

restrictive as those

C given to the court under section 1 of the Crime and Disorder Act 1998.

Jonathan Crow for the Secretary of State for the Home Department. In determining whether, as a matter of domestic classification, a particular statutory provision forms part of the criminal law, there are two elements: (I) a “prohibited act” and (ii) “penal consequences”: see *Proprietary Articles Trade Association v Attorney General for Canada* [1931] AC 310, 324. In

^D relation to the first limb, the Act itself does not itself “prohibit” the conduct defined in any anti-social behaviour order. In relation to the second limb, it is important to consider the nature of an anti-social behaviour order independently from the possible consequences of any breach. Given that the only act that can logically be said to have been “prohibited” by section 1 is the act which triggers the making of the order, it is only permissible to

^E consider the immediate consequences of that act—not the possible consequences of some other acts in breach of the anti-social behaviour order, that may or may not occur in the future. When properly analysed *Amand v Home Secretary* [1943] AC 147 and *R v Board of Visitors of Hull Prison, Ex p St Germain* [1979] QB 425 support that approach. They decide that a cause or matter would be classified as criminal if, carried to its conclusion, it might result in a conviction and sentence. That analysis demonstrates that

^F the criminal sanction for a breach of an anti-social behaviour order cannot affect the proper classification of the proceedings that are brought for the imposition of an anti-social behaviour order. It is also entirely consistent with the analysis adopted in many other areas of the law, for example, interim injunctions, sex offender’s orders and orders under the Company Directors Disqualification Act 1986.

^C The question whether any act is “prohibited” by section 1 of the 1998 Act is not answered by reference to the question whether the preconditions for making an anti-social behaviour order are exactly co-extensive with some other substantive criminal offence—e.g. under the Public Order Act 1986 or the Prevention from Harassment Act 1997. The correct question is whether section 1 itself prohibits any act. It does not. In any event there are substantial differences between, on the one hand, section 4A of the Public

^H Order Act 1986 and section 1 of the Protection from Harassment Act and, on the other, section 1 of the 1998 Act.

For the purposes of article 6 there are several reasons why the preconditions to making an anti-social behaviour order take it outside the criminal realm. The order seeks to deal with anti-social behaviour, not with

crime, and it seeks to do so by preventing future crimes rather than by punishing past ones. If a sanction is imposed for the purposes of deterrence or punishment, then it is likely to be regarded as a criminal penalty: see *Oztiirk v Germany* (1984) 6 EHRR 409; *Han v Customs and Excise Comrs* [2001] 1 WLR 22.53. By contrast, a sanction that is imposed for preventive reasons is not so regarded (even if it involves a restriction on liberty, and/or an interference with property rights, and/or it is imposed in the context of criminal proceedings: see *Raimondo v Italy* (1994) 18 EHRR 237; *M v Italy* (1990) 70 DR 59. A decision whether to impose an anti-social behaviour order does not involve the determination of a criminal charge simply because the matters on which reliance is placed might also happen to constitute the necessary elements of a criminal offence: see *Pelle v France* (1986) 50 DR 263; *McFeeley v United Kingdom* (1980) 3 EHRR 161. Finally, the existence of past misconduct cannot of itself trigger an antisocial behaviour order: there must also be a need for protection for the future under section i(i)(b).

An anti-social behaviour order is clearly not a criminal penalty. Section 1(4) precludes any order being made other than as a prohibition.

The court can neither fine nor imprison a person. There is a very significant difference