X The admission of hearsay evidence

35 Having concluded that the proceedings in question are civil under domestic law and article 6, it follows that the machinery of the Civil Evidence Act 1995 and the Magistrates' Courts (Hearsay Evidence in Civil Proceedings) Rules 1999 allow the introduction of such evidence under the first part of section 1. The weight of such evidence might be limited. On the other hand, in its cumulative effect it could be cogent. It all depends on the particular facts. In my view the ruling of the Divisional Court, set out in paragraph 10 above, was correct.

36 It is submitted that, even if the relevant proceedings are civil, words must be implied into the Civil Evidence Act 1995 which give the court a wider power to exclude hearsay evidence. As the Divisional Court judgment makes clear this is unnecessary and unwarranted. Counsel in the *Clingham* case then argued that, even if the proceedings are civil, nevertheless the introduction of hearsay evidence infringes a defendants right to a fair trial under article 6(1) "in the determination of his civil rights and obligations". This is a misconceived argument. The case has not been heard. Such a challenge is premature. Upon a due consideration of the evidence, direct or hearsay, it may turn out that the defendant has no answer to the case under section 1(1). For the sake of completeness, I need only add that the use of the Civil Evidence Act 1995 and the Rules in cases under the first part of section 1 are not in any way incompatible with the Human Rights Act 1998.

XI The standard of proof

37 Having concluded that the relevant proceedings are civil, in principle it follows that the standard of proof ordinarily applicable in civil proceedings, namely the balance of probabilities, should apply. However, I agree that, given the seriousness of matters involved, at least some reference to the heightened civil standard would usually be necessary: *In re H (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563, 586D–H, per Lord Nicholls of Birkenhead. For essentially practical reasons, the Recorder of Manchester decided to apply the criminal standard. The Court of Appeal said that would usually be the right course to adopt. Lord Bingham of Cornhill has observed that the heightened civil standard and the criminal standard are virtually indistinguishable. I do not disagree with any of these views. But in my view pragmatism dictates that the task of magistrates should be made more straightforward by ruling that they must in all cases under section 1 apply the criminal standard. If the House takes this view it will be sufficient for the magistrates, when applying section 1(1)(a) *to be sure* that the defendant has acted in an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself. The inquiry under section 1(1)(b), namely that such an order is necessary to protect persons from further anti-social acts by him, does not involve a standard of proof: it is an exercise of judgment or evaluation. This approach should facilitate correct decision-making and should ensure consistency and predictability in this corner of the law. In coming to this conclusion I bear in mind that the use of hearsay evidence will often be of crucial importance. For my part, hearsay evidence depending on its logical probativeness is quite capable of satisfying the requirements of section 1(1).