



Okpabi and others vs Royal Dutch Shell plc and another UKSC 2018/0068

Rule 15 submission to Supreme Court of the United Kingdom by Amnesty International

26 April 2018

Dear Lord and Lady Justices

Amnesty International has worked for over two decades with communities from the oil-rich regions of the Niger Delta, Nigeria, to highlight the serious human rights abuses stemming from oil activities and the serious gaps in accountability and access to reparations affecting thousands of women, men and children living in the area. Pursuant to Rule 15 of the Supreme Court Rules (2009), we submit this letter in support of the Claimants' application for permission to appeal (UKSC 2018/0068) in *Okpabi and others v Royal Dutch Shell plc and another* [2018] EWCA Civ 191 which raises issues of serious consequence for the effective protection of human rights in the context of the global operations of multinational companies.

Our organisation

Amnesty International is a worldwide voluntary movement founded in 1961 that works to prevent violations to people's human rights. Amnesty International Limited is a not-for-profit company registered in England and Wales. The International Secretariat is the coordinating body for Amnesty International's worldwide membership and its national sections. The organisation's vision is of a world in which every person enjoys all of the human rights enshrined in the Universal Declaration of Human Rights and other international human rights instruments. In pursuit of this vision, Amnesty's mission is to conduct research and take action to prevent and end abuses of all human rights.

The organisation's work on the Niger Delta

The Niger Delta has been a major focus of Amnesty International's work on corporate accountability for over two decades. This is because the region suffers from hundreds of oil spills which every year devastate the environment and lives of people living there. Neither the powerful actors in the oil industry, nor the Nigerian government, have yet been able to put into practice lasting solutions that prevent the spills and clean them up effectively when they occur. The cumulative impact of decades of contamination makes the Niger Delta, Africa's most important oil-producing region, one of the most polluted places on earth.

Over the past decade, Amnesty International has published a series of reports, based on in-depth investigations, examining serious failings in the operational practices of the multinational oil companies operating in the Niger

Delta, including Shell.¹ These reports have exposed Shell's failure to operate responsibly and in line with national law and international best practice standards. Shell's failures were confirmed in 2011 by the United Nations Environment Programme which conducted the most in-depth investigation to date of the causes and extent of oil pollution in the region.

Our research has also exposed the failure of the Nigerian state to enforce its own regulations as to how companies, like Shell, should prevent and respond to oil spills. Finally, Amnesty International's research has examined how the pollution has had an appalling impact on the human rights of the communities living there, harming their livelihoods, health and access to food and clean water. While the Nigerian government is aware that communities continue to suffer, it has failed to protect them and remedy the harm they have suffered. No corporation has ever been held properly to account, highly polluted areas have not been cleaned up; compensation for the loss of livelihoods is seldom granted, and few steps have been taken to monitor or otherwise address negative health impacts. As a result of the government's reluctance to hold Shell to account for its role in the contamination, the company has little incentive to improve its practices in the region. Consistent with its mission, Amnesty's key priorities for the Niger Delta are to ensure that all perpetrators of human rights abuses associated with oil activities in the region are held legally to account, and victims receive an adequate remedy for the harm suffered.

The organisation's work on corporate accountability more broadly

Our work on the Niger Delta is part of a global program of work on corporate accountability for human rights abuses. Part of this work has included researching and highlighting major obstacles to justice in cases of human rights abuses by multinational corporations. Our research into these cases has shown that parent companies are either directly engaged in the abuses or failing to take proper actions to prevent them when they are both aware of them and capable of doing so. A major obstacle to effective accountability and remedy in these cases is the legal doctrine of "separate legal personality" (the so called "corporate veil") which exists between parent companies and their subsidiaries. This doctrine severely undermines the ability of victims to hold parent companies accountable for abuses committed by subsidiaries who they control or are in a position to control. Our research confirms that, in practice, the "corporate veil" works to shield parent companies from liability for serious harm they could and, under international standards, should have acted to prevent.

Another serious obstacle to justice Amnesty International identified through its research is the difficulty for victims of corporate human rights abuse to access the evidence required to fully substantiate their claim. This is often because this evidence is in the exclusive hands of the corporate defendant. This leads to an imbalance of power and inherent inequity between the parties, where affected communities are at a serious disadvantage. If courts do not ensure this evidence is available at the relevant stage in the proceedings, they may take important decisions before having had an opportunity to examine all the relevant evidence.

While in theory they may be preferable, claims against subsidiaries in host state courts are often extremely challenging or impossible. As starkly illustrated by our work on the Niger Delta, this is often a result of structural problems which include a weak rule of law, corruption, lack of independence of the courts and corporate capture. In these contexts, bringing a claim before the courts of the parent company's jurisdiction (the home state) might be the only realistic avenue for justice.

The organisation's interest in this case

As expressed above, two key aims of Amnesty International's work in the Niger Delta are to ensure that people affected by oil pollution have their right to remedy recognised, and that the proper corporate perpetrators of human rights abuses associated with this pollution are held legally accountable. Given the structural difficulties in securing accountability and access to reparations in Nigeria, effective accountability and remedy largely

¹ Our reports include, 'Nigeria: Petroleum, Pollution and Poverty in the Niger Delta' (2009), 'The True Tragedy: Delays and Failures Tackling Oil Spills in the Niger Delta' (2011), 'Clean it Up' (2015) and 'Negligence in the Niger Delta,' (2018).

depends on the outcome of litigation in the UK. Given its long-term involvement in the case and calls for effective parent company liability, it is in the organisation's interest that this case proceeds to an examination of its merits and allows the claimants a chance to fully substantiate their claim.

In addition, the resolution of this case has potentially far reaching repercussions for corporate accountability law, policy and practice both in the UK and across the globe. UK case law has contributed immensely to the development of parent company liability law over the years. UK jurisprudence in this area is not only cited in other court cases², but is also used to inform debates and influence legal developments in both common and civil law jurisdictions. A decision that rolls back on these important advances will not only have direct legal implications for case law in the UK and other common law jurisdictions, but it will also stall or set back developments more broadly across the globe. This is of serious concern to anyone working to advance business respect for human rights worldwide.

For the reasons expressed above, Amnesty International is particularly concerned about the decision of the Court of Appeal to dismiss the claim (i) prior to full disclosure of corporate documents; and, (ii) on the basis of a highly restrictive legal test for parent company liability. In addition, the organisation is alarmed by the Court of Appeal's interpretation of duty of care that (iii) runs counter to the international trend, as reflected in key international standards, on responsible business conduct; and, (iv) denies that these standards have any bearing on findings of parent company liability. These issues are examined in further detail below.

(i) Dismissal before full disclosure of corporate documents

We are concerned about the decision of the Court of Appeal to dismiss the claim based on the absence of evidence that demonstrates "operational control" of the parent over the subsidiary, before having had a chance to examine all the corporate documentation that can help substantiate this very fact. Such a high evidentiary burden on claimants at such early stage of the proceedings is unjust, unrealistic, and does nothing to redeem the inequality of arms and asymmetry in both access and control of information that typically exists between the parties in this type of dispute. On the contrary, it only reinforces and entrenches them.

(ii) A highly restrictive legal test for parent company liability

The Court of Appeal disregarded principles on parent company liability established under *Chandler v Cape plc*.³ While issuing inadequate standards can give rise to parent company liability under Chandler without the need for active control or enforcement to exist, the Court of Appeal denied that liability may arise when that control or enforcement does not exist. Under Chandler, it is sufficient that the parent (who enjoys superior expertise) fails to advise its subsidiary in relation to its harmful practices. This test more accurately reflects the reality behind many cases of corporate human rights abuse Amnesty International has investigated. In many of these cases, it is not the active engagement of a parent company in the abuse, but its failure to act to prevent it when it could that results in serious harm.

² See for example, *Garcia v. Tahoe Resources Inc.*, 2017 BCCA 39 – CanLII (where a claim against a Canadian parent company is going ahead on similar grounds to this litigation); *Yaiguaje v. Chevron Corporation*, 2015 SCC 42, [2015] 3 S.C.R. 69; *Friday Alfred Akpan et al v. Shell*, Court of Appeal The Hague 17 December 2015. In *Garcia v. Tahoe Resources Inc*, the

³ *Chandler v Cape plc* [2012] 1 WLR 3111.

In addition, requiring proof of actual control or enforcement places too onerous a burden on claimants, in this case residents of two rural fishing and farming communities of a remote area of the Niger Delta, at a point in the proceedings in which they have not had the benefit of full disclosure, as pointed out above. Coupled with the difficulties noted above in accessing corporate-held information, the result of this requirement would be to make claims against UK-based parent companies alleged to have been involved in human rights abuses almost impossible.

(iii) A position that contradicts international standards

A view that suggests that a duty of care may only arise in cases of active control or enforcement would promote a “hands off” approach to the human rights impacts of subsidiaries. This runs counter to the international consensus, reflected in key international frameworks such as the *UN Guiding Principles on Business and Human Rights (UNGPs)* and the *OECD Guidelines for Multinational Enterprises (OECD Guidelines)*, that requires a “hands on” approach to corporations’ global human rights impacts. These instruments call on companies to take proactive due diligence steps to ensure they avoid infringements on human rights across their global operations. It is clear that they specifically target parent companies in a position to control or influence the activities of their overseas subsidiaries. Should it stand, the Court of Appeal’s ruling would have the exact opposite effect of discouraging parent companies from concerning themselves with, and taking action to avoid, the adverse human rights impacts of their global operations. It could even lead to a pernicious unintended consequence of encouraging UK companies to create subsidiaries in foreign countries, where the rule of law is weak, with the view of evading liability. This would run in the face of years of effort by the international community to set clear rules and standards on responsible corporate behaviour. Companies need clear and consistent guidance, including from the courts, on how to behave responsibly.

(iv) Relevance of international standards for parent company liability

Amnesty international is extremely concerned about the view expressed by the majority in the Court of Appeal that international standards on responsible business conduct are irrelevant to the existence of an arguable duty of care. Courts examining claims of alleged human rights abuses committed abroad by companies domiciled within the forum state must necessarily examine the international normative framework that has been designed specifically to deal with these situations (as explained above in (iii)). Key international instruments, such as the UNGPs and OECD Guidelines, have been recognised and accepted by both governments, including the UK government,⁴ and businesses. They have in fact been elaborated with the full participation and direct input from businesses. Shell itself expressly says that it uses the UNGPs to inform its global approach to human rights.⁵ In view of this, it would be contradictory for UK courts to dismiss as irrelevant international normative frameworks that governments and businesses themselves are using to, respectively, set up their expectations of businesses and inform their steps to prevent negative human rights impacts across their global operations.

⁴ The UK government committed to implementing the UNGPs in 2011 and reaffirmed this commitment in 2016. In doing so, it stated its expectation that companies adopt appropriate due diligence policies to identify, prevent and mitigate human rights risks, and commit to monitoring and evaluating implementation. See <https://www.gov.uk/government/publications/bhr-action-plan>

⁵ “Shell is committed to respecting human rights as set out in the Universal Declaration of Human Rights and the International Labour Organization core conventions. Our human rights approach is informed by the UN Guiding Principles on Business and Human Rights and applies to all of our employees and contractors. We embed this into our existing policies, systems and practices.” See <https://www.shell.com/sustainability/transparency/human-rights.html>

As expressed above, this case is of immense importance to the Nigerian claimants who have very little, if any, opportunity for justice at home. Because of its worldwide ramifications, it is also of great significance to global efforts to improve corporate accountability for human rights abuses. In light of all the above, Amnesty International believes there are strong reasons for the Supreme Court to accept the Claimants' application for permission to appeal. We look forward to being notified in accordance with practice direction 3 (3.3.18) should the appeal be granted.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Anna', with a stylized flourish underneath.

Anna Neistat
Senior Director for Research