

stage process. First, there was a finding of a breach of the peace or a finding of anti-social behaviour and, secondly, there was imprisonment if the defendant refused to be bound over or if the defendant chose to disobey the anti-social behaviour order. Accordingly, if binding over proceedings are criminal proceedings for the purposes of article 6 it follows that an application for an anti-social behaviour order is also a criminal proceeding within the meaning of article 6.

I am unable to accept the defendants' submissions for the reasons given by Lord Phillips of Worth Matravers MR in his judgment in McCann

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R (McCann) v Manchester Crown Ct (HL(E))

Lord Hutton

[zoo1] I WLR 1084, 1100-1101, para 62, with which I am in respectful agreement. In particular I consider that the view expressed by the European Commission and the court is primarily based on the consideration that in the proceedings for breach of the peace before the magistrates' court the court has power in those proceedings themselves to commit the defendant to prison if he or she refuses to be bound over. Thus, the commission stated, at 28 EHRR 603, 616, para 67: "the punitive element derives from the fact that if a person does not agree to be bound over, he will be imprisoned for a period of up to six months" and the court stated, at p 636, para 45:

"Bearing in mind the nature of the proceedings in question and the penalty at stake, the court considers that breach of the peace must be regarded as an 'offence' within the meaning of article 5 (1) (c) The importance of the distinction between the power to commit to prison immediately on refusal to be bound over and the need for a subsequent prosecution to impose a punishment for breach of an anti-social behaviour order or a sex offender order under section 2 of the 1998 Act is referred to by Lord Bingham of Cornhill C] in B v Chief Constable of Avon and Somerset Constabulary [2001] 1 WLR 340, 353, para 27:

"In Percy v Director of Public Prosecutions [1995] 1 WLR 1382 the defendant had a choice between agreeing to be bound over and going to prison. Her refusal to agree to be bound over had an immediate and obvious penal consequence without any intervening stage. The threat of imprisonment was no doubt intended to be coercive, but it was also punitive, in my judgment that is a crucial distinction between Percy's case and any injunctive procedure such as in play here."

The fact that the defendant would be liable to imprisonment under section 1(10) of the 1998 Act if he chooses within the period specified in the order without reasonable excuse to do anything which he is prohibited from doing by the order, does not mean that the order itself constitutes a punishment or penalty. In my opinion, the reasoning of Lord Bingham of Cornhill CJ in B v Chief Constable of Avon and Somerset Constabulary [2001] 1 WLR 340, 352, para 25 in respect of a sex offender order made under section 2 of the 1998 Act applies with equal force to section 1: "The rationale of section 2 was, by means of an injunctive order, to seek to avoid the contingency of any further suffering by any further victim. It would also of course be to the advantage of a defendant if he were to be saved from further offending. As in the case of a civil injunction, a breach of the court's order may attract a sanction. But, also as in the case of a civil injunction, the order, although restraining the defendant from doing that which is prohibited, imposes no penalty or disability upon him." The jurisprudence of the European Court recognises that proceedings taken to obtain an order designed to prevent future harmful conduct, but not to impose a penalty for past offences, does not constitute the bringing of a criminal charge. In Guzzardi v Italy 3 EHRR 333 the