

**DECISION AND REASONS FOR DECISION**

FISHERMEN CLAIMS APPEAL BOARD (TRAWL BAN)

CASE NO. CP0146

Between

FUNG KWAI SAM (馮桂森)

*Appellant*

and

THE INTER-DEPARTMENTAL WORKING GROUP

*Respondent*

Date of Hearing: 26 August 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 Prof. CHU Ka-hou):-

**Introduction**

1. This is an appeal by Mr. FUNG Kwai-sam ("**Mr. Fung**") against the decision of the Inter-departmental Working Group ("**IWG**") dated 14 December 2012 ("**the Decision**<sup>1</sup>") determining that Mr. Fung's fishing vessel (with Certificate of Ownership Number CM69720Y) ("**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. Fung 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 91

## **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. The Vessel was a pair-trawler. Mr. Fung used to operate it in a pair with another pair-trawler (Certificate of Ownership Number CM69327Y) owned by Wong Kin-yau (黃建有) (“**Mr. Wong**”).
- 7. In his appeal application form<sup>2</sup>, Mr. Fung claimed he was 70% reliant on Hong Kong waters for his trawling operations. 70% of his catches were from Hong Kong waters. He further claimed that the Vessel was already 24 years’ old and had been gradually moving its catchment area towards Hong Kong waters. As such, the Vessel should not be classified by IWG as a larger trawler. In any case, he challenged the expertise, professionalism and impartiality of IWG in coming to its conclusions and awards<sup>3</sup>.

### **The Appeal Hearing**

- 8. At the hearing, (“**the Appeal Hearing**”):
  - (1) Mr. Fung was represented by Mr. Anthony Sin (冼秉浩律師) of Messrs. S.H. Chan & Co.; and
  - (2) IWG conducted the appeal through their representatives, Mr. Yim

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<sup>2</sup> Hearing Bundle p 3

<sup>3</sup> Hearing Bundle p 5

Ho-ching, Government Counsel of the Department of Justice, and Ms. Louise Li (“**Ms. Li**”) and Dr. So Chi-ming (“**Dr. So**”) of Agriculture, Fisheries and Conservation Department.

9. Mr. Fung relied on a statement of submission<sup>4</sup> signed on behalf of Messrs. S.H. Chan & Co. dated 27 August 2014. According to that statement, he operated the Vessel in Hong Kong waters to the extent of 80% of his time and 70% of his catches were caught in Hong Kong waters. He only spent 2.5 months in a year, or 20.9% of his time, operating outside Hong Kong, namely, from the start of the 3<sup>rd</sup> month to the middle of the 5<sup>th</sup> month of each year. During those 2.5 months (and only those 2.5 months), he would hire 4 to 5 workers from the Mainland to assist him. For the remainder of the year, the Vessel would be operated by himself and his wife only. It was further elaborated in the statement that during the period from the 8<sup>th</sup> month of the year to the 2<sup>nd</sup> month of the following year, Mr. Fung could only stay in Hong Kong waters to trawl - he could not fish outside Hong Kong waters because of monsoons.
10. Mr. Fung produced an unsigned certificate<sup>5</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. Fung had during 2009 to 2012 sold his catch from Hong Kong waters to that company intermittently every few days.
11. Mr. Fung was cross-examined at the hearing by Government Counsel, Mr. Yim Ho-ching, representing IWG. He was asked why he could not fish outside Hong Kong waters during the 8<sup>th</sup> month to the 2<sup>nd</sup> month of the following year and the answer he gave was this: the Vessel was made of wood, was old and leaking, and he himself was old. Mr. Fung was then referred to some of his answers in the January 2012 questionnaire, in particular, his answer that the Vessel was operated throughout the year in Lingding and Dangan area<sup>6</sup>. In response, Mr. Fung said that he rarely stayed near Lingding and maintained that he was in Hong Kong waters 80% of his time<sup>7</sup>. He was then referred to his appeal application in which he claimed that fishermen would fish wherever there were fishes. He confirmed the contents on p 98 of the Hearing Bundle to have come from

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<sup>4</sup> Hearing Bundle pp 271-275

<sup>5</sup> Hearing Bundle p 278

<sup>6</sup> Hearing Bundle p 45 para.19(b)

<sup>7</sup> In re-examination, Mr. Fung claimed that his answer in the questionnaire was erroneous and should be corrected accordingly.

himself and that fishermen tended not to have any fixed location of operations.

12. Apart from Mr. Fung himself, he also called Mr. Yeung Yun-kwong (楊潤光) (“**Mr. Yeung**”) as his witness. Mr. Yeung had prepared a witness statement<sup>8</sup>, which he adopted at the hearing. In his statement, he claimed to be a traditional fisherman with more than 40 years in the trade. He is the chairman of International Fisheries Alliance (國際漁業聯盟) and claims to be familiar with the mode of operations of Hong Kong fishermen. His statement essentially confirms Mr. Fung’s solicitors’ statement of submissions insofar as the *modus operandi* of the Vessel was concerned.
13. Under cross-examination, Mr. Yeung conceded that he had no personal experience in pair trawling at all and he was not familiar with the pair trawl trade in Hong Kong.

### **Decision & Reasoning**

14. Having considered all the evidence and submissions from the parties, this Board has decided to dismiss Mr. Fung’s appeal.
15. The Board notes that the appeal turns on a narrow compass on a major factual issue, that is, whether and if so how much time the appellant Mr. Fung was operating in Hong Kong waters.
16. We have the opportunity of considering the evidence and submissions filed or given before and at the hearing. We do not believe Mr. Fung has good ground of appeal. More particularly, we have considered Mr. Fung’s evidence and submissions as a whole and below we also deal with Mr. Fung’s oral evidence and submissions given at the hearing. Such evidence includes the evidence of Mr. Yeung given on behalf of Mr. Fung.
17. The certificate of Chi Kee Fish Wholesale adduced by Mr. Fung and alluded to above, it sets out the various kinds of fish Mr. Fung 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

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<sup>8</sup> Hearing Bundle p 298

cannot show that Mr. Fung's catch must have come from Hong Kong waters.

18. We also considered Mr. Fung's evidence, his representative's submissions and grounds adduced before the hearing does not take his case further.
19. For example, his representative, Mr. Sin, submitted during his oral opening submission that the evidence of sea patrol surveys and typhoon shelter surveys was irrelevant to the determination of the correct amount of *ex gratia* allowance and that such evidence should not have been considered by the IWG. Whilst this Board accepts that it would not be reasonable to draw any conclusion on the issue of reliance or dependency on Hong Kong waters by mere sampling in such surveys, what cannot be denied is that those patrols and surveys had indeed taken place. If they showed sightings or presence of an applicant's vessel, they would be useful and relevant to the IWG. If they did not show any sighting of an applicant's vessel, they would also be useful and relevant to the IWG on the question of dependency. Without hesitation, we accept that an absence of sighting would not necessarily equate to non-existence of dependency. However, we do not accept that the sighting statistics or data are irrelevant. We are of the view that they are relevant. It is all a matter of how much weight we as a fact-finding tribunal place on such evidence when we determine each appeal.
20. As noted earlier, during cross-examination, it became apparent that Mr. Fung had earlier declared in the January 2012 questionnaire that the Vessel had been operated throughout the year in Lingding and Dangan area<sup>9</sup>. Mr. Fung sought to retract from that position during his cross-examination and re-examination. He now claims that his answer in the questionnaire was incorrect. In our view, it is incumbent on Mr. Fung to convince us that his retraction is well founded and supported by evidence. That he has failed to do. He has not produced any evidence or particulars of sufficient detail to persuade us into believing in his latest stance, namely, he spent 80% of his time fishing in Hong Kong waters. Bare assertions of his position, without details or evidence in support, is nothing but self-serving statements.
21. Having considered all the evidence, including the specific aspects raised by

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<sup>9</sup> Hearing Bundle p 45 para.19(b)

Mr Fung's representatives at the hearing, the Board has taken the view that Mr. Fung 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 or that 70% of his catches were from Hong Kong waters. Mr. Fung has failed to convince this Board, on a balance of probabilities standard of proof, that there was any real error in the answer he gave in the questionnaire in this regard.

22. We also find Mr. Fung to be an unreliable witness. Even though he must have well understood the questions put to him under cross-examination, he appeared to be evasive. This was particularly apparent when he was asked questions about the questionnaire.
23. This Board has further considered the issue of the percentage figure of dependency. In particular, we have considered whether or not it is open to us to make a finding that this appellant's dependency on Hong Kong waters was over and above 10%, thereby putting him into a different category of applicant for *ex gratia* allowance, say, somewhere between 20% and 50%. Upon lengthy deliberation, we have come to the view that it is not open for us to do so in the circumstances of this case. To make a finding of any particular range of figures of dependency requires evidence. Such evidence must be sufficiently reliable. Mere assertions will not do. Making a finding without evidence would be dereliction of our duties. Here, we have no such evidence or reliable evidence.
24. Finally, we find Mr. Fung's challenge mounted against the IWG on their expertise, professionalism and impartiality unfounded. It cannot be disputed that Mr. Fung had been informed of IWG's preliminary view that the Vessel should be treated as a larger trawler, i.e. 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 that he was invited to provide further proof and documentary evidence should he wish to challenge such a view<sup>10</sup>. It was up to him to produce proof, be it in the form of documentary evidence, statements or submissions, to help the IWG decide in his favour. Based on the materials supplied, the IWG could then make a final decision. The criticism<sup>11</sup> of Messrs. S.H. Chan & Co. that it was procedurally improper for

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<sup>10</sup> Hearing Bundle p 83

<sup>11</sup> contained in para.46 of their skeleton submissions dated 24 August 2015

the IWG not to have cross-examined Mr. Fung before rejecting his evidence is unfounded. In any event, the present appeal has offered Mr. Fung an opportunity to present his case and evidence fully and, as mentioned above, this Board has found that he has not discharged his burden to show that the IWG's decision was in any way incorrect.

## Conclusion

25. In the circumstances, this appeal is dismissed.

Date of hearing : 26 August 2015

Heard at : Conference Room 4, 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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Prof. CHU Kai-hou  
Member



The Appellant, Mr. FUNG Kwai Sam, represented by Mr. Anthony SIN (冼秉浩律師)  
of Messrs. S.H. Chan & Co.

Mr. Yim Ho-ching, Govt. Counsel, Department of Justice

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