THE GANGMASTERS (APPEALS) REGULATIONS 2006

In the matter of an appeal against a decision made by the

Gangmasters Licensing Authority (Ref 44/E/RV)

The Gurkha's UK Limited

(The Appellant)

V

The Gangmasters Licensing Authority

(The Respondent)

Appointed Person

Ms Gill Sage

Decision and Summary Statement of Reasons of the Appointed Person in relation to the above matter:

Decision

Upon consideration of the appeal documents and accompanying letter lodged by the Appellant dated 21 April 2008 and the response to the appeal lodged by the Respondent it is the decision of the Appointed Person that the appeal of the Appellant be dismissed and the decision will take effect on the date of the promulgation of this decision.

Summary Statement of Reasons

1. This is an appeal against the decision of the Respondent dated the 4 April 2008 to revoke the Appellants license without immediate effect.

2. As a result of the expedited procedure set out in Regulation 20 Gangmasters (Appeals) Regulations 2006 ("the Appeals Regulations") applies, directions have been given to me and the parties have agreed that the appeal will be dealt with without an oral hearing pursuant to Regulation 15 of the Appeals Regulations. The parties have supplied all the documents they wish to rely upon and these have been considered by me in accordance with Regulations 15(3) of the Appeals Regulations.

The Background

3. The Appellant applied for a license on the 24 October 2006 and an application inspection was carried out on the 27 November 2006 a full license was granted on the 28 November 2006. It was noted to be a "new business" and this definition applied to businesses not trading in the required sector at the time of application. As they were not operating in a regulated sector, no worker interviews were carried out at the time and a full assessment of compliance was not obtained.

4. The Appellant called to advise the Respondent that they had begun to supply workers to the Regulated Sector on the 2 November 2007 therefore a compliance visit was scheduled for the 25 March 2008. This inspection was abandoned because the Appellant was not prepared.

5. The compliance visit was carried out on the 27 March 2008 and the Appellant scored 56 points. The failure score was 30 points.

6. In the License Decision Report it recorded that the decision to fail was made in respect of the following:

    a. The Inspector was unable to confirm that National Insurance and income tax payments were correct as no PAYE records were available for inspection. The inspector reported that he was informed by the Principal Authority that the records were kept by the son of an employee on his PC in his bedroom.

b. No workers had been paid holiday or sick pay (SSP). The labour provider had therefore admitted to withholding wages.

c. No wage slips could be produced by the workers or the labour provider and no evidence could be provided that the workers had received wage slips.

d. The records of 18 workers had been inspected and 8 of those had worked more than 48 hours. There was no evidence that workers had signed an opt out agreements.

e. The workers had not received health and safety training

f. The labour contract only showed an entitlement to 20 days holiday whereas from the 1 October 2007 all workers were entitled to 24 days holiday per annum (for a 5 day working week). There was no mention of maternity pay in the contract. Two workers did not have contracts at the time of inspection.

g. Records were not kept for workers. For 11 out of 18 workers no records could be found or where in the process of being assembled.

7. On the basis of the above inspection outcome, the decision was made to revoke without immediate effect by a letter dated the 4 April 2008 the decision taking effect on the 1 May 2008 unless an appeal was submitted by the Appellant. The Appellant appealed by a letter and an appeal form dated the 21 April 2008. The letter confirmed that the labour provider:

> **"Was set up by an Ex-British Gurkha to assist in the placement and recruitment for similar Ex-British serving Gurkha's and is currently very small with only one main customer"**

In addition to setting out their grounds of appeal, at the end of the letter they stated that:

> **"We ask you that you give us the opportunity to explain and detail our position with the intention of keeping out (sic) license and demonstrating to you we are a compliant labour provider"**

8. The Appellant spoke on the telephone with the Respondent Secretariat on the 24 April 2008 about the appeal and the Appellant was made aware of the difference between a written determination and an oral hearing.

9. By a letter dated the 22 May 2008 the GLA Secretariat wrote to the Appellant informing him that the Respondent was content for the matter to be dealt with without the need for a formal hearing. The Appellant was asked to respond within 10 days to indicate whether he was content with this suggestion. The letter was received by the Appellant on the 23 May 2008. Having not responded, the Secretariat then wrote to the Appellant a second letter dated the 10 June 2008 (which was received by the Appellant on the 11 June 2008) asking for a response. As no response was received, the matter was therefore referred to the Appointed Person for a written determination of the matter.

Finding in relation to the alleged breaches of the Licensing Standards

The findings of fact in relation to the breaches of the Licensing Standards I find to be as follows:

1. Breach in relation to **Standard 2.2:**

   The compliance visit found that, despite giving advanced warning of the documentation that they required to see on the visit (which was abandoned on the first attempt) it was found that the first payments of income tax and national insurance had been made one day after the inspector's initial visit, even though the contract for the supply of labour had been in place for 4 to 5 months. The inspector could not view the documentation relating to payments of tax and national insurance as they were not on site despite a request to see them. The inspector was unable to view the documentation as the Appellant told the Respondent that the son of an employee kept the employee records on his PC in his bedroom. The inspection concluded that there was no proper scheme in place to collect national insurance and income tax and VAT or that these had been paid to the collecting authorities'. It was concluded on the facts before them that there was a clear breach of this standard. The Appellants appeal letter responded that they had made the **"yellow payment booklet"** available at the inspection together with a breakdown per staff member of the payments made. They accepted that the accounting is processed by a relative of the owner off site but that it was **"incorrect to insinuate that this is being carried out in a bedroom, it is not".**

2. Having considered the evidence given by the Appellant and the Respondent, it was not disputed that the records were not kept on site and that they were not available for inspection as required. It was noted that standard 2.2 requires that **"Deductions from workers' pay of income tax and National Insurance are accurate, appropriate and paid to HMRC"**. The Respondent on the compliance visit was not able to clarify the amounts properly due in respect of tax and National Insurance as the records were not available and the Appellant does not claim that these records were available at the time. Although in the appeal the Appellants refer to the yellow book, this document would not have been able to show the calculations carried out for each worker to establish whether the income tax deductions were correct. There was also no evidence available at the inspection, nor do the Appellants contend that any evidence was available, that the appropriate and correct sums had been paid to the HRMC, that being the case the Respondent's were entitled to conclude on the facts before them that there had been a failure of this standard. Even though the Appellants objected to the insinuation that the accounting was being carried out in a bedroom; that is beside the point. Irrespective of where the accounting is performed, it should be available for inspection at the appropriate time and it is made clear in Licensing Standard 2 that "**Documents must be properly maintained and retained**". In this case they were not properly maintained and available for inspection when requested. The Respondents were entitled to conclude on the facts that there had been a failure of this standard.

3. Breach of **Standard 2.7:**

   The Respondent maintained that the Appellants had failed to pay holiday or sick pay (SSP) and that the Appellant had admitted to the Respondent's on the visit that he had failed to make these payments. It was concluded that the Appellant had admitted to withholding wages and was a clear breach of this standard. In the appeal letter the Appellants response to this was **"The Company is currently paying all Holiday pay to the left workers and re-training the current workers to their entitlements"**. It was noted that the Appellants did not deny that they were in breach of this standard at the date of the inspection nor that the Respondents were wrong in the conclusions that they reached on the facts. The evidence of the Respondent is therefore not disputed and it is concluded that there is a clear breach of license standard 2.7.

4. Breach of **Standard 2.10:**

   There is a requirement for labour providers to provide itemised accurate payslips for each pay period showing at least income tax, national insurance and other authorised deductions. At the inspection no wage slips could be

produced for inspection by either the workers themselves or the Appellant. In the appellants ground for appeal they stated that **"a sample of the workers pay slips and detailed that the records were held electronically by our accounts service"**. It was noted that the Appellant could not state that pay slips had been produced and had been given to the workers, it was not explained what "a sample" meant. The appeal did not state that the Respondent was wrong to conclude that no payslips had been produced at the inspection. The Appellant did not say why no payslips could be produced by themselves or their workers, therefore on the balance of probabilities the report of the Respondent is accepted as the correct position at the time of inspection, that no wage slips were available for inspection and that as a result the conclusion of the Respondent was correct on the facts available to them at the time to conclude that there had been a breach of this standard.

5. Breach of **Standard 5.2:**

This standard states that all those workers who wish to work above 48 hours per week must sign an opt out to the Working Time Regulations. When the inspection took place it was identified that 8 workers had worked in excess of the 48 hour maximum and there was no evidence of an opt out being signed. The Appellants response on appeal to this point was as follows: **"All the workers who wish to work over 48 hours are requested to sign an opt-out and but (sic) some staff do not wish to and don't sign the agreement so not all staff files have such agreements"**. It was not entirely clear what point was being made by the Appellants but it is no defence for a labour provider to state that workers do not want to sign opt out's if they wish to work over 48 hours per week. It is a requirement of the labour provider to get opt out's signed and to place them on file. The Appellant does not state that the required opt out's have been signed therefore there is a breach of this standard and the Respondent was correct on the facts before them to conclude that there was a failure of this standard.

6. Breach of **Standard 6.2:**

This standard requires a labour user to provide health and safety training to all workers that is appropriate. On the inspection the Respondent discovered that the workers had not received health and safety training and they concluded that either the Appellants system was not working as intended or was not being followed. The Respondent concluded therefore that there was a breach of this standard. On the appeal the Appellants stated that **"The workers were H&S trained/ buddied by the labour user until recently when new workers are being trained by the company"**. The grounds of appeal do not show what health and safety training had taken place and how this was monitored and checked by the Appellant. There was also no evidence of

when the situation had changed and what training was being provided by the Appellant after they took over responsibility for health and safety training. The conclusions of the Respondent were not challenged by the Appellant who found that in fact the workers had not received health and safety training it can only be concluded therefore that the Appellant accepts that at the time of the inspection there was a breach of this standard. There was therefore a breach of this standard.

7. Breach of **Standard 7.3**:

This standard requires that all workers who are employed for more than one month or more under a contract of employment have a written statement of employment particulars. Those terms must include reference to holiday entitlement and SSP. On the inspection, the Respondent discovered that the contracts provided wrongly stated that the holiday entitlement was 20 days per annum (the entitlement had increased on the 1 October 2007 to 24 days) and there was no mention of statutory maternity pay. On the inspection it was discovered that two workers did not have contracts a further two workers had contracts that were not signed and one person did not have a contract. The Respondent held that this was a breach of this standard because the contracts did not correctly include the current holiday entitlement due under the Working Time Regulations, two workers did not have contracts and two had undated contracts. It was held that this was a breach of the standard. The Appellants appeal was stated to be **"All contracts have been amended detailing holiday and maternity entitlement and all workers have been reviewed of their entitlement"**. It can be concluded from this appeal point that the Appellants accept that at the time of the inspection they were in breach. It was taken into consideration that changes made after the inspection does not indicate that the original decision was incorrect. The conclusion is therefore that at the time of the inspection the Respondent was entitled to conclude on the evidence before them that the Appellants were in breach of this standard.

8. Breach of **Standard 9.1:**

This standard requires that all workers files shall include their names, date of birth, address, national insurance number and documentation showing their entitlement to work in the UK. On inspection the Respondent found that records were not kept for all workers. 11 out of 18 workers had no records that could be found therefore it was concluded at the time of the inspection that the labour provider was in breach of this standard. In the Appellants appeal they stated that **"All workers files are completed and up to date"**. The Appellant does not deny that he was in breach at the time of the inspection and the fact that he now has complied with the Standard does not

make the respondent's decision on this point open to appeal. It is decided that the Appellant was at the time of the inspection in breach of this standard.

9. The community impact assessment carried out by the Respondent took in to account the impact upon the community and the decision to revoke was taken without immediate effect but it was concluded by the Respondent that there should be no delay in the implementation of the decision to revoke if the matter is held to be in the Respondent's favour and the decision to revoke is upheld. The Respondent makes the point that although the decision to revoke was not with immediate effect this was not to imply that the breaches were not serious. They called for a decision to revoke to be applied immediately if the decision goes against the Appellant.

Decision

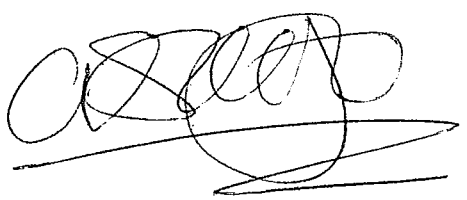
10. It will be noted from the above findings that the Appellant did not successfully challenge any of the Respondent's conclusions in the inspection report. The Appellant did not state that the facts leading to the Respondent's findings were wrong or flawed in some way. The conclusions reached by the Respondent were therefore applied correctly on the facts and the evidence before them at the time of inspection and applied correctly to the license standards, entitling the Respondent in each case to conclude that a breach had occurred and in each case the breach was defined as a major breach. As set out in the findings above, the Respondent was entitled in each case to conclude that the breach had occurred. It can only be concluded therefore that at the relevant time that the decision was taken, the decision to revoke the licence was correct.

11. The Respondent calculated that the score that was achieved by adding up all of the major non-compliance for each category was 56 against a fail score of 30. This score was correctly calculated by the Respondents on the facts before them. Although this decision was appealed, the Appellant failed to set out any grounds on which the original decision was challenged. They stated in their appeal that certain breaches had, since the inspection been corrected (in relation to breaches 2.7, 7.3 and 9.1), but action taken after the inspection is irrelevant to the fact that the Appellant was found to be in breach at the date of the inspection leading to the conclusion that the Appellant had failed to comply with the standards set down by the Respondent.

12. I am reminded that the GLA was set up to "protect workers from exploitation" and the licensing scheme sets out to protect workers in the industries that are

subject to regulation. In this case all of the breaches were in relation to existing and long standing rights to protect employees and workers in the workplace. The breaches were major and resulted in the workers being exposed to significant hardship and possible risk in the workplace due to health and safety failing (not only in respect of failing to provide training but also in respect of failing to give paid holiday and to secure the 48 hour opt out).

13. It is my decision that the appeal be dismissed and that the revocation take place with immediate effect. It was noted in the Respondent's response to the Appellants appeal that any delay in the implementation of the decision would result in workers suffering further exploitation and as there had been significant breaches relating to health and safety and Working Time Regulations provisions I am satisfied that the revocation should take place on the date of the promulgation of this decision.

Signed 

Dated 1-7-08.

Person appointed by the Secretary of State to determine appeals under the Gangmasters (Appeals) Regulations 2006