Judicial Review
Acknowledgment of Service

In the High Court of Justice Administrative Court	
Claim No.	CO/5231/2010
Claimant(s) (including ref.)	Corner House Research Samata
Defendant(s)	Secretary of State for Business, Innovation and Skills
Interested Parties	

Name and address of person to be served

name
Corner House Research
Samata

address
Leigh Day & Co Solicitors
Priory House
25 St John's Lane
London EC1M 4LB

SECTION A

Tick the appropriate box

1. I intend to contest all of the claim.	☒	} complete sections B, C, D and E
2. I intend to contest part of the claim.	☐	
3. I do not intend to contest the claim.	☐	complete section E
4. The defendant (interested party) is a court or tribunal and **intends** to make a submission.	☐	complete sections B, C and E
5. The defendant (interested party) is a court or tribunal and **does not intend** to make a submission.	☐	complete sections B and E

Note: If the application seeks to judicially review the decision of a court or tribunal, the court or tribunal need only provide the Administrative Court with as much evidence as it can about the decision to help the Administrative Court perform its judicial function.

SECTION B

Insert the name and address of any person you consider should be added as an interested party.

name

address

Telephone no.

Fax no.

E-mail address

name

address

Telephone no.

Fax no.

E-mail address

SECTION C

Summary of grounds for contesting the claim. If you are contesting only part of the claim, set out which part before you give your grounds for contesting it. If you are a court or tribunal filing a submission, please indicate that this is the case.

Please see the attached Summary Grounds of Resistance.

SECTION D

Give details of any directions you will be asking the court to make, or tick the box to indicate that a separate application notice is attached.

1 Permision to apply for judical review be refused.

2 The Claimants shall pay the Defendants' costs of preparing their Acknowledgement of Service (including the Summary Grounds). A costs schedule will be filed shortly. The interim protective costs order made by Mr Justice Cranston dated 5 May 2010 limits the Claimants' liability for costs to a maximum of £10,000 (inclusive) at the permission stage.

SECTION E

*delete as appropriate

I am duly authorised by the defendant to sign this statement.

(if signing on behalf of a firm or company, court or tribunal)

Position or office held
For the Treasury Solicitor

(To be signed by you or by your solicitor or litigation friend)

Signed

Date
1.06.2010

Give an address to which notices about this case can be sent to you.

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Completed forms, together with a copy, should be lodged with the Administrative Court Office, Room C315, Royal Courts of Justice, Strand, London, WC2A 2LL, within 21 days of service of the claim upon you, and further copies should be served on the Claimant(s), any other Defendant(s) and any interested parties within 7 days of lodgement with the Court.

IN THE HIGH COURT OF JUSTICE CLAIM NO. CO/5231/2010

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

IN THE MATTER OF AN APPLICATION FOR PERMISSION TO APPLY FOR JUDICIAL REVIEW

BETWEEN:

THE QUEEN

On the application of

(1) CORNER HOUSE RESEARCH
(2) SAMATA

Claimants

-and-

SECRETARY OF STATE FOR BUSINESS, INNOVATION AND SKILLS

Defendant

DEFENDANT'S

SUMMARY GROUNDS

Introduction

1. The Claimants seek permission to apply for judicial review of the decision of the Export Credits Guarantee Department ("ECGD") to adopt a policy, from 1 May 2010, of following an OECD recommendation concerning review of the environmental, social and human rights impacts of officially supported exports, and not separately to operate its own policies which go beyond that recommendation.

2. The Claimants contend that the decision has the effect of abandoning ECGD's policy against providing support to projects involving harmful child labour and forced labour, and that

such a decision is both irrational and in breach of Article 4 of the European Convention on Human Rights ("ECHR").

3. ECGD contends that the claim is misconceived and that the Court should refuse permission to apply for judicial review. In summary, and for the reasons set out below, ECGD's decision to adopt the relevant OECD recommendation does not involve abandonment of its policy not to support projects involving child or forced labour. As to the Claimants' grounds for judicial review:

   (1) ECGD's decision to adopt a policy which reflects the international consensus contained in the OECD's "Common Approaches" could not possibly be described as irrational; and

   (2) In the light of the well-established principle of the essentially territorial jurisdiction under Article 1 of the ECHR and the Human Rights Act 1998 ("HRA"), there is no arguable case that Article 4 could be engaged in relation to ECGD's policy for the grant of financial support to UK exporters.

Background Facts

ECGD

4. ECGD is a Department of State which reports to the Secretary of State for Business, Information and Skills. ECGD conducts its functions on behalf of the Secretary of State under powers contained in the Export and Investment Guarantees Act 1991. It is an Export Credit Agency ("ECA"), whose principal role is to provide support in connection with the export of goods and services from the United Kingdom, and to assist overseas investment by UK firms. It does so by issuing credit insurance policies to UK exporters, and financial guarantees to commercial banks in respect of loans to overseas buyers and borrowers that are used to purchase goods and services from UK exporters.

Business Principles and ancillary policies

5. In December 2000, ECGD adopted a set of Business Principles, which required ECGD, when considering support for a project, to screen applications for cover to identify, and then analyse, any adverse or beneficial environmental, social or human rights ("ESHR") impacts of relevant projects. The Secretary of State made clear at the time in his Foreword to the Business Principles that the:

> "statement of principles, objectives and policies remains a 'living document' which will be developed and modified in the light of experience or changes in circumstances."

6. ECGD developed a number of ancillary policies which derived from the Business Principles. In May 2004, ECGD published the Case Impact Analysis Process ("CIAP"), which set out the process by which ECGD would screen and then analyse the ESHR impacts of all non-defence, non-aerospace projects for which ECGD support was requested. Under the CIAP, all such projects were screened and then categorised as having low, medium or high potential impacts. Medium or high potential impact cases were then reviewed against international standards and guidelines to determine whether or not ECGD considered that those standards had been met by the project. Low potential impact cases were not subject to any ESHR review.

7. ECGD also published policies and guidance concerning bribery and corruption, and sustainable lending. In addition, it published a Case Handling Note which describes how ECGD deals with applications for support.

OECD agreements

8. Since 2001 there have been a number of OECD publications dealing with ESHR impacts. In that year, the OECD issued a draft recommendation on how ECAs should consider environmental issues which arise on applications for support. The recommendation was adopted by OECD members in 2003. A revised version was published in 2007, titled the Revised Recommendation on Common Approaches on the Environment and Officially Supported Export Credits ("Common Approaches").

9. The Common Approaches require Members to screen applications for officially supported export credits with a repayment term of two years or more; to classify new projects in respect of which a Member's share is above Special Drawing Rights ("SDR") 10 million (equivalent to £10 million) or which are in or near sensitive areas; and to review those projects classified as Category A or B (high or medium potential impacts) against international standards (including those which relate to child or forced labour).

10. The OECD also published principles and guidelines to promote sustainable lending practices, and a recommendation on bribery.

11. An OECD recommendation is an OECD act adopted by the OECD Council in accordance with Article 5b of the OECD Convention. It is not legally binding on OECD members but expresses the common position of the whole OECD membership. The UK has a policy of complying with the Common Approaches.

Proposal to revise Business Principles and consultation process

12. As a result of the developments after ECGD's adoption of its Business Principles, and for the reasons set out in the Consultation Document, ECGD proposed to revise its Business Principles and to adopt a policy of following OECD agreements related to the environment, sustainable lending and bribery, and not to operate its own policies going beyond those agreements.

13. ECGD commenced a public consultation on its proposals in December 2009. ECGD made clear, in the Public Consultation on Proposed Revisions to ECGD's Business Principles and Ancillary Policies ("Public Consultation") **[C1-51]**, published in December 2009, and in a Ministerial Written Answer of 25 January 2010, that if the proposals were to be implemented, the effect would be that projects would henceforth be screened, categorised and potentially reviewed where the Common Approaches indicated this should occur. In other words, consistent with the Common Approaches, ECGD would not henceforth assess the ESHR impacts of civil, non-aerospace projects where:

(1) The repayment term is less than two years; or

(2) The UK export value is less than Special Drawing Rights ("SDR") 10 million currently (equivalent to £10 million) unless the project is in or near a sensitive area.

14. The reasons for the change in policy were also set out clearly in the Public Consultation. First, adopting a policy of following the Common Approaches will achieve clarity and avoid the risk of duplication and confusion arising from having two sets of documents and criteria for assessing the same issues. Second, it will provide a level playing field for UK exporters. As ECGD explained in paragraph 42 of the Public Consultation document **[C10]**:

> "Until HMG has been able to fulfil its policy objective of a revision to the Common Approaches, it is HMG's view that it is not right to impose a burden upon UK exporters which is not imposed by the Common Approaches upon exporters of other OECD countries. This is especially true in, but does not depend upon, the current economic circumstances and the national benefits to be derived from UK companies taking advantage of favourable exchange rates in order to grow their international sales." (emphasis added)

15. It is important to put this policy change in context. If, in the past, this policy had been in operation, the proposed change would have affected only a very small proportion of applications for ECGD support. The Common Approaches apply only to civil business i.e. business outside the defence and aerospace sectors. In 2007-2008, civil business amounted to 13% of the value of ECGD's business, representing approximately 0.065% of UK exports. In 2008-2009, 26% of ECGD's business was civil, representing approximately 0.13% of UK exports. Within the civil business category, historically only a small number of contracts previously written by ECGD have had a repayment term of less than two years or a value of less than SDR 10 million. During the calendar years 2005-2009, contracts having a repayment term of less than two years accounted for approximately 2% of total ECGD business, while contracts having a value of less than £10 million accounted for approximately 1% of total ECGD business. The categories of contracts having a repayment term of less than two years and those for a value of less than £10 million overlap.

16. ECGD received a number of representations during its consultation process, including a joint response by the First Claimant and other NGOs, namely, Amnesty International UK, Campaign against Arms Trade, Jubilee Debt Campaign, Oxfam GB, and WWF UK **[C52-77]**.

17. The representations from UK exporters, financial institutions and insurance brokers were strongly supportive of the proposed changes. For example, Sovereign Star Trade Finance Limited, a UK financial institution which offers small and medium export credits to overseas customers of UK goods manufacturers, stated in its representations **[D288-293]** that it strongly supported the proposal that ECGD should comply with international agreements and not operate policies which go beyond them, and that the only impact of operating policies on a unilateral basis "is to disadvantage UK exporters". It noted that:

> "We are involved in assisting small and medium sized exporters who obtain contracts of less than £10m. Most involve the supply of goods and services to public and private buyers where the exporters have no influence or control over the environmental impacts in terms of the use of the goods and services by the buyer. The exporters could, of course, demand to be given details of the environmental impacts from their buyers but in doing so, they would be at high risk of losing the business because their competitors will not be required to seek such information. The consequence is that British exporters lose out – mainly SMEs upon whom the country is relying to help export its way out of the economic downturn."

18. ECGD provided an interim response to the public consultation ("Interim Response") on 19 March 2010 **[C87-96]**, and its final response to the public consultation ("Final Response") on 1 April 2010 **[C110-133]**. ECGD implemented the proposed policy changes on 1 May 2010.

<u>UK Policy on Child and Forced Labour</u>

19. It is, and remains, ECGD's policy not to provide support to projects that involve harmful child labour or forced labour. Contrary to the assertion in the Grounds for Judicial Review, ECGD's decision to apply the Common Approaches does not mean that ECGD has abandoned that policy.

20. The decision to follow the Common Approaches merely affects the thresholds at which ECGD will screen, categorise and potentially review applications for support. It will not be ECGD's policy to screen, categorise or potentially review cases falling beneath OECD thresholds to determine whether they involve ESHR impacts (which include forced or child labour). Nevertheless, as was made clear in paragraph 13 of the Final Response **[C114]**, ECGD (in common with any other Government Department) plainly retains a discretion to assess projects where it considers it necessary or appropriate to do so. Where ECGD believes that a project, an export to which it is asked to support, involves harmful child or forced labour, it remains ECGD's policy to withhold support to that export.

Legal framework

The Common Approaches

21. The Common Approaches **[D150-164]** is a multilateral agreement reflecting the common position of all OECD Members, including the UK, on ESHR matters relating to officially supported export credits. The Preamble records that the OECD Council:

> "RECOMMENDS that Members, before taking decisions on officially supported export credits, apply the following common approaches for addressing environmental issues relating to exports of capital goods and services and the locations to which these are destined."

22. The general objectives of the Common Approaches, set out in paragraph 2, are to:

- "Promote coherence between policies regarding officially supported export credits and policies for the protection of the environment, including relevant international agreements and conventions, thereby contributing towards sustainable development.
- Develop common procedures and processes relating to the environmental review of new projects and existing operations benefiting from officially supported export

credits, with a view to achieving equivalence among the measures taken by the Members and to reducing the potential for trade distortion.

- Promote good environmental practice and consistent processes for new projects and existing operations benefiting from officially supported export credits, with a view to achieving a high level of environmental protection.

- Enhance efficiency of official support procedures by ensuring that the administrative burden for applicants and export credit agencies is commensurate with the environmental protection objectives of this Recommendation.

- Promote a level playing field for officially supported export credits and increase awareness and understanding, including among Non-Member Economies, of the benefits of applying this Recommendation."

23. Paragraph 1 sets out the scope of the Common Approaches, stating that it applies to "officially supported export credits with a repayment term of two years or more". The effect of this paragraph is that projects with a repayment term of less than two years fall outside the scope of the Common Approaches and are not subject to its processes.

24. Under paragraph 4, Members are required to screen all applications for officially supported export credits covered by the Common Approaches (i.e. those with a repayment term of two years or more).

25. Paragraph 5 provides, in relevant part:

> "The screening should identify:
>
> > 5.1 applications for exports of capital goods and services to identifiable existing operations that are undergoing no material change in output or function in respect of which a Member's share is above SDR 10 million. ...
> >
> > 5.2 applications for exports of capital goods and services to any new commercial, industrial or infrastructure undertaking at an identified location or to any existing operation that is not covered by paragraph 5.1 above (hereafter referred to as 'projects'). Members should classify all projects in respect of which their share is above SDR 10 million and all projects in or near sensitive areas in respect of which their share is below SDR 10 million."

26. Having screened and identified such applications (ie applications falling within paragraph 5.2), Members are required under paragraph 6 to classify projects into one of three

categories (Categories A, B or C) depending on their potential environmental impacts. For the purposes of the Common Approaches, "environmental impacts" are defined as including "all relevant environmental and social impacts addressed by the international standards applied to projects in accordance with paragraph 12". In other words, such standards are not restricted to standards concerned with purely environmental impacts.

27. Category A projects are those with the potential to have significant adverse environmental impacts. A project is classified as Category B if its potential environmental impacts are less adverse than those of Category A. Category C projects are likely to have minimal or no adverse environmental impacts.

28. The effect of these provisions is that Members are not required to classify or review new projects where the application for support for an export has a value of less than SDR 10 million, unless they are located in or near sensitive areas.

29. Part III of the Common Approaches sets out the standards for review of projects classified as either Category A or B. (Paragraph 11 provides that beyond screening and classification, no further action is required for a Category C project.) Paragraph 12 provides in relevant part:

> "When undertaking a review:
>
> - For all projects, Members should benchmark projects against host country standards and either against the relevant aspects of all ten World Bank Safeguard Policies or, where appropriate
>
> - For private sector limited or non-recourse project finance cases, against the relevant aspects of all eight International Finance Corporation Performance Standards,
>
> ...
>
> - In addition, Members may benchmark projects against the relevant aspects of any internationally recognised sector specific or issue specific standards that are not addressed by the World Bank Group."

30. As was made clear in paragraph 19 of the Final Response, while the International Finance Corporation ("IFC") Performance Standards are only required to be applied to private sector

limited or non-recourse project finance cases, ECGD has always, in relation to child and bonded labour, reviewed cases against the standard contained in the IFC Policy Statement on Forced Labour and Harmful Child Labour (1998), and it remains ECGD's policy to do so. These are standards contemplated by the Common Approaches. Therefore, the standards of review applied by ECGD to projects eligible for review have not changed as a result of the new policy.

IFC Policy Statement on Forced Labour and Harmful Child Labour

31. The IFC Policy Statement on Forced Labour and Harmful Child Labour **[D91-97]** states that the IFC will not support projects that use forced or harmful child labour. Forced labour is defined, consistently with the ILO Convention on Forced Labour (1930), as "all work or service, not voluntarily performed, that is exacted from an individual under threat of force or penalty". Harmful child labour is defined, consistently with the United Nations Convention on the Rights of the Child, as "the employment of children that is economically exploitative, or is likely to be hazardous to, or interfere with, the child's education, or to be harmful to the child's health, or physical, mental, spiritual, moral or social development."

European Convention on Human Rights

32. Article 1 of the European Convention on Human Rights provides:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

33. Section I of the Convention includes Article 4.

34. Article 4 provides:

> "1. No one shall be held in slavery or servitude.
> 2. No one shall be required to perform forced or compulsory labour.
> 3. For the purpose of this article the term 'forced or compulsory labour' shall not include:

(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
(b) any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service;
(c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
(d) any work or service which forms part of normal civic obligations."

Human Rights Act 1998

35. Section 6(1) of the Human Rights Act 1998 ("HRA") provides:

> "It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

36. Convention rights are defined in section 1(1) of the HRA to include Article 4. Section 6(1) therefore requires UK public authorities to act compatibly with Article 4.

ECGD's Submissions

Irrationality

37. The Claimants' first ground of review is wholly misconceived.

38. In the first place, it is premised on a misconception as to the nature of ECGD's policy change. ECGD has not abandoned its policy against providing support to projects involving harmful child labour or forced labour. Nor has it amended or lowered its "standard of review" for projects eligible for review (as appears to be suggested in paragraphs 28-30 of the Grounds). Rather, ECGD's policy is now to adopt the approach recommended by the OECD through the Common Approaches, and to that end, to apply the OECD thresholds for screening, categorisation and review of cases. All applications for support that exceed those thresholds will continue to be subject to ESHR review, applying all of the standards of

assessment that ECGD currently applies, including those IFC standards concerning child or forced labour, which incorporate the terms of relevant international conventions.

39. Secondly, the Claimants do not come anywhere near reaching the high threshold for establishing irrationality, namely, that ECGD has acted in a way that no reasonable decision maker would have done. The logic of the Claimants' position is that it is outside the range of reasonable decisions for ECGD to bring its policies into line with an international agreement, to which the UK is a party, and whose purpose is to promote a common and coherent approach to addressing ESHR issues relating to officially supported export credits. This cannot be right.

40. It is plainly rational for the policy of ECGD to reflect a multilateral agreement of this kind for the following reasons:

    (1) The UK has a policy of complying with the Common Approaches. ECGD published its Business Principles prior to the adoption of the Common Approaches, which explains the initial variation in approach. In light of the developments in OECD policy in this area over the past decade, it is plainly appropriate for ECGD to seek to rationalise its own policies and procedures to bring them into line with the Common Approaches.

    (2) The Common Approaches represent an international consensus as to the appropriate standards for ECAs to apply when considering applications for support, and as to the appropriate thresholds for screening and assessment of those applications. Those thresholds are considered to be justified by the OECD as a whole, bearing in mind their objectives. Unless and until those thresholds are amended by common agreement of the Members, it is not irrational for an OECD Member to adopt and apply those thresholds.

    (3) The stated objectives of the Common Approaches are, inter alia, to promote coherence between policies regarding officially supported export credits; to develop common procedures and processes relating to ESHR review of projects with a view to achieving equivalence among the measures taken by the Members and to reducing the potential for trade distortion; and to promote a level playing field for export credits. It would be

inconsistent with these objectives for any Member to adopt or maintain policies that differ from the standards or thresholds set out in the Common Approaches because this would have precisely the result that the Common Approaches were intended to prevent, namely, incoherence between policies, lack of equivalence among Members' procedures, increased potential for trade distortion, and creation of an unlevel playing field. Therefore, it is in accordance with the stated objectives of the Common Approaches, and hence rational, for the UK to bring its own policies into line with the Common Approaches.

41. As to the particular points made by the Claimants in paragraph 30 of the Grounds:

(1) Sub-paragraph (a) is misconceived. As explained above, the objective of the Common Approaches is to achieve uniformity among OECD Members in relation to ESHR issues when making decisions about officially supported export credits. At the very least, there is nothing in the Common Approaches which would prevent the UK from bringing such policies, protections or standards into line with the Common Approaches.

In any event, it is wrong to suggest either that the UK has "reduced" its "standards of protection" or that the Common Approaches represents some "minimum level" of protection. In the first place, it should be noted that there are very real limitations to what an ECA is able to achieve in relation to the protection of human rights. ECAs are not regulators in the sense that they have the power to force the organisation and operation of a business sector to comply with rules of their making. Secondly, as explained above, the policy change does not affect the standards of assessment to be used on the occasions when ECGD conducts an ESHR review; the policy change will determine when an ESHR review will be undertaken by ECGD. Projects will not, as a matter of policy, be eligible for ESHR review where they have a repayment term of less than 2 years or where the UK export value is less than SDR 10 million: see paragraph 16 of the Final Response.

(2) Sub-paragraph (b) is factually incorrect. In the first place, as stated above, ECGD's previous policy did not impose requirements that were in excess of the "standards" in the Common Approaches; the policy change affects the thresholds for review but does not affect the standards of review.

Secondly, ECGD does not accept that "many other countries also adopt standards which are higher than those set out in the OECD Recommendation". Mr Hildyard's witness statement does not address 'standards' and therefore provides no support for that proposition. Moreover, contrary to Mr Hildyard's assertions in paragraphs 24-25 of his witness statement, it is not, in the view of the Defendant, the practice of the majority of OECD Members' ECAs to review cases falling beneath OECD thresholds. Mr Hildyard's evidence appears to be based upon a misinterpretation of the responses given by OECD Members to the OECD Export Credit Working Group's 2009 survey on implementation of the Common Approaches. (This is a matter which, should permission be granted, will be explained further in ECGD's evidence.)

(3) As to sub-paragraph (c), it is not the case that there is no evidence that the forced labour provisions are in fact burdensome for applicants to comply with. Contrary to the assertion in paragraph 27 of Mr Hildyard's witness statement, the administrative enquiries employed to check that a project does not use forced or child labour are not straightforward.

It is not, as Mr Hildyard suggests, simply a question of an exporter filling in ECGD's Impact Questionnaire **[D139-149]** and making a declaration as to whether the goods or project for which they are seeking support will "cause, require, bring about or stimulate" child labour or forced or bonded labour. The burden to the exporter lies in the investigation which needs to be carried out by it before this declaration can be made and the assessment which is subsequently carried out in respect of any Category A and B projects. This is time and resource consumptive for both the exporter and its purchaser. Moreover, most cases falling below OECD thresholds involve the issue of an insurance policy to the exporter against non-payment by its purchaser, rather than a

loan to the purchaser whose repayment is guaranteed by ECGD. It follows that neither the exporter, nor ECGD, is in a position to exercise control or leverage over a purchaser in order to review the project to which the export is destined. In these cases, the purchaser wants nothing from ECGD and may not even know of its involvement. As Sovereign Star pointed out in its response to the consultation (see paragraph 17 above), the result is that UK exporters are at a high risk of losing the business because their competitors are not required to seek or provide such information to their national ECAs.

(4) The comparison drawn with anti-bribery and corruption procedures in sub-paragraph (d) is not apt. As the Grounds themselves acknowledge, ECGD has made changes to its bribery and corruption procedures pursuant to the consultation in question. These changes and the reasons for them are described in detail in paragraphs 43-47 and Annex F of the Public Consultation, and paragraphs 18-23 of the Interim Response.

(5) As to sub-paragraph (e), for the reasons set out below, ECGD does not accept that it is under any legal obligation to prevent breaches of ECHR rights committed wholly outside the jurisdiction of the UK. Furthermore, as is pointed out at (3) above, and as was set out in the Final Response (quoted in the Grounds at paragraph 17), while the Government is of course concerned that human rights should be respected in all countries, the use of ECAs for this purpose in any event has its limitations.

42. For these reasons, ECGD submits that there is no arguable irrationality in its decision to follow the Common Approaches and apply the thresholds contained therein.

Article 4

43. The Claimants' Article 4 claim is also wholly misconceived. The claim rests on the flawed propositions that:

(1) ECGD is obliged to take steps to prevent child or forced labour wherever it might occur in the world, and

(2) ECGD's obligations under Article 4 are engaged merely by virtue of the fact that its actions in providing support to a UK exporter may have effects outside the United Kingdom.

44. For the reasons set out below, ECGD's obligations under the ECHR are not engaged where it provides support to a project which, in theory, may involve the provision of child or forced labour outside the territory of the United Kingdom. Accordingly, the Claimants have no arguable case that the ECHR or the HRA applies in this context, let alone that ECGD's proposed policy change amounts to a breach of Article 4. (For the avoidance of doubt, this argument should not be taken to involve any concession that, absent the jurisdiction argument, Article 4 would be engaged.)

45. The starting point is that any projects for which ECGD support would be sought or granted would, by definition, be located outside the territory of the United Kingdom. Therefore, the provision of any child or forced labour to such projects would only ever occur outside UK territory, and any victims of child or forced labour would be located outside UK territory.

46. The jurisdictional scope of the HRA is identical to that of the ECHR: see *R (Al-Skeini) v Secretary of State for Defence* [2008] 1 AC 153. Therefore, the extent of ECGD's obligations under section 6(1) of the 1998 Act is to be determined by reference to the meaning and scope of Article 1 of the ECHR.

47. Article 1 of the ECHR requires Member States to "secure to everyone within their jurisdiction" the listed rights and freedoms. The House of Lords in *Al-Skeini* held that the decision of the Grand Chamber of the European Court of Human Rights in *Bankovic v Belgium & United Kingdom* (2001) 11 BHRC 435 is authoritative on the meaning of "jurisdiction" under Article 1. *Bankovic* makes clear that the concept of jurisdiction is essentially territorial, and that Article 1 thereby sets a territorial limit on the reach of the Convention. Further, the ECHR does not govern the acts of states which are not parties to it; nor does it require the Member States to impose Convention standards on non-Member States. See also the recent judgment of the Grand Chamber in *Medvedyev v France* (29 March 2010), para 63.

48. Hence, the UK's obligations under the ECHR (and the HRA) are confined to securing the relevant rights and freedoms of people within its own territory. The UK's responsibilities under the ECHR are not, without more, engaged where it commits an act in the territory of another state, or where its acts produce effects in the territory of another state.

49. In keeping with the essentially territorial notion of jurisdiction, the ECtHR has accepted only in exceptional cases that acts of a Member State performed, or producing effects, outside its territory could constitute an exercise of jurisdiction by it within the meaning of Article 1. Those exceptional cases were identified in *Bankovic* as:

    (1) extradition or expulsion cases where the act of the state in removing a person from its territory to another state would give rise to a real risk that the person would be subjected to torture or inhuman or degrading treatment in that other state. The Court in *Bankovic* rightly held that these cases do not concern true extra-territorial jurisdiction because liability is incurred by the state's action concerning a person who is physically present on its territory. (This is the line of cases exemplified by *Soering v United Kingdom* (1989) 11 EHRR 439, which the Claimants cite in paragraph 40 of the Grounds.);

    (2) cases involving the activities of diplomatic or consular agents abroad or on board aircraft or ships registered in, or flying the flag of, a state. In these cases, customary international law and treaty provisions have clearly recognised and defined the extraterritorial exercise of jurisdiction by the relevant state;

    (3) cases where, as a result of military action, a state exercises effective control of an area outside its national territory. This excludes situations where, as in the *Bankovic* case, what was at issue was an isolated extraterritorial act, as the provisions of Article 1 do not admit of a 'cause-and-effect' notion of jurisdiction (*Bankovic* at [75]);

    (4) certain cases involving the acts of judicial authorities which produce effects outside the state's territory.

50. None of the recognised exceptions to the principle of territorial jurisdiction apply in the present context. There is no European or domestic authority for the Claimants' proposition that ECGD's obligations under the ECHR are engaged merely by virtue of the fact that it could, in theory, provide support to an exporter who is involved in a project which involves child or forced labour in the territory of another state. To the contrary, the cases of *Bankovic* and *Al-Skeini* demonstrated that the ECHR did not apply where the UK's acts directly resulted in the deaths of civilians in Yugoslavia and Iraq; if the applicants in those cases were not "within the jurisdiction" of the UK, then there is no arguable case that persons abroad, who are required to provide their labour to a project in respect of which a UK exporter has received ECGD support, would fall within the UK's jurisdiction for the purposes of Article 1.

51. Contrary to the Claimants' assertion in paragraph 40 of the Grounds, ECGD's actions in providing support to a UK exporter in the UK, which may facilitate child or forced labour outside the UK, are not sufficient to activate the jurisdiction of the ECHR. The Claimants' argument relies on a 'cause and effect' notion of jurisdiction, which was expressly disapproved in *Bankovic*.

52. The cases referred to in the Grounds do not assist the Claimants. In *Siliadin v France* (2006) 43 EHRR 16, France's obligations under Article 4 were engaged because the housemaid was subjected to forced labour in the territory of France. It goes without saying that in that case, the housemaid was within the jurisdiction of France, and therefore France's obligations under Article 4 were engaged. The decision is not authority for the proposition that Article 4 imposes positive obligations on a Member State to prevent forced labour occurring outside the jurisdiction of that State.

53. In *Rantsev v Cyprus and Russia* (Application 25965/04), Russia's obligations under Article 4 were engaged because the trafficking of Ms Rantsev commenced in the territory of Russia. Russia's obligations in that case were limited to putting in place measures to prohibit and punish trafficking in Russia, and to investigate allegations of trafficking in relation to acts occurring in its territory; the Court expressly refrained from imposing obligations on Russia

in respect of acts which occurred outside Russian territory: see paras 207-208 and 301-309 of the judgment. For example, the Court stated as follows:

> "301. The Court recalls that the responsibility of Russia in the present case is limited to the acts which fell within its jurisdiction. ...
>
> 304. The Court recalls that any positive obligation incumbent on Russia to take operational measures can only arise in respect of acts which occurred on Russian territory. ...
>
> 307. The Court recalls that, in cases involving cross-border trafficking, trafficking offences may take place in the country of origin as well as in the country of destination ... The Russian authorities therefore had an obligation to investigate the possibility that individual agents or networks operating in Russia were involved in trafficking Ms Rantsev to Cyprus.
>
> 308. ... The recruitment having occurred on Russian territory, the Russian authorities were best placed to conduct an effective investigation into Ms Rantsev's recruitment."

54. Likewise, the cases of *Soering v United Kingdom* (1989) 11 EHRR 439, *Chahal v UK* (1997) 23 EHRR 413 and *Al-Saadoon & Mufdhi v United Kingdom* (61498/08, 2 March 2010) do not assist the Claimants. *Soering* and *Chahal* were cases concerning extradition and deportation, respectively, of persons from the UK to other states. The UK's responsibility under the ECHR was engaged in those cases by virtue of the fact that the victims were present on UK territory, clearly within its jurisdiction. As *Bankovic* made clear, such cases do not concern the actual exercise of a state's jurisdiction abroad.

55. *Al-Saadoon* concerned the arrest and detention of Iraqi nationals in Iraq by UK armed forces in UK-run detention facilities. During the first months of the applicants' detention, the United Kingdom was an occupying power in Iraq. The Court held at [88] of its admissibility decision that the applicants were within the jurisdiction of the United Kingdom for the purposes of Article 1 because the UK authorities exercised "total and exclusive *de facto*, and subsequently also *de jure*, control" over the premises in question.

56. The facts of *Al-Saadoon* bear no resemblance to the facts of this case. There is no question of ECGD having any, let alone total and exclusive, *de facto* or *de jure* control over the premises

of projects to which child or forced labour may be provided; nor have the Claimants provided any evidence of such control. As stated above, and as was pointed out in paragraph 47 of the Final Response, ECAs are not regulators in the sense that they have the power to force a business sector to comply with rules of their making. Moreover, in so far as export credit business consists of insurance policies rather than finance arrangements (as is the case with most transactions falling beneath OECD thresholds), neither the exporter nor the ECA has control or leverage over their buyer.

57. In light of the well-established principles set out above, there is no arguable case that the ECHR or the HRA would apply to the provision by ECGD of support to an exporter who is involved in a project which operates forced or child labour practices outside UK territory. ECGD does not owe obligations to persons outside the jurisdiction of the UK. This was pointed out in ECGD's response to the letter before claim **[C144-152]**. The Claimants' only purported answer is in paragraph 40 of the Grounds. As explained above, the authorities there referred to are not on point, and in fact provide no answer to ECGD's submission as to jurisdiction.

58. For the reasons set out above, the Court is respectfully requested to refuse permission to apply for judicial review. Should permission be refused, the Defendant asks for the costs of preparing his Acknowledgement of Service (including these Summary Grounds). A costs schedule will be filed shortly.

Protective Costs Order

59. If the Court grants permission, ECGD opposes the grant of any further protective costs order for the reasons set out in its letter to the Administrative Court dated 4 May 2010 (a copy of which is attached) There are no exceptional circumstances which would justify the grant of a protective costs order beyond the permission stage.

60. Further, the Court is invited to note that despite the fact that the First Claimant submitted a joint response to the public consultation with five other NGOs, none of those NGOs are a party to this claim. If those NGOs had been parties to this claim, a protective costs order is

unlikely to have been necessary. The Claimants have provided no explanation for the fact that those other NGOs have not joined in the claim.

61. If the Court is minded to grant a further protective costs order to apply beyond the permission stage, in view of the fact that the Claimants have retained their representatives under a conditional fee agreement and can be expected to seek their costs if they succeed at either the permission stage or the substantive hearing, the Court is requested to make a capping order in respect of the Claimants' costs that restricts such costs to solicitors' fees and the fees of one junior counsel that are no more than modest in amount: see *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600 at [76]; *R (Buglife: The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp* [2008] EWCA Civ 1209 at [25].

MONICA CARSS-FRISK QC
CATHERINE CALLAGHAN

1st June 2010

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URGENT

Dear Sir / Madam

R (Corner House & Samata) v Secretary of State for Business, Innovation and Skills
Ref: CO/5231/2010

We are instructed by the Secretary of State for Business, Innovation and Skills. We are in receipt of the Claimants' Claim Form, Statement of Grounds and Application for urgent consideration. We received the Claimants' bundle and evidence shortly before sending this letter, but have not had time to carefully consider their contents.

We understand that the papers will be placed before a judge at 3pm today to consider the Claimants' application for an interim protective costs order limiting their joint and several liability in costs to a maximum of £10,000 at the permission stage. The Respondent opposes this application for the reasons set out in this letter. We would be grateful if this letter could urgently be placed before the judge listed to deal with this application.

The Court's power to make a protective costs order is to be exercised only in the most exceptional circumstances: see *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600 at [72]; *R (Compton) v Wiltshire Primary Care Trust* [2009] 1 WLR 1436 (copies of which are attached). Before making such an order, the Court must be satisfied, among other things, that the issues raised are of general public importance and that the public interest requires that those issues should be resolved. It will not be in the public interest to make such an order unless the claimant's case has a real prospect of success: see *Corner House Research* at [73]-[74].

At least two of those conditions are not satisfied in this case.

Simon Harker – Head of Division
Natalie Cohen – Team Leader

ECHR could be engaged in respect of persons who provide labour to a project located outside the UK.

It would not be appropriate to order an interim protective costs order in respect of a claim that is not arguable and for which permission should not be granted.
The Secretary of State therefore invites the Court to dismiss the application for an interim PCO. The Respondent seeks its costs of resisting the application.

If the Court is minded to grant such an order, the Court is invited to take into account that the Claimants have not given an undertaking that (i) their representatives are willing to act *pro bono* or (ii) they will not seek their costs if they succeed at either the permission stage or the substantive hearing. The Court is therefore invited to make a capping order in respect of the Claimants' costs that restricts such costs to solicitors' fees and the fees of one junior counsel that are no more than modest in amount.

For the avoidance of doubt, our client reserves the right to contest any application for a full PCO which may be made at a later date.

Yours faithfully

Sarah Kember on behalf of Andrew Jack
For the Treasury Solicitor

Encl.

Cc: Leigh Day & Co., Solicitors for the Claimants