

Letterhead of JUDICIARY ADMINISTRATOR'S OFFICE JUDICIARY HONG KONG

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10 June 2000

Mrs Percy Ma
Clerk to LegCo Panel on Administration
of Justice and Legal Services
Legislative Council
Legislative Council Building
8 Jackson Road
Central
HONG KONG

Dear Madam,

LegCo Panel on Administration of Justice and Legal Services
Appointment of Judges of the Court of Final Appeal

I refer to your letter of 5 June 2000 and am directed by the Chief Justice who is Chairman of Judicial Officers Recommendation Commission ("JORC") to reply.

2. Your letter stated that the exercise of LegCo's power of endorsement "requires the understanding of the process whereby appointments were made" (3rd para. on p.1), that is the seven appointments for which the Chief Executive is obtaining LegCo's endorsement. And the letter set out the information sought (on p.2).

3. Your letter is of course treated with full respect. Subject to the constraints of confidentiality under which JORC operates, it is appropriate for JORC to supply information to LegCo on the workings of JORC relating to CFA appointments generally outside the context of particular judicial appointments. Accordingly, JORC is supplying information in the enclosed paper and will be sending the undersigned,

and Miss Emma Lau, Deputy Judiciary Administrator, to appear before the LegCo Panel concerning the same.

4. But there are legal and constitutional reasons (as explained in the enclosed paper) why JORC should not go beyond para. 3 above. I understand that the Administration will be supplying a separate paper, with additional information relating to the current exercise of the appointment of the seven CFA judges.

Yours sincerely,

(Wilfred Tsui)
Judiciary Administrator

c.c. Director of Administration

Paper for the
LegCo Panel on Administration of Justice and Legal Services

Background

On 5 June 2000, the clerk to the LegCo Panel on Administration of Justice and Legal Services ("the Panel") wrote to the secretary of Judicial Officers Recommendation Commission ("JORC"), seeking information from JORC ("the Panel's letter").

2. On 10 June 2000, the secretary of JORC replied as directed by the Chief Justice who is Chairman of JORC, stating that subject to the constraints of confidentiality under which JORC operates, he would be pleased to provide information to the Panel concerning the workings of JORC relating to the appointment of Court of Final Appeal (CFA) judges generally outside the context of particular judicial appointments.

The Constitutional Arrangements for Appointment of CFA Judges

3. The Basic Law and the Hong Kong Court of Final Appeal (CFA) Ordinance, Cap. 484 provide for 4 steps:

- (a) Step 1: Recommendation by the Judicial Officer's Recommendation Commission (JORC);
- (b) Step 2: Appointment by the Chief Executive on the recommendation of JORC;
- (c) Step 3: The Chief Executive to obtain the endorsement of the Legislative Council (LegCo) of his appointment; and
- (d) Step 4: The Chief Executive reporting the appointment to the Standing Committee of the National People's Congress "for the record".

4. The detailed provisions in the Basic Law (see extracts at Annex A) and the CFA Ordinance (see extracts at Annex B) relating to those steps are as follows:

- (a) Step 1: Under the JORC Ordinance, JORC has the function of making recommendations to the Chief Executive who, under the Basic Law (Article 88), makes appointments on the recommendation of JORC (see Annex A);

- (b) Step 2: In accordance with Article 88 of the Basic Law and Sections 7, 8 and 9 of the CFA Ordinance, both permanent and non-permanent judges of the CFA (collectively "judges of the CFA") shall be appointed by the Chief Executive on the recommendation of an independent JORC (see Annexes A and B);
- (c) Step 3: In accordance with Article 90 of the Basic Law and Section 7A of the CFA Ordinance, the Chief Executive shall obtain the endorsement of LegCo for the appointment of judges of the CFA (see Annexes A and B); and
- (d) Step 4: In accordance with Article 90 of the Basic Law and Section 7A of the CFA Ordinance, the Chief Executive shall report the appointment of judges of the CFA to the Standing Committee of the National People's Congress of the People's Republic of China (see Annexes A and B).

5. It is clear that under these constitutional arrangements for the making of senior judicial appointments:

- (a) JORC makes recommendations to and only to the Chief Executive who makes appointments on such recommendations. JORC's interface is only with the Chief Executive;
- (b) The Chief Executive has to obtain LegCo's endorsement of his appointments (not JORC's recommendations). LegCo's interface is only with the Chief Executive; and
- (c) Having regard to (a) and (b), there is no constitutional basis for LegCo to have any interface with JORC in relation to the judicial appointments which require LegCo endorsement.

6. The underlying rationale of these constitutional arrangements for the making of senior judicial appointments, in particular the absence of any interface between JORC and LegCo, is to safeguard the independence of the Judiciary which is fundamental to the rule of law and to avoid any risk of politicising judicial appointments which would seriously erode that independence.

7. Further, Section 11 of the JORC Ordinance prohibits with a criminal sanction the disclosure without the permission of the Chief Executive by any member of JORC or other person of any information coming to his knowledge in the course of duties under the Ordinance.

8. In the light of the above, this paper only provides information on the workings of the JORC relating to CFA appointments generally outside the context of particular judicial appointments.

Qualifications of CFA Judges

9. The legal qualifications of CFA judges are set out in Section 12 of the CFA Ordinance, namely:

(a) Permanent Judges

Section 12(1) provides that a person shall be eligible to be appointed as a permanent judge if he is - (a) the Chief Judge of the High Court, a Justice of Appeal or a judge of the Court of First Instance; or (b) a barrister who has practised as a barrister or solicitor in Hong Kong for a period of at least 10 years.

(b) Non-permanent Hong Kong Judges

Section 12(3) provides that a person shall be eligible to be appointed as a non-permanent Hong Kong judge if he is - (a) a retired Chief Judge of the High Court; (b) a retired Chief Justice of the Court; (c) a retired permanent judge of the Court; (d) a Justice or retired Justice of Appeal; or (e) a barrister who has practised as a barrister or solicitor in Hong Kong for a period of at least 10 years, whether or not he is ordinarily resident in Hong Kong.

(c) Non-permanent Judge from another common law jurisdiction

Section 12(4) provides that a person shall be eligible to be appointed as a judge from another common law jurisdiction if he is - (a) a judge or retired judge of a court of unlimited jurisdiction in either civil or criminal matters in another common law jurisdiction; (b) a person who is ordinarily resident outside Hong Kong; and (c) a person who has never been a judge of the High Court, a District Judge or a permanent magistrate, in Hong Kong.

10. It should also be noted that Section 13 of the CFA Ordinance contains a statutory prohibition on legal practice in Hong Kong for CFA judges (permanent and non-permanent) during office and thereafter.

The Workings of JORC relating to Appointment of CFA Judges Generally

11. The JORC as prescribed by the JORC Ordinance, Cap. 92 consists of 9 members (Section 3):

- (a) 3 judges (including the Chief Justice as the ex-officio chairman);
- (b) 3 lawyers (including the Secretary for Justice as the ex-officio member and a barrister and a solicitor who are appointed in consultation with the professional bodies); and
- (c) 3 persons not connected with the practice of law.

12. The JORC is entrusted with the function to make recommendations to the Chief Executive regarding the filling of vacancies in judicial offices. (Section 6(a) of the JORC Ordinance).

13. A quorum comprising the Chairman and no fewer than 6 members (that is a total of 7) must be present at the meeting. (Section 3(3) of the JORC Ordinance).

14. In relation to appointment of CFA judges, the JORC Ordinance provides:

- (a) Any member who is or may reasonably be regarded as a candidate for selection as a permanent judge or a non-permanent judge shall disclose whether or not, if he or she is selected, he or she is willing to accept appointment, that disclosure shall be recorded in the minutes. Section 3(5B); and
- (b) Any member disclosing such willingness (a) shall not take part in any deliberation of the Commission with respect to that appointment and shall not vote on any question concerning it; and (b) shall be treated as unable to act. Section 3(5C).

15. In considering the appointment of CFA judges, the names of eligible persons are usually put before JORC by the secretary in consultation with the Chairman. Any member is at liberty to put further names.

16. In relation to the appointment of CFA judges, JORC would base the criteria of selection of eligible persons on Article 92 of the Basic Law which requires judges to be chosen on the basis of their judicial and professional qualities.

17. In relation to non-permanent CFA judges, JORC would also take into account:

- (a) The legal maximum number of non-permanent judges is 30. Section 10 of the CFA Ordinance; and
- (b) The need to have a sufficient number of both non-permanent Hong Kong judges and non-permanent common law judges to provide flexibility to deal with CFA's case load.

18. A resolution of JORC is not effective if there are more than 2 votes not in favour. Section 3(3) of the JORC Ordinance provides that at a meeting of JORC, a resolution is effective if -

- (a) Where 7 members are present, at least 5 vote in favour;
- (b) Where 8 members are present, at least 6 vote in favour; and
- (c) Where 9 members are present, at least 7 vote in favour.

19. An effective resolution would be communicated to the Chief Executive. In relation to the appointment of CFA judges, JORC will invite the Chief Executive to accept its recommendations in accordance with the Basic Law and the CFA Ordinance. In doing so, the Chief Executive would be informed of the detailed procedures which have been undertaken in each particular exercise so that he can be satisfied that the recommendations made are in order.

Secretary, Judicial Officers Recommendation Commission
June 2000

Anyone who is lawfully arrested shall have the right to a fair trial by the judicial organs without delay and shall be presumed innocent until convicted by the judicial organs.

Article 88

Judges of the courts of the Hong Kong Special Administrative Region shall be appointed by the Chief Executive on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors.

Article 89

A judge of a court of the Hong Kong Special Administrative Region may only be removed for inability to discharge his or her duties, or for misbehaviour, by the Chief Executive on the recommendation of a tribunal appointed by the Chief Justice of the Court of Final Appeal and consisting of not fewer than three local judges.

The Chief Justice of the Court of Final Appeal of the Hong Kong Special Administrative Region may be investigated only for inability to discharge his or her duties, or for misbehaviour, by a tribunal appointed by the Chief Executive and consisting of not fewer than five local judges and may be removed by the Chief Executive on the recommendation of the tribunal and in accordance with the procedures prescribed in this Law.

Article 90

The Chief Justice of the Court of Final Appeal and the Chief Judge of the High Court of the Hong Kong Special Administrative Region shall be Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country.

In the case of the appointment or removal of judges of the Court of Final Appeal and the Chief Judge of the High Court of the Hong Kong Special Administrative Region, the Chief Executive shall, in addition to following the procedures prescribed in Articles 88 and 89 of this Law,

obtain the endorsement of the Legislative Council and report such appointment or removal to the Standing Committee of the National People's Congress for the record.

Article 91

The Hong Kong Special Administrative Region shall maintain the previous system of appointment and removal of members of the judiciary other than judges.

Article 92

Judges and other members of the judiciary of the Hong Kong Special Administrative Region shall be chosen on the basis of their judicial and professional qualities and may be recruited from other common law jurisdictions.

Article 93

Judges and other members of the judiciary serving in Hong Kong before the establishment of the Hong Kong Special Administrative Region may all remain in employment and retain their seniority with pay, allowances, benefits and conditions of service no less favourable than before.

The Government of the Hong Kong Special Administrative Region shall pay to judges and other members of the judiciary who retire or leave the service in compliance with regulations, including those who have retired or left the service before the establishment of the Hong Kong Special Administrative Region, or to their dependants, all pensions, gratuities, allowances and benefits due to them on terms no less favourable than before, irrespective of their nationality or place of residence.

Article 94

On the basis of the system previously operating in Hong Kong, the Government of the Hong Kong Special Administrative Region may make provisions for local lawyers and lawyers from outside Hong Kong to work and practise in the Region.