

Legislative Council Panel on Security

Review of compensation provision under the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575)

Purpose

This note provides information on the review of the compensation provision under the United Nations (Anti-Terrorism Measures) Ordinance (the Ordinance) (Cap. 575).

Background

2. The Ordinance implements the mandatory elements of the United Nations Security Council Resolution 1373 and the most pressing elements of the Special Recommendations of the Financial Action Task Force on Money Laundering for combatting the financing of terrorism. The Ordinance was passed by the Legislative Council on 12 July 2002 and a substantive part of it has come into operation with effect from 23 August 2002.

Provisions for compensation

3. Section 5 of the Ordinance provides that the Chief Executive may apply to the Court of First Instance for an order to specify a terrorist, terrorist associate or terrorist property. Section 6 provides that where the Secretary for Security has reasonable grounds to suspect that any funds are terrorist property, the Secretary may, by notice in writing freeze the funds. Section 17 provides for an appeal mechanism whereby affected persons can apply to the Court of First Instance to revoke a specification order or notice.

4. Section 18 further provides that where a person or property has ceased to be specified under section 5 or 6 respectively (as for example, the specification order or notice has been revoked under section 17), then the Court of First Instance may, on application by the affected person, order compensation to be paid by the Government to the applicant, having regard to all the circumstances. In this regard, the Court of First Instance will have to be satisfied that -

- (a) at no time when the person concerned was specified as a terrorist or terrorist associate was the person either a terrorist or terrorist associate;

- (b) at no time when the property was specified as terrorist property was the property terrorist property;
- (c) there has been some serious default on the part of any person concerned in obtaining the specification; and
- (d) the applicant has, in consequence of the relevant specification and the default mentioned in paragraph (c) above, suffered loss.

The amount of compensation to be paid by the Government shall be determined by the Court of First Instance as it thinks just.

Members' concerns

5. When scrutinizing the Ordinance before its passage, certain Members had expressed concerns that the above compensation arrangement was not of practical benefit to the affected persons, the main reason being that it would be difficult for the affected persons to satisfy the court that there had been "serious default" on the part of the Government. Some Members had intended to move Committee Stage amendments (CSAs) to the compensation provision to provide for a lower test. However, the CSAs were ruled by the President as having a charging effect and were not put forward.

6. As Members' suggested amendments might feature differences from the compensation criteria under the common law, we had explained the difficulty in accepting the amendments given their impact on existing compensation policy, public expenditure as well as the compensation arrangement for ensuing civil litigation. However, having duly noted Members' views, we had undertaken to review the compensation provision under the Ordinance in consultation with the relevant bureaux and departments, and report to Members within six months of the commencement of the Ordinance.

Review of compensation provision

7. We have carefully looked at the various elements in the compensation provision. The results of our review are set out in the ensuing paragraphs.

(a) That at no time when the person or property was specified as terrorist/terrorist associate or terrorist property was the person or property a terrorist/terrorist associate or terrorist property, as the case may be

8. Some Members expressed concerns that the criteria in section 18(2)(a) and (b) will require the affected person to prove that he/she was not a terrorist/terrorist associate or that the property was not terrorist property.

9. In this respect, we would observe that if a person or property is “wrongfully” specified by the Government, it will be open to the affected person to appeal to the Court of First Instance under section 17 to revoke the specification order, in which case the presumption under section 5 that the person or property is a terrorist/terrorist associate or terrorist property, as the case may be, will no longer apply. Under the appeal procedure, the Government will bear the burden of proof and have to satisfy the Court of First Instance that the person or property specified is a terrorist/terrorist associate or terrorist property as appropriate. If the specification order is revoked under section 17, the affected person will be able to satisfy the court pursuant to section 18(2)(a) or (b) that he/she or the property in question is not a terrorist/terrorist associate or terrorist property, as the case may be. Accordingly, for practical purposes, compensation will be able to be claimed if the Government cannot satisfy the court that its original specification was correct.

(b) That there has been some serious default on the part of the Government in obtaining the relevant specification

10. We have looked at the question of serious default in the context of the position at common law, the position under the legislation of other jurisdictions (in particular anti-terrorism laws) and the position under Hong Kong legislation.

The position at common law

11. Wade & Forsyth’s Administrative Law (8th Ed, p.753, paragraph 2) states that -

“Although important questions remain to be answered, there is a clear tendency, in England at least, against applying the ordinary law of negligence to discretionary administrative decisions. The decisions of licensing authorities, for example, may be held ultra vires and quashed if proper attention is not given to the case. But there is no indication

that actions for damages will lie for any resulting loss, merely because negligence can be shown.”

12. In Dorset Yacht Co Ltd v Home Office [1970] AC 1004 Lord Reid (at 1031) stated -

“When Parliament confers a discretion there may, and almost certainly will, be errors of judgment in exercising such a discretion and Parliament cannot have intended that members of the public should be entitled to sue in respect of such errors. But there must come a stage when the discretion is exercised so carelessly or unreasonably that there has been no real exercise of the discretion which Parliament has conferred. The person exercising the discretion has acted in abuse or excess of his power. Parliament cannot be supposed to have granted immunity to persons who do that.”

13. The issue came before the English Court of Appeal in May 2002 in Hughes & Others v HM Customs and Excise. In that case Hooper J, in considering an argument that Article 1 of the First Protocol of the European Convention on Human Rights required that compensation be paid, made the following observations -

“I entirely accept that an acquitted (or indeed unconvicted) defendant must for these purposes be regarded as an innocent person I cannot accept, however, that for this reason it must be regarded as disproportionate, still less arbitrary (another contention advanced by the respondent) to leave the defendant against whom restraint and receivership orders have been made uncompensated for such loss as they may have caused him – unless, of course, by establishing “some serious default” on the prosecutor’s part he can bring himself within the strict requirement of section 89 [of the Criminal Justice Act].

It is common ground that acquitted defendants are not, save in the most exceptional circumstances, entitled to compensation for being deprived of their liberty whilst on remand or indeed for any other heads of loss suffered through being prosecuted. In my judgment it is no more unfair, disproportionate or arbitrary that they should be uncompensated too for any adverse effects that restraint and receivership orders may have had upon their assets.”

14. Taking the above into account, we have carefully examined the provision of “serious default” in section 18(2)(c) of the Ordinance, and concluded that it is consistent with the common law position that negligence has

to be established on the part of the Government.

Legislation of other jurisdictions

15. We have examined the anti-terrorism legislation of a number of common law jurisdictions to ascertain whether provision is made for compensation in the circumstances covered by section 18 of the Ordinance (i.e. incorrect specifications of persons as terrorists/terrorist associates or property as terrorist property). Our researches have indicated that most major common law jurisdictions do *not* generally provide for compensation for “incorrect specifications”. Some exceptions identified are Australia, the United Kingdom and India; however, the compensation provisions in question are largely limited to “property”, the nature of which is different from that of section 18 of the Ordinance-

- (a) The Australian Charter of the United Nations Act 1945 (as amended by the Suppression of the Financing of Terrorism Act 2002) provides that the owner of property is entitled to compensation from the Government for loss sustained as a result of the holder of his property refusing to comply with his instructions in relation to the property, if the holder in effect had a genuine but mistaken belief that the property was a freezable asset within the meaning of the Act. The compensation payable is of an ex-gratia nature and is determined on the Government’s discretion;
- (b) The United Kingdom Anti-Terrorism Crime and Security Act 2001 provides for compensation to be payable in certain cases where suspected terrorist cash has been detained but not subsequently forfeited. The amount of compensation is (i) the amount the court thinks would have been earned in interest if the cash had been held in an interest bearing account after the initial detention period of 48 hours; and (ii) additional compensation for loss suffered in exceptional circumstances. It should be noted that the provision relates specifically to detention and forfeiture of terrorist cash, the nature of which is different from section 18 of the Ordinance which applies to specification actions;
- (c) The United Kingdom Terrorism Act 2000 provides that where any property restrained or forfeited in relation to proceedings for an offence under the Act does not result in conviction, a person who had an interest in the property concerned may apply to the court for compensation. The court may order compensation to be paid if it is

satisfied that (i) there was a serious default on the part of the Government; (ii) the applicant has suffered loss pursuant to the restraint or forfeiture of the property; and (iii) it is appropriate to order compensation to be paid having regard to all the circumstances. The compensation criteria are more or less the same as those under section 18 of the Ordinance. The Act also provides for compensation where action is taken in respect of a person's property in connection with the commission of an offence and the person is not subsequently convicted of the offence; and

- (d) The Indian Prevention of Terrorism Act 2002 provides for compensation if a person has been corruptly or maliciously proceeded against pursuant to the Act.

16. With the above findings, we have noted that the compensation arrangement under section 18 of the Ordinance is not inconsistent with the practices in other common law jurisdictions. It is indeed no worse than those provided for in other overseas statutes.

Hong Kong legislation

17. There are provisions on compensation payable by the Government in other ordinances in Hong Kong for such matters as land resumption and seizure and detention of goods. Section 18 of the Ordinance is in fact based on section 27 of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405) and section 29 of the Organized and Serious Crimes Ordinance (Cap. 455). Given the similar intention of these three Ordinances to provide for compensation for "incorrect" Government actions, we consider that the established compensation provisions in Cap. 405 and Cap. 455 represent the most appropriate models for the United Nations (Anti-Terrorism Measures) Ordinance.

- (c) That the applicant has, in consequence of the relevant specification and the default on the part of the Government, suffered loss

18. It is legally justifiable and reasonable for compensation to be awarded only when the affected persons have suffered loss. Therefore, the criterion under section 18(2)(d) should be retained.

Conclusion

19. With the above review, we consider that the compensation provision in section 18 of the United Nations (Anti-Terrorism Measures) Ordinance is proportionate and reasonable. It is consistent with the position at common law and is based on established compensation criteria adopted in other existing ordinances. It also stands out among the anti-terrorism laws in other common law jurisdictions in providing for compensation for “incorrect” Government specifications.

Security Bureau
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