

DECISION AND REASONS FOR DECISION

FISHERMEN CLAIMS APPEAL BOARD (TRAWL BAN)
CASE NO. AB0102

Between

LEUNG SUP-NG (梁十五)

Appellant

and

THE INTER-DEPARTMENTAL WORKING GROUP

Respondent

Date of Hearing: 21 August 2015 and 24 February 2016

Date of Decision and Reasons for Decision: 3 April 2017

DECISION AND REASONS FOR DECISION

JUDGMENT (Chairman Mrs. CHEUNG Po-yee, Peggy, Member Dr. SHIN Kam-shing, Paul, Member Ms. AU Sin-lun, Catherine, Member Miss LEUNG Wun-man, Emba and Member Miss KUNG Ching-yee, Athena):-

Introduction

1. Case number AB0102 is an appeal by Mr. LEUNG Sup-Ng (梁十五) (“**Mr. Leung**”) against the decision of the Inter-departmental Working Group (“**IWG**”) dated 14 December 2012 (“**the Decision**”¹) determining that Mr. Leung’s fishing vessel (with Certificate of Ownership Number CM64628A) (“**the Vessel**”) was an eligible trawler that generally did not operate in Hong Kong waters (一艘一般不在香港水域作業的合資格拖網漁船) and awarding him an *ex gratia* payment of \$150,000 under the one-off assistance scheme in respect of the Vessel.
2. According to Mr. Leung’s case, at the material time before the Trawl Ban

¹ Hearing Bundle (Part I) p 238

(as defined hereinbelow), the Vessel had been operating as a “shrimp trawler” (蝦拖)². On average, the Vessel had been fishing in Hong Kong waters 20-30% of the time³. Its reliance on Hong Kong waters was said to be 30%. His grounds for appeal are summarized under the section “Appeal Grounds” hereinbelow.

The Trawl Ban and the EGA

3. According to Paragraph 3 of Food and Health Bureau Paper dated 29 January 2013 (“**FHB Paper**”), the Chief Executive announced in his 2010-11 Policy Address that the Government would implement a basket of fisheries management measures including banning trawling in Hong Kong waters (“**the Trawl Ban**”) through legislation in order to restore our seabed and marine resources as early as possible. The statutory notice for the Trawl Ban was published in the Government Gazette in March 2011 and came into effect on 31 December 2012.
4. The Finance Committee (“**FC**”) of the Legislative Council also approved in June 2011 a one-off assistance package to trawler owners affected by the Trawl Ban, which included making ex-gratia allowance (“**EGA**”) to affected trawler owners for permanent loss of fishing grounds arising from the Trawl Ban (“**EGA Package**”).

The Policy and Guiding Principle

5. According to paragraph 7 of the FHB Paper, the policy and guiding principles underlying the EGA Package are set out in FC Paper FCR(2011-12)22 (“**FC Paper**”).
6. According to Paragraph 12 of the FC Paper, the guiding principle is that the EGA apportioned to different groups of claimants should be proportional to the impact on them caused by the Trawl Ban.
7. Owners of inshore trawlers which operated wholly or partly in Hong Kong waters were expected to be most affected when the Trawl Ban took effect as they would lose their fishing grounds in Hong Kong waters. They would receive a greater amount of EGA than owners of larger trawlers⁴.

² Hearing Bundle (Part I) p 53

³ Hearing Bundle (Part I) p 3 and p 53

⁴ Paras. 5 to 10 of FC Paper

8. Owners of larger trawlers which generally did not operate in Hong Kong waters were also affected by the Trawl Ban since they would lose the option to trawl in Hong Kong waters in the future. However, as the impact of the Trawl Ban on them was far much less when compared with owners of inshore trawlers, an owner of a larger trawler is only granted a lump sum EGA of HK\$150,000⁵.

The Appeal Grounds

9. In the present appeal, Mr. Leung contends⁶ that:
- (1) the Vessel was an “inshore” trawler rather than a “larger” trawler that generally did not operate in Hong Kong waters;
 - (2) prior to the Trawl Ban, the Vessel’s dependency on Hong Kong waters was 30%;
 - (3) the Vessel’s particulars, his mode of operations, the types, quantities and sale channels of his fish catch all showed that a sizeable part of his operations was conducted in Hong Kong waters;
 - (4) the EGA amount of \$150,000 for him was too little to compensate for his losses resulting from the Trawl Ban; and
 - (5) IWG’s survey methodology was not comprehensive.
10. By written submissions dated 17 June 2014, the then-counsel for Mr. Leung elaborated on his appeal grounds⁷.

The Appeal Hearing

11. Prior to the hearing, there had been a change of solicitors and counsel for Mr. Leung. He had originally been represented by Counsel Mr. SIO Chan-in (蕭震然) and solicitors, Messrs. Yung, Yu, Yuen & Co⁸.
12. At the hearing, (“**the Appeal Hearing**”):
- (1) Mr. Leung was represented by Counsel, Mr. Lawrence L K CHEUNG (張立群) and solicitors, Messrs. Hoosenally & Neo; and

⁵ Paras. 9 and 10 of FC Paper

⁶ Hearing Bundle (Part I) p 3-4

⁷ Hearing Bundle (Part I) pp 419 - 426

⁸ Hearing Bundle (Part I) p 426 and (Part II) p 961

- (2) IWG was represented by Counsel, Mr. Stanley NG Cheuk-kwan (吳焯軍) and Government Counsel, Mr. YIM Ho-ching (嚴浩正) of the Department of Justice. Also present at the hearing were representatives Dr. SO Chi-ming, Ms. LI Wai-hung and Dr SIU Ho-lim.
13. The hearing took place on 21 August 2015. It was adjourned part-heard, with directions given to the parties to file further evidence and submissions. The hearing was resumed on 24 February 2016. At the end of the hearing on that day, the Board gave further directions for the filing of supplemental documents and information⁹.
14. IWG submitted further documents¹⁰ on 23 March 2016 and 6 April 2016. Subsequently, the parties filed their respective closing submissions¹¹ on 4 May 2016.

Decision & Reasoning

15. Having carefully considered all the evidence and submissions, both oral and written, from the parties, this Board has regrettably decided to dismiss Mr. Leung's appeal.
16. The Board accepts the reasoning set out in IWG's written submissions. Importantly, the Board finds that Mr. Leung has failed to discharge his burden of proving that his operations depended on Hong Kong waters to the extent claimed in the appeal, i.e. about 30%¹². The evidence adduced by Mr. Leung is unconvincing and, having considered his evidence in its entirety and the principles on the assessment of credibility of witnesses set out in paragraph 5 of the Appellant's Closing Submissions and Counsel's submissions, we find Mr. Leung unreliable as a witness.
17. In our view, it is inherently improbable that Mr. Leung was relying on Hong Kong waters to any significant extent for his trawling operations given the fact that none of the 5 full-time workers from mainland China on board the Vessel assisting him and his wife had permission to enter Hong Kong and work here. Under cross-examination¹³, Mr. Leung confirmed that he had not even applied for permission for those workers to work in Hong Kong. He further confirmed that it would not be feasible for just him

⁹ Hearing Bundle (Part IV) p 1375

¹⁰ Hearing Bundle (Part IV) p 1378 and p 1389

¹¹ Hearing Bundle (Part IV) pp 1402-1418 and pp 1460-1473

¹² Hearing Bundle (Part I) p 3 and p 431

¹³ on 24 February 2016 at about 9:30 am

and his wife to operate the Vessel during trawling operations without the help of the mainland workers. Those workers were tasked to lay the nets, bring in the catch, sort out and select the catch, which were all labour-intensive tasks. In other words, the mainland workers formed the "core team" of Mr. Leung's trawling operations.

18. Why would Mr. Leung take chances by bringing in his "core team", trawl in Hong Kong waters and run the risk of being caught by the Hong Kong authorities and receive an immediate custodial sentence of several months, or even longer, upon conviction? Employing workers who are not lawfully employable in Hong Kong has very serious consequences. It is plainly inherently unlikely that Mr. Leung would have wanted to take his chances in this way. It is much more likely that had he wanted to bring his core team to work for him in Hong Kong waters, he would have sought to apply for permission for those workers accordingly. That Mr. Leung conceded he had not sought. And according to Mr. Leung during his cross-examination, he had been engaging his mainland workers for up to 5 years.
19. Mr. Leung's evidence during the course of his appeal shows considerable inconsistencies. Many of these inconsistencies have been pointed out by Mr. Stanley Ng, Counsel for IWG, in his Closing Submissions. We accept that credibility of Mr. Leung is in issue and find that he is unable to persuade this Board to believe him on the key issue in this appeal, namely, that he had been relying on Hong Kong waters to the extent contended for.
20. In coming to our view, we have not lost sight of the fact Mr. Leung had received very limited education and is essentially illiterate. We accept the submission of Mr. Lawrence Cheung, Counsel for Mr. Leung, that Mr. Leung is a fisherman, not an accountant or someone running a sophisticated business who would be expected to keep his accounts and receipts completely and properly. We further accept his submission that no fisherman would be expected to have the foresight, before the pronouncement of the *ex-gratia* compensation scheme, to think of documenting his time in and out of Hong Kong waters and gathered and kept such evidence for a lengthy period of time¹⁴. However, it is nonetheless incumbent on Mr. Leung to convince this Board that what he asserts should be believed. The burden is on him to show he is right about his case. It is not sufficient for him to simply show that IWG's survey methodology was incomprehensive. On the evidence, this Board disbelieves he had been relying on Hong Kong waters as contended for.

¹⁴ Hearing Bundle (Part IV) p 1417

21. For the avoidance of doubt, by reason of the foregoing, this Board also finds that Mr. Leung has not established a case that his dependency on Hong Kong waters at the material time was at least 10%.
22. As to Mr. Leung's contention that \$150,000 was too small an amount to compensate for the loss of a chance to return to Hong Kong waters to trawl, one only needs to refer to the discussion paper¹⁵ for the Finance Committee in June 2011, that the \$150,000 allowance was specifically to compensate for the loss of opportunity to return to trawl in Hong Kong waters insofar as larger trawlers were concerned, including the situation where the age of the vessel has reached a stage when the vessel would no longer be suitable for sailing afar. In other words, it was part of the policy to make \$150,000 as the figure for such an allowance.
23. The Board is mindful of the Terms of Reference upon which it has been established. In essence, they are as follows:
 - (1) To see that the criteria established by the IWG for processing and/or vetting applications for the EGA comply with the government policy, and are fair and reasonable to the applicants;
 - (2) To see that the IWG's decisions on eligibility and the amount of EGA granted comply with the government policy and are fair and reasonable to the applicants;
 - (3) To examine any new or additional information / evidence provided by the appellants (or their representatives) who have lodged an appeal against the IWG's decisions or by the relevant departments, and to consider the relevance of and the weight to be given to such information/ evidence;
 - (4) To consider whether to uphold the IWG's decisions on the appellants' cases or to revise the decisions, and to determine the type and amount of EGA payable to the appellants, as appropriate.
24. We are satisfied on the evidence that IWG's decision to classify the Vessel as a larger but eligible trawler that generally did not operate in Hong Kong waters (一艘一般不在香港水域作業的合資格拖網漁船) was a correct one. In light of the Terms of Reference and the policy as set out in the Finance Committee discussion paper abovementioned, we are of the view that the decision of awarding \$150,000 allowance to this appellant was correct.

¹⁵ Hearing Bundle (Part I) p 307 paras. 9, 10

Conclusion

25. In the circumstances, this appeal is dismissed.

Date of hearing : 21 August 2015 & 24 February 2016

Heard at : (21 August 2015)
Conference Room 1
Central Government Offices, 2 Tim Mei Avenue,
Tamar, Hong Kong

(24 February 2016)
Room 1818, 18th Floor, East Wing
Central Government Offices, 2 Tim Mei Avenue,
Tamar, Hong Kong.

(signed)

Mrs. CHEUNG Po-yee, Peggy, JP
Chairman

(signed)

Dr. SHIN Kam-shing, Paul
Member

(signed)

Ms. AU Sin-lun, Catherine
Member

(signed)

Miss LEUNG Wun-man, Emba
Member

(signed)

Miss KUNG Ching-yee, Athena
Member

The Appellant, Mr. LEUNG Sup-Ng, appearing by Counsel Mr. Lawrence L K CHEUNG (張立群), Solicitor Mr. Nicky S H TSE (謝世恒) and Solicitor Mr. CHEUNG Hau-kit (張孝杰)

IWG, appearing by Counsel Mr. Stanley NG Cheuk-kwan (吳焯軍), Government Counsel Mr. YIM Ho-ching (嚴浩正) of the Department of Justice, and Ms LI Wai-hung, Dr SO Chi-ming and Dr SIU Ho-lim of the AFCD
Mr. Paul LEUNG, Legal Advisor to the Board