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2 September 2019

Mr Philip J Dykes SC
Chairman
The Hong Kong Bar Association
LG2, High Court
38 Queensway
Hong Kong

Dear Chairman,

**Consultation Paper 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**

Thank you for your letter of 21 June 2019 to the Judiciary Administrator on the captioned Consultation Paper (“the letter”) and the views expressed by your representative at the meeting of the Legislative Council Panel on Administration of Justice and Legal Services on 24 June 2019. We are pleased to set out below our response on the issues raised in your letter.

The necessity of the amendments (paragraphs 6 to 12 of the letter)

2. The number of cases received by the Judiciary at any given time is beyond our control and would depend on the parties' own decisions to take out legal proceedings. That said, it is evident that the civil caseload, particularly that part of it arising from judicial review cases from non-refoulement claims, have surged rapidly in recent years. This has imposed great pressure on the workload and resources of the Judiciary, in particular for the High Court and the Court of Final Appeal ("the CFA").

3. In the interest of the administration of justice, all cases have to be carefully considered and judicial resources must be fairly and effectively deployed. As a result of the rapid increase in the number of non-refoulement claim cases, if no action is taken to address the matter in time, the Judiciary's ability to efficiently handle cases generally would inevitably be affected. It is therefore incumbent upon the Judiciary to consider initiatives to address the present situation so as to ensure that the judicial system continues to run efficiently for the benefit of all parties and court users.

4. Against this backdrop, the Judiciary considers that the proposed amendments are necessary to streamline court procedures so as to facilitate the processing of cases. These amendments would not only apply to judicial review concerning non-refoulement claims, but also to other cases invoking the High Court's civil jurisdiction, including applications for leave to appeal to the CFA. Furthermore, the Judiciary is also taking other measures to increase the overall efficiency of case handling, such as promoting more common use of paper disposal of cases, in particular over procedural matters, e.g. applications for extension of time to file or serve documents, through introducing the proposed provisions to clarify that a Court of First Instance ("CFI") judge has the power to determine a matter on paper without physically sitting in the Court of Appeal ("the CA") when there will be no oral hearing, and similarly for a CA judge sitting in the CFI. By increasing our flexibility in deployment of judicial manpower in taking up different court cases, the proposals will allow the Judiciary to put judicial resources to more effective use.

Special considerations for non-refoulement cases (paragraphs 3 to 5 of the letter)

5. There is an assumption in paragraph 4 of the Hong Kong Bar Association's submission that any streamlining of judicial procedures must be detrimental to the litigant, and that the use of a 2-Judge CA would be somehow less fair than that of a 3-Judge CA. The Judiciary cannot agree with these views.

6. Under Order 53, Rule 3(4) of the Rules of the High Court (Cap. 4A), where an application for leave to apply for judicial review 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. In this regard, the Judiciary's proposal to allow a 2-Judge CA instead of 3-Judge CA to hear an O.53, r.3(4) appeal would not alter the requirement that an O.53, r.3(4) order made by the CFI judge may only be disturbed or modified unless at least 2 CA judges made such an order. In the case of a 2-Judge CA, unless the Court unanimously finds in the appellant's favour, a substantive application for judicial review may not proceed. In the event that the 2 judges are unable to agree, the party lodging appeal may apply to have the case re-argued before a 3-Judge CA. As such, no party will be put at an advantage or disadvantage due to the change. Furthermore, one needs to look at the entirety of the judicial proceedings to decide whether the requisite standard of fairness is met. In this regard, the Judiciary would like to reiterate that the important safeguards in the appeal procedures, including the applicable legal principles and tests, the duty of the court to give reasons in its judgment, and the applicant's right to appeal against an O.53 r.3(4) order etc, are in no way affected by our proposed amendments.

7. The Judiciary is of the view that by improving the efficiency of the courts and suitably streamlining procedures, the proposed amendments would enhance access to justice. Judges, in discharging their judicial responsibilities, must conduct themselves in full accordance with the law, impartially, honestly and with integrity. They must also safeguard the law and administer justice without fear or favour, self-interest or deceit. The proposed change would in no way affect the high standard of fairness of deliberation of individual judges in a proceeding (be it related to non-refoulement claims or otherwise), whether sitting in a 3-Judge CA or 2-Judge CA.

8. In fact, under the existing law, there are already cases where appeals are heard by a 2-Judge CA, e.g. interlocutory appeals in civil matters, and appeals against sentence from the District Court and the CFI for criminal cases. Moreover, pursuant to section 34B(4)(c) of the High Court Ordinance (Cap. 4), with the consent of the parties, an appeal may also be heard by a 2-Judge CA. In fact, in a number of cases, the parties in an appeal against refusal of leave to apply for judicial review (including but not limited to non-refoulement cases) actually agree to have the appeal heard by a 2-Judge CA. It has not been suggested that there is an issue with the standard of fairness under such circumstances.

9. The Judiciary would like to reiterate that our proposed amendments are related to leave applications, not substantive judicial review. Leave application is a filtering process and cases which meet the threshold of reasonable arguability, i.e. whether the case is one which enjoys realistic prospects of success, will proceed with a full judicial review. The appeal of a substantive judicial review will continue to be heard by a 3-Judge CA.

10. Moreover, our proposed amendments only seek to provide that an appeal against refusal of leave can be heard by a 2-Judge CA. They do not prevent the Court, in a more complicated case, even in the context of an appeal against refusal of leave, to list it before a 3-Judge CA. As in illustration, important principles of law or issues of general importance are sometimes determined in the context of an appeal against refusal of leave. These kinds of cases would continue to be listed before a 3-Judge CA even though it could be heard by a 2-Judge CA.

The proposed amendments and other ways to deal with the rise in non-refoulement cases (paragraphs 13 to 17 of the letter)

Judicial manpower.

11. The Judiciary is fully aware that the current legislative proposals alone would not address the problems arising from rapid surge in caseload, particularly arising from judicial review cases relating to non-refoulement claims. Additional measures would also be required. In this regard, the Judiciary would closely monitor the position and continue to engage temporary judicial resources as far as practicable to cope with its operational needs. If there are any additional requirements for permanent judicial and other staffing resources, the Judiciary

would put forward bids for such resources to the Government according to the established mechanism of the budgetary arrangements between the Judiciary and the Government.

Issues not under the purview of the Judiciary

12. In the submission, the Hong Kong Bar Association relayed concerns on other issues such as the operation of the immigration screening process and the Torture Claims Appeal Board, funding for legal aid and duty lawyer, etc. Those matters are outside the remit of the Judiciary and it would not be appropriate for the Judiciary to comment on them.

Specific comments on the proposed amendments (paragraph 18 of the letter)

13. The Judiciary takes note of the Hong Kong Bar Association's viewpoint that the re-argue mechanism has to take into account the actual circumstances of the parties, including non-refoulement claimants who are not legally represented and may encounter difficulties in communicating in English or Chinese. However, the Judiciary has reservation to the suggestion that when a 2-Judge CA cannot reach a unanimous decision, that matter should be automatically re-argued before a 3-Judge CA. While this suggestion has the benefit of ensuring that every split case is re-argued regardless of any procedural difficulty which some litigants in person may face, the downside is that in some cases the parties may be deprived of the chance to decide not to proceed with re-hearing of the appeal before a 3-Judge CA, in particular when the re-hearing would inevitably incur additional time and costs. In this regard, it is worthwhile to note that under the current mechanism, where none of the parties apply for a re-argument, the case comes to an end.

14. Taking into account the above considerations; we are studying a new proposal to introduce amendment to section 34(B)5 of Cap. 4 to the effect that in case a 2-Judge CA cannot reach a unanimous decision, the Court may give direction to have the case re-argued in front of a 3-Judge CA, in addition to "on application by the party" pursuant to the extant provision. The Court may balance various considerations before giving that direction, including the actual circumstances of the parties. Our view is that this proposed arrangement can give

flexibility to the Court hearing the application while paying heed to the high standard of fairness in terms of procedure in non-refoulement context.

Way Forward

15. We hope the above has addressed the points raised by the Hong Kong Bar Association. As requested by the Legislative Council Panel on Administration of Justice and Legal Services, I am also copying this reply to them for reference.

Yours sincerely,

A handwritten signature in black ink, consisting of a large, sweeping loop on the left and several smaller, connected strokes on the right.

(David Lau)
for Judiciary Administrator

cc. Clerk to LegCo Panel on Administration of Justice and Legal Services
(Attn: Mr Lemuel Woo) (with Chinese translation)