

# LCQ22: Systems of judicial review and legal aid

Following is a question by the Hon Kenneth Lau and a written reply by the Chief Secretary for Administration, Mr Matthew Cheung Kin-chung, in the Legislative Council today (February 24):

Question:

It is learnt that the number of judicial review (JR) cases has increased sharply in recent years, and the applicants in quite a number of such cases have been granted legal aid by the Legal Aid Department. Some members of the public have queried that the present systems of JR and legal aid have been abused, leading to much wastage of judicial resources and public money. In this connection, will the Government inform this Council:

(1) of the statistics on JR related cases in each of the past five years as set out in Table 1;

Table 1

| JR related cases   | 2016 | 2017 | 2018 | 2019 | 2020 |
|--|------|------|------|------|------|
| (i) Leave applications<br>(a) Number of cases filed                      |      |      |      |      |      |
| (b) Number of cases in which the applicants were granted legal aid       |      |      |      |      |      |
| (c) Number of cases in which the applicants were granted leave           |      |      |      |      |      |
| (ii) Appeals against refusal to grant leave<br>(a) Number of cases filed |      |      |      |      |      |
| (b) Number of cases in which the applicants were granted legal aid       |      |      |      |      |      |
| (iii) Substantive proceedings of JR<br>(a) Number of cases filed         |      |      |      |      |      |
| (b) Number of cases in which the applicants were granted legal aid       |      |      |      |      |      |
| (iv) Appeals against JR decisions<br>(a) Number of cases filed           |      |      |      |      |      |

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|--|--|--|--|--|--|
| (b) Number of cases in which the applicants were granted legal aid |  |  |  |  |  |
|--|--|--|--|--|--|

(2) of the statistics on the legal aid applications made by applicants of JR related cases in each of the past five years as set out in Table 2; and

Table 2

| JR related cases  | 2016 | 2017 | 2018 | 2019 | 2020 |
|---|------|------|------|------|------|
| (i) Legal aid applications made by applicants   |      |      |      |      |      |
| (a) Number of cases received  |      |      |      |      |      |
| (b) Number of cases approved  |      |      |      |      |      |
| (c) Public expenditure incurred for the approved cases  |      |      |      |      |      |
| (ii) Cases in which the applicants were granted legal aid and the Government was one of the parties involved in the proceedings |      |      |      |      |      |
| (a) Number of cases filed   |      |      |      |      |      |
| (b) Public expenditure incurred   |      |      |      |      |      |
| (c) Number (percentage) of cases with decisions made in favour of the Government  |      |      |      |      |      |
| (d) Number (percentage) of cases with decisions made not in favour of the Government  |      |      |      |      |      |

(3) of the new measures put in place by the authorities to prevent the systems of JR and legal aid from being abused; whether mechanisms will be put in place to regularly review the procedures for vetting and approving applications of the two systems, so as to prevent abuse from happening?

Reply:

President,

In consultation with the Judiciary and the Legal Aid Department (LAD), a reply to the various parts of the question is as follows:

(1) and (2) According to the Judiciary, the number of applications for leave to apply for judicial review (JR) filed in the Court of First Instance of the High Court from 2016 to 2019 and the number of leave applications granted are as follows:

| Year of filing  | 2016 | 2017  | 2018  | 2019  |
|---|------|-------|-------|-------|
| (a) Number of applications for leave for JR                         | 228  | 1 146 | 3 014 | 3 889 |
| (b) Number of leave applications granted (as at November 10, 2020)# | 30   | 56    | 97    | 25    |

#The figures represent the number of leave granted (as at November 10, 2020) amongst the applications for leave to apply for JR filed in the year. Such statistics are live data which may vary at different report generation dates and time.

Note: The number of cases filed in 2020 is being compiled. As a rough indication, more than 2 000 applications for leave for JR had been filed.

Apart from the above statistics on applications for leave for JR, the numbers of JR related cases filed from 2016 to 2019 are as follows:

|                |  |
|----------------|--|
| Year of filing | (a) Number of appeals against refusal of leave |
| 2016           | 13   |
| 2017           | 57   |
| 2018           | 410  |
| 2019           | 372  |
| Year of filing | (b) Number of substantive JR cases filed       |
| 2016           | 31   |
| 2017           | 29   |
| 2018           | 40   |
| 2019           | 15   |
| Year of filing | (c) Number of appeals against JR decisions     |
| 2016           | 21   |
| 2017           | 18   |
| 2018           | 20   |
| 2019           | 21   |

The numbers of legal aid applications for JR received and legal aid certificates granted (including the Government or a public organisation being one of the parties of the proceedings) by LAD between 2016 and 2020 are

tabulated below:

| Legal aid cases related to JR       | 2016 | 2017  | 2018  | 2019 | 2020 |
|-------------------------------------|------|-------|-------|------|------|
| (a) Number of applications received | 437  | 1 046 | 1 547 | 797  | 359  |
| (b) Number of applications approved | 27   | 29    | 60    | 81   | 82   |

Note: The numbers of legal aid certificates granted, as listed above, cover all circumstances mentioned in the question, including applications for leave for JR to Court of First Instance of the High Court, JR proceedings with leave granted, substantive proceedings of JR and appeals against refusal to grant leave and JR decisions. Legal aid certificates may not be granted in the same year as the applications were received.

The expenditures on legal aid cases involving JR in the past five financial years are tabulated below:

| Financial year                | Legal expenditure on JR cases# (\$ million) |
|-------------------------------|---|
| 2016-17                       | 36.3  |
| 2017-18                       | 26.6  |
| 2018-19                       | 29.5  |
| 2019-20                       | 37.6  |
| 2020-21<br>(As at January 31) | 29.1*                                       |

#The total legal expenditure on JR cases is the total legal aid expenditure on JR cases of the same year, including the expenditure on JR cases where the legal aid certificates were not granted in the same year.

\*The amount may be subject to changes after year-end closing.

When processing applications for legal aid (including legal aid applications involving JR), LAD will consider whether the applicants satisfy both the merits test and the means test. The stage of judicial proceedings of an application or the parties involved in the legal proceedings of a JR case (e.g. the Government or a public organisation) are not LAD's considerations when processing legal aid applications. Therefore, LAD does not keep the relevant detailed statistical breakdown.

(3) According to the Judiciary, Order 53 of the Rules of the High Court (Cap. 4A) provides that no application for JR shall be made unless the leave

of the Court has been obtained. The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates. Based on the Judiciary's operational experience, this requirement of obtaining leave from court helps screen out applications for JR which are not reasonably arguable with a realistic prospect of success.

From 2016 to 2019, the total number of applications for leave to apply for JR increased substantially from 228 to 3 889, mainly from non-refoulement claim-related applications for leave to apply for JR. The number of such applications increased from 60 in 2016 to 3 727 in 2019. For the year of 2020 (as at September 30), 1 879 non-refoulement claim-related applications for leave to apply for JR were filed. As for other JR cases in general, the number has remained stable at an annual average of around 160 cases with no apparent trend of increase.

The Judiciary has all along been adopting a stringent approach in handling leave applications for JR. Between 2016 and 2019, among the 3 610 cases concluded as at November 10, 2020, leave was granted in only 208 cases (i.e. about 6 per cent), and among the 3 071 cases relating to non-refoulement claims, leave was granted in only 112 cases (about 4 per cent of the concluded cases).

In respect of legal aid, the policy objective 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. LAD has an established mechanism to guard against abuse of legal aid. The Legal Aid Ordinance (Cap. 91) (LAO) provides that legal aid will only be granted to applicants who satisfy both the merits test and the means test. These criteria are also applicable to the legal aid applications for JR. As such, all legal aid applications (including the applications for JR) 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. In fact, JR cases only account for a small proportion of civil legal aid cases and of all legal aid cases. In 2019 and 2020, legal aid applications for JR which were granted legal aid certificates only accounted for 1.6 per cent of all civil legal aid certificates and 1 per cent of all legal aid certificates respectively.

Besides, the Legal Aid Regulations (Cap. 91A) (the Regulations) also provides the penalties against abuse of legal aid services. Section 9 of the Regulations requires that LAD may revoke a legal aid certificate if the applicant or aided person knowingly made a false statement concerning any information furnished by him/her, and recover from the person all costs incurred on his/her behalf. LAD will also refer the case to the Police for follow-up actions. The aided person will be liable on conviction to a fine

and to imprisonment for 6 months. Furthermore, LAD has put in place a mechanism for making "representations". Any person can report to LAD if he/she believes that an applicant or aided person withheld information or furnished false information for LAD's investigation.

Furthermore, according to section 11 of the Regulations, where a person has applied for legal aid and been refused on two or more occasions where the applications relate to substantially the same cause or matter; or in any other case, on four or more occasions, and it appears to the Director of Legal Aid that his/her conduct has amounted to an abuse of the facilities provided by the LAO, the Director may order that no consideration shall be given to any future application by that person for a maximum of three years.