

LegCo Panel on Administration of Justice and Legal Services

Information paper on

Payment of compensation to persons wrongfully imprisoned

Background

On 20 December 2001, the Panel agreed to examine the question whether persons who have served terms of imprisonment as a result of a criminal conviction which is quashed on appeal or found to have been secured wrongfully should be paid compensation from public funds. In a letter dated 27 December 2001, the Clerk to the Panel set out questions requesting information from the Administration by 25 January 2002 in order to facilitate the Panel's consideration.

2. It appears from the files of the Department of Justice that the Administration's policy on this matter has been stable since 1988 in respect of administrative compensation, and since 1991 (when the Hong Kong Bill of Rights Ordinance (Cap. 383) was enacted) in respect of statutory compensation.

3. The Department of Justice is currently liaising with other parts of the SARG in order to consider fully the issues raised by the Panel.

4. This paper has been prepared for the assistance of the Panel based on the information currently available to the Department of Justice. The paper can be supplemented as required depending on any further information obtained or additional questions asked by the Panel. In this context, the Panel's questions with the Administration's responses are set out below.

Responses to the Panel's questions

(a) What is the Administration's policy on this question and the rationale for having such a policy?

5. It is the Administration's policy, within established guidelines, to pay compensation to persons who have suffered miscarriages of justice, including

persons who have been wrongfully imprisoned. The rationale of the policy is that it is just that such persons should be compensated for the resulting losses, such as loss of liberty and loss of earnings.

6. There are two compensation schemes, one of which is administrative and ex gratia and covers miscarriages of justice generally. The other scheme is statutory (under Article 11(5) of the Bill of Rights) and covers wrongful conviction and punishment only. The two schemes are described below. The interaction of the two schemes is the subject of an internal review by the Department of Justice.

(i) The administrative compensation scheme

7. An administrative ex gratia compensation scheme has operated for many years under Public Expenditure Head 106 Miscellaneous Services, Subhead 122 Compensation (see Annex I). Out of court settlements are among other items under the subhead. Applications for compensation may be made to the Solicitor General, or the Director of Public Prosecutions or the Law Officer (Civil) may refer a case of possible miscarriage of justice to the Solicitor General. The Deputy Financial Secretary was given the authority, delegated from the Finance Committee, to approve the payment of compensation to those deserving an ex gratia payment for damage done by the Government where it is not legally liable. The Deputy Financial Secretary determines the amount of payment after considering the circumstances of individual cases and the views of the Secretary for Justice and any other department or bureau concerned.

The statutory compensation scheme under Article 11(5) of the Bill of Rights

8. Article 11(5) of the Hong Kong Bill of Rights Ordinance (Cap. 383) provides that when a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment shall

be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time was wholly or partly attributable to him.

9. The Bill of Rights Ordinance provides for a claim for compensation under Article 11(5) to be determined by the court (unlike the position in England under section 133 of the Criminal Justice Act 1988 which provides for the Home Secretary to determine a claim administratively). Under section 6(1)(a) of the Ordinance, the court is expressly empowered, in any proceedings within its jurisdiction in an action for breach of the Bill of Rights, to grant such relief, or make such order, in respect of such a breach as it has power to grant or make in those proceedings and as it considers appropriate and just in the circumstances. If a claim under Article 11(5) could not be resolved with the Government amicably it would have to be adjudicated by the court like any other civil claim.

(b) Whether the Administration has received any application for compensation from persons described above.

10. According to our records, only one application for compensation from a person wrongfully imprisoned has been received by the Administration. This application was made in 2001 and remains the subject of correspondence between the Department of Justice and the applicant's legal advisers.

(c) Whether the Administration has received any complaints about the lack of compensation for persons described above; if yes, the number of such complaints in the last 10 years.

11. The Department of Justice has no record of any such complaints.

(d) Whether the Administration has information on overseas practices on the question described above.

12. In the United Kingdom, applications for compensation for wrongful conviction or charge of a criminal offence are considered first, under section 133 of

the Criminal Justice Act 1988 and then, if necessary, under the ex gratia arrangements announced by the Home Secretary in a statement to the House of Commons on 29 November 1985. A general guide to compensation, published by the Home Office, which includes both the 1985 statement and section 133 of the 1988 Act is attached (see Annex II).

13. Briefly, section 133 of the 1988 Act provides that compensation shall be paid where a conviction has been reversed on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted. Under section 133(5), “reversed” is defined as including a conviction having been quashed following an out of time appeal.

14. In the event that the requirements under section 133 are not met, the Home Secretary is prepared, in exceptional circumstances, to pay ex gratia compensation to persons who have spent a period in custody following a wrongful conviction or charge. Examples of such exceptional circumstances are where the Home Secretary is satisfied that the wrongful conviction or charge has resulted from serious default on the part of a member of a police force or of some other public authority; or where facts emerge at a trial or on appeal within time which completely exonerate the accused person.

(e) Whether there has been any public discussion on the policy issues relating to the question described above; and if yes, the details of such discussion.

15. The Department of Justice has no record of any such discussion.

Legal Policy Division

Department of Justice

January 2002

For discussion
on 14 October 1987

FCR(87-88)

ITEM FOR FINANCE COMMITTEE

HEAD 106 Miscellaneous Services
Subhead 122 Compensation

Members are invited to formally delegate to the Deputy Financial Secretary the authority to approve compensation to be paid to those deserving ex-gratia payment for damage done by Government where it is not legally liable.

Background

Provision under this vote is for settlement of claims made against the Government (other than compensation connected with land, public works and mails, and for civil servants under the Employees' Compensation Ordinance). Charges against this vote include -

- (a) out-of-court settlements;
- (b) payments of compensation or damages ordered by the courts;
- (c) payments of compensation for seized articles the return of which is either ordered by the courts or claimed by the owners concerned; and

- (d) settlement of claims brought by civil servants for loss or damage under the Civil Service Regulations.

2. The above list is however not intended to be exhaustive. This vote has been taken to cover, for example, those cases where the Government is subject to claims which are not legally enforceable but which clearly should be met.

3. There are a number of different types of such case. One that arises from time to time is innocent parties suffering damage in police raids or in the pursuit of criminals. Such parties only have a legal claim if there is negligence or malice on the part of the Police. Often, however, it is felt wrong that they should suffer from Police action (in some cases from their co-operation with the Police). Similar damage is occasionally caused by Fire Services' and other Departments' unavoidable actions or other similar situations where damage has been caused which is attributable to Government but is not the consequence of any liable negligence or malice. Compensation has been paid in ten such cases, totalling \$72,000, in the five years since Members last considered this subhead. Most of these cases involve sums in the range of \$1,000 or less.

4. There are also cases of more serious injustice affecting wrongly convicted individuals. In a recent case, two taxi-drivers were framed, and convicted, for traffic offences with the consequential loss of their livelihood until the framer was apprehended and the miscarriage of justice discovered. The Government is not legally liable for the unfortunate effects of wrongful convictions such as these, based as they are on due process of law. But it is recognised that there is a

strong moral obligation on Government to compensate the damages by ex-gratia payment. Such cases are very rare, though they may involve more damage and more expense than those in paragraph 3. The last case of a similar type, in 1984, involved compensation of \$12,000.

5. Some cases may arise from unintended and blameless damage indirectly caused by the Judiciary. In a recent instance, for example, a judge was unable to complete a case for unforeseeable reasons. In these and similar instances, the principles of the judicial system mean that parties are faced with re-hearings and therefore incur duplicated expense.

6. In cases such as those in paragraphs 3, 4 and 5, the Government has a moral obligation to pay compensation. However the level of delegation from the Finance Committee has not been formally specified.

Proposal

7. It is proposed, therefore, to state specifically that under this Subhead the Deputy Financial Secretary is delegated by the Finance Committee to approve ex-gratia payments of up to \$500,000 in cases where the Attorney General recommends that while there is no legal claim for compensation there is a strong moral obligation on the part of Government. The Deputy Financial Secretary shall determine the amount of payment after taking into consideration the circumstances of individual cases and the views of the Attorney General's Chambers and any other Department concerned.

Speaking Note for Chairman F.C.

Head 106 Miscellaneous Services

Subhead 122 Compensation

Head 106 Subhead 122 Compensation is for settlement of general claims against the Government other than those on works, contracts etc. As present spelt out it broadly covers payment not only of damages actually awarded by the court but also to those who have rightful claim against Government. This has covered cases where there is a strong moral claim on Government as well as those where there is a strictly legal claim. As there is no formal delegation in this respect and as a result of certain pending cases, it is considered appropriate to seek Finance Committee's approval for the formal delegation up to \$500,000.

(The Assistant Financial Secretary (C) can be is attendance if required).

(WP 427p/17p)

Payment of Compensation

1. The Home Secretary is prepared under certain specified circumstances to pay compensation to those who have been wrongly convicted or charged. These are set out in the then Home Secretary's statement to the House of Commons on 29 November 1985 (Annex A), the first part of which has now been reflected by the provisions of Section 133 of the Criminal Justice Act 1988 (Annex B). The legislation complies with international obligations [article 14(6) of the International Covenant on Civil and Political Rights].

How to apply for compensation

2. Applications should be made in writing to the Home Secretary and sent to the Compensation Section, Justice and Victims Unit, Home Office, Room 335, 50 Queen Anne's Gate, London SW1H 9AT. There is no standard application form. Applications should include the applicant's full name; place and date of conviction or details of charge; the circumstances in which the conviction was reversed or the charge dropped; and the reasons why the applicant feels compensation is due to him/her. Where charges were dropped it would be helpful to know which police force was involved.

How applications are decided

3. There is no general entitlement to recompense for wrongful conviction, for example where the prosecution is unable to sustain the burden of proof against the accused person. The Home Secretary will nevertheless consider any application which is made to him, examining it in turn under the statutory provisions and the ex-gratia arrangements:

(a) Statutory provisions

Briefly, compensation is payable under section 133 of the Criminal Justice Act 1988:

- if a conviction is quashed on an out-of-time appeal; or
- if a conviction is quashed after the case has been referred to the Court of Appeal by:
 - (i) the Home Secretary under section 17 of the Criminal Appeal Act 1968 before 31 March 1997 or
 - (ii) the Criminal Cases Review Commission under section 9 of the Criminal Appeal Act 1995 on or after 31 March 1997; or
- if a Free Pardon is granted;

in each case after the emergence of some new evidence, and provided the non-disclosure of this evidence was not wholly or partially attributable to the applicant.

(b) Ex-gratia scheme

Alternatively, the Home Secretary may make an ex-gratia payment in certain exceptional cases where the applicant has spent time in custody, for example where there is serious default by a public authority, such as the police, or if an accused person is completely exonerated (whether at trial or on appeal).

Awards of compensation

4. The Home Secretary takes the final decision as to whether the applicant qualifies for payment. An independent assessor determines the amount of the award in all cases. It is not the Home Secretary's normal practice to publish details of individual awards.

TEXT OF PART OF WRITTEN ANSWER TO HOUSE OF COMMONS ON 29 NOVEMBER 1985 ABOUT COMPENSATION FOR WRONGFUL CONVICTION [REFERENCE HANSARD COLUMNS 691-692]

Mr. Hurd: "There is no statutory provision for the payment of compensation from public funds to persons charged with offences who are acquitted at trial or whose convictions are quashed on appeal, or to those granted free pardons by the exercise of the royal prerogative of mercy. Persons who have grounds for an action for unlawful arrest or malicious prosecution have a remedy in the civil courts against the person or authority responsible. For many years, however, it has been the practice for the Home Secretary, in exceptional circumstances, to authorise on application *ex gratia* payments from public funds to persons who have been detained in custody as a result of a wrongful conviction."

[The next passage of the Home Secretary's answer referred to his preparedness to pay compensation as required by the Government's international obligations. The wording of the quoted article 14.6 of the international covenant on civil and political rights was to be very closely followed in subsequent legislation - that is section 133 of the Criminal Justice Act 1988].

"I remain prepared to pay compensation to people who do not fall within the terms of the preceding paragraph but who have spent a period in custody following a wrongful conviction or charge, where I am satisfied that it has resulted from serious default on the part of a member of a police force or of some other public authority."

"There may be exceptional circumstances that justify compensation in cases outside these categories. In particular, facts may emerge at trial, or on appeal within time, that completely exonerate the accused person. I am prepared, in principle, to pay compensation to people who have spent a period in custody or have been imprisoned in cases such as this. I will not, however, be prepared to pay compensation simply because at the trial or an appeal the prosecution was unable to sustain the burden of proof beyond a reasonable doubt in relation to the specific charge that was brought."

"It has been the practice since 1957 for the amount of compensation to be fixed on the advice and recommendation of an independent assessor who, in considering claims, applies principles analogous to those on which claims for damages arising from civil wrongs are settled. The procedure followed was described by the then Home Secretary in a written reply to a question in the House of Commons on 29 July 1976 at columns 328-330. Although successive Home Secretaries have always accepted the assessor's advice, they have not been bound to do so. In future, however, I shall regard any recommendation as to amount made by the assessor in accordance with those principles as binding upon me. I have appointed Mr. Michael Ogden QC* as the assessor for England and Wales. He will also assess any case that arises in Northern Ireland, where my right hon. Friend the Secretary of State for Northern Ireland intends to follow similar practice."

NOTES: * Sir David Calcutt QC currently acts as assessor.

It was announced on 17 June 1997 that the Home Secretary and the Secretary of State for Northern Ireland will continue to be bound by the provisions for *ex-gratia* payment of compensation as set out in Mr Hurd's statement.

**TEXT OF SECTION 133 OF THE CRIMINAL JUSTICE ACT 1988:
COMPENSATION FOR MISCARRIAGES OF JUSTICE**

- (1) Subject to subsection (2) below, when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction or, if he is dead, to his personal representatives, unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted.
- (2) No payment of compensation under this section shall be made unless an application for such compensation has been made to the Secretary of State.
- (3) The question whether there is a right to compensation under this section shall be determined by the Secretary of State.
- (4) If the Secretary of State determines that there is a right to such compensation, the amount of the compensation shall be assessed by an assessor appointed by the Secretary of State.
- (4A)~~≠~~ In assessing so much of any compensation payable under this section to or in respect of a person as is attributable to suffering, harm to reputation or similar damage, the assessor shall have regard in particular to-
- (a) the seriousness of the offence of which the person was convicted and the severity of the punishment resulting from the conviction;
 - (b) the conduct of the investigation and prosecution of the offence; and
 - (c) any other convictions of the person and any punishment resulting from them.
- (5) In this section "reversed" shall be construed as referring to a conviction having been quashed -
- (a) on an appeal out of time; or
 - (b) * on a reference -
 - (i) under the Criminal Appeal Act 1995; or
 - (ii) under section 263 of the Criminal Procedure (Scotland) Act 1975.
- (6) For the purposes of this section a person suffers punishment as a result of a conviction when sentence is passed on him for the offence of which he was convicted.
- (7) Schedule 12** shall have effect.

NOTES:

≠ Section 133(4A) of the 1988 Act was inserted by section 28 of the Criminal Appeal Act 1995 and came into force on 1 January 1996.

* Section 133(5)(b) was amended with effect from 31 March 1997 by Schedule 2, paragraph 16(4) of the Criminal Appeal Act 1995, by:

- substitution in sub-paragraph (i) of a reference to the Criminal Appeal Act 1995 instead of the reference to section 17 of the Criminal Appeal Act 1968 and
- omission of sub-paragraph (iii) (reference under section 14 of the Criminal Appeal (Northern Ireland) Act 1980).

The above amendments do not apply in relation to a reference made under section 17 of the above 1968 Act or under section 14 of the above 1980 Act before 31 March 1997.

** Schedule 12 deals with matters of appointment, removal from office, remuneration and qualification of the person to be appointed as assessor.

COMPENSATION FOR MISCARRIAGES OF JUSTICE

NOTE FOR SUCCESSFUL APPLICANTS

General

A decision to pay compensation in accordance with the provisions of section 133 of the Criminal Justice Act 1988, or to make an ex gratia payment from public funds in accordance with the then Home Secretary's Statement to Parliament on 29 November 1985*, does not imply any admission on the part of the Secretary of State of legal liability (other than a legal duty to pay compensation under the terms of section 133). Such decisions are not based on considerations of liability, for which there are appropriate remedies at civil law. The payment is made in recognition of the hardship caused by a wrongful charge or conviction and notwithstanding that the circumstances may give no grounds for a claim of civil damages.

Procedure for assessing the amount of the payment

2. The assessment of compensation is undertaken by an independent assessor, appointed by the Home Secretary, who is experienced in the assessment of damages. One or more interim payments may be made by the assessor before the final amount is determined. The amount of any interim payments will be paid generally on account and will be deducted from the final award.

3. The independent assessment is made on the basis of written submissions setting out the relevant facts. When the applicant or his/her solicitor is first informed that a payment will be offered, an invitation is extended for the submission to the Home Office of any information or representations which the claimant would like the assessor to take into account when considering the amount to be paid. Based on this material a draft memorandum is prepared by the Home Office, to include:
 - (a) a full statement of the facts of the case;

 - (b) any available information on the applicant's circumstances and antecedents;

- (c) the claimant's date of birth and those of any children of the claimant;
- (d) any special features in the case which might be considered relevant to the amount to be paid;
- (e) any comments which the Home Office may wish to make, in its discretion, on any aspect of the claim; and
- (f) incorporation of comments or representations received from or on behalf of the claimant.

4. A draft of the completed memorandum will be sent to the claimant or his solicitor for any further comments which they may wish to make. Amendments to the memorandum will be made where possible; alternatively a copy of the comments will be made available to the assessor with the submission of the memorandum. The assessor may, through the Home Office, seek further information or clarification arising from the material placed before him.

5. In reaching his assessment, the assessor will apply principles analogous to those governing the assessment of damages for civil wrongs. The assessment will take account of both pecuniary and non-pecuniary loss arising from the wrongful charge or conviction and/or loss of liberty, and any or all of the following factors may be relevant according to the circumstances:

5.1 **Personal pecuniary loss**

- (a) loss of earnings as a result of the charge or conviction (to be supported by best available documentary evidence, together with details of any State benefits received during the same period);
- (b) loss of future earning capacity;
- (c) legal costs incurred;

- (d) additional expenses incurred, eg for travelling, in consequence of detention, including such expenses incurred by the claimant's immediate family.

5.2 Non-pecuniary loss

Damage to character or reputation; hardship, including mental suffering; injury to feelings, and inconvenience.

6. When making his assessment, the assessor will take into account any expenses, legal or otherwise, incurred by the claimant in reversing his conviction, or pursuing the claim for compensation. In submitting their observations solicitors should state, as well as any other expenses incurred by the claimant, what their own itemised costs are, to enable them to be included in the assessment.

7. In considering the circumstances leading to the wrongful charge or conviction the assessor will also have regard, where appropriate, to the extent to which the situation might be attributable to any action, or failure to act, by the police or other public authority, or might have been contributed to by the claimant's own conduct. Although the amount awarded will take account of this factor, it will not include any element analogous to exemplary or punitive damages. The assessor will also have regard to any other convictions of the claimant and any punishment resulting from them.

8. Under section 133(4) of the 1988 Act the determination of the amount of the award is entirely for the assessor. The Home Secretary has no power to vary that determination. Although in ex gratia claims the assessor's role is strictly to advise the Home Secretary of the amount to be paid, successive Home Secretaries* have agreed to be bound by the assessor's recommendation. All claimants are provided with a written note from the assessor setting out the basis on which he has reached his decision.

9. The assessor will not enter into correspondence or discussion about his award; the Secretary of State would consider approaching him on a claimant's behalf only if, in response to written representations, there were good grounds for believing that the assessor had failed to take a material point into account, or had taken into account erroneous or irrelevant material. A

claimant is not bound to accept the award finally made; he can pursue the matter by other means, for example by way of a civil claim for damages, if he considers that such a claim can be established against any person or agency.

Publicity

10. In the interests of a successful claimant, the Home Office will not normally make any public or other statement about the amount of an award in a particular case. Where he has reason to believe that any civil proceedings are being, or may be pursued, the Secretary of State will notify the quantum of compensation awarded by the assessor, for use strictly in any such proceedings, to the defendants involved. The purpose of this procedure is to prevent a double recovery.

11. Generally speaking no individual claimant will be identified by name. The Home Office will advise enquirers, for example from the press, to contact the claimant, his solicitors or other agent. The Home Office should be advised whether or not the claimant wishes this practice to be followed. Government Ministers have responsibility for accounting for public expenditure and the Home Secretary must therefore be ready to answer any such specific queries by Members of Parliament. However, it is not normal practice to reveal the names of individuals receiving payments of compensation. Nevertheless, the Home Office cannot undertake to prevent press queries or reports.

NOTE:

* It was announced on 17 June 1997 that the Home Secretary and the Secretary of State for Northern Ireland will continue to be bound by the provisions for ex-gratia payment of compensation as set out in Mr Hurd's statement.

Home Office

June 1997