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European Court of Human Rights, Fifth Section
Council of Europe F-67074
Strasbourg Cedex France

Att: Section Registrar, V. Soloveytchik

Oslo, 15 September 2022

Responsible partner:
Cathrine Hambro, Emanuel Feinberg

APPLICATION NO. 34068/21 - COMMENTS TO THIRD PARTY INTERVENTIONS

1. Introduction

We refer to the Court's letter dated 8 August 2022 where parties were given the opportunity to comment on the third-party interveners' Written Observations by 15 September 2022.

From the Applicants' point of view it is worth noting that there are no intervenors that oppose the Applicants' allegations of breaches of rights under the Convention.

As the interveners are supportive of the Applicant's allegations our comments only relate to some contextual elements in the interveners' submissions that are additional to the Application dated 15 June 2021 and our Written Observations on behalf of the Applicants dated 29 June 2022.

Additionally, in item 7 below, we use the opportunity to draw attention to certain misinterpretations in the translated version of the Norwegian Supreme Court (NSC) judgement forwarded in the State's Written Observations dated 26 April 2022.

2. Comments to Written Observations made by the International Commissions of Jurists (ICJ)

The ICJ precisely distinguishes between the discontinuation, the continuation at present levels, and the expansion of the Norwegian petroleum industry in Norway (cf. ICJ submission para. III). Applicants again underline that the domestic claim was never about licences that aim at bringing resources to the market in the short or medium term. The disputed licences were the first step in the operationalization of the intention to expand the Norwegian petroleum industry "*initially by nine percent by 2024*" (cf. ICJ submission for further references.) Applicants agree with ICJ that "*any case related to human rights protection and the environment in relation to it ought to take the distinctions between discontinuation,*

continuation, and expansion into consideration ..." and that the application is not challenging the Norwegian petroleum policy as a whole (ICJ submission para. III 5.)

3. Comments to the written observations made by the UN Special Rapporteur on human rights and the environment and the UN Special Rapporteur on toxics and human rights (the Special Rapporteurs)

The Special Rapporteurs throughout their Written Observations describe the recognition by the world's institutions of a *right* to a sustainable environment. Applicants underline that this *common ground* approach is highly relevant when the Court decides upon both procedural and material requirements of the Convention in relation to the Applicants' allegations.

In para. 12 the Special Rapporteurs state that "*wealthy State actions that will foreseeably increase emissions are inconsistent with their obligation to protect the human rights to life and private and family life ...*". Applicants draw the Court's attention to the correlation between this view and the distinction between the mere continuation of the Norwegian petroleum industry and its expansion, as emphasised by ICJ.

In part V the Special Rapporteurs point towards the *Urgenda* and *Neubauer* judgments. The implicit point made here, as the Applicants see it, is that no State may evade responsibility for the pressing climate harm and threat by pointing to difficulties in prioritising etc., to which Applicants agree.

In para. 13 the Special Rapporteurs describe the responsibility of judges to ensure that the laws and their application guarantee human rights[1]. Applicants draw the Court's attention to the correlation between this view and the minority opinion of the NSC which in para. 286 points to the obligation under the EEA-Agreement Article 3 to ensure fulfilment of the obligations under the Agreement and how these impact on courts' obligations. The obligation of judges to ensure the law is embodied in Article 13 of the Convention, cf. para. 3.3.7 of the Applicants Written Submission dated 29 June 2022 which describes how the NSC fell short of fulfilling this duty.

4. Comments to Written Observations made by ClientEarth

ClientEarth's focus, ie. on the differences between a SEA and an EIA and how there is a global consensus according to the Espoo Convention to do both cf. para. 7. In item 8 a), it is pointed out that the responsibility for conducting a SEA *lies with the state*, whereas *the developer* is responsible for preparing the environmental report under EIA law. Applicants add that this is true also according to the Norwegian Petroleum Act.

The Petroleum Act in Article 4-2 second paragraph (which relates to the PDO stage) obliges the *developer* (the licensee) to do environmental assessments (and other assessments) whereas Article 3-1 obliges the *state* to do assessments (including such assessments as required under the SEA Directive) prior to the opening of new areas for petroleum production.

Applicants point out to the Court that the NSC did not address whether distinguishing between the status of the parties (state or private party) was relevant when it decided that the assessments of combustion emissions could be postponed to the PDO stage – and the private party. However, Applicants agree with ClimateEarth's observations that it is not only relevant when the assessments are made, but also who makes them.

[1] In the referred source - as this is laid down in the American Convention on Human Rights.

5. Comments to Written Observations made by the Grandparents Climate Campaign (Grandparents)

The Grandparents rightly point out that until the Court has clarified the interpretation and application of the Convention in relation to climate issues, national supreme court decisions are important sources, and that these sources show a consensus as to the effect that emissions and climate change involve human rights, cf. item 6 below. The Grandparents are furthermore correct when they state that courts must take account of the national supreme court decisions in their review of the legality of administrative action.

Applicants stress that the NCS judgement goes against this consensus[2], not only regarding the material aspects of the rights enshrined in Articles 2 and 8 of the Convention, but even with the procedural aspects of the rights. Applicants draw the Court's attention to how ill-suited this approach is when seen in conjunction with the point made by the Special Rapporteurs that "*wealthy State actions that will foreseeably increase emissions are inconsistent with their obligation to protect the human rights to life and private and family life ...*" as also quoted above, and the ICJ's point regarding the need to make distinctions between discontinuation and expansion of the Norwegian petroleum industry.

6. Comments to written observations made by the European Network of National Human Rights institutions (ENNHRI)

In the final part of item 13 ENNHRI states with references: "*For instance, the 8,6-27,9 MtCO2 emissions that could result from the combustion of 20-65 million barrels of oil discovered as a result of the [...] Sputnik-field (Barents Sea South) may in principle constitute a sufficient link with interests protected by Article 2 and 8, as it could add significantly to the overshoot of an already depleted 1,5C carbon budget.*" Applicants would like to point out that the Sputnik field is geographically the same area as covered by licence PL 855. PL 855 is formally relinquished but subsequently awarded through another licensing system to the same operator, cf. Applicants Written Submissions dated 29 June 2022 para. 21-25 for details.

Paragraph 4 of ENNHRI's observations give a science-based refutation to the Respondent's illogical attempts to justify expanding gas exploration on the basis of current events in Ukraine. ENNHRI notes with references: "It is estimated that 17 GtCO2 worth of recoverable oil and gas remains on the Norwegian continental shelf, half of which is undiscovered, and approximately 65% of which is in the Arctic (Barents Sea). It may take 17 years from opening and exploration until production. Hence, a short term need for gas in Europe due to current events in Ukraine, cannot be met by exploration for new oil and gas in the Arctic. The EU has stressed that gas is merely 'a transitional energy source', and the 'strategic investment in our independence' is renewables."

In para. 18 ENNHRI substantiates with references that as of 2022 there are no alternatives to deep emission reductions and that reliance on negative-emissions technologies are high risk. Applicants stress that this continues to be the situation. The Court must take note of the fact that Norway has not tried to justify how the intention to expand the Norwegian petroleum industry (as addressed by ICJ) is compatible with the obligation to protect life and physical integrity of the Applicants.

Applicants also allege that the licensing involves breach of Article 14. Applicants point out ENNHRI's references to the ECJ's prohibition of discrimination between generations cf. ENNHRI para. 33 with references and additional sources. When seen in conjunction with

[2] This view is shared by ENNHRI cf. ENNHRI Written Submission para. 16.

particularly the *Neubauer* judgement, but also *Urgenda,* the prohibition against discrimination may be seen as a common legal ground that draws boundaries for state activities also in the context of the disproportionate threat from climate change and licensing for the expansion of the Norwegian petroleum industry.

Applicants have noted that the Sami Counsel was not recognized as an intervener, and as a last remark particularly draw the attention of the Court to ENNHRI para. 34 which with referenced sources show that Arctic indigenous peoples, including the Sami people, are disproportionately impacted by climate change due to their high dependendence on the climate sensitive ecosystem found in the Arctic region. Norway, as one of five countries in the Arctic region, and the state that is eagerly is expanding its petroleum industry further north, must have a strong obligation to protect the material and procedural rights covered by Article 2 and 8 and with particular strong obligations not to discriminate against its Sami people to which Applicants 2, 4 and 6 belong.[3]

7. Comments regarding translations of the NSC judgement

NSC has translated its judgement, which is published on the most commonly used and updated source for legal documents in Norway: www.lovdata.no. A meaningful correction of the translation of para. 241 of the judgement was, however, made and published by Lovdata on 4 May 2022. Furthermore, the error in translation pointed out in our Written Submission dated 29 June 2022 cf. footnote 141 has been corrected today.

We enclose the updated version of the translation:

Attachment: Official translation of the NCS' judgement as of 15 September 2022.

The document can be found on the Lovdata web site:

https://lovdata.no/dokument/HRENG/avgjorelse/hr-2020-2472-p-fulltekst

Also, please note that the link in footnote 11 of our Written Observations dated 29 June 2022 is inoperative. The link was meant to lead to the judgement in both Norwegian and the updated translation. The documents should, however, be found via the Lovdata web site.

Sincerely,

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(sign.)

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[3] Applicants also respectfully draw attention to ENNHRI paragraph 33 and referenced sources: "The disparate impacts of climate change itself and the uneven distribution of the reduction effort may be seen as indirect discrimination based on age, generation or birth-cohort. This interpretation would be consistent with the principle of intergenerational equity, the ECJ's prohibition of discrimination between generations or birth-cohorts, as well as the recommendations of UN Treaty Bodies."