in the European jurisprudence between imposing a restriction on a D person's liberty (which will not be a criminal penalty) and depriving a person of his liberty (which will be a criminal penalty): see *Guzzardi v Italy* 3 EHRR 333; *Raimondo v Italy* 18 EHRR 237. The court cannot deprive a person of his liberty under the cloak of an anti-social behaviour order, and the fact that an order might interfere with his freedom of movement (e g by excluding him from designated areas) does not convert it into a criminal penalty.

The fact that a person may be imprisoned for acting in breach of an antisocial behaviour order does not mean that the imposition of the order itself involves any criminal penalty: see by analogy *Ibbotson v United Kingdom* (1998) 27 EHRR CD 332. The reason why a different conclusion was reached in *Steel v United Kingdom* 28 EHRR 603 was that the penalty was available to be imposed at the outset by the sentencing court in order to enforce compliance with the order. The difference in *Ibbotson* was that in *F* that case separate proceedings would have to be brought for a breach of the statutory obligation before any criminal sanction could be imposed. The same is true under section 1 of the 1998 Act.

Steel v United Kingdom 28 EHRR 603, *Garyfallou AEBE v Greece* 28 EHRR 344 and *Lauko v Slovakia* 33 EHRR 994 merely illustrate the application in very different factual situations of the three criteria in *Engel v* Q *the Netherlands (No 1)* 1 EHRR 647 without adding any points of principle.

Applying the criminal standard of proof is wrong in three respects. First, it undermines one of the purposes of section 1 of the 1998 Act, namely to render it easier to obtain an anti-social behaviour order than it would be to obtain a conviction for a comparable offence. Second, it conflates the two elements in section 1 of the 1998 Act. There is no reason why the criminal H standard should be applied in relation to the question whether section i(i)(b) is satisfied: that is a matter of evaluation as to future risk, and simply does not lend itself to being tested by reference to the criminal standard of proof. Third, in relation to the issues generally under section 1, the Court of

A Appeal's approach subverts the proper classification of an anti- social behaviour order as involving civil proceedings.

The civil standard of proof should be regarded as a single fixed standard. However, the more serious the allegation the more cogent the evidence will need to be: see *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563.

[5] *Solley QC* in reply. *Kostovski v Netherlands* (1989) 12. EHRR 434 and *Saidi v France* (1993) 17 EHRR 251 involved a lack opportunity to examine witnesses.

The criminal standard of proof would not lie comfortably with the hearing of hearsay evidence under the Civil Evidence Act 1995. There should be a declaration of incompatibility under section 4 of the Human

Q **Rights Act 1998.**

Fulford QC in reply. *Raimondo v Italy* 18 EHRR 237 and *Guzzardi v Italy y* EHRR 333 involved very different proceedings from an anti-social behaviour order. See also *Krone-Nerlog GmbH v Austria* (Application No 28977/95) (unreported) 21 May 1997 and *Nottingham City Council v 7, ain (A Minor)* [2002] 1 WLR 607.

D

Their Lordships took time for consideration.

17 October. LORD STEYN

1 My Lords, section 1 of the Crime and Disorder Act 1998 ("the Act") provides for the making of anti-social behaviour orders against any person

E aged ten years or over. It came into force on 1 April 1999. Between 1 April 1999 and