

香港特別行政區政府
政務司司長辦公室轄下行政署



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3 May 2018

Ms Wendy Jan
Clerk to Subcommittee on
Proposed Senior Judicial Appointments
Legislative Council Complex
1 Legislative Council Road
Central
Hong Kong

Dear Ms Jan,

Subcommittee on Senior Judicial Appointments

Thank you for your letter dated 30 April 2018, enclosing the submissions from deputations/individuals received by the Subcommittee on Proposed Senior Judicial Appointments. In consultation with the Judiciary, I write to provide our responses to the issues raised in the submissions in the ensuing paragraphs.

Appointment of non-permanent judges from other common law jurisdictions of the Court of Final Appeal

As emphasised by the Government and the Judiciary at the Subcommittee meeting, in accordance with Article 92 of the Basic Law, judges of the Hong Kong Special Administrative Region (“HKSAR”) shall be chosen on

the basis of their judicial and professional qualities and may be recruited from other common law jurisdictions. The professional qualifications of judges of the Court of Final Appeal (“CFA”) are stipulated in section 12 of the Hong Kong Court of Final Appeal Ordinance (“HKCFAO”) (Cap. 484). According to section 12(4) of the Ordinance, a person shall be eligible to be appointed as a judge from another common law jurisdiction if he/she 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.

The Judicial Officers Recommendation Commission’s recommendations in the current appointment exercise

Article 88 of the Basic Law stipulates that judges of the courts of the HKSAR shall be appointed by the Chief Executive on the recommendation of an independent commission. The Judicial Officers Recommendation Commission (“JORC”) is the statutory body constituted by the Judicial Officers Recommendation Commission Ordinance (Cap. 92) to perform the functions of the independent commission. It makes recommendation on the appointment of judges of the CFA in strict accordance with Article 92 of the Basic Law and the professional qualifications stipulated in HKCFAO. In recommending the proposed appointments of the Right Honourable the Baroness Hale of Richmond and the Right Honourable Beverley McLachlin, P.C. as non-permanent judges from other common law jurisdictions (“CLNPIs”) of the CFA, the JORC considered that they fulfil the requirements in terms of judicial and professional qualities.

All judges, including CLNPIs, will take the judicial oath when they assume office. The Judicial Oath is listed in Schedule 2 of the Oaths and Declarations Ordinance (Cap. 11). In taking the Judicial Oath, the judge swears that he/she will uphold the Basic Law of the HKSAR, bear allegiance to the HKSAR of the People’s Republic of China, serve the HKSAR conscientiously, dutifully, in full accordance with the law, honestly and with integrity, safeguard the law and administer justice without fear or favour, self-interest or deceit. The Government and the Judiciary would like to reiterate that in considering judicial appointments, the criteria to be adopted are the judicial and professional qualities as stipulated in the Basic Law and the relevant legislation. Other considerations,

including backgrounds or personal views on political, social or economic issues should not be taken into account because it may run the high risk of politicising the process of judicial appointments. Similarly, a meeting with deputations on the proposed judicial appointments will run the high risk of politicising the process and undermining judicial independence or the perception of it.

Adjudication process of the CFA

The CFA is a collegiate court of five judges in hearing substantive appeals. The Chief Justice, Permanent Judges (“PJs”) and Non-permanent Judges (“NPJs”) have the same power that may be exercised in court. In the collegiate court of the CFA comprising five judges, each sitting PJ or NPJ has one vote. As specified under section 16 of HKCFAO, the judgment or order which is that of the majority of the judges sitting shall be the judgment or order of the Court.

Hearing of cases by NPJs

In accordance with section 16 of HKCFAO, in hearing and determining substantive appeals, the Court must constitute the Chief Justice, three PJs and a NPJ (the 5th judge) selected by the Chief Justice and invited by the Court. A NPJ can be a non-permanent Hong Kong judge or a CLNPJ. When the Chief Justice is not available to sit, he shall designate a PJ to sit in his place. When a PJ is not available to sit, the Chief Justice shall nominate a HKNPJ to sit in his place.

The selection and invitation of a NPJ as provided by HKCFAO are part of the exercise of the independent judicial power conferred by the Basic Law. According to the Judiciary, CLNPJs are usually invited to sit as the 5th judge in the Court for hearing appeals. In selecting and inviting a CLNPJ to sit, the Court would take all relevant circumstances into account, including the availability of the judges, their particular expertise in certain areas of law and the nature of the cases to be heard, etc. The Judiciary emphasises that CLNPJs when sitting in the CFA are functioning as Hong Kong judges and are dealing with cases according to Hong Kong law. The CLNPJs are in a position to function effectively in the CFA and this has proven to be the case over the past 20 years.

Matters relating to the handling of bias in judicial proceedings

The handling of actual, presumed or apparent bias in judicial proceedings is entirely a matter for the Judiciary. The following response is provided by the Judiciary –

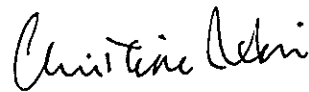
“The Judiciary would like to point out that as set out in the Guide to Judicial Conduct, there are established common law principles and practices in dealing with this matter. For details, please refer to Part D, paragraphs 38 to 70 of the Guide to Judicial Conduct which is uploaded on the Judiciary’s website.

In sum, according to the established principles, the following three classes of cases may call for disqualification of a judge from sitting in a particular case –

- (a) where there is actual bias;
- (b) where bias is presumed and disqualification is automatic (e.g. pecuniary or proprietary interest); and
- (c) where the circumstances give rise to apparent bias (e.g. circumstances that lead a reasonable, fair-minded and well-informed observer to conclude that the judge would be biased).

Therefore, suffice to say that there is well established way to deal with any real or apparent bias situations.”

Yours sincerely,



(Ms Christine Wai)
for Director of Administration

c.c. Judiciary Administrator (Attn: Mrs Connie Ngan)