HM Courts & Tribunals Service

legal services COMMISSION

Guidance on the Consideration of Defence Representation Order Applications

July 2012

INTRODUCTION

During 2008 the Legal Services Commission in conjunction with Her Majesty's Court Service held a number of workshops to assess current practices and training needs surrounding interests of justice decision-making for the grant of criminal legal aid. Following the workshops a meeting of 'experts' was held to discuss ways in which greater certainty could be introduced.[1]

This renewed guidance document is the outcome of that process. Its aim is to improve the quality and consistency of decision-making. Whilst it is addressed to and written primarily for court staff that grant and refuse legal aid on behalf of the Legal Services Commission, it will also assist applicants and their solicitors.

This guidance is national guidance issued jointly by Her Majesty's Courts & Tribunals Service, the Justices' Clerks' Society, and the Legal Services Commission. It replaces all other guidance and should be followed by court legal advisers, administrative staff and applicants alike. All other guidance, whether national or local, should be disregarded.

Court administrative staff with the power to grant legal aid should be able to seek the advice and guidance of legal advisers when it is required and effective procedures will be in place in each office to enable this.

1. GENERAL PRINCIPLES

Criminal legal aid may be granted for proceedings before any court in favour of any individual accused or convicted of a criminal offence. Criminal legal aid also extends to other non-criminal proceedings, which include those set out in section 12(2) of the Access to Justice Act 1999 (e.g. proceedings in relation to a bindover or contempt of court) and certain 'prescribed proceedings' listed in regulations.[2]

Under the Access to Justice Act 1999 legal aid should, subject to means testing, be granted in cases only where it is in **the interests of justice** for the defendant to be represented. Each application for legal aid must be considered individually, and decision-makers must weigh up all the relevant factors.

A list of factors which **must** be taken into account (known as the Widgery criteria) are contained in Schedule 3 of the Act and these are reproduced on legal aid application forms. Decision-makers may consider additional factors not on this list, but they must be relevant to the interests of justice. Applicants must make clear on application forms the factors on which they are relying.

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[1] HMCTS and the LSC would like to acknowledge the advice & assistance of Professor Richard Young of the University of Bristol in the preparation of this guidance.

[2] See Annex A, and the Criminal Defence Service (General) (No.2) Regulations 2001.

In some cases two or more factors may combine together to justify a decision to grant when neither by itself would have sufficed. When such a combination is relied upon, this should clearly be noted on the application form.

It is the responsibility of the applicant, usually with the assistance of a solicitor, to provide sufficient relevant information to support an application. Where insufficient information is provided the application should be refused (and be recorded as a refusal for statistical purposes) rather than returned. This should be communicated to the applicant who may wish to provide additional information. Whilst it is acknowledged that a need to re-apply may initially cause some delay and an increase in administration, it will also encourage applicants to provide sufficient information at the outset, resulting in longer term efficiency.

If, after considering all the relevant factors the decision to grant is finely balanced, then the applicant should be given the benefit of the doubt and legal aid granted. This will apply **only** when there is enough detail on the application form for a competent decision to be taken. The benefit of the doubt should not be used to fill gaps in information which applicants should provide. It is not a requirement that a list of previous convictions be provided as these are often not available at the time the application is submitted. However, if reliance is placed upon previous convictions, it is important that sufficient information about them is given.

Co-defendants

If a case involves co-defendants, the applicant should instruct the same solicitor as the co-defendant(s) unless there is, or is likely to be, a conflict of interest.[3] The application form requires the applicant to state the reasons why he and his co-defendants cannot be represented by the same solicitor. The most common reasons are that one defendant is blaming the other or they are running incompatible defences (eg one says the fight never happened, the other says there was a fight, but he was defending himself).

Cases in the Crown Court

With the introduction of means testing in the Crown Court, the interests of justice test is automatically met in all cases which are committed, sent, or transferred to the Crown Court. In such cases, the interests of justice test is 'Passported' and these applications are subject to the means test only. There is one exception, being that of appeals to the Crown Court against conviction or sentence. Such applications should be subject to both the interests of justice test and the means test.

Equality of Arms

The term 'equality of arms' frequently appears on legal aid application forms. It refers to the legal principle that a defendant must have an effective

[3] Regulation 16A Criminal Defence Service (General) (No.2) Regulations 2001.

opportunity to present his own case to the court under conditions which do not place him at a substantial disadvantage in relation to the prosecution.

The fact that the prosecution case will be presented by a professional prosecutor is not good reason in itself to conclude that an unrepresented defendant is at a substantial disadvantage.[4] The law governing criminal legal aid clearly envisages a class of cases which should not attract publicly funded legal representation. The issues (if any) in these cases will typically be narrow and straightforward enough such that any disadvantage to an unrepresented defendant would be less than substantial. Legal advisers in magistrates' courts have a legal duty to assist unrepresented defendants.

2. GROUNDS FOR GRANTING LEGAL AID

Under Schedule 3 of the Access to Justice Act the following factors (sometimes referred to as the 'Widgery Criteria') must be taken into account.

a. It is likely that I will lose my liberty if any matter in the proceedings is decided against me

Loss of liberty does not just mean straightforward imprisonment, it also includes

- Suspended custodial sentences
- Remands into custody or into secure accommodation
- Hospital orders and similar forms of confinement
- Committal to prison or suspended committal for non-payment of fines, council tax or maintenance.

In cases where the hearing has concluded before the application has been determined, the outcome of the hearing should not be the deciding factor in assessing whether or not the interests of justice test is satisfied. If loss of liberty was likely at the outset then the application will have satisfied the test notwithstanding the fact that the defendant was released, perhaps as a result of the solicitor's representations.

<u>Custodial Sentences</u>

When considering applications under this heading you should always refer to the Magistrates' Court Sentencing Guidelines, a copy of which must be

[4] In R v. Havering Juvenile Court ex parte Buckley, Lexis CO/554/83 12 July 1983 it was noted that the fact that the prosecution was legally represented was something that could properly be taken into account, but it did not follow that a grant of legal aid must be made in such circumstances.

available in your office. This is updated from time to time. You can find the most up to date version on the Sentencing Council's website.

Where there is a published guideline for the offence then this should be used to work out the starting point for sentencing. The likelihood of custody should be assessed taking into account the circumstances of the offence and any previous convictions. The applicant should provide enough information about the facts of the offence for the starting point to be identified, but some cases may not fit clearly into any category described in the guideline. Where there is no published guideline and/or you are unsure of the appropriate sentencing starting point you should consult a legal adviser.

Every application must be considered individually. Applications relating to a particular charge or category of charges should not be automatically granted or refused without full and proper consideration.[5] Notwithstanding this, a strong presumption of grant should operate in the following circumstances:

- The starting point in the guidelines is a custodial sentence.

- The defendant would be in breach of a suspended sentence if convicted, either through breach of its requirements or via the commission of a further offence.

- The defendant is before the court for a second or subsequent breach of the requirements of a community order (i.e. there is a previous breach of the order which was admitted or proved at court).

- The offence is imprisonable and occurred whilst the defendant was subject to recall in relation to a previous custodial sentence.

For cases outside these categories with a starting point lower than custody, the applicant should indicate the relevant sentencing starting point, which you should check against the guidelines. The applicant must then identify the aggravating features peculiar to the offence and/or the defendant which lead them to believe that despite the lower starting point, loss of liberty is likely.

In the case of *McGhee*[6] the High Court rejected the argument that a community order with unpaid work constituted a loss of liberty. However, the possibility of such an order being imposed may be a contributory factor which, in combination with other factors, may justify grant (see 'Any Other Reasons' below).

<u>Previous Convictions</u>

The relevance of previous convictions depends upon how old they are, how serious they were, and how similar in character they are to the current charges. The court will generally take no notice of

[5] R v. Highgate Justices ex parte Lewis, 142 JP 78.
[6] R v. Liverpool City Justices ex parte McGhee [1993] Crim LR 609.

- spent convictions.

- cautions, warnings and reprimands.

A recent history of breaching court orders will make a custodial sentence more likely (provided that the new offence is punishable with imprisonment). A legal adviser should be consulted where recent convictions are relied upon, but they are of a totally different character. Otherwise previous convictions will act as an aggravating factor when the court decides sentence. It will usually only be appropriate to take them into account if this means that a custodial sentence is likely. For example, previous convictions will be far less likely to aggravate the sentence to custody if the relevant sentencing guideline indicates the starting point for the sentence is a fine than if it is a high community order.

Previous convictions may also put a defendant at greater risk of conviction if they are pleading not guilty because the prosecution may be allowed to put the convictions in evidence. If this is cited in the application form you may need to seek the advice of a legal adviser.

If the standard police form of recorded convictions is not available then there must be enough information stated on the application form for a competent decision to be taken, namely:

- a description of the previous offences said to be relevant.

- the dates (or approximate dates) of conviction.

- the sentences imposed (which will generally indicate their relative seriousness).

<u>Loss of Liberty in Youth Cases</u>

See section 3 in relation to youths below.

<u>Remands into Custody</u>

Loss of liberty can also mean a remand into custody.

The fact that the defendant is **appearing** before the court in custody is not relevant. In these circumstances legal aid and legal representation will be justified only where it is likely that he will **remain** in custody after the hearing.

If the applicant believes that loss of liberty is likely due to a remand into custody then the application form should make clear:

- why the case is likely to be adjourned (without an adjournment there will be no remand at all).

- whether the prosecutor will oppose bail.

b. I have been given a sentence that is suspended or non custodial. If I break this, the court may be able to deal with me for the original offence.

The existence of the current suspended or non-custodial sentence must have some bearing on the current proceedings in order to be relevant to the interests of justice decision. The fact that the offence took place whilst the defendant was subject to a community order, for instance, is unlikely in itself to justify grant unless the wider circumstances of the case mean that loss of liberty is likely.

Whilst it is important that each case be considered on its individual merits, a strong presumption of grant should operate in the following circumstances:

- the defendant would be in breach of a suspended custodial sentence if convicted (either through the breach of its requirements, or via the commission of a further offence).

- the defendant is before the court for a second or subsequent breach of the requirements of a community order. (i.e. there is a previous breach of the order which was admitted or proved at court).

- the offence is imprisonable and occurred whilst the defendant was subject to a previous custodial sentence either before his release, or after release whilst subject to recall.

<u>Breach of the Requirements of Community Orders</u>

Applications should state

- The number of previous breaches of the order

- whether revocation of the order is being sought by the probation service

An application for the first breach of a community order is very unlikely to be granted without an additional factor in the case which increases the likelihood of a custodial sentence, or presents some other reason to justify grant. For a second or subsequent breach a strong presumption of grant should operate as stated above under ‘Custodial Sentences’.

c. It is likely that I will lose my livelihood.

In almost all cases the defendant will need to be in employment in order to argue that his livelihood will be lost.

Legal aid should be granted only when

- it is likely that the applicant will lose his livelihood,

  and

- that risk would arise as a direct result of conviction and/or sentence, or through any other matter arising in the proceedings being decided against him (e.g. a condition of bail which the prosecution are seeking),

  and

  - representation is justified in order to help the defendant avoid the conviction or the particular sentence (or other matter which may be decided against the applicant).

If the defendant is pleading guilty and **must by law** receive a sentence which is likely to lead to loss of livelihood then it is unlikely that he will qualify for grant. On the other hand, where the sentence likely to lead to loss of livelihood is discretionary **and** it can be shown that legal representation would assist in persuading the court to exercise its discretion in favour of the defendant, **which the defendant would have difficulty achieving if unrepresented**, then legal representation should be granted. Defendants intending to plead guilty need to be especially clear on the application form why legal representation would make a difference.

If a defendant will lose his job due to a driving ban, but he is pleading guilty to an offence carrying mandatory driving disqualification, then (in the absence of an argument for special reasons) legal aid is likely to be refused. If in doubt, consult a legal adviser.

d. It is likely that I will suffer serious damage to my reputation

If the defendant is intending to plead guilty it is unlikely that an order will be granted under this heading as it is usually the conviction which gives rise to the damage and no lawyer could prevent this. This factor will therefore apply almost exclusively where the plea will be not guilty.

In every case two factors must be considered in deciding whether serious damage would be caused:

- the defendant's current reputation, and

- the nature and seriousness of the offence.

The decision-maker then needs to consider the impact that conviction (or less likely, the sentence) would have on the defendant's reputation and whether this could be said to be **serious** damage.

Case law[7] suggests that any defendant of previous good character pleading not guilty to a charge equal to, or more significant than, section 5 of the Public Order Act 1986 in terms of nature and seriousness should be granted legal aid, regardless of their social or professional standing. This is very unlikely to include non-imprisonable road traffic or regulatory offences.

There may be circumstances in which it is appropriate to grant legal aid under this heading to a defendant who has previous convictions. This will only arise where such convictions are either 'spent'[8], or are for minor offences that would not have been considered capable of causing serious damage to a defendant's reputation (eg a defendant previously fined for careless driving is now contesting a charge involving dishonesty, or where the defendant has no similar convictions and the present offence is held in particular contempt). This means that even a defendant with a substantial record for imprisonable offences may be eligible if charged with a sexual offence.

e. Whether the determination of any matter in the proceedings may involve consideration of a substantial question of law.

When you are in any doubt under this heading in particular, a legal adviser should be consulted.

The applicant must identify

- the question of law which may arise
- which aspect of the case it relates to (e.g. plea, trial etc)
- why it is substantial and beyond the remit of the duty solicitor.

Brief statements such as 'recklessness', 'identification', 'intent' etc are not acceptable without more information as it is possible that these issues turn entirely upon fact and not law.

If the applicant intends to plead guilty the likelihood of a substantial question of law arising must generally be remote. The need for a Newton hearing, special reasons hearing, or other sentencing considerations may complicate the sentencing process, but legal aid will be justified under this heading only if a substantial question of law may arise within them.

A right to representation should not generally be granted for the purpose of obtaining advice as to the appropriate plea, since this can rarely be described as a substantial question of law. Preliminary advice as to plea and routine questions of law can usually be provided satisfactorily by advice from the duty solicitor.

[7] R v. Chester Magistrates' Court ex parte Ball, (1999) 163 JP 757.
[8] Under the terms of the Rehabilitation of Offenders Act 1974.

The substantial question of law will usually arise in cases where a trial is necessary. Substantial legal points may arise either before the trial (these could include applications for bad character or hearsay evidence to be adduced) or during the trial itself. You need to consider whether legal representation at the trial is justified or whether the assistance of the legal adviser would be sufficient.

The legal adviser is under a duty to advise magistrates openly in front of the defendant on any legal issues which arise. They are also obliged to assist an unrepresented defendant to present his case, but cannot represent him or argue a point of law for him.[9]

f. I may not be able to understand the proceedings or present my own case

This criterion includes, but is not restricted to, cases in which the applicant has an inadequate understanding of English (or Welsh), and/or a disability. The length and complexity of the case is a relevant consideration in addition to the defendant's level of understanding.

<u>Inadequate Understanding of English</u>

If English is not the applicant's first language then the form should state the language the applicant normally speaks and the degree to which English can/cannot be understood and why this would make the proceedings too difficult for the defendant to deal with.

A need for an interpreter is not, in itself, sufficient to justify grant. Conversely, the provision of an interpreter does not necessarily mean that legal aid should be refused.[10] You should first consider other factors in the case which are relevant to the question of legal aid leaving aside the need for an interpreter. In the event that these other factors are not sufficient to justify grant you should go on to consider the impact that the defendant's lack of understanding of English would have on those other factors and on the wider case as a whole. This should include consideration of whether any pre-court documentation may be too lengthy or difficult for the applicant to deal with, and/or the need for a trial or Newton hearing.

In order for legal aid to be granted there must be good reason why it would not be sufficient simply for the applicant to be provided with an interpreter, bearing in mind that it is not part of their role to give advice.

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[9] Practice Direction (criminal: consolidated). Criminal Procedure Rules 2010, Rule 37.14.

[10] In R (on the application of Luke Matara) v. Brent Magistrates' Court (2005) 169 JP 576, it was held that, 'The requirement that the proceedings be in a language that a defendant understood was merely one aspect of the requirement that a person must be able to effectively participate in criminal proceedings against him pursuant to the guarantee of a fair trial under the ECHR Article 6, and did not of itself negate the need for legal representation.' The high court found that the applicant's poor English undermined his ability to state his own case.

If the applicant speaks fluent English but the application is based upon a lack of literacy then the extent to which he is able to read and/or write must be stated, and the impact this would have on his ability to understand the proceedings or state his own case. You should take into account the likely volume of pre-court documentation. A very strong presumption of grant should operate for applicants who are totally illiterate.

Disability

The fact that the applicant has a disability (whether physical or mental) is not sufficient in itself for legal aid to be granted. The question is what impact the disability would have on the applicant's ability to understand the proceedings or to state his own case, and this should be stated on the application form.

General non-specific reference to a disability without confirmation or a diagnosis will not usually be sufficient. Whilst it will often not be necessary to have a detailed medical analysis of the condition said to be relevant there should be some supporting information eg 'I was an in-patient at X hospital for six months last year' or 'I have been prescribed Y medication by my G.P. for my condition.'

Youths

The young age of the defendant may also be a relevant factor under this heading. See section 3 in relation to youths below.

g. Witnesses may need to be traced or interviewed on my behalf

The application form should make clear:

- Who the witness is. (Not by name, but by their potential standing in relation to a possible matter in issue in the case).
- Whether the witness is known to the defendant.
- How their evidence could be relevant to an issue in the case.
- Why legal representation is necessary to trace and/or interview them.

Short statements such as 'My brother-in-law' or 'There were other people with me in the car' would not be adequate.

The fact that a defence witness is to be called is not in itself sufficient for legal aid to be granted under this heading unless pre-trial tracing or interviewing of

that witness by a defence lawyer would be necessary in the interests of justice.[11]

h. The proceedings may involve the expert cross-examination of a prosecution witness (whether an expert or not)

This criterion is relevant only to those cases in which cross-examination of **prosecution** witnesses may be involved. This will include trials, special reasons hearings, and Newton hearings.

'Expert cross examination' refers to the expertise required to-cross examine, and not the fact that a witness is an expert witness.

Not every cross-examination is an expert cross-examination calling for legal aid or representation. The decision whether to grant under this heading requires you to think ahead to the trial and imagine what the cross-examination is likely to involve. The level of expertise needed will depend on a number of factors which will include:

- The nature and seriousness of the offence.
- The capacity of the defendant to cross-examine (including their age and understanding).
- The nature of the witness (police, expert, or other).
- The age and understanding of the witness.
- The relationship between the defendant and the witness.
- The number of witnesses.
- The issues in the case and their potential complexity.
- The issues that will need to be explored with the witness (i.e. the nature and extent of questions likely to be asked).

This is not an exhaustive list and the weight (if any) to be given to any single factor will vary from case to case. The fact that a witness is a police officer is

[11] In R v. Gravesend Magistrates' Court ex parte Baker ((1997) 161 JP 765) the defendant was charged with excess alcohol and put forward a special reasons argument based on spiked drinks. The high court held that the applicant should be granted legal aid because a scientific expert would be required, the assistance of a solicitor would be needed to find witnesses of the facts, to take proper proofs, and to extract the story in the witness box from those witnesses and from the applicant herself. In R v. Scunthorpe Justices ex parte S (TLR 5 March 1998) the defendant (aged 16) was charged with obstructing a police officer in the execution of his duty. The high court held that in so far as there had been a conflict between the evidence of the police officer and witnesses, the applicant wanted the witnesses traced. A defendant aged 16 would be seriously handicapped if left to conduct his own defence and there was an obvious need for expert cross-examination.

a relevant consideration in favour of grant but is not, in itself, sufficient reason to grant.[12]

You should take into account that legal advisers are under a duty to assist an unrepresented defendant and may ask questions of witnesses on the defendant's behalf. They must not, however, appear to become an advocate for the defendant.[13]

Legal aid and representation will not be appropriate in the most straightforward of cases in which the issues are narrow and straightforward and few witnesses are to be called, and where the level of assistance afforded by the legal adviser would be adequate.

i. It is in the interests of another person that I am represented

The other person will most commonly be a prosecution witness in cases of sensitivity where it would not be appropriate for the defendant to cross-examine them in person. A domestic violence case requiring a trial or a Newton hearing is highly likely to qualify for grant.

If the person identified in the application is not a prosecution witness, then you should consider very carefully what difference legal representation for the defendant will make to that person, particularly if they are not directly involved in the proceedings.

Relevant factors in relation to witnesses may include:

- the nature and seriousness of the charge,
- the relationship between the defendant and the witness,
- the vulnerability of the witness
- any issues of sensitivity which will need to be explored with the witness.

Examples of 'another person' outside the category of prosecution witnesses may include a co-defendant, or co-defendant's witness in a sensitive case, particularly where there is a conflict of interest between co-defendants.

The question of representation being granted in the interests of the court is dealt with under 'Any other reasons' below.

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[12] In R v. Scunthorpe Justices ex parte S (TLR 5 March 1998) the defendant, aged 16, pleaded not guilty to 'obstruction' on the basis that the police officer concerned was not acting in the execution of his duty. The High Court held that a defendant aged 16 would be seriously handicapped if left to conduct his own defence and there was an obvious need for an expert cross-examination.

[13] Practice Direction (criminal: consolidated) para. V55.

3. ANY OTHER REASONS

Other reasons may be taken into account as part of the interests of justice test beyond the criteria listed above. Additional factors may be sufficient in themselves to justify grant, but will usually be matters to be considered alongside other criteria in the application.

Examples in this category could include the need for expert examination of defence witnesses[14] or expert cross-examination of a co-defendant or co-defendant's witness.

The likelihood of a demanding community penalty may be relevant, but will not in itself justify grant. (See comments made under the 'Custodial Sentences' heading above). There will need to be other relevant factors in the case which in combination with this would sufficiently justify legal representation.

All these are examples which have appeared in case law. Each case turns upon its own individual circumstances and combination of factors and it is very difficult to establish general rules about the weight that each factor should be given.

Where the defendant's conduct of the case is such as to distract the court from the exercise of its judicial function it may be in the interests of justice for legal aid to be granted. (As in any other case, the grant of legal aid in these circumstances will still be subject to means testing). This is likely to occur only in exceptional circumstances and when the presence of a lawyer is justified in order to mitigate the problem. The defendant's conduct of the case must be such as to obstruct the course of justice. Mere administrative inconvenience to the court would not be sufficient.

Situations may arise in which the court decides to exclude a disruptive defendant from the courtroom and proceed in his absence. Legal aid should not be granted merely because a defendant is drunk or disruptive.

<u>Youth Cases</u>

The Access to Justice Act makes no specific reference to youth defendants. The factors to be taken into consideration therefore apply equally to both youths and adults. As with adult cases, each application must be considered individually. Consideration of the defendant's age is a factor to be taken into consideration, and a strong presumption of grant should operate for all defendants under the age of 16 on the basis that such defendants would be unable to understand the proceedings or to state their own case.

Loss of liberty will generally be less likely in youth cases. It should be remembered that the shortest custodial sentence available to a youth court is 4 months. Also, the younger the defendant, the less likely they are to be sent

[14] R v. Gravesham Magistrates' Court, ex parte Baker (1997) 161 JP 765.

into custody for any given offence. These factors substantially diminish the importance of the 'loss of liberty' criterion in youth proceedings. Legal aid should only be granted under this heading on the basis of risk of a custodial sentence if, taking into account the defendant's age as well as all other relevant factors, a custodial sentence of at least 4 months is likely.

Previous convictions should be taken into account in the same way as any other case in determining loss of liberty or any other factor.

Loss of liberty may also arise through a remand into custody or secure accommodation, although again this is less likely to occur in youth cases than adult cases. As in adult cases, the fact that the defendant appears in custody is not relevant. Legal aid is justified only where it is likely that he will remain in custody after the hearing. If the risk of remand is relied upon, the application should state whether the prosecutor opposes bail.

Applications to Vary or Discharge Orders

Criminal legal aid is available for proceedings in respect of a sentence or order which was made as a result of a conviction.[15] Applications to vary or discharge such orders, including applications under section 42 Road Traffic Offenders Act 1988 to remove a driving disqualification, may therefore be granted.[16]

Whilst such proceedings are technically eligible for legal aid, a number of the usual criteria for grant will have no relevance at all and the great majority of cases will not satisfy the interests of justice test.[17] Most applications of this nature will simply require the defendant to explain his circumstances to the court. Unless there is a clearly identifiable factor which takes the case outside the norm (eg a genuine need to obtain an expert report or a disability which would materially impair an applicant from explaining his circumstances to the court) legal aid should be refused.

Appeals

The interests of justice test applies to cases appealed to the Crown Court in the same way as any other case. If the test was not met in the magistrates' court in the first instance it is very unlikely that it will be satisfied for the appeal case unless there has been a material and relevant change in circumstances (eg the defendant in fact received a custodial sentence when previously loss of liberty was deemed unlikely).

The Duty Solicitor

Where an application for a representation order has been refused and the solicitor named in that application is no longer acting on a defendant's behalf, the defendant will still be entitled to see the duty solicitor provided that his

[15] Section 12(2)(b) Access to Justice Act 1999.
[16] R v Liverpool Crown Court, ex parte McCann [1995] RTR 23.
[17] R v Liverpool Crown Court, ex parte McCann [1995] RTR 23.

case fulfils the criteria for the duty solicitor scheme. The mere fact that he has applied for and been refused a representation order does not render him ineligible for the duty solicitor.

ANNEX A

Prescribed Proceedings

Regulation 3 of the Criminal Defence Service (General) (No.2) Regulations 2001 sets out 'prescribed proceedings' is reproduced below.

(1) For the purposes of this regulation, "the 1988 Act" means the Crime and Disorder Act 1998.

(2) The following proceedings are criminal proceedings for the purposes of section 12(2)(g) of the Act:

(a) civil proceedings in a magistrates' court arising from a failure to pay a sum due or to obey an order of that court where such failure carries the risk of imprisonment;

(b) proceedings under section 1, 1D, and 4 of the 1998 Act relating to anti-social behaviour orders;

(ba) proceedings under sections 1G and 1H of the 1998 Act relating to intervention orders, in which an application for an anti-social behaviour order has been made;

(c) proceedings under section 8(1)(b) of the 1998 Act relating to parenting orders made where an anti-social behaviour order or sex offender order is made in respect of a child;

(d) proceedings under section 8(1)(c) of the 1998 Act relating to parenting orders made on the conviction of a child;

(e) proceedings under section 9(5) of the 1998 Act to discharge or vary a parenting order made as mentioned in sub-paragraph (c) or (d);

(f) proceedings under section 10 of the 1998 Act to appeal against a parenting order made as mentioned in sub-paragraph (c) or (d);

(g) proceedings under sections 14B, 14D,14G, 14H, 21B and 21D of the Football Spectators Act 1989 (banning orders and references to a court);

(h) Proceedings under section 137 of the Financial Services and Markets Act 2000 to appeal against a decision of the Financial Services and Markets Tribunal;

(i) Proceedings under sections 2, 5 and 6 of the Anti-Social Behaviour Act 2003 relating to closure orders;

(j) proceedings under sections 20, 22, 26 and 28 of the Anti-Social Behaviour Act 2003 relating to parenting orders in cases of exclusion from school and parenting orders in respect of criminal conduct and anti-social behaviour;

(k) proceedings under sections 97, 100 and 101 of the Sexual Offences Act 2003 relating to notification orders and interim notification orders;

(l) proceedings under section 104, 108, 109 and 110 of the Sexual Offences Act 2003 relating to sexual offences prevention orders and interim sexual offences prevention orders;

(m) proceedings under section 114, 118 and 119 of the Sexual Offences Act 2003 relating to foreign travel orders;

(n) proceedings under sections 123, 125,126 and 127 of the Sexual Offences Act 2003 relating to risk of sexual harm orders and interim risk of sexual harm orders;

(o) proceedings under Part 1A of Schedule 1 to the Powers of Criminal Courts (Sentencing) Act 2000 relating to parenting orders for failure to comply with orders under section 20 of that Act; and

(p) proceedings under section 5A of the Protection from Harassment Act 1997 relating to restraining orders on acquittal.

(q) Proceedings before the Crown Court or the Court of Appeal relating to serious crime prevention orders and arising by virtue of sections 19, 20, 21 or 24 of the Serious Crime Act 2007.

(r) Proceedings under sections 100, 101, 103, 104, and 106 of the Criminal Justice and Immigration Act 2008 relating to violent offender orders and interim violent offender orders;

(s) Proceedings under sections 3, 5, 9 and 10 of the Violent Crime Reduction Act 2006 relating to drinking banning orders and interim orders.