

LCQ20: Handling of non-refoulement claims

Following is a question by the Hon Elizabeth Quat and a written reply by the Chief Secretary for Administration, Mr Matthew Cheung Kin-chung, in the Legislative Council today (January 27):

Question:

It has been reported that the public expenditure in the past seven financial years on handling non-refoulement claims and related work exceeded \$6 billion, and the relevant estimated expenditure for the current financial year is as high as \$1,227 million, hitting a seven-year high. As at October last year, there were about 13 000 non-refoulement claimants (claimants) in Hong Kong. Among them, more than 8 000 claimants have lodged applications for leave for judicial review (JR) in relation to the results of their claims, and some claimants have even lodged appeals against the results of such applications. Some members of the public consider that the judicial proceedings and legal aid system have been abused, leading to wasteful spending of a considerable amount of public funds and aggravating the financial burden on the Government. In this connection, will the Government inform this Council:

(1) whether it knows the number of applications for leave for JR received by the Judiciary from claimants in each of the past two years and the number of appeals lodged by claimants against the results of such applications;

(2) of the respective numbers of legal aid applications from claimants received, approved and rejected by the Legal Aid Department in each of the past three years; if there were rejected applications, of the reasons for that; whether the Government has found abuses of the legal aid system by claimants; if so, of the proposals to resolve the problem;

(3) given that under the legal aid system, the numbers of civil legal aid cases assigned to individual solicitors and counsels within the past 12 months are capped at 35 and 20 respectively, of the respective numbers of (i) solicitors and (ii) counsels, in each of the past three years, to whom non-refoulement claim cases were assigned within the past 12 months, with a breakdown by the range to which the number of cases belonged (set out in tables of the same format as the table below); the measures in place to prevent solicitors and counsels from being assigned too many non-refoulement claim cases, thus affecting their provision of services to local aided persons;

Year: _____

	Number of non-refoulement claim cases assigned						
	5 or below	6 to 10	11 to 15	16 to 20	21 to 25	26 to 30	31 to 35
(i)							
(ii)					(Not applicable)		

(4) of the measures in place to prevent non-refoulement claim cases from being assigned to several certain solicitors or counsels in a concentrated manner, and the new measures in place to prevent the problem of champerty from occurring in those cases; and

(5) given an upsurge of the number of cases related to non-refoulement claims in recent years, whether it knows if the Judiciary will consider setting up special courts to expedite the handling of case backlogs, so as to avoid the delay in the hearing of other civil cases; if the Judiciary will, of the details and timetable; if not, the reasons for that, and whether the Judiciary will consider extending the office hours of courts and making arrangements for courts to sit on Saturdays to conduct hearings?

Reply:

President,

According to the Judiciary, to avoid abuses in the use of judicial reviews (JR), including those relating to non-refoulement claims, leave must be obtained from the court before any application for JR can be instituted. This helps screen out cases which are not reasonably arguable with a realistic prospect of success. Where leave to apply for JR is refused by the Court of First Instance of the High Court (CFI), or the application for JR is refused after leave to apply for JR is granted, the applicant may appeal to the Court of Appeal of the High Court (CA). If the appeal is refused by the CA, an application for leave to appeal may be filed with the CA or the Court of Final Appeal (CFA), and if granted, the applicant may lodge the appeal with the CFA.

The policy objective of legal aid is to ensure that no one with reasonable grounds for taking or defending a legal action is denied access to justice because of lack of means. The Legal Aid Ordinance (Cap. 91) (LAO) provides that legal aid will only be granted to applicants who have satisfied both the merits test and the means test. After legal aid is granted, the Director of Legal Aid (DLA) may act for an aided person through in-house professional lawyer of the Legal Aid Department (LAD) or assign any lawyer in private practice selected from the Legal Aid Panel (the Panel) by the DLA or the aided person.

A reply to each part of the question is as follows:

(1) According to the Judiciary, the numbers of cases relating to non-refoulement claims at various levels of court from 2018 to 2020 (up to September 30, 2020) are as follows:

Number of cases relating to non-refoulement claims from 2018 to 2020 (up to September 30, 2020)	
Year of filing	Number of cases
Leave applications for JR relating to non-refoulement claims filed with the CFI	
2018	2 851
2019	3 727
2020 (up to September 30)	1 879
Civil appeals relating to non-refoulement claims at the CA	
2018	393
2019	351
2020 (up to September 30)	349
Leave applications for (civil) appeal relating to non-refoulement claims at the CFA	
2018	65
2019	388
2020 (up to September 30)	199

(2) As the figures for 2020 are still under compilation, the numbers of legal aid applications in relation to non-refoulement claims, legal aid certificates granted and applications refused from 2017 to 2019 are as follows:

Legal aid applications in relation to non-refoulement claims			
Year	Number of applications received	Number of legal aid certificates granted [^]	Number of applications refused [^]
2017	1 020	32	981
2018	1 500	46	1 429
2019	690	71	620

[^]Some of the legal aid certificates granted and applications refused do not necessarily correspond to the legal aid applications made in the same year.

LAD has put in place a mechanism to guard against abuse of legal aid. As mentioned above, legal aid will only be granted to applicants who have satisfied both the merits test and the means test. As such, all legal aid applications (including the applications for JR in relation to non-refoulement claims) are processed by Legal Aid Counsel employed by LAD. In assessing the merits of an application, LAD will carefully look into and consider the facts of the case, evidence available and the legal principles applicable to the case to determine whether there are reasonable grounds for legal aid to be granted. Even if an applicant is successfully granted legal

aid, LAD will still monitor his/her case from time to time to ensure that there are sufficient grounds for the aided person to continue to receive legal aid. Otherwise, LAD will discharge the legal aid certificate.

As for those legal aid applications related to non-refoulement claims, among the applications refused, the majority of them were refused on merits.

As a matter of fact, the success rate for legal aid applications related to non-refoulement claims is quite low. From 2017 to 2019, the success rate for such cases was 4.6 per cent, which accounted for only 0.84 per cent of all successful civil legal aid cases.

(3) The numbers of solicitors/counsel assigned by the LAD to handle legal aid applications in relation to non-refoulement claims from 2017 to 2019 are as follows:

2017:

	5 cases or below	6 to 10 cases	11 to 15 cases	16 to 20 cases	21 to 25 cases	26 to 30 cases	31 to 35 cases
Total number of solicitors	20	4	0	0	0	0	0
Total number of counsel	22	0	0	0	0	0	0

2018:

	5 cases or below	6 to 10 cases	11 to 15 cases	16 to 20 cases	21 to 25 cases	26 to 30 cases	31 to 35 cases
Total number of solicitors	22	3	1	0	0	0	0
Total number of counsel	15	2	0	0	0	0	0

2019:

	5 cases or below	6 to 10 cases	11 to 15 cases	16 to 20 cases	21 to 25 cases	26 to 30 cases	31 to 35 cases
Total number of solicitors	20	1	3	0	0	0	0

Total number of counsel	21	5	0	0	0	0	0
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The above statistics show that there is no question of any individual solicitor/counsel having been assigned too many cases related to non-refoulement claims. In any case, to ensure that no assigned lawyer handles too many legal aid cases, LAD sets a limit on the number of assignments for each lawyer. Regarding civil legal aid cases (including those related to non-refoulement claims), the limit on assignments for each solicitor is 35 civil legal aid cases in the past 12 months; while for each counsel, the limit on assignment is 20 civil legal aid cases.

(4) In Hong Kong, champerty and maintenance are criminal offences under the Criminal Procedure Ordinance (Cap. 221). Such offences (including conspiring to commit or inciting others to commit an offence) are punishable by imprisonment of seven years and a fine.

Regarding nomination of lawyers by legally aided persons, LAD, having consulted the Legal Aid Services Council and the two legal professional bodies, introduced a "Declaration System" in September 2013 with a view to preventing improper touting or champerty activities. The system seeks to ensure that an aided person nominates a lawyer solely at his own will without reaching any agreement with any person (including the lawyer nominated, his employee, agent or claim agent) regarding the sharing of damages, assets or costs that may be recovered in a proceeding. Also, LAD maintains communication with the two legal professional bodies to prevent improper touting activities in legal aid cases. A clear message that the improper behaviour of assigned lawyers will be dealt with seriously has also been disseminated to the public through publicity and education. Depending on the nature of individual cases, the LAD may also refer such cases to the Police for investigation.

As to the practice of allowing aided persons to nominate lawyers, LAO provides that apart from assigning an in-house lawyer to act for an aided person, DLA may also assign a private legal practitioner on the Panel who is selected by DLA or the aided person. When an aided person nominates a lawyer pursuant to LAO by himself/herself, having regard to the interest of the aided person, LAD normally gives weight to his/her nomination. However, LAD may also reject the nomination if the lawyer nominated by the aided person is considered not appropriate on grounds such as having previous records of unsatisfactory performance, disciplinary actions taken against the nominated lawyer by a regulatory body, or language requirements of the proceedings which are likely to undermine the aided person's interest in the proceedings; or the aided person has made repeated or late requests for change of lawyer without reasonable grounds.

While an aided person usually chooses to nominate a lawyer who has experience and expertise in the relevant case, the lawyer concerned must meet the assignment criteria of LAD (including limit of cases assigned and/or the ceiling of legal aid costs received) before he can be assigned by LAD. As a matter of fact, a total of 518 counsel and 1 046 solicitors were assigned

legal aid cases in 2019. Among them, counsel and solicitors with experience of ten years or above accounted for 80 per cent and 85 per cent respectively. LAD does not consider that legal aid cases (including cases relating to non-refoulement claims) are disproportionately taken up by a handful of lawyers.

(5) As the processing of non-refoulement claim-related cases usually has to go through the CFI, the CA and then the CFA according to the established procedures, the Judiciary considers that the most efficient and effective way to cope with the heavy caseload relating to non-refoulement claims is to timely increase judicial manpower. As such, the Judiciary has no plan to set up any special court, extend court sitting hours, or arrange Saturday sittings for this purpose. The Judiciary will continue to proactively implement the following measures to process, among others, non-refoulement claim cases more expeditiously:

(a) The Judiciary launched a new round of open recruitment for Judges and Judicial Officers (JJOs) for all levels of courts in November 2020 with a view to increasing the substantive judicial manpower to cope with the operational needs of the courts. In February 2019, on top of the existing JJOs, the Judiciary created four Deputy Registrar of the High Court posts to increase judicial manpower in the Masters Office of the High Court;

(b) for the CFI, the Judiciary has been engaging additional temporary judicial manpower to expedite the processing of applications for JR. The Judiciary will continue to adopt this arrangement as far as practicable;

(c) paper disposal will continue to be adopted to deal with suitable cases (interlocutory matters in particular);

(d) for the CA,

(i) the Judiciary has introduced amendments to the High Court Ordinance (Cap. 4) to streamline court procedures and facilitate processing of cases in the CA, including JR cases relating to non-refoulement claims. The amendments mainly include the extension of the use of a 2-Judge bench of the CA to determine more types of cases and the clarification of the powers of additional CFI or CA judges to dispose of cases on paper without having physically to "sit" in court. The amendments have come into effect on January 18, 2021;

(ii) the Judiciary will seek the approval of the Legislative Council to create one additional Justice of Appeal of the CA post to increase the judicial manpower for dealing with cases; and

(e) for the CFA, the Judiciary has been making arrangements to engage more non-permanent judges to expedite the handling of relevant cases.