

DECISION AND REASONS FOR DECISION

FISHERMEN CLAIMS APPEAL BOARD (TRAWL BAN)

CASE NO. AB0280

Between

CHEUNG CHI ON (張志安)

Appellant

and

THE INTER-DEPARTMENTAL WORKING GROUP

Respondent

Date of Hearing: 12 December 2014

Date of Decision and Reasons for Decision: 4 March 2015

DECISION AND REASONS FOR DECISION

1. This is an appeal by the Appellant against the decision of the Inter-departmental Working Group (“**IWG**”) on the eligibility and amount of ex-gratia payment granted to him (“**the Appeal**”).
2. The Appeal was heard on 12 December 2014 when the Appellant was absent. The Board was notified of the Appellant’s intended absence by way of notice written by the Appellant’s wife that was dated and received on the day of the hearing. According to the Appellant’s application for appeal (“**the Appeal Notice**”) dated 20 January 2014, the Appellant indicated that he would personally handle the Appeal, which was stated to be inclusive of attending the hearing of the Appeal and other meetings, as well as making oral/preparing written submissions.

3. Having ascertained that the Appellant had been duly sent the Notice of the hearing date, time and venue on 21 November 2014 (whereby the Appellant was also informed of the applicable procedures if he or his representative is unable to attend the hearing) and that no reasonable excuse has been given for his absence, the Board resolved to conduct the hearing in absence of the Appellant.
4. The Board now gives its decision and reasons for the decision.

Pertinent facts and the IWG's decision

5. On 13 October 2010, the Chief Executive announced that the Government would implement a basket of 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 Trawl Ban took effect on 31 December 2012.
6. In light of the Trawl Ban, an assistance package was approved by the Legislative Council Finance Committee in June 2011. This was a "*One-off assistance package to trawler vessel owners, local deckhands and fish collector owners affected by the trawl ban and other related measures*". This led to the setting-up of the IWG which was responsible for handling all matters relating to applications received under the assistance scheme. The Appellant was one such applicant.
7. The subject matter of the Appeal concerns the IWG's decision (communicated to the Appellant by letter dated 21 September 2012) whereby the Appellant's fishing vessel was classified as a large trawler generally not operating in Hong Kong waters ("**the Decision**"). By definition of the IWG, a large trawler is one that spends less than 10% of its annual fishing time in Hong Kong waters.

8. In context of the ex-gratia allowance (“**EGA**”) payments that was resolved to be granted to affected trawler owners, this meant that the Appellant was not eligible to apportion a total amount of HK\$1,190 million of EGA with eligible inshore trawler owners. Instead, he will receive a lump sum EGA of HK\$150,000.
9. According to the IWG’s records which were compiled from a number of sources (including information from the Appellant), the Appellant’s fishing vessel was a wood stern trawler (license no. CM63992A) (“**the Vessel**”) that had 3 engines and measured 30.25 metres in length in total. Its propulsion engine power came up to 686.32 kilowatts, and the fuel tank capacity was 60.00 cubic metres.
10. Based on statistical data kept by the Agriculture, Fisheries and Conservation Department (“**AFCD**”) concerning the operation of fishing trawlers of different type, length, material and design, it was concluded that the Vessel, which had the above-mentioned attributes generally did not operate in Hong Kong waters. Besides, given the Vessel’s engine power and fuel tank capacity, which enabled it to venture into farther waters for fishing, it was also concluded that the Vessel most likely operated in offshore waters.
11. Furthermore, the IWG also referred to the AFCD’s patrol records at typhoon shelters in the year 2011, whereby with the exception of Chinese New Year and periods where the fishing moratorium was in place, the Vessel had not frequently docked at Aberdeen Typhoon Shelter (which was the Vessel’s “home port” in Hong Kong). And, according to the AFCD’s records of patrol in Hong Kong waters for the years 2009-2011, the Vessel had also not been found to have been operating in the region.
12. Other factors considered by the IWG included, amongst other things, the number and demographics of the hands employed onboard the Vessel, the fact that the Appellant possessed a permit that enabled the Vessel to fish in the waters of the Mainland, that the majority of the Vessel’s catch would be

sold in the Mainland, and the Appellant's failure to adduce credible objective evidence to prove his averment (stated at page 14 of his application form for EGA dated 2 February 2012) that his reliance on Hong Kong waters for fishing was 40%.

Grounds of Appeal

13. The Appellant had, in the Appeal Notice, stated a number of reasons for disagreeing with the Decision:-

- a) There was a lack of legislative prohibition against trawlers of 29 metres in length from operating in Hong Kong waters;
- b) Stern trawlers generally do operate where the sea is shallow, and not infrequently in Hong Kong waters;
- c) In light of the low-interest loan provided by the AFCD in the 70's and 80's, the fishing industry underwent changes. He had the Vessel built at the time with greater horsepower and the normal implements;
- d) Hong Kong waters constituted an important fishing ground for him and his reliance thereon was 60% (which is contradictory to his previous averment of 40%).

14. By written submissions dated 23 March 2014 ("**the Appellant's Submissions**"), the Appellant asserted that he intended to make submissions as follows:-

- a) He came from a family of fishermen and had since young, followed his parents on fishing trips. Due to his mother's passing away and his father's old age, he was now responsible for operating the Vessel;
- b) Both his parents suffered from hypertension, which led his family to operate in inshore waters, e.g. around the Po Toi Islands, and each trip only lasted several days, depending on his parents' conditions and need for medical attention. He did not dare to go too far away from shore in

fear of his parents falling ill and had to return to Hong Kong for medical treatment urgently;

- c) Because he had gotten used to the conditions where his family usually fished, he had not changed fishing grounds after taking over the operation of the Vessel.
- d) The Appellant referred to the repair and refuelling records, as well as those of fish sales which were enclosed with the submissions. Regarding the repair services that he sought from Dongguan, Mainland PRC, the Appellant explained that due to the scarcity of repair docks in Hong Kong and their more expensive charges, it was his custom to take the Vessel to Dongguan for repairs.

15. The Board further noted that, by an earlier letter to the Board dated 29 December 2012, the Appellant had inconsistently stated, *inter alia*, that his reliance on Hong Kong waters (chiefly in the Ninepin Group and east of Waglan Island areas, during September to January of the lunar calendar) had been 30%.

The Board's Decision

16. During the hearing of the Appeal, the Board had the benefit of oral and written submissions from Dr. So Chi-ming of the AFCD (“**Dr. So**”) who appeared on behalf of the IWG. The Board also had before it the written submissions and supporting documents lodged by both parties for the Appeal. No witnesses were called by either party.

17. Having considered the materials before us, we are satisfied that the reasoning adopted by the IWG, as well as the basis thereof, appears to be sound and supported by objective evidence. Whilst cognizant of the fact that the IWG had placed somewhat heavy reliance on circumstantial evidence or non- case-specific data in arriving at the Decision, we also note that the Appellant had the opportunity, but did not apparently attempt to contest the

case on its facts, say to challenge the applicability of the objective data collected by the AFCDC or otherwise. Looking at the matter in the round, we are satisfied that the IWG had before it sufficiently cogent materials for the purposes of drawing their conclusion.

18. Apart from the grounds relied upon by the IWG when arriving at the Decision, the Board also gave detailed consideration to the supporting documents submitted by the parties. Having closely examined these in conjunction with the parties' submissions, we have noted and do agree with Dr. So's observations that the Vessel's attributes, as well as the Vessel's pattern of operations (as derived from all of the evidence, including evidence submitted by the Appellant) do appear to be consistent with the profile and pattern of fishing operations that are carried out offshore rather than inshore.
19. Specifically, aspects of the Vessel's pattern of operations that was given express consideration during the hearing included, amongst other things, the implications of the rare sightings of the Vessel within the Aberdeen Typhoon Shelter (4 times out of 36 days of patrol between January to November in the year 2011); implications of zero sightings of the Vessel in Hong Kong waters between November 2010 to November 2011; the Appellant's representation that the destination of sale for Vessel's catch was largely Mainland China; the Vessel's volume and frequency of refueling (which on a per-refuel basis, was of a level which far surpassed the needs of an inshore-operating trawler and was sufficient for long periods of operation at sea); and the frequency of ice stocks that was purchased between 2009-2011 (which appeared to indicate that the Appellant did not always purchase ice from Hong Kong).
20. Last but not least, the Board also noted with concern the apparent contradiction between the Appellant's various averments about the degree of his reliance on Hong Kong fishing waters. We are unable to speculate why different figures have been put forward at different times, but in the absence of the opportunity to question the Appellant, not to mention the lack of

evidence to support such figures, we are left with no choice but to reject the Appellant's submissions in this respect.

21. In light of the above, the Board has found no reason to disturb the findings made by the IWG. The Decision should be upheld and the Appeal dismissed.

Date of hearing : 12 December 2014

Heard at : Conference Room 2, Ground Floor, Central
Government Offices, 2 Tim Mei Avenue,
Tamar, Hong Kong.

(Signed)

TO Wai Keung, Vincent, BBS
Chairman

(Signed)

HUI Mei Sheung, Tennessy, JP
Vice-Presiding Person

(Signed)

AU Sin Lun, Catherine
Member

(Signed)

CHAN Weng Yew Andrew
Member

(Signed)

LO Wai Kei Wilkie
Member

The Appellant, absent.

Dr. So Chi-ming, Fisheries Officer (Sustainable Fisheries) 1, AFCD, representative on behalf of the IWG.

Ms. Li Wai-hung, Senior Fisheries Officer (Sustainable Fisheries)(Ag.), AFCD, representative on behalf of the IWG.

Ms. Abigail Wong, Legal Advisor to the Board.