

立法會
Legislative Council

LC Paper No. CB(2)842/03-04

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Ref : CB2/PL/AJLS

Panel on Administration of Justice and Legal Services

**Minutes of special meeting
held on Monday, 14 November 2003 at 3:30 pm
in Conference Room A of the Legislative Council Building**

Members present : Hon Margaret NG (Chairman)
Hon Jasper TSANG Yok-sing, JP (Deputy Chairman)
Hon Albert HO Chun-yan
Hon Martin LEE Chu-ming, SC, JP
Hon James TO Kun-sun
Hon Ambrose LAU Hon-chuen, GBS, JP
Hon Emily LAU Wai-hing, JP
Hon Audrey EU Yuet-mee, SC, JP

Members absent : Hon CHAN Kam-lam, JP
Hon Miriam LAU Kin-yee, JP
Hon TAM Yiu-chung, GBS, JP

Public officers Attending : Mr Wilfred TSUI
Judiciary Administrator

Miss Emma LAU
Deputy Judiciary Administrator
(Development)

Miss Florence HO
Assistant Judiciary Administrator
(Corporate Services)

Clerk in attendance : Mrs Percy MA
Chief Assistant Secretary (2)3

Staff in attendance : Mr Arthur CHEUNG
Senior Assistant Legal Adviser 2

Miss Kitty CHENG
Assistant Legal Adviser 5

Mr Paul WOO
Senior Assistant Secretary (2)3

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I. Post-retirement employment and pension benefits of and acceptance of advantages by judges and judicial officers
(LC Paper Nos. CB(2)248/03-04(01) and (02); 324/03-04(01) - (04); and 325/03-04(01))

The Chairman said that the meeting was held in response to the request of Hon James TO. She referred members to Mr TO's letter dated 3 November 2003 to the Panel which had been issued vide LC Paper No. CB(2)324/03-04(01)).

2. The Judiciary Administrator (JA) started by stating that the Judiciary believed that it was of fundamental importance that judges and judicial officers should conduct themselves with the utmost integrity. This was essential to the maintenance of public confidence in the Judiciary and the administration of justice. JA then introduced the paper prepared by the Judiciary Administration (LC Paper No. CB(2)325/03-04(01)). He highlighted the following points -

- (a) pension benefits of retired judges and judicial officers were governed by the Pension Benefits (Judicial Officers) Ordinance (Cap. 401). Sections 34(1) and 28(1) of Cap. 401 might be applicable in cases where retired judges and judicial officers took up employment or an appointment after retirement;
- (b) the discretionary authority of the Chief Executive (CE) under section 34(1) to decide whether a pension should be suspended or continued had been delegated to the Chief Justice (CJ) with regard to judges and judicial officers taking up post-retirement employment. In considering applications under section 34(1) for continuation of payment of pension, the Judiciary had referred to and taken into account the approach adopted by the Administration in dealing with similar applications by retired civil servants, which included :

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- (i) considering whether the proposed employment would involve any conflict with the public interest;
 - (ii) within the two-year period, normally imposing a sanitisation period of six months from the cessation of active service for directorate civil servants; and
 - (iii) where the employment was in the public service or a gazetted subvented organization, not suspending the pension if such employment was for a full time job for a period of not more than three months, or for a part-time job involving not more than 24 hours a week;
- (c) concerning the discretion conferred by section 28(1) on not suspending the pension upon re-appointment to the public service or appointment to service in any gazetted subvented organisations after retirement, the Judiciary's view was that the considerations referred to above were similarly relevant. Section 28(1), however, did not expressly specify the authority vested with the discretion to suspend pension. In 1994, the Judiciary took the view that the CJ could exercise the discretion. That view was reached on the premise that where a discretion was given under legislation and the ordinance only provided for discretion without stating who would be the authority to exercise it, the power was given to whoever was applying the legislation. As Cap. 401 was administered by the then CJ, it was interpreted that the power vested in the then CJ. The Administration also agreed with that view then. In June 2003, on reviewing the matter in connection with the application by Mr Michael WONG, a retired judge, to take up appointment as Chairperson of the Equal Opportunities Commission (EOC) without suspension of his pension, the Judiciary concluded that the better view was that section 28(1) by implication vested the discretion in CE because CE was mentioned therein in relation to determination of any subvented organization to be public service for the purposes of that section. Moreover, CE was expressly stated as the authority in section 34(1). It was noted that this view now held by the Judiciary was consistent with the latest view of the Administration that the discretion under equivalent statutory provisions for the civil service was vested in CE. As the discretion under section 28(1) was vested in CE and as both section 34(1) and 28(1) appeared to be applicable in Mr. Michael Wong's case, the Judiciary advised Mr Michael WONG that CE was the proper approving authority for his application;
- (d) since it was desirable for the Judiciary to have the flexibility of appointing retired judges and judicial officers to act as deputies for a

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period of say three months without suspension of pension in order to meet operational needs, and as the discretion under section 28(1) was not delegated to CJ, the Judiciary would consider inviting CE to delegate his discretion under section 28 to CJ solely for the purpose of making such appointments. As such appointments would not exceed a period of three months, they would meet the criterion mentioned in paragraph 2(b)(iii) above; and

- (e) since 1 July 1997, there had been five cases where retired judges and one case where a retired judicial officer were given permission by CJ to continue to receive their pensions while taking up other employment or appointments after their retirement (a summary of the six cases was in Annex A to the Judiciary Administration's paper).

Issues raised by members

Post-retirement employment and pension benefits

3. Mr James TO said that the Judiciary's conclusion that the discretion under section 28(1) of Cap. 401 was vested in CE raised the question as to whether CJ should be the authority to give permission in past cases to allow retired judges appointed as deputy judges to continue to receive pensions while taking up the appointments after their retirement. He opined that if the permission given by CJ in those cases was not legally proper, a possible scenario would be that the judges who had received pensions during the relevant period might be required to refund the pensions. Mr TO opined that as a remedial measure, CE might give covering approval for these cases. The Administration should also consider introducing legislative amendments to remove the ambiguity in section 28(1).

4. JA and Deputy Judiciary Administrator (Development) (DJA(D)) said that the view held by the Judiciary in 1994 was that CJ could exercise the discretion under section 28(1). On this basis, the then CJ granted general permission for retired judges and judicial officers appointed as deputies without suspension of pension. As regards the six cases handled since 1 July 1997, permission was granted by CJ under section 34(1) in each of these six cases. Further, in the case of the appointment of a retired judge as deputy judge, the CJ proceeded on the basis that the discretion under section 28(1) was vested in him. In the Judiciary's view, there was no question of exercising the discretion to suspend the pension because the appointment, being for a period of three months, met the criterion for continued payment of pension. The other five cases were part-time employment or appointments. JA agreed to convey the views expressed by Mr James TO for CJ's consideration.

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5. Ms Audrey EU asked whether, apart from the criteria applicable to civil servants, there were additional factors which should be taken into account in the exercise of the discretion under section 34(1) in relation to retired judges and judicial officers to ensure that judicial integrity would be upheld. JA responded that other considerations included whether judicial independence, or the perception of such independence, might be compromised and whether the proposed employment might involve any conflict of interest or perception of conflict. The time that had elapsed between the proposed employment and the cessation of active service was also relevant. JA drew members' attention to the six cases since 1 July 1997 of retired judges and judicial officers who were granted permission by CJ to continue to receive their pensions while taking up employment and appointments after retirement. He pointed out that in one case, a retired judicial officer (a Magistrate) was given permission to work part-time as a consultant in a solicitor's firm. The Magistrate was asked to confirm and duly confirmed that he had no professional contacts with the firm over the previous two years. Moreover, a sanitisation period of six months from cessation of active service was imposed. In the other cases, several retired judges were granted permission to take up part-time positions without suspension of pension, including taking up position as non-executive director of companies and the office of Chairman of the Administrative Appeals Board (AAB). In the cases of taking up positions as non-executive director of companies, the judges confirmed that they had not dealt with any case involving the company concerned or any company in the group to which it belonged. As for the case of the AAB, the condition imposed was that the retired judge should not handle any case, in his capacity as Chairman of AAB, which he had previously dealt with as a judge.

6. In response to Mr James TO's enquiry, DJA(D) said that the office of Chairman of AAB was a part-time position and the office holder was paid an honorarium which did not involve any gratuity. The term "public service" was defined in section 2 of Cap. 401. It was considered that the office of the Chairman of AAB did not fall within the definition of "public service" under section 2 and was not subject to section 28 of Cap. 401. It was also considered that such office was not an employment and was not subject to section 34 of Cap. 401. It was understood that this view was also shared by the Administration. However, for the avoidance of doubt, permission was granted by CJ to the application for continued payment of pension which met the established criteria for approval.

7. Mr James TO requested the Judiciary Administration to comment on whether the conditions imposed in granting permission for retired judges and judicial officers to continue to receive pension while taking employment after retirement had any binding effect, and explain the consequences of not complying with such conditions. He remarked that the Judiciary Administration might take legal advice on this if necessary.

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8. Ms Emily LAU asked whether the names of the judges and judicial officers involved in the six cases listed in Annex A to the Judiciary Administration's paper could be disclosed. JA said that the Judiciary considered that it was not appropriate to do so in view of the requirements under the Personal Data (Privacy) Ordinance. Ms LAU said that the public had a right to know the information as payment of pension benefits involved the use of public money. She opined that subject to the agreement of the retired judges and judicial officers concerned, the Judiciary Administration should disclose their names. She further suggested that in future cases of granting permission to retired officers to continue to receive pension while taking up employment after retirement, a condition should be imposed such that the Judiciary Administration, where appropriate, could disclose the names of the retired officers concerned. JA agreed to convey Ms LAU's views for CJ's consideration.

JA

9. Ms Audrey EU considered that from the policy point of view, it was not desirable to have different authorities for the exercise of the discretion under section 34(1) and section 28(1) respectively. She asked whether the Judiciary Administration would review the possibility of allowing the discretion under both sections to be exercised by CJ to achieve consistency. Ms Emily LAU said that retired judges and judicial officers taking up remunerated offices after retirement was likely to attract wide public attention. She opined that to allay public concern about conflict of interest and the adverse effect on judicial independence, CJ, being the head of the Judiciary, should be given the authority to exercise the discretion under both sections 34(1) and 28(1). She said that CJ should also be consulted in specific cases as to whether the retired judges or judicial officers concerned were suitable to take up the employment or appointments after their retirement. Mr Albert HO expressed similar views. He opined that legislative measures should be introduced to provide CJ with such statutory functions. The Chairman added that the existing restrictions imposed on post-retirement employment of judges and judicial officers should be comprehensively reviewed to ensure that judicial integrity and independence would be safeguarded. JA said that members' views would be conveyed to CJ for his consideration.

JA

Pension benefits of Mr Michael WONG appointed as Chairperson of EOC

10. Mr Albert HO said that CE's approval to allow Mr Michael WONG to continue to receive his pension after taking up the appointment as the Chairperson of EOC did not comply with the criteria set out in paragraph 2(b)(iii) above, given the fact that the appointment was a full-time job exceeding three months. He asked whether CJ, having concluded that CE should be the approving authority for Mr Michael WONG's application, had given any advice to CE on -

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- (a) the criteria for suspension of pension of retired judges and judicial officers while taking up post-retirement employment; and
- (b) whether permission should be given to Mr Michael WONG to continue to receive pension upon taking up the appointment as Chairperson of EOC.

11. JA replied that the Judiciary had not advised CE on Mr Michael WONG's case because the Administration had not consulted the Judiciary in this regard. Moreover, the Judiciary considered that the selection of the person to fill the office of the chairperson of EOC was entirely a matter for the Administration and it was up to the Administration to undertake such consultation as it considered necessary. It was inappropriate for the Judiciary to comment on its own initiative. He further said that CJ had not advised CE on the criteria adopted in considering applications from retired judges and judicial officers for payment of pension while taking up employment after retirement because CJ had not been consulted.

12. Mr Abert HO considered that the Judiciary should have a duty to advise the Administration on Mr Michael WONG's case. He pointed out that Mr WONG's appointment as Chairperson of EOC, which was a full-time employment in a public office exceeding three months, had set a precedent. The departure from established criteria in handling Mr WONG's application to continue to receive pension benefits had given rise to concern about favouritism and jeopardized public perception of the conduct and integrity of judges. Ms Audrey EU expressed similar views. She said that similar applications must be carefully handled to ensure that judicial integrity and independence would not be undermined.

13. Ms Emily LAU reiterated that the Administration should consult CJ on matters relating to employment of judges and judicial officers after retirement, including the suitability of the judges and judicial officers in taking up the employment in specific cases. The Chairman said that judicial independence was the pillar of Hong Kong's judicial system. There had been concern expressed that appointment of retired judges to offices whose work was of a sensitive or controversial nature could undermine the image of judicial independence. She opined that the Administration should undertake an overall review in that regard. JA said that he would convey members' views to CJ for his consideration.

14. Ms Emily LAU and Mr James TO referred to the reply of the Secretary for Home Affairs (SHA) to Mr Albert HO's oral question raised at the Council meeting on 22 October 2003. In his reply, SHA stated that the Administration had, before dealing with Mr Michael WONG's application, informed the Judiciary of Mr WONG's wish to continue to receive his pension during his term

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of office as Chairperson of EOC. Ms LAU and Mr TO enquired about the sequence of the events which had taken place.

15. In response, JA and DJA(D) said that Mr Michael WONG had sent a letter to CJ on 19 June 2003 applying for permission to continue to receive pension upon his taking up the appointment as Chairperson of EOC. Some time before Mr WONG's application on 19 June 2003, the Judiciary was informed by the Administration by phone of Mr WONG's wish to take up the appointment without suspension of his pension. As section 28(1) was ambiguous as to who should in law be regarded as the appropriate authority to exercise the discretion, the Judiciary conducted a review on the relevant provisions. After the review, CJ replied Mr Michael WONG on 26 June 2003 that the Judiciary had concluded that section 28(1) vested the discretion in CE and therefore CE should be the proper authority to deal with his application. The CJ's written reply to Mr WONG had also been copied to the Administration. The Judiciary subsequently received notification from the Administration in early July 2003 that Mr WONG's application had been approved.

16. DJA(D) further informed members that SHA had issued a written reply dated 4 November 2003 to Ms Audrey EU in response to Ms EU's two letters (i.e. 29 and 30 October 2003) regarding some follow up questions relating to SHA's reply to the oral question raised by Mr Albert HO on 22 October 2003. With the agreement of Ms Audrey EU, DJA tabled a copy of SHA's letter for members' information.

(Posting-meeting note : The letter was issued to the Panel after the meeting vide LC Paper No. CB(2)353/03-04(02)).

Admin

17. Mr James TO requested information on the date on which the Administration approved Mr WONG's application.

18. Mr James TO questioned the intention of the Administration to notify, not to consult, the Judiciary of Mr Michael WONG's wish to continue to receive his pension, prior to Mr WONG's application to CJ on 19 June 2003. He said that the Administration's notification to the Judiciary could be perceived as pressurising the Judiciary and interfering with the independence of the Judiciary. Ms Audrey EU said that if the Administration accepted that CE was the approving authority, it would not be necessary to consult the Judiciary. If the view was taken that the authority was vested in CJ, the Administration's notification to the Judiciary could amount to an interference.

19. Mr James TO requested the Judiciary Administration to revert to the Panel with information on -

- (a) the date the Administration informed the Judiciary by phone of Mr Michael WONG's wish to continue to receive his pension;

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- (b) who made the telephone call to the Judiciary; and
- (c) who received the phone call from the Administration.

(*Post-meeting note* : The written response from the Judiciary Administration to Mr James TO's enquiries was issued to the Panel vide LC Paper No. CB(2)393/03-04(01) on 20 November 2003.)

20. Ms Audrey EU asked whether Mr Michael WONG's case was the first case where CE had exercised the discretion to grant permission to a retired judge to continue to receive pension while receiving remuneration of a full-time public office after retirement. Ms EU recalled that there was a precedent case in which a retired judge was appointed to take up the office of the Ombudsman.

JA

21. DJA(D) replied that according to information available, Mr Michael WONG's case was the only case since July 1997 where a retired judge was appointed to a full-time public office after retirement. She undertook to revert to the Panel in writing on the situation before July 1997.

JA

22. The Chairman referred to paragraph 25 of the Judiciary Administration's paper, which stated that under section 29(1) of Cap. 401, a designated officer (appointed by CE) could, among other things, cancel or reduce a pension granted to an officer "if it is shown to the designated officer that the pension was obtained by the wilful suppression of facts, or that it was granted in ignorance of facts, which were such that had they been known before the retirement of the officer the pension would not have been granted in full or in part.". She requested the Judiciary Administration to explain in writing the existing mechanism for initiating investigation of suspected cases under section 29(1) of Cap. 401.

Acceptance of advantages by judges and judicial officers

23. Mr James TO referred to the press statement issued by the Judiciary on 3 November 2003 (LC Paper No. CB(2)248/03-04(02)) concerning the allegation in the media that Mr Michael WONG had accepted, while holding office as a judge, a gift of air tickets from a businessman. In the press statement, the Judiciary explained that as the allegation had been reported by members of the public to the Independent Commission Against Corruption (ICAC), it was not appropriate for the Judiciary to initiate an inquiry into the matter at present. Mr TO said that he did not agree with the Judiciary's decision. He said that as the investigation of ICAC took time and ICAC would not disclose the progress of its investigation to any party including the Judiciary, the Judiciary should initiate its own inquiry into the incident. He added that an inquiry by the Judiciary would also help to identify drawbacks in the existing system of handling acceptance of advantages and bring about improvements to the system.

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24. JA reiterated the stance of the Judiciary as set out in the Judiciary's press statement on 3 November 2003. He said that as far as the allegation about acceptance of air tickets by Mr Michael WONG was concerned, the Judiciary was of the view that the matter must be dealt with in accordance with law and the relevant statutory provisions governing acceptance of advantages by judges and judicial officers.

25. In reply to Ms Emily LAU's enquiries concerning applications for permission to accept an advantage by judges and judicial officers, JA informed members that the number of such applications received in the years 2000 to 2003 (January to October 2003) was 23, 36, 38 and 14 respectively. The advantages involved were mostly books, small gifts and souvenirs received by judges and judicial officers. Ms Emily LAU requested the Judiciary Administration to provide information on the names of the judges and judicial officers in receipt of the advantages, the dates of receipt of the advantages as well as the nature of such advantages for the Panel's information.

JA

Way forward

26. The Chairman requested the Judiciary Administration to provide written responses to the concerns raised by members at the meeting as soon as practicable.

JA

27. Mr James TO suggested that the Panel should invite SHA to attend future meetings to discuss relevant issues. The Chairman said that the Panel would decide how to follow up the issues after receiving the responses from the Judiciary Administration. She asked the Secretariat to provide copy of the minutes of the meeting to SHA for his information.

Clerk

II. Any other business

Authority of CJ to appoint Deputy Judges and Deputy Judicial Officers

28. JA tabled for members' reference a copy of a press statement issued by the Judiciary on 14 November 2003 in response to some newspaper reports published on the same day which raised concerns whether CJ had the authority to appoint Deputy Judges and Deputy Judicial Officers. He said that the press statement clarified that under section 10 of the High Court Ordinance (Cap. 4), section 7 of the District Court Ordinance (Cap. 336) and section 5A of the Magistrates Ordinance (Cap. 227), CJ might appoint eligible persons to be a Deputy Judge of the Court of First Instance of the High Court, Deputy District Judges and Deputy Magistrate respectively. All these appointments had been gazetted and there was no doubt whatsoever that the appointments were fully valid. The press statement further stated that the ambiguity as to who should in law be regarded as the authority which had the discretion to suspend pensions

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under section 28 of Cap. 401 was an entirely separate issue which had nothing to do with the authority to appoint Deputy Judges and Deputy Judicial Officers.

(Posting-meeting note : The press statement was issued to the Panel after the meeting vide LC Paper No. CB(2)353/03-04(01)).

29. The meeting ended at 5:25 pm.

Council Business Division 2
Legislative Council Secretariat
31 December 2003