UK court on Tort litigation Against Transnational Corporations

Ekaterina Aristova, PhD in Law Candidate, University of Cambridge authored this post on 'Tort litigation Against Transnational Corporations: UK court will hear a case for overseas human rights abuses'. She welcomes comments.

On 27 May 2016, Mr Justice Coulson, sitting as a judge in the Technology and Construction Court, allowed a legal claim against UK-based mining corporation Vedanta Resources Plc ("**Vedanta**") and its Zambian subsidiary Konkola Copper Mines ("**KCP**") to be tried in the UK courts. These proceedings, brought by Zambian citizens alleging serious environmental pollution in their home country, is an example of the so-called "foreign direct liability" cases which have emerged in several jurisdictions in the last twenty years. Other cases currently pending in the UK courts include a claim by a Colombian farmer alleging environmental pollution caused by Equion Energia Ltd (formerly BP Exploration), two environmental claims arising from oil spillages against Shell, litigation against iron ore producer Tonkolili Iron Ore Ltd for alleged human rights violations in Sierra Leone and a dispute between Peruvian citizens and Xtrata Ltd involving grave human rights abuses of persons involved in environmental protest against the mining operations.

Transnational corporations ("**TNCs**") have frequently been involved in various forms of corporate wrongdoing in many parts of the world. Severe abuses, reported by non-governmental organisations, range from murder to the violation of socio-economic rights. To date there has been only modest success in developing theoretical and practical solutions for legal enforcement of international corporate accountability. In the absence of an international legally binding instrument addressing human rights obligations of private corporations and the various regulatory problems in host states, a few jurisdictions have evidenced a growing trend of civil liability cases against TNCs. These cases are examples of private claims brought by the victims of overseas corporate abuse against parent companies in the courts of the home states. While US courts continue to debate issues of jurisdiction over extraterritorial human rights corporate abuses, the UK courts have recently being consistent in allowing claims

against local parent companies of TNCs. The case against Vedanta is the most recent example of this trend.

A. Facts of the case

On 31 July 2015, 1,826 Zambian citizens, residents of four communities in the Chingola region, commenced proceedings against Vedanta and KCM in the Technology and Construction Court of the High Court of England, alleging personal injury, damage to property, loss of income, and loss of amenity and enjoyment of land. The majority of the claimants are farmers who rely on the land and local rivers as their primary source of livehood. They also rely on the local waterways as the main source of clean water for drinking, washing, bathing and irrigating farms. The claimants' communities are located close to the Nchanga Copper Mine that is operated by KCM, an indirect subsidiary of Vedanta. The mine commenced operations in 1937, but Vedanta acquired a controlling share in KCM in 2004. KCM operates a mine as a holder of a mining licence in accordance with the local legislative requirements that operations be run through a locally domiciled subsidiary. The claimants allege that from 2005 they have been suffering from pollution and environmental damage caused by the mine's operations. They allege that the discharge of harmful effluent in the waterways has endangered their livelihoods and physical, economic and social wellbeing.

In September and October 2015, both defendants applied for a declaration that the English court does not have jurisdiction to hear the claims. The defendants argued that Zambia was an appropriate forum to try the claims since it is the place where the claimants reside and where the damage is said to have occurred. In the course of a three-day hearing in April 2016 both parties presented their arguments. The judgement allowing a legal claim against both defendants to be tried in England was delivered on 27 May 2016.

B. Jurisdiction over the Parent Company (Vedanta)

The claimants argued that Vedanta breached the duty of care it owed to them of ensuring that KCM's mining operations did not cause harm to the environment or local communities. The allegations are based on evidence that the parent

company exercised a high level of control and direction over the mining operations of its subsidiary and over the subsidiary's compliance with health, safety and environmental standards (para 31). In their argument, the claimants relied on the Court of Appeal's decision in *Chandler v Cape*, which recognised the possibility of parent company responsibility for injuries of its subsidiary's employee and set a test for the establishment of the parent company's duty of care. Based on their submission on the breach of the duty of care by Vedanta, the claimants argued that the English court has jurisdiction over the parent company "as of right" by virtue of Article 4 of the Brussels I Regulation recast ("**Brussels I**"). Vedanta claimed that the court should apply the *forum non conveniens* argument and stay proceedings in favour of Zambia. Furthermore, the parent company claimed that a case against Vedanta is "a device in order to ensure that the real claim, against, KCM, is litigated in the United Kingdom rather than in Zambia" (para 51). Finally, the parent company sought to establish that there is either no real issue between Vedanta and claimants or, alternatively, the claim is weak and it should impact court's decision on the jurisdiction over the case (para 52).

The judicial response to the arguments of the parties was straightforward and explicit. It was held that Article 4 provided clear grounds to sue Vedanta as a UK-domiciled company in the UK (para 53). Mr Justice Coulson placed considerable weight on the decision of the Court of Justice of European Union ("**CJEU**") in *Owusu v Jackson* preventing UK courts from declining jurisdiction on the basis of the *forum non conveniens,* when the defendant is domiciled in the UK. In the view of the judge the different facts of the present case and any criticism of CJEU's reasoning did not make *Owusu* judgement less binding (para 71). Finally, the judge considered the claimants' arguments on the overall control exercised by Vedanta over Zambian mining operations and ruled that there is a real issue to be tried between the claimants and Vedanta (para 77). It was recognised that, although the claimants' argument against Vedanta was a challenging one, the pleadings set out a careful and detailed case on the breach of duty of care which was already supported by some evidence (para 128).

C. Jurisdiction over the foreign

subsidiary (KCM)

KCM also challenged jurisdiction of the UK court by applying for an order setting aside service of the claim form on it out of the jurisdiction. The defendant company claimed that the entire focus of the litigation was in Zambia, and the claim against Vedanta was "an illegitimate hook being used to permit claims to be brought [in the UK] which would otherwise not be heard in the UK" (para 93). In response, the claimants argued that it was reasonable to try claims against both companies in the UK and, alternatively, the claimants would not have access to justice in Zambia (para 94).

Once again the decision of the court did not leave any ambiguity about the jurisdiction of an English court to hear the case about Zambian operations. It was first held that the claim against KCM undoubtedly had a real prospect of success (para 99). It was then established that the claim against Vedanta was arguable under both English and Zambian law (para 124). Furthermore, the judge ruled that it was reasonable for the court to try the claim against Vedanta, who, as a holding company of the group, had "the necessary financial standing to pay out any damages that are recovered" (para 146). Therefore, it was concluded that KCM was a necessary and proper party to the claim against Vedanta (para 147).

Finally, the court unconditionally established that England is the proper forum in which to bring the claim against KCM in accordance with the tests established by *The Spiliada* decision and *Connelly v RTZ* case. The judge decided that the assessment of England as the appropriate forum should be considered in light of the claims against Vedanta (para 160). Following this conclusion, and the earlier finding of the real issue to be tried between the claimants and Vedanta, it was held that England is an appropriate place to hear the claims against two legal entities of the major international company (para 163). Moreover, it was established that the claimants would not obtain access to justice in Zambia should the trial take place there (para 184). In particular, the judge took into account evidence that the Zambian legal system is not well developed (para 176); that the vast majority of the claimants would be unable to afford legal representation (para 178); that there was an insufficient number of local lawyers able to proceed with a mass tort action of such scale (para 186); and that KCM will be likely to prolong the case (para 195).

D. Significance of the decision

The *Vedanta* decision represents another significant achievement for foreign victims and their lawyers struggling with the jurisdictional hurdles of foreign direct liability cases in the courts of the home states. Following decisions in such cases as *Connelly v RTZ, Lubbe v Cape* and *Ngcobo v Thor Chemicals,* the present case contributes to the development of the law relating to the jurisdiction of English courts over foreign violations of human rights by UK-based TNCs. First, the decision clearly confirmed the mandatory application of Article 4 in tort litigation concerning extraterritorial abuses of TNCs. The first tort liability claims in England were intensely litigated for several years on the *forum non conveniens* issue. However, the trial judge's insistence that *Owusu* decision constitutes a binding authority for all cases involving defendants domiciled in UK, now makes it more difficult for defendant corporations to mount arguments over inadmissibility of the extraterritorial adjudicatory jurisdiction over corporate overseas activities.

Secondly, although at this stage of the proceedings the judge did not consider the case on the merits, there is nonetheless acceptance that the parent company may be held responsible for the human rights abuses committed to the members of the community at the place where the subsidiary runs its operations. The judge considered the claimants' "single enterprise" submission about Vedanta being "the real architects of the environmental pollution" (para 78). Moreover, it was recognised that the argument that "Vedanta who are making millions of pounds out of the mine, […] should be called to account […] has some force" (para 78). The acknowledgement of the economic reality of the TNCs and the decisive role of the parent corporation in the overseas operations of the subsidiary speaks in favour of the increasing awareness about the legal gaps in the international corporate accountability. However, a final determination of the liability of TNCs awaits in future decisions.

Another set of issues is raised by the court's reliance on the decision in *Chandler v Cape*. Despite the fact that the case did not have any foreign element, some commentators have already concluded that the ruling may have an influence in the context of TNCs. The reasoning of Mr Justice Coulson has left no doubts that *Chandler* should be considered as an authority for the resolution of the tort liability cases involving foreign operations of UK-based parent companies. Moreover, it was once again confirmed that invoking duty of care is strategically

beneficial for the claimants since: (1) the claim against the parent company provides the required connecting factor of the claim with the UK; and (2) framing the case through the duty of care doctrine provides a means by which the extraterritoriality concerns may be addressed. These arguments are consistent with the judge's finding that arguing breach of the duty of care by the parent company "could have a direct impact on jurisdiction grounds" (para 44). This approach and claimants' success may result in an increase in foreign direct liability cases in the UK courts.

The judgement also provides interesting material for the analysis with respect to the evaluation of the patterns of corporate behaviour in the host states and weak remedies available for the victims of abuses in their states of residence. The judge put considerable weight on the findings about KCM's financial position. Evidence submitted by the claimants provided that there was a real risk that KCM on its own would be unable to meet the claims (para 24). Indeed, undercapitalisation of the subsidiary remains a significant risk for claimants in the tort litigation against TNCs. The limited liability principle in corporate law creates an incentive for shareholders to engage in high risk projects, which plausibly have the possibility to result in moral hazard. Specifically for mass tort actions involving TNCs, the obtainment of final judgment against a subsidiary with no real assets will effectively mean losing the case. By establishing the case against the parent company, the claimants automatically target a pool of assets that would not otherwise be available were litigation to be commenced against the subsidiary in the host state. The compensational nature of the foreign direct liability claims is what makes them most valuable for the claimants

To date English courts have been consistent in treating the parent company and the subsidiaries as distinct legal entities in the context of allocating responsibility within the corporate groups. Similarly, the case law did not derogate from the conventional concept of corporate legal form. However, the fact that Mr Justice Coulson considered the financial position of the subsidiary as raising "legitimate concerns" (para 82) while deciding on the jurisdiction over the parent company, coupled with the increasing number of cases against parent companies allowed in the courts of their home states, suggests that there may be a shift from the traditional approach to the nature of the corporate groups to the more realistic reflection of the economic reality of these complex structures.

Finally, the decision in *Vedanta* case to restrain from the policy judgement on the

assessment of the Zambian legal system (para 198) is in line with the previous practice of the UK courts. First, in *Connelly v RTZ*, the House of Lords avoided making any assessment on the ability of the South African justice system to guarantee the claimants access to justice. Instead, its judgment focused on the personal ability of the claimant to obtain financial assistance of pursuing complex and expensive litigation. Later, in the *Lubbe v Cape* the House of Lords again decided to refrain from considering the influence of such public interest factors in the private interests of the parties and the ends of justice. Similarly, Mr Justice Coulson held that "criticism of the Zambian legal system" was not "the intention or purpose" of the judgement and, therefore, could not be regarded as "colonial condescension". Nevertheless, findings on the court about weak remedies available for the claimants in Zambia have been already questioned by Zambian President Edgar Lungu, which again raises the issue of judicial imperialism of the developed states through exercise of the extraterritorial jurisdiction over overseas operations of local TNCs.

Whether the English courts will take the ground breaking decision to rule that the parent company should be held liable for the overseas operations of its subsidiary is open to debate. It may not even be answered in this case, with settlement remaining a real possibility. Martin Day, a partner at the firm representing the Zambian farmers, has already called for the defendants to "engage in meaningful discussions and try to resolve these claims". An out-of-court settlement will again leave legal practitioners, academics and human rights activists without a single UK precedent on parent company liability in tort litigation against TNCs.