

Oslo 30 May 2022.

Comments on behalf of the Norwegian Grandparents' Climate Campaign in the case of Greenpeace Nordic and Others against Norway (Application no. 34068/21)

We are grateful for your granting us leave on 8 April 2022 to make written submissions to the Court on behalf of the Norwegian Grandparents' Climate Campaign (GCC).

1. About GCC

GCC was established in 2012 and is an independent grassroots organisation with some 5600 members, including grandchildren and other younger members, <https://www.besteforeldreksjonen.no/about-the-grandparents-climate-campaign/>. It has regional groups across Norway. GCC has proved a significant voice in the public debate on the state of Norway's climate policy at home and abroad. GCC has CO2 emissions and Norwegian oil exploration, extraction and export, including in the Arctic Ocean, among its priorities. It has adopted Article 112 of the Norwegian Constitution as the guiding principle for climate action and climate justice. Article 112 provides: 'Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.' Article 112 is one of the provisions of 'Chapter E. Human Rights' in the Norwegian Constitution.

GCC has intervened in the climate litigation before the Norwegian courts, from 2016 and in all three instances, including the Supreme Court, which delivered its judgment on 22 December 2020. Norway is the largest oil and gas producer in Western Europe, and the only Western European country that licenses, and financially assists, oil exploration. The export is mainly to Europe where the oil and gas are burned. The court action was for judicial review of the first licences for new oil exploration in the Arctic. Principles and rules of human rights law, including the European Convention on Human Rights, were at the core of the court action.

2. Norway continues to violate Convention rights through exploration and production of oil and gas.

The factsheet in Appendix 1 sets out background information about CO2 emissions globally and in Norway, and how Norway plans to continue exploration and production of oil and gas.

Articles 2 ECHR obliges States to adopt an effective "legislative and administrative framework" and to implement "appropriate measures" to "protect the public". Article 8

obliges States to take “reasonable and appropriate measures” to protect the right to private and family life.¹ An “appropriate” measure is one that can protect life and physical integrity, commensurate with the degree of severity and the likelihood of the risk and reasonably available to the authorities.² The onus lies on the State to explain how it has provided effective protection using detailed and rigorous data.³ Existing obligations to provide information in related environmental rules and the application of the precautionary principle will inform the procedural obligations under the Convention. – Procedural obligations will apply for exploration constituting breaches of Articles 2, 3, 8 and 13 and Protocol no. 1 Article 1, alone, and in conjunction with Article 14, and are triggered also by the *risk* of breaches.

3. Exported emissions from fossil fuels cause harm under the effective control of the Respondent State Norway and further jurisdictional issues

Exported combustion emissions from fossil fuel production are relevant to a State’s ECHR obligations. A State has effective control of whether to approve new fossil fuel extraction within their jurisdiction, and whether the emissions will be released into the atmosphere by the combustion of oil and gas. Exported emissions cause equal harm within the State’s territory regardless of where in the world they are combusted. This has already been recognized by the Norwegian Supreme Court, Australian courts and the Committee on the Rights of the Child.⁴ Exported combustion emissions from Norwegian oil and gas are encompassed by Section 112 of the Norwegian Constitution. States are responsible under the Convention for those emissions that are within their “effective control” and cause harm within their jurisdiction, which includes exported combustion emissions.

The relevant question is whether fossil fuel extraction from the respondent State contributes to the accumulation of GHG in the atmosphere, and not whether a hypothetical denial of permits would see hypothetical substitute production in other parts of the world. Hypothetical marked substitution is too speculative. At any rate, several studies establish that reducing oil and gas extraction in one location or market will

¹ *Hatton* § 98 with further references. While fossil fuels decisions could also be viewed as a negative interference with Article 8, the applicable principles of the negative and positive obligations are “broadly similar”, where the State in both context has to strike a “fair balance” between the competing interests of the individual and of the community as a whole, see *Hatton* § 98 with further references.

² *Kotilainen et al. v. Finland* (62439/12) 17.09.2020 § 67 with further references. See also HRC, *General Comment No. 36* para. 18 and the Inter-American Court on Human Rights, *Advisory Opinion (OC-23/17)* para. 149. Similarly, see *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937* art. 3 q).

³ *Öneryildiz* § 89; *Budayeva*, § 132; *Cordella* §§ 161, 173; *Dubetska et al. v. Ukraine* (30499/03) 12.02.2011 §§ 145, 155; *Jugheli et al. v. Georgia* (38342/05) 13.07.2017 § 76 with further references. Similarly, the Hoge Raad in *Urgenda*, para. 5.3.3., and the special duty of care and duty on the authorities in Bundesverfassungsgericht, Order of the First Senate of 24 March 2021 - 1 BvR 2656/18.

⁴ *Sacchi et al. v. Germany et al.*, UN Doc CRC/C/88/D/104-108/2019, Germany no. 107, paras 9.3 og 9.4, *Nature and Youth Norway and others v. Norway*, HR-2020-2472-P (Supreme Court of Norway), para. 149, 155 and 260. *Gloucester*. See also the French Constitutional Council on the relevance of extraterritorial environmental effects, Decision no. 2019-823 QPC of 31 January 2020.

decrease global GHG emissions.⁵ In the event that speculations regarding market substitution are considered relevant, any uncertainty must at least favour the environment in accordance with the precautionary principle and the assessment of risks under the Convention.

Norway's human rights obligations apply to persons within Norwegian jurisdiction likely to be affected by the potential effects of the ultimate exportation of fossil fuels. *Hanan v Germany* (GC, 4871/16) clarified the jurisdictional reach of the Convention in Article 1 and the duty to investigate under Article 2.⁶ Licensing of production has taken place within the jurisdiction of Norway, and the production will result in exportation from Norway. Other attempts to limit jurisdiction will fail: the effects of climate change take place in Norway and in all other Convention states, and the burning of the exported oil and gas is mainly within the legal space of the Convention.

4. *Locus standi* and exhaustion (the Court's questions 1 and 2 to the parties)

There were no further remedies against the production licences granted.

Under any circumstances, any new judicial review action would take several years without any prospect of success. It is clear that any challenge to the Supreme Court plenary judgment would fail if any of the applicants were to attempt to bring one. The Supreme Court judgment has in effect blocked any available (or sufficient) remedies against other licences for oil production.

The court summarily dismissed that there could be a violation of Convention rights. The majority (11-4) ruled that the environmental impact and planning requirements only applied at a much later stage in the exploration/production process. The legal consequences of the invalidity that follows from the view of the minority on EU law obligations are uncertain.

Not one single judge at any instance stated that there were duties under the Convention to prevent the harm from climate change following from exportation of fossil fuels. The Supreme Court summarily dismissed *Urgenda* as irrelevant to the case. Violations of the

⁵ See e.g. Taran Fæhn m.fl. Climate policies in a fossil fuel producing country: Demand versus supply side policies in *Discussion Papers No. 747*, June 2013 Statistics Norway, Research Department and *the Energy Journal*, Vol. 38, No. 1; Asheim m.fl. The case for a supply-side climate treaty in *Science* 365 (6451), 325-327, 2019; Rystad Energy, «Utslippseffekten av produksjonskutt på norsk sokkel», 31.08.2021, Peter Erickson et al. (2018), Limiting fossil fuel production as the next big step in climate policy, *Nature Climate Change* 8, pp. 1037–1043., UK Climate Change Committee, *Letter: Climate Compatibility of New Oil and Gas Fields*, 24.02.2022 p. 4, Klimarådet, «Danmarks indvinding af olie og gas i Nordsøen: Vurdering af klimaperspektiverne i at gennemføre eller aflyse 8. Udbudsrunde», X.06.2020 p. 4.

⁶ Both majority and minority in *Hanan* support that the infringement in our application falls within the jurisdiction, see also *Ilau* (48787/99), §§317, 331, the UN Committee on Economic, Social and Cultural Rights (2017), General Comment No 24 (2017) (E/ C.12/ GC/ 24), §26; UN Human Rights Committee (2018), General Comment No 36 (2018) (CCPR/C/GC/36), §22, and the strong support from the Bundesverfassungsgericht in its *BND Urteil* (Urt. v. 19.05.2020, Az. 1 BvR 2835/17).

Convention were raised at all instances, from the claim from plaintiffs and interveners ('stevning') and onwards.

5. Has the application established the link between the licences and the violations (question 3)?

Before the Norwegian courts, the parties and the intervener (the Norwegian Grandparents' Climate Campaign) argued that the 23 licensing round (issuing ten licences in 2015) would be followed by new licensing rounds. It has. The judicial review was brought against the 2015 licences, and not against Norwegian oil and climate policies in general. The parties and the intervener claimed the ten licences could not be issued unless the authorities had adopted necessary mitigation measures. Had the parties and the intervener succeeded, that would have stopped not only the ten 2015 licences but the issuing of further licences until the adoption of necessary mitigation measures. That was the review action before the Norwegian courts, and is subject of the application before the Court.

The Supreme Court accepted that the 23 licensing round could not be seen in isolation, even if the review concerned the licences granted in the 23 round. These licences constituted a part of a broader context, and Supreme Court concedes that account has to be taken of the totality ("heilskapen", para. 148). That has to include subsequent licensing rounds, at the least those planned at the time of the granting for the licences under review, and at the time of the proceedings in the complaint before the European Court. But the Supreme Court further addresses "heilskapen" in paras. 154, 161, 162, 163, 167 and 168, only to use the totality and context to reject review as the companies allegedly had not found oil, that it was uncertain if they would, and that finding oil was too far into the future.

The Supreme Court stated in (163):

In addition, the Storting has established specific target figures for reduction of the greenhouse gas emissions. They now originate in the Norwegian Climate Change Act. As mentioned, the Storting and the Government have also initiated and planned many measures in order to reach the target figures. At the same time, any possible emissions from Barents Sea South-East will not appear until far into the future. Therefore, this matter does not involve a gross disregard of the duties under the third paragraph of Article 112 of the Constitution.

The Supreme Court did not review what actually had been done to reduce emissions, or instigate mitigation measures, or the feasibility of existing plans. That emissions "will not appear until far into the future" cannot exclude review. That would conflict with the principles of prevention, precaution and inter-generational equity, contained not only in international environmental and EU law but the very idea of protecting human rights for the future through conventions and constitutions. Climate policy and human rights protect the interests also of children and grandchildren.

We turn to the duty to conduct SEAs and EIAs under Norwegian and EEA law, and the consequences for violations of the Convention.

6. Violations under the Convention (question 4)

Until the Court has clarified the interpretation and application of the Convention as an evolving and living instrument, national supreme court decisions are important sources. The existential challenge of climate change makes this gap filling pressing. The *Hoge Raad* in *Urgenda*, and more recently the judgments by the *Conseil d'etat* (and *Tribunal administrative de Paris*) and *Bundesverfassungsgericht* are important, even to the point of establishing a national consensus on important points. The responses by the Governments of the Netherlands, France and Germany, taking urgent action to comply with the judgments, ratify this gap filling.

This first consensus is, at the lowest, that emissions and climate change involve human rights, and that courts have to take account of them in their review of legality of administrative action. The Norwegian Supreme Court went against this first national consensus by rejecting – off hand – the Convention arguments of the parties and the intervener.

The licences are granted in violation of Articles 2, 3, 8 and 13 and Protocol no. 1 Article 1 alone and in conjunction with Article 14. The climate crisis interferes with the rights of members of the applicant organisation and the individual applicants and will do so increasingly. There is a 'real and imminent threat'. Norwegian oil production contributes to reaching a tipping point in the climate system. It conflicts with the principles of prevention, precaution and inter-generational equity, contained not only in international environmental and EU law but the very idea of protecting human rights for the future through conventions and constitutions.

In *Fredin* (1991) 13 E.H.R.R. 784 the Court applied the living instrument doctrine and its emphasis on present day conditions: 'protection of the environment is an increasingly important consideration'. Climate induced dangers such as heat waves, the rise in sea levels, desertification and wildfires pose a risk to human rights according to the 2019 Joint Statement on Human Rights and Climate Change by five UN Human Rights Treaty bodies. Climate change is the most imminent danger to humanity and the human rights of individuals.

6.1. Procedural obligations under ECHR art 2, 3 and 8: domestic and EEA regulations

Norwegian oil and gas extraction is regulated in three phases set out in the Petroleum Act of 1996.⁷ *Opening of new areas* requires a prior strategic environmental impact assessment (SEA), see Section 3-1, also regulated by the SEA Directive. It takes 17 years from opening until production. *Exploration* requires a production license (Section 3-3), awarded in predefined areas and numbered licensing rounds in less explored areas. It takes 10-15 years from a production license to production. *Production* requires the

⁷ <https://www.npd.no/en/regulations/acts/act-29-november-1996-no2.-72-relating-to-petroleum-activities/>

Ministry's approval of plans for development and operation of petroleum (PDO), in which the company must submit an environmental impact assessment (EIA), see Section 4-2 and Section 22a of the Petroleum Regulations, and the EIA Directive. It takes 2-10 years from a PDO approval until production.

6.2. The duty to conduct SEAs and EIAs under Norwegian and EEA law

It is not required to conduct a SEA of the potential combustion emissions before the opening of an area, cf. Section 3-1 of the Petroleum Act. The Supreme Court has noted, however, that Section 4-2 of the Petroleum Act, read in the light of Section 112 (2) of the Norwegian Constitution, requires exported combustion emissions to be included in EIAs prior to the approval of plans for development and operation of petroleum deposits (PDOs). Indeed, the Supreme Court assumed that the climate effects of combustion emissions "will be subject to an environmental impact assessment in connection with a possible PDO application" at this stage.⁸

In addition, SEAs and EIAs of environmental effects of combustion emissions are required by Directive 2001/42/EU (SEA Directive) and Directive 2011/92/EU as amended by Directive 2014/52/EU (EIA directive).⁹ The ECJ frequently points out that the scope of these directives is "wide and its purpose very broad".¹⁰ With regard to the IEA Directive, the ECJ has held that "it would be simplistic and contrary to that approach" to only take "the direct effects of the works envisaged themselves into account," and "not of the *environmental impact liable to result from the use and exploitation of the end product* of those works."¹¹ In *Abraham* not only the impacts from the building of the airport had to be assessed, but also the "the projected increase in the activity of an airport" and ensuing environmental impacts such as noise.¹² The analogy from existing case law is clear on combustion emissions. The intended product of the airport extension in *Abraham* was the increased sale of the airport capacity for airborne traffic, leading to increased emissions of *noise*. Similarly, the intended product of the development of an oil and gas platform is the increased sale of oil and gas, leading to increased emissions of *GHG*. The EFTA Surveillance Authority presuppose that future combustion emissions are included in the duty to conduct environmental impact assessments, both at the planning stage (SEA Directive) and the project stage (EIA Directive).¹³

⁸ HR-2020-2472-P, para. 241, see also paras. 218, 241, 216, 218. In its observations to this Court, the Government cited an inaccurate translation of paragraph 241, downplaying the necessity to conduct an EIA at the PDO stage. The translation error has since been corrected by the Supreme Court.

⁹ EIA Directive article 3.1, re Annex IV para 5. See the minority of the Supreme Court (para. 263). The majority did not find it necessary to rule on the applicability of the SEA Directive to combustion emissions, as any failure to assess these emissions then would be rectified by a subsequent IEA at the PDO stage.

¹⁰ C-2/07 *Paul Abraham and Others v Region of Wallonia and Others*, para 42 with further references.

¹¹ *Ibid* para 43. See also C-227/01 *Commission v Spain* [2004] ECR I-8253, para. 49.

¹² C-2/07 para 45, 46.

¹³ The EFTA surveillance authority (ESA), *Request for information concerning the requirements to carry out environmental assessments and environmental impact assessments under the SEA and EIA Directives*, 04.10.2021, question 1a), footnote 8.

6.3. Exported combustion emissions have not been assessed at the PDO stage, and will still not be part of a public EIA prior to a decision is taken

The State argued in the Supreme Court that it would be better to conduct an EIA of combustion emissions at the PDO stage, since it was too uncertain at the opening stage whether exploration would lead to recoverable discoveries, and any production license (*utvinningstillatelse*) would not give an automatic right to extraction. The Supreme Court simply followed the state, assuming that the global climate effects of combustion emissions “will be subject to an environmental impact assessment in connection with a possible PDO application”, and a PDO application would be denied if considerations of climate and the environment so required.¹⁴ Since the Supreme Court judgment, as in every PDO approved before, the Government has not required any IEA of the climate effects of combustion emissions.¹⁵ The Norwegian National Human Rights Institution, in a letter to the Ministry on 4 October 2021, and a report to the Ministry on 18 March 2022, concluded that PDOs granted without a prior and public EIA of combustion emissions violated the Constitution.¹⁶ The legislation have remained unchanged since 2014, and scholars have questioned the constitutionality of PDOs granted since 2014.¹⁷

The letters from the NHRI led representatives in Parliament to summon the Minister for questioning, who admitted on 21 April 2022 that PDOs had been approved without a prior and publicly available EIA of combustion emissions also after the Supreme Court’s judgment on 22 December 2020.¹⁸ An inquiry initiated by the Parliamentary Standing Committee on Scrutiny and Constitutional Affairs, has followed.¹⁹ The Ministry of Petroleum and Energy has claimed that changes to follow up the Supreme Court judgement were made in the autumn of 2021. Yet, there is no mention of combustion emissions even in PDOs approved as late as February 2022.²⁰ The Ministry has refused to withdraw PDOs approved without assessments of combustion emissions, citing political support regardless of what such studies could have found.²¹ Public and prior EIAs are a

¹⁴ *HR-2020-2472-P*, para. 241, see also paras. 218, 241, 216, 218, 222, 223.

¹⁵ The Norwegian government’s responses, or lack of such, contrast unfavourably with those of the German and French governments after Bundesverfassungsgericht’s decision (2021) and Conseil d’etat’s in *Grande-Synthe* (2020).

¹⁶ Letter from NIM to the Oil and Energy Ministry of March 18, 2022 (Section 2.3), available at: <https://www.nhri.no/wp-content/uploads/2022/03/Utreddning-om-Grunnloven-%C2%A7-112-og-plan-for-utbygging-og-drift-av-petroleumsforekomster.pdf>.

¹⁷ Henrik Bjørnebye, "Spørsmålet om mangelfull utredning av klimavirkninger i HR-2020-2472-P" *Lov og Rett* 60, nr. 3 (2021) pp. 174, 176, 177; <https://www.vg.no/nyheter/innenriks/i/QyzgA8/professor-langt-flere-oljevedtak-kan-vaere-ulovlige>

¹⁸ See: <https://www.stortinget.no/no/Saker-og-publikasjoner/Sporsmal/Skriftlige-sporsmal-og-svar/Skriftlig-sporsmal/?qid=88985>. See also letter to the Parliamentary Standing Committee on Energy and the Environment, 27 April 2022, available at: <https://www.nhri.no/2022/skriftlig-innspill-til-dokument-8236-s-2021-2022/>.

¹⁹ <https://www.aftenposten.no/norge/politikk/i/V9v44W/hoeyre-og-sv-stiller-kontrollspoersmaal-om-praksis-i-norsk-oljepolitikk>

²⁰ <https://www.vg.no/nyheter/innenriks/i/BjLz4v/skal-aapne-opp-interne-vurderinger-av-oljerisiko>

²¹ https://www.stortinget.no/globalassets/pdf/initiativsaker/breidablikk/svarbrev_23mai_breidablikk.pdf

requirement under EEA law, and the EFTA Surveillance Authority has initiated formal procedures, querying whether Norway has circumvented the duty to conduct SEAs and EIAs under the SEA and EIA Directives.²²

On 8 April 2022, after the NHRI's repeated warnings, questioning from Parliament, and news coverage, the Ministry assured that it will "follow up the Supreme Court's judgment".²³ The Government provided the most specific information about these assessments to date in its written observations to the Court (para. 115). The Government claims that the assessments will only be "communicated in the PDO decisions".²⁴ This violates national and constitutional law, and EEA law, which require publicly available EIAs *during the preparation and before any adoption of the final decision*.²⁵ The Ministry has countered that the assessments will be subject to parliamentary debate, yet only a small number of PDOs are ever presented to Parliament. Add to this that PDO approvals are and will be granted without the IEAs that the Supreme Court, based on the State's submissions in the case, understood should take place.

This chain of events shows that the Government's pleadings on the adequacy of future assessments need be scrutinized closely by the Court, and not taken at face value. There is a discrepancy between what the State presents to the Court as the law on the books, and the reality on the ground, with the implementation and actual application of these laws.

6.4. Exported combustion emissions must also be assessed at the opening stage
Environmental impact assessments are part of general international law. A main purpose of impact assessments is to ensure that negative environmental effects are prevented at the source rather than after the harm has occurred, making them "one of the fundamental mechanisms to protect the environment"²⁶, and, by extension, human rights. Another purpose is to ensure public participation in decision making by giving "access to the relevant information" *before* a decision and ensuring there are effective remedies available.²⁷

²² Letter from ESA to Norwegian authorities, *Request for Information concerning the requirements to carry out environmental assessments and environmental impact assessments under the SEA and EIA Directives*, 04.11.2021, p. 4.

²³ Royal Norwegian Ministry of Petroleum and Energy, "Tilleggs melding til Meld. St. 11 (2021-2022)", 08.04.2022, section 3.5.1, available at:

<https://www.regjeringen.no/contentassets/e38e9f5393fc4f109b6394f61bd750f8/no/pdfs/stm202120220011000dddpdfs.pdf>

²⁴ "Tilleggs melding til Meld. St. 11 (2021-2022)" section 3.5.1.

²⁵ Petroleumsforskriften § 22(3), § 22a(4); EIA Directive, Article 6.4: the public concerned shall "be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken."

²⁶ As stated by the European Court of Justice (ECJ) in Case C-261/18, *European Commission v Ireland*, 12.11.2019, para 116.

²⁷ *Dubetska et al. v. Ukraine* (30499/03) 12.02.2011 §§ 143-144.

A forecast of potential combustion emissions at the opening stage will be subject to inherent uncertainties, yet it will enable decision-makers (and the public) to make strategic choices of whether any oil and gas from this area should, in the end, be extracted.²⁸ Moreover, since the Government now admits that these emissions are relevant at the PDO stage, it follows that the climate effects of these emissions are relevant to the opening decision, as the IEA at the PDO stage is merely a specific project assessment flowing from the scoping of the impacts laid out in the SEA.

In the event the Court should find the uncertainties regarding potential discoveries of oil and gas detrimental to a SEA requirement of combustion emissions prior to the opening, an updated SEA must at the very least be conducted before production licenses are issued. It is recalled that it often takes years from an area is opened until production licenses are issued. Postponing these assessments until the very last approval phase before extraction (PDO) would erode effective rights protection. It will be too late to change the course of action, the assessments would be sliced up in minor impacts, and challenges would be futile in view of the Government's reluctance to revoke PDOs despite inexistant or flawed IEAs.

Applying the well-established procedural safeguards in Article 8 to require SEAs of potential combustion emissions prior to exploration would foster democratic debate about the full climate effects of extraction. It would offer at least some protection to our grandchildren from "what might fairly be described as the greatest inter-generational injustice ever inflicted by one generation of humans upon the next".²⁹

Yours sincerely,

A handwritten signature in black ink, appearing to read "Mads Andenas". The signature is fluid and cursive, with the first name "Mads" and the last name "Andenas" clearly distinguishable.

Ketil Lund
Former Supreme Court Justice

Professor Mads Andenas QC

Attachments listed on next page

²⁸ The authorities will have to make predictions about the risk of pollution they "might" be exposed to based on the evidence base available to the State, even if it is uncertain, see e.g. *Guerra et al. v. Italy*, § 60.

²⁹ *Sharma & Others v Minister for the Environment* | Federal Court of Australia | VID607/202, para. 293 (reversed on appeal).

Attachments:

1. NGCC Factsheet: Continued Norwegian fossil fuel exploration which is not justified under the Convention, Oslo 2022
2. ESA's Request for information concerning SEAs and EIAs, 4 November 2021
3. Guidance to the Norwegian National institution for Human Rights to the Ministry of Oil and Energy (Olje- og energidepartementet), 18 March 2022
4. Opinion on the Norwegian non-compliance with the requirements to undertake prior strategic environmental impact assessments (SEA) by Professor Ole Kristian Fauchald, the University of Oslo, Oslo 2022.