The facts are stated in the opinion of Lord Hope of Craighead. A

Clingham v Kensington and Chelsea Royal London Borough Council

APPEAL from the Divisional Court of the Queen's Bench Division

This was an appeal, with leave of the House granted on 23 October 2001, by the defendant, Andrew George Clingham, against a decision of the Divisional Court (Schiemann LJ and Poole J) dated 11 January 2001 B dismissing his appeal by way of case stated against a decision on the admissibility of evidence by District Judge David Kennett Brown, sitting as a magistrate at Marylebone Magistrates' Court on 14 September 2000 at a pre-trial review of an application by Kensington and Chelsea Royal London Borough Council for an anti-social behaviour order against the defendant. In refusing leave to appeal the Divisional Court certified, under section 1(2) C of the Administration of Justice Act 1960, that the following point of law of general public importance was involved in its decision: "Whether hearsay evidence is admissible in proceedings to secure the making of an anti-social behaviour order under the Crime and Disorder Act 1998?"

The facts are stated in the opinion of Lord Steyn.

Stephen Solley QC and *Alan Fraser* for Clingham. Seen as a whole, the D scheme provided for by the Crime and Disorder Act 1998 for the making of and enforcement of anti-social behaviour orders is punitive, rather than preventative, and therefore truly criminal. The sanctions for breach of such an order, which include imprisonment for a maximum of five years, are clearly penal in nature. The proper application of the relevant criteria lead to the conclusion that it is properly categorised as criminal even in respect of E the initial imposition of the order looked at alone. Consequently, the usual criminal procedures apply and the Civil Evidence Act 1995 and the Magistrates' Courts (Hearsay Evidence in Civil Proceedings) Rules 1999 (SI 1999/681) do not.

The absence of any real restriction on the possible ambit of anti-social behaviour orders also presents the risk of ad hoc, novel and ill-defined "criminal offences" (founded on the terms of any such order), that is a matter F of concern and possible injustice in that it is effectively creating "offences" attracting substantial penalties without the direct involvement of Parliament and in circumstances lacking the sort of certainty that should characterise any prohibition carrying such penal sanctions. The fact that the conduct originally complained of is inevitably reflected in the formulation of the "offence", it is an integral and inextricable part of a single process with G punitive sanction.

Geographical exclusion from a particular area is also properly regarded as punitive. It encroaches on freedom of movement and may in some circumstances amount to an infringement of the right to respect for private and family life (contrary to article 8 of the Convention) and/or freedom of association (contrary to article 11). Although each of these rights is subject H to restriction for reasons including the "prevention of crime and disorder" and the "protection of rights of others" that reinforces the argument that such a sanction is a punitive order.

Even if it is held that the proceedings are properly characterised as "civil", defendants are entitled to a "fair" hearing in accordance with article 6(1) "in