

IN THE HIGH COURT OF JUSTICE

Claim No. _____

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

B E T W E E N:

THE QUEEN

on the application of

(1) CORNER HOUSE RESEARCH

(2) SAMATA (a society registered under the laws of India)

Claimants

and

SECRETARY OF STATE FOR BUSINESS, INNOVATION AND SKILLS

Defendant

GROUNDS FOR JUDICIAL REVIEW

Suggested pre-reading: Witness statements of Hildyard and Rebbapragada, Final Decision

A. Introduction

1. This claim for judicial review concerns the decision of the Export Credits Guarantee Department ("ECGD") to remove its prohibition on supporting projects involving "harmful" child labour and forced labour.
2. The ECGD's current policy is to:

- a) screen all applications for export credit guarantees to check whether they involve the use of “harmful” child labour, forced labour or bonded labour;
 - b) to reject all applications that involve the use of “harmful” child labour; and
 - c) to reject all applications that involve the use of forced or bonded labour.
3. From 1 May, the ECGD will abandon these policies:
- a) Applications will not be screened to check whether they involve child labour, forced labour or bonded labour if the value of UK support is under around £10 million or if the term of the guarantee is under 2 years.
 - b) Exporters will benefit from a ‘don’t ask, don’t tell’ policy on the part of the ECGD. Taxpayer backed guarantees will be available to projects below the review thresholds that utilise child labour and/or forced or bonded labour.
4. The Claimants submit that the policy change is unlawful. The Court is invited to quash the decision to implement the new policy and remit the matter back to the Secretary of State for reconsideration.
5. The First Claimant, Corner House Research, is a non-governmental organisation that carries out research and campaigning on social justice and environmental issues. It has a long-standing interest in the activities of export credit agencies and the effect of guarantees on disadvantaged communities. It was the Claimant in *R (Corner House*

Research) v Secretary of State for Trade and Industry [2005] 1 WLR 2600, a successful challenge to the consultation procedure on revisions to the ECGD's bribery and corruption procedures (and the leading case on protective costs orders).

6. The Second Claimant, Samata, is an Indian community organisation which represents the interests of the tribal Adivasi people of the mining areas of Andhra Pradesh, India. See the witness statement of Ravi Rebbapragada.

B. Facts

7. On 1 April 2010, the ECGD published its final response to the public consultation on proposed revisions to the ECGD's Business Principles ("the Final Response"). The new policies and procedures described in the Final Response are scheduled to come into force on 1 May 2010.

Current ECGD policy on forced labour and child labour

8. The history of the ECGD's policy on forced labour and child labour is set out in the Seventh Report of the Select Committee on Environmental Audit published on 9 July 2003:

"Impact questionnaire and guidance notes

46. Applicants for ECGD cover are required to complete the impact questionnaire when initial screening has resulted in their case has been identified as having medium potential impacts. The impact questionnaire is accompanied by a series of guidance notes.

47. The UK has ratified the United Nations Convention on the Rights of the Child and the International Labour Organisation conventions on the abolition of child labour. We were therefore surprised to see that the guidance notes, despite recognising the UK's commitments in these areas, employ a loose form of wording which implies that there are circumstances under which ECGD would consider supporting projects which exploit children. They state that "there must therefore by exceptional circumstances for ECGD to provide cover to projects which involve child labour".

48. Similarly, despite the UK's ratification of the International Labour Organisation Conventions on forced and bonded labour, rather than ruling out support for projects which breach the convention, ECGD state that "it is difficult to imagine circumstances in which ECGD could provide cover to projects which involve forced labour".

49. [The ECGD witness] defended ECGD's position by arguing that it was important for ECGD to be able to consider the circumstances of individual cases; that other international organisations adopted a similar approach; and that it did not want its discretion fettered.

There is no circumstance under which it would be acceptable for ECGD, using taxpayers money, to support projects which exploit children or employ bonded or forced labour. We were therefore pleased to receive a further note from ECGD assuring us that "it is the Department's policy not to provide support for any project that involves the use of bonded or forced labour. The policy statement in the guidance notes for the impact questionnaire will be amended to provide greater clarity on this point". We look forward to receiving copies of the amended text. We recommend that a similarly categorical statement is made in respect of child labour and the guidance notes suitably amended. (emphasis in original)

9. Following the Report of the Select Committee, the ECGD's Policy Statement in the Guidance Notes was amended. The current Guidance Notes contain an unambiguous statement of policy:

"Child Labour

...

It is ECGD's policy not to provide support to projects that involve harmful child labour...

Bonded or forced labour

Is any of the work extracted for no payment and/or under threat of force or penalty e.g. does the employer hold workers' identity documents? Is work extracted as payment for a debt? In common with most countries around the world, the UK has ratified the International Labour Organisation Conventions on the elimination of forced or compulsory labour. **It is ECGD's policy not to provide support to projects that involve bonded or forced labour**" (emphasis added).

New ECGD policy on forced labour and child labour

10. In the Final Response the ECGD has abandoned its policy of always refusing taxpayer-backed support to projects that use forced or "harmful" child labour. This fact was obscured in the original consultation documents and it was only through careful analysis of the documentation that it has become clear.
11. The ECGD's original consultation document was published in December 2009. The ECGD proposed to adopt OECD guidelines on when to review the environmental and social impacts of a project. The effect of this proposal was to exclude projects from review with a repayment term of under 2 years or where the UK export component is less than 10 million Special Drawing Rights (approximately £10 million).
12. The consequences of this change were not clearly spelled out. Nowhere in that document does ECGD expressly state that it proposed to abandon its strict policy of never providing support to projects that use "harmful" child labour or forced labour.
13. The joint NGO response to the consultation paper identified the actual effect of ECGD's proposals:

“40. The Consultees contend that the proposed changes to ECGD’s Business Principles and ancillary policies would have the effect of overturning ECGD’s current ban on harmful child labour and forced labour, or, at the very least, seriously undermining its implementation.

41. The effect of the proposed changes would be:

- To exclude *all* ECGD support with a repayment period under two years from *any* screening for child and forced labour;
- To exclude *all* ECGD support for projects where the UK export value is less than SDR10 million from *any* screening for child and forced labour;
- To release ECGD from its current commitment to screen projects with repayment periods over two years for child and forced labour” (emphasis in original)

14. In the Final Response, ECGD confirm that this is indeed the effect of the proposals:

“20. The Joint Response contends that the proposed changes will undermine ECGD’s current policy not to support projects that involve harmful child or bonded or forced labour... In The Corner House response of 30th March, part of the Second Representations, it is asserted that: “ECGD should explain how the proposal [no longer to screen for classification contracts with a repayment period of under two years or a value of under SDR 10 million for forced or child labour impacts] is compatible with its current stated policy refusing support for projects involving forced labour or harmful child labour. If the policy is being abandoned, ECGD should clearly state this and consider the impacts of such a policy change on the UK’s reputation and its international legal undertaking in an impact assessment”.

Government Response

21. The proposal to adopt the OECD Thresholds applies to all ESHR matters, including child or forced labour issues, and the proposed change to ECGD policy in this regard is part of the subject of this Consultation. It would, however, under the proposals, be ECGD’s policy to consider, for potential review, applications above the OECD Thresholds in the manner described in paragraph 16. The resulting policy would be the adoption of the relevant International Agreement (that is to say the OECD Common Approaches) governing such reviews by Export Credit Agencies. The outcome of this change would be monitored as referred to in paragraph 14 above.”

15. As from 1 May 2010, it will be ECGD's policy not to refuse funding for projects using child labour or forced labour:
- a) if the repayment term is 2 years or less; or
 - b) if the value of the British export is under SDR 10 million.

This is because such projects will not be subject to any assessment of whether they involve forced labour or child labour. They will be approved regardless.

16. In Corner House's second representations to the ECGD, it asked for an explanation as to how the proposed changes would comply with the UK's international law obligations. No attempt has been made in the Final Response to respond to this request.
17. The justification for the change is to reduce a supposed burden on business. Similar justifications have historically been used to justify the use of slave labour and child labour. The Final Response explains the ECGD's position further at paragraphs 45-46:

There have been strong representations from all exporters in this consultation asking for release from a regulatory burden (that is to say the non-operation by ECGD of the OECD Thresholds) not imposed on the majority of their overseas competitors.

The Government is of course concerned that the global environment should be protected and that all forms of human rights should be respected in all countries. But, in persuading foreign governments, institutions, project companies and private corporations to create only acceptable impacts, it has to consider the most effective means. The Government takes a full part in the promotion of Treaties and Conventions of, for example, the UN, to achieve those goals. The use of Export Credit Agencies for these purposes has limitations.

C. Legal framework

ECGD

18. The ECGD is a Department of State. Its operations are governed by the Export and Investment Guarantees Act 1991. Its role is to facilitate UK exports within the law and government policy. It does so by providing financial guarantees for loans made by banks and offering insurance policies to exporters using public funds.
19. ECGD operates subject to its 'Business Principles' which require it to consider the environmental, social and human rights implications of a project before providing guarantees. To consider such matters, ECGD has a 'case impact analysis' process that seeks to ensure that it only supports applicants whose projects are consistent with its Business Principles.

International law

20. The ECGD's current forced labour and child labour policies comply with the UK's obligations under the ILO Forced Labour Convention 1930 and the International Convention on the Rights of the Child.
21. Article 1(1) of the Forced Labour Convention provides:

Each Member of the International Labour Organisation which ratifies this Convention undertakes to suppress the use of forced or compulsory labour in all its forms within the shortest possible period.

22. Articles 4 and 5 impose obligations on states not to permit private companies to use forced labour, and not to provide indirect state support for forced labour by the granting of concessions. Such concessions plainly include the grant of state guarantees for exports:

4(1) The competent authority shall not impose or permit the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations.

...

5(1) No concession granted to private individuals, companies or associations shall involve any form of forced or compulsory labour for the production or the collection of products which such private individuals, companies or associations utilise or in which they trade.

23. Article 32 of the International Convention on the Rights of the Child 1990 provides for the regulation of child labour:

1. States Parties recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

24. Article 36 provides:

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

European Convention on Human Rights

25. Article 4(2) of the ECHR provides that “no one shall be required to perform forced or compulsory labour”. Article 4(2) includes positive obligations to prohibit forced or compulsory labour and to take reasonable steps to prevent it.

D. Grounds

26. The decision to alter the forced labour and child labour policy was unlawful:
- a) The decision is irrational.
 - b) Providing UK taxpayer-backed support for forced labour would amount to a breach of Article 4 of the European Convention on Human Rights. The ECGD, as a Department of State, owes a positive obligation to ensure that it does not facilitate forced labour by taking reasonable steps to avoid providing taxpayer support for it.

Irrationality

27. The ECGD’s new policy is that it will comply with the 2007 OECD Revised Council Recommendation on Common Approaches on the Environment and Officially Supported Export Credits (“the OECD Recommendation”). The OECD Recommendation provides for “Environmental Review” of projects over the 2 year/SDR 10 million thresholds.

28. The standard of review is “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” (paragraph 12).
29. The “ten World Bank standards” are those of the International Bank for Reconstruction and Development. None deal with child or forced labour. The IFC Performance Standard on Labour and Working Conditions apply in certain project finance cases and simply repeat the terms of the Forced Labour Convention and the Convention on the Rights of the Child:

Child Labor

14. The client will not employ children in a manner that is economically exploitative, or is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development. Where national laws have provisions for the employment of minors, the client will follow those laws applicable to the client. Children below the age of 18 years will not be employed in dangerous work.

Forced Labor

15. The client will not employ forced labor, which consists of any work or service not voluntarily performed that is exacted from an individual under threat of force or penalty. This covers any kind of involuntary or compulsory labor, such as indentured labor, bonded labor or similar labor-contracting arrangements.

30. The ECGD’s new policy is irrational. The ECGD justifies the changes by reference to the aim of reducing burdens on business by imposing the minimum OECD review procedures. The aim is to “provide a level playing field for UK exporters”, according to

the ECGD's response to the pre-action letter. This plea is inadequate to establish the rationality of the policy change:

- a) Nothing in the OECD Recommendation requires the UK to reduce its pre-existing policies, procedures and standards of protection to the minimum level of the Recommendation.
- b) The existing ECGD policy imposes requirements that are in excess of the minimum standards in the OECD Recommendation. Many other countries also adopt standards which are higher than those set out in the OECD Recommendation. See the Annex to the witness statement Mr Hildyard.
- c) The Final Response does not contain any evidence that the forced labour provisions were in fact burdensome for applicants to comply with. The administrative enquiries required to ensure that a project does not use forced or child labour are straightforward (see Mr Hildyard's witness statement at paragraph 27).
- d) The strict anti-corruption procedures introduced following the ECGD's settlement of the claim in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600 will remain unchanged, even those rules are stricter than those in some other OECD countries. The ECGD has not advanced any explanation for this difference in approach. See paragraph 33, footnote 4 of the Consultation Paper ("A small number of glosses will need to be made ... fn 4. For instance that, save in the respects mentioned in this document and the

Statement of Processes and Factors, no procedures set out in the Final Response to the Consultation on ECGD's Anti-Bribery and Corruption Procedures will be altered"). These procedures will remain unchanged even though they no doubt impose some burden on applicants, and in some respects are stricter than those applying in some other countries.

- e) The context in which burdens on business should be assessed is against the need to prevent breaches of fundamental rights and of the importance of preventing forced labour and child labour. The effects of forced labour and child labour are at least as serious as those caused by bribery and corruption. In these circumstances, the test to be applied is one of anxious scrutiny of the new policy.

Article 4 ECHR

- 31. The new policy breaches the Article 4 ECHR prohibition on slavery and forced labour.
- 32. In *Siliadin v France* (73316/01), the European Court of Human Rights considered the case of a Togolese housemaid whose passport was taken from her and who was forced to work unpaid. The ECtHR held that Article 4 includes positive obligations to prevent forced labour:

"89. In those circumstances, the Court considers that limiting compliance with Article 4 of the Convention only to direct action by the State authorities would be inconsistent with the international instruments specifically concerned with this issue and would amount to rendering it ineffective. Accordingly, it necessarily follows from this provision that States have positive obligations, in the same way as under Article 3 for example, to adopt criminal-law provisions

which penalise the practices referred to in Article 4 and to apply them in practice (see *M.C. v. Bulgaria*, cited above, § 153)."

33. In *Rantseva v Cyprus & Russia* (25965/04), the ECtHR considered a human trafficking case involving a Russian in Cyprus. Ms Rantseva was trafficked to Cyprus and eventually died in disputed circumstances. The Court held that it had jurisdiction to consider alleged breaches by Russia of Article 4 by reason of its failure to take measures to prevent trafficking and its failure to investigate allegations of trafficking, even though the breaches of Article 4 took place in Cyprus:

"207. The applicant's complaints against Russia in the present case concern the latter's alleged failure to take the necessary measures to protect Ms Rantseva from the risk of trafficking and exploitation and to conduct an investigation into the circumstances of her arrival in Cyprus, her employment there and her subsequent death. The Court observes that such complaints are not predicated on the assertion that Russia was responsible for acts committed in Cyprus or by the Cypriot authorities. In light of the fact that the alleged trafficking commenced in Russia and in view of the obligations undertaken by Russia to combat trafficking, it is not outside the Court's competence to examine whether Russia complied with any obligation it may have had to take measures within the limits of its own jurisdiction and powers to protect Ms Rantseva from trafficking and to investigate the possibility that she had been trafficked. Similarly, the applicant's Article 2 complaint against the Russian authorities concerns their failure to take investigative measures, including securing evidence from witnesses resident in Russia. It is for the Court to assess in its examination of the merits of the applicant's Article 2 complaint the extent of any procedural obligation incumbent on the Russian authorities and whether any such obligation was discharged in the circumstances of the present case."

208. In conclusion, the Court is competent to examine the extent to which Russia could have taken steps within the limits of its own territorial sovereignty to protect the applicant's daughter from trafficking, to investigate allegations of trafficking and to investigate the circumstances leading to her death."

34. The Court held that states owe extensive positive obligations to prevent breaches of Article 4, including taking measures to regulate business activities which support and promote forced labour:

“284. In assessing whether there has been a violation of Article 4, the relevant legal or regulatory framework in place must be taken into account (see, *mutatis mutandis*, *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 93, ECHR 2005-VII). The Court considers that the spectrum of safeguards set out in national legislation must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking. Accordingly, in addition to criminal law measures to punish traffickers, Article 4 requires member States to put in place adequate measures regulating businesses often used as a cover for human trafficking. Furthermore, a State’s immigration rules must address relevant concerns relating to encouragement, facilitation or tolerance of trafficking (see, *mutatis mutandis*, *Guerra and Others v. Italy*, 19 February 1998, §§ 58 to 60, *Reports of Judgments and Decisions* 1998-I; *Z and Others v. the United Kingdom* [GC], no. 29392/95, §§ 73 to 74, ECHR 2001-V; and *Nachova and Others*, cited above, §§ 96 to 97 and 99-102).” (emphasis added)

35. Further, where there are potential breaches of Article 4, the state must investigate and take appropriate measures to prevent the breach.
36. The ECGD’s previous policy ensured compliance with the UK’s positive obligations under Article 4. Applications for taxpayer-backed support were reviewed and if they were found to involve forced labour, the application would be rejected. Forced labour is an economic activity carried out for commercial purposes, and by regulating the economic activity, and not providing state support to it, the UK complied with its international law obligations.
37. In contrast, the new procedures put the UK in breach of Article 4. Instead of investigating and reviewing all applications, the ECGD will turn a blind eye to forced

labour where the repayment period is under 2 years or the value of the UK component is under SDR 10 million.

38. In consequence, it is likely that UK taxpayer-backed funds will now be used to support (and in the event of a default, provide funds to) those who operate forced labour practices.
39. The ECGD has suggested in its response to the Claimants' pre-action letter that any breach of Article 4 that arose from its conduct would arise outside the UK and the Court therefore has no jurisdiction. The ECGD goes as far as to say that "there is no arguable case that the ECHR or the 1998 [Human Rights] Act would apply to the provision by ECGD of support to an exporter who is involved in a project which operates forced labour practices outside UK territory."
40. The fact that the slavery takes place outside the UK is not a bar to the application of the Convention. Without ECGD support in the UK, the wrongful conduct would not take place. The ECGD's actions will facilitate slavery. For similar reasons, deporting someone to face torture or the death penalty abroad are also breaches of the ECHR, even though the relevant torture or execution will take place outside the UK. See, for example, *Soering v UK* (1989) 11 EHRR 439 and *Al-Saadoon & Mufdhi v UK* Application 61498/08 (2 March 2010) (death penalty), and *Chahal v UK* (1996) 23 EHRR 413 (torture). The essential acts of facilitation in the UK are sufficient to activate the jurisdiction of the ECHR.

E. Conclusion

41. The Court is invited to grant permission to proceed.

42. Further, the Court is invited to grant an interim protective costs order and, in due course, a protective costs order. For the reasons set out in the witness statements of Nicholas Hildyard and Ravi Rebbapragada, the maximum sum that the Claimants can afford to risk in this litigation is £10,000. The Claimants have no funds to sustain an open-ended costs liability. In the event that a PCO is not made, the Claimants will have no option but to withdraw the claim.

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