

## Takeaways From World Uyghur Congress Forced Labor Ruling

By **Peter Hood, Max Hill and Alex Tivey** (August 1, 2024, 2:20 PM BST)

The Court of Appeal's judgment in *R (on the application of World Uyghur Congress) v. National Crime Agency* in June confirms that anyone who imports or sells goods in the U.K., knowing or suspecting that they are the product of forced labor, is potentially liable to criminal investigation and prosecution.[1]

This gives rise to a significant legal risk for U.K. companies importing cotton produced in Xinjiang Uyghur Autonomous Region, or XUAR, as well as other high-risk products such as cocoa, sugar and cobalt.

This article looks at the Court of Appeal's judgment and considers what it means in practice, including in relation to companies' supply chain due diligence.

### Background

In April 2020, the World Uyghur Congress, or WUC, sent evidence to the National Crime Agency that serious human rights abuses were taking place in the XUAR and that cotton from that region likely resulted from forced labor.

The NCA declined to investigate, stating that it was not required to do so unless a specific shipment of cotton had been identified as the proceeds of crime. It also said that once someone in the supply chain had paid adequate consideration, i.e., market value, for the product, it could no longer be criminal property, per the exemption in Section 329(2)(c) of the Proceeds of Crime Act 2002, or POCA.

The WUC was unsuccessful in its challenge of the NCA's decision by way of judicial review and it appealed. The Court of Appeal allowed WUC's appeal and quashed the NCA's decision.

### Court of Appeal Judgment

Echoing the high court's findings, the Court of Appeal said that it was accepted that there was "a diverse, substantial and growing body of evidence" that large-scale human rights abuses were occurring in the XUAR.

The WUC's unchallenged evidence was that 85% of all cotton grown in China comes from the XUAR.



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Justice Ian Dove at first instance in *World UYGHUR Congress v. HMRC* in 2023 referred to a "striking consensus" of "clear and widespread abuses in the cotton industry in the XUAR, involving human rights violations and the exploitation of forced labor." Specifically, Justice Dove noted that there was "clear and undisputed evidence of instances of cotton being manufactured in the XUAR by the use of detained and prison labor as well as by forced labor."<sup>[2]</sup>

The Court of Appeal went on to hold that the NCA had erred in law in two fundamental respects. First, it is unnecessary to identify specific criminal property and conduct, i.e., a specific consignment of cotton produced by forced labor before determining that there can be a proper basis for an investigation under POCA. Such an understanding could discourage the NCA and other investigative bodies from commencing investigations, including in relation to corruption, in the absence of concrete evidence of particular crimes carried out by particular persons.

Second, the payment of adequate consideration at some point in the supply chain does not deny a shipment of cotton produced by forced labor its criminal character. A purchaser or importer who suspects that goods are the product of forced labor or other serious human rights abuses would therefore not be able to rely on the "adequate consideration" exemption under POCA.

In allowing the WUC's appeal, the Court of Appeal ruled that the question of whether to carry out an investigation should be remitted to the NCA for reconsideration.

### **Products of Forced Labor Are Criminal Property**

"Criminal property" is broadly defined in Section 340 of POCA as any benefit derived from criminal conduct, or any property representing the same. Any proceeds relating to the sale of cotton or other products created through forced labor will therefore fall within that definition.

Additionally, Part 5 of POCA provides a scheme for the recovery through civil proceedings of property that is, or represents, "property obtained through unlawful conduct."

Unlawful conduct includes conduct that "constitutes, or is connected with, the commission of a gross human rights abuse or violation" that occurs outside the U.K.

### **Knowledge or Suspicion**

A person commits an offense under Section 328(1) of POCA if they enter into or become concerned in an arrangement that they know or suspect facilitates the acquisition, retention, use or control of criminal property by or on behalf of another person.

Knowledge is a high bar, and one that is unlikely to be met in the majority of supply chain cases. The threshold for suspicion, however, is much lower. Suspicion does not have to be clear, or firmly grounded and targeted on specific facts — rather, it only needs be "more than merely fanciful," as per *R v. Da Silva* in 2006.<sup>[3]</sup>

Given widespread and credible public reports on the prevalence of forced labor in the sector, this would be a relatively easy threshold for investigators and prosecution authorities to surmount.

This will be particularly the case for any companies conducting human rights due diligence on their supply chain and publicly reporting pursuant to EU sustainability legislation such as the Corporate

Sustainability Due Diligence Directive or the Corporate Sustainability Reporting Directive — or, voluntarily, pursuant to the U.N. Guiding Principles on Human Rights.

### **Potential Penalties**

Unlike in the EU, there is no legislation in the U.K. that prohibits the importation of goods made using forced labor. However, an individual that is guilty of any of the primary money laundering offenses, i.e., those contained in Sections 327, 328 and 329 of POCA, is liable to a maximum of 14 years' imprisonment or an unlimited fine.

For a corporate entity, the maximum penalty is an unlimited fine.[4] Further, following the introduction of the Economic Crime and Corporate Transparency Act 2023, a company will now be guilty of a money laundering offense if a "senior manager ... acting within the actual or apparent scope of their authority" commits that offense.[5]

### **Practical Consequences**

The NCA may still decide not to open an investigation in this case or other similar cases, for example on the grounds that it lacks the necessary resources, has other operational priorities or that the likelihood of successful prosecution is too low.

However, this judgment makes it clear that companies buying and selling goods suspected to be products of forced labor can, in principle, be investigated and prosecuted for money laundering under POCA. And, given the relatively low threshold for suspicion under POCA, this presents significant legal and reputational risk, not just to companies importing cotton from the XUAR, but to a range of companies importing or selling goods containing other high-risk materials such as cocoa and critical minerals like cobalt.

In certain circumstances, companies may be able to mitigate these risks through implementing supply chain due diligence, in accordance with the U.N. Principles and the Organization for Economic Cooperation and Development Due Diligence Guidance for Responsible Business Conduct.

However, in circumstances where it is not realistically possible to gain unimpeded access to the location in which forced labor is suspected, or to exercise leverage over supply chain business partners such as to prevent the forced labor, this due diligence will be ineffective in mitigating legal risk. In these circumstances, companies will need to consider finding an alternative, lower risk supplier.

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[1] R (on the application of World Uyghur Congress) v. National Crime Agency [2024] EWCA Civ 715.

[2] R (on the application of World Uyghur Congress) v. Secretary of State for the Home Department [2023] EWHC 88 (Admin) at [56].

[3] R v. Da Silva [2006] EWCA Crim 1654.

[4] Section 334(1), POCA.

[5] Section 196(1), ECCTA.