the 2005 system last five years longer than those allocated according to the 2007 system is therefore of minor interest For those who structured prior to the 2007 amendment, these five years can in no way be regarded as adequate compensation for their having to surrender the non-time-limitation.

(255) As I pointed out earlier, it is not possible to escape the fact that a non-time-limited right is in principle worth more than one that is time-limited. If one were to calculate the loss that Volstad AS has suffered as a result of the introduction of time limitation on the increased quota factor acquired by the company through the structuring in 2005, it is natural to take as a starting point the assumed purchase price of a corresponding non-time-limited quota factor in 2033. However, the loss is not limited to this. As long as the increased quota factor lapses in 2033, the operation of the vessel must be geared to this, and the market value of the vessel and quota rights will be substantially reduced during this period. On the other hand, account must be taken of the assumption in connection with the regulatory amendment in 2007 that quotas that became available on the termination of time-limited quota factors would be distributed among the other holders of quota factors within the group of vessels. If this is done, the value of the residual quota factor will increase in 2033. Whether such a

distribution will take place on the termination of time-limited quota factors is highly uncertain, however. The State has given no legally binding guarantee for this. As mentioned previously, when calculating Volstad AS's loss, no particular weight can be attached to the possibility of depreciating the value of time-limited quota factors, as this option – as the parties have agreed – has been of no value to the company.

(256) Since several of the elements involved in calculating the loss inflicted on Volstad AS are uncertain, it is difficult - as pointed out by the second-voting judge – to quantify it. Nor is it necessary for the deciding of the case. In the same way as in the proportionality assessment pursuant to Article 97 of the Constitution, the central aspect of the proportionality assessment pursuant to EHCR Protocol 1 Article 1 is that the offer of non-time-limited quota shares implicit in the Structural Quota Regulation of 2005 before the amendment in 2007, was aimed at encouraging structuring. Although there was political conflict about the 2005 Regulation, those who elected to structure pursuant to this regulation prior to the amendment in 2007, had to assume that any change would not take place with retroactive effect. Volstad AS was tempted by the offer of non-time-limited quotas and made irreversible sacrifices by condemning two vessels and surrendering the fishing rights associated with them. The State must be regarded as an entity – independent of changing governments. It is unacceptable that, after shipping companies have accepted the promises of the authorities, the State should be able to renege on its promise without there being weighty societal grounds for doing so.

(257) In the proportionality assessment pursuant to ECHR Protocol 1 Article 1, the ECtHR allows national authorities a margin of appreciation. The reason for this margin of appreciation is that national authorities will normally be in a better position than the ECtHR to determine the necessity of the interference, because national authorities have greater insight into the special conditions that might obtain in the individual country. There is no similar distance between national legislators and courts. As expressed by the ECtHR in a Grand Chamber judgment of 19 February 2009 in the case A and others v. United Kingdom, paragraph 184, the margin of appreciation according to the ECHR therefore cannot be transferred to relations between domestic authorities. The ECtHR states here:

> **"The doctrine of the margin of appreciation has always been meant as a tool to define relations between the domestic authorities and the Court. It cannot have the same application to the relations between the organs of the State at the domestic level."**

(258) The fact that the margin of appreciation according to the ECHR does not apply to relations between domestic courts and legislators can nonetheless not prevent domestic courts from attaching weight to the legislators' assessment in the proportionality assessment. The right pursuant to ECHR Article 13 of citizens to have the question of whether there is a violation of the Convention tried before a national authority cannot be understood such that in determining whether a violation is proportionate, the courts can simply put themselves in the place of the legislators. Whether the courts should exhibit reticence in trying the proportionality assessment of the legislators depends entirely on *national rules*, however.

(259) In my view, there are good reasons for Norwegian courts normally being somewhat reticent about reviewing the political priorities of the Storting and the Government in the matter of the proportionality assessment pursuant to Protocol 1 Article 1. In our case, however, it is not a question of reviewing the political priorities of the Storting and the Government, but of which demands should be made of the authorities' behaviour in relation to the citizens, and how political goals should be balanced against due process for the citizens. In the resolving of such questions, there is little reason to allow political authorities any particular leeway for discretionary assessment.

(260) I have accordingly concluded that the introduction of time limitation on the increased quota factor Volstad AS acquired through the structuring in 2005 is not only a violation of Article 97 of the Norwegian Constitution, but also a violation of ECHR Protocol 1 Article 1.

(261) **Justice Tjomsland**: I concur in all essentials and as regards the conclusion with the first-voting judge, Justice Tønder.

(262) Justice **Matningsdal**: Likewise.

(263) Justice **Stabel**: Likewise.

(264) Justice **Endresen**: Likewise.

(265) Justice **Indreberg**: Likewise.

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

(267) Justice **Noer:** Likewise.

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

(269) Justice **Bårdsen:** As the third-voting judge, Justice Skoghøy.

(270) Justice **Falkanger:** Likewise.

(271) Justice **Øie:** I concur in all essentials and as regards the conclusion with the second-voting judge, Justice Normann.

(272)

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

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

(275) Justice **Gjølstad:** Likewise.

(276) After the voting, the Supreme Court handed down the following

J U D G M E N T :

The Court finds in favour of the Norwegian Government represented by the Ministry of Fisheries and Coastal Affairs.

True transcript certified: