CSO/ADM CR 10/4/3222/85(01)

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7 February 2002

Ms Bernice Wong
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(Fax No.: 2877 5029)

Dear Ms Wong,

Hong Kong Court of Final Appeal (Amendment) Bill 2001

Thank you for your letter of 30 January. This is a consolidated response from the Department of Justice, the Judiciary Administrator and the Administration Wing to the points raised therein.

Clause 3

Para. 1 of your letter

2. It is a common drafting practice to use the short form or abbreviated terms in section headings. The phrase "Chief Executive Election" is a deliberate choice partly for the reason that it echoes the name of the Chief Executive Election Ordinance.

Para. 2 of your letter

3. Your alternative proposal is noted with thanks. Nonetheless, matters being handled under the provisions relating to CE election appeal are different from those proposed under section 27E. As sections 23, 24 and 25 are directly applicable to an election-related appeal, it is not necessary to adopt the "apply subject to necessary modifications" formula. If we could simply stipulate that sections 23, 24 and 25 shall apply, that would obviate the need for a separate division.

Clause 4

Para. 3 of your letter

4. For ease of reference, the following abbreviations will be used in this reply:

(a) The leapfrogging criterion under the proposed section 27C(2)(a)(i) would be referred to as the "construction of statute" route;
(b) The leapfrogging criterion under the proposed section 27C(2)(a)(ii) would be referred to as the "bound by precedent" route; and
(c) The leapfrogging criteria under the proposed section 27C(2)(b)(i) and (ii) would be referred to as the "Basic Law" route.

5. The Basic Law is a constitutional instrument of the HKSAR under its new legal order and the jurisprudence has to be developed. The more judgments there are at whatever level, the better for this process. The policy intention is that questions of the interpretation of the Basic Law should generally be excluded from the leapfrog procedure, subject to the exception where the judge is bound by a decision of the Court of Appeal (the "CA") or the Court of Final Appeal (the "CFA"). This is to ensure that the CFA would not be deprived of the benefits of the CA's judgment.

6. Consistent with such policy intention, the exceptional "Basic Law" route for leapfrogging should be narrowly confined to cases where the point relates wholly or mainly to the construction of the Basic Law. If it does not so relate, it could not be properly regarded as a Basic Law point. In other words, to come within this exceptional route, the point of law must in essence be a Basic Law point, hence wholly or mainly.

7. If the point of law is not in essence a Basic Law point, it would in essence concern some other aspect of law and the "Basic Law" route should not then apply. But the point of law may be within one of the other routes, i.e. (i) the "construction of statute" route if it relates wholly or mainly to the construction of an Ordinance or subsidiary legislation; or (ii) the "bound by precedent" route if it is one in respect of which the judge was bound by a decision of the CA or the CFA in previous proceedings.

8. To be consistent with the "wholly or mainly" criterion in the "Basic Law" route, the other routes should be prefaced similarly. Accordingly, we suggest to further amend proposed section 27C(2)(a) so as to read –

> "where that point of law does not relate wholly or mainly to the construction of the Basic Law…".

9. It may be clearer if the reference to "relate wholly or mainly to the construction of the Basic Law" is put at the beginning of the relevant provision (see section 27C(2)(b)), and not in a subsection (b)(i). We suggest to further amend the proposed section 27C(2)(b) so to read –

> "where that point of law relates wholly or mainly to the construction of the Basic Law, it must –
>
> (i) be one in respect of which the judge is bound by a decision of the Court of Appeal or the Court in previous proceedings, and was fully considered in the judgments given by the Court of Appeal or the Court (as the case may be) in those previous proceedings."

Para. 4 of your letter

10. Regarding part (a) , the proposed section 27C(2)(a)(i) and (ii) provides for **two different** routes, that is, the "construction of statute" and the "bound by precedent" routes. They are not alternative conditions for one route. These routes are modelled on similar provisions in Part II of the UK Administration of Justice Act 1969 which deals with appeals from the High Court to the House of Lords.

11. As regards the third route, i.e. the "Basic Law" route, there is only one condition. Please refer to paragraph 9 above.

12. Regarding part (b), for the "bound by precedent" route and the "Basic Law" route, both have an identical requirement of being bound by a binding precedent of the CA or the CFA. It is sufficient for this requirement that the point has been fully considered in the judgments. It would usually have been fully argued. But strictly speaking, even if it had not been fully argued, this does not affect the fact that the precedent is binding.

13. In contrast, for the "construction of statute" route, this route could be considered as wider. This is considered justified having regard to the nature of questions concerning the interpretation of statute. There is no requirement that there is a binding precedent on the point. But it is necessary that the point has been fully argued and considered in the judgment. Otherwise, the first instance judgment would be of little assistance to the CFA. And it would be unusual for a final appellate court to address an important point of law without the benefit of assistance from such a judgment.

Clause 6A

Paras. 5, 6 and 7 of your letter

14. The proposed clause 6A is intended to avoid the possibility of having to apply to the CA for an extension of time for serving notice of appeal, in cases where parties have failed to obtain the certificate under the new section 27C or the leave to bring a leapfrog appeal directly to the CFA under the new section 27D.

15. Given that one of the conditions for the granting of a leapfrog certificate is the consent of all the parties to the proceedings, it is extremely unlikely that any party having successfully obtained a leapfrog certificate would change his mind and does not proceed to apply to the CFA for leave to appeal, and revert back to appealing to the CA. This may only happen in rare and exceptional circumstances and in such circumstances, parties can seek extension of time under Order 3, rule 5 and Order 59, rule 15 of the Rules of the High Court.

Para. 8 of your letter

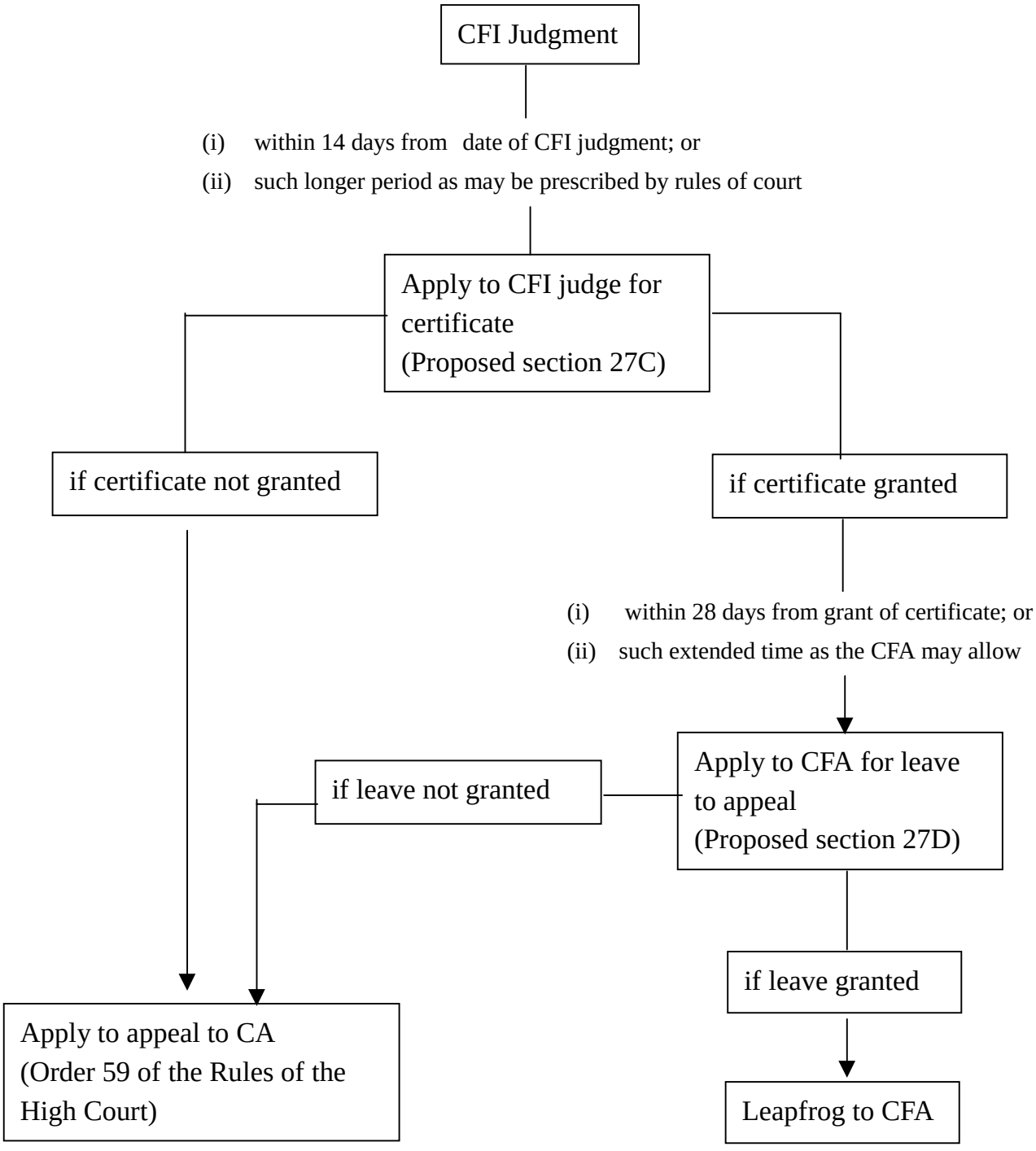
17. A flow-chart is attached for easy reference.

Yours sincerely,

(Chan Yum-min, James)
for Director of Administration

Civil Appeal

(under the Hong Kong Court of Final Appeal (Amendment) Bill 2001)



Note:

CFI - The Court of First Instance of the High Court

CA - The Court of Appeal of the High Court

CFA - The Court of Final Appeal