

LCQ5: Judicial review cases related to basic human rights

Following is a question by the Hon Mrs Regina Ip and a reply by the Secretary for Justice, Mr Paul Lam, SC, in the Legislative Council today (January 15):

Questions:

It has been stipulated in Chapter III of the Basic Law a series of fundamental rights, including basic human rights, enjoyed by Hong Kong residents. On the other hand, the Court of Final Appeal (CFA) established the four-step proportionality test for balancing basic human rights in the case of Hysan Development Co. Ltd and others v Town Planning Board in 2016, and CFA reaffirmed the aforesaid test last year in the two cases of Nick Infinger v The Hong Kong Housing Authority (HA) and Li Yik Ho v HA. In this connection, will the Government inform this Council:

(1) of the number of judicial review cases filed with the court in the past five years in respect of the Government's alleged excessive restriction of basic human rights and, among such cases, the respective numbers and percentages of those cases in which the Government had won and lost, as well as a breakdown of the legal costs incurred by the Government; the respective litigation costs needed to be paid by the Government in respect of such unsuccessful cases; and

(2) whether there were cases in the past in which the Government insisted on lodging appeals despite considering that the cases would have a low success rate after taking into account the aforesaid test; if so, of the factors taken into consideration by the Government in insisting on lodging the appeals; how the Government will hold the officials concerned accountable for such unsuccessful cases in the future?

Reply:

President,

Thank you the Hon Mrs Regina Ip for your two questions.

(1) After reviewing relevant records and weeding out judicial review (JR) cases related to non-refoulement claims, the Department of Justice (DoJ) has arrived at the figure of 61 cases in total involving applicants' allegations against the Government for imposing excessive restriction of fundamental human rights among the JR cases filed with the court in the past five years (Note 1). The yearly breakdown is as follows:

Year	Number of JR cases
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2020	7
2021	14
2022	18
2023	10
2024	12

Note 1: The classification is based on the content of Form 86 of the cases obtained in the Court of First Instance (CFI) or subsequently served by the applicant(s), which clearly refers to the human rights guaranteed by the Basic Law or the Hong Kong Bill of Rights.

Among the 61 cases above, there are 14 cases, i.e. 23 per cent pending the judgment of the CFI, while there are 42 cases, i.e. 69 per cent in which the CFI or a higher court ruled in favour of the Government or held that the Government did not impose disproportionate or excessive restriction of fundamental rights, or the pertinent JR applications were withdrawn by the applicants. There are five cases, i.e. 8 per cent in which the court ruled against the Government on the ground of excessive restriction of fundamental rights, or were settled upon the Government making concessions.

The legal expenses incurred by the Government in respect of the above cases mainly involve staff costs of DoJ for handling the cases, costs for briefed-out counsel, if any, who acted for the Government, and the expenses on payment of litigation costs to applicants. We have not maintained statistics on the legal expenses incurred by DoJ staff in handling the cases in question. Based on the available information, in respect of the said 61 cases, the annual average fees payable to briefed-out counsel acting for the Government and the annual average litigation costs payable to applicants by the Government are around \$3,890,000 and \$119,000 respectively.

Generally speaking, litigation costs will be awarded in favour of the Government when the court ruled in favour of the Government in JR cases and part of these costs would be payable by the applicants and are not necessarily borne entirely by public funds. When a costs order is made in favour of the Government in specific cases, such litigation costs will cover (i) DoJ's staff costs; and (ii) fees of outside legal services, e.g. fees for briefed-out counsel. In respect of the said 61 cases, the Government has been awarded litigation costs in the total sum of around \$4,150,000. As to the above five cases of which the outcome was not in favour of the Government, the fees payable by the Government to the briefed-out counsel acting on its behalf and the litigation costs payable to the applicants totalled around \$922,000.

(2) The proportionality test established by the Court of Final Appeal is a very complex legal concept aimed at determining whether restrictions on human rights and freedoms caused by certain administrative decisions, policies, or legal provisions are reasonable. This test involves four steps: (i) What is the aim of the restriction? Is it a legitimate aim? (ii) If so, is the restriction rationally connected to that legitimate aim? (iii) Whether the restriction is proportionate to achieving the legitimate aim and not

excessive? and (iv) Are the societal benefits brought by the restriction reasonably balanced against the protection of individual rights? The appropriate application of the proportionality test in individual cases often generates considerable controversy and is not a simple clear-cut legal issue.

When faced with JR cases involving fundamental human rights, DoJ would first thoroughly discern the background and purpose of the impugned decision, policy, or legal provision from the relevant policy bureau, and provide legal advice to the relevant policy bureau after careful consideration and legal research. When significant issues are encountered, the Government would also often seek further advice from independent local or overseas barristers.

Every decision and the strategy in litigation is only made after the relevant policy bureau consulted DoJ and considered a basket of factors. Accurately assessing the outcome of litigation is already quite challenging; but more importantly, the likelihood of success is not the only consideration but just one of many considerations, and there is in particular the need to take into account the overall public interest, such as the potential political, social, and economic impacts, as well as the profound effects on the use and allocation of limited and valuable public resources if the JR is successful.

Every decision made by the Government and every policy formulated, including those approved by the Executive Council, as well as every piece of legislation proposed by the Government and passed by the Legislative Council, would have undergone careful scrutiny and it is truly believed to be in compliance with fundamental human rights and freedoms. Therefore, when faced with JR cases, it is generally necessary, as a responsible government, to put forward its case with conviction so that the Court and the public can clearly understand the Government's position.

Of course, some cases are more challenging, but there are still ample reasons for the Government to stand firm on defending its position in the legal proceedings. First, for significant issues, an appeal process must be undertaken so as to obtain a final and authoritative ruling on the issue in dispute. More significantly, the most important aspect of litigation, aside from the outcome, is the reasoning of the judgments. Even if the Court ultimately rules against the Government, it is crucial to understand the reasons behind the judgment; this is very important for the Government's next steps and plans. The Government needs to understand and discern why the Court held that a certain decision, policy, or legal provision did not meet certain human rights requirements before it proceeds to make a new decision, formulate new policies, or put forward legislative or amendment proposals. This is something a responsible government must do; otherwise it would be difficult to provide adequate explanations to the public, the Executive Council, and the Legislative Council.

In fact, even in past cases involving fundamental human rights where the Court ultimately ruled against the Government, the Court never criticised the Government for abusing legal procedures or acting unreasonably, wasting resources or time.

In future, whenever the Government makes any decision, formulates any policy, or makes any legislative proposals, it will certainly strive to ensure compliance with the fundamental human rights and freedoms protected by the Basic Law.

Thank you, President.