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Date: 12 April 2010

By Fax & Post: 7512 7146

URGENT

Dear Sirs,

Proposed claim for judicial review

Introduction

We act for Corner House Research. Please treat this letter as a pre-action letter under the Judicial Review Pre-Action Protocol.

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 currently scheduled to come into force on 1 May 2010. This pre-action letter concerns the ECGD's proposed new policies on forced labour and child labour.

Current ECGD policy on forced labour and child labour

The history of the ECGD's policy on forced labour and child labour is recorded 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.

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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. *Mr Brown 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)

Following the Report of the Select Committee, the ECGD's Policy Statement in the Guidance Notes was amended. The current version contains an unambiguous statement of current government 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).*

The current policy complies with the UK's obligations under the ILO Forced Labour Conventions, the International Convention on the Rights of the Child, Article 4 of the European Convention on Human Rights, the ICCPR and the UN Declaration on Human Rights.

New ECGD policy on forced labour and child labour

In the Final Response the ECGD has abandoned its policy of refusing taxpayer-backed support to projects that use forced or child labour. Regrettably, this fact was obscured in the original consultation documents and it was only through our client's careful analysis of the documentation that it has become clear.

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 is to exclude projects with a repayment term of under 2 years and where the UK export component is less than SDR 10 million from review. Regrettably, 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 not providing support to projects that use child labour or forced labour, and by so doing, breach the UK's international law obligations on child labour and forced labour.

The joint response to the consultation paper identified the real 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)

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.”

As from 1 May 2010, it will be ECGD's policy not to refuse funding for projects using child labour or forced labour:

- if the repayment term is 2 years or less; or
- 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. Even where a review is carried out, it appears that there will no longer be any absolute bar on ECGD support.

In Corner House's second representations, 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.

Policy change unlawful

We consider that the decision to alter the forced labour and child labour policy is unlawful:

- 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.
- No proper reasons have been given for the decision.
- The decision is based on a basic misunderstanding of the international law framework and is irrational.

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.

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)."

In *Rantsev 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."

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).”

Further, where there are potential breaches of Article 4, the state must investigate and take appropriate measures to prevent the breach.

The ECGD’s previous policy ensured compliance with the UK’s positive obligations under Article 4. Indeed, we assume that the strict policy of no support for forced labour was introduced to ensure compliance by the ECGD with Article 4 and other similar provisions in the ILO Forced Labour Convention, the UN Convention on the Rights of the Child, the ICCPR and the UN Declaration. 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, and by regulating the economic activity, and not providing state support to it, the UK complied with its international law obligations.

In contrast, the new procedures put the UK in breach of Article 4. Instead of investigating and reviewing all applications, the ECGD will automatically turn a blind eye to forced labour where the repayment period is brief or the UK contribution is limited. Further, even where a review takes place, it appears there will be no policy of never providing UK taxpayer-backed support for forced labour.

In consequence, it is likely that UK taxpayer-backed funds will be used to support (and in the event of a default, provide funds to) those who operate forced labour

practices. Applying the principles in *Rantsev*, this amounts to conduct within the jurisdiction of the UK, and is a plain breach of Article 4.

The ECGD's new policy is neither rational nor capable of justification by reference to the principle of proportionality. The ECGD justifies the changes by reference to the aim of reducing burdens on business. However, Article 4 contains fundamental and non-derogable rights. Nor does the Final Response contain any evidence that the forced labour provisions were in fact burdensome for applicants. Indeed, we note that the strict anti-corruption procedures introduced following the ECGD's concession of *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600 will remain unchanged. 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 may be stricter than those applying in other countries. If it is justifiable for the UK to impose requirements in respect of bribery and corruption beyond those in the OECD Framework documents, it should also plainly be complying with its international law obligations to avoid supporting forced labour.

For the same reasons, we consider that the decision to now provide support to projects using child labour is also irrational. In particular, the decision to follow OECD Framework principles, but not the requirements in other relevant international law instruments makes little sense. The OECD Framework documents do not refer to forced labour because this topic is dealt with in other treaties.

As to reasons, no explanation is given as to how the decision to provide support to forced labour and to abandon reviews for many cases is appropriate. This is despite a request for an explanation in Corner House's second consultation response.

Urgency

The new procedures will take effect on 1 May. In these circumstances, please reply to this letter by 4.30pm on Monday 19 April 2010.

Leigh Day & Co

In the event that we do not receive a satisfactory response to this letter, we are instructed to commence a claim for judicial review.

Yours faithfully,

Leigh Day & Co

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