

**DECISION AND REASONS FOR DECISION**

FISHERMEN CLAIMS APPEAL BOARD (TRAWL BAN)  
CASE NO. CP0050

Between

\_\_\_\_\_  
PO CHOI (布財)

*Appellant*

and

THE INTER-DEPARTMENTAL WORKING GROUP

*Respondent*

Date of Hearing: 26 September 2014

Date of Decision and Reasons for Decision: 12 October 2015

\_\_\_\_\_  
**DECISION AND REASONS FOR DECISION**  
\_\_\_\_\_

**MAJORITY JUDGMENT** (Chairman Mr. To Wai-keung Vincent, Member Miss Hui Mei-sheung Tennessy, Member Mr. Chan Weng-yew, Andrew and Member Miss Kung Ching-yee, Athena):-

**Introduction**

1. Case number CP0050 is an appeal by Mr. PO Choi ("**Mr. Po**") against the decision of the Inter-departmental Working Group ("**IWG**") dated 21 December 2012 ("**the Decision**<sup>1</sup>") determining that Mr. Po's fishing vessel (with Certificate of Ownership Number CM65158A) ("**the Vessel**") was *not* one that was "mainly reliant on Hong Kong waters" even though it qualified as an eligible inshore trawler operating within Hong Kong waters.

**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

\_\_\_\_\_  
<sup>1</sup> Hearing Bundle p 119

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 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 FC Paper FCR(2011-12)22 ("**FC Paper**")<sup>2</sup>.
5. The eligibility criteria for application of EGA ("**the Eligibility Criteria**") are set out in Part (A) of Enclosure 1 to the FC Paper<sup>3</sup> :

#### **"(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;

---

<sup>2</sup> Hearing Bundle p 184

<sup>3</sup> Hearing Bundle p 193

- (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 Appeal Hearing

6. At the hearing, (**"the Appeal Hearing"**):
- (1) Mr. Po 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"**).
7. After the hearing, this Board gave leave to the parties to file additional evidence. During the deliberation of this Board, the additional documentary evidence filed pursuant to such leave was considered as well.

### Decision & Reasoning

8. Having considered all the evidence and submissions from the parties, this Board has decided to dismiss Mr. Po's appeal.
9. The burden of proof is on Mr. Po to show that the Decision was wrong. The legal burden is on Mr. Po. Has he succeeded in discharging this burden?
10. Mr. Po's case is that the Vessel relied on Hong Kong waters to the extent of 80%<sup>4</sup> to 90%<sup>5</sup>.
11. IWG's records show that during the period between 2009 and 2011, the Vessel was rarely sighted in the typhoon shelters or at sea. The frequency of sightings of the Vessel in shelters was considerably lower than that of other similar fishing vessels (摻繒), i.e. 22.2% compared with 40.2%<sup>6</sup>. IWG appeared to have heavily relied on this factor in coming to the Decision.
12. For the present appeal, Mr. Po put forward records of his medical appointments and consultations in Hong Kong. At the hearing, IWG's representatives confirmed that in coming to the Decision, they had not

---

<sup>4</sup> Hearing Bundle p 3

<sup>5</sup> Hearing Bundle p 89

<sup>6</sup> Hearing Bundle p 957

considered Mr. Po's medical records.

13. We have now had the opportunity to consider these medical records. These records clearly are credible documentary evidence on which we can rely. There is no doubt that Mr. Po was a habitual visitor to medical clinics, especially on dates close to October 2010. In 2010, there were 7 occasions on which he visited a hospital and various other medical clinics. He apparently received acupuncture treatments and treatments for his back problem. However, we need to consider whether such problems or medical treatments would have prevented Mr. Po from sailing outside Hong Kong waters.
14. At the hearing, Mr. Po testified that on average he was at sea fishing 25 days each month and that each outing/trip lasted about 3 to 4 days. As we understand it, it should only take 2 to 3 hours for a fishing vessel to sail from shore to waters outside Hong Kong's territory. Therefore, assuming that Mr. Po's evidence about his outing duration reflected the truth of the matter, he should have no trouble sailing out of Hong Kong waters to trawl fish on each outing *even with* his medical conditions. In other words, contrary to his assertion that he was afraid to travel far, his medical conditions and treatments would not have prevented him from sailing beyond Hong Kong waters for trawl-fishing.
15. In coming to our decision, we have also considered other factors. Mr. Po's evidence on his purchases for ice and fuel and evidence on his fish sales cannot assist his appeal. There were minimal ice purchases; refueling in Hong Kong was infrequent. Furthermore, the quantities of fish-catch apparently sold in Hong Kong were relatively low.

### **Conclusion**

16. In summary, although we consider the medical evidence to be credible, Mr. Po has not adduced sufficient evidence to convince this Board that his medical conditions would have prevented him from operating outside of Hong Kong waters in a material way at all. On a balance of probabilities, we are not convinced that he had been operating the Vessel 80% to 90% of the time within Hong Kong waters. He has failed to discharge his burden to show that the Decision was wrong. Accordingly, his appeal falls to be dismissed.

### **DISSENTING JUDGMENT (Member Prof. Lai Ki -leuk, Joseph):-**

17. I have had the opportunity to read the main judgment of this appeal in draft.

With due respect to the Chairman and the other 3 members of this appeal board, I hold a dissenting view on the merits of this appeal. And they are as follows.

18. The appellant, Mr. PO Choi, has adduced undisputed documentary evidence to show, which I accept as a fact, that he has been suffering from a serious illness. In my view, someone who has a serious illness such as cancer would prefer staying close to medical facilities – close to shore. It is quite conceivable that he or she could be susceptible to various life-threatening emergencies. The time required for the patient to be rushed to a hospital for urgent treatment may well be as critical as a matter of life or death. An extra 2 or 3 hours of travelling time could indeed cost the patient his or her life.
19. From this, one can readily infer that given a choice, Mr. Po would prefer fishing in Hong Kong waters to fishing, say, 2 or 3 hours further out into the sea. However, the reality is, after the trawl ban, Mr. Po no longer has that option. He has been deprived of the opportunity to make a living close to shore in his “comfort zone”. Since the original intention of the present scheme is to compensate for individual fishermen’s financial loss of future fishing opportunities within Hong Kong waters, I hold the firm view that Mr. Po ought to be compensated fully for such loss of his.
20. Assessment of fishermen claims is a difficult task. Decisions are often made based on evidence that is far from categorical. Take for example the port surveys presented and relied upon by the IWG in the present case. They are what one may call a “probability assessment”. Such an assessment is, in my view, far from perfect. It involves to a large extent an element of luck and coincidence and is prone to statistical sampling errors. Further, the use of past fishing habits to predict future behaviour can also lead to errors. Unfortunately, it appears to me that the IWG has heavily relied on these surveys when deciding on Mr. Po’s claim. A strict adherence to an imperfect rule would inevitably lead to cases of injustice. I perceive an injustice has been done here.
21. I believe that the evidence submitted by Mr. Po is, when compared with the evidence adduced by the IWG, stronger - his medical evidence is unequivocal. Therefore, in my opinion, he deserves to be paid the full award rather than merely a partial award of \$3,288,916 to fully reflect his loss of opportunity to fish in safer waters.
22. For myself, I will allow his appeal.

## FINAL CONCLUSION

23. By a majority of 4 to 1, this appeal is dismissed.

Date of hearing : 26 September 2014

Heard at : Conference Room 5, Ground Floor,  
Central Government Offices, 2 Tim Mei Avenue,  
Tamar, Hong Kong.

\_\_\_\_\_  
(signed)  
TO Wai-keung, Vincent, BBS  
Chairman

\_\_\_\_\_  
(signed)  
HUI Mei-sheung, Tennessee, JP  
Vice-Presiding Person

\_\_\_\_\_  
(signed)  
CHAN Weng-yew, Andrew  
Member

\_\_\_\_\_  
(signed)  
KUNG Ching-yee, Athena  
Member

\_\_\_\_\_  
(signed)  
LAI Ki-leuk, Joseph  
Member

The Appellant, Mr PO Choi appearing in person  
Ms LI Wai-hung, Louise, Senior Fisheries Officer (Sustainable Fisheries) (Ag.),  
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