

**DECISION AND REASONS FOR DECISION**

FISHERMEN CLAIMS APPEAL BOARD (TRAWL BAN)

CASE NO. AB0332

Between

WONG KIN YAU (黃建有)

*Appellant*

and

THE INTER-DEPARTMENTAL WORKING GROUP

*Respondent*

Date of Hearing: 10 April 2015

Date of Decision and Reasons for Decision: 4 October 2016

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**DECISION AND REASONS FOR DECISION**

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**JUDGMENT** (Chairman Mr. MAK Yip-shing, Andrew, Member Mr. CHAN Wai-chung, Member Mr. CHAN Weng-yew, Andrew, Member Mr. KONG Tze-wing, James and Member Mr. NGAI Ming-tak, Michael):-

**Introduction**

1. This is an appeal by Mr. WONG Kin Yau ("**Mr. Wong**") against the decision of the Inter-departmental Working Group ("**IWG**") dated 30 November 2012 ("**the Decision**<sup>1</sup>") determining that Mr. Wong's fishing vessel (with Certificate of Ownership Number CM69327Y) ("**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 Mr. Wong an *ex gratia* payment of \$150,000 under the one-off assistance scheme in respect of the Vessel.

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<sup>1</sup> Hearing Bundle p 84

## **The Trawl Ban and the EGA**

2. 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.
3. 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**").

## **The Policy and Eligibility Criteria**

4. According to paragraph 7 of the FHB Paper, the policy and guiding principles underlying the EGA Package are set out in the Finance Committee Paper numbered FCR(2011-12)22 ("**FC Paper**").
5. The eligibility criteria for application of EGA ("**the Eligibility Criteria**") are set out in Part (A) of Enclosure 1 to the FC Paper, including :

"(A) EGA

The eligibility criteria are to be determined by an inter-departmental working group (IWG) established before the commencement of the registration for applying for EGA. Only applicants who can meet the criteria are eligible for the EGA. The criteria should include, inter alia, the following:

- (a) the applicant must be the owner of a trawler vessel which is used for fishing only and not engaged in other commercial activities as at 13 October 2010, and at the time of application is still the owner of that trawler;
- (b) the applicant must be the holder of a valid certificate of ownership

and operating licence of a Class III vessel issued by the Marine Department (MD) under the Merchant Shipping (Local Vessels) (Certification and Licensing) Regulation (Cap. 548D) in respect of the trawler vessel on or before 13 October 2010; or has obtained an approval-in-principle letter for construction of a Class III vessel issued by the MD on or before 13 October 2010, and submit a document proving that the vessel under construction is a trawler vessel;

- (c) where the application is in respect of an inshore trawler, the trawler vessel in the application must wholly or partly fish within Hong Kong waters.

### **The Grounds of Appeal**

6. In this appeal, Mr. Wong contends that the Vessel was a pair-trawler. He said he used to operate in a pair with another pair-trawler (Certificate of Ownership Number CM67704Y) owned by Chan Kam-hei (陳金喜) up until 2009's fishing curfew (休漁期), spending about 70 to 80% of his operating time in Hong Kong waters. From the end of 2009's fishing curfew, he paired up with another pair-trawler owner, Fung Kwai-sam (馮桂森) instead (Certificate of Ownership Number CM69720Y). According to Mr. Wong, despite the change in pairing, the mode of operation remained unchanged.
7. In his appeal application form lodged<sup>2</sup> on 7 February 2014, Mr. Wong had claimed having spent 80% of his time operating in Hong Kong waters.

### **The Appeal Hearing**

8. At the hearing, ("**the Appeal Hearing**"):
- (1) Mr. Wong conducted the appeal in person; and
  - (2) IWG conducted the appeal through their representatives, Ms. Louise Li ("**Ms. Li** ") and Dr. So Chi-ming ("**Dr. So**").

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<sup>2</sup> Hearing Bundle pp 3 - 4

9. Apart from relying on the documentary evidence already submitted to the Board prior to the hearing, Mr. Wong gave evidence on a number of issues.
10. First, he confirmed that Fung Kwai-sam (馮桂森) was his regular pair-trawler partner after 2009's fishing curfew. Mr. Fung Kwai-sam was not called to give evidence at the hearing.
11. Secondly, Mr. Wong did not see the need to keep any sale receipts. Mr. Wong produced an unsigned certificate<sup>3</sup> purportedly issued by one Chi Kee Fish Wholesale (志記鮮魚批發) on 17 January 2013, with a company chop, certifying that Mr. Wong had during 2009 to 2012 sold his catch from Hong Kong waters to that company intermittently every few days. He also produced a handwritten note from Shing Kee Seafood Wholesale Company (勝記海鮮) dated 18 January 2013, certifying that Mr. Wong had during 2007 to 2012 caught all his catch within Hong Kong waters and sold it to Shing Kee Seafood Wholesale Company.
12. Thirdly, Mr. Wong confirmed that at the material time, the Vessel was refueling about 130 to 140 barrels of diesel each month<sup>4</sup>. He usually refueled once or twice each month, each time filling up about 60 barrels. He confirmed that with 60 barrels, the Vessel could reach areas outside Hong Kong waters.
13. Fourthly, Mr. Wong confirmed that for the fish types that he would normally catch, those types could also be caught outside Hong Kong waters.
14. Fifthly, Mr. Wong confirmed that at the material time, the Vessel had 5 full-time Mainlander workers onboard who did not have permission to work in Hong Kong waters.

### **Decision & Reasoning**

15. Having considered all the evidence and submissions from the parties, this Board has decided to dismiss Mr. Wong's appeal.
16. The Board notes that the appeal turns on a narrow compass on a major

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<sup>3</sup> Hearing Bundle p 265

<sup>4</sup> Hearing Bundle p 268

factual issue, that is, whether and if so how much time the appellant Mr Wong was operating in Hong Kong waters.

17. We have the opportunity of considering the evidence and submissions filed or given before and at the hearing. We do not believe Mr Wong has good ground of appeal. More particularly, we have considered Mr Wong's evidence and submissions as a whole and below we also deal with Mr Wong's new evidence and submissions given at the hearing.
18. The handwritten note of Shing Kee Seafood Wholesale Company adduced by Mr. Wong and alluded to above is not a reliable piece of evidence. It states that *all* of Mr. Wong's catch was from Hong Kong waters. That is to be contrasted with the claim by Mr. Wong that he operated only 80% of his time in Hong Kong waters. There is no explanation given on how the writer of the note knew how much of Mr Wong's catch was from Hong Kong waters. The note from Shing Kee Seafood Wholesale Company is exaggerated and clearly unreliable, and we do not accept the note as evidence reflecting the truth.
19. As regards the certificate of Chi Kee Fish Wholesale adduced by Mr. Wong and alluded to above, it sets out the various kinds of fish Mr. Wong sold to it from 2009 to 2012. We accept IWG's submission that such fish types can be found outside Hong Kong waters as well. As such, the document is unhelpful; it cannot show that Mr. Wong's catch must have come from Hong Kong waters.
20. As far as the evidence on diesel usage is concerned, the certificate<sup>5</sup> from King Shing Company is not helpful to the case of Mr. Wong. According to Mr. Wong's own information, as provided in the questionnaire<sup>6</sup>, each refill for the Vessel would be for about 60 barrels of fuel. Mr. Wong during the hearing confirmed that he did not on-sell the Vessel's fuel to others and that with 60 barrels, the Vessel could travel outside Hong Kong waters. As such, it seems more likely than not that Mr. Wong had been fishing outside of Hong Kong waters.
21. We also considered Mr Wong's evidence, submissions and grounds adduced before the hearing does not take his case further.

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<sup>5</sup> Hearing Bundle p 268

<sup>6</sup> Hearing Bundle p 44

22. Having considered all the evidence, including the specific aspects raised by Mr Wong at the hearing, the Board has taken the view that Mr. Wong has not been able to discharge the burden of proof, which is on him as the appellant, to establish his case that, on a balance of probabilities, that the Vessel had been spending about 80% of its time operating in Hong Kong waters.

### **Conclusion**

23. In the circumstances, this appeal is dismissed.

Date of hearing : 10 April 2015

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

(signed)

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Mr. MAK Yip-shing, Andrew, BBS, JP  
Chairman

(signed)

(signed)

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Mr. CHAN Wai-chung  
Member

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Mr. CHAN Weng-yew, Andrew  
Member

(signed)

(signed)

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

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Mr. NGAI Ming-tak, Michael  
Member

The Appellant, Mr. WONG Kin-yau appearing in person  
Ms. LI Wai-hung, Louise, Senior Fisheries Officer (Sustainable Fisheries),  
representative on behalf of the IWG  
Dr. SO Chi-ming, Fisheries Officer (Sustainable Fisheries) 1, representative on  
behalf of the IWG  
Mr. Paul LEUNG, Legal Advisor to the Board