Neutral Citation Number: [2014] EWCA Civ 312

Case No: C1/2012/3390

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM [2012] EWHC 2445 (the Administrative Court)**
**President of the Queen's Bench Division and Mr Justice Treacy**
**CO/1827/2011**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/03/2014

**Before :**

**LORD JUSTICE MAURICE KAY, VICE PRESIDENT OF THE COURT OF APPEAL (CIVIL DIVISION)**
**LORD JUSTICE RIMER**
and
**LORD JUSTICE FULFORD**

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**Between:**

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| **KEYU & OTHERS** | **Appellants** |
| **- and -** | |
| **SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS & ANR** | **Respondents** |

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**Michael Fordham QC, Danny Friedman QC and Zachary Douglas** (instructed by **Bindmans Solicitors**) for the **Appellants**
**Jonathan Crow QC and Jason Coppel QC** (instructed by **The Treasury Solicitor**) for the **Respondents**

Hearing dates : 26-28 November 2013

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# Approved Judgment

**Lord Justice Maurice Kay:**

**This is the judgment of the court to which all three members have made substantial contributions.**

## ***Introduction***

1. This appeal is principally concerned with the appellants' contention that there should be a public inquiry or similar investigation into events that occurred on 11/12 December 1948 when a patrol of the Second Battalion of the Scots Guards shot and killed 24 civilians at the Batang Kali rubber plantation on the Sungei Remok Estate, in the State of Selangor, which was a British Protected State within the former Federation of Malaya. The context of the incident was the fighting and unrest that accompanied the communist threat that then existed within the Federation, known as the "Malayan Emergency". It is alleged that the 24 civilians were executed without any justification, and that the authorities thereafter have either covered up what occurred or have been reluctant to take the necessary steps to enable the truth - whatever it may be - to be revealed. This has never been accepted by the British authorities, who have maintained that the deceased were shot while they were attempting to escape.

2. The appellants were either in Batang Kali at the time of the deaths or they are closely related to those who were killed. Before the Divisional Court they challenged the decision of the Secretaries of State ("the respondents") in letters dated 29 November 2010 and 4 November 2011 to exercise their discretion under the Inquiries Act 2005 not to establish a public inquiry (or any other form of inquiry) into the deaths. In essence it was the case for the appellants before the Divisional Court – as repeated on this appeal – that the respondents have a duty to set up an appropriate inquiry or, alternatively, they erred in the exercise of their discretion in this regard. The Secretaries of State argue that they are not under a legal duty to establish an inquiry and, moreover, they contend that they properly exercised their discretion in deciding not to take this step.

3. The Divisional Court (Sir John Thomas, President of the Queen's Bench Division, as he then was, and Treacy J, as he then was) on 4 September 2012 decided that there were no sustainable reasons for overturning the decisions of the respondents: [2012] EWHC 2445 (Admin).

## ***The background***

4. The ultimate source of authority in the State of Selangor in the context of the actions of the Second Battalion of the Scots Guards is a relevant issue in this case, and – put generally – control over the state was the subject of significant change during the later years of the British Empire.

5. In 1874 or 1875 an arrangement was reached by way of an exchange of letters between the ruler of Selangor (Sultan Abdul Samad) and the British Government whereby the Sultan agreed that a British Resident was to aid and advise him in

governing his state. In the result, although the Sultan remained the sovereign, he usually acted only on the advice of the Resident who in turn took his instructions from the British Government.

6. During the Second World War Selangor was occupied by the Japanese. British military administration was established by September 1945, and on 24 October 1945 the state became a Protectorate as a result of a treaty between the British Government (acting on behalf of King George VI) and the Sultan (the Treaty of McMichael).

7. In 1946 Selangor joined the Malayan Union.

8. On 21 January 1948, shortly before the Federation of Malaya was created, Sir Richard Gent, on behalf of King George VI, concluded the Selangor Treaty with the Sultan which delineated authority within the state. By clause 3, the British Crown was to exercise "complete control of the defence and all other external affairs" of Selangor, and the King was responsible for protecting the state "from external hostile attacks". In order to discharge this and other obligations, the King's forces were allowed unrestricted access to the state and were entitled to employ all necessary means of opposing attacks of this kind. The Sultan agreed to accept the advice of the British Adviser on all matters relating to the government of Selangor, save for matters concerning the Muslim religion and the Customs of the Malays.

9. The Federation of Malaya Agreement came into force on 1 February 1948; Sir Richard Gent had negotiated the Agreement on behalf of the King with the various rulers of the Malay States, and as a result Selangor became one of the states within the Federation.

10. The arrangements as to authority over defence and external affairs were governed by clause 4 of the Agreement, which reflected clause 3 of the Selangor Treaty. Clause 4 provided:

> "His Majesty shall have complete control of the defence and of all the external affairs of the Federation, and undertakes to protect the Malay States from external hostile attack and for this and other similar purposes, His Majesty's Forces and all persons authorised by or on behalf of His Majesty's Government shall at all times be allowed free access to the Malay States and to employ all means of opposing such attacks."

11. A High Commissioner exercised the Crown's and other executive power for the states (including Selangor), and the rulers were bound to accept his advice in all matters connected to the Federation (Part II of the Agreement). Executive authority for the Federation was vested in the High Commissioner, who was advised by a Federal Executive Council which he appointed (Part III of the Agreement).

12. The High Commissioner was given particular responsibilities for "the safeguarding of any grave menace to the peace or tranquillity of the Federation or any Malay State or Settlement …" by clause 19(b) of the Agreement.

13. The High Commissioner and the rulers of the states were empowered to make laws ("Ordinances"), with the advice and consent of the Federal Executive Council, and the latter had the power to make laws in relation to certain specified matters which included defence and emergency powers (Part V of the Agreement).

14. As a result of these arrangements and particularly given the continued sovereignty of the Sultan, Selangor came within the definition of a Protected State for the purposes of the British Protectorates, Protected States and Protected Persons Order 1949.

15. During the late 1940s there was a significant communist insurgency within the Federation, and this intensified during 1948. Several British planters and businessmen were killed and there were violent incidents within Selangor. It was believed that there were approximately 600 saboteurs and 4000 armed guerrillas operating in units of 10 – 50 members. Following a meeting on 24 June 1948 between Sir Malcolm McDonald (the British Commissioner General for South East Asia), the Defence Co-ordination Committee for the Far East, the Governor of Singapore and the High Commissioner of the Federation, the Colonial Secretary approved the use of emergency powers in the context of a planned operation that had two anticipated phases. The objective of the first phase of the operation was to "apprehend or liquidate the enemy forces and so far as this does not succeed completely to drive them into the jungle". The installations that were deemed essential to the Malayan economy were to be protected, and the police force was to be strengthened and assisted by the Malay Regiment and other local troops. The second phase was described as comprising "the operation necessary to liquidate guerrilla bands in the jungle involving also destruction of camps, cutting off food supplies and uncovering dumps of arms etc. […] These operations will be primarily of a military nature in which the police will participate […]". It was acknowledged that reinforcements might become necessary.

16. The Acting High Commissioner (Sir Alec Newboult) and the rulers of the states (with the advice and consent of the Federal Legislative Council) issued Emergency Regulations Ordinance number 10 of 1948 on 7 July 1948. In essence, this enabled the High Commissioner to proclaim a state of emergency, and thereafter to make regulations of wide scope, which included such features as the use of the death penalty.

17. The High Commissioner declared a state of emergency on 12 July 1948 for the entire Federation, and on 15 July 1948 he issued the Emergency Regulations 1948 under the Emergency Regulations Ordinance. These regulations provided the police with significant additional powers; they permitted *in camera* trials; and, by regulation 36, coroners and magistrates were entitled to dispense with inquiries or inquests

following the death of any individual as a result of the operations by the police or the military in suppressing disturbances.

18. The role of the military at this stage was set out by the Commissioner General for South East Asia in a memorandum to the Colonial Secretary on 12 July 1948 as follows:

> "There is a very close liaison and coordination between the police and military at all levels and in each State and Settlement the Chief Police Officer retains final decision of responsibility for law and order. In most affected areas in the Federation troops are taking a very big share in evacuation operations, but we are maintaining the principle that military are acting in aid of civil power. Except in static guard duties troops operate with an element of police presence wherever possible. There is excellent understanding between police and military staffs in both the Federation and Singapore and no difficulty seems to be arising regarding their respective roles. "

***The decision to send a brigade of the British army to Malaya***

19. On 9 August 1948, the Defence Co-ordination Committee for the Far East secretly requested that reinforcements from the British army were despatched to meet the emergency. There was intelligence that large numbers of armed uniformed Chinese were at the frontier of Malaya and Thailand who were likely to enter the Federation in small bands, thereby materially increasing the enemy strength. The Defence Committee of the British Cabinet considered this request on 13 August 1948, and ministers agreed to send a brigade of the British army to Malaya by the end of August 1948. The cost was to be borne by the Treasury.

20. Many of the troops that were sent were national servicemen, with only limited training in relation to operations of this kind. The Second Battalion of the Scots Guards arrived in Singapore in October 1948 and after three weeks training they were sent to the Federation.

***The deaths at Batang Kali on 11/12 December 1948***

21. The Scots Guards were sent to areas of insurgent or "bandit" activity, and they were deployed in joint army and police patrols. As set out above, the deaths with which this appeal is concerned occurred during the course of a patrol of this kind at Batang Kali on 11/12 December 1948. G Company of the second battalion of the Scots Guards was based at Kuala Kubu Bahru (where they underwent training for jungle warfare) and the soldiers on the particular patrol at Batang Kali were drawn from the 7th Platoon, G Company.

22. The senior police officer for the district asked Captain Ramsey (the second-in-command of G Company) to send patrols to two separate areas which had not previously been visited, in order to ambush a party of insurgents who were due to arrive the following day. Captain Ramsey commanded one of the patrols whilst Lance

Sergeant Charles Douglas led the other because – notwithstanding Captain Ramsey's request to Battalion Headquarters – no officer was available.

23. Early in the evening of 11 December 1948, Lance Sergeant Douglas's 14-man patrol took control of a village of residential huts on the Batang Kali rubber plantation in the district of Ulu Selangor, approximately 45 miles northwest of Kuala Lumpur. Lance Sergeant Thomas Hughes was Douglas's second in command, and the patrol included a Lance Corporal and eleven guardsmen (almost all of whom were undertaking National Service). A Malay Special Constable (Jaffar bin Taib) acted as a guide and they were accompanied by two police officers, Detective Sergeant Gopal and Detective Constable Woh. Fifty unarmed adults and some children were detained, and it is alleged that some of the villagers were interrogated at the site by way of methods that included mock executions.

24. The Divisional Court rehearsed 10 key facts (judgment paragraph 29) that have been relied on by the appellants. Although additional evidence will no doubt be sought should an inquiry be ordered, there appears to be no proper basis for disputing the accuracy of these 10 factual propositions and the respondents have not suggested that they are likely to be the subject of serious dispute. They are as follows:

i*)* Batang Kali was a village on a rubber plantation, inhabited by families. They did not wear uniforms, had no weapons and were a range of ages.

ii) On the way to the village the patrol pursued two uniformed armed insurgents, but lost them.

iii) A young man was shot dead by the patrol in the village on the evening of 11 December 1948; he was said to be Loh Kit Lin.

iv) The inhabitants were separated by the patrol as between (1) men and (2) women and children. They were detained in custody in the village.

v) Interrogation of the inhabitants took place. There were simulated executions to frighten them, causing trauma.

vi) The police officers secured information from one of the males, Cheung Hung, about armed insurgents who occasionally visited the village to obtain food supplies. This information was passed to the patrol.

vii) A lorry arrived in the morning. It was searched. The kepala (headman) was detained. Rice was found.

viii) The women and children and one traumatised man were loaded onto the lorry. It was driven a little way. They were guarded by members of the patrol before being driven back to their village.

ix) The hut with 23 men was unlocked. Within minutes all of the 23 men were dead as a result of being shot by the patrol.

x) The inhabitants' huts were then burned down and the patrol returned to its base.

***Events following the deaths***

25. The first document which describes the killings was a confidential telegram sent by Sir Henry Gurney, the High Commissioner, to the Colonial Office on 13 December 1948 in which it was stated that "26 bandits have been shot and killed by police and military in the Kuala Kuba area of Selangor" and that one "bandit" had been wounded and captured.

26. Also on 13 December 1948, a journalist working for the *Straits Times*, Harry Miller, drove to the Scots Guards base at Kuala Kubu Bahru. He interviewed Sergeant Douglas who said that the individual shot on 11 December 1948 and all those shot on 12 December 1948 had been trying to escape when about to be taken to the company's base for interrogation. This account was published in the *Straits Times* on 13 December 1948, and on 17 December 1984 the General Officer Commanding Malaya, Major General Sir Charles Boucher, stated at a press conference that this was an extremely accurate description of what had occurred.

27. On 17 December 1948 a Far-Eastern Land Forces British Army Report on relevant incidents (a "Sitrep" report) was compiled setting out the actions that had been taken to combat the insurgency. It included an account of the events at Batang Kali:

> "Another 2 SG patrol captured twenty six male bandits near K Kubu Bahru. Detained for night in Khongsi huts. Early the following morning on information from one of the captured bandits ambush laid for lorry arriving with food. Lorry captured. Bandits attempted mass escape. 25 killed. One recaptured." (**Punctuation added**).

28. The official report of the War Office of 22 December 1948 accepted the version set out in this report and referred to the patrol as a very successful action. It described how the men had been killed as they made a mass escape attempt having been detained overnight in a jungle hut.

29. This official account, however, was not universally accepted. The families of those killed appealed for help to various organisations and the Chinese Consul-General requested an inquiry, suggesting that the killings were unjustified given that the deceased were unarmed. Claims appeared in the Chinese press that there had been a massacre. Potentially of particular significance, on 22 December 1948 the owner of the estate which included Batang Kali, one Mr Menzies, stated publicly that all those killed were his employees with records of good conduct. There had been no strikes or other problems. On 24 December 1948 *The Straits Times* called for an inquiry.

30. Thereafter, Sir Stafford Foster-Sutton, the Attorney General of the Federation and a Federal counsel, Mr Shields, conducted an investigation ("the 1948-9 Inquiry"), which in all probability commenced shortly after the complaint by Mr Menzies and it was speedily concluded (seemingly within a matter of a few days). The Colonial Office file in relation to their work – indeed, the majority of the other files relating to law and order issues during the Malay Emergency – were destroyed in 1966 because they were considered as unworthy of public preservation. Sir Stafford Foster-Sutton set out the only known account of this inquiry in 1970 when speaking to the police and to the radio programme, *The World at One*. His rehearsal of the steps he took was summarised by the Divisional Court as follows (at paragraph 35):

> i) He told the police that the inquiry originated as a result of public disquiet and a complaint from the owner of the rubber estate where it occurred. No evidence was taken on oath. Statements had been taken from each member of the patrol which were given to him by the police. No enquiries were made of inhabitants of the village; none was questioned by him
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> > "for a very good reason, because they were most unlikely to talk and, if they did talk, to tell the truth".
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> He visited the scene and met the sergeants and the two detectives. He had examined the burnt down huts and found shell cases that had obviously exploded during the fire and were obviously illegally there. He concluded:
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> > "After my inquiry I was satisfied of the bona fides of the patrol and there had not been anything that would have justified criminal proceedings. I reported my findings to the High Commissioner, Sir Henry Gurney, and am under the impression that a written report was made for record purposes and passed to the Special Branch at Kuala Lumpur."
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> ii) He told the World at One that he arranged to meet the sergeant in charge of the patrol and another non commissioned officer. They had given him an account of arresting men they believed were bandits and had put them into huts. On the following morning, the patrol let the men out to take them to interrogate them, but they made a dash for it and it was then the Guards opened fire. He had cross examined them and the police officers who had accompanied the patrol and was "absolutely satisfied a bona fide mistake had been made."

31. It is relatively clear that there were separate investigations by the police and the army, although scant and contradictory information survives as regards the detail and the extent of these undertakings. For instance, Major General Sir Charles Boucher told the press on 5 January 1949 that he had instigated an investigation immediately after he heard about the incident, but no details of this inquiry have been uncovered.

32. Although it has been suggested – particularly by Captain Ramsey – that statements were taken from the members of the patrol and handed to the police in 1948/9, the only contemporaneous statements that have been discovered are from Detective Sergeant Gopal, Detective Constable Chia Kam Woh (his statement is dated 14 December 1948) and the only surviving male from Batang Kali, Cheung Hung. Officers Gopal and Woh indicated that Cheung Hung had told them about visits by "bandits" in order to obtain food. Hung told the police that this was common knowledge but the villagers were afraid to inform the authorities. The officers stated that they separated Cheung Hung, and that they were in the area of the store when the 23 men were shot. Cheung Hung (who has given somewhat differing accounts over the years) indicated that he been in a yam patch at the time of the shooting. He had not seen any attempted escape but instead the men were shot when they were being walked away from the huts.

33. Part of a telegram from the High Commissioner, Sir Henry Gurney, to the Colonial Office dated 1 January 1949 has survived. It includes the following paragraph:

> "10. Everyone who has visited the spot including the Attorney General is satisfied that the soldiers who had been posted with object of protecting the clearing from external attack did everything that it was possible for them to do to stop the escaping Chinese before resorting to force. Moreover, one Chinese had been shot the previous evening during an attempted escape and the others had been warned of the danger to them should they attempt to follow his example."

34. Sir Henry repeated this account at a press conference on 5 January 1949, adding that when the soldiers fired they had intended to kill.

35. Demands were made, and rejected, for a public inquiry conducted by a High Court judge.

36. On 20 January 1949, the Emergency Regulations were amended to permit the use of lethal weapons for the purposes of stop and search and to prevent escape. By Regulation 27 A (6) it was provided:

> "Any act or thing done before the coming into force of this Regulation which would have been lawfully done if this Regulation had been in force, shall be deemed to have been lawfully done under this Regulation."

Accordingly, with retrospective effect this provision appeared to protect the guardsmen if the 24 men had been killed during an attempted escape.

37. In late 1969 one of the Scots guardsmen, William Cootes, provided a vivid account in a sworn statement to the newspaper, *The People*, that the victims at Batang Kali had

been massacred in cold blood. However, in return, he asked the newspaper for a financial contribution towards a deposit on a house. Statements were thereafter taken from other guardsmen: Alan Tuppen, Robert Brownrigg and Victor Remedios. In brief, they alleged that the deceased had been massacred on the orders of the two sergeants on the patrol, and it was suggested by some of the deponents that they had been ordered to give the false explanation that the victims had been killed when trying to escape. A further guardsman, George Kydd (who did not provide a written statement) told the reporter that what had occurred was murder - "sheer bloody murder […] these people were shot down in cold blood. They were not running away. There was no reason to shoot them." For their part, Sergeant Douglas (by then a Regimental Sergeant Major) and former Sergeant Hughes reiterated the account given in 1948 by Sergeant Douglas, set out above, that the individual shot on 11 December 1948 and all those shot on 12 December 1948 had been trying to escape when about to be taken to the company's base for interrogation.

38. A reporter from *The People* then interviewed Cheung Hung who was still living in Malaysia. He said that the troops had separated the women and children from the men, divided the men – who did not attempt to escape – into groups and shot them. Similarly, he suggested that the man who had been shot the night before had not been trying to escape. We note that the first appellant is Cheung Hung's son.

39. *The Straits Times* interviewed one of the guides, Inche Jaffar bin Taib, who said that shortly before the shooting, a sergeant told him not to look at the male detainees. After he had turned his back he heard a burst of gunfire, and when he turned round he saw dead bodies everywhere. The sergeant told him that he would be jailed if he breathed a word about what had happened.

40. The British Government issued a press statement indicating that although the allegations that were now being made contradicted the evidence that had originally been provided, it was nonetheless taking the matter very seriously since murder was being alleged. A three-year limitation period prevented prosecutions under the Army Act 1861 but given the view was taken that prosecutions in the civilian courts remained a possibility, a decision on whether to institute criminal proceedings necessarily came before the Government could resolve whether to hold an inquiry.

41. Very considerable efforts appear to have been taken by the Ministry of Defence, the Foreign Office and the Army to trace relevant contemporaneous documents, but, as set out above, in the main these had been destroyed.

42. The Director of Public Prosecutions ("DPP"), Sir Norman Skelhorn Q.C., received advice on 27 February 1970 from a prosecution lawyer (John Wood), with which he and the Attorney General agreed, that the Metropolitan Police should investigate what had occurred. It was proposed that this inquiry into the facts was to include interviewing all the guardsmen, the police officers who accompanied the patrol, the interpreter and the sole survivor. Sergeants Douglas and Hughes were to be interviewed last. Whether the investigations should extend to Malaysia was left for

later determination; indeed, on 18 March 1970 the DPP informed the Ministry of Defence that he would extend the inquiry beyond the United Kingdom if he considered this to be a necessary step. On 13 April 1970 the Malaysian Government offered to assist the investigation.

43. Responsibility for the investigation was given to the Metropolitan Police, and Detective Chief Superintendent Williams was nominated as the lead officer. DCS Williams contemplated taking two months to interview the guardsmen in the United Kingdom before providing an interim report to the DPP. If authority was given to pursue investigations in the Far East, he envisaged requiring 6 weeks to interview 36 witnesses in Malaysia. He also had in mind the possibility of exhuming the bodies. The sergeants were to be interviewed as the last stage before he submitted his report to the DPP. He expected that the entire process would take approximately 6 months.

44. Four guardsmen – William Cootes, Alan Tuppen, Robert Brownrigg and George Kydd – were interviewed under caution. They each admitted that Sergeant Hughes had ordered them to shoot the men, who did not attempt to escape, as suspected bandits or sympathisers. None of the guardsmen had taken the option that was offered of not participating. Although the record of his interview is not available, a further guardsman, Keith Wood, also admitted when interviewed under caution that the men were murdered. Victor Remedios did not answer the officer's questions, but he did not withdraw his earlier admission of murder. Additionally, Brownrigg and Kydd said that they had been instructed by the army to provide the false explanation that the men had been trying to run away.

45. Two lance corporals, George Porter and Roy Gorton, said that the men had been shot whilst attempting to escape.

46. The sergeants were not interviewed because the inquiry was terminated before this step could be taken.

47. DCS Williams spoke to the two reporters and he was critical of their methods, including the offer of money to William Cootes (£1,500) and the fact that the latter was present when they interviewed other guardsmen. Moreover, it appears that the journalists may have given incorrect information concerning the possibility of a prosecution.

48. Notwithstanding concerns expressed by the High Commissioner in Kuala Lumpur and the Foreign Office in May and June 1970 about the risk that conducting interviews of the villagers was likely, *inter alia*, to produce unreliable accounts, not least because of the lure of compensation, on 12 June 1970 the DPP's office provided the Director with a minute which contained the following conclusion:

> "I am satisfied that on the evidence we have there is no prospect of criminal proceedings. But there are at least five persons who say this was murder. It seems to me that enquiries

> must be pursued in Malaysia, as otherwise the inquiry will only be half done. Furthermore there are a number of witnesses out there who claim to have seen what took place, including Cheung Hung. The various statements by this witness are inconsistent and we want to pin him down. It appears also that a number of persons who say they saw what happened (women on the lorry) could not have been in a position to do so. I feel that this should be cleared up. I am of the opinion that, if we do not go through to the bitter end, we will lay ourselves open to attack by the newspapers and the anti-military brigade."

The DPP's endorsement read:

> "I have nothing to add to my minute of 5/6/70 (which, we interpolate to note, is unavailable). Having embarked on this inquiry, must we now go as far as we can? Perhaps the Malaysian Government will refuse entry to the investigating team and save any further expenditure of time and money on this unrealistic inquiry."

49. Following the General Election on 18 June 1970, the new Attorney General (Sir Peter Rawlinson Q.C.) indicated at a meeting with the DPP on 26 June 1970 that it was unlikely that sufficient evidence would be obtained to support a prosecution and therefore the investigation should go no further. This decision was communicated to the Ministry of Defence by the DPP on 29 June 1970, as follows:

> "The evidence shows that there is a substantial conflict among the soldiers who were present at the village of Batang Kali. Some confirm the allegation in The People newspaper, whereas others deny that anything of the kind took place. Further, the statements of the witnesses supporting the allegations must be viewed with reserve in that these men made statements in respect of a civil inquiry held in Malaya in 1948 and, without exception, maintained that the villagers had been shot whilst trying to escape. An alleged survivor says that he was an eye witness to the shooting, but in a statement made in 1948 he said he did not see what occurred. Neither did the two police officers who accompanied the patrol witness any of the shooting that took place in the village. Taking into consideration these facts together with the fact that the incidents took place 21 years ago, I am satisfied that the institution of criminal proceedings would not be justified on the evidence so far obtained. Further in my view the prospect of obtaining any sufficient additional evidence by further police investigation are so remote that this would not be warranted. Accordingly I do not propose to ask the Police to pursue the inquiry and the Attorney-General agrees with my views."

50. The Ministry of Defence decided not to hold an inquiry given what was described as the serious conflict of evidence which would lead, in all probability, to inconclusive findings.

51. These various decisions brought DCS Williams' investigation to a premature end and in his report of 30 July 1970 to the Commissioner of Police for the Metropolis he set out that:

> "At the outset this matter was politically flavoured and it is patently clear that the decision to terminate enquiries in the middle of the investigation was due to a political change in view when the new Conservative Government came into office after the General Election on 18 June 1970."

52. The Williams Report was only disclosed to the appellants for the first time, despite numerous requests, in the course of these judicial proceedings.

53. The deaths at Batang Kali next gained significant public prominence in a BBC documentary broadcast on 9 September 1992 entitled *In Cold Blood*. This was based on a range of materials, which included interviews with Cheung Hung and a number of others who were related to the men who had been killed or who had been present in Batang Kali when these events occurred. One of the officers involved in the 1970 Metropolitan Police investigation (Detective Sergeant Dowling) and three guardsmen who had not been on the patrol were interviewed and some of the interviews in 1970 with the guardsmen were read out.

54. Following this programme, there was consideration by the Crown Prosecution Service as to whether any further steps should be taken. The conclusion was seemingly reached that although the decision in 1970 to terminate the work of DCS Williams' team was potentially open to criticism, it was pointless to reopen the criminal investigation because any defendant in criminal proceedings would be able to mount an irrefutable abuse of process application (see the draft review by Jim England of the War Crimes Unit, dated 26 March 1993).

55. It would appear that no consideration was given at this juncture to holding an inquiry rather than pursuing a criminal prosecution.

56. On 8 July 1993 Foo Moi, the wife of one of the men who had been shot, and Cheung Hung presented a Petition to the Queen via the British Embassy in Kuala Lumpur requesting the British Government to reopen the investigations, prosecute those responsible for the deaths and to pay compensation.

57. As the Divisional Court noted (judgment, paragraph 74), "[i]t is clear from internal British Government memoranda that there was seen to be no reason to progress a response to the Petition with any rapidity. By April 1994 the Petition had been

submitted to the Palace with a draft response which was described as "non committal." In December 1994 the High Commissioner responded to the Malaysian Chinese Association who enquired as to the progress of the response to the Petition that he was looking into the matter. It would appear that a response to the Petition was never forthcoming.

58. The petitioners simultaneously complained to the Royal Malaysia Police that the events at Batang Kali had been a crime. The Malaysian police launched an inquiry, and took statements form Cheung Hung and a number of others who were either related to the men who had been killed or who had been in the village at the time, as well as three retired police officers. Again, as the Divisional Court observed:

> "77. It is clear from internal British Government memoranda that there was seen to be no reason to provide rapid assistance to the Royal Malaysia Police inquiry. Sometime during 1994 the Royal Malaysia Police made a request for help, but it is evident that it was considered not to be in the interests of the British Government to progress that request with any speed.
>
> 78. A Royal Malaysia Police report of 31 May 1995 concluded that further enquiries were necessary, including obtaining the views of the chief pathologist as to examining the bodies and taking statements from the Scots Guards. A request was made through Interpol for British help which was passed to the Metropolitan Police War Crimes Unit. This included a request for the names of the Scots Guards on the patrol. It took until 31 July 1996 to send the names. The addresses were then sought by the Royal Malaysia Police, but nothing further seems to have been supplied.
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> 79. It was submitted by the claimants that the High Commission in Kuala Lumpur had done its utmost to procrastinate, to delay British police assistance to the Royal Malaysia Police Investigation and to prevent the Royal Malaysia Police coming to the United Kingdom to investigate. Although there is material that lays the foundations for these submissions, we cannot decide on the materials before us that the High Commission played such a role. We can, however, record that the Royal Malaysia Police obtained virtually no assistance from the United Kingdom authorities and that no one from the Royal Malaysia Police came to the United Kingdom."

59. The Royal Malaysia Police file on this inquiry was closed on 30 December 1997- it would appear due to lack of evidence to support criminal charges.

60. On 25 March 2008 a group called the Action Committee Condemning the Batang Kali Massacre sent a second Petition to the Queen seeking an apology and compensation. In October 2008 the appellants' solicitors wrote to the Foreign Secretary requesting a

response to the Petition. On 12 December 2008, a supplementary Petition was presented seeking additional relief including a public inquiry. On 21 January 2009, the High Commissioner gave a response that was subsequently withdrawn:

> "In view of the findings of the two previous investigations that there was insufficient evidence to pursue prosecutions in this case, and in the absence of new evidence, regrettably we see no reason to re-open or start a fresh investigation."

61. A barrister, Dr Brendan McGurk, was instructed to review the available material for the respondents. The appellants provided the Secretaries of State with the views of Professor Sue Black from the Centre of Anatomy and Human Identification at the University of Dundee as to the prospects of disinterment revealing new evidence. On 29 November 2010 the Treasury Solicitor wrote to the appellants' solicitor communicating the decision to refuse to hold an inquiry or to pay compensation.

62. These proceedings were issued on 25 February 2011. Permission was granted on 31 August 2011 and the Divisional Court judgment was handed down on 4 September 2012.

63. On 4 November 2011 the respondents confirmed their decision not to hold an inquiry following a submission from officials addressing an argument concerning the adequacy of the previous investigations.

## ***The principal issues arising in this appeal***

64. In these proceedings, the principal areas of dispute are as follows. The appellants maintain that: (1) the Secretaries of State are under a legal obligation, pursuant to the procedural obligation arising under article 2 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) to establish an independent and effective investigation such as a public inquiry, which obligation is now enforceable in domestic law by reason of section 6 of the Human Rights Act 1998; (2) alternatively, a comparable obligation arises pursuant to customary international law but is enforceable at common law; (3) in the further alternative, the exercise of discretion by the Secretaries of State not to establish a public inquiry is vitiated on conventional domestic public law grounds. In relation to the article 2 submission, the appellants place strong reliance on *Janowiec v Russia*, a decision of the Grand Chamber of the European Court of Human Rights (ECtHR), 55508/07, which was handed down after the decision of the Divisional Court in the present case. On behalf of the appellants, Mr Michael Fordham QC submits that the ECtHR would now conclude that the Secretaries of State's refusal to establish a public inquiry constitutes a breach of the article 2 procedural obligation and that we should foreclose the need for the appellants to apply to the ECtHR by reaching the same conclusion, having had due regard to the decision of the Grand Chamber in *Janowiec*, pursuant to our duty under section 2 of the Human Rights Act.

65. The case for the Secretaries of State as advanced by Mr Jonathan Crow QC is that: (1) *Janowiec* would not compel such a conclusion in the ECtHR but, even if it would, as a result of domestic authority binding on this court, we should not follow it; (2) no obligation under customary international law arises, not least because an applicable obligation cannot be said to have existed in 1948; (3) in any event, the reliance on article 2 and/or customary international law is misconceived because, as a matter of state responsibility, the United Kingdom did not assume liability for the deaths at Batang Kali and in any event liability fell away from the United Kingdom as a result of the post-colonial constitutional settlement with Malaysia in 1957; (4) the domestic law challenge to the exercise of discretion is unsustainable.

***Janowiec v Russia***

66. The judgment of the Divisional Court considered (at paragraphs 95-99) the judgment of the Fifth Chamber in *Janowiec* (55508/07 with 29520/09) but concluded that, as it was bound by high domestic authority (*Re McKerr* [2004] 1 WLR 807 and *Re McCaughey* [2011] 2 WLR 1279) on the temporal scope of article 2, it should not apply *Janowiec*. We have received further submissions about *McKerr* and *McCaughey* to which we shall return. However, since the judgment of the Divisional Court, the Grand Chamber has given judgment in *Janowiec* on 21 October 2013. It took the opportunity to review its extensive jurisprudence on the temporal scope of article 2 and its judgment now stands as the definitive exposition of the relevant principles by the ECtHR.

67. *Janowiec* was concerned with the notorious massacre of thousands of Polish prisoners by the Russian authorities in April and May 1940 in locations including the Katyn Forest. For many years, Russia falsely asserted that the perpetrators were the Germans. We now know that Russian records were destroyed or concealed in 1959. However, the concealed documents were finally released in 2010. Russia was not a party to the ECHR when it was adopted on 4 November 1950. However, it became a party by ratification on 5 May 1998 – 58 years after the Katyn massacre. By thirteen votes to four, the Grand Chamber concluded that the application relating to the procedural obligation to investigate pursuant to article 2 had not been breached because the applicants could not bring themselves within the temporal scope of the ECHR.

68. The Grand Chamber analysed the jurisprudence and clarified the applicable principles. Its assessment is to be found in the following passages:

> "128…the provisions of the Convention do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention with respect to that party ('the critical date') …
>
> 129. Where an act, omission or decision alleged to have violated the Convention occurred prior to its entry into force

> but the proceedings to obtain redress for that act were instituted or continued after its entry into force, these proceedings cannot be regarded as part of the facts constitutive of the alleged violation and do not bring the case within the Court's temporal jurisdiction….
>
> 130… in order to establish the Court's temporal jurisdiction it is essential to identify, in each specific case, the exact time of the alleged interference. In doing so, the Court must take into account both the facts of which the applicant complains and the scope of the Convention right alleged to have been violated…
>
> 132… the procedural obligation to carry out an effective investigation under Article 2 had evolved into a separate and autonomous duty. Although it is triggered by the facts concerning the substantive aspect of Article 2, it can be considered a detachable obligation arising out of Article 2 capable of binding the State even when the death took place before the critical date…
>
> 133. However, having regard to the principle of legal certainty, the Court's temporal jurisdiction as regards compliance with the procedural obligation of Article 2 in respect of deaths that occur before the critical date is not open-ended…"

69. Having referred to the Court's earlier judgment in *Silih v Slovenia* (2009) 49 EHRR 57, including its requirement of a "genuine connection" between the death and the critical date for the procedural obligation under article 2 to come into effect, the judgment continued:

> "142…the Court's temporal jurisdiction extends to those procedural acts and omissions which took place or ought to have taken place in the period after the entry into force of the Convention in respect of the respondent government.
>
> ….
>
> 144. The mention of "omissions" refer to a situation where no investigation or only insignificant procedural steps have been carried out but where it is alleged that an effective investigation ought to have taken place. Such an obligation on the part of the authorities to take investigative measures may be triggered when a plausible, credible allegation, piece of evidence or item of information comes to light which is relevant to the identification and eventual prosecution or punishment of those responsible … Should new material emerge in the post-entry into force period and should it be sufficiently weighty and compelling to warrant a new round of proceedings, the Court will have to satisfy itself that the respondent State has

> discharged its procedural obligation under Article 2…. However, if the triggering event lies outside the Court's jurisdiction ratione temporis, the discovery of new material after the critical date may give rise to a fresh obligation to investigate only if either the 'genuine connection' test on the 'convention values' test…have been met."

70. We do not need to concern ourselves with the "Convention values" test because the Court went on to hold that it cannot be applied to events which occurred prior to November 1950. The present appellants do not seek to rely on it. We return to the judgment and the "genuine connection" test:

> "146… the time factor is the first and most crucial indication of the 'genuine' nature of the connection…the lapse of time between the triggering event and the critical date must remain reasonably short if it is to comply with the 'genuine connection' standard. Although there are no apparent legal criteria by which the absolute limit on the duration of that period may be defined, it should not exceed ten years…
>
> …
>
> 148… for a 'genuine connection' to be established, both criteria must be satisfied, the period of time between the death as the triggering event and the entry into force of the Convention must have been reasonably short, and a major part of the investigation must have been carried out after the entry into force. "

71. We have set out these passages at length because of their importance and because we believe that this is the first occasion upon which they have had to be considered in our domestic appellate courts.

## ***Would the appellants' case succeed in Strasbourg?***

72. The next question is whether, in the light of the decision of the Grand Chamber in *Janowiec*, these appellants would be likely to succeed on an application to the ECtHR. This is the first of Mr Fordham's building blocks. It raises questions concerning the temporal and territorial reach of the ECHR. We shall consider them first as matters of general principle. If, at first blush, *Janowiec* is supportive of the appellants' case, there is a further complication arising from the fact that, since 1957, Malaysia has been an independent state and the case for the Secretaries of State is that any obligation which lay on the United Kingdom at that time was transferred to the independent state by virtue of the devolving legislation.

73. The events of 1948 occurred well before the ECHR had been concluded. The United Kingdom ratified the ECHR in September 1953 and, pursuant to Article 56, extended

it to the Federation of Malaysia, on 23 October 1953. It is common ground that nothing turns on the difference between these two dates. Taking 23 October 1953 as the material one, that becomes "the critical date" within the meaning of paragraph 128 of *Janowiec*. It was four years and nine months after the events at Batang Kali. This is significantly shorter than the outer limit of ten years between "the triggering event" and "the critical date" contemplated by paragraph 146 of *Janowiec*. The application in *Janowiec* failed not simply because the Katyn massacre took place long before the ECHR was conceived but because the critical date in relation to Russia was 5 May 1998 and it did not satisfy the "genuine connection" test in relation to the period thereafter.

74. If the ECtHR were now considering the present case, the focus of its attention, in the light of *Janowiec*, would be on procedural acts and omissions which took place or ought to have taken place in the period after October 1953 (paragraph 142). In particular, the Court would have to consider whether new material has emerged since the critical date and, if so, whether it was "sufficiently weighty and compelling to warrant a new round of proceedings" (paragraph 144). For the "genuine connection" test to be satisfied, it would have to be established that "a major part of the investigation must have been carried out or ought to have been carried out" after the critical date (paragraph 148).

75. The first submission on behalf of the Secretaries of State is that there were significant investigations in 1948-1949 but that it is no longer possible to evaluate them properly because most of the contemporaneous documentation has not survived. On this basis, it is suggested that we should not impugn the 1948-1949 investigations as inadequate or conclude that "a major part of the investigation must have been carried out" since the critical date. We reject this submission. We cannot escape the conclusion that the investigation at that time was woefully inadequate. We refer to the matters set out in paragraphs 25 to 35, above. Everything points to the investigation having been one-sided. We need only to refer to its brevity and to the view that it was not worth questioning the inhabitants of the village "for a very good reason, because they were most unlikely to talk and, if they did talk, to tell the truth".

76. Since the critical date, the significant developments have been intermittent. However, in 1969-1970 there were developments of great potential significance in the form of apparent confessions by some of the soldiers (paragraph 37). This resulted in the involvement of the Metropolitan Police and the DPP. However, their unfinished investigations were brought to an end by the intervention of the new Attorney General in June 1970 (paragraph 49). Some of the information about this only came to the notice of the appellants and their advisors after the commencement of the current proceedings.

77. The next event of note was the BBC documentary in 1992. The Crown Prosecution Service became involved but the matter was not taken much further because the view was taken that any defendant to a criminal prosecution would obtain a stay of the proceedings as an abuse of process. It does not seem that the matter was considered at that time from any perspective except that of a possible prosecution.

78. In late 1994 a complaint was made to the Royal Malaysian Police. An inquiry was launched and statements were taken from Cheung Hung and from others. We have described this period at paragraphs 58-59 above. As the Divisional Court observed (paragraph 79), the Royal Malaysian Police file was closed on 30 December 1997.

79. There the matter lay until, in 2008, the present campaign took shape. A further Petition to the Queen was sent in March 2008 and a supplementary Petition followed on 12 December 2008. More significantly for present purposes, the appellants' solicitors wrote to the Foreign Secretary in October 2008. We have described in paragraphs 60 to 63 above, how all this led to the decision of the Secretaries of State not to hold an inquiry which was communicated by a letter dated 29 November 2010 and confirmed a year later following the commencement of proceedings.

80. This chronology is very different from the history which preceded *Janowiec*. There the critical date was 5 May 1998. Whilst there had been investigative steps taken in the early 1990s, none of significance was taken after the critical date. The Court added (at paragraph 159):

> "Nor has any relevant piece of evidence or substantive item of information come to light in the period since the critical date. That being so, the court concludes that neither criterion for establishing the existence of a "genuine connection" has been fulfilled."

81. It is also pertinent to observe that the Russian state no longer adheres to the original version advanced in the aftermath of Katyn. In the present case, the original account has not been abandoned. Indeed, we are urged by Mr Crow to adopt a stance of neutrality towards it.

82. Whilst developments since our critical date have been intermittent, they have yielded material which, to put it at its lowest, may cast doubt on the original account. The confessions which arose in 1969-1970 were of potential significance and remain so, not least because the investigation within which they emerged was brought to an abrupt halt. They have never been tested or discredited. The sum of knowledge has been significantly increased by the work of the Royal Malaysian Police twenty years ago but they were unable to secure meaningful co-operation from the United Kingdom authorities. Importantly, significant material from the Metropolitan Police in the 1970s and a considerable amount of potentially relevant material accumulated during the Royal Malaysian Police investigation in the 1990s has only come to the notice of the appellants in the course of, and as a result of, these proceedings. It includes statements made many years later by some of the children who were at Batang Kali at the time of the shootings. It is not suggested that the material which has emerged since the critical date and which, if true, discredits the official version is all inherently incredible. The fact is that it has never been tested independently. Nor has it been brought together for a singular independent assessment. Moreover, there is reason to suppose that, even now, it could be supplemented by significant

pathological expert evidence following exhumation. Professor Sue Black of the University of Dundee has so opined.

83. The "genuine connection" test focuses not only on what took place, pursuant to the article 2 procedural obligation, after the critical date but also on what "ought to have taken place". In view of the limited nature of the investigation which took place before the critical date and the potential significance of the new material which has emerged since the critical date but which has never been subjected to the full rigour of independent evaluation, it is our view that, whilst we cannot predict with certainty what the ECtHR might decide, it is probable that it would find the "genuine connection" test to be satisfied in this case. In the words of paragraph 148 of the judgment, "the period of time between the death[s] as the triggering event and the entry into the force of the Convention [was] reasonably short, and a major part of the investigation [was] carried out or ought to have been carried out after the entry into force".

84. So far we have said nothing about the territorial application of article 2. One aspect of this (to which we shall return) is the fact that the territory in question has been an independent state since 1957. Our immediate concern is whether, in any event, the ECtHR would conclude that the appellant's case falls within the territorial ambit of article 2. We are in no doubt that, in the light of *Al-Skeini v United Kingdom* (2011) 53 EHRR 589, and postponing for the moment our consideration of the state responsibility point, it would conclude that this case falls within the territorial ambit of article 2.

85. In these circumstances, the appellants have forged the first link in the chain. The next question is whether this Court, applying the Human Rights Act, should come to the same conclusion as a matter of domestic law, having regard to recent authority in the House of Lords and the Supreme Court which continues to bind us.

## ***The Human Rights Act 1998***

86. If the effect of the decision of the Grand Chamber in *Janowiec* is that an application by the present appellants to the ECtHR would now be successful, the next question is whether we, as a domestic court, should reach the same conclusion in order to give effect to what is sometimes called "the mirror principle". This is the concept through which our domestic courts "bring rights home" in accordance with the purpose of the Human Rights Act: see, for example, *R (Quark Fishing Ltd) v Secretary of State* [2006] 1 AC 529, per Lord Nicholls at paragraph 34. On the other hand, it is the duty of this court to follow existing House of Lords and Supreme Court authority, even when that authority seems to be inconsistent with a later decision of the ECtHR: *Kay v Lambeth London Borough Council* [2006] 2 AC 465. It is for the Supreme Court in an appropriate case, to decide whether to change its jurisprudence so as to bring it into line with that later Strasbourg decision. It is therefore necessary for us to consider whether, notwithstanding *Janowiec*, we are bound by a different domestic interpretation of article 2. This requires analysis of the two important domestic

authorities relating to the procedural obligation under article 2 in respect of deaths which occurred before the Human Rights Act came into force on 2 October 2000.

87. In *McKerr*, the deaths had occurred in November 1982. An inquest had been opened in 1984 but abandoned in 1994. In 1993, a surviving relative had made an eventually successful application to the ECtHR: *McKerr v United Kingdom* (2011) 34 EHRR 553. In June 2002, a year after the Strasbourg judgment, domestic judicial review proceedings were commenced complaining about the continuing failure to provide an article 2 compliant investigation. Reliance was placed on section 6 of the Human Rights Act. The House of Lords unanimously refused to apply the Act to deaths which had occurred before 2 October 2000. Lord Nicholls said (at paragraph 32):

> "…Parliament chose not to give [the Human Rights Act] retroactive effect. In relation to Article 2, the intention of Parliament… was not to create an investigative right in respect of deaths occurring before the Act came into force."

88. This view was shared, with some differences in their reasoning, by Lord Steyn (at paragraph 48), Lord Hoffmann (at paragraph 67), Lord Rodger (at paragraph 81) and Lord Brown (at paragraph 89). One of the themes running through the speeches was the inextricability of the link between the substantive and the procedural obligations arising under article 2. As we have explained, *Janowiec* (and, before that, *Silih*) has departed from that analysis by adopting "detachability". However, *McKerr* is substantially based on the interpretation of the Human Rights Act in relation to retrospectivity. Its ratio is that, even if Strasbourg jurisprudence is more expansive (and that was highly debatable before *Silih* and *Janowiec*), the rights which domestic law "brought home" by the Human Rights Act are only enforceable domestically in relation to breaches occurring after 2 October 2000.

89. *McCaughey* was decided in the Supreme Court after *Silih* but before *Janowiec*. The deaths had occurred in October 1990. In 1993 the Director of Public Prosecutions decided not to prosecute the soldiers who had shot the deceased. In 1994, the papers were passed to the Coroner but he did not receive all the relevant documents until 2002. At a preliminary hearing of the inquest in 2009, there was an issue as to whether it had to comply with the procedural requirements of article 2 now that *Silih* had held that the procedural obligation under article 2 is detachable from the substantive obligation. The Supreme Court (Lord Rodger dissenting) held that the circumstances of the case, looked at after taking account of the Grand Chamber judgment in *Silih*, did require the inquest to be conducted in accordance with the procedural requirement of article 2.

90. The case for the appellants, in this court, is that *McCaughey* has replaced or at least marginalised *McKerr* on the question of the retrospectivity of the Human Rights Act in a case such as this. Mr Fordham submits that, of the seven judges in the Supreme Court, four (Lord Phillips, Lady Hale, Lord Brown and Lord Dyson) support this reading. Before considering their judgments, it is important to keep in mind a factual distinction between *McCaughey* and the present case. There, an inquest was actually

taking place after the coming into force of the Human Rights Act. Here the issue is whether there is an obligation to commence an investigation or inquiry at all.

91. The judgment of Lord Phillips, having set out *Silih*, has a heading "*McKerr* reviewed". It includes these passages:

> "61…The relevant event in these appeals is the fact that the Coroner is to hold an inquest into [the]…deaths…
>
> 62. Is the presumed intention of Parliament when enacting the HRA that there should be no domestic requirement to comply with this international obligation? This is a very different question from that considered by the House of Lords in *In re McKerr*…, and so far as I am concerned it produces a different answer. The mirror principle should prevail [over the non-retrospective principle]. It would not be satisfactory for the coroner to conduct an inquest that did not satisfy the requirements of article 2, leaving open the possibility of the claimants making a claim against the United Kingdom before the Strasbourg Court. On the natural meaning of the provisions of the HRA they apply to any obligation that currently arises under article 2. These appeals are concerned with such an obligation. The mirror principle reinforces an interpretation that does not exclude this obligation from the ambit of the HRA"

92. Does this analysis sweep away the whole of *McKerr*? In our judgment, it does not and it was not the intention of Lord Phillips that it should. His next two sentences read:

> "It may be that this involves a departure from *McKerr*. I am inclined to think that it does."

93. This language does not suggest a total reversal. If that had been the intention one would expect it to have been expressed unequivocally. In our judgment, it has to be seen in the context of an inquest which was actually taking place rather than in relation to an issue as to whether there is an obligation to hold one.

94. The judgment of Lord Hope (upon which Mr Fordham does not rely) is plainly consistent with *McKerr*.

> "77… the holding of inquests into the deaths in this case will be a procedural act which the state itself has decided should take place…
>
> 78…The effect of *Silih*…is to breathe life into the procedural obligation post-commencement in a way that domestic law can recognise and give effect to.

> 79…as there is nothing in the wording of the 1998 Act to prevent us from directing that when he conducts these inquiries the coroner must comply with the procedural obligation under article 2, I would hold that we should do so. ”

This approach undoubtedly attaches significance to the fact that the coroner was already seized of the matter before 1 October 2000 and was proceeding with the inquest after that date.

95. The same approach is apparent in the judgment of Lady Hale:

> “89… The coroner began his inquiries at the very latest once the Director of Public Prosecutions had announced on 2 April 1993 that there was to be no prosecution. But for a variety of reasons things have proceeded very slowly since then and a significant part of the investigation, in particular the inquest, has still to take place.
>
> 90. I do not see this as involving the retrospective operation of the 1998 Act. As public authorities, the coroner and the court have now to act compatibly with the Convention rights…
>
> 93…Accepting that this inquest must comply with the procedural requirements of article 2 does not require that old inquests be reopened (unless there is important new material) or that inquiries be held into historic deaths… if there is now to be an inquiry into a death for which the state may bear some responsibility under article 2, it should be conducted in an article 2 compliant way.”

Again, this seems to focus on inquests which are being held rather than question of whether an investigation or inquest into a historic death should be held at this stage.

96. Lord Brown’s focus was on “any inquests still outstanding, even, as in these cases, in respect of deaths occurring before 2 October 2000” (paragraph 101). He referred to a total of sixteen “legacy inquests” with the consequence that there would “be only comparatively few inquests affected by this ruling” (paragraph 102). Far from supporting Mr Fordham’s submission, this seems to us to restrict *McCaughey* to the narrow parameter of inquests commenced before but substantially processed after October 2000. Mr Fordham does not claim to derive support from the judgment of Lord Kerr.

97. There are passages in the judgment of Lord Dyson which may seem more favourable to the present appellants. They stem from his emphasis on the mirror principle and the way in which he expressed it (see, for example, paragraphs 135 and 140). However, we are not wholly convinced that he had in mind circumstances in which a decision maker is called upon to decide whether or not an investigation or inquest into a

historic death should be commenced. He attached "considerable importance" to the fact that "the investigation had been initiated" before 1 October 2000 (paragraph 137).

98. Lord Rodger, dissenting, held to *McKerr* in its full rigour, finding "no article 2…right to an inquiry into a death that occurred before the Act commenced" (paragraph 160), notwithstanding the "poorly reasoned and unstable decision… in *Silih.*"

99. We return to Mr Fordham's essential submission, using the language of his skeleton argument, namely that, whilst *McKerr* had constructed a roadblock, *McCaughey* has removed it. It is a bold submission. In our judgment it is wrong because it seeks to derive from *McCaughey* more than it has placed on offer. We do not consider that the Supreme Court was addressing the question whether a post-Human Rights Act decision whether or not to commence an investigation or inquest into pre-Human Rights Act historic deaths is constrained by the procedural obligation under article 2. *McCaughey* was a clear case of an inquest formally commenced before 1 October 2000 but with the major part of it being processed after that date. *Silih*, incidentally, was concerned with deficiencies in a criminal investigation in relation to the period after the critical date (Slovenia's accession to the ECHR).

100. We do not consider that the appellants can equiparate the present case with "legacy inquests" by tying the adverse decisions in 2010 and 2011 to earlier investigations in this country or in Malaysia. There is no element of continuity. Indeed, it is the appellants' case that all previous investigations had been terminated or had fizzled out long before 2000. What they have been seeking in recent years is a new public inquiry, embracing an inquiry into the inadequacy of previous investigations. In our view, the domestic law in relation to reliance on article 2 in these circumstances is still that expounded in *McKerr*, by which we remain bound. We do not accept that a majority of the Supreme Court overruled *McKerr* on this point or intended to do so. If they had so intended, they would have said so. Any attempt to move in that direction would now be a matter for the Supreme Court rather than for us.

## ***Customary International Law***

101. The alternative submission on behalf of the appellants is that if they fail in their claim brought under section 6 of the Human Rights Act (as they have) they may nevertheless establish a right to a public inquiry even at this stage at common law by reference to customary international law. It seems that the origin of this submission lies in a kite flown by Lord Steyn in *McKerr* who said (at paragraph 52):

> "At a later stage of the appeal…I did wonder whether customary international law may have a direct role to play in the argument about the development of the common law."

102. The argument about the development of the common law to which he was referring arose from the alternative submission in *McKerr* that, if the Human Rights Act did not apply, it was still open to the courts to impose a common law obligation

corresponding to the procedural obligation under article 2 of the ECHR but without the statutory restriction concerning retrospectivity. It was not a submission based upon customary international law but it stimulated Lord Steyn's personal consideration. He observed, uncontroversially, that in the absence of a contrary statute, customary international law has been part of English law since before the Human Rights Act came into force. In this regard, Mr Fordham points to the observation of Toulson LJ in *R (Guardian News & Media Ltd) v Westminster Magistrates Court* [2013] QB 618, at paragraph 88, that "the development of the common law did not come to an end on the passing of the Human Rights Act". That, of course, we accept and, indeed, celebrate.

103. In *McKerr*, the invitation to impose a common law obligation akin to the procedural obligation under Article 2 but without the temporal limitation, was soundly rejected on the grounds that such an obligation was being sought "as a means of supplementing, or overriding, the statutory provisions relating to the holding of coroners' inquests" which would not be an appropriate role for the common law or that it would conflict with the statutory scheme set out in the Human Rights Act (Lord Nicholls, at paragraphs 31-2). See also Lord Steyn at (paragraph 51) and Lord Hoffmann at (paragraph 71).

104. It is in these circumstances that Mr Fordham seeks to take up the customary international law possibility floated by Lord Steyn who said that "it may have to be considered in a future case", albeit with the warning that "it may be unrealistic to suggest that the procedural obligation was already part of customary international law at a time material to these proceedings" (paragraph 52). It will be recalled that the deaths in *McKerr* post-dated those in the present case by 34 years. Two main questions arise. First, does the customary international law argument run into the same difficulty as the primary common law submission in *McKerr*, namely an inhospitable statutory framework? Secondly, did customary international law at the material time (1948) embrace a positive obligation to investigate the events at Batang Kali?

105. As regards the first question, the statutory framework prior to the coming into force of the Human Rights Act did not concern itself with the investigation of deaths caused by the acts of state agents overseas. There was no right to an investigation, inquiry, or inquest. There was simply a discretion to establish one. As several cases since 2000 have illustrated, there is now a domestic statutory right arising under the Human Rights Act but limited by the constraints, including the temporal constraint, contained in that Act. Mr Crow submits that if (as we have held) the appellants cannot surmount the temporal constraint arising under the Human Rights Act, the common law does not permit reliance on customary international law in order to circumvent the statutory regime. He relies on the principle articulated by Lord Denning MR in *Trendtex Trading Corp v Central Bank of Nigeria Ltd* [1977] QB 529,557-8, which acknowledges the inclusion of the rules of international law in the common law:

> "unless they are in conflict with an Act of Parliament".

For a recent application of that proviso, see *Mutua v Foreign and Commonwealth Office* [2011] EWHC 1913 (QB), at paragraph 82, per McCombe J (as he then was). When rejecting the appeal to common law (albeit not in relation to customary international law) in *McKerr,* Lord Nicholls said (at paragraph 32):

> "The effect of the proposed right would be to impose positive human rights obligations on the state as a matter of domestic law in advance of the date on which a corresponding positive obligation arose under the 1998 Act."

106. Although the context of the present case is different, it seems to us that the Human Rights Act, as properly construed in domestic law in relation to its temporal and territorial limitations, has set the parameters within which a right to an investigation can be claimed. The temporal limitation is based on a prohibition on retrospective reliance, save in circumstances such as those present in *McCaughey*. In our judgment, it was not the intention of Parliament to leave open in domestic law a mandatory duty without temporal limitation by reference to customary international law.

107. The second question was given short shrift in the Divisional Court (at paragraph 105):

> "In any event, it seems to us that the Secretaries of State are correct in their contention that any duty under customary international law must be judged at the time of the occurrence of the act about which an inquiry is sought. The act occurred in 1948 long before any duty arose as part of customary international law."

Having considered the international instruments and adjudication referred to by Mr Fordham in his submissions in this court, we believe that the conclusion of the Divisional Court was and remains correct. There may have been straws in the wind but we are not persuaded that international law imposed an obligation of the kind contended for in 1948.

## ***The Wednesbury Challenge***

108. If the appellants had been able to bring themselves within article 2 or to rely on customary international law, an entitlement to an investigation would have arisen as of right. Their alternative case is that the Secretaries of State's refusal to order a public inquiry was a flawed exercise of discretion by reference to domestic public law principles.

109. The Divisional Court identified (at paragraph 157) a number of purposes which an inquiry might serve, including: establishing the facts; learning from the past and preventing a recurrence; catharsis; providing reassurance and rebuilding public confidence; and accountability. In rejecting the *Wednesbury* challenge, it repeatedly referred to the passing of time and that it would now be "very difficult… to establish

definitively whether the men were trying to escape or whether there were deliberate executions" (paragraph 159, but see also paragraphs 160,161,165,167,168). Expected difficulties in reaching definitive conclusions lay at the heart of its reasoning. It seems that this quest for the definitive came from the Court's consideration rather than from the submissions of the parties. With great respect, we believe that it resulted in the imposition of too high a threshold.

110. It is not uncommon for a public inquiry to reflect upon the standard of proof required to sustain its conclusions. Of course, the ideal outcome would be findings based on certainty. However, that does not mean that findings based on a lower standard are worthless. This issue has arisen and has been addressed in several high-profile inquiries in recent years. In *Bloody Sunday* there were rival submissions concerning the standard of proof, one submission being that it would be unfair to apply anything less than the criminal standard in relation to findings implying criminal conduct. This submission was rejected by the inquiry on 11 October 2004. Following an earlier ruling of Dame Janet Smith in the *Shipman inquiry*, Lord Saville and his colleagues said (at paragraph 24):

> "… it would be quite wrong to confine ourselves in relation to this central part of the inquiry to making findings where we were certain what happened. On the contrary, it is in our view our duty to set out fully in our Report our reasoned conclusions on the evidence we have obtained and the degree of confidence or certainty with which we have reached those conclusions. We are not asked to report only on these central matters on which the evidence makes us certain".

111. The final sentence emphasises the importance of the terms of reference. This has not resulted in later inquiries having more restrictive terms of reference. Thus, in the *Baha Mousa inquiry*, Sir William Gage adopted the civil standard of proof, "but indicating where appropriate where I am sure of a finding".

112. In our view, the Divisional Court was wrong to inject a definitive requirement. It is very difficult to evaluate the prospects of attaining that standard before all the surviving witnesses have given their evidence and all the relevant material has been considered. However, the error we have identified was an error of the Divisional Court. What we have to consider is whether the decisions of the Secretaries of State were vitiated by public law breaches. There were two decision letters dated 29 November 2010 and (following reconsideration) 4 November 2011.

113. The letter of 29 November 2010 reveals that an earlier "provisional" decision had been expressed in terms similar to the Divisional Court's concern about the likelihood of firm conclusions. But this approach was expressly disavowed in this letter. The Secretaries of State now considered that:

> "they should not assume that an Inquiry would be 'unlikely' to be in a position to reach firm conclusions about what happened in December 1948" (original emphasis).

Against that background, they considered a number of matters including the facts that most of the witnesses are now dead, the survivors are in their 80's and that "it is obvious that there may be difficulties in relying on oral evidence given now about events that took place more than 60 years ago".

114. The consideration was expressly set in the context of section 1 of the Inquiries Act 2005 and the criteria of (a) events having caused public concern, or (b) public concern that particular events may have ocurred. The Secretaries of State acknowledged that public inquiries can serve the purpose of "establishing the truth of contested events" but added:

> "…the goal of establishing the truth about contested events is especially important and especially likely to justify the substantial financial and other resources which an Inquiry inevitably involves – when that truth can cast light on systemic or institutional failings, the correction of which would be likely to reduce the prospects of a repetition … this is more likely to be the case where the events the subject of the inquiry are relatively recent ones."

115. They went on to doubt the extent to which any conclusions of a public inquiry would be likely to assist commanders in the present day in ensuring the proper treatment of prisoners. There is now "a very different legal backdrop". Moreover, "training methods and command structures have moved on". Comparison was made with the *Baha Mousa inquiry* (which had not yet concluded). They anticipated that its conclusions were likely to be of relevance to ensuring that repetitions do not occur "precisely because they will consider current practices and report on any deficiencies in those practices", adding:

> "It is difficult to see how a report on training practices or command structures in 1948 would have the same sort of contemporary relevance."

116. In considering cost and resources, the Secretaries of State accepted that, as regards oral evidence and contemporaneous 1948 documents, an inquiry might be less demanding than an inquiry dealing with more recent events, but the cost would still be "considerable". They also addressed the possibility of a racial motive in relation to the killings and in relation to the inadequacy of the previous investigation, together with the potential of an inquiry to improve present relations between the ethnic Chinese population in Malaysia and the rest of the population there but they did not consider that these factors were sufficient to outweigh countervailing considerations. They were mindful of the fact that the United Kingdom ceased to be a colonial power in Malaysia more than half a century ago.

117. The rejection of the request for a public inquiry communicated in the letter of 29 November 2010 provoked a threat and then the reality of a legal challenge. At the same time as defending that challenge, the Secretaries of State reconsidered their decision but confirmed it in the letter of 4 November 2011. The second letter contains a succinct reiteration of the points made a year earlier. In relation to costs and resources it observed that an increased focus upon the detail of previous investigations (as sought on behalf of the appellants) would add to the cost.

118. The case for the appellants is that the reasoning set out in the two decision letters cannot survive a *Wednesbury* challenge. We totally disagree. We are satisfied that the Secretaries of State considered everything which they were required to consider; did not have regard to any irrelevant considerations; and reached rational decisions which were open to them. Indeed, when considered in the domestic legal context of discretion, we do not think that any other Secretaries of State would have been likely to reach a different conclusion at this stage.

***State responsibility***

119. We have yet to consider the respondents' contentions that, if there ever was any accountability on the part of the British Government such as to impose upon it an obligation to hold the inquiry sought by the appellants, there are additional reasons why the Government is not now under any such obligation.

120. The first submission advanced by Mr Crow is in support of his challenge to the assertion that Strasbourg would entertain the appellants' claim. It is of the essence of the appellants' argument that not only can they build a bridge into the Convention even though the deaths preceded its creation; but that they can then also establish a continuing connection to the present day such that they can say there is an extant default on the part of the Government in failing to commission an inquiry. The appellants claim to establish that connection by relying on the new events that happened, and the new material that emerged, in the 1970s, the 1990s and more recently.

121. Mr Crow's answer is that if (which the respondents dispute) down to the date of Malaysian independence in 1957 the Government was under any obligation to institute an inquiry into the deaths, such obligation passed to and was assumed by the newly independent State of Malaysia upon independence in 1957. If so, that severed the connection which the appellants assert makes the Government answerable today for an extant failure to commission an inquiry. If that would foreclose any prospect of Strasbourg entertaining the appellants' claim, so also, submitted Mr Crow, must it foreclose the appellants' claim under the Human Rights Act 1998. Mr Crow also had a separate argument as to why the appellants can anyway have no claim under the Human Rights Act. That is because their claim can only be in respect of the acts of a public authority of the United Kingdom (see section 6), whereas he said the Scots Guards deployed to Selangor in 1948 cannot be regarded as having acted in such a capacity.

122. Before coming to the arguments, we shall summarise the conclusions of the Divisional Court on the state responsibility issue. The court held that under section 71 of the Army and Air Force (Annual) Act 1929 the King was empowered to make Regulations as to the command over British armed forces, namely the King's Regulations. The Scots Guards were subject to those Regulations. Regulation 6 vested the government of the Army in the Crown; regulation 37 provided that at a station abroad the command responsibilities rested on the officer commanding the troops; and regulation 310 required special arrangements to be made if a soldier was to be employed by a colonial or similar government. No such arrangements were made in relation to the Scots Guards and the Court recorded the respondents' acceptance that the command of the Scots Guards remained with the British Army.

123. The respondents' point, however, is that it was not the immediate command structure of the Scots Guards that counted, but the ultimate constitutional source of the authority for such structure. As to that, the Court held that it was clear that it lay with the British Government, for which it gave five reasons:

> "112. … First, the Scots Guards were part of the British Army in contradistinction to the Malay Regiment and other local forces. Second, it is evident from the minute of the British Cabinet set out at paragraph 22 above [referred to in [19] above] that the reason for the decision to send the Brigade of the British Army was to defend British interests against the advance of communism on what was in reality territory the British government controlled, to prevent the deaths of British citizens and to protect its economic interests. Third, control over the deployment of the army in Malaya was vested in British Defence Co-ordination Committee Far East; this was chaired by the Commissioner General and comprised only military members, though the High Commissioner of the Malay Federation could be invited to attend. Fourth, the Scots Guards were paid by the British Government, not by the Federation or the Ruler of Selangor. Fifth, it is clear from the role played by Major General Sir Charles Boucher in relation to the investigation in 1948 that his command was in charge of the Scots Guards."

124. In addition, the Court placed reliance on the *obiter* observations of Browne-Wilkinson LJ (as he then was), in *Trawnik v. Lennox* [1985] 1 WLR 532, at 552, that, in relation to the actions of the British Armed Forces in the British Sector of Berlin, he was:

> "… far from clear how liabilities for the acts of the British Army (as opposed to forces of any other part of the Commonwealth) can be said not to arise from the acts of the Crown in respect of the Government of the United Kingdom."

The court also referred to a concession to like effect made in *Mutua v. Foreign and Commonwealth Office* [2011] EWHC 1913, recorded by McCombe J (as he then was) at paragraph 118.

125. The Court concluded that, as what was in issue was the actions of the Scots Guards, on ordinary principles it was those responsible for their command, ultimately the Army Council, who had responsibility for their actions. If wrong on that, the Court anyway did not accept the respondents' contention that the Scots Guards were acting for the Ruler of Selangor in dealing with an internal security issue; nor did it accept that, as they were acting in aid of the civil power under the Emergency Regulations 1948 made by the High Commissioner, they were acting for the Federation of Malaya. The Court held that the British Government, as Ministers of the Crown in right of the United Kingdom, could not formally instruct either the High Commissioner or the British Adviser in Selangor what to do. Formally, such instructions were given on behalf of the King in right of his position in Selangor and the Federation. All the relevant decisions resulting in the sending of the Scots Guards to Selangor were, however, decisions of the British Government as advisers to the Crown of the United Kingdom. Under article 4 of the Federation Agreement and article 3 of the Selangor Treaty, the King had wide powers to send the army to the Malay States not only in the event of an external threat but also for similar purposes. That was a power of the King in right of the United Kingdom, which could be exercised to protect the interests of the United Kingdom in South East Asia. In the Court's view, the constitutional position was that the United Kingdom Government in its own right deployed the army to the Malay States for that purpose, and the authority ultimately vested in the United Kingdom Government.

126. If that was the correct position, the Court dealt next with the respondents' contention that any legal responsibility that the British Government may have had was transferred to the Federation of Malaya on independence in 1957. That was said to be the result of article 167(1) of the Constitution of the Federation of Malaya, scheduled to the Federation of Malaya Independence Order, which was made under the Federation of Malaya Independence Act 1957. The Court set out article 167 (slightly inaccurately) and held that, whilst it operated to transfer to the Malaysian states all rights, liabilities and obligations of the Crown 'in respect of' the Government of the Federation, it did not operate so as to transfer the liabilities and obligations of the Crown in relation to the actions of the Scots Guards. That was because the responsibility for those actions lay not with the High Commissioner or Adviser in Selangor, or therefore with the Crown in right of the Federation or Selangor. It lay with the Crown in right of the United Kingdom, and so did not pass under article 167(1).

127. Mr Crow does not dispute that the British Government's decision to send troops to Malaya was taken in protection of British interests, but asserts that the Divisional Court misunderstood the constitutional arrangements that regulated the exercise of British authority in Malaya. The Federation of Malaya was a grouping of independent Protected States, including Selangor, with the status of colonies. On 21 January 1948, Sir Gerard Gent on behalf of the King entered into a Treaty with the Ruler of Selangor. On the same day, the Federation of Malaya Agreement was signed. The

Treaty and Agreement contained materially identical provisions in relation to protection and external affairs. Thus, article 3 of the Treaty provided:

> " (1) His Majesty shall have complete control of the defence and of all the external affairs of the State of Selangor and His Majesty undertakes to protect the Government and State of Selangor and all its dependencies from external hostile attacks and for this and other similar purposes His Majesty's Forces and persons authorised by or on behalf of His Majesty's Government shall at all times be allowed free access to the State of Selangor and to employ all necessary means of opposing such attacks."

Article 4 of the Agreement was in identical terms, save that for "the State of Selangor" there was substituted "the Malay States".

128. The precise nature of the rights thereby retained by, or conferred upon, the King was, however, put into question by the provisions of articles 16 and 17 of the Agreement. These were in Part III of the Agreement, headed 'Federal Executive Authority, The High Commissioner'. Article 16 provided that:

> "16. Subject to the provisions of this Agreement, and in particular without prejudice to the provisions of Clauses 18, 66 and 110 thereof, the executive authority of the Federation shall extend to all matters set out in the First Column of the Second Schedule to this Agreement."

We would, if we could, also quote article 17, but it has been so highlighted as to render it illegible in the copy provided to us. Its substance, though, was, we were told, to vest the executive authority of the Federation in the High Commissioner. Article 19 also provided, so far as material that:

> "In the exercise of his executive authority, the High Commissioner shall have the following special responsibilities, that is to say:"
>
> …
>
> (b) the prevention of any grave menace to the peace or tranquillity of the Federation or any Malay State or Settlement comprised therein …

129. The relevant part of the Second Schedule provides:

> "Defence and External Affairs
>
> 1. All matters relating to defence including:

> (a) Naval, military or air forces of His Majesty; local forces; any armed forces which are not forces of His Majesty but are attached to or operating with any of His Majesty's forces within the Federation; …
>
> (c) Naval, military and air force manoeuvres;"

130. Mr Crow also referred us to article 48 of the Agreement, which provided:

> "Subject to the provisions of this Agreement, it shall be lawful for the High Commissioner and Their Highnesses the Rulers, with the advice and consent of the Legislative Council, to make laws for the peace, order and good government of the Federation with respect to the matters set out in the Second Schedule to this Agreement, and subject to any qualification therein."

and to article 13, which provided:

> "His Majesty may from time to time give to the High Commissioner Instructions, either under his Majesty's Sign Manual and Signet, or through a Secretary of State, for the due performance, or the proper exercise, of the powers, duties and rights of the High Commissioner under, and in conformity with, this Agreement …."

The relevant Secretary of State was the Colonial Secretary.

131. Relating all this to the deployment of the Scots Guards in Malaya in 1948, the Divisional Court explained at paragraphs 17 to 26 how the communist threat and insurgency resulted in the Colonial Secretary's approval of the use of emergency powers, following which the Acting High Commissioner promulgated an Emergency Regulations Ordinance, which enabled the High Commissioner in Council to proclaim a state of emergency. In August 1948, the Defence Co-Ordination Committee for the Far East asked the Chiefs of Staff in London for reinforcements to meet the emergency, a request supported separately by the Commissioner General and the Acting High Commissioner. The result was the decision to send a Brigade of the British Army to Malaya, including the Scots Guards. When they arrived, they were deployed in aid of the civil power and joint army and police patrols were organised. It was one of these patrols that went to Batang Kali in December 1948.

132. Mr Crow's submissions are, first, that despite the absolute terms of article 4 of the Agreement giving His Majesty "complete control" of defence and the external affairs of the Federation, these powers were mediated through the executive and legislative powers of the High Commissioner, who was the ultimate executive authority in the Federation. In exercising such powers, the High Commissioner was subject to instructions from His Majesty, as provided by article 13 of the Agreement. The

consequence of this was that it was the High Commissioner who had ultimate legal responsibility for the joint patrols which went on manoeuvres in his name. None of the factors relied upon by the Divisional Court pointed away from such conclusion. Mr Crow says the Divisional Court's decision was flawed by a failure to consider the provisions of the Agreement. Mr Crow's alternative submission is that if the insurgency in Selangor was properly to be regarded as an internal matter, not engaging His Majesty's rights under article 4 of the Agreement, then it was difficult to see how the Scots Guards were deployed otherwise than in aid of the Ruler of Selangor, an independent sovereign, who would therefore take responsibility for their actions.

133. Mr Crow submits further that, if he was wrong on his primary submission, any responsibility of the British Government for the actions of the Scots Guards transferred to the Federation of Malaya when it became independent in 1957. He relied upon article 167(1) of the Constitution of the Federation, which provided materially as follows:

> "167. – (1) Subject to the provisions of this Article, all rights, liabilities and obligations of –
>
> (a) Her Majesty in respect of the government of the Federation, and
>
> (b) the Government of the Federation or any public officer on behalf of the Government of the Federation,
>
> shall on and after Merdeka Day [31 August 1957] be the rights, liabilities and obligations of the Independent Federation.
>
> (2) Subject to the provisions of this Article, all rights, liabilities and obligations of –
>
> (a) Her Majesty in respect of the government of Malacca or the government of Penang,
>
> (b) His Highness the Ruler in respect of any State, and
>
> (c) the Government of any State,
>
> shall on and after Merdeka Day be the rights, liabilities and obligations of the respective States. …"

134. Mr Crow's submission is that, if he is correct that the ultimate constitutional responsibility for the actions of the Scots Guards lay with the former Federation rather than with the Crown, such responsibility passed to the newly independent Federation under article 167(1) (b). If, however, he is wrong on that, he places reliance on article 167(1) (a), which formed the primary focus of his oral submissions. He notes, correctly, as the Divisional Court may not have done, that there the word "government" has a lower case "g" as compared with other uses of the word in article 167. It was, therefore, a reference to the "governing" of the Federation. In this case,

the British Government sent troops, including the Scots Guards, to the Federation, where they could only be deployed because it was permitted under the constitution of the Federation; and the particular powers they exercised were those conferred upon them by the Emergency Regulations. The fact that they were sent there to protect British interests in a broader international sense did not justify any conclusion other than that their actions were performed in connection with, and in respect of, the "governing" of the Federation. They were acting with the federal police force, which was the responsibility of the High Commissioner.

135. If, and contrary to his primary submission, any liabilities *were* incurred by the British Government by reason of the actions of the Scots Guards, Mr Crow submits that such liabilities could only have been incurred by "Her Majesty *in respect of the government* of the Federation". He points to the width of the phrase "in respect of" and submits that it was difficult to imagine anything more closely connected with the government of the Federation than the deployment of troops to assist the Government of the Federation in putting down an emergency. If so, those liabilities, including any liability to carry out a detachable article 2 inquiry in respect of the Batang Kali incident, passed to the newly independent Federation. Mr Crow's alternative submission is that, if the acts of the Scots Guards were originally to be regarded as having been ultimately the responsibility of the Ruler of Selangor, then upon independence that responsibility passed to the State of Selangor under article 167(2)(b).

136. For the appellants, Mr Fordham supports the decision of the Divisional Court for the reasons it gave. Command over the Scots Guards remained with the British Army Council and their commanding officers, and it was the structure of command that governed the legal responsibility for their actions. No authority had been cited for the submission that responsibility for the actions of British forces overseas depended upon the constitutional arrangements of the overseas territory. Even if legal responsibility depended upon the ultimate source of constitutional authority over the Scots Guards, that was the Crown in right of the United Kingdom. Either way, no such liability passed to the Federation of Malaya upon independence in 1957.

137. Cogently though Mr Crow advances the respondents' case, we agree with the appellants that the Divisional Court was correct in its conclusion that any accountability for the acts of the Scots Guards at Batang Kali in December 1948 was that of the Crown; and we do not accept that any such accountability was a liability that passed to the newly independent Federation of Malaya upon its independence in 1957.

138. In our view the difficulty in the respondents' argument is that we can identify no basis for the deployment of the troops in Selangor in 1948 other than that deriving either from the "complete control" reserved to His Majesty by article 3 of the Selangor Treaty or else by the like reservation of "complete control" in article 4 of the Federation Agreement. We are not persuaded that there is any evidential basis for a conclusion that the decision to deploy the troops in Malaya was mediated through the High Commissioner. The deployment was a deployment of troops by the Crown in

right of the Government of the United Kingdom, with the consequence that the Crown became accountable for the actions of the troops.

139. We also see no basis upon which it can be said that any such accountability, or liability, passed from the Crown upon the establishment of the independent Federation of Malaya in 1957. The answer to Mr Crow's submission is that any liability incurred by the Crown by reason of the deployment of troops in Malaya pursuant to the reservations of "complete control" contained in the prior Treaty and Agreement was a liability incurred by the Crown's exercise of its powers in right of the Government of the United Kingdom, and cannot therefore fairly be regarded as a liability incurred "in respect of the government" of the Federation.

140. That conclusion also provides our answer to Mr Crow's submission that, for the purposes of section 6 of the Human Rights Act 1998, the Scots Guards deployed to Malaya in 1948 are not to be regarded as having acted as a "public authority", which necessarily means a United Kingdom public authority. For the reasons which flow from our response to Mr Crow's submissions, we consider that they were so acting.

## ***Conclusion***

141. It follows from our analysis of the human rights, customary international law and *Wednesbury* issues that these appeals fall to be dismissed. In the circumstances, it is unnecessary for us to consider further issues raised on behalf of the Secretaries of State such as ECHR time limits.