

DECISION AND REASONS FOR DECISION

FISHERMEN CLAIMS APPEAL BOARD (TRAWL BAN)
CASE NOS. CP0178 & CP0179
(HEARD TOGETHER)

Between

LEUNG PO KONG (梁寶光)

Appellant

and

THE INTER-DEPARTMENTAL WORKING GROUP

Respondent

Date of Hearing: 17 June 2016

Date of Decision and Reasons for Decision: 15 September 2017

DECISION AND REASONS FOR DECISION

JUDGMENT (Chairman Ms. HUI Mei-sheung, Tennessy, Member Ms. LAM Po-ling, Pearl, Member Ms. CHAN Nancy, Member Prof. CHU Ka-hou and Member Ms. AU Sin-lun, Catherine):-

Introduction

1. Case number CP0178 and CP0179 are 2 appeals by Mr. LEUNG Po-kong (梁寶光) (“**Mr. Leung**”) against the decisions of the Inter-departmental Working Group (“**TWG**”) both dated 14 December 2012 (“**the Decisions**”¹) determining that Mr. Leung’s fishing vessels (with Certificate of Ownership Numbers C139136 and C139194) (“**the Vessels**”) were eligible pair trawlers (雙拖) that generally did not operate in Hong Kong waters (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 each of the Vessels.

¹ Hearing Bundle p 98 of CP0178 and CP0179

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 Guiding Principle

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**").
5. 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.
6. 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 trawlers².
7. 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\$150,000³.

² Paras. 5 to 10 of FC Paper

³ Paras. 9 and 10 of FC Paper

The Appeal Grounds

8. In both appeals, the Appellant contends that:
 - (1) the Vessels were reliant on Hong Kong waters to the extent of 40%; 40% of their catch was from Hong Kong⁴;
 - (2) he would operate wherever there were fishes; there should be no distinction between inshore operators and outer-sea operators⁵;
 - (3) the IWG members were neither professional nor independent; their investigations were neither objective nor thorough⁶;
 - (4) the age of the Vessels was 10 years and therefore should not be categorized as “larger trawlers”⁷.
9. The registration documents⁸ show that the year of construction of the both Vessels was 1992 and that Mr. Leung became their registered owner in June 2009. The Vessels are both 40.45m in length and made of steel.
10. The Appellant did not submit any witness statement.

The Appeal Hearing

11. At the hearing, (“**the Appeal Hearing**”):
 - (1) the Appellant conducted his appeals in person and had, in addition, authorised Mr. YEUNG Yun-kwong as his representative; and
 - (2) IWG conducted the appeal through their representatives, Dr. William SIU and Ms. Teresa YUEN.
12. Mr. Leung and his representative, Mr. Yeung, made the following points at the hearing:
 - (1) the Appellant operated the Vessels both in Hong Kong waters and mainland waters;

⁴ Hearing Bundle p 3

⁵ Hearing Bundle p 3

⁶ Hearing Bundle p 5 in CP0178 and p 4 in CP0179

⁷ Hearing Bundle p 4 in CP0178 and p 5 in CP0179

⁸ Hearing Bundle p 53 in CP0178 and CP0179

- (2) when the winds were not strong, the Vessels would operate far from Hong Kong;
- (3) the Vessels were 30 years' old and near the end of their usable lives; it would be dangerous to operate them in the outer seas; the Appellant bought the Vessels as second-hand in 2009;
- (4) the Vessels had global positioning systems installed on board;
- (5) the Vessels very rarely returned to Hong Kong. They refueled in Aberdeen, Hong Kong, because fuel was cheaper here than in the mainland. But other than for refueling, there was no point to return to Hong Kong. Each refuel could last up to 1 month's operations. Ice was mostly sourced from the mainland where it was cheaper.
- (6) the CP0178 Vessel was operated by Mr. Leung and his son; the CP0179 was operated by Mrs. Leung and another son. Besides these individuals, they engaged 6 mainland workers on each vessel. None of these mainland workers had permission to enter Hong Kong under the Mainland Fishermen Deckhands Scheme.
- (7) the Appellant's catch was sold mostly near Lingding Island but he also sold to various other fish collectors (收魚船); the Vessels usually moored near Lingding Island (伶汀島) for the mainland workers' convenience. Sometimes, the Vessels moored near Pinghai (平海).
- (8) each outing would last 7 to 8 hours until 8 or 9 pm;
- (9) usually the Vessels would operate in Hong Kong waters, to the extent of 80% of the winter months starting from lunar 9th month until lunar 1st month or 2nd month, i.e. 80% of those 5 to 6 months (making a total of approximately 40% of the year);
- (10) the effect of the Trawl Ban on the Appellant's operations is that during the windy winter months, there is now a reduction of 30% of income. For example, before the Trawl Ban he would be doing \$3 million business during the winter months. Now he can only do about \$1 million less (i.e. \$2 million instead of \$3 million).

13. At the hearing, IWG's representatives pointed out:-
- (1) the Vessels had large fuel capacity and high powered engines;
 - (2) the Vessels were sighted only 5 times outside the Chinese New Year and fishing moratorium periods in the typhoon shelter; there was no sighting of them during the sea surveys;
 - (3) the mainland workers on board the Vessels had no permission to enter or work in Hong Kong waters;
 - (4) the Vessels had permission to trawl in mainland waters;
 - (5) the Appellant has adduced no evidence to support his case of having 30-40% reliance on Hong Kong waters;
 - (6) the Vessel's age at the relevant time when the Trawl Ban took effect was about 20 years, not 30 years as claimed by the Appellant;
 - (7) it should not be cost effective to operate the Vessels in Hong Kong waters, given the relatively very large size of the Vessels;
 - (8) each of the Vessel should be able to hold 50 tonnes of fuel and with that amount of fuel, the Vessels could operate for as many as 50 days to 2 months without having to refuel; and that can explain why the Vessels barely spent any time in Hong Kong waters;
 - (9) the Appellant mainly sold to mainland fish collecting boats near Lingding; if the Appellant had truly been operating in Hong Kong waters by as much as claimed (i.e. 40%), he should not need to travel so far back to Lingding Island to sell his catch;
 - (10) the Appellant's claim of spending 80% of his time during the windy winter months in Hong Kong waters does not tally with the sea survey results, which showed no sighting of them at all;
 - (11) the Vessels could not be operated as pair trawlers with just 2 members of crew on each vessel. In other words, assuming that all the 12 mainland workers did not enter Hong Kong waters, as they could not legally do so, it would not be feasible for the Vessels to operate on a crew of 2 on each vessel within Hong Kong waters.

Decision & Reasoning

14. Having considered all the evidence and submissions from the parties, this Board has decided to dismiss both appeals.
15. Mr. Leung was an evasive witness. Furthermore, he was unable to tell the Board his mode of operations with the level of clarity one would expect from an honest witness who had been operating his vessels for years. When he was giving evidence about which months were considered as the windy winter months, he was remarkably inconsistent, varying from 4 months to 7 months commencing from lunar 9th month (i.e. from lunar 9th month until Chinese New Year, and until lunar 3rd month, respectively). His evidence about the age of his vessels and how they would be dangerous to operate in their old age is also unconvincing. The documentary evidence⁹ clearly suggests that the Vessels were only 20 years in age from the time of their construction until the Trawl Ban. In any case, according to Mr. Leung, the Vessels had been modified in 2009 before he acquired them for his pair trawling operations. The document further shows that the purchase price was \$2,000,000. By the time when the Trawl Ban was announced, the Vessels had only been in his care for around 2 years. It begs belief that the Vessels were on the verge of retirement and in a condition dangerous to operate in the outer seas outside Hong Kong waters in 2011-2012.
16. He convinced this Board to be an unreliable and incredible witness.
17. We take the view that had the Vessels truly been operated in Hong Kong waters as much as 80% of the time during the winter months, the chances of them being sighted during the sea surveys should be reasonably high. Yet, there was not even one sighting.
18. The burden is on the Appellant to persuade this Board to accept his case and Mr. Leung has failed to do so here. He has also failed to challenge IWG's reasoning as set out in the Statement submitted by the Respondent in the hearing bundles, Parts B, C and D (乙部、丙部、丁部).

Conclusion

18. In the circumstances, these appeals are dismissed.

⁹ Hearing Bundle p 53

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Date of hearing : 17 June 2016
Heard at : Room 1801, 18/F, East Wing, Central Government
Offices, 2 Tim Mei Avenue, Tamar, Hong Kong

(signed) _____
Ms. HUI Mei-sheung, Tennessy, MH, JP
Chairman

(signed) _____
Ms. CHAN Nancy
Member

(signed) _____
Prof CHU Ka-hou
Member

(signed) _____
Ms. LAM Po-ling, Pearl
Member

(signed) _____
Ms. AU Sin-lun, Catherine
Member

The Appellant, Mr. LEUNG Po-kong appearing in person and represented by Mr. Yeung Yun-kwong
Dr SIU Ho-lim, William, Fisheries Officer (Sustainable Fisheries), AFCD, representative on behalf of the IWG
Ms. YUEN Wing-sum Teresa, Fisheries Officer (Sustainable Fisheries) , AFCD, representative on behalf of the IWG
Mr Paul LEUNG, Legal Advisor to the Board