

Borgarting Court of Appeal

Oslo, 28 February 2022

**APPEAL**  
**TO**  
**BORGARTING COURT OF APPEAL**

**Oslo District Courts case no.:** 20-169475TVI-TOSL/04

**Appellant 1:** Norwegian Kennel Club, org. no. 937125577  
c/o Board Chair Jan-Helge Nordby  
PO Box 52 Holmlia  
1201 Oslo

**Appellant 2:** Norwegian Cavalier King Charles Spaniel Club, org. no. 996057690  
c/o Board Chair Kari Skarpsno  
Rønnålgarda 7  
2164 Skogbygda

**Appellant 3:** Norwegian Bulldog Club, org. no. 913338413  
c/o Board Chair Arne Øygarden  
Vestre Skogbygdveg 699  
2370 Løten

**Appellant 4:** Inger Pettersen  
Kennel Gostuen  
Gollersudkroken 96  
2344 Ilseng

**Appellant 5:** Liv-Anne Klubben  
Kennel Jørsi  
PO Box 189  
4291 Kopervik

**Appellant 6:** Christel Hagen  
Kennel Cavalierhagen  
Veivokterveien 2  
3531 Krokkleiva

**Appellant 7:** Lena Haugland

Kennel Kalagera  
Vestre skogbygdveg 669  
2370 Løten

**Appellant 8:** Liss Bodil Olsen  
Kennel Zendream  
Albert Pettersons vei 18A  
5750 Odda

**Appellant 9:** Jorunn Rosander  
Kennel Jofro-Bull  
Thor O. Hannevigsvei 1  
3179 Åsgårdstrand

**Counsel:** Advocate Anette Fjeld  
Advokatfirmaet Simonsen Vogt Wiig AS  
PO Box 2043 Vika  
0125 Oslo  
+4793207728 / [afj@svw.no](mailto:afj@svw.no)

**Assistant counsel:** Associate Eirik Bergsjø  
Advokatfirmaet Simonsen Vogt Wiig AS  
PO Box 2043 Vika  
0125 Oslo

**Respondent:** Norwegian Society for Protection of Animals, org. no. 971277475  
Øvre gate 7  
0551 Oslo

**Counsel:** Advocate Emanuel Feinberg  
Advokatfirmaet Glittertind AS  
PO Box 1383 Vika  
0114 Oslo

**Assistant counsel:** Advocate Dagny Marie Ås Hovind  
Advokatfirmaet Glittertind AS  
PO Box 1383 Vika  
0114 Oslo

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## 1 INTRODUCTION

On 31 January 2022, Oslo District Court pronounced a judgment containing the following conclusion:

*With respect to the Norwegian Kennel Club:*

1. *It is contrary to section 25, first, second and third paragraphs, of the Animal Welfare Act to breed the dog breed English Bulldog.*
2. *It is contrary to section 25, first, second and third paragraphs, of the Animal Welfare Act to breed the dog breed Cavalier King Charles Spaniel.*

*With respect to the Norwegian Bulldog Club:*

1. *It is contrary to section 25, first, second and third paragraphs, of the Animal Welfare Act to breed the dog breed English Bulldog.*

*With respect to the Norwegian Cavalier King Charles Spaniel Club:*

1. *It is contrary to section 25, first, second and third paragraphs, of the Animal Welfare Act to breed the dog breed Cavalier King Charles Spaniel.*

*With respect to Inger Pettersen, Liv-Anne Klubben and Christel Hagen:*

1. *It is contrary to section 25, first, second and third paragraphs, of the Animal Welfare Act to breed the dog breed Cavalier King Charles Spaniel.*
2. *Inger Pettersen, Liv-Anne Klubben and Christel Hagen are prohibited from breeding the dog breed Cavalier King Charles Spaniel.*

*With respect to Lena Haugland, Liss Bodil Olsen and Jorunn Rosander:*

1. *It is contrary to section 25, first, second and third paragraphs, of the Animal Welfare Act to breed the dog breed English Bulldog.*
2. *Lena Haugland, Liss Bodil Olsen and Jorunn Rosander are prohibited from breeding the dog breed English Bulldog.*

*With respect to all defendants:*

1. *No legal costs are awarded.*

The judgment and a service form were published in the case management portal on the same day. The appeal deadline is one month from 31 January 2022. The appeal has thus been submitted in time.

The entire judgment is being appealed to Borgarting Court of Appeal. The appeal concerns both the district court's application of the law and its assessment of the evidence.

The case raises questions of principle. It raises questions concerning the court's intensity of review in cases under the Animal Welfare Act and jurisdiction to issue a breeding prohibition under section 33 of the Animal Welfare Act in a civil case. The case also raises the question of the legal content of section 25 of the Animal Welfare Act.

More specifically, the case concerns whether it is contrary to section 25 of the Animal Welfare Act to breed the dog breeds English Bulldog (Bulldogs) and Cavalier King Charles Spaniel (Cavaliers), including whether breeding of these breeds can continue within the framework of the provision.

## 2 BACKGROUND TO THE CASE

### 2.1 About the parties

On pages 9 to 13 of the judgment, the district court has provided a brief account of the parties to the case. The description of the Norwegian Kennel Club (NKK), Norwegian Bulldog Club (NBK), Norwegian Cavalier King Charles Spaniel Club (NCK) and five of the six breeders can be adopted by the court of appeal.

On behalf of breeder Inger Pettersen, we would point out certain *errors* in the court's account. On page 13, the district court has written that, "Three of the sold puppies have been returned due to heart murmurs, and two due to suspected CM." Pedersen [sic] has stated that a weak heart murmur was discovered in three puppies, but that none of these puppies have been returned. Pedersen [sic] has also stated that there have been purchasers who have suspected CM, but that these suspicions have not been diagnosed and have not developed further. The dogs have not been returned to the breeder.

On behalf of Christel Hagen, we would point out that she also – in addition to what is described in the district court's account – informed the court that health and the use of older males is prioritised. Contrary to the impression which might be created by the court's account, it is not true that she only gives consideration to award-winning breeding dogs.

On behalf of Jorunn Rosander, we would point out that her own male dogs breed naturally. We also wish to clarify the reasons why the veterinarian opted for a C-section in two of the instances mentioned by the court: in one case, the puppy lay across the bitch's birth canal (one puppy in the litter); in the second case, the contractions became weak after the bitch had given birth to two of the puppies. Rosander has initiated BOAS registration.

On behalf of Lena Haugland, we would point out that five out of seven bitches birth naturally, and that none of her dogs have experienced BOAS-related difficulties.

In addition to the stated errors, the appellants see a need to expand the factual presentation somewhat.

### 2.1.1 NKK

Fédération Cynologique Internationale (FCI) is the overarching organisation that recognises and decides which breeds can be registered. FCI is not responsible for the breed standards; instead, it constitutes a shared cooperation platform for the national kennel clubs, which bear independent responsibility for the breed standards applicable to the national dog breeds of individual countries.

The home country of a breed "owns" the standard. The Kennel Club UK owns the breeds Bulldog and Cavalier and the related breed standards. Norwegian breed clubs and breeders have to follow these standards.

FCI appoints a kennel club in each country to which it delegates the overarching responsibility for breed management, i.e. responsibility for national management of all FCI-approved breeds. NKK is an FCI member, and has delegated breed responsibility in this capacity. NKK has delegated this responsibility to the breed clubs representing the different breeds. It is the breed clubs which are mandated to protect the breeds and facilitate desirable breeding.

It is only when a breed lacks a breed club, or when a breed club fails to meet its responsibility, that NKK has *de facto* breed management responsibility. In the case of the breeds to which the present case relates, there are breed clubs that undertake satisfactory breed management.

NKK is a member organisation. The membership of the organisation is made up of the breed and activity clubs. No dog owners are direct members of the organisation. NKK adopts general rules on breeding and rearing based on proposals received from the breed clubs. Further, NKK provides breed clubs and breeders with specialist support related to breeding, and gives guidance. NKK also provides general information on the value of pedigree breeding to both society and dog owners.

NKK is required to register breeds approved by FCI. NKK may only refuse registration if a breed is prohibited.

Further, NKK arranges registration of health data, including BOAS grading and registration of BOAS grades for English Bulldogs, and maintains a register of dogs delivered by C-section. In addition, registration requirements have been developed for known HD status in parent animals for a range of breeds, to enable registration of litters accordingly. NKK also maintains studbooks.

NKK does not own animals used in breeding. It does not organise breeding or participate in breeding work in any way.

NKK engages in extensive dialogue with the Norwegian Food Safety Authority. The Norwegian Food Safety Authority considers NKK to be a reputable stakeholder that desires appropriate dog breeding.<sup>1</sup>

The Norwegian Food Safety Authority has never found reason to consider issuing a decision targeting NKK based on breach of section 25 of the Animal Welfare Act.<sup>2</sup>

Among other things, NKK has asked the Norwegian Food Safety Authority to introduce a reporting duty for operations on the respiratory organ occasioned by external exaggerations (brachycephaly).<sup>3</sup> The purpose of the request was to exclude dogs with breathing problems from breeding. The Norwegian Food Safety Authority did not grant the request.

NKK thereafter developed a strain test to detect breathing problems in short-muzzled dogs. This test was used until NKK began using BOAS grading and registration in 2019. The system and the grading are based on extensive scientific work done by Cambridge University's BOAS Research Group under the leadership of Jane Ladlow. Grading results are registered in DogWeb. Moreover, separate rules and recommendations have been developed for breeding animals.

NKK has also initiated a wide-ranging project to screen Cavaliers for heart conditions. In cooperation with *Norsk Forening for Veterinær Kardiologi* [the Norwegian association of veterinary cardiologists] (NFVK), NKK is registering the screening results from heart examinations in DogWeb. Only veterinarians with special approval from NKK/NFVK may register such results. Separate rules have been developed for the Cavalier breed.

To register the result of an auscultation examination – the method chosen for the screening system – in DogWeb, the dog must be at least three years of age. The results of auscultation/ultrasound examination can be registered in DogWeb for dogs of all ages, but to meet the requirements applicable to breeding animals the examination must have been undertaken after the animal has turned three. NKK additionally recommends that close relatives of breeding dogs (offspring, siblings, parents, etc.) should also be examined, since this will give an indication of the suitability of the dog as a breeding animal.

### 2.1.2 The breed clubs

The breed clubs have national breed management responsibility. This responsibility means that the clubs can propose and promote health requirements and guidelines applicable within the club. However, the rules do not apply other than within the club.

The breed clubs have a particular responsibility for the management and protection of their breed(s), and therefore have the right to propose breeding-related measures and restrictions to NKK. The purpose of this is to ensure that breeding has the desired focus within the framework of section 25 of the Animal Welfare Act, and within the framework laid down by the breed standard applicable at the relevant time. The focus is on health, behaviour, use characteristics and function.

The Norwegian Bulldog Club has developed its own rules on dog-keeping and breeding. The purpose of the BOAS system/BOAS grading and the breeding councils is to reduce the prevalence of breathing problems in the breed. All breeding animals are required

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<sup>1</sup> See Doc. 89-2/D, page 1531.

<sup>2</sup> See Doc. 89-2/D, page 1527.

<sup>3</sup> See Doc. 9-2/D, page 958.

to have a known BOAS status. Breeding is primarily done with BOAS grade 0 or 1 dogs. Dogs with grade 2 BOAS, if they are to be used in breeding, must have a grade 0 or grade 1 mate. Moreover, it is recommended that consideration should be given to excluding dogs who have had a C-section – regardless of cause – from further breeding.

We submit the ethical rules of the Norwegian Bulldog Club as

**Exhibit 1** Basic ethical rules for keeping, breeding and rearing English and French Bulldogs, revised and updated 6 August 2021

The Norwegian Cavalier King Charles Spaniel Club has developed its own breeding requirements and guidelines. The purpose of the screening programme and the breeding councils is to reduce the prevalence of valve disease in Cavaliers by excluding the breeding animals with the poorest hereditary characteristics and encouraging combinations of breeding animals with the highest probability of producing healthy offspring.

To date, the Norwegian Cavalier King Charles Spaniel Club has not found it necessary to impose an absolute breeding exclusion on all animals with heart murmurs, since this could have a negative impact on genetic variation within the breed. The Norwegian Cavalier King Charles Spaniel Club has therefore developed a matrix (table) showing which dogs can/should be bred with one another. The matrix take account of the heart status of breeding animals and the parents of breeding animals at different ages.

We submit the breeding requirements and breeding guidelines for Cavaliers as

**Exhibit 2** Breeding requirements and breeding guidelines for Cavaliers, last updated on 27 January 2022

The Norwegian Food Safety Authority has not found reason to consider issuing a decision targeting the breed clubs based on breach of section 25 of the Animal Welfare Act.<sup>4</sup>

### 2.1.3 The breeders

The Norwegian Food Safety Authority has made inspection visits to five of the breeders. Following the Dogs4All exhibition in November 2018, the Norwegian Food Safety Authority received reports regarding concerns from the Norwegian Society for Protection of Animals, including in relation to brachycephalic breeds. The Norwegian Society for Protection of Animals asked whether the relevant breeders had breached section 25 of the Animal Welfare Act.

In connection with several inspections, the Norwegian Food Safety Authority obtained records prior to the inspection and examined the dogs during the inspection. The Norwegian Food Safety Authority found no breaches of section 25 of the Animal Welfare Act, but did exercise its duty to give guidance in its capacity as a specialist agency.

The inspections consistently revealed high awareness among the breeders of issues related to breeding and the selection of breeding animals. No health problems were found in any of the animals the breeders had at home.<sup>5</sup>

A number of inspection reports have been submitted in the case. By way of illustration, we would quote the following from a report:

*“During this inspection, the Norwegian Food Safety Authority has not discovered circumstances which necessitate pointing out a duty or giving notice of a decision.*

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<sup>4</sup> See Doc. 89-2/D, page 1527.

<sup>5</sup> See Doc. 89-2/D, page 1529.

*The standard of dog-keeping is very high, and the owners are very competent. The owner has dedicated most of her time and resources to her dog-keeping, and is an example to be followed.”<sup>6</sup>*

The Norwegian Food Safety Authority issued no decisions in the inspection cases.<sup>7</sup>

This evidences a substantial discrepancy between the views of the Norwegian Society for Protection of Animals and the supervisory body on the animals' health and whether breeding is contrary to section 25 of the Animal Welfare Act.

## **2.2 Regarding the health problems of the breeds English Bulldog and Cavalier**

### **2.2.1 General**

The parties agree that Bulldogs and Cavaliers are dog breeds with health challenges. In the case of Bulldogs, this relates particularly to breathing problems, including BOAS and inability to reproduce naturally. In the case of Cavaliers, this relates to heart valve disease and complex developmental malformation of the skull and craniocervical vertebrae, which are associated with an excessively short/small skull (CM). The latter is also linked to the neurological condition syringomyelia (SM). Extensive evidence was submitted to the district court on the health problems experienced by the breeds and the diagnoses to which they are predisposed.

The parties do not agree on the diagnoses to which the breeds are predisposed, or how the diagnoses as such may develop and affect individual dogs.

The appellants therefore consider that it may be appropriate for the parties to attempt to prepare a joint, balanced presentation of facts so that the case can be concentrated on the fundamental legal questions and the factual disagreement between the parties.

The factual disagreement between the parties concerns whether breeding of Bulldogs and Cavaliers can continue within the framework of section 25 of the Animal Welfare Act. This question revolves around whether there are enough healthy animals within the breed to continue breeding through targeted breeding within the breed or whether the breed has to be crossed with another breed to inject new genes.

In the appellants' view, animal health can be protected within the framework of section 25 of the Animal Welfare Act through targeted breeding within each breed; see sections 2.2.2 and 2.2.3 below. This is supported by expert opinions.

### **2.2.2 English Bulldog**

No Bulldogs with grade 3 BOAS are bred in Norway, and grade 2 dogs are only bred to a limited extent – and even then only with grade 0 or 1 mates. The district court has concluded that continued breeding of Bulldogs with a BOAS grade of 0 or 1 is also contrary to section 25 of the Animal Welfare Act; see page 55 of the judgment. The district court has concluded that there are too few healthy animals to enable continue breeding within the breed.

The appellants consider this to be incorrect.

Grade 0 dogs are healthy animals, and are unaffected. This has been emphasised by several of the experts in the case. The same applies to dogs with grade 1 BOAS. Jane Ladlow, one of the world's leading experts on BOAS, has stated:

*“We consider no airway noise (grade 0) and mild airway nose (only audible with stethoscope – grade 1) as clinically unaffected as in these dogs we do not detect any decrease in quality of life, with normal exercise tolerance and no other associated clinical signs”*

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<sup>6</sup> See Doc. 97-2/D, page 2307.

<sup>7</sup> See Doc. 89-2/D, page 1529.

Further, regarding continued breeding within the breed:

*“In the University of Cambridge/ Kennel Club RFG Scheme we have advised not [breeding] grade 3 (severely affected) dogs. Grade 2 (moderate affected) dogs can be bred if they have other desirable points but should be bred with care and to grade 0 or 1 dogs. The reason we have allowed grade 2 dogs to continue in the breeding pool is that if you reduce a breeding stock too quickly it is likely to decrease genetic variability in the breed and thus other disease are more likely to emerge.*

*We think by removing the severely affected bulldogs we can improve the health of the breed over the next 5-10 years.”<sup>8</sup>*

Likewise, veterinary Astrid Indrebø has concluded that dogs with grade 1 BOAS do not suffer “*problems as a result of the disease which are significant from an animal welfare perspective*”.<sup>9</sup>

The Norwegian Food Safety Authority also considers that dogs with grade 0 or grade 1 BOAS are healthy animals that can be used in breeding. The Food Safety Authority advises against breeding animals with grade 2 or grade 3 BOAS.<sup>10</sup>

BOAS screening has been carried out in Norway since 28 August 2019. The screening results show that 31% of Bulldogs have grade 0 BOAS, and that 51% have grade 1 BOAS. We submit as evidence

**Exhibit 3** BOAS statistics English Bulldogs, 29 August 2019 to 22 February 2022

Overall, 82% of the dogs are healthy animals, i.e. unaffected. In the NKK system, it is primarily animals with a BOAS grade of 0 or 1 which are used in breeding. The statistics show a positive trend. The breed clubs and NKK are therefore considering whether to impose a requirement to exclude BOAS grade 2 dogs from breeding. In the appellants' view, continued breeding of Bulldogs is *not* contrary to section 25 of the Animal Welfare Act.

The district court has concluded that it is most likely that the genes of Bulldogs have reduced the breed's ability to give birth naturally contrary to section 25, second paragraph, b), of the Animal Welfare Act, and that this is an independent ground for excluding Bulldogs from further use in breeding. The appellants consider that the district court's assessment of the evidence is incorrect.

As regards the breed's problems related to natural reproduction, we refer to statements by Astrid Indrebø. Statistics on C-sections in other countries, including England in particular, do not provide a correct picture of the situation in Norway. The district court has also adopted an excessively high figure for the number of dogs delivered by C-section. We submit as evidence

**Exhibit 4** Statistics on C-sections and insemination

### 2.2.3 Cavalier King Charles Spaniel

It is undisputed that Cavaliers are predisposed to heart valve disease and CM and the associated risk of syringomyelia (SM). However, it is clear that not all dogs of the breed have the said diseases, and the proportion that experiences suffering from an animal welfare perspective, for example due to CM, is small. Nevertheless, on pages 50–51 the district court has concluded that continued breeding will be contrary to section 25, second paragraph, a) and c), and third paragraph, of the Animal Welfare Act.

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<sup>8</sup> See Doc. 91-1/D, page 2273.

<sup>9</sup> See Doc. 89-1/D, page 1521.

<sup>10</sup> Doc. 97-2/D, page 2314.



In the appellants' view, the district court has drawn conclusions based on insufficient documentation. The district court has primarily adopted the expert opinion and evidence of Rusbridge. Her research is based on approximately 500 dogs of the Cavalier breed. In the appellants' view, this number is too small to allow conclusions to be drawn about the breed both in Norway and the rest of the world.

Further, it is clear that dogs with these diseases are affected to varying degrees. We therefore submit that it is possible to continue breeding within the breed within the framework of section 25 of the Animal Welfare Act.

We refer to the opinion of Frode Lingaas. He stated the following regarding genetic variation and continued breeding with the breed:<sup>11</sup>

*“Cavaliers and Bulldogs show variation between individuals with respect to many health-related characteristics, and many dogs appear healthy. By examining the dogs' health history closely, using health certificates, etc. it should be possible to improve many undesirable characteristics through systematic use of the best dogs in breeding.*

*The breeds have a measured genetic variation somewhat below that observed in our studies of other randomly selected dog breeds, but it does not diverge materially from what has been observed in many other breeds/species. Systematic measurement of genetic variation within the breeds based on DNA methods over time should be a helpful instrument in monitoring to ensure that genetic variation is not lost.”*

Continued breeding is possible if thorough health examinations are conducted and targeted breeding is carried out with healthy animals, for example by developing screening tools for SM and making these generally available, screening all animals and allowing test results to determine whether animals may be used in breeding.

The appellants will submit further evidence on this point later.

The district court has also concluded that Cavaliers are most likely to have an excess frequency of, among others, the diseases Episodic Falling Syndrome (EF) and Curly Coated Eyes Syndrome (CCS), which are heritable conditions. In this regard, we would note that these diseases are no longer a problem in Norway because all breeding animals in Norway are genetically tested.

### **3 DETAILED COMMENTS ON THE GROUNDS FOR APPEAL**

#### **3.1 Introduction**

The Animal Welfare Act contains overarching, general guidance on our handling and treatment of animals.

The act is also an enabling act that provides legal authority for issuing more detailed provisions in the form of regulations; see Proposition to the Odelsting No. 15 (2008–2009), page 12. Such regulations already exist in many areas, particularly in relation to the nutritional aspects of keeping animals. No regulations have been issued that prohibit or restrict breeding of particular dog breeds.

In the absence of a distinct breeding prohibition applicable to Bulldogs or Cavaliers, the requirements in section 25 of the Animal Welfare Act must be considered by reference to specific breeders and based on concrete documentation showing a lack of animal welfare.

Section 25 of the Animal Welfare Act reads:

*“Persons who keep animals, breeders, breeding organisations and breed clubs shall through breeding promote characteristics which produce robust animals which function well and have good health.*

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<sup>11</sup> See Doc. 82 Exhibit 2, pages 5–7/DU, pages 1494–1496.

*No breeding, including through methods of gene technology, shall be carried out which:*

- a) alters genes in such a way that they influence the physical or mental functions of animals negatively, or pass on such genes,*
- b) reduces the ability of animals to engage in natural behaviour, or*
- c) raises general ethical concerns.*

*Animals with a genes as cited in the second paragraph shall not be used for further breeding.*

*The King may issue regulations on breeding in accordance with the principles in this section, including on breeding activity within breeding organisations and breed clubs.”*

The act gives supervisory and enforcement authority to the Norwegian Food Safety Authority; see section 30, first paragraph, of the Animal Welfare Act, which reads:

*“The Norwegian Food Safety Authority shall conduct supervision and may issue necessary individual decisions to secure compliance with provisions laid down in or pursuant to this act.”*

The Norwegian Food Safety Authority’s responsibilities and jurisdiction are particularised in, among other things, section 32 on the execution of orders, temporary custody of animals, etc. and section 33, first paragraph, which empowers the Norwegian Food Safety Authority to impose a prohibition against activities falling within the scope of the act. Section 33 reads:

*“The Norwegian Food Safety Authority may impose a necessary prohibition against any activities falling within the scope of this act on any person who fails to comply with a material order or engages in aggravated or repeated breaches of provisions laid down in or pursuant to this act. The prohibition may apply to all or some species, one or multiple activities, and for a certain period of time or indefinitely.*

*The court may impose a prohibition as specified in the first paragraph in the context of criminal proceedings.”*

Sections 5 and 19 of the Animal Welfare Act on, respectively, the duty to report and disclosure duty owed to the Norwegian Food Safety Authority, as well as section 5 on supervision, also underline the role of the Norwegian Food Safety Authority as the supervisory and enforcement body under the act.

Decisions by the Norwegian Food Safety Authority can be appealed in accordance with the rules in the Public Administration Act and, if necessary, be submitted to the courts for review. In such cases, the courts can review the legal interpretation adopted by the public administration, but not the public administration’s exercise of discretion; see the wording “may issue necessary individual decisions”. The assessment as to what measures are necessary in a specific instance falls within the discretion of the public administration, and is subject to the restrictions which follow from the principle of abuse of authority.

If the Norwegian Food Safety Authority discovers potentially criminal circumstances, the preparatory works provide that the matter must be reported to the police and that the Norwegian Food Safety Authority shall not exercise its power under section 33, first paragraph. This is because the courts may issue a prohibition against activities covered by the act “in the context of criminal proceedings”; see section 33, second paragraph, see also the first paragraph. Proposition to the Odelsting No. 15 (2008–2009), page 83, stated the following with regard to section 33:

*“If it is appropriate to report the matter for the purpose of prosecution, the Norwegian Food Safety Authority should not make a decision pursuant to the provision. In such cases, the decision should be made by the court in connection with the criminal case.”*

In other words, the Animal Welfare Act is based on a clear distribution of jurisdiction between the public administration and the courts. The Norwegian Food Safety Authority checks that animal-keeping occurs in compliance with the act and has jurisdiction to make individual decisions, including to impose a prohibition against activities pursuant to the act. The task of the courts is to review decisions of the public administration when these are submitted for review. In addition, the courts have been granted power to impose an activity prohibition pursuant to section 33 in the context of criminal proceedings.

### 3.2 The court lacks jurisdiction to issue a breeding prohibition in a civil case

A decision by the Norwegian Food Safety Authority to impose an activity prohibition pursuant to section 33, first paragraph, presupposes that the animal owner has either 1) failed to comply with a *material order* issued by the Norwegian Food Safety Authority, or 2) that there have been *aggravated* or 3) *repeated breaches* of the act.

As stated, the courts have corresponding jurisdiction in the context of criminal proceedings; see section 33, second paragraph.

In section 5.4.3, second paragraph, on page 24 of the judgment, Oslo District Court concluded that:

*“Section 33, second paragraph, ‘emphasises the power of the court to impose a corresponding prohibition in connection with criminal proceedings’. The district court finds that this emphasis does not impose any restriction on the courts’ power to issue a prohibition against unlawful breeding in a civil case.”*

The district court’s application of the law is incorrect. There are no grounds in the act, the preparatory works or other sources of law indicating that the court has jurisdiction to issue a breeding prohibition in a civil case. On the contrary, the preparatory works show that the legislature has considered the distribution of jurisdiction between the public administration and the courts and has made a change compared to the previous state of the law. In this regard, we refer to Proposition to the Odelsting No. 15 (2008–2009), page 82, section 2.4.4.2, which states:

*“In the consultation paper, reference was made to the fact that, in connection with revision of the act in 1995, consideration was given to whether the animal protection boards should be empowered to make decisions on future animal-keeping. Such decisions were deemed to be so interventionary that they should continue to be made by the courts. This issue was reconsidered in connection with the drafting of the new act on animal welfare, and the ministry concluded that it is now expedient and desirable to make a change compared to current law on this point. The primary reason for doing so is to promote the act’s purpose of good animal welfare, and to prevent and reduce animal suffering.*

*It was proposed that the power to make decisions that regulate future keeping or other use of animals be given to the Norwegian Food Safety Authority. Such decisions may be made with respect to persons who have failed to comply with material orders or who have committed aggravated or repeated breaches of provisions laid down in or pursuant to the Animal Welfare Act.”*

We also refer to Note 58 on section 33 of the Animal Welfare Act on rettsdata.no. This states, among other things:

*“In terms of content, the provision represents a continuation of section 32 of the Animal Protection Act 1974, although decision-making authority has been reassigned from the courts to the Norwegian Food Safety Authority. Whereas the imposition of an activity prohibition was previously dealt with in a criminal procedural context – in connection with either criminal proceedings or special proceedings concerning deprivation of rights – the imposition of an activity prohibition now takes the form of an individual decision within the meaning of the Public Administration Act, and can therefore be appealed and, in relevant cases, be brought before the courts for review.”*

As the above statements show, the state of the law has been deliberately amended. Jurisdiction to impose an activity prohibition under the act has been reassigned from the courts to the Norwegian Food Safety Authority. It must therefore be clear that the emphasis in section 33, second paragraph, entails a restriction on the courts’ power to impose a prohibition against unlawful breeding in a *civil* case.

Judgment must therefore be given in favour of the breeders.

### 3.3 The court must exercise restraint in reviewing section 25 of the Animal Welfare Act

The appellants would submit that the court must exercise restraint in reviewing whether it is contrary to section 25, first to third paragraphs, of the Animal Welfare Act to breed the dog breeds Bulldog and Cavalier; see the principles in Supreme Court Reports (Rt.) 1975, page 603 (Swingball) and Supreme Court Reports (Rt.) 2008, page 1555 (Biomar).

The Norwegian Food Safety Authority has veterinary insight and experience which the courts do not possess. The court's intensity of review must therefore be adapted to the actual framework for the court's review of decisions by the public administration.

The Norwegian Food Safety Authority is the supervisory body under the act, and has specialist and administrative jurisdiction to make necessary individual decisions; see section 30 of the Animal Welfare Act. Such individual decisions are generally made when the Norwegian Food Safety Authority has received reports of concerns and has conducted an inspection.

As stated in the expert opinion of the Norwegian Food Safety Authority,<sup>12</sup> the Norwegian Food Safety Authority has not identified any grounds for issuing individual decisions targeting NKK or the two breed clubs based on breach of section 25 of the Animal Welfare Act.

Moreover, the Norwegian Food Safety Authority has not identified any breaches of section 25 of the Animal Welfare Act by the individual breeders, and has therefore not issued any individual decisions. The inspections of the individual breeders were conducted precisely in response to concerns reported by the Norwegian Society for Protection of Animals. The Norwegian Society for Protection of Animals claimed that breeding by the breeders breached section 25 of the Animal Welfare Act.<sup>13</sup>

Given that – based on veterinary assessments – the Norwegian Food Safety Authority has not found the conditions in section 25 of the Animal Welfare Act to have been breached at individual level, the court must exercise restraint when reviewing whether breeding of the Bulldog and Cavalier breeds is contrary to section 25 of the Animal Welfare Act at breed level.

The Norwegian Food Safety Authority has jurisdiction to issue individual decisions against persons subject to the obligation in section 25, first paragraph, of the Animal Welfare Act. However, the Food Safety Authority has no jurisdiction under the act to issue regulations. That jurisdiction rests with the Ministry of Agriculture and Food pursuant to section 25, fourth paragraph, of the Animal Welfare Act. We quote from the fourth paragraph:

*“The King may issue regulations on breeding in accordance with the principles in this section, including on breeding activities in breeding organisations and breed clubs.”*

The Ministry of Agriculture and Food has not issued any regulations restricting or prohibiting the breeding of Bulldogs or Cavaliers, despite clear urging to do so.

The Norwegian Council for Animal Ethics, appointed by the Ministry of Agriculture and Food to investigate matters the Ministry wishes to have investigated, has recommended to the Ministry that:

*“... breeds with serious genetic functional impairments, such as serious breathing difficulties, should be prohibited.”<sup>14</sup>*

The Norwegian Animal Protection Alliance has also urged the Ministry of Agriculture and Food to issue a regulatory prohibition. We quote from Prop.128 L (2020–2021), section 3.1.4:

*“The Norwegian Animal Protection Alliance has written in its consultation submission that it should be clarified in an act or regulations that it is prohibited to continue breeding individuals with specifically defined health problems. It also considers that it should be prohibited to continue breeding specifically defined breeds and strains in which such problems are commonplace, and take heritable defects into account in their breeding work [sic].”*

The Ministry of Agriculture and Food has been strongly urged to prohibit breeding of breeds with health problems. Nevertheless, the Ministry has not issued any regulations prohibiting breeding at breed level. Work is currently being done on regulations which will contain more detailed dog-breeding requirements. A breed-level prohibition does not appear

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<sup>12</sup> See Doc. 89-2/D, page 1525.

<sup>13</sup> See e.g. Doc. 111-1/D, page 2407.

<sup>14</sup> See Doc. 1-55/D, page 359, section 1.2.4.

likely, however, The court must therefore exercise restraint in its review of the question of whether breeding of the Bulldog and Cavalier breeds is contrary to section 25 of the Animal Welfare Act.

The Swingball principle states that the court may review a decision made by the public administration, but that it must exercise restraint as regards reviewing “expert knowledge and the broad experience base”.<sup>15</sup> This principle must apply even more strongly when the public administration has *not* founds grounds for issuing either an individual decision or regulations following veterinary assessments of breed health.

In the appellants’ view, therefore, the court must exercise restraint when reviewing whether continued breeding of the breeds is contrary to the statutory requirements and prohibition in section 25 of the Animal Welfare Act.

The statements of the Supreme Court in the Swingball judgment indicate that the public administration is clearly better-positioned than the courts to make materially correct decisions. However, Oslo District Court has ignored this entirely.

Judgment must also be given in favour of NKK, NBK, NCK and the breeders on this ground.

### 3.4 Section 25 of the Animal Welfare Act concerns the breeding of individual animals

The appellants would submit that a breed-level breeding prohibition falls outside the scope of section 25 of the Animal Welfare Act. In any event, there are no grounds for concluding that the provision prohibits breeding of healthy animals on the basis that the *breed* is predisposed to disease.

Section 25 of the Animal Welfare Act is directed at breeding of individual animals. The breeding prohibition must be assessed by reference to individual animals.

According to the preparatory works, the word “breeding” encompasses activities which are necessary in order for an animal to produce offspring; see Proposition to the Odelsting No. 15 (2008-2009, page 111. Such activities take place at individual level. This indicates that the wording only applies to individuals. The prohibition in section 25, second paragraph, is directed at breeding of individuals that may have the effects listed in sub-paragraphs a) to c).

This is also supported by the second paragraph, which establishes that animals with genes as specified in a) to c) shall not be used in further breeding.

The view that section 25 is directed at breeding at individual level is also supported by the consultation paper dated November 2007, section 4.4.2, on page 43.<sup>16</sup> We quote from the paper:

*“[a]ny aspects of breeding and biotechnology other than health and welfare consequences for individual animals would fall outside the scope of this provision”.*

It must therefore be relatively clear that a breed-level breeding prohibition will fall outside the scope of the provision. This is also supported by Stenevik and Mejdell’s commentary edition of the act:

*“The provision is directed at the individual, meaning that it is insufficient for the breed generally to be robust.”<sup>17</sup>*

Section 25 reflects the overarching purpose of the Animal Welfare Act as specified in section 1, and thus provides guidance. Section 1 of the Animal Welfare Act reads:

*“The purpose of the act is to promote good animal welfare and respect for animals.”*

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<sup>15</sup> Supreme Court Reports (Rt.) 1975, page 603, on page 606.

<sup>16</sup> [https://www.regjeringen.no/globalassets/upload/lmd/vedlegg/horinger/horing\\_dyrevelferdsloven.pdf](https://www.regjeringen.no/globalassets/upload/lmd/vedlegg/horinger/horing_dyrevelferdsloven.pdf)

<sup>17</sup> Inger Helen Stenevik and Cecilie M. Mejdell, *Dyrevelferdsloven. Lovkommentar* [The Animal Welfare Act Law Commentary], Section 25. Breeding.

The content of the term “animal welfare” is discussed in greater detail in the preparatory works. In the consultation paper, the term is discussed as follows in section 2.1.2 on page 16:

*“Dyrevelferd [English: animal welfare] has come to be used in Norwegian based on the English term ‘animal welfare’. The term focuses on the individual animal and its situation.”*

Further, page 65 of the consultation paper states that “[a]nimal welfare is, in principle, a description of the condition of an individual. This cannot automatically be transferred to a group of animals.” Correspondingly, Proposition to the Odelsting No. 15 (2008–2009), section 2.1.1.4, stated that “[t]he ministry agrees that the term ‘animal welfare’ concerns how the individual animal is doing”.

The appellants therefore consider that the court of appeal must conclude that breeding must ensure good animal welfare and that animal welfare must be assessed with respect to each individual animal. Section 25 of the Animal Welfare Act must therefore be assessed specifically by reference to the individual animals used in breeding, and their offspring.

The distribution of jurisdiction in the act also indicates that it is directed at individual animals, as well as the persons who breed individual animals; see the jurisdiction granted to the Norwegian Food Safety Authority and the Ministry of Agriculture and Food. Moreover, a judgment establishing a prohibition at breed level is unsuited to achieve the stated purpose of the Norwegian Society for Protection of Animals, since the prohibition will only apply to NKK, NBK, NCK and the breeders.

Judgment must therefore also be given in favour of NKK, NBK, NCK and the breeders on this ground.

### **3.5 Threshold**

#### **3.5.1 Further comments on the threshold under the Animal Welfare Act**

The question of where the threshold for unlawful breeding should lie only becomes relevant if the court of appeal has concluded that it has legal authority to issue a breed-level breeding prohibition under section 25 of the Animal Welfare Act.

The district court has concluded that:

*“a minimum threshold must be exceeded in order for the claim to be correct that breeding at breed level is unlawful.”<sup>18</sup>*

In its assessment, the district court has given weight to the general clause in section 3, second paragraph.

And further:

*“It is difficult to quantify in detail where the minimum threshold for unlawful breeding will lie, both generally and at breed level.”*

The appellants are of the opinion that it is impossible to deduce from the judgment where the threshold for breach of section 25 of the Animal Welfare Act should lie – whether at individual or possibly breed level.

In the appellants’ view, the wording of section 25, the preparatory works to section 25 and other source of law provide no guidance on where the threshold should lie. Further, it is uncertain whether section 3 alone provides guidance on the appropriate level of any threshold.

Legal clarification is therefore required. In the appellants’ opinion, the district court has adopted an excessively low threshold in concluding that the prevalence and degree of health problems among Bulldogs and Cavaliers mean that continued breeding is contrary to section 25.

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<sup>18</sup> Oslo District Court judgment, page 24, section 5.4.4, first paragraph.



The Animal Welfare Act is a general act that regulates animal welfare with respect to many different animal species – both livestock and pets. The same threshold applies regardless of the type of animal and the purpose of animal-keeping, and the consideration of animal welfare must be balanced with the interests of animal owners. In Recommendation to the Odelsting No. 56 (2008–2009), page 40, a unanimous Standing Committee on Business and Industry pointed out that “it is challenging to balance the requirement of strong animal protection legislation with the interests of persons who will own animals, and particularly persons who use animals in a commercial context, for example in the agricultural sector.”

This alone indicates that the threshold should *not* be set too low, and should instead be pushed towards a “normal level”.

The legislature has not intended to exclude animals with heritable conditions from breeding *per se*; see Prop. 128 L (2020–2021), page 6. The district court appears to have overlooked this. If the district court’s judgment is upheld, it may have the consequence that all symptom-free animals which suffer no pain but which have a heritable condition or disease will define the breed as sick and excluded from future breeding.

### 3.5.2 Subsumption

#### 3.5.2.1 English Bulldogs

The district court has concluded that:

*“... breeding of BOAS grade 1 Bulldogs has also reduced the ability of offspring to engage in behaviour which is natural for the breed, contrary to section 25, second paragraph, b).”*

Further, the district court has concluded the following with respect to grade 0 BOAS:

*“The requirement in section 25, first paragraph prohibits the use of breeding animals which carry undesirable genes, even when the individual breeding animals are well-functioning... and will fall within the scope of the prohibition in section 25, third paragraph, see also second and first paragraphs, of the Animal Welfare Act.”<sup>19</sup>*

The appellants consider that the subsumption undertaken by the district court illustrates that the threshold drawn up by the district court is virtually non-existent.

The experts agree that dogs with a BOAS grade of 0 are clinically healthy animals without afflictions relevant from an animal welfare perspective. Dogs with a BOAS grade of 1 are also healthy, and any symptoms can only be detected using a stethoscope. The expert Ladlow has described grade 0 and grade 1 Bulldogs as

*“... clinically unaffected as in these dogs we do not detect any decrease in quality of life, with normal exercise tolerance and no other associated clinical signs.”<sup>20</sup>*

The district court’s position contrasts starkly with the veterinarian assessments in the case. Some 82% of Norwegian Bulldogs are unaffected. The statistics also show a clear trend in the right direction.

In the appellants’ view, the district court has exaggerated the number of dogs which do not give birth naturally (C-sections) and has drawn excessively concrete conclusion based on the available figures. An increasing number of Bulldogs in Norway are giving birth naturally. In 2020, 61% of dogs permitted to attempt natural birth gave birth naturally, and the figure for 2021 is 70%. No figures are available on the number of puppies born naturally pre-C-section to dogs which have to have a C-section after at least *one* puppy is born. Nor are figures available that show the reasons why dogs which give birth by planned C-section are not permitted to attempt natural birth first.

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<sup>19</sup> Oslo District Court judgment, page 55, section 7.3.1, three final paragraphs.

<sup>20</sup> Expert opinion of Jane Ladlow, Doc. 91-1/D. 2275.

In the appellants' opinion, based on the statistics it is impossible to draw the conclusion – as the district court has done – that it is the genes of Bulldogs which have reduced the breed's opportunity to give birth naturally contrary to section 25, second paragraph, b). No information is available in the form of either statistics or data underpinning the statistics that legitimates such a conclusion.

The appellants are of the view that the district court's assessment must be set aside. The court of appeal must conclude that the threshold for deeming breeding of Bulldogs unlawful at breed level is not exceeded in the present case.

### 3.5.2.2 Cavaliers

As regards Cavaliers, heart valve disease (MMVD) and Chiari-like Malformation (CM) and the associated risk of developing syringomyelia (SM) are widespread, but the district court has drawn incorrect conclusions based on the statistics. It is not necessarily the case that figures from other countries can be applied to Norway.

As regards heart valve disease, very many dogs live good lives without symptoms of this disease, including beyond the age of 10 years. Heart valve disease does not necessarily produce clinical disease indications, and in many animals the disease only arises late in life. In this regard, we refer to the opinion of veterinary cardiologist Liva Vatne, in Doc. 89, Exhibit 10:

*"I find CKCS to be a cheerful and happy dog breed. The individuals without clinical indications of heart failure generally appear to enjoy good quality of life despite having been diagnosed with valve disease. As regards the degree of suffering linked to valve disease, I would characterise this as low from the perspective of the patient's full lifespan."*

Further, the proportion of animals that suffer from CM to a degree that is relevant from an animal welfare perspective is low. In addition, the district court has overlooked the fact that an SM prevalence of 22% means that 88% of animals are healthy. There is no doubt that many dogs live good lives despite these diagnoses.

The appellants will submit documentary and expert evidence to substantiate this prior to the appeal hearing.

In the appellants' view, the district court's assessment must be set aside. The judgment implies that symptom-free dogs which do not experience pain or other types of disease help define the breed in general as sick and excluded from future breeding.

The court of appeal must conclude that the threshold for deeming breeding of Cavaliers unlawful at breed level pursuant to section 25 of the Animal Welfare Act is not exceeded in the present case.

## 3.6 The judgment will have undesirable consequences for animal welfare if it is upheld

Oslo District Court's conclusion of judgment renders it contrary to section 25, first, second and third paragraphs, of the Animal Welfare Act to breed the Bulldog and Cavalier dog breeds. This will have undesirable consequences for animal welfare.

The district court's judgment means the end of breeding controls and efforts to promote animal health. NBK and NCK play an important role in imposing breeding requirements, and require their members (the breeders) to breed within the veterinary framework imposed by rules and regulations. Correspondingly, NKK plays an important guidance and training role in relation to the clubs and breeders.

If the judgment is upheld, breeding will shift to a completely uncontrolled market. Experience from other countries shows that animal health is unfortunately outweighed by extreme breeding of external features.



Moreover, the judgment imposes no restrictions on the importation of animals. Bulldogs and Cavaliers are popular breeds, and it must be assumed that animal imports will increase, and thus also health problems.

#### **4 PROCEDURAL MATTERS**

The case does not concern assets, and the provisions in section 29-13(1) of the Dispute Act on the amount in dispute on appeal do not apply. The appellants would nevertheless note that if the judgment is upheld it will have financial consequences for the appellants which considerably exceed NOK 250,000.

The parties agree that the case raises questions of principle and that there is a need for legal clarification in this area. This conclusion was also reached by Oslo District Court.

In the appellants' view, it is unnecessary for the court of appeal to include expert associate judges. The case primarily raises questions of a legal nature.

The court of appeal will be provided with the necessary expert knowledge by the expert witnesses.

#### **5 FURTHER CASE PREPARATIONS**

The case is not suited to judicial mediation because it raises questions of principle which need to be resolved.

We request that five days be reserved for the case.

Tom Øystein Martinsen will attend the appeal hearing on behalf of the Norwegian Kennel Club. Advocate Hilde Engeland will also attend. We request that she be permitted to attend the entire appeal proceedings; see section 24-6(2) of the Dispute Act. Advocate Engeland will not give evidence. We request that she be granted the same access via the case management portal to the case documents before Borgarting Court of Appeal as she was granted before the district court.

Arne Øygarden and Kari Skarpsno will attend on behalf of the Norwegian Bulldog Club and the Norwegian Cavalier King Charles Spaniel Club. The Cavalier breeders Christel C. T. Hagen, Inger Pettersen and Liv-Anne Klubben will also attend, as will the bulldog breeders Lena Haugland, Liss B. Olsen and Jorunn Rosander

We request that the parties be permitted to attend the appeal proceedings by video link, as the court arranged during the pandemic.

In section 2.2.1, the undersigned has proposed that the parties prepare a joint factual presentation. We request that the court set a deadline – for example six weeks – that allows the parties to prepare an agreed statement of facts.

We consider it appropriate to return to the question of what documentary evidence submitted to the district court needs to be adduced before the court of appeal and to what extent the documentary evidence needs to be supplemented before the court of appeal. The same applies to the party evidence and witness evidence.

#### **6 STATEMENT OF CLAIM**

On behalf of the appellants, we submit the following

**claim:**

With respect to the Norwegian Kennel Club

1. That judgment be given in favour of the Norwegian Kennel Club.
2. That the Norwegian Kennel Club be awarded legal costs before the district court and court of appeal.

With respect to the Norwegian Bulldog Club

1. That judgment be given in favour of the Norwegian Bulldog Club.
2. That the Norwegian Bulldog Club be awarded legal costs before the district court and court of appeal.

With respect to the Norwegian Cavalier King Charles Spaniel Club

1. That judgment be given in favour of the Norwegian Cavalier King Charles Spaniel Club.
2. That the Norwegian Cavalier King Charles Spaniel Club be awarded legal costs before the district court and court of appeal.

With respect to Inger Pettersen, Liv-Anne Klubben and Christel Hagen

1. That judgment be given in favour of Inger Pettersen, Liv-Anne Klubben and Christel Hagen.
2. That Inger Pettersen, Liv-Anne Klubben and Christel Hagen be awarded legal costs before the district court and court of appeal.

With respect to Lena Haugland, Liss Bodil Olsen and Jorunn Rosander

1. That judgment be given in favour of Lena Haugland, Liss Bodil Olsen and Jorunn Rosander.
2. That Lena Haugland, Liss Bodil Olsen and Jorunn Rosander be awarded legal costs before the district court and court of appeal.

Default judgment is claimed where permitted by statute; see section 16-10 of the Dispute Act.

Oslo, 28 February 2022

**Simonsen Vogt Wiig**

**Anette Fjeld**

Advocate