

CORE Coalition
Unit 2.12, The Foundry
17-19 Oval Way London
SE11 5RR
t. 0203 752 5712

The Registrar of the Supreme Court
The Supreme Court of the United Kingdom
Parliament Square
London
SW1P 3BD

29th May 2019

Dear Lord and Lady Justices,

RE: Rule 15 submission to the Supreme Court of the United Kingdom by CORE Coalition and Others on behalf of *Okpabi and others vs Royal Dutch Shell plc and another*, UKSC 2018/0068.

We, the undersigned, are civil society organisations from around the world concerned with the negative environmental and human rights impacts of UK-headquartered multinational companies. On the 27th April 2018, the CORE Coalition and our international partners submitted under the Rule 15 procedure in support of the Claimants' application for permission to appeal in *Okpabi and others v Royal Dutch Shell plc and another* [2018] EWCA Civ 191 (*Okpabi*). Today, in light of the recent ruling in *Vedanta Resources PLC and another v Lungowe and others* [2019] UKSC 20 (*Vedanta*), we write in further support of the Claimants' application for permission to appeal.

In response to our first petition, the Court stated it would consider the Claimants' application for permission to appeal once judgment had been handed down in *Vedanta*. As set out in our previous submission, there are strong independent reasons for subjecting *Okpabi* to the analysis of the Supreme Court. From the perspective of civil society, it is clear that the judgment in *Vedanta* has only strengthened the case for accepting the Claimants' application. In particular, the inconsistencies between the *Okpabi* and *Vedanta* rulings have left victims of

business-related human rights abuse uncertain about the exact scope of parent company liability and their prospects of redress. Furthermore, many aspects of the *Vedanta* ruling stand in stark contrast to their analogues in *Okpabi*, confirming our fears that *Okpabi* inappropriately restricts access to justice for those harmed by the business operations of UK based multinational companies.

Our reasoning behind these arguments is set out in greater detail below.

1. The inconsistencies between the *Okpabi* and *Vedanta* rulings leave victims of business-related human rights abuse uncertain about the exact scope of parent company liability and their prospects of redress. With the UK home to many large multinational corporations operating in jurisdictions around the world, it is essential that the victims of alleged human rights and environmental abuse caused by these operations are given legal clarity regarding their prospects in seeking remedy in the UK courts. UK-headquartered companies have been linked to serious abuses, including exploitative working conditions; toxic pollution; rampant destruction of rainforests; land-grabs and evictions of indigenous peoples and local communities; and violent attacks on human rights defenders. Victims, and indeed businesses, deserve to be given clarity with regard to their rights and obligations. But on a number of issues, including importantly the level of evidence required and the test to be applied in determining whether a parent company has an arguable duty of care to those impacted by the operations of its subsidiaries, the *Okpabi* and *Vedanta* rulings differ substantially. In addition, if left unrectified this discrepancy will unjustly shut out 40,000 Nigerian community members from seeking remedy.

2. As representatives of civil society, we fear that *Okpabi* will inappropriately restrict access to remedy for victims of business-related environmental and human rights abuse around the world. In *Okpabi*, the Claimants were required to show that Royal Dutch Shell plc had active control of the subsidiary's operations and/or actively enforced group-wide mandatory standards. This places an impossibly high evidential burden on claimants at a stage in the proceedings in which they cannot rely on disclosure rules. By contrast, in *Vedanta* it was held to be 'obvious' that proof of such control would depend on the contents of internal documents as of yet undisclosed. It was further found that in addition to demonstration of control, a parent company may incur liability through the issuing of defective group-wide policies and guidelines, or through publicly pronouncing control and supervision of subsidiaries, even if they do not do so in fact. Indeed, in

explicit contradiction to *Okpabi*, the ruling in *Vedanta* found no ‘limiting principle’ that prohibited a parent incurring liability only through issuing group-wide policies.¹

This discrepancy is all the more alarming as UK parent company liability jurisprudence is being relied on to bring corporate accountability cases in many other jurisdictions, including Canada, the Netherlands, Italy, and Germany (e.g. *Garcia v. Tahoe Resources Inc.*, 2017 BCCA 39 – CanLII; *Yaiguaje v. Chevron Corporation*, 2015 SCC 42, [2015] 3 S.C.R. 69; *Ododo Francis v. ENI and Nigerian Agip Oil Company (NAOC)*; *Friday Alfred Akpan et al v. Shell*, Court of Appeal The Hague 17 December 2015, ECLI:NL:GHDHA:2015:3587; *Jabir et al vs. KiK Textilien und Non-Food GmbH*, Landgericht Dortmund, 2016) in which a number of the undersigned have been involved. Establishing that parent companies may have a duty of care to those impacted by the operations of their subsidiaries is an important global development, and vital given the reality of modern global business practices. The inconsistency between *Okpabi* and *Vedanta* on this matter must therefore be clarified.

3. The ruling in *Okpabi* made a number of contentious statements with regard to the relationship between corporate structure and responsibility for business-related environmental and human rights abuses. These include in particular, that both the size of a network of subsidiaries and the corporate structure itself suggest that a parent company could not have intended to assume responsibility for the actions of its subsidiary. This is a particularly damaging line of argument for the Court of Appeal to take. While it may be that in some instances parent companies are merely investors with no direct involvement in the running of the company, that is by no means always the case in fact. Indeed, it is widely known that many multinational companies operate as single commercial undertakings even if they are structured as legally separate entities in different jurisdictions. This fact is now commonly reflected in international instruments on responsible business.² Those responsible for serious abuse cannot be allowed to escape accountability by hiding behind a legal structure that is irrelevant to the operational management of a business.

¹ This is clearly laid out in *Vedanta*, para 52-53.

² See for example, *United Nations Guiding Principles on Business and Human Rights*, Principle 2 and 14; *OECD Guidelines for Multinational Enterprises*, Concepts and Principles, Para 4.; *ICESCR General Comment No. 24*, para 42-44.

We welcome the Supreme Court's approach to this issue in *Vedanta*. In the Court's judgment it was found that there is 'nothing special or conclusive about the bare parent/subsidiary relationship' because there is 'no limit to the models of management and control which may be put in place within a multinational group of companies' with, in some instances, 'the boundaries of legal personality and ownership within the group becoming irrelevant'. We fear that should the Claimant's application not be accepted UK-headquartered multinationals will rely on the jurisprudence within *Okpabi* to avoid responsibility for the impacts of their international operations.

4. The Court of Appeal ruled that international standards on corporate responsibility are irrelevant to the existence of an arguable duty of care. As civil society organisations with a concern for the negative global impacts of multinational companies on human rights and the environment, we have worked to support the development and promotion of international standards on corporate responsibility and consider this analysis erroneous. We believe that contemporary international standards on corporate human rights responsibility must be taken into account in the way the legal system regards acceptable business behaviour.

Those standards and their relevance to cases of parent company liability were, for instance, expounded in the International Commission of Jurists and the Corporate Responsibility Coalition Ltd Statement in Intervention to *Vedanta*. The intervention lays out, for example, the UK States parties' obligation under the International Covenant on Economic, Social and Cultural Rights to 'take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control' and to 'remove substantive, procedural and practical barriers to remedies, including by establishing parent company or group liability regimes'. In addition, domestic materials such as the UK Government publication *Good Business: Implementing the UN Guiding Principles on Business and Human Rights* seek to give effect to and draw on international standards. This document stresses that the UK should 'help support access to remedy for human rights abuses by business enterprises both at home and overseas' which includes 'avenues to pursue civil law claims in relation to human rights abuses by business enterprises.'

Decisions by UK courts are held in high regard by international civil society, business, courts in other jurisdictions and those vulnerable to and suffering from

business-related environmental and human rights abuse. If *Okpabi* is left to stand, a serious blow will have been dealt to victims of human rights abuses caused by multinational companies, unable to hold to account those that benefit from their exploitation. As set out above, while we were encouraged by aspects of the *Vedanta* ruling, the discrepancy between the two judgments makes it all the more important that the Claimants' application for permission to appeal is accepted and the conflict finally resolved.

We look forward to being notified in accordance with practice direction 3 (3.3.18) should the appeal be granted and the intervention taken into account.

Yours Sincerely,

UK Signatories

The Corporate Responsibility (CORE) Coalition
Christian-Aid
Global Witness
Catholic Agency for Overseas Development (CAFOD)
Traidcraft Exchange
Rights and Accountability in Development (RAID)
The Corner House
London Mining Network
Environmental Justice Foundation (EJF)

African Signatories

African Coalition for Corporate Accountability (ACCA)
Ogoni Solidarity Forum, Nigeria
Peoples Advancement Centre (PAC), Nigeria
Ogoni Youth Development Initiative, Nigeria
Natural Resources Alliance of Kenya (KeNRA)
Network Movement for Justice and Development (NMJD), Sierra Leone
Le Forum Tunisien pour les Droits Economiques et Sociaux, Tunisia
Green Advocates International, Liberia
The Natural Resources Women Platform, Liberia

International Signatories

International Corporate Accountability Roundtable (ICAR)

International Federation for Human Rights (FIDH)
Business and Human Rights Resource Centre (BHRRC)
ESCR-Net – The international Network for Economic, Social and Cultural Rights
Inclusive Development International

American Signatories

Justiça Global, Brazil
Environmental Defender Law Centre (EDLC)
Comite Ambiental en Defensa de la Vida, Colombia
Red de Comités Ambientales del Tolima, Colombia
Corporación SOS Ambiental, Colombia
Jorge Carpio, UNTREF, Argentina
Mining Watch, Canada
Above Ground, Canada
Corporate Accountability Lab, USA
Proyecto de Derechos Económicos, Sociales y Culturales, Mexico
Project on Organizing, Development, Education, and Research (PODER), Mexico
Otros Mundos AC/Chiapas, Mexico
Organización Fraternal Negra Hondureña, OFRANEH, Honduras
Foro Ciudadano de Participación por la Justicia y los Derechos Humano
La Fundación Promoción Humana, Colombia

Asian Signatories

Human Rights Law Network, India
ALTSEAN-Burma
POSCO PRATIRODH SANGRAM SAMITI (PPSS), India
Pakistan Fisher-folk Forum

European Signatories

Friends of the Earth Europe
European Coalition for Corporate Justice (ECCJ)
European Centre for Constitutional and Human Rights (ECCHR)
Centre for Research on Multinational Companies (SOMO), Netherlands
CCFD-Terre Solidaire, France
Sherpa, France

Australian Signatories

Human Rights Law Centre, Australia