

DECISION AND REASONS FOR DECISION

FISHERMEN CLAIMS APPEAL BOARD (TRAWL BAN)
CASE NOS. CP0134 & CP0136
(HEARD TOGETHER)

Between

WONG SHUN KAN (黃順根)

Appellant

and

THE INTER-DEPARTMENTAL WORKING GROUP

Respondent

And between

WONG LOI (黃來)

Appellant

and

THE INTER-DEPARTMENTAL WORKING GROUP

Respondent

Date of Hearing: 17 August 2016

Date of Decision and Reasons for Decision: 16 March 2017

DECISION AND REASONS FOR DECISION

JUDGMENT (Chairman Mrs. CHEUNG Po-yee Peggy, Member Ms. AU Sin-lun Catherine, Member Miss KUNG Ching-yee Athena, Member Miss LEUNG Wun-man Emba and Member Mr. SOO Kwok-leung):-

Introduction

1. Case number CP0134 is an appeal by Mr. WONG Shun-kan (黃順根) (“**Mr. SK Wong**”) against the decision of the Inter-departmental Working Group (“**IWG**”) dated 14 December 2012 (“**the CP0134 Decision**¹”) determining

¹ Hearing Bundle p 113 of CP0134

that Mr. SK Wong's fishing vessel (with Certificate of Ownership Number CM64465A) ("**the CP0134 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 him an *ex gratia* payment of \$150,000 under the one-off assistance scheme in respect of the CP0134 Vessel.

2. Case number CP0136, on the other hand, is an appeal by Mr. WONG Loi (黃來) ("**Mr. L Wong**") against the decision of the Inter-departmental Working Group ("**IWG**") dated 14 December 2012 ("**the CP0136 Decision**") determining that Mr. L Wong's fishing vessel (with Certificate of Ownership Number CM64799A) ("**the CP0136 Vessel**") was also 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 him an *ex gratia* payment of \$150,000 under the one-off assistance scheme in respect of the CP0136 Vessel.
3. The appeals of Mr. SK Wong and Mr. L Wong were with the Appellants' express consent³ heard together on 17 August 2016 for the reason that the 2 vessels in questions had, according to the Appellants, at the material time before the Trawl Ban (as defined hereinbelow) been operating in tandem as "pair trawlers" (雙拖).

The Trawl Ban and the EGA

4. 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.
5. 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**").

² Hearing Bundle p 93 of CP0136

³ Hearing Bundle p 201 of CP0134 and Hearing Bundle p 179 of CP0136

The Policy and Guiding Principle

6. 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**”).
7. According to Paragraph 12 of the FC Paper, the guiding principle is that the EGA apportioned to different groups of claimants should be proportional to the impact on them caused by the Trawl Ban.
8. Owners of inshore trawlers which operated wholly or partly in Hong Kong waters were expected to be most affected when the Trawl Ban took effect as they would lose their fishing grounds in Hong Kong waters. They would receive a greater amount of EGA than owners of larger trawlers⁴.
9. Owners of larger trawlers which generally did not operate in Hong Kong waters were also affected by the Trawl Ban since they would lose the option to trawl in Hong Kong waters in the future. However, as the impact of the Trawl Ban on them was far much less when compared with owners of inshore trawlers, an owner of larger trawler is only granted a lump sum EGA of HK\$150,000⁵.

The Appeal Grounds

10. In both their appeals, the Appellants contend⁶ that 40% of their catch was derived from Hong Kong waters and they were reliant on these waters to the extent of 40%.
11. Furthermore, Mr. SK Wong argues that the CP0134 Vessel, being a wooden trawler, had already been in service for 22 years and had started to rely more on Hong Kong waters. Mr. L Wong on the other hand argues that the CP0136 Vessel had already been in service for 17 years. They both contend that their vessels should not be classified larger trawlers that generally did not operate in Hong Kong waters.
12. Both Appellants further questioned the IWG’s impartiality, professionalism and objectivity⁷. Each suggested that there are individuals who received grossly unreasonable compensations but stopped short of naming such individuals. They sought the setting aside of IWG’s decisions and a re-assessment of their EGA applications all over again.

⁴ Paras. 5 to 10 of FC Paper

⁵ Paras. 9 and 10 of FC Paper

⁶ Hearing Bundle p 3 of CP0134 and Hearing Bundle p 3 of CP0136

⁷ Hearing Bundle p 5 of CP0134 and Hearing Bundle p 5 of CP0136

13. Neither Appellants lodged any witness statement for the purpose of the appeal hearing. However, they each authorised Mr. Yeung Yun-kwong (楊潤光) (“**Mr. Yeung**”) to represent them to make submissions and lodge written submissions on their behalf⁸ at the appeal hearing.

The Appeal Hearing

14. At the hearing, (“**the Appeal Hearing**”):
- (1) both the Appellants were present at the appeal – they had Mr. Yeung to make submissions on their behalf; and
 - (2) IWG conducted the appeal through their representatives, Dr. William SIU Ho-lim and Ms. YUEN Wing-sum.
15. Apart from relying on the documentary evidence already submitted to the Board prior to the hearing, the Appellants gave little oral evidence of substance. By far the majority of the oral address was made by Mr. Yeung.
16. Mr. Yeung began his address by criticizing what he perceived to be unfairness in the distribution of EGA as a whole. He asserted that some owners received compensation of as much as \$4 million each whilst the 2 Appellants merely received \$150,000 even though they both conducted trawling in Hong Kong. Mr. Yeung then went on to tell the Board that the Appellants had been trawling in Hong Kong waters during strong windy days of autumn and winter (from the 9th lunar month until the Chinese new year) and therefore relied on Hong Kong waters in their operations.
17. Mr. Yeung argued that the IWG should not take into account whether or not a trawler owner had engaged mainland deckhands or workers who were permitted to work in Hong Kong under the Mainland Fishermen Deckhands Scheme because, according to his understanding, the Mainland Fishermen Deckhands Scheme only permitted mainland workers to offload fish catch when the vessels came to shore – the scheme did not permit those workers to help trawling operations in Hong Kong waters.

⁸ Hearing Bundle p 200 of CP0134 and Hearing Bundle p 182 of CP0136

Decision & Reasoning

18. Having considered all the evidence and submissions from the parties, this Board has decided to dismiss both appeals.
19. It is not in dispute that both vessels were pair trawlers of 32.5m / 31.9m in length, of wooden construction, respectively having 742.27kW and 596.80kW aggregate engine power. We accept IWG's submission and analysis that such vessels would be capable of operating beyond Hong Kong waters.
20. Of particular importance are the sea patrol survey records of the 2 vessels. There was no sighting recorded⁹ in respect of the CP0134 Vessel at all – not even during Chinese New Year or the fishing moratorium periods. In respect of the CP0136 Vessel, there was 1 sighting at sea¹⁰ during October 2009 to November 2011, which was during the fishing moratorium. Furthermore, the typhoon shelter survey records show there were only 3 to 4 sightings of the 2 vessels during the course of some 11 months in 2011, not counting the periods of Chinese new year and the fishing moratorium¹¹. We accept that those sighting figures are on the low side. In addition, the survey data do not reflect an operation whereby there were significant trawling activities during the autumn and winter months here in Hong Kong, let alone reliance of as much as 40% in terms of time or catch amount.
21. As a matter of fact, in the questionnaires answered by the Appellants, there were some major discrepancies between them as regards their respective reliance on Hong Kong waters. According to Mr. SK Wong, he gave a reliance figure of 60% whereas Mr. L Wong gave a reliance figure of just 30%. Had they truly been operating in tandem as claimed, their answers should have been consistent. Even giving allowance to margins of error, they should not differ by such a degree.
22. The Appellants themselves were given a chance to explain this discrepancy during the course of the hearing. They pointed out that firstly, they were illiterate. They did not make a record of how many days they were at sea in any given year. They just uttered some figures in answer to the questions in the questionnaire without thinking. They suggested that the questionnaire answer forms were filled on different days.

⁹ Hearing Bundle pp 135, 137 of CP0134

¹⁰ Hearing Bundle pp 115, 117 of CP0136

¹¹ Hearing Bundle p 133 of CP0134 and Hearing Bundle p 113 of CP0136

23. From what we do see in the hearing bundles, the questionnaire sign off dates for both Appellants happened to be the same, i.e. 19 January 2012¹². By putting their signatures on the documents, the Appellants were expressly declaring the truth of the matters stated in their answers. We therefore find their explanations for the discrepancy wholly unconvincing.
24. As regards the engagement of direct labour from Mainland China to operate the vessels, we disbelieve the Appellants' assertions insofar as they were referring to the illegal engagement of Mainland workers *within* Hong Kong. We see the Appellants would have the option of engaging workers under the Mainland Fishermen Deckhands Scheme legally and there would be no incentive for them to do anything otherwise than according to the law. The Appellants could and did hire Mainland workers to help them earn their living in Mainland waters. The contention that only when there were strong winds that they used illegal labour to trawl in Hong Kong waters is simply too far-fetched to be capable of belief.
25. It behoves the Appellants to adduce convincing evidence to persuade us to believe and accept the case they put forward in the appeals. Having considered all the evidence, the Board has taken the view that the Appellants have not been able to discharge the burden of proof to establish their case that, on a balance of probabilities, their vessels had been spending 40% or about 40%, or 10% which is the required threshold¹³, of its time operating in Hong Kong waters. Their point about there being unfairness in their receiving \$150,000 as compared with some others who were given millions in compensation is not a valid ground in the circumstances of this case. The burden is on them to persuade this Board to accept their case and they have failed to do so here. They have also failed to persuade us that the IWG had acted otherwise than impartially, professionally and objectively.

Conclusion

26. In the circumstances, these appeals are dismissed.

¹² Hearing Bundle p 50 of CP0134 and Hearing Bundle p 49 of CP0136

¹³ The Board is mindful that any percentage of fishing time in Hong Kong waters at or above 10% would satisfy the threshold requirement stipulated in Annex III of the Food and Health Bureau Paper dated 29 January 2013

Case Nos. CP0134 & CP0136

Date of hearing : 17 August 2016

Heard at : Conference Room 4, Ground Floor
Central Government Offices, 2 Tim Mei Avenue,
Tamar, Hong Kong.

Signed

Mrs. CHEUNG Po-yee Peggy, JP
Chairman

Signed

Ms. AU Sin-lun Catherine
Member

Signed

Miss KUNG Ching-yee Athena
Member

Signed

Miss LEUNG Wun-man Emba
Member

Signed

Mr. SOO Kwok-leung
Member

The Appellants, WONG Shun-kan and WONG Loi appearing in person with their authorised representative, Mr. Yeung Yun-kwong
Dr SIU Ho-lim, William, Fisheries Officer (Sustainable Fisheries), AFCD, representative on behalf of the IWG
Ms. YUEN Wing-sum, Fisheries Officer (Sustainable Fisheries), AFCD, representative on behalf of the IWG
Paul LEUNG, Legal Advisor to the Board