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Our reference LNV/mjc/54660/4

Your reference

Date 25 August 2009

**For the Personal Attention of Rt Hon Andy Burnham MP**  
Secretary of State for Health  
Department of Health  
Richmond House  
79 Whitehall  
LONDON  
SW1A 2NS

**\*URGENT\***

Dear Sirs

**PROPOSED CLAIM FOR JUDICIAL REVIEW REGARDING THE GOVERNMENT'S  
FAILURE TO IMPLEMENT "RECOMMENDATION 6" OF CHAPTER 12 OF THE REPORT  
DATED 23 FEBRUARY 2009 OF THE INDEPENDENT PUBLIC INQUIRY INTO  
CONTAMINATED BLOOD AND BLOOD PRODUCTS CHAIRED BY THE RT HON LORD  
ARCHER OF SANDWELL QC**

**To**

Department of Health

**The Claimant**

Andrew Michael MARCH, a haemophiliac born GRO-C 1973

GRO-C

**The Details of the Matter Being Challenged**

The Claimant requests that you reconsider your Decisions:

- (a) not to follow the recommendation of the Independent Public Inquiry into Contaminated Blood and Blood Products chaired by the Rt Hon Lord Archer of Sandwell QC ("the Archer Inquiry") as to the level of compensation that should be paid to individuals who have contracted HIV and/or Hepatitis C from blood or blood products supplied by the National Health Service;
- (b) to increase the current average annual payment for beneficiaries under the Macfarlane and Eileen Trusts to only £12,800;
- (c) not to review the level of payments made to victims from the Skipton Fund until 2014.

DEPT OF HEALTH  
RECEIVED  
27 AUG 2009  
CORRESPONDENCE  
PRIVATE OFFICE CC12

## The Issues

In the absence of a specific reference in the Response to the Scheme which applies in Ireland to compensate any person who has contracted HIV and/or Hepatitis C following treatment with contaminated blood or blood products, the Government's silence is construed as a Decision not to implement Recommendation (6.)(h.).

Since the Government has only committed itself to increasing payments to an average of £12,800 per annum to individuals under the Macfarlane and Eileen Trusts (therefore to HIV victims alone) and has denied an increase in the payments to individuals infected with Hepatitis C before 2014 when the Skipton Fund will be reviewed, this is also a Decision not to implement Recommendation (6.)(h.) because these sums do not represent anywhere near parity with the average award under the compensation scheme in existence in the Republic of Ireland.

Following the failure to address Recommendation (6.)(h.), the relevant Minister of State, namely the Minister for Public Health, Gillian Merron MP, has subsequently dealt with the fact that Lord Archer's specific recommendation of parity with Ireland was overlooked in the Response:

- On 1 July 2009 the Minister was specifically challenged by Dr Brian Iddon MP on the question of parity with Ireland in a Westminster Hall debate. In response to a request for clarification of an earlier comparison with Ireland, the Minister replied that comparison with Ireland could not be accepted because the Irish Blood Transfusion Service was found to be at fault, stating that *"a judicial inquiry in Ireland found failures of responsibility by the Irish blood transfusion service and concluded that wrongful acts had been committed. As a result, the Government of the Republic of Ireland decided to make significant payments to those affected. As I will explain, that was not the case with the blood transfusion service here."*
- The Minister further explained that the payments made in the UK *"are not compensation but ex-gratia payments. That is an important distinction. Lord Archer made recommendations on the payments and made comparisons with Ireland. However, it is important to re-state that the position in Ireland is very different. The independent inquiry in Ireland found the transfusion service to be at fault because it had not followed its own official guidelines in protecting the blood supply from contamination. That is not the case in the UK. Comparable levels of payment are therefore not appropriate."*

We consider the Decisions of the Secretary of State were unlawful because:

1. The Decisions were made under an error of material fact; and/or
2. The Decisions were unreasonable; and/or
3. The Government took into account irrelevant considerations and/or failed to take into account relevant considerations in making the Decisions; and/or
4. The Government has failed to give adequate reasons for the Decisions.

### 1. Error of Material Fact

We consider that the Government is wrong about the basis upon which the Irish Government established the Tribunal to compensate people who have contracted HIV and Hepatitis C through blood and blood products. In making a distinction between the Irish Government and



itself, the Government has misdirected itself as to the facts of the situation in Ireland. Therefore the Secretary of State's Decision not to implement Recommendation (6.)(h.) that compensation be paid to victims of the contaminated blood affair who have contracted HIV and/or Hepatitis C at a level "*at least the equivalent of those payable under the Scheme which applies at any time in Ireland*" was made under an error of material fact.

The Government has consistently and repeatedly expressed the view that a relevant distinction can be made between the situation in Ireland and that in the United Kingdom, namely that the compensation scheme in Ireland was set up as a result of findings of fault and/or liability on the part of the State by independent or judicial inquiries. The Government argues that compensation in the United Kingdom is applied *ex gratia* without any findings of fault and/or liability on the part of the State and therefore parity with the scheme in Ireland cannot be justified.

The Claimant can prove that the compensation scheme in Ireland was not set up in response to any findings of fault and/or liability on the part of the State, neither has any fault and/or liability been proven or admitted on the part of the Irish Government. The Irish Government has in fact been advised that it is not liable to the victims. The compensation scheme in Ireland is a 'no-fault' scheme and thus is readily comparable to the situation in the United Kingdom. To base a Decision not to implement Recommendation (6.)(h.) on the distinction between the two situations is to base it on an error of material fact. It is therefore unconstitutional and unlawful.

## 2. Unreasonableness

The Decision to increase payment for beneficiaries of the Macfarlane/Eileen Trusts to an average annual payment of only £12,800 was 'Wednesbury' unreasonable<sup>1</sup> because it makes an arbitrary and illogical distinction between victims of HIV (who will be offered increased compensation at modest levels) and victims of Hepatitis C (who will not receive any increased compensation at all) because it is not based upon the impact of whichever virus (or the combination of the two), nor is it based upon the actual loss suffered by the individual.

Further, having accepted that there was proper reason for reviewing and increasing the amounts payable under the Macfarlane and Eileen Trusts immediately, it was illogical and unreasonable to delay review and possible increase of the amounts payable from the Skipton Fund until 2014.

Further again, the Decision to reject Recommendation (6.)(h.) was unreasonable because it is based upon a capricious distinction between compensation due in circumstances of State liability following a finding of fault and the situation when the State is not liable. This constitutes an exercise of discretion on the part of the Secretary of State beyond the bounds of reason and good faith in line with the policy and objects of the provision of healthcare to citizens under the National Health Service Acts.

This Decision was also unreasonable because it was based on the erroneous justification that parity with Ireland is not appropriate because the Irish Government has admitted liability after findings at fault.

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<sup>1</sup> *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223

### 3. Relevant/Irrelevant Considerations

The Secretary of State has taken into account irrelevant considerations in basing his Decisions on an erroneous distinction between fault-based liability in Ireland and the lack of findings of fault in the United Kingdom. Further the Secretary of State has failed to take into account the relevant consideration that the situation in Ireland is directly comparable to that which pertains to the United Kingdom. The Secretary of State's decision is thereby *ultra vires* and void<sup>2</sup>.

### 4. Failure to Give Adequate Reasons

The Secretary of State has failed to give adequate or detailed reasons for deciding not to implement Recommendation (6.)(h.) In the Response published 20 May 2009 the Government did not give detailed reasons for the Decisions and subsequently has only made certain of its reasons for its Decisions not to implement fully Recommendation (6.) known to interested parties. The Government has a duty to explain its reasons for deciding to reject Recommendation (6.) and in not doing so has acted unlawfully.

### The Details of the Action that the Defendant is Expected to Take

The Claimant requests that the Government reconsiders the Decisions not to implement Recommendation (6) of the Archer Report for the reasons set out above which make the Decisions unlawful, arbitrary and unconstitutional.

### The Details of the Legal Advisers Dealing with this Claim

Michael Fordham Q.C.  
Blackstone Chambers  
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LONDON  
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Michael Mylonas  
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3 Serjeants Inn  
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<sup>2</sup> *R v Ealing LBC ex parte Times Newspapers Ltd* (1986) 85 LGR 316

### The Details of any Interested Parties

The Haemophilia Society  
First Floor  
Petersham House  
57a Hatton Garden  
LONDON  
EC1N 8JG

### The Details of any Information Sought

Please provide information regarding the steps taken to investigate the substantive and procedural history behind the compensation scheme in Ireland for those infected as a result of treatment with contaminated blood or blood products.

### The Details of any Documents that are Considered Relevant and Necessary

A full request for disclosure of relevant and necessary documents will follow.

### The Address for Reply and Service of Court Documents

Michelmores LLP, Woodwater House, Pynes Hill, Exeter, Devon, EX2 5WR.

### Proposed Reply Date Involved

No later than 14 days from the date of this letter.

We first wrote to your predecessor, the Rt Hon Alan Johnson MP by letter dated 18 December 2008 regarding our clients [GRO-A] (dob [GRO-A] 1956) and [GRO-A] [GRO-A] (dob [GRO-A] 1956) before the Archer Report was published and again by letter of 28 April 2009 on behalf of the same clients following publication of the Archer Report to request information on how the Government intended to implement the proposals for increased financial compensation set out in Recommendation (6).

These clients, like the present Claimant, Andrew Michael MARCH are also mandated members of TaintedBlood and may be added as Claimants in this action. No reply was ever received from the Secretary of State to either letter and this firm received no acknowledgement.

The Claimant has taken Counsel's advice as to whether or not the Government's response to the Archer Report dated 20 May 2009 constitutes a decision not to implement the relevant paragraph of Recommendation (6). Counsel advised that the Government's response does constitute the relevant Decision, therefore the Claimant applied for permission to commence judicial review proceedings on 20 August 2009.

At the same time the Claimant applied for permission to extend time for service of the Claim Form upon you so that the Pre-Action Protocol for Judicial Review could be followed. In such circumstances, please treat this letter as a Letter Before Action according to the Protocol. However given that we have been corresponding with the Secretary of State since 18

December 2008, we consider that you have had notice of the issues surrounding the Claimant's application for permission to commence judicial review proceedings.

Yours faithfully

GRO-C

**MICHELMORES LLP**

Email: Inv@ GRO-C