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ALERT

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# A Warning from the *World Uyghur Congress* Case: Human Rights Violations in Supply Chains Can Lead to UK Money Laundering Charges

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A relatively underreported but important judgment was handed down in the UK's High Court in late January 2023, in the case of *R. (on the application of World Uyghur Congress) v Secretary of State for the Home Department & Ors.* Although the claimant was unsuccessful, the case should nevertheless serve as a warning for all corporates about the potential scope of supply chain liability: the UK authorities have made clear that (1) offences contrary to the UK Modern Slavery Act 2015 (including forced labour) and/or the International Criminal Court Act 2001 (including crimes against humanity) are capable of constituting criminal conduct for purposes of the UK's money laundering legislation, and (2) the authorities are prepared to act when the evidence is sufficient for the criminal conduct and resultant criminal property to be identified. The *WUC* case, its significance – including for U.S.-based multinationals – and selected other takeaways, are further discussed in this Alert.

## The Court Case

The *WUC* case was an application for judicial review of the decisions of three British government agencies, which had declined to investigate or block cotton imports from China's Xinjiang Uyghur Autonomous Region (the "**XUAR**"). The applicant was the World Uyghur Congress (the "**WUC**"), an NGO that claims to promote the collective interests of the Uyghur people. The WUC sought to challenge decisions by: (1) the Border Force within the Home Office, which has operational responsibility for customs and revenue work at the UK borders; (2) His Majesty's Revenue and Customs Service, which is responsible for customs and revenue policy and operations inland; and (3) the National Crime Agency (the "**NCA**"), which is responsible for investigating serious and organised crime in the UK (collectively, the "**Agencies**").

In April 2020, the WUC had written to the Agencies calling for action in relation to cotton originating in the XUAR within the UK's value chain, urging the Agencies to investigate and block cotton imports from the XUAR. The WUC and Agencies engaged in correspondence over the next 18 months, during the course of which the WUC submitted evidence alleging forced labour in the XUAR cotton and textile industries. The evidence submitted alleged links to UK companies. The Agencies ultimately concluded that the evidence was insufficient for them to investigate or block cotton imports from the XUAR. The WUC then brought an application for judicial review of those decisions.

Judicial review is the main way in which UK courts can supervise bodies exercising public functions to ensure that they act lawfully and fairly. The scope of the courts' supervisory jurisdiction through judicial review is limited in terms of both its availability and function. The court's role in such proceedings is not to remake the challenged decision or assess the merits of the decision (except for the purpose of considering its lawfulness), but rather to review the process by which the decision was reached, in order to determine whether it was vitiated by some flaw.

The WUC claimed that the Agencies' decisions not to use their powers to investigate or block cotton imports from the XUAR were flawed because the Agencies had misunderstood or misdirected themselves as to the application of two key statutes:

- The Foreign Prison-Made Goods Act 1897 (the "**FPMGA**"), which gives UK authorities power to block the import of goods produced (in whole or part) in a foreign prison.

The WUC claimed that the Agencies ought to have been actively investigating and thereafter prohibiting the import of cotton goods originating in the XUAR under the powers available under the FPMGA (and the associated Customs and Excise Management Act 1979).

The Agencies contended that the evidence provided was not sufficient to meet the standard of proof required under the FPMGA, since an officer needs to be satisfied on the balance of probabilities that the product was in fact made in a foreign prison. The Agencies contended that the evidence needs to link a specific consignment of goods to a specified facility that constitutes a foreign prison.

- The Proceeds of Crime Act 2002 ("**POCA**"), which sets out the UK's principal money laundering offences applicable to dealing with "criminal property," which is defined broadly to include property that constitutes or represents a person's benefit from criminal conduct (in whole or part, directly or indirectly), regardless of where that criminal conduct occurred.

  The WUC claimed that the Agencies (specifically the NCA) should be investigating the imports under POCA, on the basis that cotton goods originating in the XUAR could be criminal property and trading in them could be criminal conduct.

  The Agencies (specifically the NCA) contended that there was no proper basis for a POCA investigation on the evidence provided, including because section 340 of POCA requires that both the criminal conduct and the resultant property are clearly and specifically identified. The NCA considered it insufficient, for POCA purposes, to deal in hypothetical scenarios or presumptions. The NCA concluded that, in the absence of identifying a specific consignment of goods as the product of the relevant criminality, section 340 is not met and no POCA offence (i.e., a money laundering offence) can arise.

The evidence which the WUC had provided to the Agencies was considered in court. Both the Agencies and the judge emphasised that the evidence itself was not disputed by the Agencies.

However, the High Court dismissed the WUC's application and held that the Agencies' analyses and decisions were legally sound, and that they had not misdirected themselves as to the law or the requirements of the statutes under consideration.

The WUC has not filed an appeal.

## Significance of the Case

The judgment is significant in a number of respects, not least because the Court's review has revealed the NCA's position as to how POCA will apply in relation to alleged human rights violations in supply chains. The judgment includes extracts of a letter sent by the NCA to the WUC outlining its analysis of POCA and indicates that it will be ready to investigate and take action against corporates for money laundering offences under POCA when the requisite evidence is available.

In particular, the NCA's letter expressly stated that, in the context of supply chains:

- Offences contrary to the Modern Slavery Act and/or the International Criminal Court Act are capable of constituting criminal conduct for the purposes of POCA (under section 340);

- Section 329 of POCA (i.e., the offence of acquisition, use, and possession of criminal property) is the appropriate offence, rather than section 328 (i.e., the offence of being involved in an arrangement in relation to criminal property); and

- Section 329(2)(c) of POCA provides a defence for persons who acquire or possess criminal property for adequate consideration, which gives effect to the policy aim of the POCA regime, which does not seek to taint the bona fide purchaser for value, but rather seeks to recover the proceeds of crime in the hands of criminals. The latter clarification should be reassuring for corporates that engage in fair market value transactions.

In practice, the complex nature of modern international supply chains (which frequently involve many tiers and transactions) will mean that it will be relatively difficult for UK agencies to meet the evidentiary hurdles required under the FPMGA (i.e., the civil standard: on the balance of probabilities) or Part 7 of POCA (i.e., the criminal standard: beyond reasonable doubt). The *WUC* case itself serves as an example of how difficult it can be, even when there is undisputed evidence of human rights violations. However, there remains at least some risk that criminal conduct in a supply chain may be clearly and specifically identified and linked to resultant property that can be specifically identified. Furthermore, consistent with the increasing regulatory and enforcement focus in many jurisdictions on forced labour and other human rights violations, UK agencies may over time be inclined to test the boundaries of these evidentiary standards.

## Selected Other Takeaways and Broader Trends

The global direction of travel for human rights legislation, regulatory enforcement and litigation all point in the same direction: more. It is important for multinationals to take a holistic approach to assessing human rights risks, including in their supply chains, and their related compliance initiatives.

***The potential for UK money laundering liability for human rights violations in a supply chain has broader application, beyond cotton and the XUAR***

The principles being argued in the *WUC* case are not limited to cotton or the XUAR. They are industry and region agnostic. Therefore, corporates with supply chains involving regions with widespread allegations of modern slavery or other human rights violations should take heed of the NCA's position regarding how POCA applies to human rights violations in supply chains.

It is also clear that the NCA's analysis, endorsed by the Court in this case, could apply equally to a range of other offences, including, for example, offences contrary to environmental legislation, which would be capable of constituting criminal conduct – and the resultant benefits or goods could constitute criminal property – for purposes of the UK's money laundering legislation.

In addition, POCA imposes obligations on financial institutions and others within the UK's regulated sector to make disclosures to the NCA if/when they have knowledge or suspicions of (or reasonable grounds for knowing or suspecting) that another person is involved in money laundering. These regulated entities therefore should be mindful of potential reporting obligations in light of the *WUC* case. They should also assess the sufficiency of policies and procedures for assessing and reporting transactions involving goods from regions where allegations of human rights violations are well documented.

***Regulators in other jurisdictions also are seeking to address human rights issues in supply chains, albeit in different ways***

For example, France established a Central Office to Fight Crimes Against Humanity, Genocide, and War Crimes in 2013 and, in June 2021, prosecutors announced that they had opened an investigation into several multinational fashion retailers suspected of involvement in Uyghur forced labor in the XUAR for the offence of "concealment of crimes against humanity." The investigation is ongoing. The investigation followed complaints from NGOs including Sherpa, the European Uyghur Institute and the Collectif Éthique sur l'Étiquette.

In the United States, enforcement of Section 307 of the U.S. Tariff Act has increased exponentially. Section 307 of the Tariff Act prohibits the importation into the United States of ‘‘goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part” by convict, forced or indentured labour. The goods are subject to seizure and the importer may be subject to civil and criminal penalties. Section 307 has become an even more powerful statute with the adoption of the Uyghur Forced Labor Prevention Act. That Act creates a rebuttable presumption – which took effect in June 2022 – that, for the purposes of Section 307 of the Tariff Act, goods produced wholly or in part in the XUAR are produced using forced labour. The Uyghur Forced Labor Prevention Act is discussed in our earlier Alerts here and here.

Additionally, in the last few years, legislation to address adverse human rights impacts has been proposed or adopted in several jurisdictions, including among others Belgium, France, Germany, Mexico, the Netherlands, Norway, Australia, New Zealand and at the EU level (both mandatory human rights due diligence and forced labour legislation). Please visit the links for Ropes & Gray Alerts on these topics. Many of these instruments contemplate additional enforcement touchpoints for regulators.

***The WUC case is another example of increasing litigation activism by NGOs***

The *WUC* case is yet another example of “litigation activism” by NGOs and interest groups. This activism is likely to continue to increase, since NGOs are increasingly developing well-funded, innovative, and high-profile litigation strategies to seek to force governmental authorities and corporates into taking action to address a wide range of human rights and other social issues involving supply chains, as well as environmental issues. In many cases, new mandatory human rights due diligence legislation will enhance access to remedy. Links to some of these instruments appear earlier in this Alert.

To date, much of the litigation activism has been in the environmental sphere. For example, NGO ClientEarth claims to have 168 active cases underway. In February 2023, the NGO filed a UK claim against the board of directors of a leading energy company, alleging that the directors breached their legal duties under the Companies Act to manage climate risk facing the company. Another recent claim submitted in France in January 2023 alleges that a large food products company failed to comply with French legislation that requires corporates to acknowledge and address the impacts of their operations on the environment, health, and human rights in connection with its global plastic pollution.

Even where these cases are unsuccessful or the authorities decline to open investigations, they can lead to significant publicity and possible reputational damage for the corporates concerned.

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