Ex-gratia Payment for Far East POWs and Civilian Internees

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This Note gives a guide to the *ex-gratia* payment – first announced by the British Government in November 2000 – that is available to those who were held as prisoners-of-war by Japan during World War II. It also describes the controversy there has been in recent years over the alleged application of inconsistent and discriminatory eligibility criteria in the running of the scheme. The controversy centred upon the original application of a 'bloodlink criterion', which required that applicants, or one or other of their parents, should have been born in Britain in order to qualify for payment.

A brief summary of the compensation paid to former Allied POWs and civilian internees under the 1951 Treaty of Peace with Japan is contained in an Annex to this Note.

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1 The payment and the original criteria for eligibility

On 7 November 2000 the Government announced that it would make an *ex gratia* payment of £10,000 to former prisoners of war and other detainees of Japan. The then Minister for Veterans Affairs, Lewis Moonie, said,

> I am very pleased to be able to inform the House that, as a result of the review, the Government have decided to make a single *ex gratia* payment of £10,000 to each of the surviving members of the British groups who were held prisoner by the Japanese during the Second World War, in recognition of the unique circumstances of their captivity. In cases in which a person who would have been entitled to the payment has died, the surviving spouse will be entitled to receive it instead.[1]

The scheme was to be administered by the War Pensions Agency (WPA), later renamed the Veterans Agency.[2] At the inception of the scheme, the following eligibility criteria were set out:

> There are five categories of person who are entitled to make a claim for this *ex gratia* payment. These are:
>
> (a) Surviving former members of HM Armed Forces who were held as Japanese prisoners of war in the Far East during the Second World War;
>
> (b) Surviving former service personnel who received payments under Article 16 of the 1951 Treaty of Peace with Japan under the auspices of Her Majesty's Government. These were certain members of the then colonial forces, Indian Army and Burmese Armed Forces;
>
> (c) Surviving members of the Merchant Navy who were imprisoned by the Japanese in the Far East during the Second World War. For the purposes of this scheme, a member of the Merchant Navy is a person who has been employed or engaged as or for service as a mariner in a British ship;
>
> (d) Surviving civilians who are UK nationals and who were interned by the Japanese in the Far East during the Second World War; and
>
> The surviving widow or widower of a deceased person who would otherwise have been entitled under category a), b), c) or d) above. [3]

The money is not taxed, nor is it taken into account for benefits purposes. The widows referred to above are those who were married to the deceased at time of death, regardless of their relationship during the period of imprisonment.

2 Reaction to the introduction of the scheme

On announcing the scheme, Dr Moonie, estimated that up to 16,700 people might be eligible for the money, and that the total cost might amount to £167m.

He said that

> the experience of those who went into captivity in the Far East during the Second World War was unique. We have said before that we believe the country owes a debt

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1 HC Deb 7 November 2000, c159

2 It was renamed the Veterans Agency in June 2001. At the same time, responsibility for the Agency was moved from the Department of Work and Pensions to the Ministry of Defence

3 WPA leaflet, "Ex-gratia payment for British groups who were held prisoner by the Japanese during World War Two: Notes for Guidance", November 2000

> of honour to them. I hope that I am speaking for everyone here when I say that today something concrete has been done to recognise that debt.[4]

Ian Duncan Smith, then Shadow Defence Spokesman, said that

> on behalf of the Opposition, I wholeheartedly and without reservation welcome what is frankly a generous settlement.[5]

The Liberal Democrats also warmly welcomed the announcement.

3 The 'bloodlink criterion' and subsequent controversies

Despite its universal welcome initially, controversy has arisen regarding the operation of the scheme.

3.1 The 'bloodlink criterion'

When Dr Moonie announced the scheme in November 2000 he described the various categories which would benefit, including "British civilians who were interned."[6] However, it later emerged that some British civilian claimants were being turned down following a 'clarification' of the eligibility criteria.

In the early months of the scheme – to March 2001 – eligibility did not require that former civilian internees should have a parent or grandparent who had been born in the UK. A significant number of payments were made on this basis. Then in June 2001, in what was called a 'clarification' of the eligibility criteria, this additional requirement – known as the 'bloodlink criterion' or 'birthlink criterion' –was added. This led to a much larger number of claims being rejected than had been expected.[7]

In July 2001 Nicholas Winterton asked:

> what changes there have been to the definition of "British" when applied to civilians eligible for Her Majesty's Government's ex-gratia payments to former prisoners of war and internees of the Japanese from 1941 to 1945 since 7 November 2000.

Dr Moonie replied:

> The ex-gratia payment announced on 7 November 2000 is being made to the various British groups who had been held prisoner by the Japanese during the Second World War. The eligibility criterion for civilian claimants has recently been clarified, but there has been no change in the intended scope of the scheme. British subjects whom the Japanese interned and who were born in the United Kingdom, or had a parent or grandparent born here, are eligible for the payment.[8]

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4 HC Deb 7 November 2000, c160

5 Ibid

6 Ibid

7 *'A Debt of Honour'. The ex gratia scheme for British Groups interned by the Japanese during the Second World War*, Parliamentary and Health Service Ombudsman, 4th Report Session 2005-6, Presented to Parliament pursuant to Section 10(3) of the Parliamentary Commissioner Act 1967, HC 324, 12 July 2005, para. 109
Available at: http://www.ombudsman.org.uk/pdfs/internees.pdf

8 HC Deb 11 July 2001, c517w

3.2 Legal challenges during 2002-3

In 2002, the Association of British Civilian Internees Far Eastern Region (ABCIFER) applied for judicial review of the scheme, arguing that the decision of the Government to introduce a 'bloodlink criterion' as a requirement for eligibility for certain claimants was illegal (see also the section on the Gurkhas below). ABCIFER argued that the decision was disproportionate, discriminatory, unfair and an abuse of power. ABCIFER was unsuccessful before the High Court. In April 2003, the Court of Appeal also found against it.[9] However, it concluded that the Ministerial statement of 7 November 2000 had been "less clear than it should have been".[10] Nonetheless, at the time, the Ministry of Defence took this ruling as justifying its refusal to review the eligibility criteria.

The first adjustment to the eligibility criteria came later in 2003 when three Gurkhas successfully challenged their exclusion from the scheme. In November 2002 Mr Justice McCombe found in favour of these three Gurkhas, and by implication some 330 others. He said that the distinction that had been used to exclude them, which had its origins in the 19th century, was racial in nature. Other non-British citizens, from India and Pakistan, were excluded from the original arrangements for compensation under the 1951 Peace Treaty, and thus from the *ex gratia* scheme, because their independent states had made their own arrangements with Japan. However, "the Gurkhas were excluded on the basis of a constitutional distinction which was in fact founded upon race."[11] He went on:

> the adherence to the same distinction in 2000, particularly if the racial nature of the disciplinary distinction originally made in the 19th century was not appreciated (as seems clear it was not), appears to me . . . to be irrational and inconsistent with the principle of equality that is the cornerstone of our law.

In November 2003 the Government announced that, in response to this judgement, the scheme would be widened to include Gurkhas who were imprisoned by the Japanese and who were citizens of Nepal at the time of the 1951 Peace Treaty with Japan.[12]

3.3 The complaint of Professor Jack Hayward

The 'bloodlink criterion' came under further pressure last year when the Parliamentary and Health Ombudsman published a report in July 2005 on a complaint of maladministration against the Ministry of Defence by Professor Jack Hayward.

Although the complaint was first received in December 2001, the Ombudsman waited for the outcome of ABCIFER's legal challenge to the legality of the entire scheme before deciding that it was an appropriate case for investigation. Her investigation began in June 2003.[13]

Professor Jack Hayward was born in Shanghai in 1931 to a British father who was born in India and a mother who was born in Iraq. He was interned, along with his parents, as British subjects by the Japanese in 1943. After the Second World War, he came to live in the UK.[14] In December 2000, having been invited to do so, he applied for the *ex gratia* payment.

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9 *A Debt of Honour*, paras 20-21
10 Ibid, para. 125
11 *Daily Telegraph*, 28 November 2002
12 HC Deb 5 November 2003, cc33-34WS
13 Ibid, paras 29 and 40
14 Ibid, para. 44

However, in June 2001 his application was rejected.[15] This prompted the complaint to the Ombudsman.

When the Ombudsman interviewed Professor Hayward in April 2004, he argued:

> To be told retrospectively that I was a lesser British subject because, by implication, meanwhile Great Britain had become lesser Britain was mean and disingenuous of the MOD and demeaning to me. An official apology for the insult involved and the injustice inflicted is called for.[16]

In her findings, the Ombudsman stated: "I have found injustice caused by maladministration that the Government does not propose to remedy".[17] Specifically, she ruled that the manner in which the scheme was developed constituted maladministration. So too did the lack of clarity with which the announcement of the scheme was made.[18] She also considered that the MOD's failure to "satisfy itself that the late introduction of an eligibility criterion would not lead to the inconsistent treatment of applicants or to other administrative anomalies."[19] In addition, she found that the failure to inform applicants that the criteria had been clarified when they were sent a questionnaire to establish their eligibility also constituted maladministration.[20] She also expressed sympathy with those who have questioned the fairness of the 'bloodlink criterion', while emphasizing that this was not an issue directly within her remit.[21] She welcomed the fact that the Government had made it clear that it did not intend to reclaim payments made in error during the early months of the scheme but was critical of the fact that it had not initiated a review of the scheme, given the many criticisms that had been made of it.[22]

With regard to the specific case of Professor Hayward, the Ombudsman found that this maladministration had caused an injustice to Professor Hayward and others in a similar position.[23]

She recommended:

> First, I consider that the MOD should review the operation of the *ex gratia* scheme.
>
> Secondly, I consider the MOD should fully reconsider the position of Professor Hayward and those in a similar position to him.
>
> My third recommendation is that the MOD should apologise to Professor Hayward and to others in a similar position to him for the distress which the maladministration identified in this report has caused them.
>
> Finally, I recommend that the MOD should consider whether they should express that regret tangibly.[24]

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15 Ibid, paras 47-8
16 Ibid, para. 61
17 Ibid, para. 8
18 Ibid, paras 145 and 157. She also noted that Mr Andy Burnham, then Acting Chief Executive of the WPA (and now heading up the Veterans Agency) wrote in April 2001 to the Cabinet Office that moving to the 'bloodlink criterion' "will be impossible to defend on grounds of fairness and logic. It does not seem that rejection of these cases will be in keeping with the original intent and spirit of the scheme." Ibid, para. 109
19 Ibid, para 194
20 Ibid, para. 197
21 Ibid, para 163
22 Ibid, paras 192 and 198
23 Ibid, paras 210

The Government initially accepted only her third and fourth recommendations.[25] It argued that the Ombudsman had gone beyond the terms of her remit in making general comments about the operation of the scheme. Disagreeing with this view, the Ombudsman invoked Section 10(3) of the *Parliamentary Commissioner Act* in presenting a special report to Parliament – only the third time that this has had to be done.[26] Speaking in a Westminster Hall debate on Government support to veterans on 13 July 2005, the present Minister of Veterans Affairs, Don Touhig, stated:

> I say simply that the ombudsman made some criticisms of the Government and said that we should take certain actions. He suggested in particular that we should review the operation of the scheme. I do not think that that makes any sense; there were 29,000 applications for compensation under the scheme, and 24,000 people – or 83 per cent – have been compensated. I see no purpose in examining the entire operation of the scheme, although I recognise that its announcement and introduction were not well handled. The Government accept that fully… I regret that a number of people who at first thought that they would be compensated will not now be compensated, because of the issue of birthlink. I sincerely apologise for that. It was wrong and the Government made a mistake. I shall be giving some thought to the ombudsman's recommendation that I should do more than apologise and consider some tangible response.[27]

3.4 The case of Diana Elias

Matters were further complicated on 7 July 2005 when the High Court ruled in favour of a further legal challenge to the scheme, brought by Mrs Diana Elias, a British subject who, along with her parents, was born in India. The entire family was interned in Hong Kong by the Japanese. She argued that the 'bloodlink criterion' amounted to unlawful indirect racial discrimination against those of 'non-British origin'. The High Court ruled in favour of the 81 year-old Mrs Elias on two of her arguments: that the 'bloodlink criterion' discriminates on the ground of race in terms of the *Race Relations Act*; and that the Government had failed to promote race equality and equal opportunities when devising and applying the 'bloodlink criterion'. It ruled against her on a third argument: that the 'bloodlink criterion' should be implemented flexibly, allowing all close ties with the UK to be taken into account.[28] Both sides decided to appeal against the decision to the Court of Appeal. Pending the outcome of the appeal, the Government suspended that part of the scheme relating to civilian internees.[29] A ruling was expected in early 2006.

3.5 Developments between mid 2005 and January 2006

In October 2005, the Ministry of Defence announced that it had been decided that the 'tangible response' to which he had referred in his Written Statement of 13 July 2005, should involve a one-off payment of £500 and a personal letter to those to whom an apology for

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24 Ibid, paras 212-218

25 Ibid, Annex, pp. 34-37. The Minister for Veterans Affairs, Don Touhig, placed a Written Statement before the House responding to the Ombudsman's report on 13 July 2005. See HC Deb 13 July 2005 c28-29WS

26 Uncorrected Evidence of Ann Abraham, Parliamentary and Health Service Ombudsman, to the Public Administration Select Committee, 1 December 2005, Q1-2
[Available at: http://www.publications.parliament.uk/pa/cm200506/cmselect/cmpubadm/uc735-i/uc73502.htm]

27 HC Deb 13 July 2005 c275WH

28 Information taken from http://www.bindmans.com/7.0.html (as at 17 January 2006)

29 HC Deb 26 October 2005 c381w

maladministration was due.[30] There was widespread criticism of the size of the one-off payment.

Then on 1 December 2005, Don Touhig announced a significant change in the position of the Government. Appearing before the Public Administration Select Committee, he stated:

> While preparing evidence for this session, a provisional analysis of the eligibility rules applied before and after the introduction of the birth link criteria has suggested that the two may not have been entirely consistent. If that is the case, it conflicts with my understanding of the situation that we have been discussing. As a result, I have set in train an urgent investigation. We are working hard to bottom-out the implications of this information which, as I say, only came to my attention on Monday of this week.[31]

In an Oral Statement to the House on 12 December 2005, Don Touhig stated that the MOD had now "commissioned a review into whether consistent eligibility criteria had been used throughout for civilian internees". He added that it was anticipated that the review would be completed by early February 2006. At that point, a further Statement would be made to the House. He did not say whether the timeframe was related to that of the outstanding Diana Elias case. He also stated that a separate investigation would be initiated into how it was that the use of inconsistent criteria before and after March 2001 was not revealed earlier. [32]

On 19 January 2006 the Public Administration Select Committee published its own report in response to the Ombudsman's *A Debt of Honour*. Below is the text of its conclusion:

> 44. The Ombudsman made three further general recommendations:
>
> that ex gratia schemes should be devised in a way that ensures that all the relevant
>
> issues are considered before the scheme is announced or advertised;
>
> that changes to the eligibility criteria after a scheme has been announced should be publicised and explained to those who might be affected;
>
> that where a scheme has been subject to a large number of complaints or criticisms from Courts or Parliament, it should be reviewed.
>
> 45. These might seem self evident: this case has shown they are not. Despite two Judicial Reviews and the Ombudsman's investigation it apparently took our inquiry to bring the officials concerned together and reveal that the MoD had been mistaken. On 1 December, the Minister told us:
>
> […] this new information came to light on Monday, lunchtime-ish, as my officials were preparing papers to come in to brief me for this session, and it was having the whole team at a session and discussing what they were going to advise me and tell me that this apparent discrepancy was fully exposed.
>
> The Minister told the House that this failure should be the subject of a separate investigation, and that he had asked the Permanent Secretary to identify a retired senior official or other comparable official to lead it.
>
> 46. We have already written to the Minister requesting that the investigation should deal with the following questions:

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30 MOD Press Release, 11 October 2005
[Available at: http://news.mod.uk/news/press/news_speech.asp?newsItem_id=3619]

31 Uncorrected Evidence to the Public Administration Select Committee, 1 December 2005, Q38

32 HC Deb12 December 2005 c1119-21

What precisely was the information discovered in the course of preparation for the hearing on 1 December which made the MoD change its stance?

Why is it only now becoming apparent to the MoD that the introduction of the bloodlink criterion led to inconsistencies in the scheme, when this was clear to ABCIFER and the Ombudsman years ago?

Why was the MoD convinced that the scheme for civilian internees would affect that for former PoWs?

Before November 2005, were Ministers ever given information which would have enabled them to identify the fact that the criteria for eligibility before March 2001 were not consistent with those applied thereafter?

What is the documentary evidence for the contention that the initial criteria for eligibility were simply receipt of compensation under the earlier scheme, or that a former internee was descended from someone who had received such compensation?

These questions must be fully addressed.

47. Mr Touhig made it clear to us, and to the House, that mistakes had been made because the scheme had been drawn up in haste. Understandably, he does not wish to repeat those errors. But the reasons for haste remain: those who were interned are elderly, and their numbers are rapidly diminishing. It is a source of regret, and shame, that the MoD received the Ombudsman's report a year ago, on 18 January 2005, and did nothing until our hearing meant that it had to address the report properly. It has been forced into conducting the review the Ombudsman recommended; the MoD should now accept the recommendation to reconsider the position of Professor Hayward and others in a similar position, and should do so with the urgency and generosity of the scheme's original intention.[33]

On 30 January 2006 Don Touhig made a further Written Statement to the House:

In my statement on 12 December 2005, *Official Report*, columns 1119-21, following my appearance at the Public Administration Select Committee oral evidence session on the operation of the FEPOW scheme, I told the House that I had commissioned a review into the extent to which inconsistent eligibility criteria had been used for deciding claims before and after the introduction of the birth-link criterion; this work is well-advanced. In addition, I said that a separate, independent investigation would be conducted into how the use of inconsistent criteria had arisen and why it had not been exposed earlier. I said that this work would be undertaken by a retired senior official from outside of the Departments involved. I am pleased to announce that Mr. David Watkins, a retired senior civil servant formerly in the Northern Ireland Office who is well qualified for the task, has agreed to undertake the investigation. His role will be to consider:

How the original inconsistencies arose, identifying any specific shortcomings in the development and implementation of policy;

How, subsequently, the Departments involved failed to identify that there had been inconsistencies, despite the need to explain the Government's position in Parliament, in the courts and to the Parliamentary Ombudsman; and

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[33] Public Administration Select Committee, *A Debt of Honour*, First Report for the Session 2005-6, HC735, 19 January 2006, paras 44-47

> Whether there are any lessons to be learned for the future from such shortcomings as are identified in the development of the scheme and in its administration.
>
> Mr Watkins has begun his investigation and I have indicated my concern that, while it must be thorough, it should be completed as quickly as practicable.
>
> I will make a further statement to Parliament when I have received Mr Watkins' final report.[34]

3.6 Developments since February 2006

The MOD's own review into whether consistent eligibility criteria had been used throughout for civilian internees reported in February 2006. In a subsequent statement to the house, Don Touhig announced two changes to the criteria for civilian internees in order to remedy previous inconsistencies:

> […] I have decided to make certain changes to the criteria for civilian internees. First, I am clear that we must include those who were rejected under the birth-link criterion but who would have met the Japanese asset scheme criteria, whether or not they had a Japanese asset scheme record. It would be unfair and improper if, as a matter of policy, claimants who were identical in all significant respects should have succeeded before March 2001 but failed thereafter. These rules will also apply to new claimants.
>
> Secondly, I have decided to introduce a new provision to include those who have resided in the United Kingdom for at least 20 years since world war two, until November 2000, when the scheme was introduced. I have had discussions with the all-party group and with ABCIFER, and I have listened to their views. Indeed, I pay tribute to my hon. Friend the Member for Hendon and his colleagues, and to Ron Bridge of ABCIFER, whose comments and advice have been extremely helpful as we have all sought to resolve the matter before us. I have chosen the figure of 20 years as a reasonable measure of an individual's commitment to the United Kingdom, meaning that they are likely to have spent at least part of their working life here. This is consistent with the original principle that British civilians should have a close link with the United Kingdom in order to qualify.
>
> Eligibility will go to anyone who was alive on 7 November 2000, when the scheme was introduced, or to their spouse or estate if they have since died. It will also extend to members of the armed forces of our former colonies, including the Indian army, who similarly meet this residence requirement and were held as prisoners of war. We have previously had reservations about a residence criterion because of the difficulty of providing supporting evidence. However, the 1950s scheme was residence based, and we expect the numbers now to be much smaller, both of which considerations suggest that the task before us should be manageable.
>
> We also need to resolve details of how the 20-year rule should be applied. We will publish details of the qualifying criteria as soon as they are agreed, and I would ask potential claimants not to apply until then, so that when they do so they can provide the evidence required to process their applications. To that end, I can announce that ABCIFER and the chair of the all-party group on far east prisoners of war have accepted my invitation to join me in a working group to consider how we should take forward these points and resolve them. We assess that the change could admit some 500 new claimants, although the figures cannot be estimated with certainty.
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> I should also comment on the birth-link criterion. This was found by the High Court to have resulted in unlawful indirect discrimination. The judgment is the subject of

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[34] HC Deb 30 January 2006 c2-3WS

> appeals from both sides, and I have decided that we should not take any decisions on its future until that appeal is resolved. The review has shown that, in part at least due to the scale and urgency of the desire on all sides to make payments, there have been shortcomings in administration of the scheme. Those are the subject of a separate ongoing investigation due to be completed in the summer, and I will make a further statement to the House at that time. But our review has shown that the numbers adversely affected—that is, those who met the Japanese asset scheme criteria but were rejected because they did not have a birth link—represent a very small proportion.
>
> I apologise deeply for the fact that a number of people did not receive the payment that they should have received. We will address those cases as a matter of urgency, in particular contacting those whom we know to have been affected. The Government have made payments in excess of £250 million since the scheme was introduced, and more than 25,000 people have benefited.
>
> I hope that right hon. and hon. Members will recognise that the steps I have announced today address the one outstanding group who could reasonably claim to have a close link to the United Kingdom based on residence since the war. I am confident that the revised eligibility criteria are a fair reflection of our country's debt to those for whom it could be reasonably said that we have a responsibility. [35]

Don Touhig was subsequently succeeded by Tom Watson as Parliamentary Under Secretary of State for Defence and Minister of Veterans Affairs. In June 2006 the Working Group established to agree the detailed criteria for meeting the new 20-year rule decided that 1 January 1945 and 7 November 2000 should be the dates between which the rule needed to be satisfied. It was also decided that residence of any length could be counted when aggregating more than one period.[36] A full statement of the rules for the 20-year residency requirement was issued by the MOD in late June 2006.[37]

Work also began to review whether the Veterans Agency might work with a charity to assist any claimants experiencing hardship because they had still been unsuccessful under the revised eligibility criteria:

> **Mr. Harper:** To ask the Secretary of State for Defence what assessment process he will use to judge the claims for the ex-gratia payment by those former Far East civilian internees who do not qualify under the 20 year rule; and how many such claims he expects there to be.[38]
>
> **Mr. Watson** *[holding answer 29 June 2006]:* It is not possible to make a reliable estimate of how many unsuccessful claims will remain after they have been reviewed against the changes that were announced by my predecessor on 28 March 2006. However, for those cases that do not meet the aforementioned eligibility criteria for a payment under the scheme, we are working with a relevant charity to see how we might be able to support them in their work to provide assistance in cases of hardship. It is too early to say what form this might take but I expect to have concluded this work shortly.

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35 HC Deb 28 March 2006 c681-3

36 "Declassified minutes of first meeting of the FEPOW Working Group to consider the application of the 20 year rule", Ministry of Defence, 1 June 2006, mgp 07/37, PQ 100890

37 "Rules for the 20-Year Residency Requirement", mgp 06/1586, PQ 79714, received by the House of Commons Library on 26 June 2006

38 HC Deb 3 July 2006 c706W

In July 2006 the independent investigation led by David Watkins into how the use of inconsistent criteria had arisen and why it had not been exposed earlier issued its final report.[39] On 19 July 2006 Tom Watson set out the response of the Government in a Written Statement:

> Late last year, it emerged that inconsistent criteria had been used for deciding payments over the history of the ex-gratia payment scheme for former Far East prisoners of war and civilian internees. In response to this, my predecessor, the then Minister with responsibilities for veterans, my right hon. Friend the Member for Islwyn (Mr. Touhig), agreed that there should be an independent investigation to examine how the use of inconsistent criteria had arisen and why this had not been exposed earlier. Mr. David Watkins, a retired senior civil servant from the Northern Ireland Office was appointed to undertake this work and his findings were presented to me on 7 July. A copy of his report has been placed in the Library of the House.
>
> The report finds no evidence of culpable behaviour by individuals but identifies a number of shortcomings with the scheme's development and administration and also makes recommendations designed to avoid any recurrence.
>
> I am grateful to Mr. Watkins for an investigation which has been thorough and far reaching, and has included consultation with the key representatives of those who were adversely affected by the errors. I welcome his report and can say now that we accept the overall thrust of its recommendations. We will analyse it in more detail, in consultation with other interested Departments, and I intend to give a more detailed response in a further statement after the recess.
>
> While the errors in administering the scheme were deeply regrettable, I would echo the report's recognition of the admirable work undertaken by the then War Pensions Agency and others that allowed the scheme to be introduced in a remarkably short timescale, with some 14,000 payments made within three months of the scheme's introduction, and a total of over 25,000 payments now made.

He also made a further announcement about hardship cases:

> Finally, I know that there has been a residual concern that a number of those who do not qualify under the scheme may be experiencing hardship. To respond to this concern, my officials have been in discussion with the charity which provides support in such cases amongst those from the UK who were once prisoners of war or civilian internees in the Far East. I am pleased to announce that the Ministry of Defence will shortly be providing financial assistance to support the charity's work in dealing with such cases and to help publicise the recently announced changes to the criteria, as a result of which eligibility under the scheme has been extended to those who can show a close link to the UK since the second world war.[40]

On 4 September 2006, Tom Watson gave an assessment of progress in making the *ex-gratia* payment under the revised eligibility criteria:

> **Mr. Andrew Smith:** To ask the Secretary of State for Defence what progress has been made by the working group on the introduction of the 20-year residence criterion for the settlements for Second World War Far East civilian internees; and if he will make a statement.

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[39] D. Watkins, "Investigation into Civilian Eligibility Criteria: Final Report", July 2006, mgp 06/1868, received by the House of Commons Library on 19 July 2006

[40] HC Deb 19 July 2006 c26WS. The situation does not appear to have changed since then – see also HC Deb 26 October 2006 c2015W

> **Mr. Watson:** I announced the agreement and implementation of the detailed rules for the new 20-year residence criterion for the ex-gratia payment scheme for former Far East Prisoners of War and Civilian Internees on 26 June 2006, *Official Report,* column 9. A copy of the detailed rules has been placed in the Library of the House. The Veterans Agency is presently writing to applicants who they are aware may qualify and the Association of British Civilian Internees Far East Region have agreed to highlight the implementation of the new criterion through their newsletter. In view of the age of those who may be eligible, we are working to consider applications as quickly as possible, and I am pleased to say that the first payment was made on the day of the announcement.[41]

After he made this statement, Tom Watson was replaced as Minister for Veterans Affairs by Derek Twigg. He remains in post.

Diana Elias was paid the *ex-gratia* payment following the introduction of the 20-year residency rule. However, it was not until late 2006 that her court case was resolved.

In May 2006 her Constituency MP, David Burrowes, raised Mrs Elias's case with the then Minister for Veterans Affairs, Tom Watson:

> **Mr. Burrowes:** I welcome the new Minister to his post. Will he provide an assurance to my constituent, Diana Elias, and other former far east civilian internees, that, by the time of the meeting with her next month, her compensation will be settled? Will the Government adopt in full the recommendations of the ombudsman in relation to this matter and ensure that they bring to an end this sorry chapter in their history?
>
> **Mr. Watson:** I thank the hon. Gentleman for his kind words. I am aware of the work that he has done in this respect through his contributions to the work of the Public Accounts Committee, and that he has a powerful constituency interest.
>
> This week I shall meet Ron Bridge, chairman of the Association of British Civilian Internees of the Far East Region, and I hope to meet the chairman of the all-party group on far east prisoners of war and internees. I share the hon. Gentleman's sense of urgency, and hope that we can deal with the matter as swiftly as possible. I can tell him that according to the evidence I have seen, Mrs. Elias will be eligible for the ex gratia payment.[42]

In October 2006, the Court of Appeal ruled in the case of Diana Elias. Much of the media described the outcome as a clear victory for Mrs Elias:

> A pensioner deemed not "British enough" to be compensated for childhood internment by the Japanese during the Second World War has won her legal battle with the Ministry of Defence.
>
> Diana Elias, 83, is entitled to £10,000 in compensation and nearly £4,000 for injury to her feelings for being discriminated against by the Government, the Court of Appeal ruled yesterday.
>
> Lord Justice Mummery, who opened his judgment with severe criticism of the Government's handling of the compensation scheme, said he would have awarded Mrs Elias up to £25,000 for her hurt feelings.
>
> He said the higher sum would be to reflect "the grave life-long psychological

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41 HC Deb 4 September 2006 c1698W

42 HC Deb 22 May c1194-5

consequences of her internment for being a British subject and the offensiveness of being told that she was not 'British enough' to be entitled to come within the compensation scheme".

But he said there were "insufficient grounds" to interfere with the £3,000 plus £900 interest awarded by a County Court judge.[43]

The *Independent*'s report of the case was more nuanced:

18 October 2006
The Independent

WEDNESDAY LAW REPORT 18 OCTOBER 2006 Regina (on the application of Elias) v Secretary of State for Defence ([2006] EWCA Civ 1293) Court of Appeal, Civil Division (Lord Justice Mummery, Lady Justice Arden and Lord Justice Longmore) 10 October 2006

Whilst the refusal of a claim for compensation under a scheme for British civilians who had been interned by the Japanese during the Second World War, on the ground that the claimant didnot satisfy the eligibility criteria because neither she nor one or more of her parents or grandparents was born in the United Kingdom, was unlawful, the claimant was not entitled to compensation under the scheme.

The Court of Appeal ruled on appeals by Mrs Diana Elias and the Secretary of State for Defence in proceedings arising out of her claim for compensation

Mrs Elias, who was born in Hong Kong in 1924, was a British subject, as were both of her parents (and, she claimed, her grandparents). However, neither her parents nor her grandparents were born in the UK.

During the Japanese occupation of Hong Kong from 1941 till 1945 Mrs Elias was interned by the Japanese because she was a British civilian.

In November 2000 a compensation scheme was announced "to repay the debt of honour" owed by the UK to "British civilians" who had been interned by the Japanese during the war. Single lump sum payments of £10,000 were to be made under the scheme. There was no definition of "British" and there was no reference at that time to the need to demonstrate any other links with the UK, to "belonging to Britain" or to any other defined eligibility criteria.

Mrs Elias submitted a claim under the scheme, but it was rejected on the ground that she did not satisfy the eligibility criteria because neither she, nor one or more of her parents or grandparents, was born in the UK.

She commenced judicial review proceedings, and the judge held, as was ultimately conceded by the Secretary of State, that the eligibility criteria indirectly discriminated against her on racial grounds (i.e. national origins). The judge also held that, although the eligibility criteria had a legitimate aim, the indirect discrimination was not objectively justified as the criteria were disproportionate. The criteria were therefore unlawful, but the claimant's proper remedy was to seek damages for race discrimination in the county court under section 57 of the Race Relations Act 1976.

Mrs Elias successfully brought an action against the Secretary of State under section

[43] "Woman not eligible for payout wins court fight", *Western Mail*, 11 October 2006

57, and was awarded £3,000 damages for the injury to her feelings inflicted by indirect discrimination. Both sides appealed against both judgments.

Rabinder Singh QC, Helen Mountfield, Claire McCann and John Halford (Bindman & Partners) for the claimant' Philip Sales and Martin Chamberlain (Treasury Solicitor) for the Secretary of State.

Lord Justice Mummery said that the eligibility criteria did not directly discriminate against the claimant on racial grounds, but they did indirectly discriminate against her. Whilst the eligibility criteria had a legitimate aim, they were not proportionate to the aim to be achieved and were not objectively justified, and were therefore unlawful.

The quashing of the eligibility criteria on the ground of indirect discrimination did not, however, entitle the claimant to payment of any compensation under the compensation scheme. The public law duty of the Secretary of State was to apply lawful criteria to the application for compensation. It was possible to replace the unlawful criteria with lawful criteria which would exclude the claimant from the compensation scheme without contravening the 1976 Act or any other statutory provision or legal principle.

However, there was no error of legal principle in the award of £3,000 damages by the county court for injury to feelings by race discrimination.

Derek Twigg gave the response of the Government to the judgment in a Written Statement on 17 October 2006:

> The MOD welcomes the court's judgment that the scheme's criteria do not directly discriminate on the grounds of race and that it was legitimate to limit payments to those with a close link to the United Kingdom. The MOD accepts the court's finding that the way the Government chose to define that close link – introducing the 'birthlink' criteria – involved unjustified indirect discrimination against those of non-United Kingdom national origins. We will not be seeking leave to appeal… in the light of the court's judgment, which the MOD accepts, the Department recognises the hurt unintentionally caused to Mrs Elias personally and will pay her the compensation that the court ordered, plus interest.[44]

David Burrowes subsequently asked a parliamentary question about costs arising from the MOD's decision to contest the claims of Mrs Elias:

> **Mr. Burrowes:** To ask the Secretary of State for Defence what the *(a)* total, *(b)* court and *(c)* inter-party costs were of litigation arising from cases involving Diana Elias; and how much (i) compensation and (ii) awards have been paid to Diana Elias.
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> **Derek Twigg:** The Ministry of Defence's costs arising from legal action with Mrs. Elias regarding the Ex Gratia Payment Scheme for former Far East Prisoners of War and civilian internees have yet to be finalised. The total as at the end of October was some £159,000 excluding VAT. This does not include the claimant's costs which are not yet known but does include identifiable court fees of some £400.
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> As was made clear in my statement of 17 October 2006, *Official Report*, column 46WS, Mrs. Elias has received a £10,000 ex gratia payment under the scheme. The

[44] HC Deb 17 October 2006 c47WS

> courts awarded Mrs. Elias damages of £3,000 plus interest; as at 27 November, work between the two sides to agree the final value of the this sum had not been completed.

In March 2007, the Government published its detailed response to the report by David Watkins, outlining the steps that it was taking to rectify the administrative shortcomings that had been identified in the report.[45]

In early 2008 Andrew Dismore raised the cases of rejected applicants whose births had been registered in British consulates abroad or on board British ships. Derek Twigg replied that the Government did not consider that either fact by itself established a close link, based on the residence criteria introduced since 2005, to the UK.[46]

In July 2008, Derek Twigg announced that the cut-off date for considering claims for compensation for injury to feelings, following the case of Diana Elias, resulting from discrimination on grounds of national origins from persons whose claim under the Ex-Gratia payment scheme had been rejected under the 'birthlink' criterion. The date set was 31 December 2008.[47]

Finally, there has also been some recent controversy about the eligibility of former members of the Indian Army who were held as POWs by the Japanese. This issue is not discussed here. For further information, see HC Deb 1 February 2007 c505-6W and the website of Public Interest Lawyers, a Birmingham-based law firm, at: http://www.publicinterestlawyers.co.uk/cases/cases.php?id=37 (Accessed at 26 March 2009).

4 Key facts and figures

4.1 Making a claim

On 1 April 2007, the Veterans Agency, which had been responsible for administering the scheme, integrated with the Armed Forces Personnel Administration Agency (AFPAA) to form the Service Personnel and Veterans Agency (SPVA).

Below is the latest statement of the eligibility criteria from the SPVA's website:

> There are six categories of person who are entitled to make a claim to the ex-gratia payment. These are:
>
> a surviving former member of HM Armed Forces who was held as a Japanese prisoner of war in the Far East during the second World War;
>
> a surviving former service personnel who received payments under Article 16 of the 1951 Treaty of Peace with Japan in 1951 under the auspices of the British Government. These were certain members of the then colonial forces, Indian Army and Burmese Armed Forces;
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> a surviving former member of the Colonial Forces who was held as a Japanese prisoner of war, was British at the time of internment and who can show that they lived in the UK for at least 20 years between 1 January 1945 and 7 November 2000.

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45 HC Deb 14 March 2007 c13-14WS

46 HC Deb 18 February 2008 c65-6W

47 HC Deb 14 July 2008 c2WS. The full text of the Government's response is available from the Library at: DEP 07/682

a surviving member of the Merchant Navy who was imprisoned by the Japanese in the Far East during the Second World War. For the purposes of this scheme, a member of the Merchant Navy is a person who has been employed, or engaged as, or for service as, a mariner in a British ship:

a surviving civilian who was British and interned by the Japanese in the Far East during the Second World War and who can demonstrate a close link to the United Kingdom. A close link to the UK is shown by satisfying the new residency criteria, based on at least 20 years residence in the UK between 1 January 1945 and 7 November 2000, or the criteria of the UK's 1950's compensation scheme.

the surviving widow or widower of a deceased person who would otherwise have been entitled under category a), b), c) d) or e) above, providing that they were still married at the time of death.

Please request the following claim form:

WPA 0009C Ex FEPOW or Merchant Seamen imprisoned by the Japanese or a Civilian Internee

WPA 0009W SURVIVING SPOUSE of an Ex FEPOW or Merchant Seamen imprisoned by the Japanese or a Civilian Internee Civilian Internees or their surviving spouses[48]

The SPVA can be contacted at:

Service Personnel and Veterans Agency, Norcross, Thornton-Cleveleys, Lancashire, FY5 3WP

Freeline (UK only): 0800 169 22 77

Tel (Overseas): + 44 1 253 866043

Textphone: 0800 169 34 58

E-mail: veterans.help@spva.gsi.gov.uk

Internet: www.veterans-uk.info

There is no final date for making a claim.

4.2 Key statistics about the scheme

Appearing before the Public Accounts Select Committee on 1 December 2005, Mr Ron Bridge, Chairman of ABCIFER, estimated that 3,000 surviving former civilian internees lost their entitlement to the *ex gratia* payment once the 'bloodlink criterion' was introduced. The additional cost if they were now to be given the payment would therefore be £30 million.[49]

Mr Bridge also estimated that about 150 people had been wrongly paid who had not been interned. These appear to the children of a British father who was interned and a mother born locally, who was not. He also estimated that there were about 800 former civilian internees in total who were entitled to the payment but who had not yet received it.[50]

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48 See: http://www.veterans-uk.com/vets_issues/fepow_eligibility.html (Accessed at 26 March 2009)
49 Uncorrected Evidence to the Public Administration Select Committee, 1 December 2005, Q24-5.
50 Ibid, Q31-2.

The then Minister for Veterans Affairs, Don Touhig, also giving evidence before the Public Accounts Select Committee, stated that "nearly 25,000 payments have been made".[51] Later he elaborated further, stating that 9,248 POWs had been paid, 15,517 civilians and/or surviving spouses, "coming to 24,765",[52]

He was then asked about the figure provided by Mr Bridge as to how many former civilian internees might still be due payment. He replied:

> It depends on the criteria that would apply… if you had wider criteria, then a great many more people would be eligible for a claim under the scheme."[53]

In October 2006 the new Minister for Veterans Affairs, Derek Twigg, supplied updated figures for the outcome of claims made under the scheme:

> **Mr. Harper:** To ask the Secretary of State for Defence how many people have been *(a)* paid, *(b)* refused and *(c)* are awaiting a decision on payments under the Far East Prisoners of War Ex-Gratia Payments Scheme (i) in total, (ii) under the blood link criterion and (iii) under the 20 year rule.
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> **Derek Twigg** *[holding answer 23 October 2006]:* The position as at 20 October 2006 is as follows:

	Claims paid	*Rejected*	*Awaiting decision*
Total claims (includes both Prisoners of War and Civilian Internees)	25,293	6,880	369
Civilian claims considered under the 20-year UK Residence criterion(1)	86	0	87
Civilian claims considered under the Birthlink criterion(1)	1,186	(2, 3)1,194	3

(1) Military claims are considered under separate criteria with respect to definition of the required close link to the United Kingdom.
(2) Rejections under the Birthlink criterion include cases where the claimant:
was not British; or
failed to meet either the initial criterion based on eligibility under the1950s scheme that made payments from liquidated Japanese assets or the Birthlink criterion introduced in March 2001; or
did not provide evidence to show that he or she was interned in a recognised camp.
(3) Since March 2006, a number of these rejections have been eligible for reconsideration under the 20-year UK residence criterion and a number have claimed and received an award; the precise number affected in this way is not known since we

[51] Ibid, Q38.
[52] Ibid, Q109.
[53] Ibid, Q111.

do not routinely collect information on the Birthlink criterion; however, we would expect most of the 86 claims accepted under the 20-year UK residence criterion to have been rejected previously and further consideration of claims under this criterion are expected to reduce the number of rejections further.	

By December 2007, the number of people who, following the Diana Elias case, had received offers of compensation, each worth £4000, for injury to feelings resulting from discrimination on grounds of national origins, whose claim under the Ex-Gratia payment scheme was rejected under the 'birthlink' criterion, was 208. 58 claims were still under consideration and 33 had been rejected.[54]

[54] HC Deb 18 December 2007 c1459-60W

Annex Compensation under the 1951 Treaty of Peace with Japan

The Treaty of Peace with Japan, signed on 8 September 1951 in San Francisco (Cmd. 8392), included terms for the compensation of former Allied POWs held by Japan in Asia during World War II in recognition of the peculiar suffering they had endured.

Article 14(a) of the Treaty recognised that “Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war”. Article 16 set out the means of indemnifying '"those members of the armed forces of the Allied Powers who suffered undue hardships while prisoners of war of Japan”. However, Article 14(a) also stated that “the resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation for all such damage and suffering”. The means of compensation was to be the seizure and disposal of Japanese assets under the jurisdiction of particular Allied powers and the placing at the disposal of the International Red Cross of assets in neutral states or in states which had been hostile to the Allies.

These provisions were regarded as a full discharge of Japan's obligations under Article 16, as agreed in a minute between the Allies and Japan. Equally, Article 14(b) waived all Allied reparations claims aside from those in the Treaty itself. The sums paid to individuals in the UK were £76 10s each for military prisoners and £43 each for civilian internees. The particular suffering of those forced to work on the Burma railway was recognised by an award of an extra £3 each. Other POWs, such as those from Australia and the USA, were compensated at a rate of $1.00 each per day of confinement and $1.50 each per day of forced labour. The total number of POWs from Australia, Canada, the Netherlands, New Zealand, the UK and the USA was around 180,000, of whom some 50,000 were British. There were some 8,000 British and Commonwealth civilian internees.

Inadequate though its provisions are universally recognised to be, the Treaty is nevertheless conventionally reckoned to be the final word on the matter – at least so far as international law is concerned. However, survivors' groups from six Allied states - Australia, Canada, the Netherlands, New Zealand, the UK and the USA – consistently argued that the amount of compensation paid was inadequate and that more should be forthcoming now that Japan no longer faced the economic difficulties it did in 1951, which was the stated reason for the low level of compensation originally offered.

In the absence of progress towards persuading Japan to offer further compensation to former allied POWs and civilian internees, the focus of campaigning gradually widened to involve pressure on the UK Government to provide additional compensation from its own resources, in recognition of the unique debt of honour owed to those interned by Japan during World War II. Then, in 2000, the Labour Government announced the establishment of the *ex-gratia* payment scheme.