

DECISION AND REASONS FOR DECISION

FISHERMEN CLAIMS APPEAL BOARD (TRAWL BAN)
CASE NOS. AB0108 & AB0109
(HEARD TOGETHER)

Between

CHEUNG HAK CHAI (張克仔)

Appellant

and

THE INTER-DEPARTMENTAL WORKING GROUP

Respondent

And between

CHEUNG AH CHEUNG (張亞祥)

Appellant

and

THE INTER-DEPARTMENTAL WORKING GROUP

Respondent

Date of Hearing: 5 January 2017

Date of Decision and Reasons for Decision: 22 September 2017

DECISION AND REASONS FOR DECISION

JUDGMENT (Chairman Mrs. CHEUNG Po-yee, Peggy, Member Mr. CHAN Weng-Yew Andrew, Member Prof. CHU Ka-hou, Member Mr. KONG Tze-wing James and Member Ms. LEUNG Wun-man Emba):-

Introduction

1. Case number AB0108 is an appeal by Mr. Cheung Hak-chai (張克仔) (“**Mr. HC Cheung**”) against the decision of the Inter-departmental Working Group (“**IWG**”) dated 30 November 2012 (“**the AB0108 Decision**”)¹

¹ Hearing Bundle p 95 of AB0108

determining that Mr. HC Cheung's fishing vessel (with Certificate of Ownership Number CM64158A) ("**the AB0108 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 AB0108 Vessel.

2. Case number AB0109, on the other hand, is an appeal by Mr. Cheung Ah-cheung (張亞祥) ("**Mr. AC Cheung**") against the decision of IWG dated 30 November 2012 ("**the AB0109 Decision**²") determining that Mr. AC Cheung's fishing vessel (with Certificate of Ownership Number CM64444A) ("**the AB0109 Vessel**") was also 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 AB0109 Vessel.
3. The appeals of Mr. HC Cheung and Mr. AC Cheung were with the Appellants' express consent heard together on 5 January 2017 for the reason that the 2 vessels in questions had, according to the Appellants, at the material time before the Trawl Ban (as defined hereinbelow) been operating in tandem as "pair trawlers" (雙拖).

The Trawl Ban and the EGA

4. 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 legislation for the Trawl Ban was passed by the Legislative Council ("**LegCo**") in May 2011 and came into effect on 31 December 2012.
5. The Finance Committee ("**FC**") of LegCo 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**").

² Hearing Bundle p 94 of AB0109

The Policy and Guiding Principle

6. 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**”).
7. 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.
8. 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 trawlers³.
9. 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 larger trawler is only granted a lump sum EGA of HK\$150,000⁴.

The Appeal Grounds

10. In both their appeals, the Appellants contend⁵ that:
 - (1) their dependency on Hong Kong waters for their trawling operations amounted to 30%; they mainly operated in the area to the east of Ninepin Islands (果洲群島) and Wanglan Island (橫欄島) during the period from the 9th lunar month to the 1st lunar month; when the seas were rough, they would also operate there;
 - (2) as their vessels were getting old, they had become less able to cope with rough conditions in the open sea and should not have been treated by the IWG as offshore trawlers (外海作業船隻).

The Appeal Hearing

11. At the hearing, (“**the Appeal Hearing**”):

³ Paras. 5 to 10 of FC Paper

⁴ Paras. 9 and 10 of FC Paper

⁵ Hearing Bundle p 3 of AB0108 and p 3 of AB0109

- (1) Both Appellants conducted their appeals in person; and
 - (2) IWG conducted the appeal through their representatives, Dr. William Siu and Dr. Albert Leung.
12. The Appellants' oral evidence can be summarized as follows:
- (1) Their vessels were getting old. Operating them in the outer seas would be very difficult.
 - (2) Between the 9th lunar month and the 1st lunar month, they were mostly in Hong Kong waters because of choppy conditions (浪大).
 - (3) They no longer kept any fuel, ice or fish sale receipts. Usually a few months after transactions, they would discard the receipts. Therefore, no receipts have been submitted.
 - (4) In 2016, the vessels were in fact sold.
 - (5) Their mode of operations was that they picked up their mainland workers from Lingding Island for work and dropped them off back in Lingding Island each time. Their workers could not enter Hong Kong. No declaration of Hong Kong entry or departure was made for their workers (在香港沒有報口).
 - (6) Their vessels had large fuel tanks and they would buy more fuel when the price was low.
 - (7) It is no longer practical to search for evidence of fish sale as they no longer have business dealings with fish wholesalers.

Decision & Reasoning

13. Having considered all the evidence and submissions from the parties, this Board has decided to dismiss both appeals.
14. In January 2012, the Appellants claimed in the questionnaires⁶ that 50% of their time had been spent fishing in Hong Kong waters. In their appeal documents, they claimed a dependency of 30% on Hong Kong waters for

⁶ Hearing Bundle p 39 of AB0108 and AB0109

their operations. Yet, they have produced no evidence to show they operated in Hong Kong waters.

15. Although Mr. AC Cheung claimed in the questionnaire⁷ that his mainland workers were engaged under the Mainland Fishermen Deckhands Scheme, representatives from IWG gave evidence that the situation was quite the opposite. Mr. AC Cheung did not dispute such a claim from IWG during the hearing. Based on the oral evidence of the Appellants that they did not make any declarations of Hong Kong entry or departure for their mainland workers, we find that on a balance of probabilities, the mainland workers of Mr. AC Cheung were not in fact engaged under the Mainland Fishermen Deckhands Scheme and therefore could not work in Hong Kong waters.
16. During the course of the hearing, the Appellants vaguely suggested that they would break the law on rare occasions (少部份時間) by operating in Hong Kong waters with their crew. However, they did not give any specific percentage.
17. In the circumstances, we are not persuaded by the Appellants' claim of 30% or 50% of their operations being in Hong Kong waters. They have failed to discharge their burden of proof to establish such a case.
18. We are satisfied on the evidence that IWG's decision to classify the 2 vessels as eligible trawlers that generally did not operate in Hong Kong waters (一般不在香港水域作業的合資格拖網漁船) was a correct one. IWG's conclusion was based on uncontroversial, objective facts such as the length of the vessels (30.00m and 31.20m respectively), engine power (835.52kW and 693.78kW respectively) and fuel tank capacity (63.06 cubic metres and 48.71 cubic metres respectively), and the fact that the fishing boats in question were not sighted during the sea surveys.
19. As to the Appellants' contention that \$150,000 was too small an amount to compensate each of them, one only needs to refer to Appendix 4 of the Hearing Bundle (which is in a separate booklet), p. A45, paras. 9 and 10. It is clear from this document, which was the discussion paper 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.

⁷ Hearing Bundle p 38 of AB0109

20. In the circumstances, the award of \$150,000 for each Appellant was correct.

Conclusion

21. In the circumstances, these appeals are dismissed.

Date of hearing : 5 January 2017

Heard at : 9/F, Rumsey Street Multi-storey Carpark Building,
2 Rumsey Street, Sheung Wan, Hong Kong

(signed)

Mrs. CHEUNG Po-yee, Peggy, JP
Chairman

(signed)

Prof. CHU Ka-hou
Member

(signed)

Mr. KONG Tze-wing, James, MH, JP
Member

(signed)

Mr. CHAN Weng-yew, Andrew
Member

(signed)

Ms. LEUNG Wun-man, Emba
Member

The Appellants, CHEUNG Hak-chai and CHEUNG Ah-cheung appearing in person
Dr. Albert Leung, Supervisory Fisheries Management Officer, AFCD,
representative on behalf of the IWG

Dr. SIU Ho-lim, William, Fisheries Officer, AFCD, representative on behalf of the
IWG

Mr. Paul LEUNG, Legal Advisor to the Board