

the European Court of Human Rights that this concept is co-extensive with the concept of the determination of any criminal charge: *Lutz v Germany* (1987) 10 EHRR 182. Germane to the present case is the minimum right under article 6(3)(d) of everyone charged with a criminal offence to examine or have examined witnesses against him or to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. If the proceedings under section 1 of the Act are criminal within the meaning of article 6, this provision is applicable. If it is civil, article 6(3)(d) is inapplicable.

29 Before I examine directly in the light of European jurisprudence the question whether proceedings involve a criminal charge, it is necessary to make clear that this is not one of those cases where the proceedings may fall outside article 6 altogether. Examples of such cases are given by *Emmerson & Ashworth, Human Rights and Criminal Justice* (2001), pp 152–166. In the cases before the House the two principal respondents accept that the proceedings are civil in character and that they attract the fair trial guarantee under article 6(1). Counsel for the Secretary of State in the *McCann* case reserved his position. For my part, in the light of the particular use of the civil remedy of an injunction, as well as the defendant's right under article 8 to respect for his private and family life, it is clear that a defendant has the benefit of the guarantee applicable to civil proceedings under article 6(1). Moreover, under domestic English law they undoubtedly have a constitutional right to a fair hearing in respect of such proceedings.

30 In *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647, 678–679, para 82, the European Court established three criteria for determining whether proceedings are “criminal” within the meaning of the Convention, namely (a) the domestic classification, (b) the nature of the offence, and (c) the severity of the potential penalty which the defendant risks incurring. The character and attributes of the proceedings for an anti-social behaviour order have been outlined. Domestically, they are properly classified as civil. That is, however, only a starting point. Turning to factor (b), the position is that the order under the first part of section 1 does not constitute a finding that an offence has been committed: contrast the community charge decision in *Benham v United Kingdom* (1996) 22 EHRR 293. It is right, however, to observe that the third factor is the most important. Here the position is that the order itself involves no penalty. The established criteria suggest that the proceedings were not in respect of a criminal charge.

31 The House has been taken on a tour d’horizon of the leading decisions of the European Court: see the judgment of Potter LJ in *Han v Customs and Excise Comrs* [2001] 1 WLR 2253, 2269–2273, paras 55–64 for a recent review of the European case law. It will serve no purpose to review again decisions far removed from the present case. What does emerge, however, is that there is, as Lord Bingham of Cornhill CJ pointed out in *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340, no case in which the European Court has held proceedings to be criminal even though an adverse outcome for the defendant cannot result in any penalty. It could be said, of course, that there is scope for the law to be developed in this direction. On the other hand, an extensive interpretation of what is a criminal charge under article 6(1) would, by rendering the injunctive process ineffectual, prejudice the freedom of liberal democracies to maintain the rule of law by the use of civil injunctions.