

A 32 The closest case in support of the defendants' submission is *Steel v United Kingdom* (1998) 28 EHRR 603, 635–636, paras 48–49, which is authority for the proposition that proceedings whereby in England and Wales a person may be bound over to keep the peace involve the determination of a criminal charge for the purposes of article 6. This power goes back many centuries: see *Percy v Director of Public Prosecutions* [1995] 1 WLR 1382, 1389H–1390H. It is in a very real sense a judicial power sui generis. The European Court found a punitive element in the fact that the magistrates may commit to prison any person who refuses to be bound over not to breach the peace where there is evidence beyond reasonable doubt that his or her conduct caused or was likely to cause a breach of the peace and that he would otherwise cause a breach of the peace: para 48. There was an immediate and obvious penal consequence. Properly analysed this case does not assist the defendant's argument.

C 33 The conclusion I have reached is reinforced by a cogently reasoned judgment on the interpretation of article 6 by the Lord President (Lord Rodger of Earlsferry) in *S v Miller* 2001 SC 977. Section 52(2) of the Children (Scotland) Act 1995 provides that a child may have to be subjected to compulsory measures of supervision when he "has committed an offence". The question arose whether in such proceedings article 6 is applicable. The Lord President observed, at pp 989–990:

E "23 . . . at the stage when S was arrested and charged by the police on 31 October, he was indeed 'charged with a criminal offence' in terms of article 6, since he was liable to be brought before a criminal court in proceedings which could have resulted in the imposition of a penalty. He remained 'charged with a criminal offence' in terms of article 6 until the procurator fiscal decided the following day—in the language of section 43(5) of the Criminal Procedure Act—'not to proceed with the charge'. At that point the criminal proceedings came to an end and the reporter initiated the procedures under the 1995 Act by arranging a hearing in terms of section 63(1). In my view, once the procurator fiscal has decided not to proceed with the charge against a child and so there is no longer any possibility of proceedings resulting in a penalty, any subsequent proceedings under the 1995 Act are not criminal for the purposes of article 6. Although the reporter does indeed intend to show that the child concerned committed an offence, this is not for the purpose of punishing him but in order to establish a basis for taking appropriate measures for his welfare. That being so, the child who is notified of grounds for referral setting out the offence in question is not thereby 'charged with a criminal offence' in terms of article 6.

G "24. It is not now disputed, of course, that the children's hearing proceedings involve the determination of civil rights and obligations. Article 6 therefore applies. But, since the proceedings are not criminal, the specific guarantees in article 6(2) and (3) do not apply."

H I am in complete agreement with this reasoning as correctly reflecting the purpose of article 6. And it applies a fortiori to proceedings under section 1. After all, section 1(1) does not require proof of a criminal offence.

34 In my view an application for an anti-social behaviour order does not involve the determination of a criminal charge.