

DECISION AND REASONS FOR DECISION

FISHERMEN CLAIMS APPEAL BOARD

CASE NO. AB0333 & AB0334

Between

FENG CAI (馮彩)

Appellant

And

THE INTER-DEPARTMENTAL WORKING GROUP

Respondent

Dates of Hearing: 2 December 2015

Date of Decision and Reasons for Decision: 24 February 2016

DECISION AND REASONS FOR DECISION

1. This is an appeal by the Appellant Mr. Feng Cai of Case No. AB0333 and AB0334 against the decision of the Inter-departmental Working Group (“**IWG**”) dated 14 December 2012 that the two vessels in question – which operated as pair trawlers – were considered not to be inshore trawlers and as such were ineligible to apportionment of the ex-gratia allowance (“**EGA**”) provided by the government (“**the Appeal**”).
2. The Appeal was heard on 2 December 2015 whereby the Appellant, who had not appointed any representative to act on his behalf, was absent. The IWG was represented by Dr. So Chi Ming and Ms. Louise Li.
3. The Board now gives its decision and reasons for the decision.

Pertinent facts and the IWG's decision

4. On 13 October 2010 (“**the Cut-off Date**”), 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.
5. 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.
6. In assessing EGA applications, the IWG would assess the type of the subject vessel and consider whether it fell into the category of a larger trawler or inshore trawler. If it were the former, a lump sum EGA of HK\$150,000 would be paid to the applicant. If it were the latter, the IWG would further assess and categorize the subject vessel into specific tiers in terms of its dependence on Hong Kong waters and other special cases. This meant that subject to the category of the subject vessel and the applicable apportionment criteria, an applicant could be eligible to apportion a total amount of the HK\$1,190 million of EGA with other eligible inshore trawler owners.
7. According to the IWG's records, the Appellant's two fishing vessels (license no. C139838 and C139845) (conjunctively, “**the Vessels**”) had identical specifications: each had 2 engines and measured 37.50 metres in length, with propulsion engine power coming up to 634.00 kilowatts for each vessel, whereas the fuel tank capacity was 105.00 cubic metres.

8. The IWG made the preliminary decision that the Vessels were ineligible for apportionment of EGA, on the basis of a number of considerations. These were communicated to the Appellant by two letters (both dated 22 October 2012) whereupon the Appellant was invited to make further submissions. The following were factors considered by the IWG:
- (1) 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 Vessels, which operated as pair trawlers with each being 37.50m in length and of steel hull construction, were not generally of the kind that operated in Hong Kong waters.
 - (2) According to field surveys of the AFCD that took place in 2011, the Vessels had not been sighted at its declared home port at Aberdeen Typhoon Shelter.
 - (3) According to patrol records in Hong Kong waters for the years 2009-2011, the Vessels had also not been sighted in the region.
9. Not having received any reply by the Appellant, the IWG by letter dated 14 December 2012 informed the Appellant that they were maintaining their decision.

Grounds of Appeal

10. By letters dated 18 February 2013, the Appellant sought to appeal the IWG’s decision in relation to each of the Vessels. He stated that from 2010 to 2011 to date, the Vessels operated out of Hong Kong for one to two months each year, within the vicinity of outside the Waglan Islands, the Dangan Dao and around the Ninepin Group. He expressed personal disagreement with the government’s move of withdrawing offshore fishermen’s option of returning to fish in Hong Kong waters, for HK\$150,000. He added that fishing offshore

from Hong Kong was unavoidable because of dwindling fish stocks inshore, and now that he is aging, fishing far away and in the turbulent seas was not something he could maintain, such that returning inshore to fish was already the last step. Now that the government has banned trawling, he and other fishermen are forever precluded from fishing in Hong Kong waters. The fact that other affected trawlers were consequently likely to join in fishing in the waters offshore Hong Kong posed a threat to his income. As such the government should pay them reasonable compensation.

11. In the Notices of Appeal dated 7 February 2014 (“**the Appeal Notices**”) filed in respect of each of the Vessels, the Appellant stated that the Vessels operated 20-30% of the time in Hong Kong waters, before and after the monsoon seasons and occurrence of typhoons, between the ninth month of the lunar calendar to the first month in the next year (around October to February), reason being that the seas were relatively more turbulent. When fishing in Hong Kong waters, the location would be around the Po Toi Islands.
12. The Appellant’s arguments in his written submissions submitted for this Appeal dated 12 August 2015 were substantively the same as what he had stated in his letters dated 18 February 2013.

Matters argued before the Board

13. In their submissions to the Board, the IWG explained that having considered various aspects, they had reached the formal decision that the Vessels were not eligible for apportionment of EGA (conjunctively, “**the Decisions**”). Apart from the factors cited in their letter to the Appellant dated 14 December 2012, the IWG also argued the following:

(1) The Vessels, which had propulsion engine power coming up to 634.00 kilowatts each, and a fuel tank capacity of 105.00 cubic meters, was relatively able to travel greater distances to fish far offshore. Generally vessels with such capacity would fish relatively less often or not at all in

Hong Kong waters.

(2) According to information declared by the Appellant on each of the EGA application forms for each Vessel (both dated 21 February 2012), the crew operating the Vessels were all employed direct from the Mainland and had no entry permits for Hong Kong, with the exception of three locals which included the Appellant, the coxswain and engine operator for Vessel C139838; and two locals for Vessel C139845, although it was represented in another part of the form that for this vessel, there was only one local employed thereon apart from the Appellant himself. This meant that the Vessels were constrained from operating in Hong Kong waters, and very likely did not do so.

(3) The Appellant possessed a permit issued by Mainland authorities that enabled the Vessels to fish in the waters of the Mainland, which indicates that the Vessels are able to fish in Mainland waters.

(4) Notwithstanding the Appellant's assertion that the Vessels spent all or part of its time operating in Hong Kong waters as inshore trawlers (no less than 10%, or 15% on average), the documentation he had submitted did not support this (i.e. adopting 15% as the proportion time spent as alleged).

14. In response to the Appellant's submissions, the IWG also had the following to say:-

(1) the Vessels were only registered in the Appellant's name on 1 November 2010 with the Marine Department, and approval for its construction was obtained on 16 October 2009. The fact that the Appellant had invested in the construction of such costly Vessels (with the power to carry out offshore trawling) so recently seems somewhat inconsistent with his submissions that he had felt himself unable to maintain trawling offshore because he was aging.

(2) there were contradictions between the Appellant's various averments about the degree of his reliance on Hong Kong fishing waters, as well as the information he submitted about where the Vessels would trawl in Hong Kong and during which period of the year. These would suggest that his position/evidence in these respects, are unreliable.

(3) notwithstanding the Appellant's insistence that the Vessels operated inshore, and that his representation that he could produce receipts for purchasing fuel as evidence, such evidence was not ultimately produced.

The Board's Decision

15. The Board notes that, although the IWG had relied heavily on circumstantial evidence and statistical data that did not pertain specifically to the Vessels, the Appellant had failed to adduce any evidence that was capable of challenging such evidence. It was incumbent on the Appellant to prove his case, but he had failed to submit any evidence (such as receipts for buying ice and fuel, or records for sale and repair) that would assist in determining whether the Vessels were indeed based in Hong Kong and operated in Hong Kong waters.

16. Moreover, we have noted and do agree with Dr. So's observations in respect of how the Vessel's attributes and operations appear to be consistent with the profile and pattern of fishing operations that are habitually carried out offshore rather than inshore, and the following are matters which we have found particularly compelling:

(1) according to page 13 of each the EGA application forms, most of the Appellant's crew were employed from the Mainland and as such cannot operate freely in Hong Kong;

(2) not only that, according to page 10 of each of the EGA application forms, the coxswain and engine operator (apparently local individuals) of each

Vessel were employed in February 2012. When considering that the EGA application form was dated 21 February 2012, implications are that the Vessels' crew (save the Appellant) consisted entirely of Mainlanders who cannot enter Hong Kong to fish, for almost all material times.

17. In light of the above, and having carefully scrutinized the evidence placed before us, the Board has found no reason to disturb the findings made by the IWG. The Appellant has failed to discharge his burden to show that the Decisions are wrong. The Appeals are therefore dismissed.

Date of hearing : 2 December 2015
Heard at : Room 1801, 18th Floor, East Wing Central
Government Offices, 2 Tim Mei Avenue,
Tamar, Hong Kong.

(Signed)

Mrs CHEUNG Po-yee, Peggy
Chairman

(Signed)

Mr. CHAN Wai-chung
Member

(Signed)

Mr. LAW Chi-yuen
Member

(Signed)

Miss WONG, Barbara
Member

(Signed)

Ms LAM Po-ling, Pearl
Member

The Appellant, Mr. Feng Cai (in absentia).

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

Ms. Louise Li, Senior Fisheries Officer (Sustainable Fisheries), AFCD, representative on behalf of the IWG.

Ms. Abigail Wong, Legal Advisor of the Board