

26. Interests of Justice

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26.1 General

1. This section deals with those cases to which section 14 of the Code Criteria applies. Section 14 of the Code Criteria applies to applications in respect of proceedings in which the client may be subject to orders or penalties that are (or which the client is reasonably contending are) criminal penalties within the meaning of article 6 of the European Convention on Human Rights.
2. In such proceedings, the prospects of success and cost benefit criteria for Legal Representation in the General Funding Code do not apply. Instead, section 14.4 of the Code Criteria provides:

“An application may be refused unless it is in the interests of justice for Legal Representation to be granted”

3. Note that cases considered under section 14 of the Code are still subject to the standard criteria set out in section 5.4. For example, representation may still be refused if alternative funding is available (criterion 5.4.2).

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26.2 Proceedings to which this test would apply

1. Article 6.3 of the Human Rights Convention imposes certain minimum safeguards for people who are charged with a criminal offence. ECHR case law establishes that a case may be treated as criminal for the purposes of Article 6 even if domestic law classifies it as a civil matter. See the leading case of *Engel v. Netherlands* [1979–80] 1 EHRR 647. Whether the case should be treated as criminal for ECHR purposes depends primarily on three criteria:

- (a) the classification of the proceedings in domestic law;
- (b) the nature of the offence or conduct in question; and
- (c) the nature and severity of any possible penalty.

2. This issue has been considered in detail by the Court of Appeal in *Han & Yau and Others v. Commissioners of Customs and Excise* [2001] EWCA Civ 1040. In that case, the Court considered the nature of penalties imposed under section 60 of the VAT Act 1994 and section 8 of the Finance Act 1994 against the background of Strasbourg decision in this area. Their Lordships concluded (Sir Martin Nourse dissenting) that the penalties imposed under the sections give rise to criminal charge for ECHR purposes. The majority of the Court was persuaded to reach that view because, although in domestic law the penalties were enacted as civil penalties:

- (a) the legislative provisions applied to all citizens as taxpayers not merely to a specific group;
- (b) in common with many crimes, the charges require a finding of fraud/dishonesty;
- (c) the function of the penalties is not to compensate the Commissioners but instead to punish the taxpayer and deter future breach;
- (d) the penalties available are substantial.

The Commission will apply this test, not only where the Courts have declared a charge to be criminal in ECHR terms, but also where the client reasonably seeks to argue that the charge is criminal in those terms. The Commission will therefore consider the merits of any argument put forward as to criminality on a case by case basis. If the penalty is potentially substantial and is intended to deter and punish then the Commission is likely to consider it to be criminal especially where the basis of the penalty is a perception of criminality.

26.3 The Interests of Justice Test**3C-266**

1. Once it is concluded that the proceedings in question are or the client is reasonably contending are criminal in ECHR terms, the Commission must consider the interests of justice test as required by section 14 of the Code Criteria. In practice once it is decided that a case is criminal, taking into account the nature and severity of the penalty imposed, it usually will be in the interests of justice for representation to be provided. The Commission will apply this test in the same way that the Court applies the interests of justice test in mainstream criminal proceedings.
In deciding whether it is in the interests of justice for Legal Representation to be provided we will take into account:
 - (a) The importance of the issues to the client i.e. how seriously the client will be affected by the court decision in their particular case.
 - (b) Whether there are complex legal and factual issues that could not fairly be determined without legal representation for the client.
 - (c) Whether the client suffers from any lack of understanding of the issues, including any language problem or disability.
 - (d) Whether the case requires extensive legal preparation, for example in the tracing of witnesses, or advocacy skills, for example expert cross-examination of witnesses in court.

The above test does not require that an application demonstrate a particular percentage prospect of success. However, the merits of a case may sometimes be relevant under the interests of justice test. For example, in a tax penalty case if the client had no substantive arguments to put before the tribunal because it was clear that the penalty was entirely justified, it is likely that the application would be refused on the grounds that the interests of justice do not require Legal Representation.

In a straightforward case if there is doubt as to whether it is in the interests of justice for Legal Representation to be provided, Help at Court may be considered as an alternative.