

DECISION AND REASONS FOR DECISION

FISHERMEN CLAIMS APPEAL BOARD

CASE NO. AB0407

Between

LEUNG YAM PIU (梁蔭標)

Appellant

And

THE INTER-DEPARTMENTAL WORKING GROUP

Respondent

Date of Hearing: 24 July 2015

Date of Decision and Reasons for Decision: 23 October 2015

DECISION AND REASONS FOR DECISION

1. This is an appeal by the Appellant Mr. Leung Yam Piu of Case No. AB0407 against the decision of the Inter-departmental Working Group ("IWG") dated 14 December 2012 that the Appellant was considered ineligible for the ex-gratia allowance ("EGA") provided by the government ("the Appeal").
2. The Appeal was heard on 24 July 2015 whereby the Appellant had appeared in person. 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 fishing vessel was a shrimp trawler (license no. CM64877A) ("**the Vessel**") that had 1 engine and measured 13.85 metres in length in total. Its propulsion engine power came up to 80.57 kilowatts, and the fuel tank capacity was 23.91 cubic metres.
8. The IWG made the preliminary decision that the Vessel was ineligible for

EGA, on the basis of various pieces of evidence that suggested that the Vessel had not been used for trawling on or before the Cut-off Date. This was communicated to the Appellant by letter dated 31 October 2012 whereupon the Appellant was invited to make further submissions. 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, and cited the same grounds they relied upon when making the preliminary decision. The following grounds were cited:

(1) When the Vessel was inspected on 27 February 2012 (on the day the Appellant registered his claim for EGA) ("**the Inspection**");

(a) it was found to carry many items of brand new fish trawling equipment and tools (including trawl rope guide, towing warp winch, mast, pulleys, stern platform, trawl rope, rope hanger...etc.), which did not appear to have been used before and indicated that the Vessel had been modified just before registration. This suggests that the Vessel had not been used for the purposes of trawling;

(b) it was found to lack spare fishing gear, and despite the Appellant's averment that he was a full-time fisherman, he lacked familiarity with the Vessel's gear. These indicated that very possibly, the Appellant had not been using the Vessel for trawling.

(2) According the records obtained from the relevant department(s) in the Mainland, the Appellant was the holder of an accessory fishing vessel permit (捕撈輔助船許可証) (the authorized type of operation being "catch distribution vessel (漁獲物運銷船)", and period of operation between 29 April 2011 to 28 April 2014). This indicates that the Vessel had been engaged in fish distribution in the corresponding waters, and had not been engaged in fishing at all.

9. In their submissions to the Board, the IWG explained that having considered

various aspects, they had reached the formal decision that the Vessel was not eligible for EGA. Apart from the factors cited in their letter to the Appellant dated 14 December 2012, it was also considered that according to the relevant records kept by the Agriculture, Fisheries and Conservation Department ("AFCD"):

(1) of field surveys that took place in 2011, the Vessel had not been sighted at its declared home port at Castle Peak Bay. This indicated that Hong Kong was probably not used as the base for the Vessel.

(2) of patrol records in Hong Kong waters for the years 2009-2011, the Vessel had also not been sighted in the region. This indicated that the Vessel did not operate in Hong Kong waters.

Grounds of Appeal

10. By letter dated 13 January 2013, the Appellant sought to appeal the IWG's decision. He stated that it was the practice of fishermen to refurbish their vessels and repair fishing equipment for Chinese New Year, in hopes of good harvest in the coming year. He also stated that it is the current practice of the Mainland not to issue fishing permits, and as such he applied for an accessory fishing vessel permit on 29 April 2011.
11. In the Notice of Appeal dated 10 February 2014 ("**the Appeal Notice**"), the Appellant argued, in response to the IWG's challenge that the Vessel's equipment was relatively new which indicated that it had not been employed for fishing, that there were both old and new equipment on board, and that the addition of new equipment was for no other reason than in readiness for fishing.
12. In his written submissions (undated) submitted for this Appeal, the Appellant argued the following:

- (1) Operating fishing vessels needed to be refurbished yearly, particularly for the Chinese New Year, so that fishing in the coming year will be fruitful and safe.
- (2) His parents had long-term illnesses which was treated at Shekou in the Mainland. As such, he had to take care of them at Shekou which meant that he seldom returned to Castle Peak Bay at the time.
- (3) In the circumstances, the Vessel's daily operations had to be entrusted to employees. Its operations entailed going out to sea in the morning and returning by midday. The catch was sold to fish collectors. He accepted that he could have done more about the poor condition of the tools and lack of spare equipment on the Vessel.
- (4) He had relied on fishing from the sea for a living. Although the majority of fishermen agreed to the trawl ban, it is hoped that the government could assist the fishermen so that they could make a living for themselves.

The Evidence

13. At the hearing, the IWG adduced photos of trawlers as a comparison tool in order to demonstrate what the tools and equipment that would normally be expected to be found on a standard shrimp trawler. This was not objected to by the Appellant.
14. The Board heard evidence on how various parts/equipment on board the Vessel appeared to be brand new, repainted and/or had certain parts replaced. Amongst other things, the IWG submitted that it was rather suspicious that trawl rope guides had been painted, as the friction from frequent contact with the ropes would very soon wear off any paint, making it rather pointless to paint them. It also appeared to surprise the IWG that the shrimp trawl beams were linked to the eyebolts by wire, since this was a

heavy but moveable part that usually required a sturdy metal link, and the IWG even went so far as to say that they doubted whether the trawl beams could serve their function when connected in this manner. It was also observed by the IWG that the bulwark at the stern was open, which would have obstructed the casting and hauling the trawl nets.

15. Nevertheless, and notwithstanding these and other matters, which had led the IWG to believe that the Vessel was not a shrimp trawler but had only been recently modified to appear so, Dr. So accepted that it was possible for the Vessel to operate as a shrimp trawler on a very fundamental level, as the Vessel was equipped with the essentials for such purpose. It was doubtful however, whether a living could be made out of such operation, and on the Vessel, which was smaller than normal shrimp trawlers. The Appellant disagrees with this and says that although the Vessel was not ideal, it did manage to serve its purpose as a shrimp trawler.
16. The Board further heard evidence on the Appellant's pattern of operations. We are given to understand that the Appellant split the net profits of the Vessel's catch (around \$15,000 per month, on average) in a ratio of 6:4 with those he had employed to fish for him, and that he only went to pick up his share when he had the time, and did not appear to be particularly concerned about his share not being accounted for properly.
17. Despite his representation that the Vessel spent 50% of the time fishing in Hong Kong waters, he appeared to resile from this in his oral evidence and said that he had no idea how this figure should be derived, since the Vessel was practically operating at the border between Hong Kong and Shekou. Later on, he accepted that the Vessel only spent 20-30% of the time in Hong Kong.
18. In connection, the Appellant reiterated the fact that his need to care for his parents who were ill, led to him spending little time on the Vessel. He also stated that he had never operated a vessel of such size, and that he rarely boarded the Vessel, and would do so only if the deckhands were on holiday.

In the circumstances, the care and operations of the Vessel was left to a deckhand, a Mr. Kok Chi Kuen (transliteration), to whom he also entrusted the responsibility of answering the IWG's questions on the day of the inspection. According to the Appellant, there was some money issue between him and the said Mr. Kok which caused the latter to be less than cooperative with the IWG's investigations at the time, but he himself was helpless in this respect because he truly was unfamiliar with the Vessel's operations.

19. When asked about a receipt for repairs done to the Vessel (submitted by the Appellant) which was apparently effected in Nansha which was much further from Shekou where he was based, the Appellant defended his choice of shipyard by saying that Nansha was a location favoured by many vessel-owners because of better craftsmanship, and that he had been to other shipyards before, although he could not produce any documentary evidence in support.
20. On the issue of the accessory fishing vessel permit, although there had been some query by members of the Board as to whether the digested details of the permit as submitted by the IWG positively referred to the Appellant, the fact that this permit was in fact applied for and obtained for the Vessel was not denied by the Appellant, who also confirmed the accuracy of the record as digested. By his assertion, he was driven to obtain such a permit because it was far too difficult to obtain a proper fishing permit in the Mainland and one had to have the right connections. This, according to the Appellant, did not preclude him from fishing in Mainland waters, and was legal so long as fishing was not done during moratorium periods. This contention has been rejected by the IWG.

The Decision

21. In considering the grounds relied upon by the IWG when arriving at the Decision, the Board examined the supporting documents submitted by the parties, as well as the parties' submissions. The Board also closely observed the Appellant's responses to questioning.
22. Like many of the appeals that have come to the Board, the outcome depended upon satisfactory resolution of certain disputes of fact. It was incumbent upon the Appellant to put forward evidence and sound explanations for the matters with the IWG took issue with. We have not however, found the Appellant's evidence or explanations satisfactory, and above all, do not find him to be a credible witness.
23. Amongst all, we have found it difficult to reconcile the fact that the Appellant had applied for and obtained an accessory fishing vessel permit, ostensibly for the purposes of catch distribution, with his stance that the Vessel could have and did operate as a shrimp trawler. The Appellant's unfamiliarity with the Vessel's day-to-day operations, his explanations concerning matters as important as the distribution and receipt of his earnings and the lack of even the most basic of receipts thereof, struck us as being particularly vague and incredible, with the Appellant coming across as being an evasive witness. It is against this backdrop that we have considered the weight of the IWG's contentions (supported by logical and cogent, albeit circumstantial evidence), and likewise reached the conclusion that the Vessel had not been operating as a trawler.
24. In light of the above, the Board upholds the IWG's decision. The Appeal is dismissed.

Case No. AB0407

Date of hearing : 24 July 2015
Heard at : Conference Room 2, Ground Floor, Central
Government Offices, 2 Tim Mei Avenue,
Tamar, Hong Kong.

(signed)

Ms HUI Mei-sheung, Tennessee, JP
Chairman

(signed)

Mr. CHAN Wai-chung
Member

(signed)

Mr. CHAN Weng-yew, Andrew
Member

(signed)

Mrs CHEUNG Po-yee, Peggy
Member

(signed)

Mr KONG Tze-wing, James
Member

The Appellant, Leung Yam-piu.

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

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

Ms. Abigail Wong, Legal Advisor of the Board.