

LCQ8: Compensation for persons wrongfully imprisoned

\*\*\*\*\*

Following is a question by the Hon Dennis Kwok and a written reply by the Secretary for Justice, Mr Rimsky Yuen, SC, in the Legislative Council today (January 22):

Question:

It is learnt that in addition to the statutory compensation scheme under Article 11(5) in Part II (Hong Kong Bill of Rights) of the Hong Kong Bill of Rights Ordinance (Cap. 383), there is a practice of the Government awarding ex gratia payments on moral or compassionate grounds in certain exceptional cases of miscarriage of justice in which the Government is not legally liable. Such cases include but are not limited to those in which the claimant has spent time in custody following a wrongful conviction or charge resulting from serious default by the police or other public authority, notwithstanding the fact that the circumstances offer no grounds for any claim of civil damages. In this connection, will the Government inform this Council:

(1) of the respective numbers of applications for ex gratia payments approved and rejected in the past five years; the particulars of those approved cases, including the amount of payments awarded in each case as well as the reasons for some applications being rejected, if any;

(2) by which agency and with what criteria applications for ex gratia payments are assessed;

(3) of the number and particulars of the complaints received by the Government in the past five years about rejection of applications for ex gratia payments or about the amounts of payments awarded; and

(4) whether it has assessed if a conflict of interests may arise on the part of the Secretary for Justice and relevant

government departments in the assessment of applications for ex gratia payments; if the assessment outcome is in the affirmative, whether the Government will make reference to the system in the United Kingdom and replace the current arrangement for processing such applications with a statutory scheme under which an independent assessor is appointed to consider the merits of the applications for ex gratia payments and determine the amounts of payments to be awarded; if it will, of the details; if not, the reasons for that?

Reply:

President,

(1) The total number of applications for ex gratia payments under the administrative arrangement in the past five years is nine. Out of these nine cases, seven applications were rejected, one application was considered by the Solicitor General to fall within the guidelines (pending determination of quantum) and one application is pending determination. The case pending determination of quantum of ex gratia payment remains the subject of without prejudice correspondence between the Department of Justice and the applicant's legal advisers. The reason for the rejection of those seven rejected applications is that those cases failed to satisfy the relevant criteria set out in Part (2) below.

(2) The Solicitor General with the assistance of counsel within the Legal Policy Division of the Department of Justice is responsible for considering whether a particular case falls within the guidelines. The amount payable is 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. The administrative guidelines for the payment of ex gratia compensation are as follows:

(a) Compensation may be payable to a person convicted of a

criminal offence who has spent time in custody and has received a free pardon because his innocence has been established or his conviction has been quashed following a reference to the Court of Appeal by the Chief Executive or an appeal out of time.

(b) 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. For example, refusal of bail because of incorrect information given to the court by the prosecutor or the police, or police suppression of 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, to preserve the perceived independence of the judiciary, payment in such cases should only be made on the recommendation of the judiciary itself.

(c) Aside from guidelines (a) and (b), compensation may be payable in outstandingly deserving cases even where the loss was not caused by a wrongful act or omission by a public authority.

(d) Compensation would not be paid simply because the prosecution was unable to prove its case beyond reasonable doubt in relation to a particular charge.

(e) Compensation may be refused where there is serious doubt about the claimant's innocence, based on the argument that it would be repugnant to pay compensation out of public funds to a person who is probably guilty but, for example, whose conviction was quashed on a mere technicality.

(f) Compensation may be refused or reduced proportionately where the claimant is wholly or partly to blame for his misfortune; for example, he deliberately withheld evidence which would have demonstrated his innocence.

(g) From the perspective of public policy or administration, extending compensation beyond guidelines (a), (b) and (c) to persons who have suffered loss in the ordinary course of the criminal process (for example, to those to whom guideline (d) applies) would have substantial cost and other resource implications. There would be a much larger number of potential claimants and a tribunal or some other special machinery would be required to investigate each case and distinguish the claimants who are very probably innocent from those who were lucky to escape conviction.

If the case falls within the guidelines, compensation would include:

(a) Pecuniary losses

- (i) Loss of earnings (including, where relevant, loss of future earnings);
- (ii) Losses and expenses reasonably incurred by the claimant's family;
- (iii) Any other ascertainable losses, e.g. through forced sale of business assets rendered unusable by the claimant's conviction or punishment and investment income on money paid in fines;
- (iv) In so far as they have been borne by the claimant or his family and have not already been reimbursed, such legal expenses as he reasonably incurred in the original proceedings in which he was convicted.

(b) Non-pecuniary losses

- (i) Loss of liberty;
- (ii) Damage to character and reputation.

The claimant may also be reimbursed the expenses, legal or otherwise, reasonably incurred by him in pursuing his claim for compensation. Interim payments of compensation may be made in suitable cases of amounts which total less than the minimum likely final award.

(3) The Department of Justice does not keep statistics of the number and particulars of the complaints received by the Government in the past five years about rejection of applications for ex gratia payments or about the amounts of payments awarded.

(4) As noted in Part (2) above, applications for ex gratia payments under the administrative arrangement is handled by the Solicitor General with the assistance of counsel within the Legal Policy Division of the Department of Justice. Where necessary, outside independent counsel's advice will also be sought. The Secretary for Justice is not involved in the consideration or determination process. In any event, in each application for ex gratia payment, the Department of Justice will assess whether a conflict of interests may arise on the part of the Secretary for Justice and relevant government departments. If the assessment outcome is in the affirmative, measures would be taken to avoid the potential conflicts such as briefing outside counsel to advise on the merits of the application.

As regards the UK scheme of compensation, we note that the UK's ex gratia discretionary scheme was abolished in 2006 and its current compensation scheme is confined to claims in accordance with Article 14(6) of the International Covenant on Civil and Political Rights. Moreover, the role of the independent assessor under UK's current scheme is limited to the assessment of quantum (but not eligibility for compensation). As such, the Department of Justice will continue to follow the practice set out in the first paragraph of this part of the reply in processing applications for ex gratia payments.

Ends/Wednesday, January 22, 2014