



## **ANTI-SOCIAL BEHAVIOUR ORDERS IN AN ECHR CONTEXT**

The advent of the ASBO has not been without controversy in the field of human rights. However, just as the menace of anti-social behaviour (“ASB”) is not a new phenomenon, neither is the existence of statutory mechanisms for dealing with it. Forerunners of the ASBO included Local Authorities’ powers both to apply for injunctions against public nuisance (under the Local Government Act 1972) and, in their capacity as social landlords, to prevent ASB by injunctions against tenants (under the Housing Act 1996). Echoes of the ASBO are also to be found in the civil injunctions and restraining orders against harassment that were made available under the Protection from Harassment Act 1997.

The ASBO combats ASB by preventing, if necessary, not just the ASB but those acts preliminary or ancillary to it. A balance is struck between on the one hand the rights of the community to be free from the menace of ASB, and on the other hand the rights of the individual being restrained. The necessity of restraining the individual and the extent of interference involved in so doing are obviously relevant factors in striking this balance.

The rationale behind the ASBO is strictly preventative (see Article 6 notes), thus the court must decide whether ASB would occur without an ASBO being imposed before it can consider ordering one. Although it amounts to a civil order, a breach of an ASBO constitutes a criminal offence in itself (notwithstanding whether the underlying act would otherwise have been criminal) and that is considered key to its effectiveness as a deterrent. Therefore, if conditions of an ASBO restrain the individual from entering a given area (a measure deemed necessary by the court to prevent ASB) his mere presence in that area may amount to a criminal offence punishable by imprisonment.

Even if the ASBO is deemed necessary to avert ASB, the court, as a public authority under the Human Rights Act 1998, must first consider the individual’s human rights, both absolute and qualified, before it imposes such an order and ensure that any interference with qualified rights is necessary, proportionate and in pursuance of a legitimate aim under ECHR.



The Articles from the European Convention of Human Rights which are most relevant to ASBOs are outlined below:

### **Article 6 – Right to a fair trial**

Because the individual's rights and obligations are being determined, the process of imposing an ASBO attracts the requirements of a fair trial under Article 6. The extent of safeguards necessary to ensure a fair trial under that Article varies according to whether the process is deemed to be civil or criminal, with the latter requiring stricter safeguards.

The House of Lords in ***Clingham v Royal Borough of Kensington and Chelsea***, confirmed that the ASBO is a civil order. The rationale for this was that:

- The making of an ASBO is neither a conviction nor a condemnation that a person is guilty of an offence
- ASBOs do not result in any penal sanction; restrictions imposed are designed to be preventative of future ASB rather than punitive in respect of past acts
- There is no European Court of Human Rights decision in which proceedings have been held to be criminal even though an adverse outcome for the defendant could not result in any penalty
- The striking of a fair balance between the general interests of the community and the protection of the defendants' rights requires that the scales come down in favour of community protection. As such the use of hearsay evidence in ASBO applications should be permitted, albeit with the weight given to that evidence dependent on the facts of each case.

Therefore, Article 6 is satisfied for ASBO applications if the individual is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, and if judgment is pronounced publicly (save that the press and public may be excluded from all or part of the trial in certain prescribed circumstances). Because only the civil limb of Article 6 is triggered, the fact that hearsay evidence can be used in applications



without the makers of such statements being subjected to cross examination in court makes getting an order easier for practitioners. However, given the seriousness of the matters involved, the heightened civil standard of proof is required which is all but indistinguishable from the criminal standard.

### **Article 8 – Right to respect for private and family life**

Under this qualified right everyone has the right to respect for his private and family life, his home and his correspondence. For example, an individual's right may be engaged in relation to an ASBO that would restrain him from associating with certain persons, or from entering an area where he or his family lives or from where he needs to work. It is worth remembering that the individual's family also have rights of their own that must be factored into the equation. Thus, before deciding whether to advertise that someone is subject to an ASBO, the adverse effect on that family must also be considered.

However, since Article 8 is not absolute, the right may be interfered with in accordance with the law and under prescribed circumstances such as when necessary for the prevention of disorder or crime and the protection of the rights and freedoms of others. So long as the ASBO is proportionate to achieving these legitimate aims it may be justified.

In *R (Stanley) v Metropolitan Police Commissioner* the High Court determined that publicity by Local Authorities and the police following the grant of ASBO could engage Article 8(1) rights but on the facts might also be considered necessary and proportionate to legitimate aims under 8(2). Public safety, the prevention of disorder or crime and the protection of the rights of others each might justify publicity of an ASBO to inform, to reassure, to assist in public enforcement of the order and to deter others. In that case, far from breaching the right to respect for the privacy of the individuals subject to the ASBO, the publicity was clearly unlikely to have been effective unless it included photographs, names and partial addresses of the individuals. Not only did the public need to know against whom the orders had been made, but those responsible for publicity had to leave no room for mis-identification. Authorities should have in mind the Convention rights of the individuals but also those of the wider public (including past and potential victims of ASB) under Articles 8, 10 (freedom to receive information), 11 (freedom of assembly and association) and 17



(prohibition of the abuse of rights), certain of which the state can be found to be under a positive obligation to protect (**Anufrijeva v Southwark LBC**).

### **Article 10 – Freedom of expression**

Everyone has the right to freedom of expression including the freedom to hold opinions and to receive and impart information and ideas without interference by public authority. Thus if an ASBO prohibits the individual from expressing himself in a particular way, or from being in specified places, this Article will be engaged. However, Article 10 is a qualified right and the freedom may be subject to restrictions and conditions prescribed by law and necessary for the prevention of disorder or crime or for the protection of the rights of others. Once again, so long as the ASBO is proportionate and argued on these bases, it may be justified.

### **Article 11 – Freedom of assembly and association**

This Article contains the right to freedom of assembly and association. This might be interfered with because ASBOs often prohibit the individual from being in specified areas and from associating with other named individuals. However, as above, this is a qualified right which may be interfered with in accordance with the law when it is necessary for the prevention of disorder or crime or for the protection of the rights and freedoms of others. Once again, any interference must be proportionate as well as pursuant to legitimate aims.