

DECISION AND REASONS FOR DECISION

FISHERMEN CLAIMS APPEAL BOARD (TRAWL BAN)

CASE NO. SW0072

Between

SIN SUP CHAT (洗十七)

Appellant

and

THE INTER-DEPARTMENTAL WORKING GROUP

Respondent

Date of Hearing: 5 September 2014

Date of Decision and Reasons for Decision: 10 April 2015

DECISION AND REASONS FOR DECISION

Introduction and Procedural History

1. This is an appeal from Mr. SIN Sup Chat (“**the Appellant**”) on the decision of the Inter-departmental Working Group (“**the Respondent**” or “**the IWG**”) dated 30 November 2012¹ (i) categorizing the vessel owned by the Appellant in respect of the application for *ex gratia* allowances (“**EGA**”) payable to

¹ Hearing Bundle pp 93-94

eligible trawler fishermen affected by the trawl ban² as an “eligible trawler which generally did not operate in Hong Kong waters” and (ii) granting a lump sum EGA of \$150,000 to the Appellant. The Appellant lodged an appeal with the Fishermen Claims Appeal Board (“**the FCAB**”) against the decision.

2. Before proceeding to consider the issues in dispute between the parties, it is convenient to first set out the background context of the EGA scheme and the role of the Respondent and the FCAB in the administration of the EGA.

The Policy and Scheme of Classification for EGA

3. The Fisheries Protection Ordinance Cap 171 was enacted to promote the conservation of fish and other forms of aquatic life within the waters of Hong Kong and to regulate fishing practices and to prevent activities detrimental to the fishing industry. As a fisheries management measure, and in order to restore the seabed and marine resources, the regime for “trawl ban” was brought about by the Fisheries Protection (Specification of Apparatus) (Amendment) Notice 2011 published in the gazette on 25 March 2011 which came into operation on 31 December 2012, and the Fisheries Protection (Amendment) Ordinance 2012 which was passed by the Legislative Council (“LegCo”) in May 2012 and came into effect on 15 June 2012. Broadly speaking fishing by trawling was banned in Hong Kong waters with effect from 31 December 2012.
4. The Finance Committee (“FC”) of LegCo also approved in June 2011 a “one-off assistance package to trawler vessel owners, local deckhands and fish collector owners affected by the trawl ban and other related measures”, which included the administration of EGA to affected trawler vessel owners for permanent loss of fishing grounds arising from the trawl ban.

EGA

² as explained below

5. In this context, EGA is a non-statutory *ex gratia* payment by the Government to affected trawler owners for permanent loss of fishing grounds arising from a statutory trawl ban. The owners of inshore trawlers which used to operate wholly or partly in Hong Kong waters lost their fishing grounds when the statutory trawl ban took effect at the end of 2012. The effect is similar to, if not more significant than, the permanent loss of fishing ground and extra expenses incurred to travel afield to continue trawling resulting from marine works projects for which EGA is paid to affected fishermen. The EGA for affected inshore trawler owners is therefore determined by making references to the formulae for calculating EGA payable to fishermen affected by marine works projects. In brief, such EGA is subject to certain eligibility criteria and the total EGA amount payable to all eligible fishermen is assessed according to notional values of fish catch in Hong Kong waters³.

IWG

6. The IWG is a non-statutory administrative body and, in the present case, was set up in 2011 with representatives from the Agriculture, Fisheries and Conservation (“**AFCD**”), Marine Department and the Home Affairs Department to handle all matters relating to applications received under the one-off assistance package to trawler vessel owners, local deckhands and fish collector owners affected by the trawl ban. Its terms of reference⁴ are as follows:-

a) EGA to Owners of Affected Trawlers

- i. To determine the total amount of EGA to be paid to inshore trawler owners in accordance with the approved calculation formula.
- ii. To decide on the eligibility criteria for EGA and the criteria for distinguishing between inshore and larger trawlers according to the

³ Hearing Bundle pp 158-170.

⁴ Hearing Bundle pp171-172

principles laid down in the relevant policies, having regard to the views from fishermen representatives.

- iii. To decide on the implementation details for registration.
- iv. To organize the registration exercise and ensure that it is properly conducted.
- v. To vet all claims in accordance with the decided eligibility criteria to ensure that only those claims that comply with the eligibility criteria are recommended.
- vi. To decide on the disbursement arrangement for eligible claimants taking into consideration any possible appeal cases.
- vii. To formulate and endorse an appropriate apportionment method for calculating the amount of EGA for each eligible claimant of inshore trawler.
- viii. To prepare and endorse a list of successful claimants and the amount of EGA for each of them.
- ix. To ensure that EGA is paid to all successful claimants and that unsuccessful claimants are properly notified.
- x. To refer appeal cases to the FCAB.

b) Other *bona fide* cases

- i. To decide and approve any other bona fide cases under the one-off assistance according to the principles laid down in the relevant policies.

7. The government policy and guiding principles underlying the assistance package for trawler vessel owners affected by the trawl ban were set out in the paper for the Legislative Council Panel on Food Safety and Environmental Hygiene Paper dated 5 February 2013⁵ and Finance Committee agenda item (ref: FCR(2011-12)22) dated 10 June 2011⁶, having been given further considerations for implementation by the IWG, may be set out in paragraphs 8 to 15 below.

(1) EGA Eligibility Criteria

8. The IWG is given the mandate to determine the eligibility criteria for applying for EGA. Only vessel owners who can meet those criteria are eligible for grant of EGA⁷. The guiding principle is that an approved sum of EGA would be apportioned to different groups of claimants, which in turn should be proportional to the impact on them caused by the trawl ban.

(2) Categorization of Inshore Trawlers and Larger Trawlers

9. Under the above guiding principle, the vessel in respect of the application which is eligible for the EGA would be categorized, i.e. whether it is an “inshore trawler” or a “larger trawler”.

10. The IWG had considered the following data and information in its categorization process⁸:-

- a) The particulars of the vessel such as its type, length, hull structure and design;
- b) The number and capacity of the engine(s), and the number and type of net gear used, etc.;

⁵ Hearing Bundle pp 180-199

⁶ Hearing Bundle pp 158-170

⁷ Hearing Bundle pp 167-168

⁸ Hearing Bundle pp 183

- c) Information about the vessel as captured by the local licence and/or Mainland documentation;
- d) The number of deckhands working on board the vessel and their identity;
- e) Frequency at which the vessel was seen moored in typhoon shelters and the seasonal pattern, as borne out by AFCD's field validation surveys at the major typhoon shelters in Hong Kong in 2011;
- f) The frequency at which the vessel was seen navigating or operating in Hong Kong waters and the seasonal pattern, as borne out by AFCD's patrols in Hong Kong waters from 2009 to 2011;
- g) Means of fuel and ice replenishment pertaining to the vessel;
- h) Means of sales and volume of fish catch; and
- i) Other relevant information, including information provided by the applicant and information on the applicant or his vessel obtained by the IWG from other sources.

(3) Inshore Trawlers

11. Owners of inshore trawlers which operate wholly or partly in Hong Kong waters are expected to be most affected when the trawl ban took effect as they would lose their fishing grounds in Hong Kong waters and they should receive a greater amount of EGA.
12. The EGA granted to owners of inshore trawlers is based on a notional value of 11 years' fish catch in Hong Kong waters by all trawlers based on the data from the Port Surveys conducted by the AFCD. A total amount of \$1,190 million of EGA was approved to be apportioned amongst the eligible inshore trawler

owners.

13. Having considered the matters as stated in paragraphs 9 to 10 above which broadly reflect the dependency of the vessel owners on Hong Kong waters, the IWG further categorized inshore trawlers into two tiers, namely, "higher tier" which is highly dependent on Hong Kong waters and "lower tier" which is not mainly dependent on Hong Kong waters.
14. The actual amount of EGA payable to individual eligible trawler vessel owners also depends on the total number of successful applications (namely, the greater the number of successful applications, the lesser will be the average amount of EGA payable to each applicant) as well as other apportionment criteria determined by the IWG. The apportionment criteria would include the type (pair trawlers, stern trawlers, shrimp trawlers, hang trawlers, etc.) and length of trawlers. In determining the relative ratio of EGA payable to owners of "higher tier" and "lower tier" inshore trawlers of different types and lengths, reference was also made to the statistical data for 2005-2010 obtained from the fisheries surveys conducted by the AFCD.

(4) Larger Trawlers

15. Owners of larger trawlers which generally do not operate in Hong Kong waters are also affected by the trawl ban since they will lose the option to trawl in Hong Kong waters in the future. Yet, as the impact of the trawl ban on them should be far less when compared with owners of inshore trawlers, the EGA granted to the former is a lump sum EGA of \$150,000.

The FCAB

16. Fishermen Claims Appeal Boards were set up from time to time to consider eligibility and quantum of EGA awarded to fishermen who were affected by marine works in Hong Kong waters. After 1997, they were invariably formed pursuant to the administrative powers of the Hong Kong Special

Administrative Region Government.

17. The current FCAB was set up on 5 November 2012 to consider appeals from the IWG's decisions on EGA with the following terms of reference⁹:
- a) To see that the criteria established by the IWG for processing and/or vetting applications for the EGA comply with the government policy, and are fair and reasonable (in the public law sense) to the applicants.
 - b) To see that the IWG's decisions on eligibility and the amount of EGA granted comply with the government policy and are fair and reasonable (in the public law sense) to the applicants.
 - c) To examine any new or additional information/evidence provided by the appellants (or their representatives) who have lodged an appeal against the IWG's decisions or by the relevant departments, and to consider the relevance of and the weight to be given to such information/evidence.
 - d) To consider whether to uphold the IWG's decisions on the appellants' cases or to revise the decisions, and to determine the type and amount of EGA payable to the appellants, as appropriate.
18. This provides the jurisdictional basis for the present FCAB to consider the appeals against the IWG's decisions on the eligibility of the Appellant for the EGA, the categorization of the vessel in respect of the EGA application and the apportionment of EGA to the Appellant.

Submissions by the Appellant

19. In the present case the Appellant claimed that the vessel in respect of the EGA application was an inshore shrimp trawler which was dependent on Hong Kong waters for its trawling operation. It claimed that it had 30%-40% of its

⁹ Hearing Bundle pp 198

operations in Hong Kong waters. This is essentially a question of fact for us to determine depending on the evidence available.

20. The Appellant claimed that shrimp trawlers such as the one in the present appeal are unable to perform trawling operation in the waters over 40 meters deep and should operate in waters inshore. The operating area of his vessel was mainly in the Hong Kong waters inshore and Dangan Liedao in Mainland. As he was getting old and his vessel was also aging in condition, he had to return to operate in the Hong Kong waters. However, due to the trawl ban, he had lost the opportunity to return to trawl in Hong Kong waters and he considered a lump sum EGA of \$150,000 to be not reasonable.
21. The Appellant submitted that after trawling he usually sold his catch to fish collectors and his vessel was not frequently moored in typhoon shelters to save fuel. At the hearing, the appellant further submitted that his vessel operated in Hong Kong waters for three to four months per year. During the period operating in Hong Kong, his vessel generally operated round-the-clock and was moored in the vicinity of Tung Lung Chau, Waglan Island and Lingding Dao. According to him, this was why his vessel was rarely observed in the AFCD's field validation surveys and boat patrols.
22. The Appellant also submitted that his vessel did not operate in Hong Kong waters during the fishing moratoria since the Mainland fisheries authorities might enforce the fisheries regulations in the fishing grounds where his vessel usually operated (i.e. Coordinates: 114° 22'-30'E 22° 09'-10'N). He therefore did not operate during the period fishing moratoria to avoid being mistakenly arrested.
23. In his further submission after the hearing on 26 September 2014, the Appellant submitted pictures of the Automatic Identification System (AIS) for vessels to show that there were 11 trawlers operating with him and the owners of those trawlers were all granted EGA of over HK\$4 million each, and he argued that his vessel should therefore also be categorized as an inshore

trawler.

Submissions by the Respondent

24. The Respondent on the other hand submitted that the Appellant's allegations as to the percentage of his vessel's operation in Hong Kong waters¹⁰, i.e. 60%, were different from his submitted documents in his EGA application : the appeal proforma document¹¹, i.e. 30%-40%, and also that the Appellant was unable to provide objective proof to substantiate his claims.
25. The Respondent argued that although shrimp trawlers are unable to perform trawling operation in waters over 40 meters deep, they could operate in shallow waters offshore. Besides, with proper maintenance, vessels which have been operating for many years should still be able to operate offshore.
26. Regarding the Appellant's alleged round-the-clock trawling pattern, the Respondent submitted that the alleged pattern was not found in the other 37 shrimp trawlers EGA applications in which the owners had provided detailed information about trawling pattern, casting doubt on the Appellant's allegation.
27. The Respondent also cast doubt on the Appellant's claim that his vessel was moored in the vicinity of Tung Lung Chau, since the Appellant's vessel was only seen for one time in the AFCD's boat patrols between 2009 and 2011.
28. In addition, the Respondent also cast doubt on the Appellant's claim in relation to fishing moratoria and the Mainland fisheries authorities enforcing fisheries regulations in Hong Kong waters. The Respondent argued that in 117 EGA applications which were assessed as eligible inshore shrimp trawlers, none of them mentioned the Mainland fisheries authorities might enforce fisheries regulations in Hong Kong waters mistakenly. On the other hand, applicants

¹⁰ Hearing Bundle pp 044

¹¹ Hearing Bundle pp 003

in 24 cases of shrimp trawlers have provided detailed information about trawling pattern and claimed they would operate in Hong Kong waters during the fishing moratoria.

Discussion

(1) Burden of Proof

29. In our view, in this kind of cases, the general principle that he who asserts has the burden of proof still applies. As the Appellant asserts that his trawler was an inshore trawler which operated 30% - 40% in Hong Kong waters¹², it is up to him to prove it to this FCAB. On the other hand, we also take into account that the Appellant is not educated, his relative lack of resources to submit proof, the contents of the contemporary documents made available to us, the weight of the evidence any witnesses that he may produce, and the background context of the present case.

(2) Standard of Proof

30. Since these proceeding are civil in nature, we would adopt the standard of proof as being the balance of probabilities.

(3) Analysis

31. After consideration of all the materials and circumstances, we take the view that this case turns very much on the credibility of the Appellant. We notice that the IWG mainly relies on circumstantial evidence. There was no direct witness on the activities of the Appellant offered by the IWG. We believe this should not be criticised as the efforts of the IWG must be limited by resources consideration. In particular, there was no suggestion in the present case that the surveys were not properly conducted or that its reliability was cast with serious doubt.

¹² Hearing Bundle pp 003

32. In this regard, we would accept that the burden on the Appellant to make good his claim has not been discharged.
33. While we do not criticise the brevity of the evidence and submission of the Appellant because he was not legally represented, we notice that during the hearing, the Appellant did not seem to be able to provide a good explanation over the difference in the percentage of operation in Hong Kong waters claimed in his appeal proforma¹³ i.e. 30% - 40%, and in his submission in the EGA application¹⁴ i.e. 60%. Both percentages were also substantially different from that advanced by the IWG evidence. In the end, we have come to the conclusion that the rather late introduction of the case of the Appellant cast a lot of doubt on his suggested percentage of operation in Hong Kong waters, whether they be 30-40% or 60%. They were clearly exaggerations.
34. The latest round of submissions from the parties tends to show that the Appellant's account is even less probable.
35. One matter also caused us some concern and it may be briefly stated. Though the Appellant asserted that there were 11 trawlers operating with him together and they were all granted *ex-gratia* payment of over HK\$4 million each¹⁵, none of those persons working on the 11 trawlers was called to give evidence for the Appellant. No particulars of the 11 trawlers have been provided. No explanation was offered on whether efforts had been made by the Appellant to seek those persons as witness and yet he had failed. The assertion of the Appellant remains very much a bare assertion.

¹³ Hearing Bundle pp 003

¹⁴ Hearing Bundle pp 044

¹⁵ Hearing Bundle pp 343

Decision

36. Having regard to all the circumstances and the materials before us, we are of the view that the appeal should be dismissed.

Date of hearing : 5 September 2014

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

(Signed)

Mr MAK Yip Shing, Andrew, JP
Chairman

(Signed)

Mr FEE Chung Ming, Johnny, JP
Vice-presiding person

(Signed)

Mrs CHEUNG Po Yee, Peggy
Member

(Signed)

Mr KONG Tze Wing, James, MH, JP
Member

(Signed)

Mr LEE Ka Chung, William, JP
Member

The Appellant, Mr. Sin Sup Chat.

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

Mr. Lai Kin-ming, Mickey, Assistant Director (Fisheries)(Ag.), AFCD, representative on behalf of the IWG.

Mr. Paul Leung, Legal Advisor to the Board.