

DECISION AND REASONS FOR DECISION

FISHERMEN CLAIMS APPEAL BOARD (TRAWL BAN)
CASE NO. SW0120

Between

SIN CHI WAH (冼志華)

Appellant

and

THE INTER-DEPARTMENTAL WORKING GROUP

Respondent

Date of Hearing: 8 July 2016

Date of Decision and Reasons for Decision: 23 September 2016

DECISION AND REASONS FOR DECISION

JUDGMENT (Chairman Mrs. CHEUNG Po-yee, Peggy, Member Prof. CHU Ka-hou, Member Ms. LAM Po-ling Pearl, Member Dr. TYEN Kan-hee, Anthony and Member Mr. KONG Tze-wing, James):-

Introduction

1. Case number SW0120 is an appeal by Mr. SIN Chi Wah (冼志華) (“**Mr. Sin**”) against the decision of the Inter-departmental Working Group (“**IWG**”) dated 30 November 2012 (“**the Decision**”¹) determining that Mr. Sin’s fishing vessel (with Certificate of Ownership Number CM63750A) (“**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 him an *ex gratia* payment of \$150,000 under the one-off assistance scheme in respect of the Vessel.
2. According to Mr. Sin, at the material time before the Trawl Ban (as defined

¹ Hearing Bundle p 88

hereinbelow), the Vessel had been operating as a “pair trawler” (雙拖) and his partnering pair trawler (with Certificate of Ownership Number CM64288A) was owned by one Mr. PO Ying Ki (布英旗)² (“**Mr. Po**”).

3. Mr. Po has also lodged an appeal against IWG’s decision. By a letter dated 3 June 2016, the Secretariat of the FCAB inquired with Mr. Sin regarding whether or not he wished his appeal to be heard together with Mr. Po’s appeal. Mr. Sin replied on 23 June 2016 indicating that he did not wish to have the 2 appeals heard together. At the hearing, Mr. Sin further explained that he had asked Mr. Po to attend the appeal hearing but Mr. Po refused.
4. In the premises, Mr. Sin’s appeal was heard separately.

The Trawl Ban and the EGA

5. 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 statutory notice for the Trawl Ban was published in the Government Gazette in March 2011 and came into effect on 31 December 2012.
6. The Finance Committee (“**FC**”) of the Legislative Council 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

7. 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**”).
8. 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.

² Hearing Bundle p 44 para.16

9. 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.
10. 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

11. In the present appeal, Mr. Sin contends⁵ that:
 - (1) prior to the Trawl Ban, his dependency on Hong Kong waters was 40% - i.e. 40% of his fish catches were from Hong Kong;
 - (2) the Vessel was already 25 years' old, made of wood, and had begun trawling closer to shore;
 - (3) the Trawl Ban has made it necessary for the Vessel to operate further into the sea, incurring additional fuel costs and running higher operating and safety risks
12. At the hearing, Mr. Sin elaborated on his appeal grounds.
 - (1) By the Trawl Ban, the government had excluded trawler owners from making a living trawling in Hong Kong. Although he had been making a living trawling outside Hong Kong for years, he no longer has the opportunity to trawl in Hong Kong even if he wishes. The Government has "smashed his rice bowl". A \$150,000 compensation for that lost opportunity is too meagre.

The Appeal Hearing

13. At the hearing, ("**the Appeal Hearing**"):
 - (1) Mr. Sin appeared in person; and
 - (2) IWG conducted the appeal through their representatives, Dr. Albert Leung, Dr. William Siu and Ms. Teresa Yuen.

³ Paras. 5 to 10 of FC Paper

⁴ Paras. 9 and 10 of FC Paper

⁵ Hearing Bundle p 3-4

14. Mr. Sin explained his case at the hearing as follows:-
- (1) The government has killed his trade. In return, it offered him just \$150,000 in compensation.
 - (2) The Vessel was getting old and could no longer go far out into the sea.
 - (3) He had sold the Vessel in 2015. He has to make a living by becoming an employee. His partner, Mr. Po, had also sold his vessel.
 - (4) He is already 58 years of age and on medication for conditions including depression. He takes 15 pills a day.
 - (5) The government should look after people like him.
 - (6) He has no next generation to take over his business.
15. In terms of his *modus operandi*, Mr. Sin gave the following account:
- (1) He did not operate along any fixed route. Wherever there were fishes to catch, he went.
 - (2) He did not keep a record of his trail
 - (3) His routing would depend on sea conditions. If winds were high, he would not sail too far into the sea.
 - (4) He identified in the questionnaire 2 places outside Hong Kong where he frequented, namely, Shantou and Shanwei⁶.
 - (5) He picked up his mainland workers from Lingding and dropped them off there afterwards.
 - (6) His main customers⁷ were mainland collector vessel operators (收魚船).
 - (7) He would come as close to Hong Kong as Dangan and Ninepin Group.
16. In the January 2012 questionnaire⁸, Mr. Sin stated that his dependency on Hong Kong waters was 20%. That figure was at variance with the claimed figure of 40% in his subsequent appeal papers⁹.
17. Mr. Sin was asked by the Chairman of this Board why the figures he gave were different from the figure given by his pair trawler partner, Mr. Po, in his questionnaire¹⁰. Mr. Sin replied by saying that it all depended on the person who gave the information. He supplemented in Chinese: “若要人似我，除非兩個我”.
18. The representatives from the IWG relied on their written submissions in the Hearing Bundle and made their responses to Mr. Sin’s evidence as

⁶ Hearing Bundle p 45

⁷ Hearing Bundle p 45

⁸ Hearing Bundle p 44

⁹ Hearing Bundle p 3

¹⁰ Mr. Po declared his dependency to be 0% in the questionnaire

follows:-

- (1) the \$150,000 *ex gratia* allowance was to compensate the loss of a chance to return to Hong Kong to operate a trawling business – it was made clear in the policy paper when the Finance Committee approved the allowance;
- (2) the Vessel was a large trawler and in general, large trawlers operated outside Hong Kong waters; it was unusual for such trawlers to operate inside Hong Kong waters;
- (3) the age of a vessel should not be directly related to its operating range in terms of reach – much depended on how well the vessel was being maintained;
- (4) the IWG had taken into consideration the information given in the questionnaire and the typhoon shelter and port surveys when deciding on the award;
- (5) there was no sighting at sea at all and relatively few sightings in the typhoon shelter in question;
- (6) there was no satisfactory explanation for the discrepancy between Mr. Sin and Mr. Po's dependency figures, i.e. 20% vs. 0%;
- (7) Mr. Sin's main customers were mainland fish traders collecting at sea;
- (8) the sales receipts produced by Mr. Sin could not identify which of the catches were actually caught in Hong Kong waters and which were outside.

Decision & Reasoning

19. Having considered all the evidence and submissions from the parties, this Board has regrettably decided to dismiss Mr. Sin's appeal.
20. The Board accepts the reasoning set out in IWG's written submissions in the Hearing Bundle and their representatives' oral submissions.
21. Importantly, the Board finds that Mr. Sin has failed to discharge his burden of proving that his operations depended on Hong Kong waters to the extent of 20%, or for that matter, 40% as contended in the appeal. He could have adduced evidence to corroborate his assertions by, for example, calling his partner, Mr. Po, to testify for him. As mentioned at the outset of this Decision, Mr. Sin had requested Mr. Po to attend but to no avail. There was no suggestion from Mr. Sin that Mr. Po was unable to attend. This Board cannot guess what evidence Mr. Po could have given, but should he have attended the hearing (or agreed to have a combined hearing), the Board would have an opportunity to explore why there was a marked discrepancy between the claimed dependency of 20% and of 0% for Mr. Sin

and Mr. Po respectively. The burden is on Mr. Sin to convince this Board that IWG's award was incorrect or insufficient. Mr. Sin has failed to do so here.

22. As to Mr. Sin's contention that \$150,000 was too meagre an amount to compensate for the loss of a chance to return to Hong Kong waters to trawl, one only needs to refer to Appendix 4 of the Hearing Bundle (which is in a separate booklet), p. A45, paras. 9 and 10. It is clear from this document, which was the discussion paper for the Finance Committee in June 2011, that the \$150,000 allowance was specifically to compensate for the loss of opportunity to return to trawl in Hong Kong waters insofar as larger trawlers were concerned, including the situation where the age of the vessel has reached a stage when the vessel would no longer be suitable for sailing afar. In other words, it was part of the policy to make \$150,000 as the figure for such an allowance.
23. The Board is mindful of the Terms of Reference upon which it has been established. In essence, they are as follows:
 - (1) 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 to the applicants;
 - (2) 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 to the applicants;
 - (3) 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;
 - (4) 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.
24. We are satisfied on the evidence that IWG's decision to classify the Vessel as a larger but 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) was a correct one. In light of the Terms of Reference and the policy as set out in the Finance Committee discussion paper abovementioned, we are of the view that the decision of awarding \$150,000 allowance to this appellant was correct.

Conclusion

25. In the circumstances, this appeal is dismissed.

Date of hearing : 8 July 2016
Heard at : Room 1801, 18th Floor, East Wing
Central Government Offices, 2 Tim Mei Avenue,
Tamar, Hong Kong.

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

(signed)
Prof. CHU Ka-hou
Member

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

(signed)
Dr. TYEN Kan-hee, Anthony
Member

(signed)
Mr. KONG Tze-wing, James, MH, JP
Member

The Appellant, Mr. SIN Chi-wah appearing in person
Dr. LEUNG Wai-yin, Albert, Supervisory Fisheries Management Officer, AFCD,
representative on behalf of the IWG
Dr. SIU Ho-lim, William, Fisheries Officer (Sustainable Fisheries) 3, AFCD,
representative on behalf of the IWG
Ms. YUEN Wing-sum, Teresa, Fisheries Officer (Sustainable Fisheries) 4, AFCD,
representative on behalf of the IWG
Mr. Paul LEUNG, Legal Advisor to the Board