



## Norwegian authorities failed to provide deep sea divers with essential information about risks associated with their employers' use of rapid decompression tables

In today's Chamber judgment in the case of [Vilnes and Others v. Norway](#) (application no. 52806/09), which is not final<sup>1</sup>, the European Court of Human Rights held, by a majority, that there had been:

**a violation of Article 8 (right to respect for private and family life)** of the European Convention on Human Rights on account of the failure of the Norwegian authorities to ensure that the applicants received essential information enabling them to assess the risks to their health and lives resulting from the use of rapid decompression tables;

**no violation of Articles 2 (right to life) or 8** as regards the remainder of the applicants' complaints about the authorities' failure to prevent their health and lives from being put in jeopardy; and

**no violation of Article 3 (prohibition of inhuman or degrading treatment);**

The case concerned former complaints by divers that they are disabled as a result of diving in the North Sea for oil companies during the pioneer period of oil exploration (from 1965 to 1990).

As regards the applicants' complaints concerning the authorities' failure to prevent their health and lives from being put in jeopardy, the Court considered that the authorities had taken a wide range of measures in order to ensure the protection of divers' safety, thus complying with their positive obligations under Articles 2, 3 and 8. However, the Court also found that the authorities had failed to comply with their obligation under article 8 to provide access to essential information enabling individuals to assess the risks to their health and lives. Indeed, although there had been a lack of scientific consensus regarding the long-term effects of decompression sickness, diving companies had been allowed to keep their respective diving tables secret merely in order to have a competitive advantage over other companies. Therefore, divers had been denied access to essential information on rapid decompression times and on the consequence that this could have on their health and safety. As a result, they had been unable to fully assess the risks involved and give their informed consent.

This case is of interest because it complements the Court's case-law on access to information under Articles 2 and 8, notably in so far as it establishes an obligation on the authorities to ensure that employees receive essential information enabling them to assess occupational risks to their health and safety.

<sup>1</sup> Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: [www.coe.int/t/dghl/monitoring/execution](http://www.coe.int/t/dghl/monitoring/execution)

## Principal facts

The applicants are five Norwegian nationals living in Norway, Dag Vilnes (born in 1949 and living in Tønsberg), Magn Håkon Muledal (born in 1953 and living in Førde), Bjørn Anders Nesdal (born in 1958 and living in Kristiansand), Knut Arvid Nygård (born in 1961 and living in Tananger) and Per Arne Jacobsen (born in 1954 and living in Larvik); and, a Swedish national, Mr Lindahl (born in 1942, and living in Avaldsnes, Norway) and an Icelandic national, Sigurdur P. Hafsteninsson (born in 1953 and living in Jersey, United Kingdom).

They were all former deep sea divers who had taken part in North Sea diving operations for the petroleum industry during what was known as the pioneer period (from 1965 to 1990). All alleged that they had developed health problems and had become disabled as a result of both bounce (short) and saturation (longer duration) diving jobs. Most were still suffering from obstructive lung disease, encephalopathy, reduced hearing and Post Traumatic Stress Disorder (PTSD). They particularly alleged that shortcuts taken in their working conditions and safety had put their health and lives in jeopardy. Dispensation arrangements from safety regulations had often been authorised<sup>2</sup>, such as extending the maximum period of a saturation dive as well as the maximum length of the divers' umbilical (the breathing gas supply). Furthermore, decompression tables used for the return of divers to the surface had not been standardised until 1990, allowing oil companies to reduce the decompression time, lower their labour costs and have a competitive advantage over other companies.

As a result, most of the applicants had experienced decompression sickness and the bends. Notably, Mr Vilnes claimed that he had been involved in an incident when working on board the diving vessel *Arctic Surveyor* in 1977 when he had been exposed to serious decompression sickness causing him permanent brain and spinal damage. He further complained of another incident when, working on the *Tender Comet* in 1983, he had experienced earache and severe pain during decompression and decided to discontinue a dive. Lastly, the last six applicants also provided detailed accounts of the harm caused to them by test diving in which they participated – without their informed consent – in Bergen and the Norwegian fjords with *NUI AS/Nutec AS (Norsk Undervannsintervensjon* – Norwegian Underwater Intervention Ltd and Falc Nutec safety company).

It has been known for some time that the 350 to 400 pioneer divers, including the applicants, had developed health problems from diving. Long term studies showed possible connections between diving and injuries to the central nervous system; and, in December 2002, a report from an independent inquiry (the "Lossius report") suggested that the State had legal and therefore financial liability for the injuries sustained by North Sea divers and recommended that the divers be granted compensation. The Government, although not accepting liability from a legal point of view, considered that it had a moral and political duty to compensate the divers and a special compensation scheme was set up.

Mr Vilnes has a disability pension and work injury benefits and, under the State compensation scheme, has received 3,600,000 Norwegian krone (462,700 euros). The other six applicants each receive disability pensions and some of them – like Mr Vilnes – have received compensation from the State and the oil companies, Statoil/Hydro. In February 2005 Mr Vilnes brought proceedings against the State claiming additional compensation and in December 2005 Mr Muledal and the other five applicants brought similar claims. All the cases were subsequently joined, the third to seventh applicants' claims being adjourned pending the outcome of the proceedings brought by Mr Muledal. Initially, in August 2007, Oslo City Court found for Mr Vilnes and Mr Muledal. Although the State had taken all measures that could reasonably be expected to protect divers' lives (meaning no breach of Article 2 of the European Convention), when balancing the various interests (the disturbing number

<sup>2</sup> By the Norwegian Labour Inspection Authority (until April 1978) and subsequently the Petroleum Directorate, the public authorities entrusted with supervising and authorising diving operations.

of disabled divers compared to the fact that Norway had become one of the world's richest nations thanks to oil), it found on the whole that it would be reasonable and equitable to make the State liable for the damage to divers' health.

Later, however, in judgments of November 2008 and October 2009 the High Court and the Supreme Court both found against the first and second applicants. As concerned Mr Vilnes' complaints about specific incidents at the diving vessels *Arctic Surveyor* in 1977 and *Tender Comet* in 1983 the courts found no basis for holding the State responsible on strict liability ground in the absence of a sufficiently close connection between the State and the alleged harmful activity. Nor could the State be held liable according to the law on employer's liability having regard to the measures taken by the authorities to ensure the adoption of relevant safety regulations backed up by effective implementation, inspection and supervision mechanisms.

## Complaints, procedure and composition of the Court

Relying in particular on Articles 2 (right to life), 3 (prohibition of inhuman and degrading treatment) and 8 (right to respect for private life) of the Convention, all the applicants complain that the State failed to take appropriate steps to protect deep sea divers' health and lives when working in the North Sea and, as concerned three of the applicants, at testing facilities. They all also allege that the State failed to provide them with adequate information about the risks involved in both deep sea diving and test diving.

The application was lodged with the European Court of Human Rights on 24 September 2009.

Judgment was given by a Chamber of seven judges, composed as follows:

Nina Vajić (Croatia), *President*,  
Peer Lorenzen (Denmark),  
Khanlar Hajiyev (Azerbaijan),  
Mirjana Lazarova Trajkovska ("the Former Yugoslav Republic of Macedonia"),  
Julia Laffranque (Estonia),  
Linos-Alexandre Sicilianos (Greece) and,  
Dag Bugge Nordén (Norway), *ad hoc Judge*,

and also Søren Nielsen, *Section Registrar*.

## Decision of the Court

### Articles 2 (right to life) and 8 (right to respect for private and family life)

As regards the applicants' general complaints concerning the authorities' failure to prevent their health and lives from being put at risk, the Court mainly agreed with the assessments made by both the Supreme Court and the High Court. Notably, it confirmed that the regulatory framework put in place by the Norwegian authorities had sought to protect divers' safety responsibly and that the public funded supervision had not been organised in an irresponsible manner.

The Court then examined Mr Muledal's, Mr Lindhal's and Mr Hafsteinsson's complaints related to test diving. Referring to the Supreme Court's findings, it considered that the divers had been sufficiently informed about the test dives, which had been previously approved by the competent bodies after a thorough examination according to relevant medical norms and in the light of information available at the time. It also found that, by their very nature, the test dives had involved certain risks which made it difficult to compare them with other North Sea diving operations. Therefore, the Court found that the Norwegian authorities could not be held responsible for any violation of Articles 2 and 8 with regards to test diving.

The Court went on to examine Mr Vilnes' complaints about the incidents which had occurred on the diving vessel *Arctic Surveyor* in 1977 and on the *Tender Comet* in 1983. Apart from his allegation that he had been exposed to serious decompression sickness owing to the use of excessively rapid decompression tables, the Court found that Mr Vilnes' submissions concerning other incidents were too vague to determine whether they could be imputable to the Norwegian authorities. Accordingly, this part of his complaint was rejected as manifestly ill-founded.

The Court reiterated that all the applicants had had the possibility to have the merits of their compensation claims heard by national courts. Moreover, the Norwegian authorities and Statoil had also set up special compensation schemes under which divers had been eligible to apply for substantial amounts of compensation, which all seven applicants had done successfully. Therefore, by taking a wide range of measures, the Norwegian authorities had put significant effort into securing the protection of the divers' health and safety, thus complying with their obligations under both Articles 2 and 8.

However, the Court found it probable that the applicants' health had significantly deteriorated as a result of decompression sickness. It was also very likely that this had been due to the use of excessively rapid decompression tables by diving companies. Indeed, following the standardisation of decompression tables by the Petroleum Directorate in 1990, significantly fewer divers had suffered from decompression sickness. Therefore, had the Norwegian authorities intervened earlier, they probably could have removed what appeared to have been a major cause of excessive risk to the applicants' health and safety.

Since none of the applicants had been exposed to life-threatening experiences owing to any failure on the part of the State, the Court did not analyse the matter in the light of Article 2. However, it reiterated the State's obligation under Article 8 to provide access to essential information enabling individuals to assess risks to their health and lives. It found that decompression tables could be viewed as a relevant source of information allowing divers to assess the risks to which they could have been exposed. Yet neither the Labour Inspection Authority nor the Petroleum Directorate had required diving companies to produce their decompression tables in order to assess their safety before granting them authorisation to carry out individual diving operations. As a result, diving companies had been allowed to keep decompression tables secret and to reduce decompression times for competitive purposes.

Although there had not been a scientific consensus as to the long-term effects of diving, it had also been widely acknowledged that decompression tables contained essential information for the assessment of health risks within the framework of diving operations. For instance, in a letter of June 1984 to the Diving Medical Advisory Committee, the Petroleum Directorate had expressed its concerns about the difference between the slowest and the fastest decompression tables used in the North Sea. However, the authorities had neither informed the applicants as to the possible impact of such differences nor told them their concerns as regards their health and safety. Moreover, a long period had elapsed until such time as the authorities had required oil companies to assume full openness about the decompression tables.

Considering the authorities' role in monitoring diving operations and in ensuring their safety, as well as the lack of scientific consensus at the time regarding the long-term effect of decompression sickness, a very cautious approach should have been adopted. Indeed, the authorities should have taken steps to ensure that the applicants had received essential information regarding rapid decompression tables, thus enabling them to assess the risks to their health and safety. Had the authorities done so, they might have helped to eliminate sooner the use of excessively rapid decompression tables as a means for diving companies to promote their own commercial interest regardless of the divers' health and safety. By failing to do so, the Norwegian authorities had not fulfilled their obligation to ensure the applicants' right to respect for their private life, in violation of Article 8.

### Article 3 (prohibition of inhuman and degrading treatments)

The Court referred to its previous findings that the authorities' failure had been confined to a failure under Article 8 to provide access to information regarding risks involved in the use of excessively rapid decompression tables. Therefore it did not find that there had been a violation of Article 3 in this case.

### Just satisfaction (Article 41)

The court held that Norway was to pay 8,000 euros (EUR) to each applicant in respect of non-pecuniary damage, EUR 40,000 to Mr Vilnes in respect of costs and expenses, and EUR 50,000 to Mr Muledal, Mr Lindahl, Mr Sigurdur P. Hafsteinsson, Mr Nygård, Mr Nesdal and Mr Jakobsen jointly in respect of costs and expenses.

### Separate opinions

Judge Lorenzen expressed a partly dissenting opinion.

Judges Nordén and Lorenzen expressed a joint partly dissenting opinion.

These opinions are annexed to the judgment.

*The judgment is available only in English.*

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