63 This view as to the meaning of the phrase "criminal charge" is reinforced by the third criterion, which is the nature and degree of severity of the penalty. The formulation of this criterion in the early case of *Engel v The Netherlands (No 1)* 1 EHRR 647, 678–679, para 82 is instructive:

> "[Supervision by the court] would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring. In a society subscribing to the rule of law, there belong to the 'criminal' sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the contracting states and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so."

64 The underlying idea is that proceedings do not lie within the criminal sphere for the purposes of article 6 unless they are capable of resulting in the imposition of a penalty by way of punishment. In *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340, 353, para 28 Lord Bingham of Cornhill CJ said that he was aware of no case in which the European Court has held a proceeding to be criminal even though an adverse outcome for the defendant cannot result in any penalty. I agree. Although there are other aspects of the procedure which suggest that in proceedings for the imposition of an anti-social behaviour order the person is not "charged with a criminal offence", the critical question as I see it is whether the making of such an order amounts to the imposition of a penalty. But it is first necessary to consider whether either of the first two criteria are satisfied.

The first criterion: classification in domestic law

65 A finding that the proceedings were classified as criminal in domestic law is likely to be conclusive. But a finding that they are civil is of relative weight and serves only as a starting point: *Benham v United Kingdom* 22 EHRR 293, 323, para 56. In *Lauko v Slovakia* (1998) 33 EHRR 994, 1010–1011, para 57 the court observed that the criteria are alternative and not cumulative: see also *Garyfallou AEBE v Greece* (1997) 28 EHRR 344. As it was put in *Öztürk v Germany* 6 EHRR 409, 424, para 54, one criterion cannot be applied so as to divest an offence of a criminal character if that has been established under another criterion. But it was recognised in *Lauko v Slovakia*, at p 1011, para 57, that a cumulative approach may be adopted if the separate analysis of each of them does not lead to a clear conclusion as to the existence of a "criminal charge". For the reasons already given, I consider that the position under domestic law is that the proceedings are classified as civil proceedings and not criminal.

66 In their helpful written submissions which were developed before us in oral argument Liberty, to whom leave was given to intervene in these appeals, have contended that the essential question is how domestic law classifies the conduct which is at issue, not the proceedings themselves. They submit that the conduct which requires to be demonstrated falls within the scope of the criminal law, and that for this reason the proceedings should be treated as criminal proceedings in domestic law for the purposes of the Convention. They point out that the definition of "anti-social behaviour" in section 1(1) of the Crime and Disorder Act 1998 is modelled on