

**President's ruling on
Committee Stage Amendments to
United Nations (Anti-Terrorism Measures) Bill
proposed by Hon Howard YOUNG, JP
Hon Albert HO Chun-yan and Hon Margaret NG**

Hon Howard YOUNG, Hon Albert HO and Hon Margaret NG have each given notice to move an amendment (i.e. to add Clause 16A) to the United Nations (Anti-Terrorism Measures) Bill, if the Bill gets its Second Reading at the Council meeting to be held on 10 July 2002.

Purposes of the Members' proposed amendments

2. The Bill, in its original form, does not provide a person with a statutory right to claim compensation from the Government if the specifications made under Clauses 4A(2) and 5(1) have caused him loss. According to the Administration's advice given to the Bills Committee when studying the issue of compensation, "a person who has suffered loss as a result of a "wrong" specification in a notice under Clause 4 or Clause 5 may have an action in common law for damages if, for example, the specification was not done in good faith or was done negligently".

3. All three Members are proposing to amend the Bill by adding Clause 16A to provide a statutory compensation scheme for the loss suffered. Under their respective proposals, a person who had once been specified as a terrorist or had his property specified as terrorist property may apply to the Court of First Instance for compensation when he and/or his property have/has ceased to be so specified. The Court is empowered to order compensation to be paid by the Government if it considers it appropriate to make such an order. The amount of compensation the Court can order for payment is what the Court thinks just in all the circumstances of the case.

4. **Ms NG's proposal** only provides that the Court shall not order compensation unless it is satisfied that the applicant has suffered loss in consequence of the relevant specification. **Mr HO's proposal** provides, additionally, that the Court shall not order compensation unless it is satisfied that the applicant or the property in question was not a terrorist or terrorist property during the time when they were specified as such. **Mr YOUNG's proposal** goes one step further, by providing that the Court also has to be satisfied that there has been some default on the part of any person concerned in obtaining the relevant specification.

The Administration's View

5. The Administration is of the view that all three proposals by Members have a charging effect within the meaning of Rule 57(6) of the Rules of Procedure because their legal effect is to impose a new contingent liability on the Government to pay compensation.

6. The Administration is of the view that **Ms NG's proposal** "allows the Court to impose legal liability on the Government in circumstances not currently allowed under the common law, namely where there has been no negligence on Government's part but the Court nevertheless decides that it is 'appropriate' in all the circumstances to impose no-fault liability on Government ... The liability imposed could be very substantial.". In **Mr HO's proposal**, its charging effect arises from its major departure from the existing common law position since it is not directed at the question of Governmental negligence. In **Mr YOUNG's proposal**, "the proposed criterion of "some default" substantially increases the contingent liability of the Government under existing common law because "some default" clearly need not amount to common law negligence. Hence ... (it) releases the Court from the current legal obligation to apply the common law standards of negligence. The result is that the Government is exposed to a substantially greater contingent liability than it faces under the current law.".

Responses from the Members

7. Mr YOUNG disagrees that his proposal would result in exposing the Government to a substantially greater contingent liability than it faces under the current law. He has not elaborated on his disagreement.

8. Mr HO has advised the Clerk that he has no time to give a response.

9. Ms NG has made the following points:

- (a) The provision in Clause 16A does not have the effect of eliminating the common law principles on which liability for Government actions attaches.
- (b) It is a fallacy to view Clause 16A as creating a "new" liability based on the concept of "appropriateness". Clause 16A does no more than to state expressly that the Court has the power to award compensation in accordance with the established common law criteria for payment of damages for Government actions.

- (c) It is inconceivable that the Court would construe the word "appropriate" as creating strict liability in circumstances where strict liability would not attach as a matter at common law; it is trite law that statute is not to be construed as creating strict liability in the absence of clear language.
- (d) Given that Clause 16A does not seek to widen the scope of liability to beyond that which arises at common law, the liability of the Government to pay compensation, if any, in a given case should properly be regarded as a liability arising as an incidental consequence exercising the powers proposed under the Bill. There is support for this view in the applicable principles adopted in the House of Commons in the UK (Erskine May 22nd Edition, Page 763). As such, Clause 16A cannot be regarded as having any "charging effect".

Advice of Counsel to the Legislature

10. Counsel to the Legislature advises that the main issue for consideration for present purposes is whether the implementation of the respective proposed compensation schemes would increase the Government's legal liability to pay compensation from the General Revenue for a wrongful specification. In his view, there would be an increase of legal liability resulting from the lowering of the existing threshold in common law for triggering off Government's liability to pay compensation from the General Revenue. All the proposed amendments have a charging effect within the meaning of Rule 57(6).

11. In regard to Ms NG's response to the Administration's submission, Counsel states that the main purpose of Ms NG's proposed Clause 16A(1) is to empower the Court of First Instance to order compensation to be paid by the Government if, having regard to all the circumstances, the Court considers it appropriate to do so. The exercise of this power is subject to subsection (2) which provides that the court cannot order compensation unless it is satisfied that an applicant for compensation has, in consequence of the relevant specification, order or notice, suffered loss. Read together, the legal effect of subsections (1) and (2) is that the Court can order compensation if it is satisfied that the applicant has suffered loss as a consequence of the relevant specification etc. and that it considers it appropriate to make such an order. The provision has not provided explicitly how the Court should exercise its discretion to refuse an application except to require the Court to have regard to all the circumstances. Although it is likely that the Court may find guidance from common law principles, the provision does not impose such an obligation on the Court.

12. Counsel advises that there is no legal requirement under Ms NG's proposed Clause 16A that a Court has to apply existing common law principles when deciding whether it is appropriate to order compensation. It does not appear to have the effect of confining the Court to applying certain common law principles for establishing liability of the Government. It is not sufficiently clear that the provision is intended to state expressly what a Court is already empowered to do in common law. It seems more likely that a Court will regard the enactment of this provision as clear evidence of the Legislature's intention to create a statutory compensation scheme independent of whatever common law action for compensation that may be available. The Court will also find itself bound to apply the criteria provided in the proposed Clause 16A when considering an application for compensation order made under the provision.

13. Under Ms NG's proposed new clause 16A(2), the only thing an applicant for a compensation order has to prove is that he has suffered loss as a consequence of the relevant specification, order or notice. Counsel points out that if the same applicant is seeking compensation through an action in common law, apart from having to prove that he has suffered damages caused by the wrongful specification, order or notice, he (as a plaintiff) will have to prove negligence or lack of good faith on the part of the Government. Therefore, it could be reasonably construed that the object of the proposed provision is to provide qualified applicants with a new compensation scheme in legislation, which is more favourable to them than that available under the common law for seeking compensation.

14. Lastly, on Ms NG's reference to Erskine May, Counsel advises that Ms NG was seeking to rely on the statement that "A money resolution is not required if such a liability arises as an incidental consequence of a proposal to apply or modify the general law.". That statement describes a situation in the context of parliamentary practices in the House of Commons in UK where public expenditure in the form of a compensation payable by the Government is considered not new and distinct because the liability to pay compensation is an incidental consequence of a proposal to apply or modify the general law. The rationale behind this practice is that the public fund required for satisfying the liability to pay compensation is considered as already covered by the authorization granted by a money resolution made in relation to a proposal to apply or modify the general law. In the context of the present Bill, there is no provision in the Bill before the Council which makes the proposed Clause 16A an incidental consequence. This practice might well be relevant if the proposed Clause 16A was clearly to codify the existing liability of the Government to pay compensation without any substantive change. However, in view of the substantial difference between the proposed compensation scheme provided in the proposed Clause 16A and the relevant common law principles, the UK practice does not seem to support the Member's argument.

My opinion

15. As pointed out in paragraph 2 above, the original Bill makes no provision for compensation in respect of cases of specifications which result in losses suffered by the affected persons. The three Members' respective proposals to add Clause 16A seek to introduce a statutory compensation scheme. In Ms NG's and Mr HO's proposals, an applicant for compensation does not need to prove negligence or lack of good faith in the relevant specification. In Mr YOUNG's proposal, the applicant needs only to prove default. I accept the assertion by the Administration that the schemes proposed by Members are different from the redress available under the common law. I am in agreement with Counsel to the Legislature's analysis of the effect of the three versions of Clause 16A, if enacted, as compared to what is available to a person seeking compensation under the common law. I am of the opinion that Government's liability under the common law to pay compensation will be increased through the operation of any of the three schemes, and this constitutes a charge on the revenue.

Ruling

16. I rule that the respective amendments proposed by Mr YOUNG, Mr HO and Ms NG have a charging effect under Rule 57(6) of the Rules of Procedure, and require the consent of the Chief Executive to their proposals.

(Mrs Rita FAN)
President
Legislative Council

10 July 2002