

conviction and punishment. But an application for an anti-social behaviour order, if carried to its conclusion, will not result in conviction and punishment, it will result in the making of an order which cannot be regarded as a punishment. A conviction and punishment will only be imposed if the defendant, by his own choice, subsequently breaches the order and separate and distinct proceedings are brought against him.

96 I further consider that a complaint brought against a defendant under section 1(3) of the 1998 Act does not constitute an allegation of a crime. The fact that the background to the complaint will very often be the alleged commission of a number of criminal offences does not mean that the complaint constitutes a charge of a criminal offence: see *S v Miller* 2001 SC 977, 989–990, para 23 cited subsequently in paragraph 102 of this opinion.

97 There are two further considerations which support the conclusion that an application for an anti-social behaviour order is a civil proceeding and not a criminal proceeding. First, section 1 is contained in Part I of the Act under the heading “Prevention of crime and disorder” whereas Part II under the heading “Criminal law” creates a number of offences and provides for their punishment. Secondly, section 1(3) provides that an application for an anti-social behaviour order shall be made by complaint to a magistrates’ court, and a complaint is the appropriate procedure for commencing civil proceedings in a magistrates’ court: see section 51 of the Magistrates’ Courts Act 1980.

98 Accordingly I conclude that under domestic law an application for an anti-social behaviour order is not a criminal proceeding but is a civil proceeding.

The European Convention on Human Rights

99 Article 6(1) provides: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing . . .” Article 6(3) provides: “Everyone charged with a criminal offence has the following minimum rights . . . (d) to examine . . . witnesses against him . . .” The defendants submitted that under the jurisprudence of the Convention an application for an anti-social behaviour order is a criminal charge, and accordingly the defendants will not have a fair hearing under article 6 if the evidence against them of anti-social behaviour is hearsay evidence and they do not have the opportunity to cross-examine in court the persons who have made allegations of such behaviour against them. In these submissions the defendants were supported by the submissions advanced by counsel on behalf of Liberty which was given leave to intervene in these appeals.

100 In deciding whether there is a criminal charge for the purposes of article 6 the European Court of Human Rights stated in *Engel v The Netherlands (No 1)* 1 EHRR 647, 678, para 82 that it has regard to three criteria, which are the classification of the proceedings in domestic law, the nature of the offence, and the severity of the penalty which may be imposed. Whilst I am satisfied that the application for an anti-social behaviour order is a civil proceeding in domestic law the European Court has stated that the classification of the proceedings in domestic law is of limited value and that the other two criteria are considerations of greater weight: see *Öztürk v Germany* 6 EHRR 409, 422, para 52.