

22 Counsel for the defendants accepted that the purpose of Parliament was to cast proceedings under the first part of section 1, as opposed to proceedings for breach, in a civil mould. However, counsel submitted that objectively considered the objective was not achieved. They argued that in reality and in substance such proceedings are criminal in character. This is an important argument which must be carefully examined. The starting point is that in proceedings under the first part of section 1 the Crown Prosecution Service is not involved at all. At that stage there is no formal accusation of a breach of criminal law. The proceedings are initiated by the civil process of a complaint. Under section 1(1)(a) all that has to be established is that the person has acted “in an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself”. This is an objective inquiry: mens rea as an ingredient of particular offences need not be proved. It is unnecessary to establish criminal liability. The true purpose of the proceedings is preventative. This appears from the heading of Part I. It is also clearly brought out by the requirement of section 1(1)(b): “that such an order is necessary to protect persons in the local government area in which the harassment, alarm or distress was caused or was likely to be caused from further anti-social acts by him . . .” It follows that the making of an anti-social behaviour order is not a conviction or condemnation that the person is guilty of an offence. It results in no penalty whatever. It cannot be entered on a defendant’s record as a conviction. It is also not a recordable offence for the purpose of taking fingerprints: see section 27 of the Police and Criminal Evidence Act 1984.

23 Counsel for the defendants sought to avoid the consequences of this analysis by various arguments. First, they argued that the procedure leading to the making of an order under section 1(4) must be considered together with the proceedings for breach under section 1(10), the latter being undoubtedly criminal in character. I do not agree. These are separate and independent procedures. The making of the order will presumably sometimes serve its purpose and there will be no proceedings for breach. It is in principle necessary to consider the two stages separately.

24 Counsel next made a comparison between the requirements of section 1(1) and the ingredients of an offence under section 4A of the Public Order Act 1986. They submitted that there was a striking similarity. This proposition was not made good. It is sufficient to point out that section 4A of the 1986 Act requires proof of mens rea whereas section 1(1) does not. In any event, this is a barren exercise. It elides the critical point that section 1(1) *itself* does not prohibit any act. An anti-social behaviour order under section 1(4) does prohibit conduct specified in the order but *by itself* does not amount to a condemnation of guilt. It results in no penal sanction.

25 Counsel for the defendants also emphasised the consequences which an anti-social behaviour order may have for a defendant. This is an important factor. Section 1 is not meant to be used in cases of minor unacceptable behaviour but in cases which satisfy the threshold of persistent and serious anti-social behaviour. Given the threshold requirements of section 1(1) it can readily be accepted that the making of such an order against a person inevitably reflects seriously on his character. In response to this argument Lord Phillips of Worth Matravers MR observed [2001] 1 WLR 1084, 1094–1095, para 39: