

**For discussion
on 24 June 2019**

**Legislative Council Panel
on Administration of Justice and Legal Services**

**Proposed amendments to the High Court Ordinance (Cap.4)
to facilitate the more efficient handling of cases,
including those relating to non-refoulement claims**

PURPOSE

This paper briefs Members on the proposed amendments to the High Court Ordinance (Cap. 4) to facilitate the more efficient handling of cases, including those relating to non-refoulement claims. Specifically, the proposed amendments seek to -

- (a) extend the use of a 2-Judge bench of the Court of Appeal (“the CA”) to determine appeals from the Court of First Instance (“the CFI”) in relation to the refusal of leave to judicial review (“JR”) or the grant of leave to JR on terms;
- (b) allow parties to different types of proceedings before a 2-Judge bench of the CA¹ to apply to re-argue the case before a 3-Judge bench of the CA² when the 2-Judge CA cannot reach a unanimous decision;
- (c) streamline the procedure for application for leave to appeal to the Court of Final Appeal (“the CFA”) generally; and
- (d) introduce other technical amendments regarding a judge’s power to dispose of cases on paper.

¹ The CA that consists of 2 Justices of Appeal.

² The CA that consists of an uneven number of Justices of Appeal not less than 3.

BACKGROUND

2. The rapid surge in civil caseloads in recent years, particularly those arising from JR cases from non-refoulement claims, has imposed great pressure on the workload of the Judiciary, in particular for the High Court (comprising the CFI and the CA) and the CFA. The statistics for 2016 to 2018 relating to the impact of non-refoulement claims on the work of the High Court and the CFA are set out at Annex.

3. To ensure that all cases are handled as expeditiously as is reasonably practicable, whether or not they are related to non-refoulement claims, the Judiciary has reviewed certain procedures in relation to the conduct of proceedings in the High Court to help address the rapidly rising caseloads. After careful deliberation, we propose to amend Cap. 4 in certain areas as elaborated in the ensuing paragraphs.

PROPOSED AMENDMENTS

Extend the use of a 2-Judge bench of the CA to determine appeals from the CFI in relation to the refusal of leave to JR or the grant of leave to JR on terms

4. At present, a person needs to obtain leave (i.e. permission) from the CFI to bring an application for JR, including JR in relation to non-refoulement claims. Under Order 53, Rule 3(4) of the Rules of High Court (Cap. 4A), where an application for leave to apply for JR is refused by a CFI judge or is granted on terms (“an O.53 r.3(4) order”), the applicant may appeal against the O.53 r.3(4) order to the CA.

5. Under section 34B(2) of Cap. 4, the CA, in the exercise of its civil jurisdiction, is duly constituted if it consists of an uneven number of Justices of Appeal not less than 3 (i.e. 3-Judge CA). Section 34B(4) of Cap. 4, however, provides that the CA, if it consists of 2 Justices of Appeal, shall be duly constituted for the purpose of hearing or determining a number of civil matters. These matters include an appeal against an interlocutory order or interlocutory judgment, application for leave to appeal (except an application for leave to appeal to the CFA), appeal of which all parties have filed a consent to the appeal being heard and determined by a 2-Judge CA, etc. As an appeal against an O.53 r.3(4) order is not among such matters, it must therefore be heard by a 3-Judge CA.

6. The Judiciary is of the view that the benefits of the current arrangement of allowing certain interlocutory matters to be determined by a 2-Judge CA can be applied to appeals against O.53 r.3(4) orders, thereby expediting the hearing and determination of such appeals. To give effect to this purpose, the Judiciary proposes to introduce relevant amendments to section 34B(4) of Cap. 4. It is anticipated that with the implementation of this proposal, from the listing perspective, a case will generally progress to hearing more expeditiously before a 2-Judge CA when compared to a 3-Judge CA. Further, under the present arrangement, for appeals to the CA against an O.53 r.3(4) order heard by a 3-Judge CA, a substantive application for JR may only proceed when at least 2 (of the 3) judges find in the appellant's favour. The Judiciary's proposal does not alter this requirement. In the event of a 2-Judge CA not being able to reach a unanimous decision, under the extant section 34B(5) of Cap. 4, the applicant could apply to have the case re-argued before a 3-Judge CA. This mechanism will continue to be applicable after the implementation of the proposal.

Allow parties to different types of proceedings before a 2-Judge CA to apply to re-argue the case before a 3-Judge CA when the 2-Judge CA cannot reach a unanimous decision

7. In a case where a 2-Judge CA cannot reach a unanimous decision when hearing the civil appeals provided for under section 34B(4) of Cap. 4, section 34B(5) of Cap. 4 stipulates that the parties to the appeal may apply to have the case re-argued before an uneven number of Justices of Appeal not less than 3. However, the mechanism currently only covers "appeal³". The Judiciary therefore proposes to take this opportunity to amend section 34B(5) of Cap. 4 to expand the scope of subsection (5) to cover all causes and matters provided for under section 34B(4) of Cap. 4, which would include an application for leave to appeal under section 34B(4)(aa) (as amended by our proposed amendment in paragraph 6 above) and an interlocutory application in relation to a cause or matter pending before the CA under section 34B(4)(ab) of Cap. 4.

³ "Appeal", as defined under section 2 of Cap.4, "in the context of appeals to the Court of Appeal in its civil jurisdiction includes -
(a) an application for a new trial; and
(b) an application to set aside a verdict, finding or judgment in any cause or matter in the Court of First Instance which has been tried, or in which any issue has been tried, by a jury."

Streamline the procedure for application for leave to appeal to the CFA generally

8. Currently, no appeal to the CFA shall be admitted unless leave to appeal has been granted either by the CA or the CFA itself⁴. Pursuant to section 22(1)(b) of the Court of Final Appeal Ordinance (Cap. 484), a person may apply to the CA (or the CFA) for leave to appeal to the CFA if the question involved in the appeal is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to the CFA for decision. At CA level, section 34B(4)(aa) of Cap. 4 provides that an application for leave to appeal can be heard by a 2-Judge CA except for an application for leave to appeal to the CFA, which will be heard or determined by a 3-Judge CA. With respect to the hearing of application for leave to appeal to the CFA, if the substantive civil appeal decision is heard or determined by a 2-Judge CA, the requirement for inclusion of a third judge to form the bench when hearing leave to appeal to the CFA will inevitably prolong the proceedings before its final conclusion, the reason being that the third judge would have to take time to familiarise himself or herself with the detailed facts and merits of the case before considering the application for leave to appeal to the CFA because he or she has not participated in the determination of the appeal to be impugned.

9. To ensure the hearing of civil cases, including JR on non-refoulement claims and other civil cases, proceeds expeditiously and efficiently, the Judiciary proposes to introduce amendment to section 34B(4)(aa) of Cap. 4 to streamline the relevant leave application procedure to the effect that if a substantive decision on civil appeal is made by a 2-Judge CA, the application for leave to appeal to the CFA on matters arising from the same cause can also be heard by a 2-Judge CA, sparing the need to identify a third judge to constitute a 3-Judge CA. On the other hand, noting the possible issues of practicality and fairness when selecting only 2 judges, especially in a case where there is a dissenting opinion, if the substantive appeal was heard by a 3-Judge CA, the subsequent application to leave to appeal to the CFA would continue to be heard by a 3-Judge CA.

10. This proposed amendment does not affect an applicant in exercising his or her right to re-apply to the Appeal Committee of the CFA for such leave to appeal pursuant to the relevant provisions under Part II of Cap. 484.

⁴ Section 23(1) of the Court of Final Appeal Ordinance (Cap. 484).

Introduce other technical amendments regarding a judge's power to dispose of cases on paper

11. Under section 5(2) of Cap. 4, a CFI judge “may sit” as an additional judge in the CA on the request of the Chief Justice. Also, a CA judge “may sit” and hear cases in the CFI if its business so requires pursuant to section 4(2) of Cap. 4. The relevant provisions in Cap. 4 provide that the CFI or CA judge ‘sitting’ in the CA or the CFI respectively shall have all the jurisdiction, powers and privileges of such a Judge in that level of court.

12. The use of the words “may sit” in the relevant provisions may arguably cause some ambiguity as to whether the additional judge could only exercise his judicial power when physically ‘sitting’ in the court, and whether he could exercise his judicial power to dispose of a case on paper. While the Judiciary considers that there should be no issue with the provision as set out currently, we propose to take this opportunity to amend section 4(2) and section 5(2) of Cap. 4 to clarify and put it beyond doubt that a CFI judge has the power to determine a matter on paper without physically sitting in the CA when there will be no oral hearing, and similarly for a CA judge ‘sitting’ in the CFI. This is in line with the current practice of the Judiciary in promoting more common use of paper disposal of cases, in particular over interlocutory matters, to facilitate better case management, and save the need of the parties to attend court.

EXPECTED BENEFITS

13. The above proposed amendments in general will facilitate the processing of cases, including JR involving non-refoulement claims. If more cases are being heard by a 2-Judge CA instead of a 3-Judge CA, it would increase the flexibility in deployment of judicial manpower in taking up other court cases, and therefore put judicial resources to the best use. Furthermore, the clarification of the powers of the additional CFI or CA judge, as the case may be, to dispose of cases on paper can further enhance the Judiciary’s intention to promote just, expeditious and economical disposal of proceedings on paper where appropriate, thus increasing the overall efficiency of case handling.

CONSULTATION

14. The Judiciary has invited views from the legal professional bodies, including the Hong Kong Bar Association and the Law Society of Hong Kong and other court users and stakeholders on the proposed procedural amendments. Subject to their feedback and Members' views, we will refine our proposals elaborated in paragraphs 4 to 12 above.

WAY FORWARD

15. From time to time, the Department of Justice ("DoJ") introduces a Statute Law (Miscellaneous Provisions) Bill into the Legislative Council, proposing amendments to various enactments for the purpose of updating or improving the existing legislation. Given the straightforward nature of the proposed amendments, subject to Members' views and the consultation referred to in paragraph 14 above, the Judiciary suggests to include the proposed amendments to Cap. 4 in the next Statute Law (Miscellaneous Provisions) Bill to be taken forward by DoJ, so that the amendments may be introduced as soon as possible.

ADVICE SOUGHT

16. Members are invited to give their views on the proposed amendments to Cap. 4 as set out in the paragraphs 4 to 12 above.

Judiciary Administration
June 2019

**Statistics on non-refoulement claim cases filed in
different levels of court**

Level of Court	Case Type		2016	2017	2018
Court of First Instance, High Court	Applications for leave to apply for Judicial Review	Total	228	1,146	3,014
		<i>(a) Non-refoulement claim</i>	60	1,006	2,851
		<i>(b) Other than non-refoulement claim</i>	168	140	163
Court of Appeal, High Court	Civil Appeals	Total	246	298	611
		<i>(a) Non-refoulement claim</i>	1	26	393
		<i>(b) Other than non-refoulement claim</i>	245	272	218
Court of Final Appeal	Leave Applications (Civil)	Total	68	47	127
		<i>(a) Non-refoulement claim</i>	0	0	65
		<i>(b) Other than non-refoulement claim</i>	68	47	62