

DECISION AND REASONS FOR DECISION

FISHERMEN CLAIMS APPEAL BOARD (TRAWL BAN)
CASE NOS. SW0101 & SW0103
(HEARD TOGETHER)

Between

SIN WA HEI & SIN MEI (洗華喜, 洗美)

Appellant

and

THE INTER-DEPARTMENTAL WORKING GROUP

Respondent

And between

LO KAN (盧根)

Appellant

and

THE INTER-DEPARTMENTAL WORKING GROUP

Respondent

Date of Hearing: 9 December 2016

Date of Decision and Reasons for Decision: 28 April 2017

DECISION AND REASONS FOR DECISION

JUDGMENT (Chairman Mrs. CHEUNG Po-yee, Peggy, Member Mr. CHAN Wai-chung, Member Ms. AU Sin-lun, Catherine, Prof. CHU Ka-hou and Member Mr. SOO Kwok-leung):-

Introduction

1. Case number SW0101 is an appeal by Mr. SIN Wa-hei (洗華喜) and Mr. SIN Mei (洗美) ("**Messrs. Sin**") against the decision of the Inter-departmental Working Group ("**IWG**") dated 30 November 2012 ("**the SW0101**")

Decision¹) determining that their fishing vessel (with Certificate of Ownership Number CM64701A) (“**the SW0101 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 them an *ex gratia* payment of \$150,000 under the one-off assistance scheme in respect of the SW0101 Vessel.

2. Case number SW0103, on the other hand, is an appeal by Mr. LO Kan (盧根) (“**Mr. Lo**”) against the decision of IWG dated 30 November 2012 (“**the SW0103 Decision**”²) determining that his fishing vessel (with Certificate of Ownership Number CM64699A) (“**the SW0103 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 SW0103 Vessel.
3. The appeals of Messrs. Sin and Mr. Lo were with the Appellants’ express consent heard together on 9 December 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 herein below) been operating together 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**”).

¹ Hearing Bundle p 99 of SW0101

² Hearing Bundle p 92 of SW0103

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 trawlers³.
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\$150,000⁴.

The Appeal Grounds

10. In both their appeals, the Appellants contend⁵ that:
 - (1) their dependency on Hong Kong waters for their trawling operations amounted to 40%;
 - (2) as their vessels were wooden and 17 years of age, they had gradually moved closer to Hong Kong waters to operate and should not have been treated by the IWG as ineligible trawlers.
11. At the hearing, they instead contended, through their authorised representative, that their dependency on Hong Kong waters was 20%.

The Appeal Hearing

12. At the hearing, (“**the Appeal Hearing**”):

³ Paras. 5 to 10 of FC Paper

⁴ Paras. 9 and 10 of FC Paper

⁵ Hearing Bundle p 3 of SW0101 and p 3 of SW0103

- (1) All the Appellants conducted their appeals through their representative, Mr. CHUNG Chi-sing (鍾志成), in their absence; and
 - (2) IWG conducted the appeal through their representatives, Ms. Teresa YUEN and Dr. SO Chi-ming.
13. The Appellants did not give oral evidence at the hearing as they were not present at the hearing. Their representative, Mr. CHUNG Chi-sing, made representations to the Board which can be summarized as follows:
- (1) He has known the Appellants for decades. They are friends and in the same business as he is. The Appellants were at sea on the day of the hearing, near Shanwei. They had first approached him for his assistance in their appeals about 1 year ago.
 - (2) The Appellants may have lost their receipts and documentary proof to substantiate their claim of 20% dependency on Hong Kong waters because of the long lapse of time. The Appellants did tell Mr. CHUNG Chi-sing that they had been spending 20% of his time operating inshore (近岸). According to Mr. Chung, 2 to 3 decades ago, their dependency on Hong Kong waters used to be as much as 30 to 40%. And generations ago, the dependency used to be 80 to 90%.
 - (3) Just because a trawler is of 35.1m in length does not necessarily mean it is not an inshore trawler. The Appellants did spend time operating in Hong Kong waters. IWG cannot rule out, just based on vessel size, engine size and fuel capacity that the Appellants did operate in Hong Kong. The engine power and fuel capacity of the Appellants' vessels gave them the flexibility to choose whether to stay out for longer periods or return to Hong Kong shores more frequently.
 - (4) The Appellants mostly operated during nighttime. IWG's survey vessels could not spot the Appellants at night.
 - (5) The Appellants would operate in Hong Kong waters shortly before and shortly after typhoons. Whenever there were typhoons, the Appellants would operate in Hong Kong for 1 to 2 days.
 - (6) The Appellants used to operate in Hong Kong several days per

month. They would stay for a few days if there was a typhoon.

- (7) At first during the hearing, Mr. Chung mentioned that the people in the Appellants' field of business used to operate mostly near Dangan Island (擔杆島). When asked by Member Mr. Chan why the Appellants stated⁶ Shantou and Shanwei as their fishing grounds, Mr. Chung replied that those places were "very near" and his fellow fishermen would go to those places to operate too. He later supplemented that Shantou and Shanwei were about 8 hours' journey away from Hong Kong each way.
- (8) The Appellants were very hardworking. Their vessels were large and operated 10 to 20 days in outer waters. They would trawl even when the winds were of Beaufort Scale 6.
- (9) Mr. Chung failed to give a clear answer as to where the Appellants actually traded their catch: inside or outside Hong Kong waters. He explained that people in their trade could transact within or outside Hong Kong waters with fish traders on boats (收魚艇). It would not be cost-effective to bring the vessels back to Hong Kong to unload their catch. Normally, they would simply sell to fish traders on boats instead, irrespective of where the fish were caught.
- (10) The Appellants tended to refuel and restock ice in great quantities in Hong Kong because the queues were long at the ice supplier and the Appellants' vessels were long which made maneuvering near the ice supplier difficult. Refueling 300 barrels of fuel each time was usual because such a quantity would not last very long – may be 1 month. Furthermore, the heavier the vessel, the better it is to operate. Trawlers can trawl better when they are laden with more weight.
- (11) Mr. Chung represented that he had seen the Appellants' crew entry and departure records showing the mainland crew entering and leaving Hong Kong aboard their vessels. However, he did not produce any such records for the appeals. Nor did he ask the Appellants for such records.
- (12) The Appellants definitely did not operate during the fishing moratorium periods because it was a nation-wide policy.

⁶ Hearing Bundle p 47 of SW0101

(13) The Appellants rarely returned to Hong Kong nowadays.

Decision & Reasoning

14. Having considered all the evidence and submissions from the parties, this Board has decided to dismiss both appeals.
15. The Appellants' decision to be absent at the hearing made it very difficult for them to persuade the Board to accept their case. As appellants, the burden was squarely on them to put forward evidence to convince us on their case on a balance of probabilities. They could have done that by producing convincing documentary evidence and giving credible oral evidence at the hearing. Convincing documentary evidence might include the entry and departure records of their crew coming into and leaving Hong Kong in the year or so prior to the Trawl Ban or the announcement of the Trawl Ban, amongst other documents.
16. As matters turned out, their representative, Mr. Chung, was unable to produce any convincing documentary evidence or give any oral evidence which we could rely on. We could not give any real weight to his representations because they were mostly mere assertions of the Appellants' case, unsupported by any evidence of substance. We were not persuaded by the Appellants' claim of 20% or 40% of their operations being in Hong Kong waters. They have failed to discharge their burden of proof to establish such a case.
17. Furthermore, the representation from Mr. Chung about the Appellants never operating during the annual fishing moratorium period is also unhelpful to the Appellants because if they had been operating in Hong Kong waters to the extent as claimed, they should be able to explain why they would definitely not fish during the moratorium period. Hong Kong is not an area covered by the moratorium. They were not at the hearing to give any explanation. Their representative also did not give any explanation, besides insisting that it was Mainland China's policy that made the Appellants stop operating during those times.
18. We are satisfied on the evidence that IWG's decision to classify the 2 vessels as eligible trawlers 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) was a correct one. IWG's conclusion was based on uncontroversial, objective facts such as the length of the vessels, engine power and fuel tank capacity, and the complete lack of sighting at sea surveys. The Appellants have not been able to

successfully challenge the reasoning of IWG set out in IWG's Statement submitted by the Respondent in the hearing bundles.

19. In the circumstances, the award of \$150,000 for each vessel's owners was correct.

Conclusion

20. In the circumstances, these appeals are dismissed.

Date of hearing : 9 December 2016

Heard at : 9/F, Rumsey Street Multi-storey Carpark Building,
2 Rumsey Street, Sheung Wan, Hong Kong

(signed) _____
Mrs. CHEUNG Po-yee, Peggy, JP
Chairman

(signed) _____
Prof. CHU Ka-hou
Member

(signed) _____
Mr. CHAN Wai-chung, MH
Member

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

(signed) _____
Mr. SOO Kwok-leung
Member

The Appellants, SIN Wa-hei/SIN Mei and LO Kan appearing by their representative, CHUNG Chi-sing, in their absence
Dr SO Chi-ming, Fisheries Officer (Sustainable Fisheries), AFCD, representative on behalf of the IWG
Ms. Teresa YUEN, Fisheries Officer (Sustainable Fisheries), AFCD, representative on behalf of the IWG
Mr Paul LEUNG, Legal Advisor to the Board