

- A Applying the three criteria laid down in *Engel v The Netherlands (No 1)* 1 EHRR 647 to determine whether the proceedings are “criminal” for the purposes of article 6: first, the proceedings for anti-social behaviour orders are classified as civil in domestic law and, second, the defendants are not charged with any offence. As to the third criterion, section 1 of the Act is directed not to the detection, apprehension, trial and punishment of those who have committed crimes, but the restraint of those who have committed anti-social behaviour (which may also amount to a crime) and whose conduct is such that a measure of restraint is necessary to protect members of the public from further anti-social behaviour. The purpose of the proceedings is of importance within the European Jurisprudence: see *Raimondo v Italy* (1994) 18 EHRR 237; *Guzzardi v Italy* (1980) 3 EHRR 333. The powers available in those case were at least as restrictive as those given to the court under section 1 of the Crime and Disorder Act 1998.

- B *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.
- D In 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 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 offenders orders and orders under the Company Directors Disqualification Act 1986.

- G 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 Order Act 1986 and section 1 of the Protection from Harassment Act and,
- H 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