

**IN THE HOUSE OF LORDS
ON APPEAL FROM HER MAJESTY’S COURT OF APPEAL (ENGLAND)
BETWEEN:**

REGINA

-v-

THE CROWN COURT AT MANCHESTER

Respondent

SEAN McCANN

JOSEPH McCANN

MICHAEL McCANN

(Proceeding by their mother and Litigation Friend MARGARET McCANN)

Appellants

-v-

THE CHIEF CONSTABLE OF GREATER MANCHESTER

Interested party

NATIONAL COUNCIL FOR CIVIL LIBERTIES (“LIBERTY”)

Intervener

**WRITTEN INTERVENTION ON BEHALF OF THE INTERVENER
(LIBERTY)**

A. Classification under domestic law and section 3 of the Human Rights Act 1998

1. Liberty adopts and supports the Appellants’ submissions on domestic law. Nonetheless, its primary submissions in relation to the Convention proceed on the basis that such submissions are rejected by your Lordships, since it has been common ground at all stages that if proceedings are classified as criminal under domestic law they are also to be classified in this way for the purposes of Article 6 of the Convention.
2. However, the domestic law appeal appears to Liberty so far to have excluded consideration of the operation of section 3 of the Human Rights Act 1998 in the

particular context of this case. Liberty respectfully submits that this is an important matter of principle that should be taken into account by your Lordships in the overall consideration of this appeal.

3. Liberty understands the reasoning of the Court of Appeal in relation to domestic law to have turned ultimately on the Court's understanding of the intention of Parliament, notably the decision to adopt the form of civil proceedings for applications for antisocial behaviour orders "subject to the more relaxed rules of evidence applicable to such proceedings", notwithstanding:

- a. the "undoubtedly penal" consequences of breach of an antisocial behaviour order; and
- b. that "the original anti-social behaviour was an element, indeed the most significant element, of the criminal conduct leading to a conviction under section 1(10)": paragraphs 45 and 47 at [2001] 1 WLR 1084, 1097.

4. Independently of section 3 of the Human Rights Act 1998, taking account of the narrow "intention of Parliament" is of course a legitimate consideration, but Liberty submits that recourse to such a consideration is inappropriate and contrary to principle in the present context in the light of section 3. Section 3(1) provides:

"So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

Section 3 thus imposes on the Courts a broader general duty to construe primary as well as secondary legislation to accord with the Convention rights. In this respect, the strong interpretative obligation imposed by section 3 necessarily subordinates the narrow intention of Parliament in the adoption of particular measures to its broader intention to avoid any implied inconsistency with protection of the Convention rights, even in primary legislation.

5. The effect of section 3 of the Human Rights Act 1998 is thus to introduce a degree of circularity into the position under domestic law, requiring the position under the Convention to be considered even in respect of the proper construction of the

Crime and Disorder Act 1998 under domestic law principles. However, Liberty submits that this is a “virtuous” rather than a vicious circle, in that it opens the possibility for your Lordships to address the issue of substance raised by this appeal not only as a matter of Convention law but also in construing the substantive meaning and operation of the domestic provisions themselves. This would avoid the unsatisfactory potential bifurcation of the domestic and Convention positions that the Human Rights Act 1998 was precisely intended to avoid.

6. A broad analogy to this approach is to be found in the revision of the *Gaugh* test for impartiality in the light of the Convention jurisprudence, adopted by Lord Phillips MR in the *Medicaments* case and approved by your Lordships in *Magill v. Porter* [2002] 2 WLR 37, 83, paras. 101-102 per Lord Hope. If and in so far as considerations independent of section 3 of the Human Rights Act 1998 might lead your Lordships to construe the Crime and Disorder Act 1998 in a sense different from that dictated by the Convention case law, Liberty respectfully submits that such a construction should be set aside in order to ensure that the fair trial rights required by the Convention are protected in accordance with the broader intention of Parliament expressed in section 3.
7. It has correctly not been argued that the form of section 1 of the Crime and Disorder Act 1998 is such that it would not be *possible* to construe an application for an antisocial behaviour order as a “criminal charge” under the law of the Convention, if the principles developed by the Court of Human Rights dictate that to be the true nature or essence of such a procedure. Neither the Divisional Court nor the Court of Appeal made such a finding, each finding the matter to be finely balanced on purely domestic grounds.
8. The wider effect of this submission, if accepted, would therefore be to confine the practical application of the “first limb” of the *Engel* test within the United Kingdom to cases where primary UK legislation *expressly* defined a procedure as civil, with the procedural consequences of such a classification, where the possibility would arise that a declaration of incompatibility might be necessary if:

- a. the second and third limbs of the *Engel* test dictated a different conclusion; and
 - b. the requirements of Articles 6(2) and (3) of the Convention were not satisfied by the procedural protections accorded to the defendant under English law if a civil classification were adopted.
9. In the absence of such express classification, Liberty submits that if the Convention case law dictates a different conclusion from the traditional English law analysis then that is also the correct conclusion under domestic law. Of course, Liberty's primary submission in respect of Article 6 is that this is indeed the case here: see paragraphs 12-31 below.
10. Even if that primary submission is rejected, Liberty's secondary submission in respect of Article 6 (paragraphs 32-35 below) would still need to be taken into account in construing, in accordance with section 3 of the Human Rights Act 1998, the procedural protections that Parliament is to be taken to have conferred on individuals against whom applications for antisocial behaviour orders are made. However, Liberty concedes that effect could be given to such a submission by appropriate construction of relevant procedural instruments, such as the Civil Procedure Rules and the Civil Evidence Act 1995, rather than by a different classification of the proceedings under domestic law. The *Clingham* appeal raises one specific issue that requires determination even on that basis.

B. Liberty's submissions in respect of the Convention

11. Liberty advances two principal submissions in support of the Appellants in respect of Article 6 of the Convention:
- a. An application to a magistrates court for an antisocial behaviour order is in substance an accusation made by a public body of criminal conduct on the part of an individual that should be tested on the same procedural and evidential basis as other such accusations, in particular subject to the guarantees of a fair hearing provided for by Article 6(2) and (3) of the

Convention.

- b. Even if such applications are formally to be classified as determinations of “civil rights and obligations” rather than of a “criminal charge”, the substance of the protections guaranteed by Article 6(2) and (3) should nonetheless be provided in order to protect the fairness of the hearing for the purposes of Article 6(1) of the Convention.

a. Liberty’s first submission – applications for antisocial behaviour orders are “criminal charges”

12. The correctness of the first submission, that applications for antisocial behaviour orders should be classified as criminal charges for the purposes of Article 6(1)-(3) of the Convention, can be seen from the following considerations.

An application for an order is a formal allegation of criminal conduct to be proved in court

13. An application for an antisocial behaviour order involves the allegation that

“the defendant has acted on ... [date(s)] at [place(s)] 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” (Schedule 4 to the Guidance issued by the Home Office in respect of the Crime and Disorder Act 1998, page 35)¹.

14. Thus, such an application can succeed only if the court to which such application is made makes a free-standing and independent finding to the effect that the individual against whom the application is made has acted in a criminal way. It is thus a quite distinct proceeding from an application for a sex offender order, considered by the Divisional Court in *B. v. Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340, which is made only in respect of persons already convicted of criminal conduct: see paragraph 44 at [2001] 1 WLR 1096G of the

¹ Cf. section 5 of the Public Order Act 1986: “A person is guilty of an offence if he ... uses threatening, abusive or insulting words or behaviour, or disorderly behaviour ... within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby”.

Court of Appeal judgment. It is equally distinct from an application for confiscation of assets subsequent to a criminal conviction, considered by the Privy Council in *McIntosh v. Lord Advocate* [2001] 3 WLR 107.

15. The making of an application for an antisocial behaviour order thus in substance satisfies the statement by Lord Bingham CJ of the “general understanding” of “criminal proceedings” cited by Lord Phillips MR at paragraph 30 of his judgment in this case, [2001] 1 WLR 1093. The application for such an order is indeed:

“a formal accusation made on behalf of the state or by a private prosecutor that a defendant has committed a breach of the criminal law, and the state or the private prosecutor has instituted proceedings which may culminate in the conviction and condemnation of the defendant”.

16. Given the “autonomy” of Convention terms and the independence of the second and third limbs of the Convention criterion for identifying a “criminal charge”, it is no answer to this submission that the conduct of which an individual is charged is not formally criminal under English domestic law, nor that the “conviction” is made pursuant to a complaint rather than pursuant to a conventional criminal procedure, nor that “condemnation” for such conduct is punishable only by an order of the kind specified in the 1998 Act (a matter that is relevant at the “third limb” stage).

The class of persons potentially subject to such orders is unlimited

17. The prohibition of anti-social conduct on the basis of which such an application is made is addressed to the world at large, rather than to a pre-defined or limited class of individuals. The Court of Appeal accepted Liberty’s submission that anti-social conduct “can be characterised as a breach of public duty”: paragraph 62 at [2001] 1 WLR 1101A; cf. paragraphs 60 and 61, citing the Court of Human Rights in *Steel v. United Kingdom* (1998) 28 EHRR 603.
18. The Court of Human Rights has consistently regarded that as a strong indicator of a criminal regime: see paragraph 66 of the Court of Appeal decision in *Han* [2001] 1 WLR 2253 at 2273H-2274A and the jurisprudence cited at paragraphs 55-64, pages 2269A-2273C. This is a further point of distinction with the decisions in *B.*

v. Chief Constable of Avon and Somerset Constabulary in respect of sex offender orders and in *McIntosh* in respect of confiscation orders, where such orders can only be made in respect of persons who have already been proved to be sex or drug offenders to the criminal standard, i.e. a narrow sub-class of society in each case.

The class of persons protected by such orders is likewise unlimited

19. The object and effect of the order as made is the protection of the world at large, in clear distinction to the object and effect of civil injunctions, to which reference was made by the Court of Appeal: paragraph 39.
20. In its Guidance issued in relation to the Crime and Disorder Act 1998, the Home Office stressed that “an anti-social behaviour order is likely to be relevant where there is behaviour of a criminal nature” and that the police and local authority should “take care not to get involved in individual disputes which should be settled, as private matters, in the civil courts”: point 3.9, page 7 and cf. point 3.2, page 5.

The purposes of the legislation is in substance to reduce the procedural protections of potential defendants to criminal proceedings

21. The Divisional Court and the Court of Appeal both recognised that the object and effect of the regime of antisocial behaviour orders was to reduce the procedural protections of individuals who would otherwise enjoy the protections afforded to defendants in criminal proceedings (probably under section 5 of the Public Order Act 1986: see point 3.1 of the Home Office Guidance, page 5): paragraphs 17-18 of the Court of Appeal judgment, [2001] 1 WLR 1090E-1091A. The Court of Human Rights has consistently ruled that it is not open to use the strategy of reclassification of offences to avoid the procedural protections of national criminal law: see paragraph 53 of the judgment of the Court of Appeal, citing *Ozturk v. Germany* (1984) 6 EHRR 409, 421-422.
22. Likewise, the Court of Appeal has in two recent judgments treated as criminal for the purposes of Article 6, regimes of civil penalties introduced by Parliament in parallel to criminal regimes, in part because of the risk to the rights of

individuals that investigations or proceedings commenced in the civil jurisdiction might subsequently prejudice the rights of individuals in the parallel criminal regime: see *Han* [2001] 1 WLR 2253 at paragraph 75, page 2278C-E; *cf. Roth v. Home Office*, [2002] EWCA Civ. 158, unreported judgment of 22 February 2002, paragraphs 39 (Simon Brown LJ) and 164-167 (Jonathan Parker LJ).

Interference with the basic liberties of the subject is not consistent with a civil classification

23. The interference with the ordinary civil liberties of the subject has been accepted by the courts as analogous to the deprivation of liberty provided for under criminal statutes and regulated by Article 5 of the Convention: see *B. v. B* [1998] 1 WLR 329 at 334H-335A, citing Hobhouse LJ in *In re B. (Child Abduction: Wardship: Power to detain)* [1994] 2 FRL 479 at 488:

“Where a power of arrest or detention has been recognised other than as part of a punitive jurisdiction, it is ancillary to the exercise of another power of the court and is legitimate because it is necessary to the implementation of the order of the court.”

24. The orders at issue in this case do not fall within the ordinary categories of civil jurisdiction referred to in those cases but are free-standing punishments for the conduct proved against the individual by the UK public authorities. The mere fact that the possible exclusion of an individual from a physical area of the country is less restrictive of his liberty than imprisonment, and includes an element of prevention as well as punishment, does not provide a distinction of principle for these purposes. The minimum temporal scope of such orders, of 2 years, might equally be said to provide a contrast of the opposite kind to a short period of imprisonment imposed by a magistrates court for a minor criminal offence.
25. Further, as paragraph 3.3.3 of the Appellant’s case in *Clingham* emphasises, the *maximum* scope of such orders is as yet undefined and clearly includes orders that are far more restrictive than those at issue in the *McCann* appeal, including restrictions on personal liberty equivalent to “community orders” within the meaning of section 33 of the Powers of Criminal Courts (Sentencing) Act 2000.
26. Liberty submits that it is not a satisfactory answer to this point to suggest that the

maximum personal and geographical scope of orders whose definition is so uncertain and whose temporal scope is so large can be guaranteed not to encroach on the sphere of criminal sanction by implied limitations derived from the Human Rights Act 1998, the principle of proportionality and the intended purpose of the legislation. In reality, as the Home Office recognised in its initial guidance on the Bill, this legislation is intended to confer very wide powers on magistrates courts to deal effectively with criminal behaviour without the need for the procedural protections of the criminal law to be satisfied.

The Court of Appeal's approach to the standard of proof confirms that the substantive classification of the procedure should be criminal

27. The approach to the appropriate standard of proof, of both the Divisional Court in the *B.* case and of the Crown Court and Court of Appeal in the present case, recognises the seriousness of the matters alleged and the consequential need to apply a “civil standard of proof which will for all practical purposes be indistinguishable from the civil standard”: [2001] 1 WLR 1101-G-1102D, paragraphs 65-67 per Lord Phillips MR.
28. However, neither Lord Bingham CJ nor Lord Phillips MR seems to have considered the wider implications of this finding for a classificatory scheme that is designed to operate on issues of substance rather than form. Precisely the same considerations (in particular those set out above) that support the approach of the courts to the standard of proof appropriate to the making of antisocial behaviour orders, equally support the classification of such proceedings as criminal for the purposes of the other procedural and evidential guarantees laid down by Article 6(2) and (3).
29. The mere fact that English civil procedure has recognised that a flexible standard of proof may be appropriate in certain circumstances does not undermine the validity of this point from the perspective of the Convention

The Court of Appeal did not effectively distinguish the Steel decision

30. In the Court of Appeal, Liberty submitted that proceedings for the making of antisocial behaviour orders were “indistinguishable from proceedings in which an individual is bound over to keep the peace”, classified as criminal by the Court of Human Rights in *Steel v. United Kingdom* (1998) 28 EHRR 603.
31. At paragraph 63, [2001] 1 WLR 1100H-1101B, Lord Phillips MR identified three points of distinction from *Steel*, on the basis of which he felt able to classify proceedings for the making of an anti-social behaviour order differently from those in which an individual is bound over to keep the peace: (i) the absence of a

power of arrest; (ii) the fact that proof of antisocial behaviour was not the sole criterion for the making of such orders; and (iii) the fact that there was no power of imprisonment analogous to the power of the court to imprison an individual who refuses to be bound over to keep the peace.

32. Liberty respectfully submits that, given that the issue is one of substance rather than form, none of the points of distinction are persuasive:

- a. *The absence of a power of arrest* is merely a factor to be taken into account and is not a decisive criterion for a criminal offence, even under English domestic law. There are numerous non-arrestable criminal offences. In any event, the point is a formal rather than substantive one: in practice conduct upon which an application for an order could be based – such as breach of the peace or breach of the Public Order Act - would almost invariably be subject to arrest, confirming rather than casting doubt on the analogy with *Steel*.
- b. *The fact that the conduct of which an individual is accused is a necessary but not a sufficient condition for the making of an antisocial behaviour order* is irrelevant: the fact that such criminal or quasi-criminal conduct *must* be proved before an order can be made is the relevant factor on which the Appellants are entitled to rely. It would be equally irrelevant to point to criminal sanctions that can be imposed only where particular conditions or procedures are followed by the sanctioning court, for example in relation to youth offenders or the mentally ill. Indeed, even in its own terms the distinction is again more apparent than real, since the bind over power considered in *Steel* itself is subject to the consent of the individual concerned, and the alternative power to imprison the individual is subject to refusal of such consent, neither condition in itself involving the commission of any criminal act.
- c. *The fact that the sanction of imprisonment is marginally less directly available to a court in relation to an individual subject to an antisocial behaviour order than in respect of an individual who refuses to be bound over to keep the peace* is a highly formalistic distinction that, in Liberty's respectful submission, has no place in the analytical approach to be adopted under Article 6. An individual subject to

an antisocial behaviour order may in substance refuse to comply with it or immediately breach it or (for example by expressing such refusal in an antisocial way in the court itself, or by making a peaceful demonstration immediately in a public place from which he is excluded by the terms of the order), whereupon he is exposed to imprisonment for five years and/ or a fine, a much more serious punishment than is available in respect of an individual who expresses his refusal to be bound over in exactly the same antisocial or public way.

b. Liberty's second submission – fairness demands the protection of Article 6(2) and (3) in any event

33. As Liberty noted at paragraph 5 of its submissions before the Court of Appeal (provided to your Lordships with Liberty's petition to intervene), "the concepts of "criminal" and "civil" are not mutually exclusive under the Convention, and the rights guaranteed in Articles 6(2) and 6(3) may form part of the requirements of a fair trial under Article 6(1)": *Albert and Le Compte v. Belgium* (1983) 5 EHRR 533, paragraph 30".

34. A similar approach has been adopted by the Court of Appeal in *Official Receiver v. Stern* [2000] 1 WLR 2230, and *cf. Roth v. Home Office*, [2002] EWCA Civ. 158, unreported judgment of 22 February 2002, paragraph 33, per Simon Brown LJ:

"There is a wealth of Strasbourg case-law and a growing body of domestic authority concerning what, for Article 6 purposes, is criminal and what civil – or more particularly what under the autonomous Strasbourg approach must be regarded as criminal despite being categorised as civil under domestic law. Further extensive case law then establishes that the various procedural safeguards expressly or impliedly provided by Article 6 are not ultimately dependent upon such a classification: the protections are sometimes found unnecessary even though the proceedings are criminal; sometimes essential even though the proceedings are civil."

35. Liberty respectfully adopts this reasoning and submits that:

a. Considerations of this kind are highly relevant to the present appeal, which is on any view on the borderline between civil and criminal procedure. As with the new section 14B procedure introduced by the amendments to the

Football (Spectators) Act 1989 introduced by the Football (Disorder) Act 2000, the entire scheme and purpose of the new legislation is to provide a further weapon in the armoury of the UK authorities to combat activity that has traditionally been the province of the criminal law, *without requiring those authorities to go through the trouble of a criminal trial.*²

- b. It is precisely in such cases that the courts must be most vigilant to ensure that the procedural protections intended to be accorded by Article 6(2) and (3) - as codification of the elements of fairness required by Article 6(1) in a criminal context - are in substance satisfied, subject only to such modifications as may be appropriate to reflect the *substantive rather than formal* difference between the traditional criminal process and the innovative “civil” regime.
 - c. Thus, consistently with the approach towards the standard of proof of Lord Bingham CJ in the *B* case and of the Crown Court and the Court of Appeal in the present case, fair procedure in relation to antisocial behaviour orders requires in substance that the safeguards provided for under Article 6(2) and (3) should be available to individuals against whom applications for such orders are made.
36. In addition, of course, Liberty relies on the points of substance made at paragraphs 12-31 above in support of this alternative submission.

² In certain respects, the football banning orders case is *a fortiori* the present case, in that the minimum orders now *required* to be made by a court under the “civil” procedure are considerably *more* severe than those previously available on a discretionary basis after a criminal conviction. In addition, the international aspects of the section 14B procedure raise serious issues of compatibility with Community law that are not at issue here: see the judgment of the Court of Appeal in *Gough and Smith v. CC of Derbyshire*, 20 March 2002.

C. Conclusion

37. For the reasons set out above, Liberty submits that, both as a matter of domestic law and of the law of the Convention, proceedings for the determination of an application for an antisocial behaviour order are in substance entitled to the procedural protections afforded to defendants by Article 6, paragraphs (2) and (3), of the Convention, either as a matter of classification under domestic law or as a matter of interpretation of the relevant procedural rules.

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