Arctic Review on Law and Politics
Vol. 15, 2024, pp. 126–129

News on Arctic Law and Politics

The Karasjok Supreme Court Judgment – and Its Significance for the Legal Survey in Finnmark

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Abstract
The Karasjok judgment was pronounced by the Supreme Court of Norway on 31 May 2024. By a narrow majority (6 to 5), the Supreme Court concluded that neither the population of the municipality of Karasjok as a whole, nor the Sámi part of it, have property rights to outlying fields in the municipality, as the landownership belongs to the Finnmark Estate (Finnmarkseiendommen/FeFo). The Supreme Court thus set aside the Finnmark Land Tribunal's judgment, in which the conclusion was that the population's property rights were established through immemorial usage. In this paper, I discuss the significance of this Grand Chamber judgment for the upcoming legal survey, including which scenarios can be expected.

Keywords: *the Karasjok case, ILO-169, the Finnmark Estate, legal survey, Sámi, Sámi rights, property law*

1. Norwegian Property Law

The Karasjok judgment[1] makes it clear that Norwegian property law will be the significant legal basis for the legal survey in Finnmark – also in the Sámi areas. Concretely, the majority emphasizes that acquisition of rights must be determined

1 HR-2024-982-S (Karasjok): I. Finnmarkseiendommen/(The Finnmark Estate) v. Kárášjoga Sámiid Searvi / Karasjok sameforening, Kárášjoga gielda /Karasjok kommune et al., II. Reindeer husbandry distrikt 13 and 16 and Toralf Henriksen et al. v. Finnmarkseiendommen (The Finnmark Estate). This paper is based on Øyvind Ravna, «Karasjokdommens betydning for rettskartleggingen i Finnmark», *Rett24,* 25 June 2024, https://rett24.no/articles/karasjokdommens-betydning-for-rettskartleggingen-i-finnmark.

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 eISSN 2387-4562. https://arcticreview.no.
Citation: Øyvind Ravna. "The Karasjok Supreme Court Judgment – and Its Significance for the Legal Survey in Finnmark" Arctic Review on Law and Politics, Vol. 15, 2024, pp. 126–129. http://doi.org/10.23865/arctic.v15.6844

based on who has exercised the right-establishing use (para. 108, repeated in 204). That opinion implies that the municipality's population as a whole does not acquire ownership. At the same time, the judgment does not rule out that other groups may be subjects of property rights.

However, those who had hoped that the Grand Chamber judgment would lay down clear guidelines for the further judicial survey will be disappointed. As the majority specifies that the judgement has not taken stands on whether "individuals, village groups and siidas or others in Karasjok have acquired property rights to 'their' areas" (para. 205), it means that the legal situation is still far from being clarified. The requirement of a *prominent collective control* over the entire disputed area by the group claiming ownership rights, which the majority emphasizes without justification or anchoring in visible sources (para. 198), will also contribute to uncertainty.

2. More Detailed Legal Survey

The Karasjok judgment involves more detailed investigations of usage and legal opinions, with several field assessments, taking of evidence and questioning witnesses. Such detailing also means that court decisions or agreements on property and use rights must be marked with boundaries in the field, cf. the Finnmark Act, s. 45 first paragraph. At the same time, this will require significantly increased resource effort and consuming of time.

A further consequence of the judgment is that the study areas in Finnmark should not follow the municipal boundaries, but rather natural, uniform areas of use.

3. Four Scenarios

The Karasjok judgment can therefore lead to several scenarios. One is that the Finnmark Estate (Finnmarkseiendommen /FeFo) continues as owner and manager of the large, disputed property. Another is that rights are revealed that imply local governance of natural resources, but where FeFo is still the landowner. This may mean that the governance of natural resources in Finnmark is a step closer to the "municipal model" and the common land areas that the Sámi Law Committee proposed in NOU 1997: 4, chapter 5,[2] but which were not included in the governmental bill for the Finnmark Act. This could also be a step closer to commons of the size and scope that we find on state lands in southern Norway, where an area of approximately half the size of the territory of the Finnmark Estate is managed by 94 mountain boards.

A third scenario is that the courts (or FeFo) recognize that groups or individuals own parts of outlaying lands in Finnmark. Thus, it is conceivable that one ends up with a local administration similar to the one formed in Svartskogen in Troms County through *Čáhput Siida*, where the local people are both landowners and managers.

2 NOU (Norwegian Public Report)1997: 4 *Naturgrunnlaget for samisk kultur*

A fourth scenario could be that FeFo, with its well-established management apparatus, continues as manager by agreement with a possible future landowner.

4. International Law, Sámi Customs and History

The majority of the Supreme Court finds that if the internal legal terms for the acquisition of property rights are not met, the ILO Convention No. 169 art. 14 (1)[3] cannot contribute to collective property rights being recognized for indigenous peoples (para. 203). This is justified in the national adaptation of the convention that is read out of article 14, the flexibility norm in article 34, as well as the Sámi Rights Committee's report in NOU 2007:13.[4] The majority therefore assumes that national law alone is decisive. A timely question then becomes what the purpose of the ratification of ILO-169 is, and what is the significance of the presumption principle. Here, it is easy to agree with *Geir Ulfstein*[5] that it cannot simply be assumed that Norwegian law is in accordance with the ILO-convention, and that the majority's statement thus provides minimal guidance for the further legal survey.

The minority of five judges, which arrived at the same conclusion as the majority of the Finnmark Land Tribunal, did not support the majority interpretation of ILO-169, finding that "if national rules, applied based on Sámi premises, do not provide sufficient basis for recognizing property rights, that must, in any case be the result when national property law are applied in light of the presumption principle" (para. 319).

Nor is Sámi customary law given particular importance by the majority. Although the majority emphasizes that Sámi customs and legal opinions must be taken into account (para. 67), this is not made visible in the application of the law. The statement that the customs of the indigenous people are respected "in that the subject of rights is determined based on who has exercised the rights-giving use" (para. 108), implies nothing more than if Norwegian property law is applied correctly, Sámi rights are safeguarded, too. The fact that the judgment's conclusion is anchored in the more than 100-year-old Ullensvang judgement, where two municipalities in a completely different part of the country were not successful in claims for property rights (para. 202), does not indicate that Sámi law is emphasized. Had not recognition of the demands put forward by Karasjok's Sámi population, based on their usage and traditions, been precisely an emphasis on Sámi customary law? Although different groups have used different areas of Karasjok's outlying fields, they have collectively, according to both the Finnmark commission, the Finnmark Land Tribunal

3 C169 – Indigenous and Tribal Peoples Convention, 1989 (No. 169). Ratified by Norway 20 June 1990, entry into force 5 September 1991.

4 NOU (Norwegian Public Report) 2007: 13 Den nye sameretten. The reference is to page 231.

5 Geir Ulfstein, «Uklart om folkeretten i Karasjokdommen», *Rett24,* 18 June 2024, https://rett24.no/articles/uklart-om-folkeretten-i-karasjokdommen

and a unified Supreme Court, exercised an extensive and "relatively undisturbed" land use of the entire outlying field in the municipality "up to our time".

In the end, one can be happy that the Supreme Court cannot pass judgment on history. When the majority assumes that the King of Denmark immediately made himself the owner of the Karasjok area when it came under his majesty's jurisdiction in 1751, it maintains that the land was ownerless and that indigenous people's use could not create rights. This is a shadow of the *terra nullius doctrine* which hardly can set a precedent for legal survey.

A Higher Threshold for Recognition

The Karasjok judgment may be a signal that local people in Finnmark, in the long term, may be allowed to manage their nearby outlying areas and natural resources. For the Sámi communities, however, the dissent is probably the bright spot. Not only because the minority is significant, and because it considers the consequences of both the historical realities and international law in a more nuanced way than the majority, but also because history shows that dissent in cases related to Sámi land use may point towards what will be law in the future.

The narrow majority means that the judgment does not have the precedential effect that a Grand Chamber judgment would generally have, which means that it does not close the door for a new assessment of the significance of ILO-169. It also does not close the door to larger communities than village associations and siidas being able to put forward claims during the legal survey, even if the threshold for reaching such claims has probably become higher.