

Stephen Solley QC and *Alan Fraser* for *Clingham*. Seen as a whole, the *D* scheme provided for by the Crime and Disorder Act 1998 for the making of and enforcement of anti-social behaviour orders is punitive, rather than preventative, and therefore truly criminal. The sanctions for breach of such an order, which include imprisonment for a maximum of five years, are clearly penal in nature. The proper application of the relevant criteria lead to the conclusion that it is properly categorised as criminal even in respect of the initial imposition of the order looked at alone. Consequently, the usual criminal procedures apply and the Civil Evidence Act 1995^{amh} the Magistrates' Courts (Hearsay Evidence in Civil Proceedings) Rules 1999 (SI 1999/681) do not.

The absence of any real restriction on the possible ambit of anti-social behaviour orders also presents the risk of ad hoc, novel and ill-defined "criminal offences" (founded on the terms of any such order), that is a matter^F of concern and possible injustice in that it is effectively creating "offences" attracting substantial penalties without the direct involvement of Parliament and in circumstances lacking the sort of certainty that should characterise any prohibition carrying such penal sanctions. The fact that the conduct originally complained of is inevitably reflected in the formulation of the "offence", it is an integral and inextricable part of a single process with punitive sanction.

Geographical exclusion from a particular area is also properly regarded as punitive. It encroaches on freedom of movement and may in some circumstances amount to an infringement of the right to respect for private and family life (contrary to article 8 of the Convention) and/or freedom of association (contrary to article 11). Although each of these rights is subject to restriction for reasons including the "prevention of crime and disorder"^H and the "protection of rights of others" that reinforces the argument that such a sanction is a punitive order.

Even if it is held that the proceedings are properly characterised as "civil", defendants are entitled to a "fair" hearing in accordance with article 6(1) "in

A determination of his civil rights and obligations". In determining what is "fair" in this context an almost (or "quasi") criminal approach should be adopted not only in relation to the standard of proof but in interpretation of wider procedural issues. In the circumstances that would include having particular regard to the minimum requirements that would attach to criminal proceedings under article 6(3), even if those did not directly apply^g by virtue of criminal status. In particular this should include the right to examine witnesses pursuant to article 6(3)(d).

The application of the criminal standard of proof as being "likely to be appropriate" in the majority of applications for an anti-social behaviour order was accepted by the Court of Appeal in *McCann*. That is an unsatisfactory approach in relation to the appropriate standard of proof. It would lead to a lack of clarity and certainty, which in turn is likely to cause

C injustice, actual or perceived. The proper interpretation is that the appropriate standard of proof to be applied in relation to the making of any anti-social behaviour order is the criminal standard. It is unrealistic to suggest some sort of sliding scale between the criminal and civil standard of proof. Application of the criminal standard of proof would go a long way to achieving a fair trial.

D in *Clingham* the allegations involve serious criminal conduct including burglary, dealing in drugs and assaults. One of the consequences of this is that a person may find himself having to attempt to answer an allegation founded on multiple hearsay to resist an application for an order, only to later have to answer a formal criminal charge founded on the same "facts" which were only proved to the civil standard. Anything said in the course of the first proceedings could be used against him in respect of the later criminal

^E charge. This also has the potential of effectively depriving the person of his right to