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23 November 2009

Clerk to the Subcommittee on
Rules of the High Court (Amendment) Rules 2009
Legislative Council Building
8 Jackson Road
Central
Hong Kong
(Attn: Miss Mary So)

Dear Miss So,

**Subcommittee on Rules of the High Court
(Amendment) Rules 2009**

I refer to the meeting of the captioned Subcommittee held on 16 November 2009 during which Members requested that the Administration to seek the advice of the Judiciary on whether Rule 18(3) of the new Order 117A of the Rules of the High Court (Amendment) Rules 2009 (“Amendment Rules), LegCo Members would like to know how the Rule would operate in practice, and) whether the court has the necessary provisions (space, restricted access, etc) to meet with the requirements. The Administration’s response is set out in the following paragraphs.

The Judiciary has noted that Rule 18 of Order 117A provides that -

- (1) An application under section 12A, 12B, 12C or 12G must be heard in camera.
- (2) The information and all other documents relating to the application must be treated as confidential and must, immediately on the determination of the application, be placed in a packet and sealed by order of the judge by whom the application was heard.
- (3) The packet must be kept in the custody of the Court in a place to which the public has no access or in such other place as the judge may authorize and -

- (a) must not be opened nor must its contents be removed except by order of a judge; and
- (b) must not be destroyed except pursuant to an order of the Court.

At present, the courts already handle on a regular basis documents that need to be treated confidentially. The Judiciary has confirmed that the existing provisions of the Judiciary are sufficient to meet the requirements of Rule 18(3) of the new Order 117A . The Judiciary envisages no difficulties in the security aspects. If necessary, the Judiciary would take steps to enhance the present arrangements.

Application for compensation under section 18 of the United Nations (Anti-Terrorism Measures) Ordinance (“the Ordinance”)

Under Rule 25 of the new Order 117A, an application for an order for compensation under section 18 of the Ordinance is to be made, if in the court there are existing proceedings conducted under the Ordinance in respect of the person or property to whom or which the application relates, by a summons, or if there are no such proceedings, by an expedited originating summons. The Amendment Rules specify the timeframe for serving the summons or expedited originating summons, and affidavit in support, if any, on SJ and any other person on whose part, it is alleged, there has been default, as well as for the serving of any affidavit in opposition by SJ.

Rule 25(2)(b) of the new Order 117A is not restricted to any particular class of person who might have been alleged to have made a mistake in connection with specifying persons and property as terrorists, terrorist associates or terrorist property or with the exercise of powers under a warrant issued under section 12G of the Ordinance.

The substantive right to statutory compensation under section 18 of the Ordinance is premised on there having been some default on the part of any person concerned and the applicant has, in consequence of such specification, seizure or detention and the default, suffered loss. Rule 25(2) provides for the procedural steps for making such an application, including that the applicant must serve the application together with the affidavit in support on the Secretary for Justice and “on any other person on whose part, it is alleged, there has been default”. The liability to pay statutory compensation, if and when established to the satisfaction of the Court, lies with the HKSAR Government. Where the applicant alleges any default on the part of the Government as a whole, the allegations will be brought to the notice of the Government when the Secretary for Justice is served under Rule 25(2)(a). If, however, the applicant alleges specifically that there has been default on "any other person" relevant to his claim, it is considered fair and appropriate that Rule 25(2)(b) requires the application to be served on such other person so that he can rebut any specific allegation against him as he thinks fit.

The procedure under Rule 25(2) cannot have the effect of depriving an applicant of his right to compensation under section 18 if he is otherwise entitled as a matter of substantive law. Provided that the allegations of default on the part of the Government are sufficiently set out in his application and affidavit in support, the Court will be in a position to adjudicate the applicant's claim for compensation. In the event that provision of additional information or documents by the applicant or the Government, as the case may be, should be necessary, the Court can give any direction as appropriate. The Administration does not consider that an applicant is procedurally barred from making the application for compensation under section 18 merely because the applicant does not allege or know who the other persons covered by Rule 25(2)(b) are.

In short, even though the applicant does not specifically name a person who is in default and therefore does not serve the relevant documents in accordance with Rule 25(2)(b), this fact alone does not prevent him from proceeding with his claim under section 18 and Rule 25 of Order 117A. Further, in a case where the applicant does not know the whereabouts of any such other person mentioned in Rule 25(2)(b) such that no address is available for effecting service of the application under section 18, there is a provision of general application in Order 65 Rule 9 that the relevant document need not be served on that person unless the Court otherwise directs or any of the court rules otherwise provides. Accordingly, Rule 25 does not purport to impose, by way of Rule 25 (2)(b), any procedural hindrance against the making of an application otherwise entitled under section 18.

Yours sincerely,

(David Lau)
for Secretary for Security