

LCQ17: Judicial review mechanism

Following is a question by the Hon Paul Tse Wai-chun and a written reply by the Secretary for Justice, Mr Rimsky Yuen, SC, in the Legislative Council today (December 16):

Question:

Recently in a speech he made, a former permanent judge of the Court of Final Appeal cited several cases to illustrate that the judicial review mechanism had been abused. Besides, some newspaper commentaries have opined that politics and the laws should not be tangled with each other, and that only when the judicial review mechanism is put to sensible and proper use can it effectively check against government policies breaching the law and thereby achieve the objectives of maintaining the rule of law and good governance for the community. The mechanism should not be used as a means to deliberately impede the implementation of government policies and to hinder the commencement of infrastructure projects, thereby imposing an unwarranted cost on society. In this connection, will the Government inform this Council:

(1) whether it has, in light of or with regard to the aforesaid views, reviewed the judicial review mechanism and the threshold for approving legal assistance applications involving judicial review cases; if it has, of the details; if not, the reasons for that;

(2) as it has been reported that the incumbent Secretary for Justice indicated upon assuming office in 2012 that on the premise that the threshold for judicial review should be determined by judges, reviews could be conducted to explore the feasibility of further enhancing the judicial review mechanism in terms of legal perspectives and execution, of the progress of the relevant reviews and their anticipated completion time; and

(3) whether it has reviewed if the increase in the number of judicial review cases in recent years is attributable to the following situation: as there are deficiencies in Hong Kong's political system and the Government have made mistakes from time to time in the approach, strategies and attitudes adopted for implementing its policies, quite a number of disputes cannot be resolved by political means, resulting in politicians from the pan-democratic parties and environmental groups (as pointed out by a local newspaper) taking an alternative approach of lodging judicial reviews repeatedly, in the hope that they will win in the disputes through lodging judicial reviews; if it has, of the details; if not, the reasons for that?

Reply

President,

With regard to parts (1) to (3) of the question raised by Hon Paul Tse Wai-chun, the Government's consolidated reply is as follows:

Under the common law system, judicial review is an important safeguard to the rule of law. Through legal proceedings, individuals can seek relief from the Court to ensure that the formulation of policies and legislation by the executive authorities and the exercise of public powers are in accordance with the law and are subject to appropriate checks and balances. The Special Administrative Region (SAR) Government always respects the residents' right to apply for judicial reviews. The SAR Government will abide strictly by the rule of law, and deal with judicial reviews through appropriate legal procedures.

Currently, the judicial review system in Hong Kong adopts a two-stage approach. Before the Court hears a judicial review application substantively, an applicant

first has to apply for leave to bring judicial review from the Court of First Instance on an ex parte basis. The threshold for granting leave to apply for judicial review is determined and reviewed by the Court on the basis of the relevant law and public interest. In fact, in a case (Note 1) in 2007, the Court of Final Appeal raised the threshold for granting leave to apply for judicial review from cases with potential arguability to those with reasonable arguability, i.e. whether the case is one which enjoys realistic prospects of success. Under the current legal system, the Department of Justice takes the view that it is appropriate for the independent Judiciary to determine the relevant threshold.

As regards legal aid, according to the information provided by the Home Affairs Bureau and the Legal Aid Department (LAD), the policy objective of legal aid is to ensure that no one with reasonable grounds for pursuing or defending a legal action in the Hong Kong courts is denied access to justice due to a lack of means. To qualify for legal aid, a person has to satisfy the means test and the merits test as stipulated in the Legal Aid Ordinance (LAO) (Cap. 91). To ensure that only those cases with reasonable grounds are granted legal aid, all legal aid applications are processed by Legal Aid Counsel appointed to serve in the LAD. In conducting the merits test, LAD will consider the background of the case, the evidence available and the legal principles applicable to the case so as to determine whether there are reasonable grounds for legal aid to be granted. In assessing the merits, LAD must be satisfied that there are reasonable grounds or points of law involved for which it is desirable to grant legal aid to enable the matter to be submitted to the court for decision or judgement. For individual applications, if the available documents already demonstrate strong ground(s) for taking proceedings or that the issues raised are already covered by previous judgements or advice, legal aid may be granted to applicants who have passed the means test. If complicated legal issues are

involved in the application, LAD may seek independent legal opinion from counsel in private practice on the merits of the application under section 9(d) of LAO.

Legal aid will only be granted to applicants who pass both the merits test and the means test in accordance with LAO. LAD has also put in place a monitoring mechanism to ensure that the processing of legal aid applications is reasonable and to safeguard against abuse of legal aid. If an application is refused, the applicant may appeal against the decision of the Director of Legal Aid to the Registrar of the High Court in accordance with section 26 of LAO, for which the decision of the Registrar is final.

With the continuous development of the community, individuals are increasingly concerned about the implementation of Government's policies in different areas and the protection of their legal rights. The numbers of challenges against the Government's policies and decisions through judicial review as well as applications for legal aids have been on the rise. We are also aware that, in recent years, some of the controversial cases have drawn much public attention and have been widely reported. Such cases have highlighted the different views of the community on the procedure for bringing judicial review applications, the time needed for disposal and the delay possibly caused by the relevant judicial review proceedings to the implementation of the relevant policies and decisions. The Department of Justice has been paying attention to the discussion in the community on the ways to improve the judicial review system as well as the relevant developments in other common law jurisdictions, and will review the need to further enhance the judicial review system as and when necessary.

It is the legal right of residents to apply for judicial review and it is a right which has to be respected by the SAR Government. Meanwhile, the SAR Government will continue to seek and incorporate views of the Legislative Council (LegCo),

different political parties, relevant stakeholders (such as the green groups) and the public on our various policies at an appropriate stage and on a broad scale with a view to reducing the likelihood of controversies arising after the promulgation of policies, which will be conducive to smooth governance. Amongst others, Secretaries of Departments and Directors of Bureaux will fully make use of various avenues, such as the respective Panels of the LegCo as well as attending public hearings organised by Panels to listen to and take on board advice from LegCo Members and the public, and lobbying LegCo Members' support for the bills or funding proposals to be introduced. The SAR Government will continue to work for the common good and long-term development of the Hong Kong SAR, promulgate policies for the benefit of the public, and listen to the views of LegCo Members, different sectors and the public on formulation of policies, such that the policies will better meet the aspirations of the community.

Note 1: Chan Po Fun Peter v Cheung CW Winnie & Anor [2005] 5HKC 145.

Ends/Wednesday, December 16, 2015