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.
room 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)*** r 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 weigh**t:** see ***Oztiirk v Germany*** 6 EHRR 409, 422, para 52.
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rot in relation to the second and third criteria the European Court stated in ***Oztiirk,*** at pp 423-414, para 53:
"according to the ordinary meaning of the terms, there generally come within the ambit of the criminal law offences that make their perpetrator liable to penalties intended, inter alia, to be deterrent and usually consisting of fines and of measures depriving the person of his liberty . . . the general character of the rule [of law infringed by the applicant] and the purpose of the penalty, being both deterrent and punitive, suffice to show that the offence in question was, in terms of article 6 of the Convention, criminal in nature."
The complaints against the defendants under section 1 of the 1998 Act do not allege the commission of criminal offences for which punishment is sought. The fact that the backgrounds to the complaints were the alleged commission of a number of criminal offences does not mean that the complaints constituted charges of criminal offences. In LS' ***v Miller*** 2001 SC 977, the Inner House was considering section 52.(a.)(I) of the Children (Scotland) Act 1995 which provides that a child may be in need of compulsory measures of supervision where he "has committed an offence", and Lord President Rodger stated, at pp 989-990, para 23:
"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.**"
In relation to the third criterion, I consider that the making of an anti-social behaviour order does not constitute a punishment or penalty imposed on the defendant. In my opinion the magistrate who heard the complaint against the defendant Clingham was correct when in the case stated for the opinion of the High Court he stated: