LegCo Panel on the Administration of Justice and Legal Services

Review of Section 18(3) of the Hong Kong Court of Final Appeal Ordinance (Cap. 484)

Introduction

The paper sets out the views of the Administration as to whether there is a need to amend section 18(3) of the Hong Kong Court of Final Appeal Ordinance (Cap. 484) (the "Ordinance").

Background

2. A member of the public wrote to the LegCo Panel on Administration of Justice and Legal Services requesting the Administration to consider amending section 18(3) of the Ordinance to the effect that there could be a further appeal from the decision of the Appeal Committee ("AC"). The member of the public is a litigant in a civil personal injuries claim. His application for leave to appeal to the Court of Final Appeal ("CFA") was heard and denied by the AC. The Administration is requested to consider, as a matter of policy, whether there should be a further appeal from the decision of the AC.

The Existing Arrangement

3. Under section 23 of the Ordinance, no appeal shall be admitted to the CFA unless leave to appeal has been granted by the Court of Appeal ("CA"); or in the absence of such leave, leave has been granted by the CFA. Under section 24(3) of the Ordinance, if an application for leave is refused by the CA, an application for leave may be made to the CFA. Section 18(2) of the Ordinance provides that the power of the CFA to hear and determine any application for leave to appeal shall be exercised by the AC, which consists of either the Chief Justice ("CJ") and two permanent judges; or three permanent judges appointed by the CJ. Section 18(3) of the Ordinance provides that the decision of the AC shall be final and not itself subject to appeal.

Considerations

4. The AC, when determining an application for leave to the CFA, needs to consider whether the question involved in the appeal is one of great general or public importance; or whether a point of law of great and general importance is involved; or whether substantial and grave injustice has been done.

5. In considering whether there should be a further appeal against the decision of the AC, regard should be made to the following:

(a) The function of the CFA

6. In civil matters, the CFA deals with questions which are of great general or public importance, or on matters where the amount in dispute is of the value of $1,000,000 or more. As for criminal matters, leave to appeal to the CFA would only be granted if a point of law of great and general importance is involved in the decision and/or where it is shown that substantial and grave injustice has been done. The CFA is not meant to function as a second court of appeal in the ordinary way. The CFA should deal with cases of importance which are appropriate for a final appellate court to deal with. The purpose of the leave criteria is to ensure this.

(b) Public interest

7. The threshold for the AC to grant leave is to establish a "reasonably arguable case". In cases where even this reasonable threshold cannot be passed, there should be no reason for the whole matter to be heard by the CFA again. To require the CFA to, unnecessarily, review decisions made by other judges would result in delay in the hearing of other cases. It is a general legal policy principle that there should be a limit or a finality of legal proceedings. Providing another layer of appeal for cases that are unlikely to be meritorious would contravene such principle and does not serve the public interest.

(c) Public demand

8. Apart from the request from the member of public in the case mentioned in paragraph 2, the existing arrangement for the determination of application for leave by the AC has worked well.

(d) Existing safeguard against bias

9. There are safeguards expressly provided in section 18(2A) (a) – (c) of the Ordinance which, inter alia, precludes a judge from sitting as a member of the AC if he has given judgment, passed sentence or refused the appeal for the case in the court(s) below. This in some way ensures that the members in the AC would not have preconceived views on the cases and can take a fresh look at the merits of the case before making the decision.

(e) Implications for the composition of the CFA

10. In hearing appeals, the CFA comprises five judges : The CJ, three permanent judges and a non-permanent judge (Hong Kong or overseas). If the CJ or a permanent judge does not sit, a non-permanent Hong Kong judge will sit instead. As the AC comprises the CJ and two permanent judges or three permanent judges, the decision of the AC would represent in effect the majority view of the CFA.

11. If there were to be further appeal from the decision of the AC, this must be scrutinised by the full court of the CFA as there is no other appropriate body which has the standing, authority and expertise to review the AC's decision. In this regard, the three members of the AC could not sit on the CFA, having regard to the principles of natural justice, and non-permanent Hong Kong judges would have to be appointed in their place. Therefore, the CFA would comprise four non-permanent judges and only one judge out of the CJ and three permanent judges (i.e. the judge out of the four who did not sit on the AC). This represents a fundamental departure in the composition of the CFA from the existing position and what is envisaged in the Ordinance to be its usual composition.

(f) Past practice

12. Appeals before the re-unification were referred to the Judicial Committee of the Privy Council ("the Judicial Committee") which usually comprised five judges.

13. As to applications for special leave to appeal, the Judicial Committee itself comprising three judges would deal with them. As it was the Judicial Committee itself comprising three judges which would deal with applications for special leave to appeal, there would be no appeal against its decisions. Section 18(3) of the Ordinance mirrors the position before July 1997.

Conclusion

14. In conclusion, the Administration believes there is no sound reason for providing an appeal against the decision of the AC. The existing arrangement ensures that the applications for leave are heard fairly by judges of high standing who sit at the apex of the court system and has worked well since its inception. It is therefore considered that the existing appellate structure is adequate in promoting justice and change to the system is neither necessary nor desirable.

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