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Case No: CO/1827/2011

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/09/2012

Before :

PRESIDENT OF THE QUEEN'S BENCH DIVISION
and
MR JUSTICE TREACY

Between :

Chong Nyok Keyu
Loh Ah Choi
Lim Kok
Wooi Kum Thai
- and -

Claimants

(1) Secretary of State for Foreign & Commonwealth Affairs
(2) Secretary of State for Defence

Defendants

Michael Fordham QC, Danny Friedman and Zachary Douglas (instructed by **John Halford, Bindman & Partners**) for the **Claimants**
Jason Coppel and Marcus Pilgerstorfer (instructed by **Treasury Solicitor**) for the **Defendants**

Hearing dates: 8 and 9 May 2012

Judgment Approved by the court
for handing down
(subject to editorial corrections)

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The President of the Queen's Bench Division:

This is the judgment of the court.

INTRODUCTION

1. On 11 and 12 December 1948 a patrol of the Second Battalion of the Scots Guards deployed to combat an insurgency and communist threat in the then Federation of Malaya shot and killed 24 civilians at Batang Kali, in the State of Selangor, a British Protected State. The deaths have been the subject of much controversy during the past 63 years.
2. There were investigations by at least the police and the Attorney General of the Federation of Malaya in December 1948. The conclusion of the investigations was that those killed were shot whilst trying to escape. Most of the papers relating to the investigations no longer survive.
3. In 1970, there was a Metropolitan Police investigation instigated by the Director of Public Prosecutions following allegations by members of the patrol published in *The People* that the 24 had been deliberately executed. They had not been shot whilst trying to escape; that account had been put forward by the leader of the Scots Guards patrol to cover up the executions. All the papers relating to that investigation are available. The investigation was terminated by the British Director of Public Prosecutions and Attorney General before it was concluded on the basis that there was insufficient evidence to bring a prosecution.
4. After the broadcast of a BBC documentary about the deaths entitled *In Cold Blood* in 1992, the Crown Prosecution Service (CPS) considered whether there should be a prosecution and decided there should not be. In the light of the BBC documentary and a complaint by relatives of those killed and the Malaysian Chinese Association, the Royal Malaysia Police carried out an investigation between 1993 and 1997, but it was terminated by the Malaysian Attorney General. Most of the papers relating to that investigation are available.
5. The claimants who are witnesses to and survivors of the deaths at Batang Kali and close relatives of those who were killed sought, by Petition to Her Majesty the Queen in 2008, a public inquiry into the conduct of the Scots Guards and the ensuing events and investigations. They contended that the conclusion of the inquiry in 1948/9 was not sustainable and a fair appraisal of the available evidence compelled the conclusion that the 24 had been deliberately executed. The Secretaries of State by decisions dated 29 November 2010 and 4 November 2011 decided to exercise their discretion under the Inquiries Act 2005 not to establish a public inquiry or any other inquiry into the deaths.
6. The claimants, supported by 568 organisations in Malaysia ranging from schools and temples to professional and other associations, have brought these proceedings not only to challenge those decisions based on the exercise of the discretion which the Secretaries of State have to establish an inquiry, but to establish a legal duty on the Secretaries of State to carry out an inquiry. As the claimants' case necessarily involves imputing murder to the Scots Guardsmen who were members of the patrol,

they have been served as interested parties, though only some are still alive. None took any part in the proceedings.

7. The Secretaries of State contended that no inquiry was required. First, they were under no legal duty to establish any inquiry; in any event, the British Government was not responsible for the Scots Guards as that responsibility rested either with the Ruler of Selangor or the Federation of Malaya or had passed to Malaysia on independence in 1957. Second, the exercise of their discretion was one which was properly made.
8. This judgment
 - i) First sets out the factual background which we have merely outlined.
 - ii) Then considers the issue as to whether there was a legal duty to hold an inquiry. We have concluded there was not.
 - iii) Finally considers whether there are any grounds to challenge the decisions of the Secretaries of State who had in the exercise of their discretion under the Inquiries Act 2005 determined that an inquiry would not be held. We have concluded that the challenge fails.

I: THE FACTUAL BACKGROUND

(1) The State of Selangor and the Federation of Malaya

(a) 1874-5: The origins of British control over Selangor

9. In 1874 or 1875 Sultan Abdul Samad, as Ruler of the State of Selangor, entered into an arrangement with the British Government under which it became a Protected State; similar arrangements were entered into with other Malay states. The Ruler agreed by an exchange of letters with the Governor of the Straits Settlements to receive a British Resident who would aid and advise him in governing his kingdom. In effect the Ruler generally acted only through the Resident, who acted on instructions from the British Government. The Ruler, however, remained a sovereign: he was in the same position as the Ruler of another Malay state, Johore, whose sovereign status was acknowledged in *Mighel v Sultan of Johore* [1893] QB 149.
10. During the Second World War, Selangor and much of Malaya was conquered by the Japanese army. During that time the communist Malayan People's Anti-Japanese Army fought with the British to defeat the Japanese.
11. After the conclusion of the war, Sir Harold McMichael on behalf of the King entered into a Treaty with the Ruler on 24 October 1945 under which Selangor became a Protectorate. The treaty provided that "His Majesty the King shall have full power and jurisdiction within the State of Selangor". In 1946 Selangor entered the Malayan Union. Malay opposition to these imperial arrangements then led to the restructuring of the Union as the Federation of Malaya and a renegotiation of the 1946 Treaty.

(b) 1948: Selangor as a State within the Federation of Malaya

12. In anticipation of the creation of the Federation, 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 as the Federation of Malaya agreement was concluded; similar treaties were made with other Malay states. Under clause 3 of the Treaty the Crown was to have “complete control of the defence and all other external affairs” of Selangor and the King undertook to protect Selangor “from external hostile attacks”. For that and similar purposes the forces of the King were allowed free access to Selangor and to employ all necessary means of opposing any such attacks. The Ruler of Selangor undertook to accept the advice of a British Adviser on all matters connected with the Government of the State, other than matters relating to the Muslim religion or the custom of the Malays.

13. On 1 February 1948 the Federation of Malaya Agreement entered into force. It had been made between Sir Gerard Gent on behalf of the King and the Rulers of the Malay States. Clause 4 of the Agreement contained provisions in relation to defence and external affairs similar to that in clause 3 of the Selangor Treaty:

“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 necessary means of opposing such attacks.”

14. Part II of the Federation Agreement provided that the King would appoint a High Commissioner, a title used in this context not for a diplomat, but for a person entrusted with the exercise of the Crown’s power and other executive power in the territory to which he was appointed. The Rulers of the Malay States undertook to accept his advice in all matters connected with the Federation. Part III of the Federation Agreement vested the executive authority of the Federation in the High Commissioner with a Federal Executive Council appointed by him to advise him. Under clause 19, the High Commissioner was given special responsibilities which included:

“(b) The safeguarding of any grave menace to the peace or tranquillity of the Federation or any Malay State or Settlement contained therein”

15. Under Part V of the Federation Agreement the High Commissioner and the Rulers were empowered to make laws known as Ordinances with the advice and consent of a Federal Legislative Council. Under the second schedule to the Federation Agreement, the Federal Legislative Council had power to make laws in relation to specified matters including defence and emergency powers.
16. Selangor was categorised as a Protected State: see *British Protectorates, Protected States and Protected Persons Order 1949*. In both a Protectorate and Protected State, defence and external affairs were in the hands of the United Kingdom. In a Protectorate the internal administration was normally under the same degree of British control as a British colony, but in a Protected State the Crown’s jurisdiction was more limited and there was a local Ruler. See *Roberts Wray: Commonwealth and Colonial Law (1966)* at page 44-47.

(2) The proclamation of an Emergency

(a) The communist threat and insurgency

17. At the time the Federation was being formed, there was an increasing communist threat and insurgency in which the members of what had been the communist Malayan People's Anti-Japanese Army took a leading part. Contemporary documents referred to them variously as "bandits" and "thugs", but we will use the neutral term insurgents. During 1948 the communist threat and insurgency intensified and several British planters and businessmen were killed either on the rubber estates, tin mines or in towns; murder was a daily occurrence. There were several incidents in parts of Selangor.
18. A meeting took place on 24 June 1948 between Sir Malcolm McDonald, the British Commissioner General for South East Asia (who was responsible to the British Colonial Secretary for the coordination of British defence, colonial and foreign polices for the region and the immediate superior of the High Commissioner of the Federation), the Defence Co-ordination Committee for the Far East, the Governor of Singapore and the High Commissioner of the Federation. It was assumed that the insurgency in Malaya comprised about 600 saboteurs and 4000 armed guerrillas operating in small units of 10-50. They were mainly Chinese communists who were adept at "tip and run raids" and making the fullest use of the jungle and obtaining food supplies by intimidation.

"The enemy's first objective has been and is by a terrorist campaign to produce the maximum industrial unrest and disruption of economic life of the country with a view amongst other things to destroy the Government's authority."

The Colonial Secretary had approved the use of emergency powers. It was agreed that the first phase of the operation would have as its primary objective "to apprehend or liquidate the enemy forces and so far as this does not succeed completely to drive them into the jungle". Installations essential to the economy of Malaya would be protected; for this phase, the police force needed strengthening and the Malay regiment and other local troops would assist. Deployment of police from other parts of the Empire was considered. The second phase was described:

"Phase 2 comprises the operation necessary to liquidate guerrilla bands in the jungle involving also destruction of camps, cutting off of food supplies and uncovering of dumps of arms etc. In this process we shall have to deal with KMT, communists and individual robber bands and sealing off of the northern frontier will remain of primary importance. These operations will be primarily of a military nature in which the police will participate Phase 2 cannot be extensively undertaken until sufficient success is achieved in Phase 1."

The Commanders in Chief would decide if any reinforcements were necessary.

(b) The Emergency Regulations

19. On 7 July 1948 the Acting High Commissioner, Sir Alec Newbould, and the Rulers with the advice and consent of the Federal Legislative Council promulgated an Emergency Regulations Ordinance (no 10 of 1948). This enabled the High Commissioner in Council to proclaim a state of emergency and then enabled the High Commissioner during the currency of such emergency to make Regulations in relation to the emergency of wide scope, including power to prescribe the death penalty.
20. On 12 July 1948 the High Commissioner in Council acting under the Ordinance proclaimed a state of emergency in relation to the entire Federation. On 15 July 1948, the High Commissioner in the exercise of powers under the Ordinance made the Emergency Regulations 1948. This gave the police significant powers and made provision for the holding of trials in camera. Regulation 36 provided for Coroners and Magistrates to dispense with inquires or inquests in the case of the death of any person resulting from the operations by the police or military in suppressing disturbances.
21. Although the evidence before us was not definitive, it is clear that the police force in Malaya was a Federal police force. The relationship between the police and the local military before the despatch of a brigade of the British Army was described in a memorandum from the Commissioner General for South East Asia to the Colonial Secretary on 12 July 1948:

“There is 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 present 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.”

(3) The 24 deaths at Batang Kali on 11/12 December 1948

(a) The decision of the British Cabinet to send a brigade of the British Army to Malaya

22. On 9 August 1948, the Defence Co-ordination Committee for the Far East chaired by the Commissioner General asked in a secret telegram to the Chiefs of Staff in London for British Army reinforcements to meet the emergency as this was essential to bring the operations to a successful conclusion. It explained the necessity in the following terms. The Committee had taken account of

“The vital need from the point of view of British prestige, civil morale and the maintenance of the economy of the Federation of bringing the operations to a successful conclusion as early as possible. We attach the greatest possible importance to speed, for unless the enemy is rapidly defeated, there will be a loss of prestige and prosperity from the first of which the British may never recover in South East Asia and from the second of which

the county would take a very long time to recover. The result would undoubtedly strengthen the communist position in the whole of the Far East.”

The telegram explained that the police force would take some time to strengthen and there was intelligence to suggest infiltration of Chinese communists from Thailand. This request was supported by separate telegrams from the Commissioner General and the Acting High Commissioner. The latter set out intelligence that there were large numbers of armed uniformed Chinese on the Malay-Thailand frontier; it was likely that these would enter Malaya in small bands and would form “an appreciable increment to enemy strength.”

23. At a meeting of the Defence Committee of the British Cabinet on 13 August 1948, there was a discussion as to whether in the light of other commitments, particularly in Europe and the Middle East this request for troops could be met. The Chief of the Imperial General Staff, Viscount Montgomery of Alamein, made clear that the despatch of troops to any part of the world needed careful thought, as the army was very stretched. He summarised his reasons for sending a Brigade of the British Army:

“In Malaya, the trouble was not only of local origin, but was instigated by the Chinese communists and kept going by Communist reinforcements from across the Siamese boarder. The situation had not been firmly handed in the first place - the police had been weak – but the fact was that Malaya was the only place in all the areas where we were actively fighting against Communism and it was British territory. Moreover our own nationals were being killed. We could not stand this nor could we afford to lose Malaya to Communism. His conclusion was that we should take risks in the West and the Middle East, and send immediate help to the Far East”

The Ministers agreed to send a Brigade of the British Army to Malaya by the end of August 1948 and to see if Australia could also help. The cost of sending the troops was met by HM Treasury.

24. Amongst the troops sent were units of the Guards Brigade, including Coldstream Guards, Grenadier Guards and Scots Guards. Most were national servicemen and they had had only limited training for this type of operation. The Second Battalion arrived in Singapore in October 1948 and after three weeks training went to Malaya.
25. The troops were sent to areas of the Federation where insurgency activity (referred to in contemporary documents as “bandit activity”) was reported and joint army and police patrols were organised. It was in the course of one of these patrols that the 24 civilians were killed at Batang Kali on 10/11 December 1948.
26. The claimants contended that the troops were under the control of the British Crown whereas the Foreign Secretary contended that as they were sent to assist with internal security and as the insurgency was not an external attack, the legal responsibility for the actions of the Scots Guards was that of the Federation of Malaya alone or jointly with the Ruler of Selangor or such responsibility had passed to Malaysia upon independence. We return to this issue at paragraphs 106-123 below.

(b) *The current evidence: key facts relating to the deaths at Batang Kali*

27. The patrol which went to Batang Kali was part of G Company of the Second Battalion of the Scots Guards. G Company was based at Kuala Kubu Bahru. In a statement made to the police in 1970 by Captain Ramsay, the second in command of G Company, he said that the company had, after arriving at Kuala Kubu Bahru, trained in jungle warfare. When the main part of the company was away and he was in charge of a standby platoon at the base, he was asked by the officer commanding the police in the district to send two patrols to two areas to which they had never been before so that they could ambush a party of insurgents due to arrive the following day.
28. Two patrols were formed. One was commanded by Captain Ramsay and the other which went to Batang Kali was commanded by Lance Sgt Charles Douglas who was 22, as, despite Captain Ramsay's request to Battalion Headquarters, there was no officer available to lead it. His second in command was Lance Sgt Thomas Hughes who was 31. There was a Lance Corporal and 11 Guardsmen. Almost all the Guardsmen were on National Service. The patrol was guided by a Malay Special Constable and accompanied by two police officers, Detective Sergeant Gopal and Detective Constable Woh. The inclusion of police officers did not affect its character of a military patrol.
29. Although the object of the inquiry sought by the claimants is to determine how the deaths occurred, Mr Fordham QC on behalf of the claimants helpfully outlined what he identified as 10 key facts relating to the deaths of the 24 civilians as matters which, on the evidence currently available, could not be the subject of serious doubt. We accept the submission of the Secretaries of State that any inquiry, if held, would seek out further evidence and that it is not the function of this court to seek to reach a conclusion on what happened. Nonetheless there is no evidence, 63 years later, on which any of the 10 key facts relating to what happened at Batang Kali can seriously be disputed. It is therefore both helpful and necessary to an understanding of what happened after the deaths to set the 10 facts out.
 - 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.
30. There are essentially two divergent accounts of the reasons why the shootings occurred.
- i) The first account and the official explanation given in 1948-9 is that the person (Loh Kit Lin) was shot on the night of 11 December when trying to escape. On 12 December the other 23 men were taken out of a hut to be taken back to base for interrogation. One shouted, they split into three groups and there was an escape attempt. Warnings were shouted at them. When the men did not stop they were shot dead.
 - ii) The second account that first emerged in 1970 was that the deaths were planned and premeditated executions of civilians on the orders of the Sergeants leading the patrol as the villagers were all "bandits". None of the 23 men was shot when trying to run away. That was a fabricated account to cover up the truth.

(4) The investigations and enquires in 1948-9

(a) The initial accounts provided

31. Reports of the deaths appeared in the *Straits Times* on 13 December 1948 setting out a detailed account written by a journalist, Harry Miller. He told the Metropolitan Police inquiry in 1970 that he had driven to the Scots Guards base at Kuala Kubu Bahru on 13 December 1948 and interviewed Sgt Douglas in the presence of a senior officer; he said the person shot on 11 December and all those shot on 12 December had been trying to escape when about to be taken back to the company's base for interrogation. The General Officer Commanding Malaya, Major General Sir Charles Boucher, had stated at a press conference on 17 December 1948 that the account he had written was extremely accurate.
32. The High Commissioner reported the deaths to the Colonial Office on 13 December 1948 as the shooting and killing of 26 bandits by the police and military. On 17 December 1948 a "sitrep" report was made to the British Military authorities describing the actions to combat the insurgency. It included a report in relation to Batang Kali:

"Another 2 SG patrol captured twenty six male bandits near K Kubu Bahru. Detained for night in kongsi huts. Early the

following morning on infm from one of the captured bandits ambush laid for lorry arriving with food. Lorry captured. Bandits attempted mass escape. 25 killed one recaptured.”

33. Although this was the official account, the families of those killed appealed for help to various organisations and to the Chinese Consul-General who asked for an inquiry. There were claims in the Chinese press that there had been a massacre. The Consul-General claimed at a press conference that the killing was out of all proportion as the men were not armed. They should have been shot in the legs and lamed instead. On 22 December 1948, the Owner of the Estate which included Batang Kali, Mr Menzies, made a public statement that those killed had been loyal employees with a record of good conduct. He had had no strikes or other problems. The *Straits Times* called for an inquiry.

(c) *The Inquiry by Sir Stafford Foster-Sutton in 1948-9*

34. An inquiry was then conducted in these circumstances by the Attorney General of the Federation, Sir Stafford Foster-Sutton (who became Chief Justice of the Federation in 1950) and a Federal Counsel, Mr Shields. The papers in relation to this have been destroyed. It was discovered in 1970 that the Colonial Office file in relation to the inquiry and most other files on law and order during the Malay emergency had been destroyed in 1966 as the files were not considered worthy of public preservation. There was no copy of the Malayan Colonial Government file in the repository. It was concluded that it has either been left in Malaysia on independence as a “legacy document” or destroyed at that time. In contradistinction, the Foreign Office files had survived.
35. The only account of what was done in the conduct of the inquiry is set out in what Sir Stafford Foster-Sutton told the police and the BBC’s *World at One* in 1970 following the allegations made by *The People* on 1 February 1970 to which we have briefly referred at paragraph 3 and to which we refer again at paragraphs 45 and following. By that time Sir Stafford was President of the Lord Chancellor’s Pensions Appeal Tribunal.
- 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

“for a very good reason, because they were most unlikely to talk and, if they did talk, to tell the truth”.

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:

“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”

- 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.”
36. It can be inferred from what Sir Stafford said and the surviving documents there had been separate police and military investigations at which the statements were taken:
- i) Statements taken from Detective Sergeant Gopal, Detective Constable Chai Kam Woh and Cheung Hung, the only surviving male from the village of Batang Kali are available, as they were obtained by the Ministry of Defence in the course of the enquiries in 1970. That of Detective Constable Woh is dated 14 December 1948. It would therefore appear that these were part of the statements provided to Sir Stafford and were made in the course of a police investigation. Detective Sergeant Gopal and Detective Constable Woh stated that Cheung Hung gave them information about the visits by “bandits” to obtain food which was brought into the village on the estate lorry; everyone knew of this but was afraid to tell. This information was then given to the two Sergeants; Cheung Hung was then separated from the others and kept out of sight. Both police officers said they were inside the store when the shooting of the 23 men took place. Cheung Hung (whose brother had been one of those killed) gave an account in two statements which described what happened when the soldiers fired; he said nothing of the attempted escape. He had not been in the hut and had hidden in a yam patch. He had merely seen the assembled people being walked away from the huts.
 - ii) As to the statements from the Guardsmen, Major General Sir Charles Boucher, the General Officer Commanding Malaya told the press on 5 January 1949 that he had instigated an investigation immediately he had heard of the incident. Captain Ramsay, on the other hand, said in his 1970 statement that statements were made by all the men to the police in Kuala Lumpur. Each had told his story which he had written out and handed to the police. None of the statements taken survive. From enquiries made in 1970, it appears that there was no formal Army Court of Inquiry, though the Adjutant recalled in 1970 writing some sort of summary. However a letter written sometime in 2004 or 2005 by another officer who had served in Malaya recorded that the Adjutant had told him that he had taken down all the details in a court of inquiry.
37. It is not clear when Sir Stafford’s inquiry started or concluded, but it can be inferred that as the Estate owner complained on 22 December 1948 that it started shortly thereafter. As there is a telegram from the Colonial Office to the Chief Secretary of the Federation, Sir Alec Newbould, on 31 December 1948 stating that *Daily Mirror* was going to print an article which would say that the dead were not bandits but

suspects and there was disquiet about the conduct of the police and army, it may be inferred that the inquiry was brought to a rapid conclusion.

38. A surviving part of a telegram from Sir Henry Gurney, the High Commissioner, to the Colonial Office dated 1 January 1949 recorded:

“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....

12. One of the difficulties of this situation is that we have a war of terrorism on our hands and we are at the same time endeavouring to maintain the rule of law. I would also point out that is an easy matter from one's office or home to criticise action taken by the security forces in the heat of operations and working under jungle conditions but not so easy to do the job oneself. Rightly or wrongly we feel here that we must be conservative in our criticism of the men who are undoubtedly carrying out a most arduous and dangerous job and it must be remembered that when persons are picked up by the security forces under such circumstances until they are screened at headquarters it is impossible for the security forces to tell whether they are members of killer squads or to what extent they are involved. Furthermore although some of the killed were rubber tappers it is our experience that such persons are frequently rubber tappers part time and bandits the rest of the time and that their arms are usually hidden in the neighbourhood and not found with them. Moreover we feel it is most damaging to the morale of the security forces to feel that every action of theirs, after the event is going to be examined with the most meticulous care.”

That part of the telegram that sets out the narrative account of the incident (paragraph 1-9) is not contained in the surviving copy. As that part was to be used for a further press release which appears to have been the basis of press reports, the loss of that part may not be that significant.

39. A short statement was made to the press on 1 January 1949 with a further detailed official statement on 3 January 1949 which was printed in the *Straits Times* and *The Times* in London. Amongst the significant additional matters reported were:
- i) There was a general order that if any detained person tried to escape, he was to be chased and recaptured, but under no circumstances allowed to escape. No such order has been found and it appears to have been oral.

- ii) The patrol had no vehicles and no wireless or other means of communication with base.
 - iii) Some Sten gun ammunition was found hidden in one of the houses at Batang Kali; Sir Stafford referred in 1970 to the finding of the ammunition.
40. On 5 January 1949 a further press conference was held by Sir Alec Newbould and Major General Sir Charles Boucher at which they reiterated the account that the deaths had occurred because the insurgents were trying to escape from lawful custody and failed to stop after a warning. The Major General also stated that when the soldiers had to fire, the fire was intended to kill. The legal accuracy of this statement was questioned by *The Straits Times* and inconsistencies in the accounts were pointed out. Demands were then made for a public inquiry headed by a High Court Judge. There was no such inquiry.

(c) *Emergency Regulation 27A*

41. The Emergency Regulations to which we have referred at paragraph 20 provided by Regulation 27 that members of the armed forces of the British Crown should have the same powers as the police. This included the power to stop, search and arrest. In November 1948, the Regulations had been amended by the insertion of Regulation 10A to permit the use of lethal weapons to stop and search in specially designated areas. Batang Kali was not such an area.
42. On 20 January 1949, the Regulations were amended by the insertion of Regulation 27A which permitted the use of lethal weapons to stop and search and prevent escape. Paragraph (6) of Regulation 27 A 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”

43. It was contended by the claimants that this amendment was made to cover the Federation Government’s account of what had happened at Batang Kali. Apart from the coincidence of timing, and the retrospective nature of paragraph 27A(6), they relied on remarks of the High Commissioner, Sir Henry Gurney, in a telegram to the Colonial Office on 28 January 1949 in which he stated that it was impossible to maintain the rule of law and fight terrorism effectively at the same time, echoing the remarks in his telegram of 1 January 1949 referred to at paragraph 38 above.
44. The account given on 3 January 1949 was in substance given to the British Parliament by the Colonial Secretary in a written answer on 26 January 1949. It was also embodied in the Regimental History of the Scots Guards

(5) The Investigation in 1970

(a) *The account in the People on 1 February 1970*

45. Some twenty years after the deaths at Batang Kali and over forty years ago, in November 1969, a former Foreign Secretary, George Brown, had said in commenting

on the My Lai Massacre by US troops in Vietnam in 1968, that people when they were fighting did terrible things and that the British might have done such things. On 21 November 1969, *The People* wrote a leader criticising him. Shortly thereafter William Cootes, one of the members of the Scots Guards patrol, went to *The People* and gave an account that the deaths at Batang Kali had been a massacre in cold blood.

46. He asked for payment towards a deposit on his house. After taking statements from him on oath and making some promises of paying him, *The People* sought out other members of the patrol, none of whom sought payment, but who were interviewed in the presence of William Cootes. The British Government was informed at the end of January of these investigations.
47. On 1 February 1970 *The People* published an article under the headline: BRITISH GUILT REVEALED: HORROR IN NAMELESS VILLAGE. It said that, after interviewing four of the Guardsmen on oath, those who died had not been trying to escape but had been massacred on the orders of the two Sergeants; some said that they had been ordered to give the explanation as shooting to prevent escape. The Guardsmen in addition to William Cootes were Alan Tuppen, Robert Brownrigg, Victor Remedios and George Kydd, though George Kydd made no written statement. *The People* also published an account of interviews they had conducted with Sergeant Douglas, the leader of the patrol and by then a Regimental Sergeant Major on active service, and Sergeant Hughes. Both stood by the account they had given in 1948. An official of the Ministry of Defence was present when Sergeant Douglas was interviewed. He commented that the interview was “absolutely fair and correct in all respects”.
48. After publication *The People* carried out further investigations in Malaysia with a reporter interviewing Chong Hung, another name for Cheung Hung who had made a statement in 1948 as we have set out at paragraph 36.i). Cheung Hung said that the troops had separated the women and children from the men, divided the men into groups and shot them. No one made an attempt to run away; they were all shot in the back. He had fainted when the shooting started and feigned death. The man shot on the previous evening had not tried to escape. The reporter also interviewed his mother, Wong Kiew, his wife, Tham Yong, and other inhabitants of the village, Foo Moi and Chi Kiew whose husbands had been killed. The reporter was told that the man taken on the lorry had gone back to China. This account was published the following Sunday. The first claimant is the son of Tham Yong and Cheung Hung.
49. The British Government issued a press release stating that the allegations contradicted the evidence originally given and that, as what was reported could in law amount to an allegation of murder, it was taking the matter very seriously. Enquiries were made which showed all apart from Sergeant Douglas had left military service.
50. Following that article, *The Straits Times* carried out its own enquires. It located one of the guides, Inche Jaffir bin Taib, who told its reporters that shortly before the shooting, the Sergeant told him not to look at the male detainees. He turned his back towards them and there was a sudden burst of gunfire. When he turned round, there were dead bodies everywhere. He was told by the Sergeant not to breathe a word to anyone or he would be jailed.

(b) *The decision to instigate a police investigation*

51. Consideration was given by the British Government to an investigation – either a fact-finding inquiry or a criminal investigation. It was established that although there could be no prosecutions under the Army Act 1861 as it contained a three year limitation period, there was no reason why there could not be a trial in the ordinary courts. It was concluded that no decision on an inquiry could be made until a decision had been made whether to prosecute; various types of inquiry were considered, including an inquiry by a QC. Very considerable efforts were made by the Ministry of Defence, the Foreign Office and the Army to trace contemporaneous documents. Help was offered by the Government of Malaysia. However, as we have stated at paragraph 34, the most important contemporary documents were no longer available.
52. On 13 February 1970, after questions in the British Parliament from Marcus Lipton MP and others, the Secretary of State for Defence, Mr Dennis Healey, invited the Director of Public Prosecutions, Sir Norman Skelhorn QC to consider the evidence to see if the matter should be further investigated. It is clear from memoranda that the Ministry of Defence were keen that there was a proper investigation.
53. The Director of Public Prosecutions was advised by his Department on 27 February 1970 that the Metropolitan Police should investigate the factual side, interview all the Guardsmen, the police officers who accompanied the patrol, the interpreter and the survivor. Sgt Douglas and Sgt Hughes would be interviewed at the conclusion. The Attorney General, Sir Elwyn Jones QC was shown a copy of the advice. He agreed that the investigation should proceed along the lines of the advice; whether enquiries should be pursued in Malaysia would be taken up when the question arose.
54. The Director of Public Prosecutions asked the Commissioner of Police for the Metropolis to conduct the investigation. He in turn asked Detective Chief Superintendent Williams to lead. The investigation was initially to be confined to the UK, but the Director of Public Prosecutions told the Ministry of Defence on 18 March 1970 that he would extend it if necessary. On 13 April 1970 the Malaysian Government offered assistance if an officer was sent to Malaysia.
55. The plan of the investigation envisaged by Detective Chief Superintendent Williams was summarised on 28 April 1970 as follows:
 - i) Two months to see the Guardsmen in the UK.
 - ii) A report to the DPP and further authority to pursue investigations in the Far East.
 - iii) Six weeks in the Far East, including seeing 36 people and a possible exhumation of the bodies.
 - iv) Interviews of the two Sergeants.
 - v) In about 6 months a report to the Director of Public Prosecutions
- (c) *The police investigation*
56. Detective Chief Superintendent Williams was given a briefing by officials at the office of the Director of Public Prosecutions on 16 March 1970. He conducted the

inquiry with Detective Sergeant Ron Dowling, Detective Sergeant Lewis and Detective Sergeant Reynolds.

57. He traced 11 members of the patrol including the two Sergeants.
- i) He interviewed Mr Cootes, Mr Alan Tuppen (in the presence of a solicitor), Mr Robert Brownrigg and Mr George Kydd under caution. Each admitted in statements that the men had been shot on the orders of Sergeant Hughes as they were suspected bandits or sympathisers; anyone who wanted to could fall out, but none did. They had not been running away. Mr Kydd and Mr Brownrigg said they were told by the Army to give an account to the inquiry that those killed had been trying to escape. Detective Chief Superintendent Williams recorded in his report that these were admissions that murder had been committed.
 - ii) Mr Remedios, in the presence of his solicitor, refused to comment on or add to what he had said in his statement to *The People*.
 - iii) Mr D.K. Wood, a Guardsman, after he had been cautioned, verbally admitted according to the report of Detective Chief Superintendent Williams that murder had been committed. His interview with the police was not before the court.
 - iv) Mr George Porter who had been a Lance Corporal gave an account of shooting the men with his Bren gun in accordance with standing orders, as they were trying to escape. Mr Roy Gorton, a regular soldier who had also been a Lance Corporal, said that the men had been shot when they were trying to escape. Both denied the allegation that the Guardsmen had been told by Sergeant Hughes to shoot the men.
 - v) He did not interview Mr Fern, as he lived overseas. The inquiry was terminated before he interviewed the two Sergeants
58. He interviewed the two reporters. He considered that their methods would have been severely criticised if the case reached court as they had offered Mr Cootes money, took Mr Cootes with them for the other interviews, and told all they could not be extradited and possibly that they could not be prosecuted.
59. He considered that Captain Ramsay was in no way at fault and should be completely vindicated.
60. It appears from the list at paragraph 18 of Mr McGurk's review (undertaken on instructions from the Secretaries of State in circumstances which we describe at paragraph 84) that the police interviewed others whose statements or notes of statements were not made available to the court.
- (d) *The decision to terminate the police investigation*
61. In May 1970 the High Commission in Kuala Lumpur expressed concern and asked the Foreign Office to point out the difficulties in interviewing those who claimed to be villagers; any hint of compensation would bring out claims by the dozen and it would be extremely doubtful if the recollection of any villager could ever be accurate. They reiterated their concerns again on 3 June 1970 at a time when the Director of Public

Prosecutions was considering whether to authorise the continuation of the investigation in Malaysia.

62. On 10 June 1970 Chief Superintendent Williams saw officials at the office of the Director of Public Prosecutions. He was told that the Attorney General, Sir Elwyn Jones QC, would make the decision as to whether further enquires should be made in Malaysia, but that no decision could be expected until after the General Election on 18 June 1970.
63. On 12 June 1970, the office of the Director of Public Prosecutions submitted a minute which summarised the evidence and made comments on it. The conclusion was:

“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 Director of Public Prosecutions endorsed the minute:

“I have nothing to add to my minute of 5/6/70. 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.”

The minute of 5/6/70 was not available for the court.

64. After the General Election on 18 June 1970, a new Attorney General, Sir Peter Rawlinson QC, was appointed. According to the report of Detective Chief Superintendent Williams, there was a conference on 26 June 1970 between the Director of Public Prosecutions and Sir Peter Rawlinson at which Sir Peter Rawlinson decided that it was unlikely that sufficient evidence would be obtained to support a prosecution and therefore the investigation must terminate forthwith. The Director of Public Prosecutions wrote on 29 June 1970 to the Ministry of Defence to say that he had considered the evidence and discussed the matter with the Attorney-General.

“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.”

65. Consideration was given by the Ministry of Defence to holding an inquiry, but officials recommended that, in view of the serious conflict of evidence, the findings would probably be inconclusive. There were no documents. There would be no benefit from an inquiry. On 9 July 1970, Mr Ivor Richard QC who had been closely involved in the matter as Minister for the Army until the General Election told the Attorney General that the previous administration had taken the view that once the allegations had been made, there should be a full investigation by the Director of Public Prosecutions. Now that the Director of Public Prosecutions had reached a conclusion, he trusted it would be accepted a full investigation had been made. It does not appear he was told that the investigation had been terminated before completion.

66. A decision was thereafter made by the Minister that there would be no further inquiry.

(e) *The police view on the termination of the investigation*

67. On 30 July 1970, a detailed report was submitted by Detective Chief Superintendent Williams to the Commissioner of Police for the Metropolis. In it he expressed the view:

“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”

(6) 1993-97: The BBC documentary, The CPS, the Petition to HM The Queen, the Royal Malaysia Police Investigation

(a) *In Cold Blood*

68. On 9 September 1992 the BBC broadcast a documentary about the deaths at Batang Kali entitled: *In Cold Blood*. It comprised interviews with some of the inhabitants of the village – Cheung Hung (to whom we have referred at paragraph 36.i) and 48, but

known at that time as Cheung Feung), his wife, Tham Yong, Wong Yen, the sister in law of the person killed on the first night, Foo Moi whose husband had been killed and her son, Wong Mook Sang who had been 10 at the time; Tham Yong and Foo Moi had been interviewed by a reporter from *The People* in 1970 as set out at paragraph 48.

69. There were also interviews with Detective Sergeant Dowling who had been part of the 1970 investigation and three Guardsmen who had heard about the incident, but had not been on the patrol. Excerpts from some of the statements made by the Guardsmen in 1970 were read; it was said they stood by their accounts but refused to appear. The Ministry of Defence declined an invitation to participate. In correspondence with the BBC, it simply confirmed the account given in 1948/9.

(b) *Consideration by the CPS*

70. There was internal discussion amongst officials of the British Government as to whether anything should be done, as set out in a number of documents made available to the claimants. It is only necessary to refer to the CPS consideration.

71. One memorandum to the Head of the War Crimes Unit written in March 1993 concluded that, although the documentary was one sided, there were a number of people in 1970 who could have provided information to the police if the police had gone to Malaysia in 1970. Even though that criticism could be made of the decision to terminate the 1970 investigation, it was pointless to investigate in 1993, as there would be an unassailable case of abuse of process. This was plainly an assessment directed at a prosecution and not at the question of whether there should be an inquiry.

(d) *The Petition to HM The Queen in 1993*

72. On 8 July 1993 Foo Moi and Tham Yong, Cheung Hung (then called Chong Foong) presented a Petition to the Queen through the British Embassy at Kuala Lumpur requesting that the British Government re-open the inquiry, prosecute those responsible and pay compensation. The petition was supported by the Malaysian Chinese Association. In addition to petitioning the Queen, they made a complaint to the Royal Malaysia Police that the deaths at Batang Kali had been a crime.

73. The High Commissioner in Kuala Lumpur and the Foreign Office recommended that the Ministry of Defence give the Petition and cooperation with any Malaysian police inquiry its full consideration.

(e) *The way the British Government dealt with the Petition*

74. It 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”. By the end of the month, a document records that the Queen had seen the Petition and approved the reply; the reply was not in the papers provided to us. A press briefing prepared by the British High Commission in Kuala Lumpur for the anticipated broadcast on Malaysian television of the 1992 BBC documentary on 5 August 1994 stated that the Petition was under consideration. In December 1994 in response to a letter from the Malaysian Chinese Association enquiring as to a

response to the Petition the High Commissioner said he was looking into the current position.

75. It appears no response was ever sent.

(f) *The Royal Malaysia Police Inquiry*

76. The Royal Malaysia Police Inquiry resulted in statements being taken from Cheung Hung (then known as Chong Foong), Tham Yong, his wife, Foo Moi, and her son Wong Mook Sang all of whom had appeared in the BBC documentary. In addition they interviewed Foo Moi's other son, Wong Kum Soi who had been 11 at the time and Chong Koon Ying, who had been a 9 year old girl at the time. They also interviewed three retired police officers, one of whom was Chai Kam Woh (the Detective who said he had accompanied the patrol and been present when the shootings occurred as set out at paragraph 36.i)) who denied to this investigation he was present at Batang Kali at all when the deaths occurred. A report on the investigation was compiled on 22 October 1993.

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.

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.

(e) *1997: The closure of the Royal Malaysia Police Inquiry*

80. There was no further information as to the progress of the Royal Malaysia Police Inquiry, save it appears that the file was closed on 30 December 1997. That decision was reported on 16 September 2004 when it was stated that it had been closed by the Attorney General's Chambers on the basis that there was no evidence to charge anyone in the matter.

(7) 2008- 11: The second Petition to HM The Queen and the decisions to refuse an inquiry

(a) *2008: The second petition to HM The Queen*

81. A group was formed in 2008 in Malaysia called the Action Committee Condemning the Batang Kali Massacre. It petitioned the Queen on 25 March 2008 seeking an apology and compensation. In October 2008, the claimants' solicitors wrote to the Foreign Secretary asking for a response; they subsequently made requests under the Freedom of Information Act.
82. On 12 December 2008 the 60th Anniversary of the deaths at Batang Kali, a supplementary Petition was presented seeking other relief, including the holding of a public inquiry. On 21 January 2009, the High Commissioner replied to the Petition. He stated that the Foreign Office and Ministry of Defence had given the Petition careful consideration. He continued:

“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.”

After further correspondence that decision was withdrawn.

83. In June 2009, two former journalists, Ian Ward who had been *The Daily Telegraph* Correspondent for South East Asia from 1962- 1987 and his wife Norma Mirafior, published a book entitled *Slaughter and Deception at Batang Kali*. It set out a detailed account of why it could be shown that those at Batang Kali had been deliberately shot on the orders of the leader of the patrol and why it could be shown there had been a cover up. It was subsequently commented on by Professor Anthony Short in an article in *Asian Affairs* of November 2010. He cast doubt on his conclusion in 1966 as relayed to Detective Chief Superintendent Williams that detonators going off might have provided an explanation for the Guards opening fire.
84. After further correspondence and a meeting between the Ministries and the claimants' solicitors, the Secretaries of State made a provisional decision refusing an inquiry or other investigation. The decision was based on a detailed review and notes dated 3-26 July 2009 by Mr Brendan McGurk, a barrister, retained by the Secretaries of State to review the available material. The review sought to summarise the considerations that the Secretaries of State might wish to take into account in deciding whether to establish an inquiry.

(b) *The decision of November 2010*

85. During the remainder of 2009 and much of 2010, the solicitors for the claimants examined Mr McGurk's reports and the material made available to the court, save for papers of the Metropolitan Police investigation in 1970 which were only made available at the hearing. Funding was provided by the Legal Services Commission. In September 2010, a second 46 page letter before claim was sent. It included a note of an opinion by Professor Sue Black of the Centre of Anatomy and Human Identification at the University of Dundee as to the prospects of disinterment revealing new evidence.

86. This letter and submissions by officials dated 22 and 23 November were considered by the Secretaries of State. On 29 November 2010 the Treasury Solicitor wrote to the claimant's solicitor setting out the decision refusing to pay compensation and to hold an inquiry and the reasons for the decision. We return to the reasons at paragraphs 125-130.
87. On 25 February 2011 these proceedings were issued; permission was granted on 31 August 2011.

(b) The decision of November 2011

88. On 24 October 2011 a further submission was made by officials to the Secretaries of State to cover an argument raised that the inadequacy of the previous investigations and the need to investigate their inadequacy was a further consideration to be taken into account in deciding whether there should be a public inquiry.
89. On 4 November 2011, the Secretaries of State affirmed their decision not to hold an inquiry. We return to that decision at paragraphs 131-133 below.

II: WAS THERE A DUTY TO HOLD AN INQUIRY?

90. The claimants put forward two bases for their claim that the Secretaries of State were obliged to conduct an inquiry:
- i) Article 2 of the Convention (ECHR)
 - ii) The common law through customary international law
91. We will first consider each of these submissions. We will then consider whether, if there is such a duty, the Secretaries of State are nonetheless not required to hold such an inquiry as the responsibility for the actions of the Scots Guards was that of the Federation of Malaya or of the Ruler of Selangor or passed to the Federation on independence in 1957. The second issue is also relevant to the exercise of the discretion under the Inquiries Act 2005.

(1) Article 2 of the Convention

92. It is convenient first to consider whether there was a duty under Article 2. Although the duty under Article 2 of the Convention to carry out an effective investigation into unlawful or suspicious deaths is well established, two issues arose. First, the temporal scope of the Convention - did the obligation to investigate apply to deaths that had occurred before the Convention had been adopted and therefore before the UK's accession? Second, on the assumption that it did, the territorial scope of the Convention - was the Convention applicable to deaths that had occurred in Selangor in the Federation of Malaya?
- (a) The decisions in Re McKerr and McCaughey as to the temporal scope of the Convention*

93. The House of Lords decided in *Re McKerr* [2004] UKHL 12, [2004] 1 WLR 807 that there was no duty to investigate a death before the coming into force of the Human Rights Act on 2 October 2000. As the deceased had been shot by the RUC in

November 1982, there had been no breach of the obligation before that date, there could be no continuing breach thereafter.

94. In *Re McCaughey* [2011] UKSC 20, [2011] 2 WLR 1279, after the decision of the Strasbourg court in *Silih v Slovenia* (2009) 49 EHHR 996, the relatives of persons shot by members of the British Army in 1990 sought a ruling that an inquest the coroner was about to conduct into his death must comply with Article 2. On the basis of the decision in *Silih*, the Supreme Court held that an inquest held after 2 October 2000 into a death occurring before the Human Rights Act came into force had to comply with Article 2. However, it is clear from the decision that there is no obligation to conduct an inquiry into a death prior to October 2000 or to re-open enquiries that did not comply with Article 2 – see the judgments of Lord Phillips at paragraph 61, Lord Hope at paragraph 75 and Baroness Hale at paragraph 93.

(b) *The decision of the Strasbourg court in Janowiec on the temporal scope of the Convention*

95. On 16 April 2012, the Strasbourg court handed down its decision in *Janowiec v Russia* (55508/07 and 29520/09). Descendants of officers in the Polish army who were executed by the army of the USSR in 1940 at POW camps or at Katyn made various claims in respect of the deaths. Among the claims made to the Strasbourg court was a claim that the Russian authorities had failed to conduct an adequate and effective inquiry into the death of their relatives in breach of Article 2. The Russian Government contended that there was no duty as the deaths had occurred 10 years before the adoption of the Convention and 58 years before Russia acceded to the Convention in 1998.

96. The court held that the obligation to conduct an investigation under Article 2 was a detachable procedural obligation that bound the state throughout the period in which “the authorities can reasonably be expected to take measures with an aim to elucidate the circumstances of death and establish responsibility for it.” The court then added at paragraph 132:

“Nevertheless, 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.

First, it is clear that, where the death occurred before the critical date, only procedural acts and/or omissions occurring after that date can fall within the Court’s temporal jurisdiction.

Second, there must exist a genuine connection between the death and the entry into force of the Convention in respect of the respondent State for the procedural obligations imposed by Article 2 to come into effect.

Thus, a significant proportion of the procedural steps required by this provision – which include not only an effective investigation into the death of the person concerned but also the institution of appropriate proceedings for the purpose of

determining the cause of the death and holding those responsible to account – will have been or ought to have been carried out after the critical date.

However, the Court would not exclude that in certain circumstances the connection could also be based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner.”

97. The scope of the second condition appears to have been primarily directed at the interval of time between the death in question and the time the Convention came into force – see paragraphs 133 and 135.

98. As a result of this decision the claimants advanced a claim in their skeleton argument (with a corresponding amendment to their claim) that there was an obligation under Article 2 of the Convention to hold an inquiry. It was submitted by the claimants that the conditions set out had been clearly satisfied – the UK government should have established an inquiry before the date of the UK’s accession – 1950, the deaths were 2 years before the UK acceded and the period since 1950 was when the breach occurred.

(c) *The status of Janowiec in this court*

99. This court is bound by the decisions in *Re McKerr* and *Re McCaughey*. It is not for this court in those circumstances to consider applying the decision in *Janowiec*. There is therefore no duty to hold an Article 2 inquiry. We would observe that if the procedural obligation applied by reason of the proximity of the deaths to the date of accession, the most significant material breach occurred in 1970, for it was then that evidence, as opposed to the concerns expressed in 1948/9, emerged to suggest that the deaths were the result of deliberate executions.

(d) *The territorial scope of the Convention*

100. As it is not permissible for this court to consider applying the principles set out in *Janowiec* as to the temporal scope of the Convention, it is not necessary to consider at any length the arguments about the territorial scope of the Convention based on the decision of the Grand Chamber in *Al-Skeini v United Kingdom* (2011) 15 EHHR 18 and its statements about the territorial scope at paragraphs 122-137. Although it is clear that the patrol of the Scots Guards had physical control over the 24 men who were shot, this court would, even if Article 2 had been applicable on a temporal basis, have had to apply the decisions of the House of Lords in *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26 and *R (Smith) v Secretary of State for Defence* [2010] UKSC 29, despite the view taken by Lord Brown at paragraph 132 of *Al-Skeini* and that of Lord Phillips at paragraph 29 of *Smith*.

(2) Common law through customary international law

(a) *The submissions of the claimants*

101. The claimants contended that a duty to investigate arose under customary international humanitarian law as evidenced by UN General Assembly Resolution

60/147 of 16 December 2005 on *The Basic Principles and Guidelines on the right to remedy and reparations for victims of violations of international Human Rights and Serious Violations of Humanitarian Law*, which stated:

“The obligation to ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, *inter alia*, the duty to

(b) investigate violations effectively, promptly, thoroughly and impartially and where appropriate take action against those responsible in accordance with domestic and international law.”

102. The court was supplied with the materials supporting this statement as having evolved since the 1990s as part of customary international law in accordance with the well known principles for establishing customary international law.

103. It was next submitted that this obligation was regarded as a continuing obligation. Apart from reliance on the decisions of the Strasbourg court to which we have referred, the claimants relied on the decision of the Inter-American Court of Human Rights in *Moiwana Community v Suriname* (judgment of 15 June 2005) in which the court held that there was an obligation to investigate an alleged massacre by the armed forces of Suriname in November 1986 before the accession of Suriname to the American Convention on Human Rights in November 1987. The court held that it had jurisdiction and Suriname had never established a proper investigation; it had no jurisdiction to investigate what happened in 1986, but the material failings to establish an inquiry had occurred in 1989-1997.

(b) *The position of the Secretaries of State*

104. The Secretaries of State did not contest the submission that the duty under international humanitarian law had arisen in the 1990s, but contended in reliance on the *Islands of Palmas Case* (1928) 2 RIAA 829 and Article 13 of the International Law Commission’s Articles on State Responsibility (2006) that the question of whether there had been a breach of international law had to be judged at the time the act occurred. They also submitted that this court could not in the light of the decisions in *Re McKerr* and *Re McCaughey* hold that there was a duty at common law.

(iii) *Conclusion*

105. It was made clear in *McKerr* by Lord Nichols (at paragraphs 32-3), Lord Hoffmann (at paragraphs 70-1) and Lord Brown (at paragraph 91) that there was no common law right to an inquiry into a death. The decision is binding on this court and it cannot consider the question whether there was a duty at common law through incorporation of customary international law. 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.

(3) The responsibility for the actions of the second battalion of the Scots Guards at Batang Kali

106. Although there is, in our view, no legal duty to establish an inquiry, it is necessary to consider the further argument of the Secretaries of State that, as in their submission, the British Government had no legal responsibility for the actions of the Scots Guards at Batang Kali, they were in any event under no duty to hold an inquiry.
107. We have set out at paragraphs 12-25 the factual position as it emerged during the hearing and in further documents submitted after the hearing. It was the submission of the Secretaries of State that the Scots Guards were deployed to assist the Federation or the Ruler of Selangor or both in the maintenance of internal order. Any responsibility passed to the Federation of Malaya on independence in 1957 by the terms of Article 167 of the Constitution.
- (i) *Command over the Guards was vested in the Army Council and British Officer commanding*
108. Under s.71 of the Army and Airforce Annual Act, the King was given power to make Regulations as to the command over the British armed forces. It was common ground that the Scots Guards, as a regiment of the British armed forces, were subject to the King's Regulations for the Army in force from year to year. Under Regulation 6 the government of the Army was vested in the Crown and the command placed in the hands of the Army Council which in 1948 included the Secretary of State for War and the Chief of the Imperial General Staff. Regulation 37 provided that at a station abroad the responsibilities for command rested on the general or other officer commanding the troops.
109. Under Regulation 301 of the King's Regulations special arrangements had to be made if a soldier was to be employed by a colonial or similar government. The Secretaries of State accepted that the King's Regulations applied to the Scots Guards in Selangor and Malaya and no special arrangements had been made with the Ruler or the Federation.
110. Under Regulation 28, the governor of a Colony, Protectorate or Mandated Territory was the single and supreme authority responsible to and representative of the King and entitled to the obedience and assistance of the military, but was not invested with the command of the army and not entitled to take the immediate direction of any military operations. It was submitted by the claimants that this was relevant, as it was not unusual for the term Protectorate to include a Protected State: see *Roberts Wray: Commonwealth and Colonial Law (1966)* at page 51. In view of the acceptance that the command of the Guards remained with the British Army, it is not necessary to consider whether Regulation 28 applied.
- (ii) *Did the structure of command govern the responsibility?*
111. The Secretaries of State contended that what mattered for the purposes of determining responsibility for the actions of the Scots Guards was not the command structure which could give the Guards their immediate orders to conduct an operation, but the constitutional question as to what was the ultimate source of the authority and the

legal powers they were exercising at the time. It was, in short, the constitutional responsibility and not the Army Regulations or rules of command that mattered.

112. It is clear, in our view, that the British Government had command and control over the Scots Guards. 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 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 for 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.
113. Apart from those matters specific to the facts of this claim, it is helpful to refer to two decisions of the courts in England and Wales. In *Trawlink v Lennox* [1985] 1 WLR 532, owners of houses in the British Sector of Berlin brought an action against the Commandant of the British Sector seeking a declaration that the Crown should not use an airfield as a shooting range so as to be a nuisance to the owners of the houses. Although the certificate of the Foreign Secretary to the effect that the liability of the Crown arose otherwise than in respect of Her Majesty's Government in the United Kingdom was conclusive for the purposes of the Crown Proceedings Act, Browne-Wilkinson LJ observed at page 552:
- “But it is not conclusive for any other purpose and I am 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”
114. The second case is *Mutua v Foreign and Commonwealth Office* [2011] EWHC 1913, where claims were brought against the Foreign and Commonwealth Office for ill treatment alleged to have been inflicted by the Kenya police force, the Home guard and the Kenya Regiment during the Mau Mau insurgency in Kenya in the 1950s. In the hearing of a strike out application brought by the Foreign and Commonwealth Office on the basis it was not responsible for the police and military alleged to have carried out the ill-treatment, it appears to have been accepted that the Kenya Regiment and Home Guard were armed forces of the Kenya Government and not part of the British Army. A General in the British Army was sent to command; it was accepted on behalf of the Foreign and Commonwealth Office as set out at paragraphs 116-118 of McCombe J's judgment that, if the General or British Army had participated in the issuance of a policy of torture, then the Foreign and Commonwealth Office would be vicariously liable. As the judge noted at paragraph 118:

“Nonetheless, these concessions of potential liability demonstrate that the most extreme view of the extent of the

Quark principle (i.e. that nothing done by the British government in respect of colonial Kenya could be other than an act of Her Majesty in right of Kenya) was not argued before me.”

We accept, as the Secretaries of State submitted, that the concession was made in that particular case; it can be no more.

115. Nonetheless, we consider that, given that what is in issue is the actions of the Scots Guards in shooting civilians, on ordinary principles those responsible for the command of the troops who did the shooting, ultimately the Army Council, have the responsibility for their actions. The Guards were trained by the British Army and under its direct command. It is difficult to see, even if the troops were acting under the authority of the Federation or the Ruler of Selangor, why those in command should not be responsible for the actions of the Guardsmen.

(iii) *The responsibility if the constitutional authority under which the troops were acting was determinative of responsibility*

116. Even if this view was not correct, we do not accept the contention of the Secretaries of State that what mattered was the ultimate source of authority over the troops, as determined by the constitutional position. Our reasons are as follows.

117. It was originally contended that the Scots Guards were only in Selangor in support of the Ruler of Selangor as part of the local police and under their control. At the request of the court, the Secretaries of State produced further clarification of the position after the conclusion of the hearing. It was then submitted that the Scots Guards were acting either for the Ruler of Selangor in dealing with an internal security issue or, as they were acting in aid of the civil power under the Emergency Regulations made by the High Commissioner which we have set out at paragraph 20, they were acting for the Federation of Malaya. It was submitted that the more likely position was that as the police conducting the operations were Federal, the responsibility was that of the Federation or the Federation and the Ruler jointly. Under the Selangor Treaty and the Federation Agreement, responsibility for internal control was that of the Ruler and the Federation respectively. It was not possible to be more precise as there was a paucity of contemporaneous evidence. It was submitted that it was not possible for the Guards to be acting on behalf of the King in right of the United Kingdom as the government of Selangor was not the King’s Government or subordinate to his Government.

118. In the present case and in light of the decision in *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529, it is necessary in this court, despite the observations of Lord Hoffmann in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, [2008] 3 WLR 955, to proceed on the basis of law as set out in *Quark*. The constitutional position in Malaya and Singapore was that, whatever may have been the reality of British imperial power under which the instructions relating to the communist threat to the British Empire and the insurgency in Malaya were given by the Colonial Secretary to the High Commissioner through the Commissioner General for the purpose of furthering the interests of the British Government, the British Government could not, as Ministers of the Crown in right of the United Kingdom, formally instruct 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.

119. However, we cannot accept the submission that the ultimate source of the authority and legal powers was either the Ruler of Selangor or the High Commissioner acting on behalf of the Federation of Malaya. All the decisions made in relation to so serious a threat to British Imperial power as necessitated the decision of the British Cabinet on 13 August 1948 on the advice of the Chief of the Imperial General Staff to send part of the British Army to deal with the insurgency, were decisions for which the actual ultimate decision maker was the British Government as advisers to the Crown of the United Kingdom to protect the interests of the United Kingdom. It is clear that the Cabinet Committee saw the insurgency as part of the general Communist threat to the interests of the United Kingdom in South East Asia. On the evidence we see no reason to dispute the contemporary analysis of the Chief of the Imperial General Staff with which the Secretary for the Colonies agreed, and which we have set out at paragraph 23. Under clause 4 of the Federation Agreement and clause 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 for similar purposes. That was, in our view, a power of the King in right of the United Kingdom or could at least be exercised as a power of the King in right of the United Kingdom to protect the interest of the United Kingdom in South East Asia. The constitutional position was therefore the UK 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.
120. The Secretaries of State submit that this analysis is mistaken because powers were conferred on the armed forces by the Emergency Regulations. We cannot accept this. The British Army remained subject to UK domestic law; it may well have had combatant immunity under customary international law - (see the Crown's argument in *R v Gul* [2012] EWCA Crim 280 at paragraph 30). The relevance of local law (and in particular the Emergency Regulations 1948) was to provide additional powers and protections for the British Army in relation to action they could take against the civilian population and against insurgents (as has happened in the conflicts of this century). It did not affect the British Army's responsibility for the actions of the Scots Guards.

(iv) *State succession of liabilities*

121. The Secretaries of State contended that any legal responsibility which the British Government may have had was transferred to the Federation of Malaya on independence 1957. Under Article 167(1) of the Constitution of the Federation of Malaya which was scheduled to the Federation of Malaya Independence Order made under the Federation of Malaya Independence Act 1957:

“(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) ...

shall on and after Merdeka Day be the rights liabilities and obligations of the Independent Federation

(2) Subject to the provisions of this Article all rights and liabilities of her Majesty in right of

(b) His Highness the Ruler in respect of the government of any state

shall on and after Merdeka Day be the rights liabilities and obligations of the several states.”

122. It was accepted by the claimants that acts connected with instructions given to the High Commissioner under clause 13 of the Federation Agreement empowering the King to give instructions through the Colonial Secretary would be liabilities of the King in respect of the government of the Federation of Malaya; so also liabilities for actions of the High Commissioner police force or the Malay Regiment would be liabilities of the Government of the Federation or officers. These would have been transferred under Article 167.
123. We have set out our views that the responsibility for the actions of the Scots Guards was either determined by the command and so that of the Army Council or alternatively, if determined by constitutional authority, that of the United Kingdom Government in right of the United Kingdom. If the responsibility had rested, contrary to our conclusion, on the High Commissioner or the Adviser in Selangor, then on the basis of the principles in *Quark* and the position taken by the claimants set out in paragraph 122, those responsibilities would have been those of the King and the Government of the United Kingdom in right of the Federation or Selangor. Such responsibilities would have been transferred under Article 167(1).

III THE DECISIONS OF THE SECRETARIES OF STATE

(1) The reasons given by the Secretaries of State

124. As we have set out at paragraphs 85-89 above, the Secretaries of State decided to exercise their discretion under the Inquiries Act 2005 against holding a public inquiry.

(a) *The first decision in November 2010*

125. In their first letter sent on 29 November 2010 the Secretaries of State set out the reasons why they had exercised their discretion against holding an inquiry.

126. They first considered the purposes which an inquiry might serve. Their view was:

“In appropriate cases, inquiries can and do serve [the purpose of establishing the truth about contested events] but the goal of establishing the truth about contested events is especially important – and especially likely to justify the substantial 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. In the view of the Secretaries of State this is more likely to be the case where the events of the subject of the inquiry are relatively recent ones.”

127. They next considered the extent to which any conclusions reached would be relevant today. They accepted that there had been cases where some members of the UK armed forces had not lived up to the standards exhibited by the vast majority of their colleagues and that in appropriate cases the Government had established inquiries with the view to learning lessons from particular incidents, citing the example of the Baha Mousa Inquiry. However, they concluded that it did not follow that an inquiry into events in Batang Kali would assist materially in avoiding a repetition of such events in the future. They gave two reasons. First the legal backdrop was different and secondly the training and command structures of the Scots Guards in 1948 were unlikely to assist commanders today.
128. They next took into account the resources. Although document handling would be lower than in some previous cases, there would be considerable costs associated with obtaining evidence from Malaysia. In addition there were likely to be significant running costs which should be considered.
129. They then had regard to the evidence that any inquiry would have to consider. The Secretaries of State reached the view,

“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.”

However they considered that they could properly take into account three matters. First there remained a dispute of fact as to what had happened and that dispute was key to the correctness of the allegation that the killings amounted to pre-planned extra-judicial executions rather than attempts to prevent prisoners from escaping. Second any findings would be likely to require an assessment of the veracity of the accounts reported in the witness statements made by those who were direct participants, as most had died. Thirdly even to the extent that witnesses remained alive, it was obvious there might be difficulties in relying on all evidence given at the present time about events that took place more than 60 years ago.

130. The Secretaries of State took into account s.71 of the Race Relations Act. They did so on the basis they were prepared to accept that it was possible an inquiry, if established, could find the killings were carried out for reasons which included racial ones. They were also prepared to accept an inquiry could find that the racial considerations played a part in one or more of the investigations into those killings. However, in deciding whether to establish a public inquiry the Secretaries of State had not relied on any of the previous investigations undertaken in this case. They had instead relied on the more general considerations that we have set out above. Even if the inquiry established that the killings had been racially instigated or motivated or that the enquiries had been tainted by racial considerations, then it was unlikely that that conclusion would assist in eliminating unlawful discrimination or victimisation at the present time. As to the argument that an inquiry might improve relations between Chinese, Malay and other groups within Malaysia or between nationals of Malaysia

and nationals of the United Kingdom, that was possible. The Secretaries of State had therefore borne in mind that the establishment of an inquiry might contribute to an improvement of the relations between those of Chinese racial or ethnic origin and persons of other racial or ethnic groups, but that did not on its own outweigh the other considerations.

(b) *The second decision: November 2011*

131. In their second decision letter of 4 November 2011 the Secretaries of State said they had recently undertaken a reconsideration of the decisions:

“with particular reference to the relevance of the instigation and presumed inadequacy of previous investigations into the killings. They have considered that matter both as a matter which may militate in favour of an inquiry into the killings themselves and also as a matter which may warrant investigation in its own right.”

132. They concluded that the decision should remain the same. They had regard to the following matters in relation to whether there should be an inquiry into the earlier inquiries.

- i) As to the purpose which an inquiry might serve, given the last investigation took place 20 or more years ago, the lapse of time since the previous investigations would limit the utility of an inquiry.
- ii) Secondly they thought that the conclusions of the investigations in 1948 were unlikely to be of any relevance. They thought it was possible but doubtful that conclusions about the 1970 and 1993 investigations might be of relevance.
- iii) As to resources, they had assumed in November 2010 that the previous investigations would be a matter within the remit of the inquiry.
- iv) As to evidence, the problem of investigating the recent investigations would be less serious in relation to the more recent investigations.
- v) As to s.71 of the Race Relations Act 1976 they had acknowledged that an inquiry might find that racial motivations had played a part in the previous investigations but these were insufficient to justify the establishment of an inquiry.

133. The conclusions of the Secretaries of State were expressed as follows:

“The instigation and presumed inadequacy of previous investigations did not outweigh the factors against holding a public inquiry into the killings and that a public inquiry into the previous investigations themselves (whether alongside an inquiry into the killings or separately) would have many of the same disadvantages as an inquiry into the killings and would not be justified.”

(c) *The basis of challenge*

134. Those decisions were challenged by the claimants on the basis that the Secretaries of State had not taken into account the material considerations and had also reached a decision that was unreasonable. The essence of their contention was that the official account was obviously unsustainable; the evidence now available on analysis showed that it did not “add up”. This conclusion ought to have been the starting point for the Secretaries of State in making each decision. The maintenance of an account of what had happened at Batang Kali which rejected the claims of deliberate executions and refused to recognise any basis on which the events could be criticised constituted a cover-up which had succeeded to the current day.
135. Furthermore an independent inquiry could be carried out which would be enormously beneficial as to learning lessons, truth, accountability and race relations in particular, whereas the *status quo* was profoundly detrimental to those interests and the general public interest. Any such inquiry did not have to be based on an expensive model but it could be more readily achieved at a reasonable cost.

(2) The factors to be taken into account

136. It is necessary to analyse the decisions and the challenge made by reference to the factors taken into account by the Secretaries of State and those that it was argued should have been taken into account. All of these factors must be viewed in the context that the inquiry would be an inquiry into why 24 men were killed, an inquiry involving the most fundamental right – the right to life.

(i) The evidence

137. As we have already set out at paragraph 29, we do not consider that it is the function of this court to reach any form of judgment on what happened at Batang Kali. Nonetheless it is important to set out the current position on the evidence.
138. There is evidence that supports a deliberate execution of the 24 civilians at Batang Kali.
- i) Apart from the evidence given by Mr Cootes to *The People* and in the police investigation, as we have set out at paragraph 57, Mr Tuppen, Mr Brownrigg and Mr Kydd each admitted in statements made the shootings were carried out on the instructions of the patrol leader as the execution of suspected bandits. It is significant that the admission of Mr Tuppen was made in the presence of a solicitor. Mr Woods also verbally admitted that murder had been committed after he had been cautioned. Mr Remedios, who had given a statement to *The People*, refused to comment or add to what was said. These statements, unsurprisingly, are not consistent in their detail.
 - ii) The statement of Cheung Hung made to *The People* in 1970 (as set out in paragraph 48 above) and that made to the Royal Malaysia Police in 1993 as set out in paragraph 76 above. His statement in December 1948 (as we have set out at paragraph 36.i) above) makes no such allegation.
 - iii) The evidence of his wife, Tham Yong, Foo Moi, and other inhabitants of the village as reported to *The People* in 1970 and that taken by the Royal Malaysia Police in 1993. All of this evidence supports the account that the shootings

were the deliberate execution of the 24 men and they were not shot when trying to escape.

- iv) The account to reporters of *The Straits Times* given by one of the guides, Inche Jaffir bin Taib, as referred to at paragraph 50.
139. There is evidence that supports the account that the 24 men were shot whilst trying to escape:
- i) There are the contemporary investigations, the finding by Sir Stafford Foster-Sutton during the course of his inquiry on ammunition (as we have set out in paragraph 35 above).
 - ii) The statements made after the revelations to *The People* by Sergeant Douglas and Sergeant Hughes (as set out in paragraph 47 above). Furthermore the police investigation in 1970 included an interview with Mr Porter and Mr Gorton who said the men were shot when trying to escape. The investigation was terminated before the two sergeants could be asked again.
140. Furthermore there is what might be described as ambivalent evidence,
- i) The position of Detective Constable Woh, the Chinese detective who gave one account in 1948 as set out in paragraph 36.i) above and a different account to the Royal Malaysia Police inquiry in 1993 as set out in paragraph 76 above.
 - ii) The statement of Detective Sergeant Gopal made in 1948, also as set out in paragraph 36.i) above.
141. The account of Chin Peng, the Secretary General of the Malaya Communist Party is in essence no more than first hand evidence to confirm that the inhabitants of the village were not insurgents; but that is of little assistance to the disputed issue.
142. Thus, in approaching the evidence as to whether there was a deliberate execution of the men or the men were shot when trying to escape from lawful custody, there is a conflict of evidence. It can no longer be permissible to conclude, in our view, on the evidence available at the present time which was before the court, that the 24 men were shot when trying to escape. Nor can the conclusion now be reached that the 24 men were deliberately executed. There is evidence that supports both accounts.
- (ii) *The legality of the shooting on the basis that there was an attempted escape*
143. Although it is not possible to be definitive about the scope of the inquiry by Sir Stafford Foster-Sutton in view of the loss of the contemporary files, it does appear that no consideration was given to whether the actions of the soldiers in shooting the inhabitants of the village was necessary and proportionate in circumstances where every single person was killed rather than some being wounded.
144. As we have set out at paragraph 42 above, the Emergency Regulations were amended to insert Regulation 27A. It was argued on the part of the claimants that either Regulation 27A was inapplicable on its terms or it would have been *ultra vires* the Emergency Regulations Ordinance (No 10 of 1948). As to the second of those points, the Secretaries of State contended that it would be impermissible for any inquiry to

examine the *vires* of Regulation 27A as this was the legislation of the Federation of Malaya at the time and on the principles set out by Diplock LJ in *Buck v The Attorney General* [1965] 1 Ch 745 at 770, it was impermissible for a court to look into the question of *vires*. We do not think that Regulation 27 A is a factor either way. Although retrospective in nature, it was not in force at the time when the deaths took place and there is an issue as to its applicability.

145. There can be little doubt that at common law, which would have applied to the Guardsmen as members of the British Army, that the use of more force than was reasonable to effect the arrest or defend another would be unlawful. This is clear from the decision of the House of Lords in *R v Clegg* [1995] 1 AC 482. It appears to have been accepted as the law by the Attorney General, Sir Rufus Isaacs QC, in 1911 as his opinion was annexed to the 1914 reprint of the *Manual of Military Law*. S.41 of the Army Act 1881 provided for the application of this law to the army wherever it was. If and insofar as the position in customary international law is relevant, the insurgency in Malaya amounted to an armed conflict of a non-international character where the legal position as to the use of force was substantially the same. In the light of that, it is difficult to see how the oral general order referred to at paragraph 39.i) could be relied on to justify shooting to kill escaping persons.
146. Plainly the claimants advanced a powerful case that the use of force cannot have been proportionate. We return to consider the difficulties in reaching a conclusion in relation to the proportionate use of force at paragraph 160 below.

(iii) *Weaknesses in the earlier investigation*

147. Although there are no papers extant in relation to the inquiry by Sir Stafford Foster-Sutton in 1948-9, apart from the statements of the two police officers and Cheung Hung to which we have referred at paragraph 36.i) above, it is clear that the inquiry had very serious weaknesses. There do not appear to have been any post mortems or other examination of the bodies; no evidence was taken from the Estate Owner. The attitude taken by Sir Stafford to the inhabitants of the village, as set out in paragraph 35.i) above cannot be justified. That attitude and the failure to take evidence from inhabitants significantly undermines the objectivity of the inquiry. As we have set out at paragraph 143 the inquiry also has the substantial weakness that it does not appear to have considered whether the killing of each of the men was a proportionate and reasonable use of force in the circumstances, even though as we have set out at paragraphs 33 and 40 the issue was raised at the time.
148. The investigation carried out by Chief Superintendent Williams was, until terminated, plainly a thorough and detailed investigation with the plan a modern investigation would have. However it is important to recall that it was instigated, as we have set out, to determine whether there should be a criminal prosecution and not an inquiry.
149. There can be no criticism of the police for what they did nor for the fact that the police never completed their investigation. There has been severe criticism by the claimants of the decision to terminate the investigation, but such criticism must be seen in context. As the investigation was directed at the question of whether there would be a criminal prosecution, the question as to whether it should continue or be terminated would be governed by its purpose and not by the broader considerations of

an inquiry. The decision that there was insufficient evidence to bring a prosecution is not a decision which could be said to be unreasonable or otherwise open to challenge.

150. More important is that fact that a decision was made in 1970 as we have set out in paragraph 65 above that there should be no inquiry, once the criminal investigation was terminated. As is evident from what Detective Chief Superintendent Williams had achieved, at that stage it would have been possible to carry out a detailed factual inquiry, as, even though much of the 1948-9 work had been destroyed, most of those who could give evidence were still alive.
151. As to the inquiries in 1993 to 1996, no real attempt was made at that stage to look again for further evidence.

(iv) *The allegations of a cover-up in 1948 and 1970*

152. It was submitted by the claimants that the initial investigation in 1948-9 was a “cover-up”. It was suggested that the High Commissioner of the Federation and the Chief Secretary were convinced that it was not possible to suppress the insurgency and abide by the rule of law. The possibility of a conclusion by an inquiry that there was a cover-up by the British officials of the Government of the Federation of Malaya in 1948 cannot be dismissed. However, there is little surviving evidence for such a conclusion. It is also important to bear in mind that it is implicit in such a contention that Sir Stafford Foster-Sutton would have had to have been complicit in such a cover-up.
153. However the allegation of cover-up in relation to the 1948/9 inquiry relates much more significantly to the position of the British Army and Scots Guards in particular. That is the essence of the allegations made in 1970 by the Guardsmen who say there was a deliberate execution of the men and it was “covered up” by the Scots Guards and British Army. This is a very serious allegation though one which can properly be made on the evidence.
154. The claimants also submitted that the inquiries carried out by the Metropolitan Police in 1970 were stopped for political reasons. It was suggested that the Foreign Office played a role in this through their advice about the ill-advised nature of a trip to Malaysia and the extent to which the credibility of local witnesses could be relied on (as we have set out at paragraph 61 above).
155. The allegation of a cover up also relates to the decision of the then Government not to have an inquiry, once the decision not to prosecute had been made. It is clear that the question of having an inquiry, if there was no prosecution was considered immediately after the allegations were made in *The People* as set out at paragraph 51 above. After the decision of the Attorney General and Director of Public Prosecutions not to continue an investigation for the purposes of prosecution, consideration was again given as set out at paragraph 65. A decision was made not to hold an inquiry, but the reasons for that decision may be much more difficult to justify, as, at that stage, it might have been possible to resolve the conflicts of evidence.

(v) *The position in 1993-1996*

156. It is difficult to escape the conclusion that a decision was made by the relevant Departments of the British Government to progress any inquiries with as much delay as possible and to take an uncooperative attitude towards the inquiry by the Royal Malaysia Police. There is nothing to suggest a deliberate cover-up, but again these are factors to be taken into account.

(vi) *Purpose of the inquiry*

157. The Select Committee Report on Government by Inquiry (2004-5) contains various views as to the purposes of an inquiry. Lord Howe in his evidence helpfully sets out six functions: (1) establishing the facts; (2) learning from events; (3) catharsis or therapeutic exposure; (4) reassurance and rebuilding public confidence; (5) accountability, blame and retribution; (6) political considerations.

(a) *Establishing the facts*

158. The first matter in relation to the purpose of inquiry is to consider whether it can establish the facts. There are obviously enormous difficulties in conducting an inquiry into a matter that happened over 63 years ago. As we have set out, most of the contemporary documents are missing and most of those who were engaged are dead, including Sergeant Hughes and Sergeant Douglas.

159. Nonetheless it appears from enquiries helpfully made by the Secretaries of State that two of the Guardsmen, Mr Cootes and Mr Tuppen may remain alive, though they are in their 80s. The claimants thought that Mr Kydd and Mr Fern might also be alive. There are some in the village who can give an account of what they were told by their relatives and there may be others who are still alive. There is a prospect that evidence could be gathered by opening the graves, if the Government of Malaysia consented, but this can be no more than speculation at this stage. All in all, it would appear to be very difficult at this point in time to establish definitively whether the men were shot trying to escape or whether these were deliberate executions.

160. Nor, in our view, would it be any easier to determine whether the use of force was reasonable or proportionate. The claimants suggested an inference could be drawn from the fact that as all 24 were killed the force used was neither reasonable nor proportionate. Again it might at this point in time be very difficult to establish the necessary facts from which such a conclusion could be drawn. Though the fact that all 24 were killed is indicative evidence, it cannot lead on its own to the conclusion that the force was unreasonable and disproportionate.

161. It is a material consideration, therefore, to say that a very possible outcome would be that it was at this point in time on the evidence impossible to say whether the men were deliberately executed by the Scots Guards or that they were shot trying to escape. In all the circumstances, although questions clearly arise as to the proportionate use of force, it would be not possible to conclude definitively that the use of force had been disproportionate.

(b) *Learning from events and preventing a reoccurrence*

162. A second purpose of an inquiry would be to learn from events and prevent a reoccurrence. It was strongly argued on behalf of the claimants that there would be a useful purpose, as the control of soldiers during an insurgency and their relationship to the civilian police and civilians was always a matter of importance in modern circumstances. It was also argued that the inquiry would be able to clarify the law.
163. On the part of the Secretaries of State it was said that circumstances had changed enormously over the past 60 years – the army was now a professional army, there was much more experience and much had been learned from the Iraq and Afghanistan campaigns.
164. In our view it must be very questionable whether at this point in time much can be learnt from an inquiry, given the changes that have taken place in the army and the experience gained in dealing with insurgencies in the meantime.

(c) Catharsis and improving an understanding of what happened

165. As to improving understanding or catharsis, the claimants pointed to the importance of the practice of truth and reconciliation. They also pointed to the importance of the fact that the voice of the inhabitants of the village had never been heard in any investigation or inquiry by the British. Again these would be important factors if there was a reasonable prospect at this stage in time in coming to a definitive view of the facts.

(d) Providing reassurance and rebuilding public confidence

166. As to providing reassurance and rebuilding public confidence, the deaths at Batang Kali have been, as is evident from the narrative account we have set out, a source of continuing controversy over the past 60 years. The allegations against the Scots Guards are as serious as it is possible to make.
167. If there were reasonable prospects that an inquiry would be able to reach a definite conclusion on the facts, this might be a very powerful factor going to public confidence in the British Army and the Scots Guards in particular. The inhabitants of the village were never interviewed in 1948-9, as the view was taken that they would not tell the truth. The five Guardsmen who say the deaths were deliberate executions alleged in effect that the inquiry in 1948-9 was misled. As the account of the villagers and the five Guardsmen has never been the subject of a definitive inquiry, it is, as we have said, now impossible to reach any definitive conclusion as to how the deaths of the inhabitants came about.
168. An inquiry could also go to restore confidence in the fairness and impartiality of investigations. However in our judgment there would have to be a good prospect that a conclusion could be ascertained. For the reasons we have given, it is highly unlikely any definitive conclusion can now be reached on the 1948/9 inquiry. Accordingly we cannot conclude that the Secretaries of State gave insufficient weight to this factor

(e) Accountability

169. As to accountability, we have set out at paragraphs 106-123 the reasons why the actions of the Scots Guards were and remain the responsibility of the British

Government. However, the difficulties in determining accountability are clear from the other factors we have set out.

(vii) *Promoting good race relations*

170. It was argued on behalf of the claimants that the Secretaries of State had not given due regard to the capacity of the inquiry to comply with their duties under s.71 of the Race Relations Act 1976 to “promote good relations between persons of different racial groups” and under s.149 of the Equality Act, “to foster good relations between persons who share a relevant protected characteristic and persons who do not share it”. It was submitted that they had not had due regard as that would have involved reaching a conclusion on the extent of the actual benefits of an inquiry or investigation in race relations/equality terms and not proceeding, as the Secretaries of State had done, on the basis that there might be benefits. That was an approach that was not compatible with the discharge of s.71/s.149 duties. It was submitted that a proper approach necessarily involved the decision-maker identifying any negative or positive consequences in equality terms of the course of action being contemplated, balancing any such consequences against the other benefits of proceeding and considering whether, and if so how, any identified negative consequences could be mitigated.
171. It was accepted on behalf of the Secretaries of State that s.71(1) and s.149 applied to the decision, but that they had complied with their duties.
172. In our view it is clear from what we already said that it is not possible, given all the uncertainties which we have set out at length, to determine whether there would in fact be negative or positive consequences in equality terms. In our view the Secretaries of State were right to take the position that there may be benefits.

(viii) *Continuing nature of the wrong*

173. It was contended on the claimants’ behalf that the Secretaries of State had failed to take into account the continuing nature of the wrong being done to the claimants. However, that in our view is no more than to re-state what had already been set out above in relation to the evidence, the legality of the shootings (on the assumption that the men were trying to escape), the previous inquiries and whether there had been a cover-up. It is not a factor that can add much of importance on its own.

(ix) *Costs and the differing models of investigation*

174. Cost is a material factor. The amount which will be spent will ultimately depend upon the type of inquiry chosen – whether it is an inquiry of the kind conducted by Lord Saville into Bloody Sunday or the more modest and streamlined model of inquiry conducted by Mr Nicholas Blake QC, as he then was, entitled *The Deepcut Review, a review of the circumstances surrounding the deaths of soldiers in Deepcut between 1995 and 2002*.
175. We see no reason why anything more than a streamlined inquiry would be necessary; such an inquiry was contemplated in 1970. Nonetheless, even if the more streamlined type of inquiry were undertaken, that inquiry would, if it was to see if conclusions beyond those which we have outlined above could be reached, have to conduct a

series of investigations in Malaysia, including interviewing the surviving persons who could give evidence and, if appropriate and if the Government of Malaysia consented, conducting an examination of the graves of those killed. The *Deepcut* Review cost in the order of £1m in 2004-2006. There can be little doubt that even a streamlined inquiry would result in materially greater expenditure than that taking particularly into account the costs that would be incurred in Malaysia.

Conclusion

176. From the analysis which we have set out above in relation to arguments presented to the court, it follows that in our judgment the decisions of the Secretaries of State were ones that took into account the relevant considerations and were not unreasonable. There are no grounds for disturbing their conclusion. In our judgment they had regard to the relevant factors and weighed them carefully and reached a conclusion which it was plainly open to them to reach.