There are fundamental differences between an anti-social behaviour order and a sex offender order under section 2 of the Crime and Disorder Act 1998. Section 1 requires proof. Section 2 only requires "reasonable cause to believe". Thus, the court does not, under section 2, apply a simple objective test of whether acts took place as in section 1 but has a further subjective element to apply that is not consistent with a criminal offence. Furthermore, the sex offender has already had his fair trial to the criminal standard of proof on the conduct which gave rise to the jurisdiction to make an order. The sex offender order is a mechanism to control the further conduct of those already convicted of criminal offences. The essential prerequisite for the order does not need to be proved in proceedings for making the order. In the context of European jurisprudence a sex offender order is made against a very limited class of persons, those already convicted of sex offences while the anti-social behaviour order is of general application. That is a significant factor: see ***Benbam v United Kingdom*** (1996) 22 EHRR 293 The relevant criteria for the consideration of whether proceedings are criminal for the purpose of article 6 of the Convention rights a**re:** (a) the domestic classification; (b) The nature of the proceedings; (c) The nature and severity of the punishmen**t:** see ***Engel v The Netherlands (No 1)*** (1976) I EHRR 647. Those criteria are not cumulative. Any one of the three may render the proceedings as being in respect of criminal charg**e:** see ***Garyfallou AEBE v Greece*** (1997) 28 EHRR 344; ***Lauko v Slovakia*** (1998) 33 EHRR 994. There does not have to be tile formal constituent elements of an offence as recognised in domestic law: see ***Deiveer v Belgium*** (1980) 2 EHRR 439. There is a broad similarity between proceedings for anti-social behaviour orders and breach of the peace. In both cases what is effectively sought is an order prohibiting a certain kind of behaviour. The intention was almost certainly to create a civil procedure, but it did not actually achieve that: see ***Steel v United Kingdom*** (1998) 28 EHRR 603. A penalty is still a penalty even when it takes a novel form. See also ***Han v Customs and Excise GAMUTS*** [2001 j 1 WFR 2253 for a review of the European jurisprudence.

The original anti-social behaviour is the most significant element of the criminal conduct leading to a criminal sanction under section 1(10). Thus the crucial conduct of a criminal nature that lies at the heart of the order and to which it is most important for the procedural safeguards of article 6(2) and (3) to be applied occurs at the first stage on the application for an order. It is

thus impossible, when applying the autonomous test from the Convention as A to the genera! nature of the proceedings, to escape the conclusion that they are in respect of a criminal charge. Thus, the orders made in the instant proceedings on the basis that they were civil proceedings not subject to such safeguards should be quashed.

Having a shifting or varying burden of proof may impose on justices an almost impossible task and could lead to the wholly undesirable practice of g justices being asked about the approach they are going to adopt.

A professional judge could mould proceedings to meet the particular dictates of the case more easily: see ***Official Receiver v Stern*** I2000] I WLR 2230, 2257-2258. Other issues also arise: the protections under the Police and Criminal Evidence Act 1984 would not apply and there could be profound problems regarding the weight to be given to identification evidence.

Brodie Thompson QC for Liberty. There are fundamental implications in the development of criminal law involved in the use of anti-social behaviour orders. It is important that all the full protections of criminal procedure are maintained when people are in effect accused of