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24 June 2014

Ms Debbie Yau
Clerk to Panel on Administration of Justice and Legal Services
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Hong Kong

Dear Ms Yau,

Re: Compensation for Wrongful Conviction
Written Reply to Questions raised during the Meeting
held on 25 March 2014

As requested by Members at the captioned meeting, the Administration sets out below: (a) the number of serious wrongful conviction cases in the past five years; and (b) the amount of money set aside for the payment of *ex gratia* compensation under the administrative scheme in the past five years. The Administration would also like to take this opportunity to invite Members to note the revised administrative guidelines for the payment of *ex gratia* compensation.

The number of serious wrongful convictions

The Administration was asked to provide the number of serious wrongful conviction cases in the past 5 years resulting in the persons concerned spending time in custody. In this connection, the Administration would like to refer the Panel to the administrative guidelines for the payment of *ex gratia* compensation as summarised in paragraph 4 of LC Paper No CB(4)486/13-14(06) ("the Paper"). As mentioned in the Paper, there were 9 applications in the past 5 years for *ex gratia* payments under the administrative scheme and only one application was successful.

It can be seen from the explanation set out in **Annex A** that the administrative scheme is meant to cater for very exceptional cases. The mere fact

that a person has spent time in custody and his conviction has been quashed by an appellate court does not necessarily mean that he can successfully claim *ex gratia* payment.

It is only when a convicted person whose conviction was quashed applies for *ex gratia* payment for miscarriage of justice will the Solicitor General look into the case to consider whether it falls within the administrative guidelines. No separate statistics is kept by the Administration on the number of "serious wrongful conviction cases".

Amount of money set aside for *ex gratia* payment

The Administration was asked to provide information on the amount of money set aside for the payment of *ex gratia* compensation under the administrative scheme each year in the past 5 years. In each of those years, the Administration made provision for *ex gratia* compensation under the administrative scheme to be paid out of the vote of Head 106 Miscellaneous Services *Subhead 284 Compensation*. Apart from *ex gratia* compensation under the administrative scheme, the vote also provides for settlement of claims against Government (other than compensation connected with land, public works and mail, and for civil servants under the Employees' Compensation Ordinance (Cap 282)) and for certain other *ex gratia* payments.

The amount of provision required annually for *ex gratia* compensation under the administrative scheme is based on the estimate by the Department of Justice in consultation with bureaux and other departments. Based on record of the Department of Justice, the number of successful cases is few and the amount involved is not substantial. Funding requirement for such cases, if it arises, should adequately be covered within the provision.

Revised Information Note

Information relating to applications for *ex gratia* payments has been included in an information note entitled "Compensation for persons wrongfully imprisoned – Information for claimants", which was published in September 2009 ("2009 Information Note"). Paragraph 5 of the 2009 Information Note provides as follows:

> "Alternatively, the Government may make an *ex gratia* payment, in certain exceptional cases, where the claimant has spent time in custody following a wrongful conviction or charge resulting from serious default by the police or other public authority. This might be the case, for example, when bail was refused because of incorrect information given to the court by the prosecutor or the

police, or where police suppressed material evidence which would have helped to exonerate a convicted person. **Compensation may also be payable on this basis where the wrongful act was that of a judge or magistrate, but payment in such cases should only be made on the recommendation of the judiciary.**" (emphasis added.)

On a recent occasion, we have sought the views of the Judiciary Administrator ("JA") on the above arrangement to consult the Judiciary for applications involving alleged wrongful acts on the part of a judge or a magistrate, as provided in the 2009 Information Note. JA is of the view that in accordance with the principle of judicial independence, it is inappropriate for the Judiciary to make any further comments on matters relating to the conduct of a judge or magistrate which have been dealt with by the appellate court in allowing the appeal of the applicant. JA takes the view that it would be appropriate for the Government to assess these applications having regard to the relevant judicial views that the court(s) may have expressed during any appeal or review process(es) of the cases concerned. Having carefully considered the views of JA, the Administration has revised the guidelines. The updated Information Note is attached as **Annex B** for Members' information. Opportunity has also been taken to set out briefly the assessment procedure for applications of *ex gratia* payment in paragraph 8 of the Information Note. The updated Information Note has been uploaded to the Department of Justice's website at http://www.doj.gov.hk/eng/archive/pdf/ann20140617e.pdf for public information.

Yours faithfully,

(LEE Tin-yan)
Assistant Solicitor General
General Legal Policy Unit 2
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Encl.

Annex A

The Administrative Guidelines on *Ex Gratia* Payment

The Administration would like to set out in some details the administrative guidelines for the payment of *ex gratia* compensation as summarised in paragraph 4 (a) to (c) of the Paper as follows:

Para. 4(a): Free Pardon, CE Referral and Appeal Out of Time

2. The guidelines set out in paragraph 4(a) of the Paper provide that for an application to be eligible for compensation, it must be shown that the applicant's case falls within one of the following three categories: (a) he received a free pardon from the Chief Executive ("CE") who exercised his power under Article 48(12) of the Basic Law; (b) his conviction was quashed following a reference to the Court of Appeal by the CE; or (c) his conviction was quashed following an appeal out of time. The Administration would like to elaborate on these three categories as follows:

(a) Pardon

3. The CE is empowered under Article 48(12) of the Basic Law to "pardon persons convicted of criminal offences or commute their penalties". A pardon removes the criminal element of the offence named in the pardon but does not create any factual fiction, or raise an inference that the person pardoned had not in fact committed the crime for which the pardon had been granted[1]. In Hong Kong, circumstances where a free pardon is granted have been confined to: known or strongly suspected cases of "miscarriage of justice"; on legal grounds; or where there is an ascertained innocence or a doubt of guilt. It would not be granted where it is not in the public interest, e.g. to help the person to emigrate.

(b) Chief Executive's Referral to the Court of Appeal

4. The CE's power to refer a case to the Court of Appeal in respect of a conviction on indictment is found in Section 83P of the Criminal Procedure Ordinance (Cap. 221).[2] *R v Home Secretary, ex parte Hickey (No. 2)* [1995] 1 WLR 734 is the

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[1] *Re Royal Commission on Thomas Case* [1980] 1 NZLR 602 at 620.

[2] Section 83P of Cap. 221 provides as follows:
"*(1) Where a person has been convicted on indictment or been tried on indictment and found not guilty by reason of insanity, or been found by a jury to be under disability, the Chief Executive may, if he thinks fit, at any time either-*

(a) refer the whole case to the Court of Appeal and the case shall then be treated for

leading authority on the equivalent English legislation (Section 17(1) of the Criminal Appeal Act 1968). *Hickey* makes it plain that, in the exercise of his discretion under Section 83P(1), the CE is required to ask himself –

(1) whether the material presented in a petition is new and therefore unsighted by the court; and

(2) whether such material, if referred under Section 83P(1), could reasonably cause the Court of Appeal to regard the relevant conviction as unsafe.

(c) Appeal out of time

5. The Court of Appeal in *HKSAR v Medina and Another* (CACC 296/2007) held that in considering whether leave should be given to appeal out of time, the courts will look at the length of the delay, the reasons advanced for the delay and generally the bona fides of the application for extension of time. The courts will also look at the ground of the proposed appeal to see whether, by refusing leave to appeal, the courts were not shutting out a substantial and plainly arguable ground of appeal. Substantial grounds must be shown for the delay before the courts would grant indulgence, and the longer the delay, the more onerous is the duty of the applicant. The above are well established principles, see *R v Wong Kai Kong and Another* [1990] 1 HKC 279 at 280H to 281D, *HKSAR v Leung Yiu Ming and Another* [2000] 1 HKLRD 247 at 249G to 250A.

6. It can be seen from the above explanation that the administrative scheme is meant to cater for very exceptional cases. The mere fact that a person has spent time in custody and his conviction has been quashed by an appellate court does not necessarily mean that he can successfully claim for *ex gratia* payment.

Para. 4(b): Wrongful conviction resulting from serious default by public authority

7. Paragraph 4(b) of the Paper states the existing policy that compensation may be payable where a person has spent time in custody following a "**wrongful conviction or charge resulting from serious default by the police or other public authority**" (emphasis added).

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all purposes as an appeal to the Court of Appeal by that person; or

(b) if he desires the assistance of the Court of Appeal on any point arising in the case, refer that point to the Court of Appeal for its opinion thereon, and the Court of Appeal shall consider the point so referred and furnish the Chief Executive with its opinion thereon accordingly."

8. The expression "*wrongful conviction*" includes the conviction of those who are innocent of the crime of which they have been convicted and would be extended to those who, whether guilty or not, should clearly not have been convicted at their trials. The common factor in such cases as held by the House of Lords in the United Kingdom is that something had gone seriously wrong in the investigation of the offence or in the conduct of the trial, resulting in the conviction of someone who should not have been convicted (*R. (on the application of Mullen) v Secretary of State for the Home Department* [2005] 1 AC 1 (H.L.).

9. In his speech in the *Mullen* case, Lord Bingham gave several examples of "*wrongful convictions*":

> "*It is impossible and unnecessary to identify the manifold reasons why a defendant may be convicted when he should not have been. It may be because the evidence against him was fabricated or perjured. It may be because flawed expert evidence was relied on to secure conviction. It may be because evidence helpful to the defence was concealed or withheld. It may be because the jury was the subject of malicious interference. It may be because of judicial unfairness or misdirection. In cases of this kind, it may, or more often may not, be possible to say that a defendant is innocent, but it is possible to say that he has been wrongly convicted.*" (At p.24, para.4)

10. Just as a period in custody not resulting from a wrongful conviction or charge does not qualify for the compensation, a wrongful conviction or charge resulting in a person spending time in custody also does not by itself fall within the guidelines for the compensation. It is only a "serious default" of the police or other public authority in relation to the conviction or charge which can found an application for compensation.

11. Some United Kingdom authorities had interpreted the term "serious default". One can assess the level of seriousness of the default as emerges from the judgment of the appellate court (*Re Boyle's Application for Judicial Review* [2008] NICA 35, para.30).

12. If it is necessary to consider the question and make a judgment, the Solicitor General has to be properly guided by the judgment of the court which quashed the conviction. It would not generally be open to him to treat as minor what the court had treated as serious, or vice versa. It is not for the Solicitor General to go behind the judgment of the court (*In re McFarland* [2004] 1 WLR 1289 (H.L.) (N.I.), p.1279 - 1280, paras.16 & 17).

Para. 4(c): Outstandingly Deserving Cases

13. Paragraph 4(c) of the Paper sets out the existing policy that compensation may also be payable in “outstandingly deserving cases”. In the United Kingdom, compensation for persons wrongfully imprisoned had previously been paid in “exceptional circumstances” as formalised by a policy statement by the then Home Secretary on 29 November 1985 (“the Policy Statement”). The English and Irish cases on the interpretation of “exceptional circumstances” under the Policy Statement may be relevant to the interpretation of “outstandingly deserving cases” under paragraph 4(c) of the Paper.

14. In *R. (on the application of Raissi) v Secretary of State for the Home Department* [2008] QB 836 (CA) at p.880, Hooper LJ stated as follows:

> “*In our view, the Divisional Court was right on this issue. The “exceptional circumstances” provision in paragraph 2 of the scheme* <u>*cannot be read as a freestanding route*</u>*, entitling an applicant to compensation for unjustified detention provided that the merits were sufficiently strong. In our view, paragraph 2 must be understood to provide flexibility to grant compensation where the circumstances do not fit entirely into the requirements of paragraph 1 but are akin to those requirements and are of real merit…But, if we were wrong about the interpretation of paragraph 1, we would say that paragraph 2 entitled and indeed required the Home Secretary to consider a case of this kind where the substance of the allegation or charge against the claimant which resulted in his loss of liberty was that he was a terrorist,* <u>*a charge of which he has been completely exonerated*</u>.” (At para.154 – emphasis added)

15. It would be wrong to use one case in which compensation had been awarded as the bench mark against which to test all other cases where claims based on the actions of a judge were advanced. The test under the scheme is not whether one case is as grave as another, but rather whether, even if less grave, it amounted to “exceptional circumstances” (*R. v Secretary of State for the Home Department Ex p. Tawfick* [2001] ACD 28).

16. There is nothing exceptional about the ultimate quashing or substitution of a conviction after one or more unsuccessful appeals. A legal system can promise to be fair, but it cannot promise to be infallible. Even if the trial had been unfair, it does not follow that the Solicitor General is required to bring it within the *ex gratia* scheme unless something which he views as exceptional has occurred (*R. (on the application of Christofides) v Secretary of State for the Home Department* [2002] 1 W.L.R. 2769, p.2779, para.39).

17. Not every error by a judge should necessarily be considered exceptional. A case of mere judicial error, such as a mistake in a summing-up or in a ruling as to admissibility, would not constitute "exceptional circumstances". It is necessary to establish that the misconduct did cause the period in custody in respect of which compensation was sought. To distinguish between error on the one hand and misconduct on the other is of little assistance in providing an answer to the test of "exceptional circumstances" posed in the *ex gratia* scheme. It is necessary to concentrate upon the actions of the judge and to decide whether they amount to "exceptional circumstances" (*R. v Secretary of State for the Home Department Ex p. Tawfick* [2001] ACD 28, p.174 – 5, para.H13).

18. It can be seen from the above explanation that the mere fact that a person has spent time in custody and his conviction has been quashed by an appellate court does not necessarily mean that he can successfully claim for *ex gratia* payment. The administrative scheme is meant to cater for very exceptional cases.

Annex B

Compensation for persons wrongfully imprisoned Information for claimants

The Government is prepared under certain circumstances to pay compensation to those who have spent time in custody following a wrongful conviction or charge. There are two compensation schemes, one under statutory provisions and the other under administrative arrangements.

No general entitlement

2. There is no general entitlement to recompense for wrongful conviction or charge. For example, compensation will not be awarded in cases where at the trial or on appeal the prosecution was unable to prove its case beyond reasonable doubt against the accused person, or where the conviction was quashed on a technicality. Where circumstances are such that compensation could be awarded, it may be refused or reduced if the claimant was wholly or partly to blame for his misfortune: for example, where he deliberately withheld evidence which would have demonstrated his innocence.

Statutory provisions

3. Compensation is payable under Article 11(5) of the Hong Kong Bill of Rights, as provided for in the Hong Kong Bill of Rights Ordinance (Cap. 383). The Article 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 as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in

time is wholly or partly attributable to him."

4. If a claim under Article 11(5) cannot be resolved with the Government amicably, it will have to be adjudicated by the court like any other civil claim.

Ex gratia arrangements

5. Alternatively, the Government may make an *ex gratia* payment, in certain exceptional cases, where the claimant has spent time in custody following a wrongful conviction or charge resulting from serious default by the police or other public authority. This might be the case, for example, when bail was refused because of incorrect information given to the court by the prosecutor or the police, or where police suppressed material evidence which would have helped to exonerate a convicted person. Compensation may also be payable on this basis where the wrongful act was that of a judge or magistrate. The Government will assess these applications having regard to any relevant judicial views that the court(s) may have expressed during any appeal or review process(es) of the cases concerned and all other available and relevant materials.

How to apply for compensation

6. Applications should be made in writing to the Department of Justice, 23rd Floor, High Block, Queensway Government Offices, 66 Queensway, Hong Kong. Alternatively, you may apply by fax at (852) 2877 2353 or by e-mail to dojinfo@doj.gov.hk.

7. There is no standard application form. Applications should include the applicant's full name, date of birth, place and date of conviction and details of charge, the circumstances in which the conviction was reversed or the charge dropped, and the reasons why the applicant considers that compensation is due to him or her. Where charges were dropped it would be helpful to know which police, ICAC or correctional services unit was involved.

8. The Department of Justice will consider any application which is

made, examining it as appropriate under the statutory provisions and the *ex gratia* arrangements. Applications for ex gratia payments under the administrative scheme are handled by the Solicitor General with the assistance of counsel within the Legal Policy Division of the Department of Justice. Where necessary or appropriate, outside independent counsel's advice will also be sought. The Solicitor General is solely responsible for the final decision having regard to the administrative guidelines and all relevant circumstances of each case. If the Solicitor General decides that a particular case falls within the administrative guidelines, the amount payable will be determined by the Secretary for Financial Services and the Treasury, taking into account the views of the Department of Justice and any other affected department or bureau. It is not the Government's normal practice to publish details of individual awards.

Department of Justice
June 2014