

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

**RE: Rule 15 submission to the Supreme Court by Concerned Academics and Practitioners  
regarding *Okpabi and others v Royal Dutch Shell Plc and another*  
UKSC 2018/0068.**

3 June 2019

As academics and practitioners with experience in the issues raised by this case, we write to supplement our earlier Rule 15 submission in *Okpabi and others v Royal Dutch Shell Plc and another* [2018] EWCA Civ 191.<sup>1</sup> We reiterate our concerns from our first letter and confirm our support of the application for leave to appeal. We write now to highlight the importance of this appeal following the judgment delivered by this Court in *Vedanta Resources PLC and another v Lungowe and others* [2019] UKSC 20 (*Vedanta*).

The Court of Appeal's approach in *Okpabi* regarding the circumstances giving rise to an arguable case for a parent company owing a duty of care to persons harmed by the operations of a subsidiary is, we submit, incompatible with this Court's approach to the same question in *Vedanta*. This appeal is necessary to avoid uncertainty and confusion in the resolution of similar cases in the future. Additionally, as we stated in our initial letter, this Court's approach to this issue carries international significance, as it is relied on by courts and multinational corporations in the UK and abroad when evaluating the duty of care under common law.<sup>2</sup> The *Vedanta* judgment of this Court has been considered the 'most important judicial decision in the field of business and human rights since the jurisdictional ruling of the United States Supreme Court in *Kiobel v Royal Dutch Petroleum* in 2013.'<sup>3</sup>

Factual differences in *Okpabi* compared to *Vedanta* lead to distinct legal questions that make the cases complementary but not interchangeable. By hearing *Okpabi*, this Court can clarify two fundamental questions that plague lower courts hearing these cases: (1) substantively, what is the significance of a parent company's stated group-wide policies to determining its duty of care if it merely asserts policies but does not actively enforce them; and (2) what weight should a court attach to corporate disclosures on such group-wide policies in determining the existence of an 'arguable case' at the jurisdictional phase when a claimant's access to other evidence of a parent's role is limited? We hope this Court will take advantage of the opportunity *Okpabi* presents to address both of these questions.

In *Vedanta*, this Court recognized that a parent company's failure to follow through on publicly stated group-wide policies can give rise to direct liability for the parent (paras 52-53). Lord Briggs identified three ways in which a parent's group-wide policies might give rise to a duty of care:

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<sup>1</sup> Our first Rule 15 letter in support of the application for leave to appeal was submitted on 4 May 2018. The main authors are responsible for both letters, but the list of co-signatories for the two letters are not identical.

<sup>2</sup> See e.g., *Jabir and others v. KiK Textilien und Non-Food GmbH* Regional Court (Landgericht) of Dortmund 10 January 2019 Case No. 7 O 95/15; *A.F. Akpan & anor. v. Royal Dutch Shell plc. & anor.*, District Court of The Hague, 30th January 2013, LJN BY9854 / HA ZA 09-1580

<sup>3</sup> Professor Douglass Cassel, 'Beyond Vedanta – Reconciling Tort Law with International Human Rights Norms' *OpinioJuris* 19.04.19 available at <http://opiniojuris.org/2019/04/19/vedanta-v-lungowe-symposium-beyond-vedanta-reconciling-tort-law-with-international-human-rights-norms%EF%BB%BF/>

- 1) if the policies are defective, regardless of the parent's implementation of the policies;
- 2) if the parent provides policies as well as training, supervision, and enforcement of those policies; or
- 3) if the parent's published materials set out policies and 'holds [the parent] out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so' (paras 52-53).

This third category represents a form of liability for omissions by a parent company. Unfortunately, *Vedanta* did not give Lord Briggs cause to elaborate further on either the first or third categories.

*Okpabi* presents this Court with an opportunity to provide guidance on how to approach and apply these two categories. In *Okpabi*, the Court of Appeal focused only on the second category identified by Lord Briggs, when a parent has been involved in policies as well as training, supervision, and enforcement. Because the *Okpabi* decision centres on applying the claim against the *Caparo* criteria – an exercise this Court found unnecessary in *Vedanta* (paras 49-54) – the Court of Appeal considered the company's omissions in the context of its 'proximity' to the victims (paras 86-129). As a result, *Okpabi* currently requires claimants to demonstrate 'an arguable case that [the parent] controlled [the subsidiary's] operations or that it had direct responsibility for practices or failures which are the subject of the claim' (para 127). The Court of Appeal clarified that it was not looking only for general control over policies, but for 'material control' over the subsidiary's operations (para 122). The Court recognized an extensive set of 'mandatory' group-wide policies but treated them as mere 'best practices which are shared across a business operating internationally,' rather than a means by which the company holds itself out as exercising supervision it does not in fact exert (paras 121, 129). The Court did not consider whether the claimants have shown an assumption of responsibility under the first and third categories identified by Lord Briggs in *Vedanta*. In *Okpabi*, this Court's guidance is needed as to whether and when group-wide policies that are either defective or that a parent fails to supervise and enforce can give rise to a duty of care.

The relevance of the corporate policies also raises a question about the threshold required by the 'arguable case' standard at the jurisdiction phase. In *Vedanta*, this Court rightly criticized the 'disproportionate way in which these jurisdiction issues have been litigated' (para 6) and cautioned against treating jurisdiction disputes as 'mini-trials' (para 9). Yet, the Court of Appeal's decision in *Okpabi* suggests uncertainty over the relevance of corporate policies in meeting the 'arguable case' threshold, which runs the risk of parties and lower courts continuing to treat the jurisdiction phase as a mini-trial. Before discovery, public materials are likely to be the most reliable evidence available to a claimant of a parent company's assumption of responsibility. In *Vedanta*, this Court found that such disclosures indicated a 'sufficient level of intervention' by the company so as to sustain the 'well arguable' threshold (para 61). In *Okpabi*, however, the Court of Appeal found that mandatory corporate policies and standards could not, on their own, meet the 'arguable case' threshold (paras 89 and 122). The difference between the two judgments suggests a lack of clarity over the legal threshold required for an arguable case involving a parent company's duty of care on the basis of the three categories of direct liability discussed above. If this Court wishes to stem the tide towards 'mini-trials' that we are currently seeing, it needs to clarify how lower courts should treat corporate policies and disclosures at the jurisdictional phase in these cases.

For these reasons, we continue to support the application for leave to appeal with the hope that this Court will use *Okpabi and others v Royal Dutch Shell plc and another* to clarify these essential points of law.

Yours sincerely

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