

# **Business and human rights – access to remedy**

## **United Kingdom – Case study 1 2019**

FRANET contractor: Human Rights Law Centre,  
University of Nottingham

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1. Country where the incident took place	Zambia
2. Country where the remedy was sought	United Kingdom
3. Type of remedy used (reasons why this remedy was used)	Tort litigation claim for damages against parent company (domiciled in UK) and Zambian subsidiary (domiciled in Zambia)
4. Deciding body - (in original language /and in English)	United Kingdom Supreme Court
5. Date (month/year) when the remedy was initiated Date, if available, of the (final) decision	July 2015  10 April 2019
6. Reference details, (type and title of court/body; in original language and English [official translation, if available])	UK, <i>Vedanta Resources PLC v Lungowe</i> [2019] UKSC 20, available at: <a href="http://www.supremecourt.uk/cases/uksc-2017-0185.html">www.supremecourt.uk/cases/uksc-2017-0185.html</a>
7. Web link to the decision/procedure (if available)	<a href="https://www.supremecourt.uk/cases/docs/uksc-2017-0185-judgment.pdf">https://www.supremecourt.uk/cases/docs/uksc-2017-0185-judgment.pdf</a>
8. Did the incident receive media attention? If so, please provide links	Yes. For example,  <a href="https://www.ft.com/content/1cf19ebe-5b76-11e9-939a-341f5ada9d40">https://www.ft.com/content/1cf19ebe-5b76-11e9-939a-341f5ada9d40</a> ;  <a href="http://www.brickcourt.co.uk/news/detail/parent-company-can-have-a-duty-of-care-to-victims-of-foreign-subsidiarys-actions">http://www.brickcourt.co.uk/news/detail/parent-company-can-have-a-duty-of-care-to-victims-of-foreign-subsidiarys-actions</a> ;  <a href="http://ukscblog.com/case-comment-vedanta-resources-plc-anor-v-lungowe-ors-2019-uksc-20/">http://ukscblog.com/case-comment-vedanta-resources-plc-anor-v-lungowe-ors-2019-uksc-20/</a> ;  <a href="https://www.ejiltalk.org/corporate-responsibility-for-human-rights-violations-uk-supreme-court-allows-zambian-communities-to-pursue-civil-suit-against-uk-domiciled-parent-company/">https://www.ejiltalk.org/corporate-responsibility-for-human-rights-violations-uk-supreme-court-allows-zambian-communities-to-pursue-civil-suit-against-uk-domiciled-parent-company/</a> ;  Opinio Juris symposium, <a href="http://opiniojuris.org/2019/04/17/symposium-on-vedanta-resources-plc-vs-lungowe-judgment-of-the-united-kingdom-supreme-court">http://opiniojuris.org/2019/04/17/symposium-on-vedanta-resources-plc-vs-lungowe-judgment-of-the-united-kingdom-supreme-court</a> ;  <a href="https://www.hiregulation.com/2019/04/11/vedanta-uk-supreme-court-takes-the-straitjacket-off-claims-against-parent-companies-in-the-english-courts/">https://www.hiregulation.com/2019/04/11/vedanta-uk-supreme-court-takes-the-straitjacket-off-claims-against-parent-companies-in-the-english-courts/</a> ;  and many others.
9. Legal basis in national/EU	UK law and EU law. The Court was open to hear claims of this nature as part of common law tort law. This was assisted by EU Brussels I Recast Regulation

<b>/international law of the rights under dispute</b>	
<b>10. Parties</b>	Vedanta Resources PLC and Konkola Copper Mines plc (defendants/appellants)  Dominic Liswaniso Lungowe & Others (claimants/respondents)
<b>11. Form of abuse/violation, and rights involved <sup>1</sup></b>	The claimants are a group consisting of 1,826 Zambian citizens who live in four communities within the Chingola District of Zambia. Their claim is that both their health and their farming activities have been damaged by repeated discharges of toxic matter from the Nchanga Copper Mine - operated by Konkola Copper Mines plc as a subsidiary of Vedanta Resources PLC - into those watercourses, from 2005 to date.
<b>12. Type of business involved</b>	Mining and extractive industry sector. – copper mine in Zambia.  Company alleged to be responsible: Konkola Copper Mines plc (incorporated in Zambia) and Vedanta Resources PLC (incorporated in the UK) as the parent company of Konkola Copper Mines plc
<b>13. Profile of the victim(s) - individuals /population affected - can be broader than actual parties to the proceedings</b>  <i>(e.g. country of origin, belonging to a particular minority – ex. ethnic, gender, age, occupation, social status, relations with the responsible company)</i>	The claimants are a group consisting of 1,826 Zambian citizens who live in four communities within the Chingola District of Zambia. They are very poor members of rural farming communities served by watercourses which provide their only source of water for drinking (by themselves and their livestock) and irrigation for their crops. Their claim is that both their health and their farming activities have been damaged by repeated discharges of toxic matter from the Nchanga Copper Mine - operated by Konkola Copper Mines plc as a subsidiary of Vedanta Resources PLC - into those watercourses, from 2005 to date.
<b>14. Any legal or institutional factors in the Member State that facilitated the abuse of the (fundamental) rights in questions?</b>	The abuse of rights occurred outside the Member State. The Member State did not have any legislation which would have required a parent company to report on any abuse of rights by a subsidiary and the parent company did not have an obligation in the Member State to act to protect against abuses in their enterprise.
<b>15. Key facts of the case</b>	This litigation arises from alleged toxic emissions from the Nchanga Copper Mine in the Chingola District of Zambia. The claimants, who are the respondents to this appeal, are a group currently consisting of some 1,826 Zambian citizens who live in four communities within the Chingola District. Their claim is that both their health

<sup>1</sup> The rights affected may include the entire spectrum of internationally recognised fundamental rights – civil and political rights, as well as economic, social and cultural rights; for example: the right to non-discrimination, the right to private and family life, freedom of expression, the right to health, the right to protection of life and physical integrity, property rights, consumer rights or environmental rights.

	<p>and their farming activities have been damaged by repeated discharges of toxic matter from the Nchanga Copper Mine into those watercourses, from 2005 to date.</p> <p>The Nchanga Copper Mine (“the Mine”) consists, in part, of an open-cast mine, said to be the second largest in the world, and in part of a deep mine. Its immediate owner is the second defendant Konkola Copper Mines plc (“KCM”), which is a public company incorporated in Zambia. KCM is the largest private employer in Zambia, employing some 16,000 people, mainly at the Mine.</p> <p>The first defendant Vedanta Resources plc (“Vedanta”), is the ultimate parent company of the second defendant, KCM. Although Vedanta claims only to have 19 employees of its own, eight of whom are its directors, the Vedanta Group employs some 82,000 people worldwide. KCM is not a 100% subsidiary of Vedanta, since the Zambian government has a significant minority stake, but materials published by Vedanta state that its ultimate control of KCM is not thereby to be regarded as any less than it would be if wholly owned.</p> <p>The claims against both defendants are pleaded in common law tort of negligence and breach of statutory duty. Those causes of action are pursued against KCM on the basis that it is the operator of the Mine and against Vedanta, the same causes of action are said to arise by reason of its very high level of control and direction of KCM</p> <p>This case- at this stage – was solely about jurisdiction; that is, whether there is jurisdiction of the courts of England and Wales to determine those claims against both defendants. As against Vedanta, the issue is whether there is a duty of care on parent companies for actions by their foreign subsidiaries, as enabled by article 4 of the Recast Brussels Regulation. As against KCM, the issue is whether the UK is the proper forum to bring this claim, as being a necessary or proper party within English procedural rules.</p> <p>The main legal issue is whether a parent company does have a duty of care to the victims affected by the actions of its foreign subsidiary. The other main issue is whether the English courts were the proper forum for this case.</p>
<p><b>16. With respect to the case described in this template - <u>what worked well</u> from the standpoint of the complainant/victim? What were the reasons for it?</b></p>	<p>The claimants were able to show that a parent company, no matter what size in terms of its employees, did have a duty of care towards the victims of actions by a subsidiary. They did so without having to prove a new tort or any novel claim. As the Supreme Court held (para 54): <i>[T]here is nothing special or conclusive about the bare parent/subsidiary relationship, it is apparent that the general principles which determine whether A owes a duty of care to C in respect of the harmful activities of B are not novel at all.</i></p>
<p><b>17. With respect to the case described in this template – <u>what did not work well</u> from the standpoint of the complainant/victim?</b></p>	<p>It is possible that future claimants will find that the Court’s approach as to whether the UK courts are able to have jurisdiction over a host state may prove restrictive. The Court held that Zambia would have been the proper place for the litigation, except there was a real risk of the denial of substantial justice for these claimants. This means that the burden of proof is on the claimants to show by “cogent</p>

<p><b>What were the reasons for this?</b></p>	<p>evidence” that there is a risk that there is no substantial justice in the alternate forum. This may not always be easy to show.</p>
<p><b>18. Main reasoning / argumentation</b> <i>(of the parties and the court: key issues /concepts clarified by the case)</i></p>	<p>In relation to the issue of parent company’s duty of care, Vedanta’s main arguments were that any duty of care by a parent company would involve a novel and controversial extension of the boundaries of the tort of negligence, beyond any established category, and that it would be contrary to fundamental principles of company law of the separate legal person of each company. The Court rejected these arguments, as noted above. In reaching this conclusion, the Court confirmed that:</p> <p><i>“Parent and subsidiary are separate legal persons, each with responsibility for their own separate activities. A parent company will only be found to be subject to a duty of care in relation to an activity of its subsidiary if ordinary, general principles of the law of tort regarding the imposition of a duty of care on the part of the parent in favour of a claimant are satisfied in the particular case”.</i></p> <p>By adopting this approach, the Court could find a duty of care and did not need to discuss corporate veil issues. Yet the Court was pragmatic about the realities of business in stating [para 51]: <i>“There is no limit to the models of management and control which may be put in place within a multinational group of companies”</i>, as [para 53]:</p> <p><i>“Even where group-wide policies do not of themselves give rise to such a duty of care to third parties, they may do so if the parent does not merely proclaim them, but takes active steps, by training, supervision and enforcement, to see that they are implemented by relevant subsidiaries. Similarly, it seems to me that the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so. In such circumstances its very omission may constitute the abdication of a responsibility which it has publicly undertaken.”</i></p> <p>This latter statement is crucial as it includes where the parent company takes active steps – such as by training, supervision and enforcement - as well as where the parent company makes representations and where it has omitted to act, as all give rise to a possible duty of care.</p> <p>In regard to representations, the Court relied on the various published statements by Vedanta [para 61]:</p> <p><i>“[I]n which Vedanta may fairly be said to have asserted its own assumption of responsibility for the maintenance of proper standards of environmental control over the activities of its subsidiaries, and in particular the operations at the Mine, and not merely to have laid down but also implemented those</i></p>

	<p><i>standards by training, monitoring and enforcement, as sufficient on their own to show that it is well arguable that a sufficient level of intervention by Vedanta in the conduct of operations at the Mine may be demonstrable at trial...".</i> These public statements were generally made in the company's annual report and other documents. This was assisted by the UK Companies Act requirements to provide a group strategic report (sections 172 and 414A-C).</p> <p>This statement by the Court of the activities required of a parent company for there to be a duty of care clarified the law considerably. Of course, in each case there will still need to be evidence brought by claimants as to what actions a parent company has undertaken or omitted to undertake to indicate a duty of care of a parent company exists in the particular circumstances.</p> <p>One final point: this was a decision made very much about English law. Disappointingly, the Court did not refer directly to the international standards or comparative jurisprudence which was put to it by the two NGO intervenors. Their submission included the argument that the international standards indicated that a reasonable and responsible enterprise will take proper steps to conduct due diligence as to the risks of adverse impacts on human rights and the environment; to prevent or mitigate the risks of such adverse impacts; and to remediate such adverse impacts as may occur. In addition, they submitted that the recognition of a duty of care on the part of parent companies was consistent with the UK's obligations under treaties to which it is a party, such as the International Covenant on Economic, Social and Cultural Rights. The lack of reference to this submission was surprising as, during the oral hearing, Lord Wilson had expressly referred to this intervention as showing "the direction of travel" of the law. Nevertheless, this is a significant decision by the UK Supreme Court on the parent company duty of care, which will have impacts on other cases across the world.</p>
<p><b>19. What was the outcome?</b></p>	<p>Very positive outcome for the claimants in that they can continue their case to be considered on the merits. Yet the case is not finished as the merits stage must still occur, unless the case is settled.</p>
<p><b>20. Did the case lead to legislative or policy developments?</b> <i>(including more general measures introduced to stop future incidents)</i></p>	<p>Not yet. It will, though, affect the situation in two other cases which are likely to be appealed to the Supreme Court: <i>Okpabi &amp; Ors v Royal Dutch Shell Plc &amp; Anor</i> [2018] EWCA Civ 191 and <i>AAA &amp; Others v. Unilever PLC and Unilever Tea Kenya Limited</i> [2018] EWCA Civ 1532.</p> <p>It is also likely to influence other cases in other jurisdictions and possibly encourage new legislation on parent company liability.</p>

<b>21. In case the remedy sought was not of a judicial nature, was there eventually any follow up on the case in the court? Or followed by a different type of procedure?</b>	<p>This decision was solely about jurisdictional issues. The case will now be tried on its merits before a court, where a decision will be made on whether the duty of care has been breached and what remedies are owed.</p> <p>It is likely that this case will be settled at some point. This is to prevent the company creating a precedent and to enable the claimants to have some remedy.</p> <p>As one of the Interviewees noted, a compensation often gives the claimants a feeling of victory, also because of the symbolic meaning of it, even though the companies generally don't accept liability.</p>
<b>22. Any other comments relevant to case?</b>	<p>This was a ground-breaking case on parent company liability for human rights abuses.</p>