Court of Appeal allows in England claims against English-based multinational for overseas human rights violations

Written by Ekaterina Aristova, PhD in Law Candidate, University of Cambridge

On 14 October 2017, the London's Court of Appeal passed its long awaited decision in *Lungowe v Vedanta* confirming that foreign citizens can pursue in England legal claims against English-based multinationals for their overseas activities.

In 2015, Zambian villagers commenced proceedings against Vedanta, an English-based mining corporation, and its indirect Zambian subsidiary, KCM, alleging responsibility of both companies for the environmental pollution arising out of the operation in Zambia of the Nchanga Copper Mine by KCM. In 2016, the High Court allowed claims against both companies to be heard in England. The overall analysis of the judgement (see the author's earlier post on this blog) suggested that (1) claims against the parent company on the breach of duty of care in relation to the overseas operations of the foreign subsidiary can be heard in the English courts and (2) the existence of an arguable claim against the English-domiciled parent company also establishes jurisdiction of the English courts over the subsidiary even if the factual basis of the case occurs almost exclusively in the foreign state. The Court of Appeal has entirely upheld a High Court ruling.

Vedanta has focused their argument on the fact that Article 4 of the Brussels I Regulation Recast does not automatically allow an English-domiciled parent company to be sued in England and, despite the CJEU's ruling in *Owusu v Jackson*, there is always discretion as to whether the English court should allow the claims to be tried in England. In response, the three appeal judges were very clear in confirming the univocal effect of *Owusu* decision which precludes English courts from declining a mandatory jurisdiction to try claims against the English-domiciled defendant. Logically, analysis further moved to KCM's applications. KCM as a foreign defendant was brought into proceedings on the basis of a

‘necessary or proper party’ gateway under the English traditional rules of jurisdictions. It allows service out of the jurisdiction subject to two additional conditions: (1) there is between the claimant and English-domiciled defendant a real issue which it is reasonable for the court to try; and (2) England is the proper forum for trying the claims. Unsurprisingly, an initial question of whether uncustomary claims alleging liability of the local parent company for overseas damages are viable in England was a major stumbling block for the corporate defendants.

First of all, Lord Justice Simon, who delivered a leading judgement, confirmed that absence of the reported cases on the breach of duty of care by the parent company owed to the persons affected by its subsidiary’s operations does not automatically render such a claim unarguable. He then relied on several well-known English cases to derive basic principles for the imposition of such duty of care on the parent company: (1) The three-part test of foreseeability, proximity and reasonableness set out in *Caparo Industries Plc v Dickman* constitutes a starting point of the analysis; 2) A duty of care may be owed, in appropriate circumstances, to the employees of the parent company and those directly affected by the subsidiary’s operations; 3) Such a duty of care arises when the parent company has taken direct responsibility for devising a material health and safety policy the adequacy of which is the subject of the claim, or controls the operations which give rise to the claim; 4) Some of the circumstances in which the existence of the duty of care may, or may not, be established can be traced in *Chandler v Cape* and *Thompson v The Renwick Group*; 5) It is necessary to determine whether the parent company was well placed, because of its knowledge and expertise to protect the claimants; proving that parent company and the subsidiary run the same business is not sufficient; (6) The evidence sufficient to establish the duty may not be available at the early stages of the case. Following these principles, it was concluded that, irrespective of the strength or the weakness of the claim against the parent company (as opposed to the claim against the subsidiary as an operator of the mine) and in light of the supporting evidence already presented by the claimants, the claim against Vedanta cannot be dismissed as not properly arguable.

The Court of Appeal’s decision is particularly interesting for two reasons. The first issue relates to how its conclusions should be approached in the context of similar environmental litigation against English-based multinational in *Okpabi v Shell*.

Earlier this year, Fraser J, sitting as a judge in the Technology and Construction Court, ruled that a claim against English-based parent company and the Nigerian subsidiary of the Shell group for oil pollution in Nigeria will not proceed in the English courts. The judge himself did not make any conclusions which would question the ultimate decision reached by the two instances in *Lungowe v Vedanta*. More importantly, his analysis fairly suggests that determination of the parent company liability should be approached on a case-by-case basis weighing the particular characteristics of the corporate organisation of the group and the nexus between the parent company and its subsidiaries (see the author's earlier post on this blog). Nevertheless, the reasoning of Fraser J could be criticised for the scrupulousness of identifying whether sufficient evidence on each factor of the duty of care test was presented by the claimants at such an early stage of the proceedings. The jurisdictional inquiry into existence of an arguable claim against the parent company should not substitute the determination of the substantive argument and the trial itself. This approach was rightly emphasised by the Court of Appeal in *Vedanta*. By contrast, thorough analysis of the liability argument carried by Fraser J in *Okpabi v Shell* is arguably very close to the resolution of the case on the merits. The decision was appealed by the claimants, the Nigerian citizens, on these very grounds.

The second set of issues arises from the Court of Appeal's reluctance to engage in the discussion of the regulatory significance of the litigation against major transnational corporations for their overseas operations in the English courts. In the course of appeal's hearing Vedanta argued that allowing cases against English multinationals in their home state was not in the public interest. The judgement itself refrained to consider whether public interest factors have any impact on the jurisdictional inquiry in the disputes concerned with the private interests of the litigants. Therefore, foreign direct liability claims against powerful corporate groups were placed in the context of conventional theoretical public/private divide of the rules of private international law. The Parliament and the Government have at least twice engaged into discussion of the UK role in promoting responsibility and ensuring accountability of its companies in the course of 2009 and 2017 human rights and business inquiries. Further increase in the number of legal claims against English-based transnational corporations brought by the foreign citizens in the English courts may revive interest in the role of the discipline of private international law to take part in the global governance debate.