

substance at all. The last criterion is of fundamental importance to the decision as to the prohibitions that are required. And in contrast to proceedings for breach of the peace, which can lead to the immediate imposition of a sentence of imprisonment under section 115(3) of the Magistrates' Courts Act 1980 for up to six months if the defendant fails to comply with the order because he does not agree to enter into a recognisance to keep the peace or to be of good behaviour, proceedings under section 1 of the Crime and Disorder Act 1998 cannot in themselves result in the immediate imposition of a penalty.

*The third criterion: is an anti-social behaviour order a penalty?*

75 This question looks to the nature of the penalty. But here again there is a preliminary question that has to be examined. Is an anti-social behaviour order a penalty at all? The essential characteristics of an anti-social behaviour order are that the defendant is prohibited from doing something. The purpose of the prohibition is to protect people in the area to which the order relates. Section 1(6) of the Crime and Disorder Act 1998 provides that the prohibitions that may be imposed are those necessary for the purposes of protecting persons from further anti-social conduct—that is, from conduct which will cause, or is likely to cause, them harassment, alarm or distress. It is true that no limits are set as to the prohibitions that may be imposed, so long as they are found to be necessary. The defendants say that prohibitions which banish the defendant from an area of the city where he lives, or which expose him to harsher penalties than he would normally face if he commits an offence, have all the characteristics of a penalty for the anti-social acts which he is found to have committed.

76 An anti-social behaviour order may well restrict the freedom of the defendant to do what he wants and to go where he pleases. But these restrictions are imposed for preventive reasons, not as punishment. The test that has to be applied under section 1(6) is confined to what is necessary for the purpose of protecting persons from further anti-social acts by the defendant. The court is not being required, nor indeed is it permitted, to consider what an appropriate sanction would be for his past conduct. Moreover, while the court may restrict the defendant's liberty where this is shown to be necessary to protect persons in the area from further anti-social acts by him, it may not deprive him of it nor may it impose a fine on him.

*Conclusion on classification*

77 For these reasons I do not think that any of the criteria for a finding that proceedings under section 1 of the Crime and Disorder Act 1998 have the character of criminal proceedings for the purposes of article 6 are satisfied. The consequence of so holding is of fundamental importance to the future of this legislation. Cases such as *Unterpertinger v Austria* (1986) 13 EHRR 175, *Kostovski v The Netherlands* (1989) 12 EHRR 434 and *Saidi v France* (1993) 17 EHRR 251 illustrate the reluctance of the Strasbourg court to accept that the use of hearsay evidence is compatible with a defendant's right under article 6(3)(d) to examine or have examined witnesses against him. But I would hold that article 6(3) does not apply to these proceedings and that the rules of evidence that are to be applied are the civil evidence rules. This means that hearsay evidence under the Civil