

立法會
Legislative Council

Ref : CB2/HS/1/09

LC Paper No. CB(2)1783/09-10
(These minutes have been seen
by the Administration)

Subcommittee on Proposed Senior Judicial Appointments

Minutes of the meeting
held on Tuesday, 4 May 2010, at 8:30 am
in Conference Room A of the Legislative Council Building

Members present : Dr Hon Margaret NG (Chairman)
Hon LAU Kong-wah, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Ronny TONG Ka-wah, SC
Hon Paul CHAN Mo-po, MH, JP
Dr Hon Priscilla LEUNG Mei-fun

Members absent : Hon Albert HO Chun-yan
Hon Emily LAU Wai-hing, JP
Hon Abraham SHEK Lai-him, SBS, JP
Hon Paul TSE Wai-chun

Public Officers attending : The Administration

Miss Jennifer MAK
Director of Administration

Miss Agnes WONG
Deputy Director of Administration

Judiciary Administration

Miss Emma LAU
Secretary
Judicial Officers Recommendation Commission

Mrs Angela LO
Assistant Judiciary Administrator (Corporate Services)

Clerk in attendance : Miss Flora TAI
Chief Council Secretary (2)3

Staff in attendance : Mr KAU Kin-wah
Assistant Legal Adviser 6

Ms Amy YU
Senior Council Secretary (2)3

Mrs Fanny TSANG
Legislative Assistant (2)3

Action

I. Election of Chairman

Dr Margaret NG was elected Chairman of the Subcommittee.

II. Meeting with the Administration

[LC Paper Nos. CB(2)1253/09-10 and CB(2)1439/09-10(01)]

2. The Subcommittee deliberated (index of proceedings attached at **Annex**).

3. Members supported the proposed senior judicial appointments. Members agreed that the Subcommittee would report its deliberations to the House Committee on 14 May 2010.

4. Director of Administration advised members that the Administration intended to move the motions for obtaining the endorsement of Legislative Council on the appointments as soon as practicable after the Subcommittee had reported to the House Committee, and in any event before the summer recess in July 2010, as the incumbent Chief Justice of the Court of Final Appeal would leave his office on 31 August 2010.

Clerk 5. Members agreed to refer the following policy issues to the Panel on Administration of Justice and Legal Services ("AJLS Panel") for follow-up -

- (a) membership of the Secretary for Justice in the Judicial Officers Recommendations Commission;
- (b) appointment of serving Justices of Appeal of the Court of Appeal as non-permanent judges of the Court of Final Appeal; and
- (c) judicial manpower situation at the Court of Final Appeal and other levels of courts.

Clerk Members also suggested that the AJLS Panel should invite all Members to join future discussions on the issue referred to in paragraph 5(a) above.

Action

Jud
Admin

6. In respect of the issue referred to in paragraph 5(c) above, the Judiciary Administration was requested to provide relevant information to the AJLS Panel when the subject was discussed, including the caseload and judicial manpower situation at different levels of courts and relevant statutory provisions such as section 16 of the Hong Kong Court of Final Appeal Ordinance (Cap. 484) Ordinance concerning the composition of the Court of Final Appeal.

7. The meeting ended at 9:16 am.

Council Business Division 2
Legislative Council Secretariat
9 June 2010

**Proceedings of the meeting of the
Subcommittee on Proposed Senior Judicial Appointments
on Tuesday, 4 May 2010, at 8:30 am
in Conference Room A of the Legislative Council Building**

Time Marker	Speaker(s)	Subject(s)	Action required
000103 - 000131	Dr Margaret NG Ms Audrey EU Mr Ronny TONG Mr Paul CHAN	Election of Chairman	
000132 - 000237	Chairman	Submission from a member of the public	
000238 - 000403	Chairman Ms Audrey EU Mr Ronny TONG Chairman	Ms Audrey EU and Mr Ronny TONG declared that they had known Mr Justice Geoffrey MA Tao-li and Mr Justice Robert TANG Ching for many years. The Chairman also declared that she knew Mr Justice MA and had known Mr Justice TANG for many years as well.	
000404 - 000551	Chairman	Procedure for endorsement of appointment of judges by the Legislative Council ("LegCo") under Article 73(7) of the Basic Law ("BL 73(7)")	
000552 - 000959	Administration	Briefing by the Administration on the proposed senior judicial appointments [LC Paper No. CB(2)1253/09-10]	
001000 - 001751	Mr Ronny TONG Judiciary Administration ("JA") Chairman Administration	<p>Mr Ronny TONG's view about the need to enhance the transparency in the operation of the Judicial Officers Recommendation Commission ("JORC") and his concern about the membership of the Secretary for Justice ("SJ"), being a Principal Official under the Political Appointment System, on JORC.</p> <p>Noting that the then SJ had not exercised her right to nominate any candidate in the appointment of the incumbent Chief Justice of the Court of Final Appeal ("CJ") in 1997, Mr TONG's enquiries about the role of the incumbent SJ in the current appointment exercise and the relevant nomination procedure.</p> <p>JA's clarification that there was no nomination procedure in the appointment process and its elaboration on the process as follows -</p> <p>(a) JORC had agreed to draw up a long list of persons who complied with the professional eligibility requirements for the appointment (leaving aside the nationality requirement) by consolidating the list of eligible judges drawn up by the Judiciary and the lists of eligible barristers provided by the Hong Kong Bar Association, the Department of Justice ("DoJ") and the Legal Aid Department;</p>	

Time Marker	Speaker(s)	Subject(s)	Action required
		<p>(b) the long list had a total of 739 names of persons, but the number came down to 735 when the four JORC members who had declared that they did not wish to be considered as candidates for appointment as CJ were excluded;</p> <p>(c) JORC went through the long list and agreed that eight persons should be placed on the short list for further consideration;</p> <p>(d) in accordance with the agreed procedures, CJ ascertained from each of the eight persons on the short list whether he was willing to serve and whether he complied or was able and willing to comply with the nationality requirement in BL 90, and three persons had indicated their unwillingness to serve; and</p> <p>(e) after detailed consideration on the suitability of the five remaining persons, JORC decided to recommend the appointment of Mr Justice MA as the next CJ.</p> <p>The Administration's response regarding SJ's membership on JORC that -</p> <p>(a) under the JORC Ordinance (Cap. 92), SJ was an ex-officio member of JORC;</p> <p>(b) it was considered appropriate for SJ to be a member of JORC as DoJ was a major court user which also briefed out a significant number of cases to private practitioners. Apart from being the principal adviser on legal matters to the Government, SJ was also endowed with the constitutional role of being the guardian of public interest in the administration of justice and the upholder of the rule of law. When appointed as a member of JORC, SJ had taken an oath to discharge his duties in relation to JORC without fear or favour; and</p> <p>(c) the approach taken by the then SJ was a reflection of the special circumstances at the time when the appointment of the incumbent CJ was made in 1997. At that time, the then SJ designate had not yet taken up office. The incumbent SJ, however, had been in office since 2005 and was in a position to participate in the appointment process.</p> <p>The Chairman's remark that during the AJLS Panel's review of the process of appointment of judges, the two legal professional bodies had expressed reservation about the membership of SJ on JORC, having regard to his position as a political appointee.</p> <p>Members' agreement to refer the issue to the Panel on Administration of Justice and Legal Services ("AJLS Panel") for follow up and to invite all Members to join in the future discussion.</p>	<p>Clerk (para 5 of minutes)</p>

Time Marker	Speaker(s)	Subject(s)	Action required
001752 - 002020	Ms Audrey EU Chairman Administration	<p>Ms Audrey EU's enquiry on whether it was the first time serving Justices of Appeal of the Court of Appeal of the High Court were appointed as non-permanent Hong Kong judges to the Court of Final Appeal ("CFA").</p> <p>The Administration's response in the negative as follows -</p> <ul style="list-style-type: none"> (a) three then serving Justices of Appeal were appointed in July 1997 as non-permanent Hong Kong judges to CFA who were Mr Gerald Paul Nazareth, Mr John Barry Mortimer, and the late Sir Noel Power; and (b) according to section 12(3) of the Hong Kong CFA Ordinance (Cap. 484), a serving Justice of Appeal was eligible for appointment as a non-permanent Hong Kong judge in CFA. 	
002021 - 003358	Ms Audrey EU Chairman JA	<p>Ms Audrey EU's expression of grave reservation that serving Justices of Appeal were being made non-permanent Hong Kong judges of CFA. While appreciating that these non-permanent Hong Kong judges would not hear appeals from cases in which they had sat, she was concerned that the arrangement of allowing the same pool of judges to sit in both courts could give the public the impression that they were denied a real appeal in CFA and would erode public confidence in the administration of justice.</p> <p>JA's response as follows -</p> <ul style="list-style-type: none"> (a) JORC considered that the three Justices of Appeal were suitable for appointment as non-permanent Hong Kong judges in CFA; (b) the appointment of serving Justices of Appeal as non-permanent Hong Kong judges was provided for under the CFA Ordinance and in line with established policy; (c) JORC noted that it was unsatisfactory to have only three non-permanent Hong Kong judges in CFA all of whom resided outside Hong Kong and this posed some operational difficulties for the Court. It was considered necessary to increase the number of non-permanent Hong Kong judges to allow greater flexibility in dealing with the heavy caseload of CFA; and (d) CJ foresaw that the three nominees would hear only a small number of CFA cases. In the some 40 cases of substantive appeals handled by CFA each year, CJ would sit in about half of them. The existing three non-permanent Hong Kong judges who were retired judges would be nominated to sit in most of the remaining cases. It was envisaged that the three nominees would be required to sit in no more than 10 cases in total each year. 	

Time Marker	Speaker(s)	Subject(s)	Action required
		<p>While appreciating the need of flexibility in appointing a Court of Appeal judge to sit in a CFA case on an ad hoc basis under exceptional circumstances, Ms EU considered it highly undesirable to have as many as three judges serving concurrently in the Court of Appeal and CFA and pointed out that 10 cases was no small number in relation to the total caseload of 40 at CFA.</p> <p>The Chairman's remark that the legal profession were also concerned that such dual roles of judges would diminish their confidence in a fresh look being given to the case on appeal. Her view that it was a policy matter which should be dealt with by the AJLS Panel, as the Subcommittee was only tasked to consider the recommended appointments. She stressed that supporting the recommended appointments was not tantamount to agreeing to the arrangement of allowing judges to take on dual roles.</p>	
003359 - 003835	Mr Ronny TONG Chairman	<p>While supporting in principle the three recommended appointments of non-permanent Hong Kong judges of CFA, Mr Ronny TONG shared the view that it was not desirable in the long run to have same judges sitting in both the Court of Appeal and CFA having regard to the following considerations -</p> <ul style="list-style-type: none"> (a) the three Justices of Appeal, as non-permanent judges of CFA, might find themselves in an embarrassing situation of having to criticize the judgments made by their colleagues in the Court of Appeal; and (b) apart from substantive appeals, a non-permanent Hong Kong judge could also be nominated to sit in the Appeal Committee in place of a permanent judge to hear applications for leave to appeal. <p>Mr TONG's view that more resources should be provided to the Judiciary to allow more judges to be appointed and the issue should be followed up by the AJLS Panel.</p>	
003836- 003957	Dr Priscilla LEUNG	<p>Dr Priscilla LEUNG's view that the arrangement would raise perception problem and her expression of support for the AJLS Panel to follow the issue about inadequate judicial resources.</p>	
003958 - 004437	Chairman Dr Priscilla LEUNG	<p>The Chairman's view that due to the small number of permanent judges in CFA in face of the increasing caseload of CFA, it had been necessary to appoint three serving Justices of Appeal as non-permanent Hong Kong judges to CFA.</p> <p>Her elaboration that during a full hearing, CFA was constituted by CJ, three permanent judges and one non-permanent judge. Having regard to his administrative duties or the need to avoid possible conflict of interest in certain cases, CJ was not available to sit in all the cases. When CJ was not available to sit, he had to designate a</p>	

Time Marker	Speaker(s)	Subject(s)	Action required
		<p>permanent judge to preside in his place. When this happened, CJ also had to nominate a non-permanent Hong Kong judge to sit in place of a permanent judge, as there were currently only three permanent judges in CFA. Apart from CJ, the permanent judges might also need to recuse themselves from hearing certain cases due to possible conflict of interest. The need to avoid possible conflict of interest would arise more frequently should Mr Justice MA be appointed as CJ, as he would not sit in cases tried by his spouse, Madame Justice YUEN.</p> <p>The Chairman's views that consideration might have to be given to appointing more permanent judges or having more than one panel of CFA judges, and the policy issues of appointing serving Justices of Appeal as non-permanent judges of CFA and of judicial manpower situation in CFA be referred to the AJLS Panel for follow up. When the subject was discussed, JA should provide relevant information to the Panel including the caseload and manpower situation of CFA and relevant statutory provisions such as section 16 of the CFA Ordinance concerning the composition of the Court.</p> <p>Dr Priscilla LEUNG's view that the judicial manpower situation at other levels of courts should also be taken up by the AJLS Panel.</p>	<p>Clerk/Jud Admin (paras 5 and 6 of minutes)</p> <p>Clerk (para 5 of minutes)</p>
004438 - 004650	Chairman Administration Mr Ronny TONG	Date of reporting to the House Committee. Timing for moving motions for obtaining the endorsement of LegCo	