

立法會
Legislative Council

LC Paper No. CB(2)2021/11-12

Ref : CB2/HS/1/11

Paper for the House Committee meeting on 18 May 2012

Subcommittee on Proposed Senior Judicial Appointments

Purpose

This paper reports on the deliberations of the Subcommittee on Proposed Senior Judicial Appointments ("the Subcommittee").

Background

Constitutional and statutory provisions

2. Under Article 48(6) of the Basic Law ("BL 48(6)"), the Chief Executive ("CE") has the power and function to appoint judges of the courts at all levels in accordance with legal procedures. BL 88 prescribes that judges shall be appointed by CE on the recommendation of an independent commission, namely, the Judicial Officers Recommendation Commission ("JORC").

3. On the appointment of judges of the Court of Final Appeal ("CFA"), BL 90 provides that CE shall, in addition to following the procedures prescribed in BL 88, obtain the endorsement of the Legislative Council ("LegCo") of the proposed appointment. Having obtained the endorsement of LegCo, CE shall report such appointment to the Standing Committee of the National People's Congress for the record. BL 73(7) confers on LegCo the power and function to endorse the appointment of CFA judges. The endorsement requirement is also stipulated in section 7A of the Hong Kong Court of Final Appeal Ordinance (Cap. 484) ("CFA Ordinance").

4. Under BL 88 and the JORC Ordinance (Cap. 92), JORC is entrusted with the function of making recommendations to CE regarding the appointment of judges. As prescribed in section 3 of the Ordinance, JORC consists of the Chief Justice of CFA ("CJ") as the Chairman, the Secretary for

Justice ("SJ") and seven members appointed by CE comprising two judges, one barrister, one solicitor and three other persons who are not connected with the practice of law. CE is required by the JORC Ordinance to consult the Council of the Hong Kong Bar Association and the Council of the Law Society of Hong Kong regarding the appointment of the barrister and the solicitor respectively to JORC.

The current appointment exercise

5. In a letter dated 28 March 2012 to the Chairman of the House Committee, the Director of Administration advised that in accordance with BL 88, CE had accepted the recommendations of JORC to appoint -

- (a) Mr Justice Robert TANG Ching as a Permanent Judge ("PJ") of CFA;
- (b) Mr Justice Syed Kemal Shah Bokhary as a non-permanent Hong Kong judge ("HKNPJ") of CFA; and
- (c) The Right Honourable The Lord Phillips of Worth Matravers as a non-permanent judge from another common law jurisdiction ("CLNPJ") of CFA.

Appointment of PJ to CFA

6. CFA is the final appellate court in Hong Kong hearing both civil and criminal appeals. It consists of CJ and PJs. Non-permanent judges may be invited to sit. There are two lists of non-permanent judges, namely, the list of HKNPJs and the list of CLNPJs.

7. When hearing and determining appeals, CFA is constituted by five judges, namely, CJ (where he is not available to sit, he designates a PJ to preside), three PJs (where a PJ is not available, CJ nominates a HKNPJ to sit in his place), and one HKNPJ or CLNPJ. From 1997, apart from very few exceptions, the "fifth judge" has invariably been drawn from the list of CLNPJs to hear a substantive appeal.

8. Under section 12(1A) of the CFA Ordinance, a person shall be eligible to be appointed as a PJ if he is -

- (a) the Chief Judge of the High Court;
- (b) a Justice of Appeal;

- (c) a judge of the Court of First Instance ("CFI Judge"); or
- (d) a barrister who has practised as a barrister or solicitor in Hong Kong for a period of at least 10 years.

9. As a PJ vacancy will arise on 25 October 2012 when Mr Justice Bokhary, PJ, vacates his judicial office upon reaching the normal retiring age of 65 years and proceeds on pre-retirement leave, JORC has held a meeting in the first quarter of 2012 to consider recommending a person to be appointed as PJ to fill the vacancy. JORC recommended the appointment of Mr Justice TANG, a Vice-President and Justice of Appeal of the Court of Appeal, as a PJ of CFA for a term of three years with effect from 25 October 2012.

Appointment of non-permanent judges to CFA

10. At present, there are 19 non-permanent judges comprising six HKNPJs and 13 CLNPJs. The list of six of HKNPJs comprises three HKNPJs who are retired judges of CFA or the Court of Appeal, and three HKNPJs who are serving judges of the Court of Appeal.

11. Section 12(3) of the CFA Ordinance provides that a person shall be eligible to be appointed as a HKNPJ if he is -

- (a) a retired Chief Judge of the High Court;
- (b) a retired CJ;
- (c) a retired PJ of CFA;
- (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.

12. Section 12(4) of the CFA Ordinance provides that a person shall be eligible to be appointed as a CLNPJ 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 Court or a permanent magistrate, in Hong Kong.

13. JORC noted that one of HKNPJs, Mr Justice TANG, will resign from his appointment as a HKNPJ if his appointment as a PJ of CFA (paragraph 9 above refers) is approved. The number of HKNPJs will be reduced to five. In the view of JORC, the number of HKNPJs should not be reduced to less than six so as to retain flexibility for dealing with the CFA caseload and to ensure its effective operation.

14. Noting that Mr Justice Bokhary will become eligible to be appointed as a HKNPJ under section 12(3) of the CFA Ordinance on 25 October 2012 by virtue of his being a retired PJ and long established judicial experience in CFA, JORC recommended that Mr Justice Bokhary be appointed as a HKNPJ of CFA for a term of three years with effect from 25 October 2012.

15. As it is anticipated that two current CLNPJs would unlikely be available to sit or to sit on a frequent basis in the foreseeable future, JORC recommended the appointment of Lord Phillips as a CLNPJ of CFA with a view to increasing the number of CLNPJs to give greater flexibility in dealing with the CFA caseload and to ensure its effective operation. The appointment of Lord Phillips as a CLNPJ of CFA will take effect from October 2012.

The Subcommittee

16. In accordance with the LegCo procedure for endorsement of judicial appointments under BL 73(7), which was endorsed by the House Committee in May 2003, the House Committee formed a subcommittee to consider the proposed senior judicial appointments at its meeting on 13 April 2012.

17. Under the chairmanship of Dr Hon Margaret NG, the Subcommittee has held one meeting with the Administration and the Judiciary Administrator in her capacity as Secretary to JORC to discuss the proposed senior judicial appointments and related issues. The membership list of the Subcommittee is in the **Appendix**.

Deliberations of the Subcommittee

The Judiciary's policy on appointments to CFA

18. Members are concerned whether the Judiciary has difficulties in filling judicial vacancies in the appellate courts. They note that the Judiciary's current policy is to consider only internal candidates for appointments to CFA, including appointments as PJs and HKNPJs but not as CJ. Members have sought information on the Judiciary's policy on appointments to CFA.

19. The Secretary to JORC has explained that in 2002, the Judiciary and JORC conducted a review of the JORC's operation concerning the appointment of judges. Having considered the practices in other common law jurisdictions at that time and the circumstances in Hong Kong, the review concluded that it would be appropriate for the appointment of judges at CFI level through open recruitment (as was already the case for the District Court and below) and the appointment of judges of the Court of Appeal and PJs and HKNPJs of CFA through internal elevation. The major considerations at that time were that for appointments to the appellate courts, the appointees should normally have previous judicial experience at the appropriate courts, and in a small jurisdiction such as Hong Kong, the arrangement for identifying candidates for appointment at such senior levels through internal elevation would work much better than open recruitment.

20. At the request of members, the Judiciary Administration has agreed to provide, when available, updated information on the practices for appointment to the highest appellate courts in other overseas jurisdictions.

21. Concern has been raised about the transparency of the process of appointment of judges. The Secretary to JORC has advised that open recruitment is conducted for vacancies at and below CFI level, namely, CFI Judges, District Judges, Permanent Magistrates and Special Magistrates. All applicants are required to submit their applications, irrespective of whether they are from the Judiciary or outside the Judiciary. The applications will be considered by a Selection Board appointed by CJ, and the Selection Board's recommendations will be considered by JORC. As regards the appointments to CFA, the Judiciary's current policy is to consider internal candidates for appointments as PJs and HKNPJs of CFA. By virtue of BL 88 and the JORC Ordinance, JORC is entrusted with the function of making recommendations to CE regarding the appointment of judges. JORC comprises nine members, including CJ as the Chairman (see paragraph 4 above). Under section 3(3) of the JORC Ordinance, the Chairman and no fewer than six other members may exercise and perform any of the functions, powers and duties of JORC. Under

section 3(3A) of the JORC Ordinance, at a meeting of JORC, a resolution is not effective if there are more than two votes not in favour.

Term of office of PJs

22. Under section 14(1) and (11) of the CFA Ordinance, PJs shall vacate their offices when they attain the retiring age of 65 years. Notwithstanding section 14(1), section 14(2)(b) of the CFA Ordinance provides that a person who has attained the age of 65 years may be appointed to be a PJ for a term of three years, and that term may be extended for one period of three years by CE acting in accordance with the recommendation of CJ. Members have noted public concern that while Mr Justice Bokhary's term of office as PJ of CFA is not extended when he reaches the normal retirement age of 65 in October 2012, Mr Justice TANG who is nine months older than Mr Justice Bokhary is appointed as a PJ of CFA. Members have sought information on the policy of JORC in considering the extension of the term of judicial office beyond the statutory normal retirement age.

23. According to the Secretary to JORC, the policy of JORC is that extension of the term of judicial office beyond the statutory normal retirement age should not be automatic. An extension should be regarded as exceptional and will not normally be approved unless the Judiciary has operational needs, including the need for continuity, and the extension will not hinder the advancement of junior officers who are suitable for elevation and the appointment of members of the legal profession who are well suited and available for appointment.

24. The Secretary to JORC has advised that CJ applies the above JORC policy in considering whether the term of office of a PJ should be extended or not. CJ is of the view that there is no exceptional operational need for continuity in the case of Mr Justice Bokhary. CJ also considers that there would be judges in the High Court suitable for elevation as PJ. Therefore, the question of extending Mr Justice Bokhary's term of office as a PJ did not arise, having regard to CJ's views and the consistent application of the JORC's policy on extension of the term of judicial office. Accordingly, there is no requirement for CJ to make a recommendation to CE to extend Mr Justice Bokhary's term of office under section 14(2)(a) of the CFA Ordinance. In view of a PJ vacancy arising on 25 October 2012 from Mr Justice Bokhary's retirement, the matter of filling the PJ vacancy was put to the JORC in the first quarter of 2012.

25. As regards the appointment of Mr Justice TANG as a PJ of CFA, the Secretary to JORC has advised that Mr Justice TANG is currently a serving

Justice of Appeal of the Court of Appeal. His term of office as a Justice of Appeal has been extended beyond the normal retiring age of 65 years for three years until 6 January 2015. Section 11A(3) of the High Court Ordinance (Cap. 4) provides that in such a case (i.e. where the term of office of a judge of the High Court is extended) the judge shall accordingly be regarded as having attained the retiring age at the expiration of the period of extension. As such, Mr Justice TANG is no different from any other serving judge of the High Court who has not yet reached the normal retirement age for the purpose of eligibility for appointment to fill the PJ vacancy.

26. The Secretary to JORC has further explained that JORC had noted that all the 36 serving Judges of the High Court on the long list of candidates, including Mr Justice TANG, were eligible for consideration. In view of the important judicial duties of PJs in determining appeals in the highest appellate court of Hong Kong, JORC agreed that it was essential that only Judges of the highest caliber were considered for appointment as PJ of CFA. As a result, three Judges of the High Court (including Mr Justice TANG) was short listed for further consideration. Having regard to BL 92 that judges shall be chosen on the basis of their judicial and professional qualities and after detailed consideration of all relevant factors, Mr Justice TANG was considered to be eminently suitable for elevation to CFA and appointment as a PJ. Under section 14(2)(b) of the CFA Ordinance, a person who has attained the age of 65 years may be appointed as a PJ for a term of three years. In the light of this, JORC resolved to recommend to CE the appointment of Mr Justice TANG as a PJ of CFA for a term of three years from 25 October 2012 to 24 October 2015.

Mechanism for handling complaints against judges

27. Enquiries have been made about the mechanism for handling complaints against judges. The Judiciary Administration has advised that under the present mechanism, any complaint lodged against the judicial conduct of a judge may be made directly to the Judiciary. All complaints against judicial conduct are handled by CJ and/or the relevant Court Leader as appropriate. The Court Leaders would investigate into the complaints and take appropriate follow up actions if necessary.

28. According to the Judiciary Administrator, some complaints are against judicial decisions made by judges. In such cases, the complainants will be advised that anyone who disagrees with a judge's decision can only pursue his case through appropriate appeal procedures under the existing legal system. The Judiciary considers the present system satisfactory. It respects judicial independence (including the independence of each judge to adjudicate according to law without interference) and at the same time, enables legitimate

complaints against judicial conduct to be satisfactorily dealt with and responded to.

The proposed senior judicial appointments

29. Members have considered the curriculum vitae of the three recommended appointees covering various aspects including personal background, education, legal experience, judicial experience, services and activities, publications and awards. Members note that all three recommended appointees have profound judicial experience and are judges of high standing and reputation. The Subcommittee supports the proposed appointments of Mr Justice TANG as a PJ of CFA, Mr Justice Bokhary as a HKNPJ of CFA and Lord Phillips as a CLNPJ of CFA. The Subcommittee has no objection to the Administration giving notices for moving motions to seek the endorsement of LegCo on the recommended appointments.

Advice sought

30. Members are invited to note the deliberations of the Subcommittee.

Council Business Division 2
Legislative Council Secretariat
17 May 2011

Appendix

Subcommittee on Proposed Senior Judicial Appointments

Membership list

Chairman	Dr Hon Margaret NG
Members	Hon LAU Kong-wah, JP Hon Emily LAU Wai-hing, JP Dr Hon Priscilla LEUNG Mei-fun, JP Hon Paul TSE Wai-chun, JP Hon WONG Yuk-man (Total : 6 Members)
Clerk	Ms Alice LEUNG
Legal adviser	Mr KAU Kin-wah
Date	7 May 2012