SUPREME COURT OF NORWAY

O R D E R

issued on 27 September 2024 by a division of the Supreme Court The Supreme Court composed of

Justice Arne Ringnes
Justice Ingvald Falch
Justice Borgar Høgetveit Berg
Justice Kine Steinsvik
Justice Christian Lund

HR-2024-1737-A, (case no. 24-102963STR-HRET)
Appeal against Eidsivating Court of Appeal's order 24 June 2024

I.	
The Public Prosecution Authority	(Counsel Mads Fredrik Baardseth)
v.	
A	(Counsel Mathias Vellesen)
II.	
B	(Counsel Therese Lohne Boehlke)
v.	
A	(Counsel Mathias Vellesen)

(1) Justice **Lund:**

Issues and background

(2) The subject matter of the case is whether it is consistent with the prohibition of retroactivity in Article 97 of the Constitution to impose electronic monitoring under section 222 g of the Criminal Procedure Act – a so-called reverse violence alarm – based on violations of a restraining order committed before the statutory provision entered into force. Another question is whether the person to be protected has a right to appeal against the court's decision not to impose electronic monitoring, see section 377 of the Criminal Procedure Act.

(3) B is a former psychologist specialist. About 10 years ago, A was B's patient.

(4) Upon B's petition, the Public Prosecution Authority has issued a restraining order against A, prohibiting her from approaching, pursuing and in any manner contacting B.

(5) On 21 December 2023, Oslo Police District charged A with several violations of the restraining order, see section 168 (b) of the Penal Code. The charge was last expanded on 6 March 2024.

(6) The basis is that A – despite the restraining order – had repeatedly contacted B. According to the charge, A had called and/or texted B or her spouse on 13 occasions in violation of the restraining order. The charge also includes one incident where A approached B at her residence and threw a bottle on the house causing a window to break. B and her minor daughter were at home when this occurred. According to the charge, the violations were committed during the period 10 November to 13 December 2023.

(7) Section 222 g of the Criminal Procedure Act entered into force on 8 April 2024. By Oslo Police District's decision of 17 April 2024, based on this provision, A was subjected to electronic monitoring of the restraining order, as she was ordered to stay outside of a specific prohibited zone. In the decision, it was "emphasised that the person charged [had] violated the restraining order a number of times". The prohibited zone measures 196.5 square kilometers and covers most of the centre of Oslo and an area along the Bunnefjord from the centre of Oslo to south of Oppegård.

(8) The electronic monitoring was implemented on 19 April 2024 when A was fitted with an ankle bracelet. In the implementation plan served to A on the same day, she was – in addition to being banned from the prohibited zone – ordered not to travel out of Norway or use an airplane, unless in agreement with the police. She was also banned from areas without GSM reception. The ban applies until the restraining order expires on 5 October 2024.

(9) A did not accept the decision to impose electronic monitoring. The Public Prosecution Authority brought the case to Romerike and Glåmdal District Court, which by order of 5 June 2024 dismissed the application for electronic monitoring of the restraining order. The District Court found that section 222 g subsection 1 first sentence of the Criminal Procedure Act – in the light of the prohibition of retroactivity in Article 97 of the Constitution – could not be applied to violations of a restraining order committed before the provision entered into force.

(10) In its assessment of whether section 222 g subsection 1 third sentence gave a legal basis for electronic monitoring, the District Court found that it had not been proven with a strong degree of probability that A – without electronic monitoring – would commit a criminal act against B.

(11) The Prosecution Authority and B appealed against the order to Eidsivating Court of Appeal, which, on 24 June 2024, ordered as follows:

> "The appeal is dismissed".

(12) The order was made with dissenting opinions. The majority agreed with the District Court's assessments. The minority found no retroactivity in violation of Article 97 of the Constitution, and placed decisive weight on the fact that electronic monitoring is imposed to prevent future violations.

(13) The Prosecution Authority and B have appealed against the Court of Appeal's order to the Supreme Court, challenging the interpretation of the law. In a letter of 8 July 2024, the Supreme Court's Appeals Selection Committee asked for the parties' opinions on whether B, whom the restraining order is to protect, has a right to appeal against the Court of Appeal's dismissal of the Prosecution Authority's application for electronic monitoring.

(14) On 11 July 2024, in HR-2024-1314-U, the Supreme Court's Appeals Selection Committee decided to refer the appeal to a division of the Supreme Court composed of five justices, see section 5 subsection 1 second sentence of the Courts of Justice Act. It follows from the decision that the Appeals Selection Committee did not consider whether B has a right to appeal.

(15) Both the District Court and the Court of Appeal granted the appeals suspensive effect. In the Committee's decision of 11 July 2024, the appeals were not granted suspensive effect. As a consequence, A had the ankle bracelet removed on 12 July 2024.

The parties' contentions

(16) *The Public Prosecution Authority* contends:

(17) The imposition of electronic monitoring is not punishment, neither under Norwegian domestic law nor under the European Convention on Human Rights (ECHR).

(18) It is acknowledged that there is an element of retroactivity in section 222 g subsection 1 first sentence of the Criminal Procedure Act, as it is a requirement that someone is suspected of violating a restraining order. However, this is only one of several requirements, and no *direct* legal effects are linked to the past acts, see Rt-2013-1345 *structural quota* paragraph 82. The purpose and effect of the provision are forward looking, without aiming to sanction the person subjected to electronic monitoring. Therefore, it does not involve any actual retroactivity.

(19) For the provision to be contrary to Article 97 of the Constitution, it is thus required that the retroactivity is *clearly unreasonable or unfair*. This requirement is not met. The provision's element of retroactivity barely exceeds the minimum for constituting retroactivity within the meaning of the law. The provision has a strong legislative justification and is supported by

strong societal considerations, including the State's obligation to respect human rights under Article 1 of the ECHR.

(20) The provision in section 222 g subsection 1 third sentence of the Criminal Procedure Act contains no elements of retroactivity within the meaning of the law.

(21) The aggrieved person does not have a right to appeal against the courts' rulings during the review of decisions to impose electronic monitoring under section 222 g of the Criminal Procedure Act. The aggrieved person does not have disposal over the claim in such a way as to be "affected" under section 377 of the Criminal Procedure Act, see section 222 g. Electronic monitoring is a coercive measure that the Prosecution Authority must control alone.

(22) The Public Prosecution Authority asks the Supreme Court to rule as follows:

> "The Court of Appeal's and the District Court's orders are set aside."

(23) *B* contends:

(24) B has a right to appeal under section 377 of the Criminal Procedure Act. She has a concrete legal interest in whether or not electronic monitoring is imposed, and she is thus "affected" by the court's dismissal of the Prosecution Authority's application. Clear grounds are required to restrict the right to legal recourse, see HR-2016-604-U paragraph 16. A right to appeal may also ensure that the State fulfils its obligation to secure to everyone their human rights under Article 1 of the ECHR.

(25) According to section 222 g subsection 1 second sentence of the Criminal Procedure Act, electronic monitoring may be imposed together with a new restraining order. The aggrieved person has a right to appeal against an order that does not impose a restraining order. Systemic considerations thus imply that it must be possible to appeal against an order that does not impose electronic monitoring.

(26) B mainly supports the Prosecution Authority's contentions related to the prohibition of retroactivity in Article 97 of the Constitution.

(27) B asks the Supreme Court to rule as follows:

> "Eidsivating Court of Appeal's order of 24 June 2024 and Romerike and Glåmdal District Court's order of 5 June 2024 are set aside."

(28) *A* contends:

(29) The imposition of electronic monitoring is an interference with the personal liberty and security, and therefore enjoys strong constitutional protection. The interference is a coercive measure to prevent crime, and it is not of a procedural nature.

(30) The imposition of electronic monitoring under section 222 g subsection 1 first sentence of the Criminal Procedure Act based on violations of a restraining order committed before the provision entered into force, constitutes actual retroactivity, as it links burdens directly to past acts.

(31) *Principally*, an absolute prohibition must be laid down – as for punishment – against imposing electronic monitoring based on violations of a restraining order committed before the provision entered into force.

(32) *In the alternative*, retroactivity can only be justified by vital societal interests, and the norm should be stricter than for actual retroactivity concerning interference with economic rights. *In the second alternative*, strong societal considerations must be required for retroactivity to be accepted. Neither of these thresholds is reached.

(33) The District Court's interpretation of section 222 g subsection 1 third sentence of the Criminal Procedure Act is correct, so that the constitutional issue related to this provision is not at issue. Moreover, it would be contrary to Article 97 of the Constitution to apply the third sentence in the case at hand.

(34) B does not have a right to appeal against the court's dismissal of the Prosecution Authority's application for electronic monitoring. An important aspect here is that the person to be protected cannot file a legal application for electronic monitoring.

(35) A asks the Supreme Court to rule as follows:

> "I. The Public Prosecution Authority v. A
>
> 1. The appeal is dismissed.
>
> II. B v. A
>
> Principally:
> 1. The appeal is inadmissible.
>
> In the alternative:
> 1. The appeal is dismissed."

My opinion

The Supreme Court's jurisdiction

(36) The case concerns a derivative appeal against an order. The Supreme Court's jurisdiction is therefore limited to reviewing the Court of Appeal's procedure and interpretation of the law, see section 388 subsection 1 of the Criminal Procedure Act. In cases concerning the application of the Constitution and the incorporated Convention on Human Rights, the Supreme Court may also review the individual application of the relevant statutory provision, see HR-2018-699-A paragraph 21.

(37) In the case at hand, the appellant against the Court of Appeal's order is not A, but the Prosecution Authority. The Supreme Court's Appeals Selection Committee's basis in HR-2024-1214-U paragraph 15 was that when the appellant is the Prosecution Authority, the Committee may only review the general interpretation of the ECHR. Our case raises questions regarding the general interpretation of Article 97 of the Constitution, and expanded jurisdiction is not an issue.

Electronic monitoring – section 222 g of the Criminal Procedure Act

(38) The provision on electronic monitoring is placed in Part IV of the Criminal Procedure Act on coercive measures. The measures have very different characteristics and levels of seriousness. This includes serious interference such as deprivation of liberty through arrest and remand in custody in chapter 14, and less intrusive measures such as search and seizure in chapters 15 and 16. Other examples of measures in Part IV of the Act are concealed video surveillance in chapter 15 a and audio surveillance in chapters 16 a and 16 b.

(39) A coercive measure may be taken against an individual, such as arrest, remand in custody and concealed audio surveillance. However, coercive measures may also be taken against objects, such as confiscation and encumbrances. Coercive measures are normally taken against the person who is suspected or charged in the case. Searches and seizures are, however, examples of coercive measures also taken against third parties.

(40) Normally, a coercive measure is taken in connection with an ongoing investigation or a criminal case to contribute to clarifying the case or ensure its proper execution. It is also a general requirement for the use of coercive measures that there is suspicion of a criminal act. However, a restraining order under section 222 a is an example of a coercive measure that may be taken without suspicion of a criminal act and regardless of ongoing court proceedings.

(41) Section 222 g is also different from several of the other coercive measures in Part IV of the Criminal Procedure Act. The purpose of this measure is not to clarify or ensure the execution of an ongoing investigation or criminal case. It is a preventive security measure to reduce the risk of future offences. Subsection 1 of the provision reads:

> "The prosecution authority may impose electronic monitoring of a restraining order or contact ban if the person on whom the order is imposed is reasonably suspected of violating it, and electronic monitoring is deemed necessary to ensure compliance. If the suspicion involves a violation committed in the last 12 months, electronic monitoring may be imposed together with a new restraining order. Even if there is no reasonable suspicion of violations of a restraining order, electronic monitoring may be imposed in special circumstances when deemed necessary to prevent someone from committing a criminal act against another person. Section 170 a applies correspondingly."

(42) According to the *first option* of the provision, electronic monitoring may only be imposed if there are reasonable grounds to suspect violations of a restraining order. In addition, electronic monitoring must be deemed necessary to ensure compliance with the measure.

(43) As a *second option,* electronic monitoring may be imposed "in special circumstances" without there being reasonable grounds to suspect violations of a restraining order. The condition is that it is deemed necessary to prevent a criminal act against another person.

(44) The person subjected to electronic monitoring is fitted with an electronic ankle bracelet – a so-called reverse violence alarm – that tracks the person's movements. In Proposition 128 L (2022–2023) page 18, this is described as follows:

> "The person is prohibited from entering one or more geographic areas (prohibited zones). The ankle bracelet regularly sends positions to the police's technical system for electronic monitoring. If the ankle bracelet sends a position within the prohibited zone, an alarm is triggered at the police's operations centre. The ankle bracelet cannot be removed and

> must be charged daily with a mobile charging unit, with a charging time of 30 to 60 minutes."

(45) The possibility to impose electronic monitoring in connection with the issuance of a contact ban was introduced in 2009 with the addition of a subsection 5 to section 33 of the Penal Code 1902. The provision is continued in section 57 subsection 5 of the current Penal Code. The legislature chose not to give the provision retroactive effect, as electronic monitoring may only be imposed when a contact ban is issued for an act committed after the amendment entered into force, see Proposition to the Odelsting No. 25 (2008–2009) page 38. However, the Ministry believed that Article 97 of the Constitution did not prevent giving the amendment retroactive effect and stated:

> "The proposed transitional rule does not imply that the Ministry views electronic monitoring as a new form of punishment. The Ministry considers electronic monitoring as a way to enforce a restraining order. Although the proposed amendment to section 33 of the Penal Code etc. allows for electronic monitoring as a part of the sentence for a conviction, electronic monitoring will be a supplementary measure to ensure compliance with the underlying loss of rights. Article 97 of the Constitution and section 3 of the Penal Code on the prohibition of retroactive laws do not prevent enforcement rules from being reasonably amended with effect on the execution of a sentence for criminal acts committed before the amendment. The Ministry has nonetheless concluded that electronic monitoring has elements suggesting that caution should be taken in using it together with a contact ban concerning a criminal act committed before the amendment entered into force."

(46) The Ministry also considered whether electronic monitoring should be introduced as a precautionary measure following a restraining order imposed under the Criminal Procedure Act, but chose not to pursue this.

(47) Electronic monitoring of a restraining order was addressed once again in Proposition to the Storting 128 L (2022–2023), among other things based on several requests from the Storting. The objective was to improve the compliance with restraining orders and contact bans, see page 5 in the Proposition.

(48) The Ministry deals with the constitutional and human rights frameworks for the proposal in chapter 4 of the Proposition. The proposed provisions are balanced against several provisions in the Constitution and the ECHR, including Article 94 of the Constitution concerning deprivation of liberty, Article 102 concerning the respect for private and family life and Article 106 concerning the freedom of movement, as well as corresponding rights in Articles 5 and 8 of the ECHR and Protocol 4 Article 2.

(49) In section 4.3.1 of the Proposition, the Ministry discusses how intrusive a measure involving electronic monitoring will be for the person subjected to it. On pages 13–14 it is stated:

> "The Ministry finds it clear that a restraining order with electronic monitoring is an intrusive measure with significant consequences for the person on whom it is imposed. On the one hand, the person will be constantly prevented from entering a prohibited zone and forced to wear a monitoring device (ankle bracelet), which causes inconveniences. The prohibited zone will normally be larger with electronic monitoring than with a restraining order alone. On the other hand, the person may generally move freely outside the prohibited zone, anywhere and at any time. The restriction lies in having to wear an ankle bracelet, ensuring proper charging and other forms of participation. For example, the obligation to co-operate prevents the use of certain means of transport that complicate

> monitoring. However, provided one stays outside the prohibited zone, one may largely live a normal life and engage in activities as desired."

(50) After an overall assessment, the Ministry found that an arrangement with electronic monitoring of a restraining order would constitute "a restriction on the freedom of movement, but not deprivation of liberty".

(51) The application of Article 97 of the Constitution is not mentioned in the Proposition.

(52) The provision on the possibility to impose electronic monitoring of a restraining order was adopted by Act of 20 December 2023, as a new section 222 g of the Criminal Procedure Act. The amendment entered into force on 8 April 2024. No transition rules are provided.

Article 97 of the Constitution

(53) The question is whether it would be contrary to the prohibition of retroactivity in Article 97 of the Constitution to impose electronic monitoring under section 222 g of the Criminal Procedure Act upon suspicion of violations of a restraining order committed before the provision entered into force.

(54) The parties agree that the provision, in that case, has a retroactive effect to the disadvantage of the person on whom electronic monitoring is imposed. I agree. The issue at hand is particularly related to the strength of the retroactivity and which norm to apply – hereafter referred to as the constitutional norm – to establish a violation of Article 97 of the Constitution.

The strength of the constitutional protection

(55) The retroactivity in our case relates to a coercive measure that interferes with the freedom of the individual. The constitutional protection in the event of such interference is generally very strong, see the Supreme Court plenary judgment in Rt-1996-1415 *Borthen* page 1429 with further reference to Rt-1976-1 *Kløfta*. I also refer to the plenary judgment in Rt-2010-1445 *war criminal* paragraph 90, in which it is stated that the Constitution's impact is strongest when the retroactivity affects the individual's personal freedom and security.

(56) The protection in the Constitution against retroactive laws is strongest in criminal law, see the mentioned paragraph 90 in *war criminal*. In this judgment, however, the premise is that Article 97 of the Constitution allows for the application of new procedural rules when a person is indicted for older acts, even if the amendments weaken the defendant's position, see paragraph 95. This is also expressed in Rt-2014-1105 *surplus material* paragraph 64, which sets out that "new criminal procedural provisions, as a starting point and main rule, unhindered by the prohibition of retroactivity in Article 97 of the Constitution may be applied to older offences, even if the position of the person concerned becomes less favourable".

(57) The term criminal procedural provisions primarily refers to rules on the investigation and execution of criminal cases, see also Johs. Andenæs and Arne Fliflet, The Constitution in Norway, 11th edition page 583. In that regard, it is not decisive whether a provision is included in the Criminal Procedure Act. Whether a provision is procedural is determined by

its character, not by the Act in which it is placed, see Magnus Matningsdal, The Penal Code, Ordinary provisions, Commentary, 2015 page 32.

(58) Electronic monitoring of a restraining order under section 222 g of the Criminal Procedure Act is a preventive coercive measure and, by its nature, is not a procedural rule. Its purpose is to prevent future violations of an existing restraining order. It is not an investigative step and is not intended to contribute to the solving of a criminal case. As I have outlined, this coercive measure differs from several other coercive measures in Part IV of the Criminal Procedure Act.

(59) The parties in the case before the Supreme Court agree that the imposition of electronic monitoring under section 222 g of the Criminal Procedure Act is not punishment under Norwegian law or the ECHR. I agree. However, it is an intrusive measure interfering with the freedom of movement of the person subjected to it, which is protected by Article 106 of the Constitution and Article 2 of Protocol No. 4 to the ECHR, see my quotes from Proposition to the Storting 128 L (2022–2023) page 13–14. Consequently, the impact of Article 97 of the Constitution in this area should be significant.

The constitutional norm in our case

(60) In criminal law, a strict anti-retroactivity norm applies, see Rt-2010-1445 *war criminal* paragraphs 87 and 88. The Supreme Court has not established a separate constitutional norm for coercive measures that are not punishment. The Supreme Court's recent plenary judgments concerning Article 97 of the Constitution primarily involves interference with economic rights.

(61) In the plenary judgment Rt-2013-1345 *structure quota,* Justice Tønder – representing the majority – discusses previous Supreme Court rulings concerning the norm for constitutional review, see paragraphs 80 et seq. He concludes as follows in paragraphs 93 and 94:

> "As I have shown, a great variety of norms have been applied for cases of actual and non-actual retroactivity or interference with established rights or legal positions. In the examples mentioned, and, as I interpret the judgments, that were essentially considered to be cases of actual retroactivity, 'strong societal considerations' are required for the provision to withstand Article 97 of the Constitution. Although the reference to *gold clause* does not necessarily imply that the need for retroactivity must be as compelling as in that case, both the wording of the norm and this exemplification indicate a narrow legislative scope to make rules with such an effect in this type of provisions. I do not take a position on whether there is a basis for imposing such strict requirements for any case of actual retroactivity.
>
> However, in cases involving interference with established legal positions, as pointed out in *Borthen*, the target is the particularly unreasonable or unfair retroactivity – also described as 'clearly unreasonable or unfair". This indicates a significantly broader scope for the legislature to make rules with non-actual retroactive effect than in the mentioned examples of actual retroactivity…."

(62) In the Supreme Court judgment HR-2016-389-A *Storting pension*, Justice Bergsjø's starting point is the *structural quota* judgment, see paragraph 64. In paragraph 76, he summarises his outline of that ruling and other Supreme Court case law as follows:

> "Against this background, I conclude that the core issue is the strength of the retroactivity element. If the provision directly links burdensome legal effects to past events, it is generally unconstitutional. However, if the provision only gives rules on the exercise of an already established position, it is generally the opposite. In the latter events, the legislature has considerable discretion, see paragraph 94 of *structural quota*. There is a gradual transition between these extremes. In *shipping tax*, this is referred to as 'transitional forms', while *structural quota* emphasises that the 'Borthen norm' is relative, flexible and discretionary."

(63) As I read these two judgments, both are based on a distinction between actual and non-actual retroactivity, although Justice Bergsjø does not use the terms in *Storting pension*. The criteria for describing the element of retroactivity are the same in both judgments, see paragraph 82 in *structure quota* and paragraph 76 in *Storting pension*.

(64) Counsel for the defence argues that the measure in this case is so similar to punishment that an absolute prohibition of retroactivity should apply. In the alternative, the norm should be the one applied by the Supreme Court in Rt-1962-369 *gold clause* on page 385 – "the vital interests of society".

(65) I find it clear that, for the imposition of electronic monitoring, one cannot lay down an absolute prohibition of retroactivity, as is the case in criminal law. As mentioned, the coercive measure is not considered punishment within the meaning of the Penal Code. The purpose is to prevent future offenses, not to sanction past acts. However, I do not rule out that the constitutional norm for certain particularly intrusive measures that are not considered punishment should be close to the norm applicable in criminal law. Given the circumstances of our case, there is no reason for me to delve further into this.

(66) As I see it, a natural basis is more recent Supreme Court case law concerning Article 97 of the Constitution regarding legislation that interferes with economic rights. The reasoning in the judgments is largely of a general nature and, in my opinion, also has relevance beyond the economic arena. I believe that distinguishing between actual and non-actual retroactivity is well justified, even when the retroactivity is to be balanced against the coercive measure in our case.

(67) *In summary,* this means that if section 222 g of the Criminal Procedure Act directly links burdensome legal reactions to past acts or events – actual retroactivity – strong societal interests are required for the provision to withstand Article 97 of the Constitution. On the other hand, if the provision interferes with established legal positions – non-actual retroactivity – only the particularly unreasonable or unfair retroactivity is unconstitutional.

(68) I will now turn to the nature of the retroactivity.

(69) The first alternative in section 222 g of the Criminal Procedure Act contains two cumulative requirements. Firstly, the person on whom the measure is imposed must be reasonably suspected of having violated a restraining order. Secondly, electronic monitoring must be deemed necessary to ensure compliance with the restraining order. The first of these requirements is retrospective, while the second is forward looking.

(70) The necessity requirement is further described in Proposition to the Storting 128 L (2022–2023) page 29–30:

> "The question according to the proposal is intended to be the same as that under section 57 of the Penal Code, namely whether the restraining order alone will give effective protection, or whether electronic monitoring is necessary to ensure compliance therewith. In the same way as under section 57, the Prosecution Authority and the court must be given 'wide discretion' in assessing this, see Proposition to the Odelsting 25 (2008–2009) item 3.7.1.3 page 21. The necessity requirement is, also for electronic monitoring of a restraining order, not meant to be applied 'particularly strictly', see HR-2021-2151-A.
>
> Previous events are essential in the assessment of the risk of future violations. Similar to what applies under section 57, the imposition of electronic monitoring of a restraining order must be justified with reference to the history between the parties, statements made by the person posing the threat, or past violations of a restraining order or contact ban. Other circumstances may also shed a light on the risk that the measure will not be complied with, including any previous criminal activity or other unwanted and transgressive acts committed by the person posing the threat towards the threatened person, or others."

(71) This calls for a broader assessment of whether electronic monitoring should be imposed. The suspicion of past violations of a restraining order is a necessary, but not a sufficient, requirement.

(72) In the plenary judgment Rt-2006-293 *Arve's Driving School*, there was direct causality between the transitional provision introduced and the duty to repay deducted VAT, see paragraph 49. It was not – as in our case – an additional requirement. That was also not the case in Rt-2010-143 *shipping tax*. The direct consequence of the new tax rule was an increased tax burden, see paragraphs 127–129 and Justice Utgård's assessment of the retroactivity issue in paragraphs 135 and 136.

(73) The element of retroactivity was therefore clearer and more direct in these two judgments than in our case. Nonetheless, I have concluded that the retroactivity in our case has strong similarities with actual retroactivity.

(74) *Firstly*, there is a close connection between the suspicion of past violations of a restraining order and the imposition of electronic monitoring. The suspicion of past violations is a necessary, and statutory, requirement for imposition under the first option in section 222 g of the Criminal Procedure Act. Past violations will – as set out in the cited preparatory works – in practice be essential to the assessment of whether the necessity requirement is met. This makes the element of retroactivity more dominant than in cases where past acts are only one aspect in an overall assessment, as is the situation for the assessment under section 222 g second alternative.

(75) *Secondly*, past violations of a restraining order will be concluded acts that cannot be reversed. Electronic monitoring may be imposed due to suspicion of past violations of a restraining order, without there being a requirement that incidents have occurred or acts have been committed after section 222 g entered into force. The person affected will thus be unable to adjust to the new provision through subsequent behaviour, and thereby prevent the measure. Here, I refer to *structure quota* paragraphs 95 and 96, which emphases adjustment considerations and the possibility of alternative arrangements as key factors in establishing different norms for constitutional protection against actual and non-actual retroactivity.

(76) Considered in context, this implies that each individual's possibility to predict and adjust to the new legislation is limited. A basic objective of Article 97 of the Constitution is to ensure "predictability, security and due process for the citizens", see for instance the Supreme Court judgment Rt-2009-1412 paragraph 25. That case concerned criminal law, but the statement has general application.

(77) Consequently, I find that section 222 g first option of the Criminal Procedure Act is not a pure case of actual retroactivity, since no legal effects is *directly* linked to past acts or events. However, the provision contains strong elements of such retroactivity, as past acts are a necessary, statutory requirement of great consequence to the question of whether the measure should be implemented. The sanction is so closely connected to the violation of the restraining order that the reasoning behind the prohibition of retroactivity, in my opinion, applies with significant weight.

(78) I therefore conclude that the imposition of electronic monitoring based on suspicion of violations of a restraining order committed before the provision entered into force, links burdensome legal effects to past and concluded acts to such an extent that the provision can only be given retroactive effect if strong societal considerations so suggest.

Are strong societal considerations present?

(79) The purpose of the possibility to impose electronic monitoring upon suspicion of violations of a restraining order is to improve the compliance with the restraining order and contact ban. The rules contribute to strengthening the protection of persons in risk of being subjected to violence, threats and other unwanted contact, see Proposition to the Storting 128 L (2022–2023) page 5. The provision also contributes to fulfilling the State's obligation under Article 1 of the ECHR to prevent private individuals from violating each other's rights. The implementation of the provision in section 222 g of the Criminal Procedure Act is therefore justified by strong societal considerations.

(80) In my view, however, these considerations cannot justify giving the provision retroactive effect. The strong societal considerations must be linked to the need of retroactivity and not to the general reasoning for the provision.

(81) The consequence of not taking into account violations of a restraining order committed before the provision entered into force is that it will take slightly longer before the provision is fully effective. However, this cannot be decisive when the provision significantly expands the possibility to impose intrusive coercive measures. The State's obligation to respect human rights may also be fulfilled through other protective measures.

Summary

(82) Against this background, I conclude that the prohibition of retroactivity in Article 97 of the Constitution precludes the imposition of electronic monitoring under section 222 g first option of the Criminal Procedure Act when this is justified by suspicion of violations of a restraining order committed before the provision entered into force.

Section 222 g second option of the Criminal Procedure Act

(83) Although there are no reasonable grounds to suspect violations of a restraining order, electronic monitoring may be imposed "in particular circumstances when deemed necessary to prevent someone from committing a criminal act against another", see section 222 g subsection 1 third sentence of the Criminal Procedure Act.

(84) The Court of Appeal's majority supported the District Court's conclusion that the requirements for imposing electronic monitoring under this option were not met. About the interpretation of this provision, the District Court stated:

> "This provision allows 'in particular circumstances' the imposition of such monitoring without reasonable grounds to suspect violations of a restraining order. It is a requirement under the provision that 'it is deemed necessary to prevent someone from committing a criminal act against another'. The provision is meant to have a narrow area of application and may be applied only exceptionally and with great caution, see Proposition to the Storting 128 L (2022–2023) page 46. In order to apply the provision, it must be clear that other and less intrusive measures will not suffice. The standard of proof is strict. The provision must be interpreted to require, after an overall assessment, that there is a strong preponderance of probability that the person, without electronic monitoring, will commit an offence in the future, see Proposition to the Storting 128 L (2022–2023) page 64."

(85) This reflects a correct understanding of the law. The Supreme Court does not have jurisdiction to review the individual assessment.

(86) I therefore find no reason to discuss whether Article 97 of the Constitution restricts the application of section 222 g second option.

The right to appeal for the person to be protected by electronic monitoring

(87) The question here is whether B, who is the person to be protected by the electronic monitoring, has a right to appeal against the Court of Appeal's dismissal of the appeal against the District Court's order, which in turn dismissed the application for electronic monitoring.

(88) According to section 377 subsection 1 of the Criminal Procedure Act, an order may be appealed by "any person who is affected thereby". The provision sets out that a right to appeal against an order is not limited to the parties to the case, see the use of the phrase "any person". However, if the person is not a party, it is a requirement that the ruling "affects" him or her. In case law, the basis has been that there must be "a legal or relevant interest in the outcome of the case", see the Supreme Court ruling HR-2018-1517-U paragraph 26 with further reference to Rt-2008-158.

(89) The imposition of electronic monitoring contributes to ensuring compliance with a restraining order. This suggests that the person to be protected by the restraining order has a relevant interest – and is thus affected – by a decision not to impose electronic monitoring. However, the question in the case is whether the procedural provisions incorporated into section 222 g subsection 4 of the Criminal Procedure Act imply that exceptions must be made from the right to appeal against an order that would otherwise be covered by section 377.

(90) A decision not to impose a restraining order can be brought to court by the person to be protected, see section 222 a subsection 8 first sentence of the Criminal Procedure Act. It follows from the third sentence that the person to be protected must be notified of the proceedings and have right to be present and give a statement during the hearing. It does not follow from section 222 a subsection 8 that the person to be protected also has right to appeal against a decision not to impose a restraining order. It is clear, however, that such a right to appeal exists, see Proposition to the Odelsting 109 (2001–2002) page 35 and the Supreme Court ruling HR-2023-2113-A paragraph 41.

(91) In the consultation paper from the Ministry of Justice and Public Security of 6 September 2021 concerning the implementation of a legal basis for imposing electronic monitoring following violations of a restraining order, it was proposed to give similar application to the provision in section 222 a subsection 8. The right to appeal is not specifically addressed.

(92) Oslo Police District commented during the consultation round that the issue of electronic monitoring should primarily depend on the Prosecution Authority's assessment, see Proposition 128 L (2022–2023) page 38. The Ministry took a different stand than in the consultation paper and proposed that the person to be protected should not have a right to bring an application for electronic monitoring to court, see page 40 in the Proposition. In the statutory provision, this is expressed by the lack of a reference in section 222 g subsection 4 final sentence to section 222 a subsection 8 first sentence. The right to appeal is not addressed in the Proposition.

(93) I emphasise that the power to impose electronic monitoring lies with the Prosecution Authority. The legislature has deliberately chosen that the person to be protected by electronic monitoring is not to have a right to bring the Prosecution Authority's decision to court. If the Prosecution Authority considers electronic monitoring unnecessary to ensure compliance with the restraining order, the person to be protected cannot seek the court's review.

(94) The solution chosen in section 222 g subsection 4 of the Criminal Procedure Act suggests – in my view – that the legislature has presupposed that the person to be protected also does not have a right to appeal. This is also supported by weighty systemic considerations. The imposition of electronic monitoring is a harsh measure and involves the exercise of the State's coercive authority to a much greater extent than the imposition of a restraining order. Coercive measures against the citizens can only be imposed by the authorities, and it is the police and the prosecution authority that pursue such cases in court. For that reason, for instance, an aggrieved person does not have the possibility to appeal against a remand order, see Rt-2002-143. In my opinion, the same considerations behind this rule are also relevant to the assessment of whether the aggrieved person has a right to appeal.

(95) Nor can I see that a right to appeal for the person to be protected by the electronic monitoring is necessary to ensure effective remedy under the ECHR. The case in Rt-2012-12 – invoked by the aggrieved person's counsel – concerned other aggrieved persons' access to criminal case documents that would violate the right to privacy under Article 8 of the ECHR. This a different situation than in our case. Moreover, the person entitled to protection has a right to appeal when it comes to whether or not a restraining order should be imposed.

(96) Against this background, I have concluded that upon the imposition of electronic monitoring under section 222 g of the Criminal Procedure Act, section 377 of the Criminal Procedure Act must be interpreted restrictively, so that the person whom the measure is intended to protect does not have a right to appeal against a decision not to impose electronic monitoring.

Conclusion

(97) Against this background, my conclusion is that the appeal from B is inadmissible, and that the appeal from the Prosecution Authority is dismissed.

(98) I vote for this

O R D E R :

1. The appeal from B is inadmissible.

2. The appeal from the prosecution authority is dismissed.

(99) Justice **Steinsvik:** I agree with Justice Lund in all material respects and with his conclusion.

(100) Justice **Falch:** Likewise.

(101) Justice **Høgetveit Berg:** Likewise.

(102) Justice **Ringnes:** Likewise.

(103) Following the voting, the Supreme Court gave this

O R D E R :

1. The appeal from B is inadmissible.

2. The appeal from the prosecution authority is dismissed.