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Norwegian Supreme Court – HR-2016-296-A

Court	Norwegian Supreme Court – Judgment
Date	8 February 2016
Published	HR-2016-296-A
Keywords	Legislation. Implementation of a convention. State's liability for damages.
Summary	A seaman's employment was terminated with reference to Section 19 (1) of the Norwegian Seamen's Act of 1975, whereby employment protection for seaman lapsed at age 62. Upon an appeal to the European Committee of Social Rights, his claim that the rule in the Norwegian Seamen's Act was in violation of the provisions of the Council of Europe's convention on social rights (the Social Charter) was upheld. The Norwegian Supreme Court had ruled earlier that the termination was valid (Rt-2010-202). Fellesforbundet, which had covered all the costs of the terminated seaman, was not successful in its claim that the Norwegian State should reimburse these costs. After a review of the legislative process prior to the amendments to the Norwegian Seamen's Act in 2007, the Norwegian Supreme Court found that the Social Charter did not prevent continuation of the age limit provision in Section 19 (1). It was not ruled out that the a breach of the Ministry's duty of disclosure to the Storting during the legislative process could result in a liability for damages to citizens who were affected by the legislative enactment, but it was clear that there was in any case no such breach in this case. The appeal of the Court of Appeal's judgment for the defendant was dismissed. (Norwegian Supreme Court Report (Rt) summary)
Proceedings	Oslo District Court TOSLO-2014-29823 – Borgarting Court of Appeal LB-2014-177018 – Norwegian Supreme Court HR-2016-296-A, (case no. 2015/1524), civil case, appeal of a judgment.
Parties	Fellesforbundet for sjøfolk (Attorney Erik Råd Herlofsen) versus the Norwegian State represented by the Ministry of Trade, Industry and Fisheries (Attorney General, represented by Attorney Hilde Lund – under examination).
Author	Endresen, Indreberg, Ringnes, Noer, Matningsdal.
Last updated	15 February 2016

(1) Judge **Endresen:** The case concerns a claim that the Norwegian State is liable for costs that Fellesforbundet for sjøfolk incurred in assisting with the judicial review of the termination of employment for two members, and a subsequent complaint to the European Committee of Social Rights.

(2) Fellesforbundet for sjøfolk ("Fellesforbundet") acted as an accessory intervenor for two seamen in a termination of employment case that was pending before Norwegian courts in 2008-2010. Both seamen were terminated from their positions in the ship-owning company Nye Kystlink on attaining the age of 62 years, with reference to Section 19 (1) of the former Norwegian

Seamen's Act of 1975. This provision stipulated that general employment protection for seamen lapsed upon attaining the age of 62 years. The seamen filed a legal action claiming that the terminations were invalid due to wrongful age discrimination.

(3) For one of the seamen, the case ended up in the Norwegian Supreme Court, which concluded with a dissenting vote of 4-1, that the termination was valid (Rt-2010-202, the *Kystlink Judgment*). The costs were not awarded before any court. In addition to their own costs, Fellesforbundet also covered the costs that the terminated seaman incurred in the case.

(4) The seaman who was not successful in the termination of employment case, subsequently filed an appeal with the European Court of Human Rights (ECtHR) on 31 March 2010. The appeal was dismissed on 12 July 2011 in a single judge decision. Only brief grounds were given for the decision, but it follows from the cover letter to the appellant's attorney that the Court had not uncovered anything that could indicate that any violation had taken place according to the Convention.

(5) The European Convention on Social Rights ("the Social Charter") was ratified by Norway, and the original version became binding on Norway pursuant to international law when it entered into force on 26 February 1965. The Convention was revised in 1996, and Norway ratified the revised Convention on 7 May 2001. The Social Charter has not been incorporated into Norwegian law.

(6) Oversight of the states' compliance with the Convention was originally limited to supervision based on self-reports that the states are obligated to submit every other year. These reports were reviewed on behalf of the Council of Europe by the European Committee of Social Rights, which consists of 15 independent members appointed by the Council of Europe, with a view to possible further consideration by the bodies of the Council of Europe.

(7) On 20 March 1997, Norway also ratified an additional protocol that introduced a complaint scheme for representative national working life organisations and certain other organisations. Such complaints are also reviewed in the first instance by the European Committee of Social Rights.

(8) In 2011, Fellesforbundet submitted a complaint to the Council of Europe. The Kystlink case brought about the complaint, but the complaint was due to the fact that the age provision in Section 19 (1), sixth paragraph of the Norwegian Seamen's Act was in violation of several provisions in the Social Charter. The Norwegian State demanded that the complaint be dismissed due to the fact that Fellesforbundet did not have the right of appeal, but this was not successful.

(9) The complaint was reviewed by the European Committee of Social Rights in accordance with current protocol. In a decision of 2 July 2013, Fellesforbundet was successful in its complaint, since the Committee unanimously concluded that the Norwegian rule in the Norwegian Seamen's Act was in violation of Article 1, Section 2 and Article 24.

(10) On 18 November 2011, the Norwegian State had already appointed a committee that was to assess amendments to the Norwegian Seamen's Act. The mandate also encompassed an assessment of protection from the termination of employment pursuant to Section 19. This led to the age limit for seamen's protection from the termination of employment being changed to 70 years by adoption of Section 5-12 of the Norwegian Ship Labour Act on 21 June 2013. The Act entered into force on 20 August of the same year.

(11) In reviewing the report of the European Committee of Social Rights in September 2013, the Council of Europe's Ministerial Committee did therefore not have occasion to do anything beyond acknowledging that there were no grounds for further review of the complaint from Fellesforbundet.

(12) On 14 February 2014, Fellesforbundet filed the present case against the Norwegian State represented by the Ministry of Trade and Industry with a view to the reimbursement of its expenses in the Kystlink case and its complaint to the Council of Europe.

(13) On 9 September 2014, Oslo District Court rendered judgment [TOSLO-2014-29823] with the following conclusion:

> "1. The Norwegian State represented by the Ministry of Trade, Industry and Fisheries shall be ordered to pay compensation of one million Norwegian kroner (NOK 1 million).
>
> 2. The Norwegian State represented by the Ministry of Trade, Industry and Fisheries shall be ordered to pay costs of NOK 125,000 plus value added tax and NOK 350 in costs and court fees."

(14) The Norwegian State appealed the District Court's judgment to the Borgarting Court of Appeal, and judgment [LB-2014-177018] was rendered on 26 May 2015 in favour of the Norwegian State. The Court of Appeal rendered a judgment with the following conclusion:

> "1. A judgement shall be rendered in favour of the Norwegian State represented by the Ministry of Trade, Industry and Fisheries.
>
> 2. Fellesforbundet for sjøfolk shall pay in costs before the District Court and Court of Appeal one hundred eleven thousand four hundred fifty five Norwegian kroner (NOK 111,455) to the Norwegian State represented by the Ministry of Trade, Industry and Fisheries within two (2) weeks from service of this judgment.

(15) Fellesforbundet has appealed the judgment of the Court of Appeal to the Norwegian Supreme Court. The appeal concerns the Court of Appeal's application of the law, and the judgment is appealed in its entirety. Before the Court of Appeal, the appellant argued, inter alia, that the Norwegian State's liability followed directly from the incorrect incorporation of EU Council Directive 2000/78. Before the Norwegian Supreme Court the appellant maintained the view that Section 19 (1), sixth paragraph of the Norwegian Seamen's Act was in violation of the EU Directive, but this is not pleaded as an independent ground for the claim. The appellant has also dropped previous arguments that the Norwegian State must be liable for damages due to the fact that the Norwegian Supreme Court's decision in the Kystlink case was incorrect, and that the Norwegian State is liable in accordance with the rules for directors' liability. Otherwise, the case stands the same before the Norwegian Supreme Court as before the earlier courts.

(16) The appellant, *Fellesforbundet for sjøfolk*, has essentially argued:

(17) Section 19 (1), sixth paragraph of the Norwegian Seamen's Act, as it was formulated until it was repealed in 2013, according to its wording gave employers an opportunity to terminate the employment of seamen after they attained the age of 62 years without any objective ground being required. This special scheme for seamen did not have any objective ground in 2005 in any case, and it was in violation of Norway's obligations in accordance with the Social Charter, cf. Part II, Articles 1 and 24 of the Convention.

(18) The statutory provision was also in violation of EU Council Directive 2000/78/EC. An error was accordingly made when the Directive was incorporated into Norwegian law in 2005, and the ban on discrimination was included in Section 33 and 33B of the Norwegian Seamen's Act, without the special rule in Section 19 being repealed. The Council Directive, and not least the fact that the European Court of Justice's judgment of 22 November 2005 in C-144/04 (Mangold) states that the ban on discrimination already follows from the fundamental principles of EU law, are also clarifying for the understanding of the Social Charter. Whether Norway was obligated to implement the direction is of no importance in this context.

(19) The provisions of the Social Charter are not clear in all respects, but that is of no importance to this case. There is no objective ground for the special rule in Section 19 of the Norwegian Seamen's Act, and this does actually not concern an interpretation of the provisions, but rather acknowledging that a violation exists. The fact that this conflicted with Council Directive 200/78 follows from a number of decisions from the European Court of Justice, and this must also be relevant to the understanding of the Social Charter. With the unanimous decision of the European Committee of Social Rights, it has also been established that the Norwegian rule conflicted with the Convention, and this must be used as a basis.

(20) The fact that Fellesforbundet has incurred the costs for which they claim reimbursement is indisputable, and there is no doubt as to the causal connection either. The question for the Norwegian Supreme Court is whether there are grounds for liability.

(21) It is argued that the Norwegian State is liable on an objective basis for violation of the Social Charter. The fact that the Convention has not been incorporated into Norwegian law is of no importance. The ratification of the Convention entailed an obligation to amend internal Norwegian legislation to the extent that the legislation would lead to solutions in contravention of the Convention. Reference is made to the constitutional obligation of all branches of government to ensure compliance with human rights. No distinction is made here between incorporated and unincorporated conventions. The Norwegian State's strict liability for damages for breaching the European Convention on Human Rights and the EEA Agreement are well-established, and there is no reason why the Norwegian State’s breach of their obligations pursuant to the Social Charter should not have the same consequences.

(22) The Norwegian State is also responsible for the incorrect and incomplete information that the Ministry of Trade, Industry and Fisheries gave the Storting in connection with its law preparation. There is no updated review in Proposition No. 85 (2005-2006) to the Odelsting of whether there still were special grounds to maintain the weakened protection from the termination of employment for older seamen, and a distorted picture of the importance of seamen's pension payments is given. A fundamental weakness is also the fact that the Ministry conceals that the statutory rule will be in contravention of the Social Charter. This problem should at least have been addressed and discussed.

(23) The Norwegian State must be liable for this on an objective basis in the same manner as when the State is liable for invalid administrative decisions. Under any circumstances, the Norwegian State must be liable in accordance with the rules in Section 2-1 of the Norwegian Damages Act for the errors that have been made.

(24) Alternatively, it is argued that the Norwegian State must at least be liable for the costs of the complaint submitted to the European Committee of Social Rights. The prevailing law was clear at this point in time from a number of decisions from the European Court of Justice, and the Norwegian State’s opposition to Fellesforbundet’s right of appeal and the arguments that the weakened protection from the termination of employment does not entail a violation of the Convention did not have any objective grounds.

(25) The appellant has entered the following statement of claim:

“1. The Oslo District Court's judgment shall be affirmed, however, with the following amended conclusion.

The Norwegian State represented by the Ministry of Trade, Industry and Fisheries shall be ordered to pay Fellesforbundet for sjøfolk compensation of NOK 1 million within 14 days from service of the District Court's judgment.

The Norwegian State represented by the Ministry of Trade Industry and Fisheries shall be ordered to pay Fellesforbundet for sjøfolk costs of NOK 125,000 plus value added tax and

NOK 350 in costs and court fees, within 14 days from service of the District Court's judgment."

2. The Norwegian State represented by the Ministry of Trade, Industry and Fisheries shall pay the costs before the Court of Appeal and the Norwegian Supreme Court."

(26) The respondent, the *Norwegian State represented by the Ministry of Trade, Industry and Fisheries*, has essentially argued:

(27) Special legal grounds are required in order for the Norwegian State to be liable for the substantive content of the Act. It is clear that the Norwegian State can under the circumstances be liable for Acts that must be set aside as violating the Norwegian Constitution, but this liability is not objective even for a violation of the Constitution.

(28) The Norwegian State can also be liable for a violation of Article 13 of the European Convention on Human Rights, and today it has been established that a breach of the Norwegian State's obligations pursuant to the EEA Agreement may under the circumstances entail a liability for damages to those who are affected.

(29) Also in these contexts, it is a condition for liability that there is a qualified breach of the convention or agreement. The liability is not objective.

(30) There are not any grounds supporting the establishment of strict liability for the Norwegian State for the laws that are laid down, and such a liability would be highly imprudent based on the freedom of action a legislator must have, and such liability would at the same time also represent a challenge to the principle of the separation of powers.

(31) In the area of administrative law, the point of departure is that the Norwegian State shall not have strict liability for errors. The appellant has nonetheless sought to justify strict liability for a legislative error, by making reference to certain exceptions to the general principle, but these individual decisions do not have any transfer value for the question of liability for legislative errors.

(32) With regard to a possible conflict with conventions that have not been incorporated into Norwegian law, a potential liability for damages could also undermine the fundamental principle that, until they are converted, conventions only represent obligations under international law for the Norwegian State, which cannot be pleaded for internal law purposes.

(33) A liability for the Norwegian State for errors in the legislative process must at least presuppose a gross error; the threshold for being able to impose a liability for damages on a legislator must be high. The assessment must in principle be the same whether it is based on Section 2-1 of the Norwegian Damages Act or on a non-statutory culpa basis.

(34) In principle, it is the Storting that must assess whether the Government has satisfied its duty of disclosure, and it would not be prudent to intervene in the relationship between these branches of government by introducing an opportunity for individual citizens to plead a breach of the Government's duty of disclosure.

(35) There has been no breach of the duty of disclosure in connection with the revision of the Norwegian Seamen's Act, and the issue is thus accordingly not actualised.

(36) It cannot be assumed that the provision in Section 19 (1) sixth paragraph of the Norwegian Seamen's Act in 2007 was in violation of the ban on discrimination in Sections 33 and 33B of the Act, as these provisions had to be interpreted based on the Directive. The 62 year age limit was in 2007 not in contravention of the Social Charter either.

(37) There is no liability-sanctioned obligation to amend internal rules before the understanding of the rule that follows from the obligation under international law has been clarified through an unambiguous decision or a practice of a certain breadth. Anything less can clearly not be required with regard to an unincorporated Convention such as the Social Charter.

(38) There is nothing to fault in the conduct of the Norwegian State in the complaint to the Council of Europe, and the alternative claims cannot be successful either.

(39) The Norwegian State represented by the Ministry of Trade, Industry and Fisheries has entered the following statement of claim:

> The appeal shall be dismissed.
>
> The Norwegian State represented by the Ministry of Trade, Industry and Fisheries shall be awarded costs before the Norwegian Supreme Court."

(40) **I have concluded** that the appeal must be dismissed.

(41) As I will return to later on in my vote, in my opinion, it cannot be assumed that the age 62 years rule in Section 19 (1) of the Norwegian Seamen's Act was in contravention of the Social Charter when the Norwegian Seamen's Act was revised in 2007. This makes it less natural to discuss in-depth the other conditions for liability for damages.

(42) I am then content to begin by placing the issues the case presents into a larger context, and indicating certain points of departure.

(43) The case raises the fundamental question of whether the Norwegian State can be liable for damages for a failure to implement a convention that Norway is bound by.

(44) The point of departure is sufficiently clear; ratification of a convention or acceding to a treaty places an obligation on the state under international law, but with a clear conflict between the international law provisions and Norwegian law, the internal law will take precedence. I then disregard cases in which the convention has been given status as Norwegian law through incorporation, or where the law itself determines that our treaty obligations will take precedence.

(45) When Norwegian law is applied in spite of conflict with an obligation under international law, there will not normally be grounds for filing any claim for damages against the Norwegian State. It will be up to the legislator to determine what conventions are to be incorporated into Norwegian law and how this should be done, and a liability for damages on the part of the Norwegian State can contribute to undermining this principle.

(46) A liability for damages for the failure to implement EEA directives does not entail a deviation from this principal point of departure. The fact that, under certain conditions, a liability for damages can rise on the part of the Norwegian State in accordance with the principles of EEA law when EEA directives are implemented was established by the EFTA Court in case E-9/97 Sveinbjörnsdottir. The decision is, however, not based on general principles, but the fact that it follows from the EEA Agreement itself, with is regarded as representing "an international treaty *sui generis* which contains a distinct legal order of its own". It does not concern an ordinary obligation under international law, but an agreement that encompasses in itself a principle that the states can incur a liability for damages for a failure to implement.

(47) The EFTA Court made an independent assessment, but the conclusion and grounds correspond well with the principle that had already been established in the EU area, and the principal grounds for this

were given. In the European Court of Justice's judgment of 19 November 1991 in the cases C-6/90 and C-9/90, the discussion of the parallel fundamental question in the EU area is introduced in paragraph 31 as follows:

> "It is remarked by way of introduction that where a special legal order is introduced by the EEC Treaty, which is integrated in the legal systems of the member states, and which is to be applied by their courts. The legal entities from there are not just the member states, but their citizens as well.

(48) It is in other words not the breach of the obligation under international law in itself that entails a potential liability for damages on the part of the Norwegian State.

(49) The European Social Charter is a human rights convention, and the question is whether the obligation of the government agencies to respect and safeguard human rights pursuant to Section 92 of the Norwegian Constitution (formerly Section 110 c) can be regarded as an obligation of such a nature that breach of a ratified, unincorporated human rights convention can result in a liability for damages on the part of the state. The question has not been brought before the Norwegian Supreme Court, and I do not find it natural under the circumstances to develop this in greater detail in this case.

(50) If the Norwegian State was to be liable for damages for failure to implement under the circumstances, there is clearly enough no strict liability. There is no strict liability for the consequences of the fact that an act is found to be in contravention of the Norwegian Constitution, and the appellant has not cited any judgment from the Norwegian Supreme Court that is based on strict liability for an error of law in other contexts.

(51) When a claim for damages is based on a failure to implement the EEA Agreement, it has on the contrary been established by the Norwegian Supreme Court that a liability requires qualified neglect. In Rt-2005-1365 (Finanger II), the Norwegian Supreme Court finds that when the member states are given discretionary authority of a political/financial nature by the implementation of a directive, the threshold for liability must be high and the violation must be obvious and gross.

(52) I find then that, for a claim for damages for a defective implementation of the Social Charter as well, it cannot be relevant to assess the question of possible liability, unless the conflict between the act and the convention represents a qualified failure in the obligation that may possibly exist.

(53) On this basis, I will take a close look at the understanding of the relevant provisions in the Social Charter, as well as what grounds the legislator had in 2007 to stipulate the detailed content of these provisions.

(54) When the Human Rights Act was adopted, an assessment was made as to what conventions were to be incorporated into Norwegian law in connection with the Act, and be given preference then over other acts. The Social Charter was not included as a result of this. In Official Norwegian Report (NOU) 1993:18 Legislation on Human Rights, a more detailed account of the convention is given in Section 9.2.2. Of special interest to the case here is the fact that it has been emphasised that the convention – also in comparison with other conventions on financial, social and cultural rights – is quite vaguely formulated. It has also been emphasised that differing views between the various agencies that have been included in the enforcement system for the convention have contributed to the fact that it is difficult to establish what the legal status is. When the Committee concluded that the Social Charter, which is emphasised as a fundamentally important convention at the European level, should not be incorporated in the Human Rights Act, it is also pointed out, however, that the Convention is under revision.

(55) In Proposition No. 3 (1998-1999) to the Odelsting, page 36, the Ministry of Justice makes reference to the fact that the Social Charter had not achieved its intended status and practical importance. When the proposition was written, the Council of Europe's Ministerial Committee had adopted the revised Social Charter, and the Ministry pointed out that Norway had not ratified this, and that it was unclear when it would enter into force. The Ministry concludes its assessment by emphasising that it would be natural to reconsider the question when the revised Social Charter had been in effect for a while. No proposal for incorporation has yet been entered.

(56) The relevant provisions in Part II of the Social Charter are:

> *"Article 1 - The right to work*
>
> With a view to ensuring the effective exercise of the right to work, the Parties undertake:
> 1.
> 2. to protect effectively the right of the worker to earn his living in an occupation freely entered upon;
>
> ...
>
> *Article 24 - The right to protection in cases of termination of employment*
>
> With a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognise:
> a. the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service;
> b. the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief.
>
> To this end the Parties undertake to ensure that a worker who considers that his employment has been terminated without a valid reason shall have the right to appeal to an impartial body."

(57) As is evident, the wording does not provide any particular guidance with regard to the right to terminate employment as a result of attaining an age stipulated in the national legislation.

(58) The question then is whether there were other certain grounds supporting the understanding of these articles in connection with the legislative amendment in 2007.

(59) The decision by the European Committee of Social Rights on Fellesforbundet's complaint of 2 July 2013 has been of key importance to the appellant's argumentation. The Committee concludes that Section 19 (1), sixth paragraph of the Norwegian Seamen's Act entails a violation of both Article 1, Section 2 and Article 24. Separate grounds are given for each of the violations, but they are generally concurrent. Somewhat simplified, the Committee ascertains that sufficiently detailed grounds have not been provided for why the special circumstances associated with the work of seamen or working conditions can justify the special rule in the Norwegian Seamen's Act. It is emphasised in particular that it is not of decisive importance that seamen will be entitled to a seamen's pension.

(60) The theme for the European Committee of Social Rights was, however, not whether there were grounds in 2007 to conclude that there had been a violation of the convention. Fellesforbundet's complaint did not concern this question. The complaint is summarised in a paragraph as follows:

> "Fellesforbundet for sjøfolk would like the European Committee of Social Rights to confirm that Section 19 (1), sixth paragraph of the Norwegian Seamen's Act, whereby the employment of seamen can be terminated exclusively on grounds that the age of 62 is attained, conflicts with fundamental rights established in the European Social Charter.

(61) In its decision, the Committee does then not occupy itself with the situation in 2007, but it gives a current assessment based on the source of law situation at the time of the decision. Most of the legal material that the decision is based on is from the years after 2007, including the Norwegian Supreme Court's decision in the Kystlink case, and the legislative work that resulted in the repeal of the contested special rule in the Norwegian Seamen's Act.

(62) The development of the law in recent years is discussed in Official Norwegian Report (NOU) 2012:18 Rights On Board – The New Norwegian Ship Labour Act. On page 162 it is stated:

> "In addition, it is clear to the Committee that the case law – both in Norway and in the EU – have developed since the Kystlink judgment, see Section 4.8.4.1 for further details. The Committee would like in particular to point out Rt-2012-219 (Helicopter Pilot Judgment)."

(63) With regard to the legal situation in 2007, no earlier decision or statement from any agency under the Council of Europe has been cited, and reference is not made otherwise to any material that concerns the understanding of the Social Charter that existed already then.

(64) On the other hand, the appellant has made reference to Council Directive 200/78/EC, which provides general framework provisions on equal treatment in working life. It is argued that the clarification of the scope of the Directive that had taken place within the EU was a reflection of overarching general principles, and that this also contributed to clarifying the scope of the Social Charter in the relevant context.

(65) The appellant has in particular made reference to Article 6 (1) of the Directive, which is asserted to clarify under what circumstances discrimination on the basis of age is permitted. The wording of the provision is as follows:

> "Notwithstanding Article 2, paragraph 2, the member states can determine that differential treatment on the basis of age does not represent discrimination, provided there are objective and reasonable grounds based on a legitimate purpose within the framework of national law, inter alia, legitimate employment, labour market or vocational training policy objectives, and provided the means of fulfilling the relevant objective are appropriate and necessary."

(66) The provision does not stipulate a clear framework for the legislation, and in 2007 there was no decision from the European Court of Justice concerning the authority to issue special rules that weaken protection from the termination of employment due to age in fields of work where relevant considerations indicate a lower retirement age than what otherwise applies. The appellant has cited the European Court of Justice's decision of 22 November 2005 in case C-144/04, the Mangold case. The court discusses the Council Directive. However, the general comments do not add much beyond the Council Directive itself, and the circumstances of the case were so different from the issues in our case, that the decision does not contribute to clarification of how the Council Directive should be understood in our case. What the European Court of Justice ascertained was that an act that permitted a general rule that, after attaining the age of 52 years, an employee had to accept that his employment was converted to a time-limited employment contract was in contravention of the Directive.

(67) The European Court of Justice also pointed out in its decision, under reference to that fact that the ban on discrimination "originates from various international conventions and in the member states' constitutional traditions", that an overarching principle of EU law that entails a ban on discrimination on the basis of age applies regardless of the Council Directive. This does not contribute either to a more detailed determination of what the protection consists of.

(68) An obligation to implement Council Directive 200/78/EC did not follow from the EEA Agreement, but it was regarded as appropriate and desirable to implement the Directive in Norwegian law, which is part of the overall efforts to establish more general protection from discrimination by law.

(69) With regard to the introduction of a ban on discrimination in the Norwegian Seamen's Act, the Norwegian Maritime Directorate distributed a draft legislative amendment for consultation on 3 June 2005. In the consultative document, it was assumed that the provision in Section 19 (1), sixth paragraph of the Norwegian Seamen's Act could be maintained. There were no deviating opinions in any of the consultative comments. When the Norwegian Seamen's Act was harmonised with the principles of the Working Environment Act in 1985, both the Norwegian Seamen's Union and the Norwegian Shipmasters' Union spoke for increasing the age limit to age 67. However, even if the question of the weakening of the protection from the termination of employment on attaining the age of 62 was addressed directly in the consultative document, the question was in other words not problematised by either of the two organisations when the question again became relevant 20 years later.

(70) In Proposition No. 85 (2005-2006) to the Odelsting on amendments to the Seamen's Act No. 18 of 30 May 1975, page 13, the Ministry of Trade, Industry and Fisheries made reference in general to Proposition No. 49 (2004-2005) to the Odelsting on the Act relating to the working environment, working hours and employment protection. With regard to Section 19 (1), sixth paragraph in particular, the following is stated in Section 5.3.4.3:

> "Section 19 (1), sixth paragraph is understood to mean that a seaman is protected from termination of employment on the basis of age prior to attaining age 62. Entitlement to a seamen's pension is achieved already on attaining the age of 60 years. However, there is no obligatory retirement age pursuant to the Norwegian Seamen's Act. In comparison, it can be mentioned that the Ministry of Labour and Social Affairs concluded in relation to the general age limit of 70 that it can be continued without violating the ban on discrimination. There are considerations indicating that the shall be used as the basis in relation to the age limit of 62 years in the Norwegian Seamen's Act. Due to the nature of the occupation and the exertion this entails, it appears to be natural that one operates with a lower age limit. The fact that entitlement to a seamen's pension is earned at age 60 and one is therefore financially independent indicates that the limit of age 62 is not in contravention of the Directive. Discrimination on the basis of age prior to the attaining the age of 62 will on the other hand represent a breach of the Directive's ban on discrimination."

(71) The grounds are not detailed, but it must be assessed on the background of the fact that it was a question of continuing a provision that had been in force for several decades, and that there were no objections to continuation of the provision in the consultation process. In Recommendation No. 34 (2006-2007) to the Odelsting, page 5, the Standing Committee on Business and Industry also emphasises the strong consensus among the consultative bodies.

(72) In Rt-2010-202 (Kystlink), paragraph 68, the first voting justice expresses that there can be no doubt that the considerations to which reference is made in the proposition are legitimate considerations that can justify the discrimination. With regard to the proportionality, however, he expresses doubt. With reference, for example, to the fact that in cases of doubt, the courts should exhibit restraint with respect to setting aside the legislator's assessment in an area in which the states are allowed a margin of discretion, and the fact that there is no obligation under international law to implement the directive, the first voting justice concludes that Section 19 (1), sixth paragraph does not conflict with the Directive.

(73) I agree with this, and it is difficult for me to see that the understanding of Council Directive 2000/78/EC in 2007 was established in such a way that it could be regarded as contributing to the understanding of the Social Charter's ban on discrimination.

(74) It has not been contested that the special provision in Section 19 (1), sixth paragraph of the Norwegian Seamen's Act had good grounds in a historical perspective, but that there is clearly room for various views on whether it was well-justified to maintain the provision in 2007. The provision was not maintained when the Norwegian Ship Labour Act was adopted on 21 June 2013. This political assessment of appropriateness does, however, not say much about what freedom of action the legislator had in 2007 in accordance with the Social Charter.

(75) So overall, in my opinion, there were no grounds in 2007 to assume that the Social Charter impeded a continuation of the special provision in Section 19 (1), sixth paragraph of the Norwegian Seamen's Act. Under any circumstances, it must be assumed that the broader understanding of the Social Charter that the European Committee of Social Rights used as the basis for its decision in the complaint case in 2013, had not been established in 2007, so that continuation of the provision in Section 19 (1), sixth paragraph could under some circumstances entail liability for damages on the part of the Norwegian State. Even if the convention had been incorporated into Norwegian law, the conditions for a liability for damages had not been satisfied.

(76) The appellant has also argued that the Norwegian State must be liable because the Ministry of Trade, Industry and Fisheries failed to comply with its duty of disclosure to the Storting during the preparation of Proposition No. 85 (2005-2006) to the Odelsting. The Ministry failed to clarify the relationship to the Social Charter and there is no independent discussion in the proposition whether there was a continued need for a lower age limit at sea. In particular, it is emphasised that it is strongly misleading when importance is attached in the proposition to the fact that the right to a seamen's pension entails that seamen will be financially independent when they attain retirement age.

(77) It has been generally assumed in theory that a legislative enactment can become invalid as a result of a gross breach of the adoption procedure pursuant to the Norwegian Constitution. Various less than practical examples have been pointed out, but no errors of such a nature have occurred in practice.

(78) This case concerns alleged errors of a completely different nature, and it is difficult to imagine that errors of the nature cited could result in the invalidity or a legislative enactment or a liability for damages on the part of the Norwegian State. The courts must observe substantive law adopted by the Storting. It is up to the Storting to assess whether extensive law preparation is required, and it is up to the Storting to both assess the actual prerequisites for the legislative enactment and what effects the act must be expected to have. Judicial review does not encompass, as is the case with administrative decisions, the question of whether the legislative enactment is based on a proper review, builds on actual prerequisites that are correct or if the act will result in qualified unreasonable results. Whoever has such objections to an act that the Storing has adopted must seek to amend it by political means.

(79) The executive branch of power has undoubtedly a duty of disclosure to the Storing. Today this is expressly stipulated in Section 82 of the Norwegian Constitution, which is worded as follows:

> "The Government is to disclose to the Storting all information that is necessary for the proceedings on the matters it submits. No Member of the Council of State may submit incorrect or misleading information to the Storting or its bodies."

(80) The provision was added by a constitutional amendment in 2007, but it was assumed to have the same content as prior customary constitutional law. In Recommendation No. 210 (2002-2003) to the

Storting, page 15, a unanimous Scrutiny and Constitutional Affairs Committee emphasised the importance of the Storting have a good basis for the resolutions that are adopted:

> "The Committee would like to emphasise the importance of the Storting receiving information that enables it to make a proper assessment of the content and impact of the resolutions that are adopted. Since it is the Government that prepares and submits most of the items to the Storting, which leads the administration and has the right to use the public investigative resources, it has a particular responsibility for ensuring that the Storting has a proper basis for making decisions.

(81) The Committee defines the scope of the duty of disclosure as follows:

> "The Committee would like to point out that the information the Government presents to the Storting must be correct. This means that the information must be in agreement with the underlying reality. The Committee would also like to point out that a certain level of detail must be required for the information that is presented."

(82) Accordingly, there may be grounds for differing opinions on whether the Ministry of Trade, Industry and Fisheries should in Proposition No. 85 (2005-2006) to the Odelsting have discussed the relationship to the Social Charter, whether the benefits in accordance with the seamen's pension legislation should have been disclosed, and whether the Ministry should have made a more detailed clarification of the relevant maritime working conditions. I do not find any reason to delve further into this. It will be up to the Storting to ensure that a proper basis is provided for legislative enactments, and it will be up to the Storting to follow up any breach of the duty of disclosure. It can perhaps not be rules out that the duty of disclosure to the Storting can be misused to such a degree that a liability for damages on the part of the Norwegian State may arise in relation to citizens that are affected by the legislative enactment, but it will not normally be relevant to interfere with the relationship between the branches of government by establishing such a liability for damages. In this case, it is of course clear that there is not under any circumstances a breach of the duty of disclosure of such a nature, and the action claiming damages cannot be successful on this basis either.

(83) Alternatively, the appellant has claimed that the Norwegian State must be liable for the costs associated with the complaint to the European Committee of Social Rights. It has been asserted that when the complaint was filed it was very clear that the special rule in Section 19 (1), sixth paragraph of the Norwegian Seamen's Act could not be maintained and that it was unwarranted for the Norwegian State to contest this. In addition, it is argued that there was no justifiable basis for contesting Fellesforbundet's right of appeal.

(84) The Norwegian State has not asserted that it follows from the distribution of power between the government agencies that the courts cannot review the Government's assessment of whether there is a need for additional legal clarification. I point out nonetheless that it cannot just be assumed that the courts, in addition to having the jurisdiction to decide on the legal question at issue, shall also be able to review the Government's assessment of the need for such clarification with the consequence that the Norwegian State is held liable for damages. As the case stands, there is no need to take a stand on this question.

(85) In Rt-2015-385, the Norwegian Supreme Court heard a case in which damages were claimed for an allegedly groundless action. The first voting justice dismissed that the question of liability could be decided based on a broad due care assessment. It was pointed out, inter alia, that such an approach could result in a reluctance to have legal questions clarified by the courts, and that justified claims could also be affected negatively. The Norwegian Supreme Court concluded that the liability for damages must be limited to cases of misuse. Paragraph 34 states sums this up as follows:

> "Based on the sources that have been reviewed above, and particularly the statements in Rt-1994-1430 on page 1436 and the principle of the right to review by a court of law, I believe that a liability for damages beyond the costs must be reserved for the cases of misuse. Misuse will normally exist if the case is completely without any chance of being successful and the party understands that this is the case. A legal action will then be motivated by aims other than winning the case, and it will normally entail misuse of the right to legal action to institute legal action in such a case."

(86) It goes without saying then that only in completely extraordinary cases may it be relevant for a party to incur a liability for damages by defending himself against a claim filed in a lawsuit.

(87) Some of the considerations that indicate such a limitation of the opportunity to claim damages for lawsuits that should not have been filed, do not apply with the same weight when it concerns the conduct of the Norwegian State before the courts and various international institutions, but I add that it would not be relevant either for the State to incur a liability for damages unless misuse of the legal system is established.

(88) It is clear then that the alternative claim for damages cannot be successful either.

(89) The appeal has not been successful, and the case has not raised any doubt. However, since the case raises problems of a fundamental nature, I have concluded that the costs before the Norwegian Supreme Court should not be awarded, cf. Section 20-2, third paragraph (c) of the Norwegian Dispute Act.

(90) I vote for this

judgment:

1. The appeal shall be dismissed.
2. Costs before the Norwegian Supreme Court shall not be awarded.

(91) Judge **Indreberg:** I am essentially and as regards the outcome in agreement with the first voting judge.

(92) Judge **Ringnes:** Likewise.

(93) Judge **Noer:** Likewise.

(94) Judge **Matningsdal:** Likewise.

(95) After voting, the Norwegian Supreme Court handed down the following

judgment:

1. *The appeal shall be dismissed.*
2. *Costs before the Supreme Court shall not be awarded.*