

LCQ6: Overseas judges of the Court of Final Appeal

Following is a question by the Hon Paul Tse and a reply by the Chief Secretary for Administration, Mr John Lee, in the Legislative Council today (July 7):

Question:

Article 82 of the Basic Law stipulates that the Court of Final Appeal (CFA) may as required invite judges from other common law jurisdictions (overseas judges) to sit on the CFA. The CFA is constituted by five judges, including either a non-permanent Hong Kong judge or an overseas judge. In this connection, will the Government inform this Council if it knows:

(1) the principles and conditions in accordance with which the Chief Justice of the CFA (CJ) decides on the necessity to select a judge from the list of overseas judges to sit on the CFA to hear individual cases;

(2) the total number of cases heard by the CFA in the past five years and, among them, the number of those in which no overseas judges sat on the CFA; and

(3) whether the CJ has, when deciding which judge on the list of overseas judges is to be selected to sit on the CFA to hear individual cases, considered if a judge was an appropriate choice from the national security perspective; whether the CJ will, in the light of the implementation of the National Security Law for Hong Kong, take national security as a key factor for consideration in making the relevant decision?

Reply:

President,

Based on the information provided by the Judiciary, the Government's consolidated reply is as follows:

As stipulated under Article 92 of the Basic Law, judges of the Hong Kong Special Administrative Region (HKSAR) shall be chosen on the basis of their judicial and professional qualities and may be recruited from other common law jurisdictions. In making recommendations on judicial appointments, it is important to maintain the highest professional standards in the Judiciary.

Under section 16 of the Hong Kong Court of Final Appeal Ordinance (Cap. 484), all appeals shall be heard and determined by the Court of Final Appeal, which is constituted by five judges as follows:

(i) the Chief Justice or a Permanent Judge (PJ) designated to sit in his place under the Hong Kong Court of Final Appeal Ordinance;

(ii) three PJs nominated by the Chief Justice; and

(iii) one non-permanent Hong Kong judge or one judge from another common law jurisdiction selected by the Chief Justice and invited by the Court of Final Appeal.

Under section 10 of the Hong Kong Court of Final Appeal Ordinance, the total number of persons holding office as non-permanent judges shall not at any one time exceed 30.

At present, there are 13 serving non-permanent judges from other common law jurisdictions (CLNPJs), nine of whom are from the United Kingdom, three are from Australia and one is from Canada. These CLNPJs are all judges of the most eminent standing in the entire common law community, with profound judicial experience as well as the highest professional status and reputation. Their participation in hearings of the Court of Final Appeal is conducive to maintaining the high degree of confidence in the independent judicial system under the Basic Law and allows Hong Kong to maintain strong links with other common law jurisdictions.

With the exception of a few cases, all along the arrangement has been that a judge is drawn from the list of CLNPJs to sit on the Court of Final Appeal. These exceptional occasions were mainly due to the unavailability of the CLNPJs at the scheduled hearing dates or because there were unforeseen circumstances which rendered it not possible for the CLNPJs to hear the appeals as planned.

There are mainly two major types of cases heard by the Court of Final Appeal, namely applications for leave to appeal and appeals.

In respect of applications for leave to appeal, section 18 of the Hong Kong Court of Final Appeal Ordinance stipulates that the power of the Court of Final Appeal to hear and determine any application for leave to appeal shall be exercised by the Appeal Committee. The Appeal Committee consists of the Chief Justice and two PJs nominated by the Chief Justice, or three PJs nominated by the Chief Justice, without having to invite the CLNPJs to sit in the hearings.

In relation to appeal cases, from 2016 to 2020, the Court of Final Appeal disposed of a total of 143 cases, including those cases which have been allowed, dismissed, withdrawn, abandoned or discontinued. There were only two appeals in which the CLNPJs were not invited to sit in the hearings during those five years.

The listing and handling of cases, as well as the assignment of which judge or judges are to handle cases have always been judicial functions to be exercised by the Judiciary independently, and the decisions concerned are to be made by the court leaders of the relevant levels of courts. Apart from stipulating that the courts are to assign judges from a list of "designated judges" to handle cases related to national security, the National Security Law in the HKSAR has not brought about any changes to the abovementioned judicial powers and functions. As such, in selecting and inviting the CLNPJs

to sit in every hearing, the Chief Justice of the Court of Final Appeal will, as an established approach, consider all relevant factors, including the availability of the relevant judges, their areas of legal expertise, and the nature of the cases to be heard, etc.

Thank you, President.