SUPREME COURT OF NORWAY

O R D E R

issued on 8 October 2024 by a division of the Supreme Court composed of

Justice Bergljot Webster
Justice Arne Ringnes
Justice Cecilie Østensen Berglund
Justice Erik Thyness
Justice Kine Steinsvik

HR-2024-1825-A, (case no. 24-035765STR-HRET)
Appeal against Borgarting Court of Appeal's order 18 January 2024

Satudarah MC	(Counsel Kristina Davidsen and John Christian Elden)
v.	
The Public Prosecution Authority	(Counsel Thomas Frøberg)

(1) Justice **Østensen Berglund:**

Issues and background

(2) The case concerns an application to ban the motorcycle club Satudarah MC because it is a criminal association. This raises questions regarding the interpretation of the legal basis for a ban in section 222 e of the Criminal Procedure Act, the application of Article 11 of the European Convention on Human Rights (ECHR) on the freedom of association, the corresponding provision in Article 101 of the Constitution, and the prohibition of retroactivity in Article 97 of the Constitution.

(3) Satudarah MC was founded in the Netherlands in 1990 and eventually spread to other countries, also outside of Europe. It originates from Indonesian immigrants from the Maluku Islands. The club refers to itself as an MC club, but it is not a requirement that the members have a motorcycle. According to information provided, Satudarah MC is the only multi-ethnical motorcycle club in the world, but its objective is not to promote multi-ethnical interests.

(4) The club defines itself as a *one-percenter* club – a term normally used for specific motorcycle clubs with symbols indicating that they operate on the fringes of society's laws and conventions. It is known that drug crime, violence and profit-driven offences are committed within several of these clubs. They are often part of an international community, which is also the case for Satudarah MC. The national branches are often referred to as *chapters*. In 2014, such a chapter was established in Stavanger, and another was established in Oslo in 2020. The associated individuals are referred to as executive members, full members, *prospects* (trial members) and *hangarounds* (persons trying to qualify as prospects). A number of persons affiliated with the club – both in Norway and abroad – have a criminal background. Satudarah MC is banned in the Netherlands and Germany.

(5) On 3 February 2023, the Public Prosecution Authority submitted an application to Oslo District Court to ban Satudarah MC under section 222 e of the Criminal Procedure Act.

(6) By Oslo District Court's order 16 May 2023, the application was dismissed. The District Court found that the conditions under section 222 e of the Criminal Procedure Act were met, but that a ban would be a disproportionate measure, see Article 11 of the ECHR.

(7) The Public Prosecution Authority appealed against the order.

(8) By Borgarting Court of Appeal's order 18 January 2024, the application was accepted, and the association Satudarah MC was banned, see section 222 e of the Criminal Procedure Act.

(9) The Court of Appeal based its order on a broader assessment of the provisions than the District Court. It found that the requirements in section 222 e were met, and that the measure was proportionate under Article 11 of the ECHR.

(10) Satudarah MC has appealed against the Court of Appeal's order to the Supreme Court. The appeal challenges the procedure and the application of the law.

(11) On 19 April 2024, the Supreme Court's Appeals Selection Committee decided to refer the appeal concerning the application of the law to a division of the Supreme Court composed of five justices, see section 5 subsection 1 second sentence of the Courts of Justice Act. The appeal against the procedure was ruled inadmissible in accordance with section 388 subsection 2 of the Criminal Procedure Act.

The parties' contentions

(12) *Satudarah MC* contends that the Court of Appeal has incorrectly assumed that the two Norwegian groups must be considered jointly, and together with the foreign organisation. The chapters must be considered separately. The provision cannot be applied for precautionary purposes, as it is directed at established and mature groups.

(13) The Court of Appeal has also interpreted the term "participants" too broadly. The courts cannot emphasise offences committed before the relevant participant became a member or offences committed by participants who have left the club. Pending or dismissed criminal cases can also not be emphasised. Each offence must be considered individually under section 222 e of the Criminal Procedure Act. When assessing whether past acts are apt to cause fear, the potential fear capital of foreign associations is irrelevant if the Norwegian branch alone does not have the necessary fear capital.

(14) Furthermore, the Court of Appeal's ruling is contrary to Article 11 of the ECHR. It would also be contrary to Article 97 of the Constitution to emphasise offences committed before section 222 e entered into force.

(15) Satudarah MC asks the Supreme Court to rule as follows:

> "Principally:
>
> 1. The Public Prosecution Authority's application to ban Satudarah MC Oslo is dismissed.
> 2. The Public Prosecution Authority's application to ban Satudarah MC Stavanger is dismissed.
>
> In the alternative:
>
> 1. Borgarting Court of Appeal's order of 18 January 2024 is set aside."

(16) *The Public Prosecution Authority* contends that the Court of Appeal has interpreted the requirements in section 222 e correctly. The Court has emphasised the circumstances that may be considered according to the preparatory works. It has correctly concluded that a ban is necessary to prevent serious crime. The Act requires that a prohibition must be both effective and proportionate. The prohibition provision in the Criminal Procedure Act and its individual application to Satudarah MC are consistent with the measures permitted under Article 11 (2) of the ECHR. There is no conflict with Article 97 of the Constitution, as it primarily concerns a prospective assessment.

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

> "The appeal is dismissed."

My opinion

The Supreme Court's jurisdiction

(18) Initially, I note that the appeal is a second-tier appeal against an order. The Supreme Court may thus review the Court of Appeal's procedure and interpretation of the law, see section 388 of the Criminal Procedure Act. As concerns the application of the Constitution, the ECHR and other incorporated human rights conventions, the Supreme Court may also review the application of the law, but not the findings of fact.

The background to section 222 e of the Criminal Procedure Act

(19) Section 222 e of the Criminal Procedure Act entered into force on 1 July 2021, and provides the courts with a legal basis for banning criminal associations. The provision was introduced as a reaction to the major societal challenges posed by organised crime and the insecurity created in the population through the use of violence, threats and other criminal activities. The associations operate in closed environments where the leaders distance themselves from concrete acts, and where it may be difficult to punish accomplices at the periphery of the association, see Proposition to the Storting 190 L (2020–2021) page 22. Therefore, the Ministry saw a need to be able to prohibit such associations that were established in Norway, and a need to prevent international organised crime from taking root in Norway.

(20) In connection with the legislative work, the Criminal Law Council drafted two alternate proposals, see Norwegian Official Report 2020: 4. The first one was a separate penal provision on participation and recruitment to organised criminal associations, corresponding to the prohibition of such activity related to terrorist organisations. The second was a legal basis for prohibiting or dissolving an organised criminal association, combined with a penal provision if the activity persisted.

(21) The Ministry based itself on the latter proposal, see Proposition to the Storting 190 L (2020–2021) page 28, and then made certain adaptations to which I will return. The reasoning behind this choice was that a prior prohibition provides more predictability, that punishment should be a subsidiary measure and that a legal basis for prohibition would more effectively prevent international associations from expanding their activities to Norway.

(22) It follows from the preparatory works that the purpose of the provision is to be able to ban associations with so-called fear capital, see Proposition to the Storting 190 L (2020–2021) page 32. The Criminal Law Council's interpretation of this term is provided on page 9:

> "Fear capital means … the power that a group holds by exploiting other people's fear of reprisals, reactions or actions from the group (and its members). It must be known and visible to others that the group has the capacity to sanction unwanted actions … Fear capital is a form of branding that ensures internal loyalty and deters others."

(23) Furthermore, it follows from the Proposition on page 32 that such fear capital is normally acquired by the established and "mature" groups. It is also stated that this may "include subgroups of international criminal organisations taking root in Norway". The purpose of the provision and the statements in the preparatory works thus imply that it is not a requirement that the group is already well established in Norway. A ban may also be imposed on new establishments benefiting from the fear capital of foreign "parent organisations".

(24) If the prohibition in section 222 e of the Criminal Procedure Act is violated, the participant will be criminally liable under section 199 of the Penal Code. Participation in replacement groups, for instance where the business is carried on under a different name, would constitute a punishable continuation of the activities, see Proposition to the Storting 190 L (2020–2021) page 47.

Conditions in section 222 e of the Criminal Procedure Act

(25) Section 222 e of the Criminal Procedure Act reads:

> "Upon application from the Director of Public Prosecutions, the court may by order ban an association when
>
> a. participants in the association have committed repeated offences against the life, health and liberty of others,
> b. the violations are apt to cause fear in the population or the local environment of new offences of the same nature from the participants in the association, and
> c. a ban is necessary to prevent serious crime."

(26) An association may be banned when the cumulative requirements in the opening sentence and in (a) to (c) are met. The provision must be applied within the scope of the rules on the freedom of association in Article 11 of the ECHR, Article 101 of the Constitution and section 170 a on proportionality in the Criminal Procedure Act.

(27) The standard of proof is "clear preponderance of probability", see Proposition to the Storting 190 L (2020–2021) page 46. In other words, the standard of proof is lower for banning an association under section 222 e than for convicting a person of participation in a banned association.

The term "Association"

(28) It follows from section 222 e subsection 1 that the court may ban an "association" covered by (a) to (c). The term, which can be viewed as an input condition, is not defined in the provision, but has a broad application according to the wording it. However, the basis in the preparatory works, see Proposition to the Storting 190 L (2020–2021) page 45, is that it must involve a "clearly identifiable entity", with "a certain degree of structure and duration". Organisational conditions, structure, the use of common symbols, premises, possible "control" of geographical areas, loyalty to the group and possible connections to an international network are all significant factors. Changes in the membership base, on the other hand, will normally carry little weight.

(29) Based on this understanding of the requirement, the Court of Appeal found it clear that Satudarah MC was an association under section 222 e. This is not in dispute. I agree with this as well.

(30) Satudarah MC contends that the groups in Stavanger and Oslo must be considered as two separate associations. In my view, the contention can clearly not succeed. I confine myself to pointing out that the groups are part of the same international network, subject to the same international management and hierarchy, they comply with identical bylaws, operate with

identical membership contracts, use the same symbols and pay in an amount to a national cash reserve. Similar to the Court of Appeal, which has relied on the same interpretation of the law, I find that there is no doubt that Satudarah MC in Stavanger and Satudarah MC in Oslo are two chapters of the same international association.

The term "Participants"

(31) It is a requirement under section 222 e (a) of the Criminal Procedure Act that "participants" in the association have committed repeated offences. Who is included in the participant concept will be significant for which individuals' offences are to be considered in the assessment under section 222 e of the Criminal Procedure Act.

(32) Satudarah MC contends that the Court of Appeal has built on an overly broad definition of the participant concept, and that the legal requirement implies that this must be limited to members and individuals with an active role.

(33) The term is not defined in the Act or mentioned in the preparatory works to section 222 e. According to the corresponding provision in section 199 of the Penal Code, it is a requirement for punishment that a person "participates in, recruits members to or otherwise continues the activity" of the banned association. Although the terms used are slightly different – *participants* v. *participates in* – and section 199 is applicable where the person who participates already knows that the act is punishable, the statements on the provision in the preparatory works are of some interest. They set out that the participation concept must generally be understood in the same way as the corresponding concept in section 136 a of the Penal Code, which concerns participation, etc. in a terrorist organisation, see Proposition to the Storting 190 L (2020–2021) page 35–36. This implies that the contributions must be active, and that "minor or peripheral contributions are not covered", see for instance the Supreme Court judgments HR-2018-1650-A paragraph 46 and HR-2022-2418-A paragraph 20, both concerning section 136 a of the Penal Code. However, it is established in both these judgments that the threshold for active participation is not very high. I cannot see how this is any different under section 222 e of the Criminal Procedure Act, given the purpose of the provision.

(34) There is no requirement of a formal membership and participation is not subject to the acceptance of other members. Often, a members' register is not kept and a general acceptance will not necessarily exist in associations marked by internal conflicts. A possible internal status in the association can thus not be given much weight. Regular presence, the use of symbols etc. are factors indicating that a person is a participant.

(35) The participation requirement is intended to substantiate that persons associated with the group commit the relevant type of crime, not necessarily to identify the individual person. It is thus sufficient to meet the requirement in (a) that offences can be attributed to the association, typically as the participants commit criminal acts in a manner that contributes to increasing the group's fear capital. This is substantiated by the significance of international branches, to which I will return.

(36) The Court of Appeal assumed that in an association like Satudarah MC, full members and *prospects* fall under the participant concept. *Hangarounds* may also be covered, but only after

an individual assessment. In my view, the Court of Appeal builds on a correct interpretation of the law.

"Repeated offences against the life, health or liberty of others"

(37) It is also a condition under section 222 e (a) that the participants in the association have committed "repeated offences against the life, health or liberty of others". Thus, it follows directly from the wording that there must be several incidents, and that serious violations against the integrity of others will be central. This will typically relate to the use of violence, sexual offences and deprivation of liberty, but also robbery and extortion, see for instance Proposition to the Storting 190 L (2020–2021) page 45, where further examples are provided. In addition, threats and the obstruction of justice may fall under the requirement, since such offences may have a large impact on an individual's liberty.

(38) Although there is a requirement of several offences, the preparatory works also state that it is not a requirement that several offences can be linked to one perpetrator. Nor is it required that the perpetrator can be identified, that criminal liability is established or that someone is convicted of the offence, see Proposition to the Storting 190 L (2020–2021) pages 45 and 33. Criminal cases that have been dismissed or that are under investigation, as well as intelligence reports from the police, may also be taken into account. The reason is that all of this taken together may substantiate the association's fear capital, see the requirement in (b).

(39) As concerns dismissed cases, I add that the same understanding is used as a basis in ordinary criminal cases. Here, I mention the Supreme Court rulings HR-2018-578-U and Rt-2007-24 paragraphs 17 and 18, stating that "documentation of previous acquittals of the defendant or dismissals of police reports" may be presented, as long as they "may provide clarification of the issue of guilt or punishment in the relevant case".

(40) Satudarah MC contends that the Court of Appeal has incorrectly considered offences committed before the relevant participants joined the association, while the District Court correctly assumed that the criminal act at the outset had to have been committed while the person was a member or otherwise a participant in the association.

(41) According to its wording, the provision covers offences committed by participants who have subsequently left the association, voluntarily or by exclusion, as well as offences committed before the person became a member. The preparatory works also do not establish any temporal limit. In my view, the purpose of the rules substantiate that, as a clear starting point, there can be no temporal limit. Offences committed before a person became a member may also contribute to strengthening the association's fear capital. It would therefore be contrary to the purpose of the provision not to emphasise crime committed prior to participation in the association. Furthermore, fear capital built by an individual will not necessarily be lost if the individual exits the association. If an exit were to have the effect that the acts could not be emphasised, it would also be easy to avoid imposing a ban. To which I will return, however, an exit or exclusion may be significant to the fear assessment under (b).

(42) I add that the legislature has highlighted the contribution to the association's fear capital as more important than the direct link between crime and the association's activities. While the proposals from both the majority and the minority of the Criminal Law Council entailed a requirement that participants *as a step in the association's activities* have committed criminal

acts, see Norwegian Official Report 2020: 4 page 108, the Ministry chose to remove this requirement to ensure a simpler evidentiary system where the building of fear capital became central, see Proposition to the Storting 190 L (2020–2021) page 33. The fear requirement in (b) will prevent any unreasonable effects of the temporal assessment.

(43) As for offences committed abroad, there is no disagreement that these will be relevant when committed by participants in the Norwegian chapter. However, Satudarah MC argues that offences committed by foreign participants' abroad cannot be emphasised.

(44) The wording in section 222 e expresses no geographical delimitation and no delimitation towards participants who are foreign nationals. The imposition of a ban involves exercise of Norwegian jurisdiction in Norway and therefore raises no jurisdiction issues. At the same time, it follows from the preparatory works that one of the purposes of the provision is to prevent international associations from taking root in Norway, and that foreign criminal convictions may be taken into account, see for instance Recommendation to the Storting 629 L (2020–2021) page 3. Thus, when Satudarah MC's Norwegian and foreign chapters are part of one common association, with common fear capital, it must be relevant to take into account offences committed by foreign participants abroad.

(45) Satudarah MC contends that each individual offence and incident must be assessed individually and against all the requirements in the provision. As I read the preparatory works to section 222 e, it is based on the opposite. Few requirements are made for concretisation and individualisation, see Proposition to the Storting 190 L (2020–2021) page 45. Here, it is stated that there is no requirement for each individual offence to be proven, but there must be a clear preponderance of probability that offences covered by (a) have been committed. However, the specific scope may influence the assessment of the fear requirement under (b) and the necessity and proportionality requirement under (c).

(46) The Court of Appeal has applied the same understanding of the different requirements in section 222 e of the Criminal Procedure Act. I therefore have no objections to the Court of Appeal's interpretation of the law on this point.

(47) As for the Court of Appeal's individual assessment of whether the input requirement and the requirements in (a) are met, there is nothing to indicate that the Court of Appeal has erred in the case. I confine myself to pointing out its presentation of the extensive criminal history of the Norwegian participants in Satudarah MC, which includes aggravated acts of violence, deprivation of liberty and threats against representatives of the judiciary. In addition, the association is banned in the Netherlands and Germany because of its criminal activities.

(48) Satudarah MC contends that Article 97 of the Constitution prevents the emphasis on offences committed before section 222 e of the Criminal Procedure Act entered into force. I will return to that.

The fear requirement in section 222 e (b)

(49) It is a requirement under section 222 e (b) of the Criminal Procedure Act that "the violations are apt to cause fear in the population or the local environment of new offences of the same nature from the participants in the association". The term "violations" refers to offences covered by (a).

(50) The term "apt to" denotes a requirement of the fear potential of the acts. It is not a requirement that fear has in fact been caused.

(51) Satudarah MC argues that the condition must be strictly interpreted, and that the threshold under the provision therefore is high. It refers to the statement in the preparatory works that although various forms of crime may be serious, they do not necessarily cause fear. The legislative intent has been to target established "mature" groups that exploit built-up fear capital in its ongoing criminal activities.

(52) It follows from the preparatory works that there is a threshold for such violations mentioned in (a) to be said to give grounds for fear, but that this threshold is not very high. In this regard, I refer to Proposition to the Storting 190 L (2020–2021) page 45–46, stating that the fear does not need to be serious, and that the requirement is much less strict than that in section 131 of the Penal Code on terrorist acts. Nonetheless, it is clear according to the preparatory works that it is not sufficient that "a handful of persons become nervous"; the fear must be apt to occur in the population or the local environment. Fear among ordinary citizens is just as relevant as fear among other criminals.

(53) The link between (a) and (b) implies that offences covered by (a) presumably will cause fear as described in (b). No particular requirements are made for the effects the fear. It may be of different natures, such as inner fear or a fear that causes physical or practical consequences, typically that one avoids certain areas or refrains from reporting crime, see Proposition to the Storting 190 L (2020–2021) page 46.

(54) I stress that it is a requirement under the law that the fear is linked to the association as such, and not to the individual perpetrator.

(55) The Court of Appeal has taken the same legal approach, but has not only emphasised the fear the offences cause in its individual assessment under (b).

(56) It starts by pointing out that the participants have committed a considerable number of offences covered by section 222 e (a) of the Criminal Procedure Act. It notes that in various judgments, it is assumed that the participants are encouraged to commit violence, that violence is considered a legitimate means of enforcing Satudarah MC's rules, that private law enforcement has occurred related to the club in the form of aggravated bodily harm and deprivation of liberty, and that many have been convicted of obstructing justice in cases involving other participants. In the Court of Appeal's view, this shows that violence and threats are an important part of the club's activities, used to achieve what Satudarah MC wants. The Court of Appeal also refers to the association's international affiliation, and the crime related to other countries.

(57) Next, the Court of Appeal notes that the general image Satudarah MC gives of itself and the association's use of symbols, hallmarks etc. that contribute to increasing the fear. Although these factors are not mentioned in (a), the Court of Appeal's view seems to be that when names and symbols are thus displayed to the world, the offences cause more fear. The Court of Appeal points out that this, precisely, is what has contributed to making threats particularly frightening. By referring to itself as a one-percenter club, the association also signals that it does not adhere to society's set of rules, only to its own.

(58) Although the use of names and symbols are not mentioned in (a) or (b), I find that the court may include this fear-inducing effect in its overall assessment. The association's fear capital is central, see the clear statements in the preparatory works, and this capital may be consciously built as described by the Court of Appeal. Therefore, I cannot see any flaws in the Court of Appeal's understanding of the requirement in (b).

The requirement that the prohibition must be necessary to prevent serious crime

(59) The final requirement in section 222 e (c) of the Criminal Procedure Act is that "a prohibition is necessary to prevent serious crime". It also follows from the preparatory works that a proportionality assessment must be carried out, see section 170 a of the Criminal Procedure Act, see Proposition to the Storting 190 L (2020–2021) page 46.

(60) As for the expression "serious crime", it follows from Proposition to the Storting 190 L (2020–2021) page 46 that this lacks a definite content, but that it relates, at the outset, to offences with a maximum penalty of at least three years of imprisonment.

(61) The question of whether the ban is necessary must be individually assessed. Since the factual circumstances in the case may be particularly burdensome for the association, the standard of proof is clear preponderance of probability, see Proposition to the Storting 190 L (2020–2021) page 46.

(62) The freedom of association enjoys special protection under Article 101 of the Constitution and Article 11 of the ECHR. Both these provisions also contain a requirement of necessity. There is no basis for asserting that the Constitution extends further than the ECHR in this area. This implies that if the measure is justifiable under Article 11 of the ECHR, it will normally also be so under Article 101 of the Constitution, section 222 e (c) of the Criminal Procedure Act and section 170 a of the Criminal Procedure Act. As this case stands, it is thus sufficient to assess the application of Article 11 of the ECHR.

Article 11 of the European Convention on Human Rights

(63) Article 11 of the ECHR reads:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of assembly with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

(64) It is clear that the prohibition in section 222 e of the Criminal Procedure Act has a legal basis and that it is justified by a legitimate purpose, namely the fight against crime. The question is whether it is necessary and proportionate in a case like that at hand.

(65) Initially, I mention that questions may be raised as to whether Article 11 of the ECHR protects an association like that concerned in the case at hand. It should be noted that we are dealing with a possible ban on an association that, due to the criminal history of its participants, has built such fear capital that it affects other people and may restrict their enjoyment of life. As far as I can see, the European Court of Human Rights (ECtHR) has not previously considered the banning of associations similar to Satudarah MC. However, there is some case law related to groups with violent elements, where it is presupposed that the provision is applicable, see for instance the ECtHR's judgment of 27 October 2016 in *Les Authentiks and Supras Auteuil 91 v. France*. The judgment concerned a different form of association, but given the strong protection of the freedom of association, I find as a fact that Satudarah MC may be protected under Article 11 of the ECHR. Therefore, I will not delve further into Article 17 of the ECHR on the prohibition of abuse of the rights.

(66) The protection of the freedom of association in Article 11 is also rooted in the need to ensure well-functioning democracies. Political parties therefore enjoy particularly strong protection, but that may also be the case for other associations with a high threshold for interference, such as religious organisations and associations supporting minorities. Here, I refer to the judgment of 17 February 2004 *Gorzelik and Others v. Poland* paragraph 88, where the ECtHR stressed the need for pluralism.

(67) However, associations whose purpose directly or indirectly threatens or violates the democracy or the rights and liberties of others, cannot expect the same protection as associations that contribute to preserving a living and pluralistic democracy. Therefore, the threshold for interference against the former, see for instance the *Gorzelik* judgment paragraph 94 and the ECtHR's judgment 9 July 2013 *Vona v. Hungary* paragraph 58, where it is expressed that different associations may enjoy different levels of protection. In *Les Authentiks and Supras Auteuil 91* paragraph 84, the ECtHR notes that the purpose of the association, in this case a club of football supporters, gives national authorities a broader margin of appreciation in their assessment of the necessity of interference in cases that are not in the core area of Article 11. Yet, the threshold depends on the significance of the freedom of association. Discomfort related to an association's activities and standpoints must therefore be accepted.

(68) To establish whether a measure is necessary in a democratic society, long-standing ECtHR case law requires an assessment of whether the ban corresponds to "a pressing social need" and of whether it is proportional. The dissolution of an association is a measure entailing significant consequences, and may only be taken in the most serious cases, see for instance the ECtHR's judgment 11 October 2011 *Assembly Rhino and Others v. Switzerland* paragraph 62, the *Vona* judgment paragraph 58 and *Les Authentiks and Supras Auteuil 91* paragraph 84.

(69) Due to the harshness of the measure, there is a strict requirement of proportionality for the dissolution of existing associations. A dissolution may only take place where there is "particular justification", see for instance the ECtHR's Grand Chamber judgment 15 October 2015 *Kudrevičius and Others v. Lithuania* paragraph 146.

(70) A broad proportionality assessment must be carried out under Article 11, see the Supreme Court judgment HR-2022-981-A *Extinction Rebellion, XR-1* paragraph 26. In line with the prescriptions therein, emphasis must, on the one hand, be placed on the purposes outlined in Article 11 (2), while, on the other hand, consideration must be given to the participants in the association. Central to the assessment is whether the measure is reasonable and suitable for

attaining the objective pursued. The general rule is that there must be no other, less intrusive, means of achieving the same end, see for instance the *Assembly Rhino* judgment paragraph 65.

(71) The application of Article 11 of the ECHR is discussed in more detail by the Criminal Law Council in Norwegian Official Report 2020: 4 page 55 and in Proposition to the Storting 190 L (2020–2021) page 19. Both the Criminal Law Council and the Ministry found it clear that Article 11 does not prevent a ban as prescribed in section 222 e of the Criminal Procedure Act.

(72) The Court of Appeal assumed that when assessing whether the ban on Satudarah MC complies with Article 11, regard also had to be had to section 199 of the Penal Code, establishing a prohibition of participation, recruitment or continuance of the activity of a banned association. The maximum penalty is up to three years of imprisonment. I agree. I also note that among the various proposals that were examined to prevent criminal associations, the least intrusive alternative was chosen.

(73) In its discussion, the Court of Appeal has pointed out Satudarah MC's lack of a political or non-profit agenda of significance to a well-functioning democracy. On the contrary, the association threatens other people's rights and liberties under the ECHR, including the right to protection of safety and health. By defining itself as a one-percenter club, it contributes to counteracting the values of the rule of law and promotes serious crime. The Court of Appeal found a ban under section 222 e of the Criminal Procedure Act to be a proportional, suitable and effective measure. The fact that the members can still commit crime does not imply that the ban is not suitable, since it prevents the recruitment of new members, contributes to names and symbols no longer being in use and to weakening Satudarah MC's fear capital.

(74) The Court of Appeal also mentioned that other, less intrusive measures have been tried, such as sanctioning of offences and confiscation. This has not led to any durable change. Attempts of dialogue and attempts to prevent establishment in clubhouses have also failed.

(75) In the Court of Appeal's view, the ban was not disproportionate. Although the banning of the club may be perceived as stigmatising, it is clear that the club's core activity is linked to neither motorcycles nor the promotion of minority interests, but to serious crime.

(76) The Court of Appeal also found that the necessity requirement is met. Although the association constituted a social community for the members, this could not prevail over the criminal activities linked to the association and the built-up fear capital, which threatens the life, health and liberty of others.

(77) Overall, the Court of Appeal concluded that:

> "a ban, with a clear preponderance of probability, is necessary to prevent serious crime, see section 222 e (c) of the Criminal Procedure Act, and that it is not a disproportionate interference with the freedom of assembly under Article 11 of the ECHR. Nor is it in conflict with other human rights. The Court of Appeal finds that the ban fulfils the requirement of compelling and special reasons."

(78) In my view, there are no flaws in the Court of Appeal's general understanding of Article 11 of the ECHR or in its individual assessment of whether Satudarah MC can be banned.

(79) Thus far, there is a basis for dismissing the appeal.

The application of Article 97 of the Constitution

(80) The courts have the power and the duty to review the application of statutory provisions is in accordance with the Constitution, see Article 89. During the appeal proceedings in the Supreme Court, it was questioned whether Article 97 of the Constitution, which establishes that no laws must be given retroactive effect, prevents the assessment under section 222 e (a) of the Criminal Procedure Act from emphasising criminal acts committed before section 222 e entered into force. The issue has not been considered by the District Court or the Court of Appeal.

(81) Section 222 e entered into force 1 on July 2021, and no transitional provisions have been provided. The preparatory works do not address the application of Article 97 of the Constitution. The concrete offences considered by the Court of Appeal when assessing whether the fear requirement is met, were committed both before and after the provision entered into force.

(82) In the Prosecution Authority's view, Article 97 of the Constitution does not prevent emphasis on offences committed before the provision entered into force from, while Satudarah MC asserts a constitutional violation.

(83) Article 97 of the Constitution is discussed in a number of Supreme Court rulings, most recently in HR-2024-1737-A *electronic monitoring*, which provides a thorough account of the impact of Article 97 in various areas of law. The issue in that case was whether electronic monitoring could be imposed as a criminal procedural coercive measure, based on suspicion of violations of a restraining order committed before the legal basis for the measure, section 222 g of the Criminal Procedure Act, entered into force. The Supreme Court responded in the negative, and found that would violate Article 97 of the Constitution.

(84) Like section 222 e of the Criminal Procedure Act, section 222 g is included in the chapter on coercive measures, but none of the rules is procedural rules by nature. Thus, there is little guidance to obtain from previous case law on criminal procedural provisions. I confine myself to mentioning the discussion in *electronic monitoring* paragraphs 56–58, which is also applicable to our case. For the sake of clarity, I mention that neither electronic monitoring nor the banning of criminal associations can be regarded as punishment. Also here, a reference to *electronic monitoring* is adequate.

(85) However, both provisions are rooted in rights protected by the Constitution and the ECHR. As for the dissolution of an existing association, this may be a harsh measure that restricts the freedom of assembly of those affected. The strength of *the protection against retroactivity* in such a case will depend on a deeper assessment. The case at hand concerns an interference with the freedom of association of a criminal group in order to protect the rights and liberties of others.

(86) The constitutional norm, if any, to apply is prescribed as follows in *electronic monitoring* paragraph 67:

> "… 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. However, if the provision interferes with established legal positions – non-actual retroactivity – only the particularly unreasonable or unfair retroactive effects are affected."

(87) Section 222 e of the Criminal Procedure Act lays down several requirements that must be met before an association can be banned. The participants in the association must have committed repeated offences of a certain character, these must be apt to cause fear in the population or the local environment of similar new offences, and the ban must be necessary to prevent serious crime.

(88) Although the first requirement is retrospective, it is the association's current fear capital that is central to whether a ban should be imposed. In assessing this, previous offences will only be one of several factors, see what I have already said about the content of the fear requirement. Overall, section 222 e of the Criminal Procedure Act prescribes a broad and prospective assessment.

(89) The central considerations behind the prohibition of retroactivity in Article 97 is predictability, security and due process for the citizens, see *electronic monitoring* paragraph 76. I cannot see that these considerations suggest that the prohibition is applicable in the case at hand. Although previous criminal acts are part of the assessment of the fear capital, the banning of the association is not a sanction or a direct legal effect the acts. In my view, it is particularly important that the interference is not aimed at the individual perpetrator or member, but at the association.

(90) In summary, I find that the element of retroactivity in section 222 e is so limited that the application of section 222 e of the Criminal Procedure Act in this case is not contrary to Article 97 of the Constitution.

(91) Consequently, Article 97 of the Constitution does not prevent the assessment under section 222 e of the Criminal Procedure Act from including criminal acts committed before the provision entered into force.

Conclusion

(92) My conclusion is thus that the association Satudarah MC may be banned in accordance with section 222 e of the Criminal Procedure Act.

(93) I vote for this

O R D E R :

The appeal is dismissed.

(94) Justice **Steinsvik:** I agree with Justice Østensen Berglund in all material respects and with her conclusion.

(95) Justice **Thyness:** Likewise.

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

(97) Justice **Webster:** Likewise.

(98) Following the voting, the Supreme Court issued this

O R D E R :

The appeal is dismissed.