Neutral Citation Number: [2012] EWHC 2678 (QB)

Case No: HQ09X02666

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/10/2012

Before :

The Hon. Mr. Justice McCombe

- -

Between :

(1) Ndiki Mutua
(2) Paulo Nzili
(3) Wambugu Wa Nyingi
(4) Jane Muthoni Mara
(5) Susan Ngondi — **Claimants**

- and -

The Foreign and Commonwealth Office — **Defendant**

- -
- -

Richard Hermer QC, Phillippa Kaufmann QC, Alex Gask and Henry Witcomb (instructed by **Leigh Day & Co**) for the Claimants
Guy Mansfield QC, Alex Ruck Keene and Jack Holborn (instructed by the **Treasury Solicitor**) for the Defendant
Elizabeth-Ann Gumbel QC (instructed by **Redress** as the Intervener)

Hearing dates: 16th-20th and 23rd-25th July 2012

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
The Honourable Mr Justice McCombe

(A) Introduction

1. By paragraph 8 of the Order made by me in this action on 21 July 2011, I directed that the case be set down "for hearing of limitation as a preliminary issue". The pleaded issues on limitation are as follows.

2. In paragraph 11 of the Amended Defence the defendant pleads that each claim by the claimants is barred by virtue of the expiry of the three year time limit provided for under section 11(4) of the Limitation Act 1980 ("the Act"). By paragraph 17 of the Reply the claimants state:

> "It is the Claimants' case that:
>
> (i) Although there are compelling reasons why the claim was not issued before 23 June 2009, and the claimants did not have actual knowledge of some causes of action within 3 years of that date, it is admitted that the action is outwith the time limit provided by s.11 of [the 1980 Act];
>
> (ii) Notwithstanding the passage of time a fair trial remains possible and there are compelling reasons why the Court should exercise its discretion under s.33 and permit the claims to proceed"."

3. The principal features of the case and the outline facts underlying it are set out in my earlier judgment in the action handed down on 21 July 2011 ([2011] EWHC 1913 (QB)). I do not intend to repeat those matters again and this judgment should be read, in effect, as one with the earlier judgment. It will be necessary, however, to supplement the factual background in certain areas for the purposes of my decision on the preliminary issue now before me.

4. There are three surviving claimants. The claim by the First Claimant, Mr Mutua, has been discontinued by Notice of Discontinuance served on 5 July 2012. The Fifth Claimant Mrs. Ngondi has died and no personal representative has been substituted as a claimant in the action; the consequences of that state of affairs, in respect of Mrs Ngondi's claim, are considered below. It is to be noted that this is not Group Litigation within the meaning of Section III of Part 19 of the Civil Procedure Rules.

5. The first allegations in respect of which the claims are brought begin with the arrest of the Third Claimant, Mr Nyingi, in December 1952. They end with the release of the Fifth Claimant, Mrs Ngondi (now deceased) in mid-1959. It seems to be common ground, therefore, that the primary limitation periods in respect of the claims by the Second to Fifth Claimants respectively ended in September 1960 (Mr Nzili), 3 March 1962 (Mr Nyingi) and on dates in 1963 (which are unclear) (Mrs Mara and the late Mrs Ngondi). The period of delay is, therefore, from between 1960/1963 to the issue of these proceedings on 23 June 2009, a period of approximately 50 years in duration. The events to be investigated at any trial would extend back to 1952 at least, a period of 60 years or more by the likely date of trial.

(B) Section 33 of the 1980 Act

6. Section 33, in its material respects, provides as follows:

> "33. Discretionary exclusion of time limit for actions in respect of personal injuries or death.
>
> (1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which –
>
> (a) the provisions of section 11 [or 11A] or 12 of this Act prejudice the plaintiff or any person whom he represents; and
>
> (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents;
>
> the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.
>
> (1A) [not relevant]
>
> (2) [not relevant]
>
> (3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to-
>
> (a) the length of, and the reasons for, the delay on the part of the plaintiff;
>
> (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11 [by section 11A] or (as the case may be) by section 12;
>
> (c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
>
> (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
>
> (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
>
> (f) the steps, if any taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."

7. A summary of the parties' respective cases on the preliminary issue can be found in paragraph 3 of the defendant's skeleton argument and paragraph 35 of the claimants' Reply respectively. In its skeleton argument the defendant says this:

> "The issues identified by the Claimants…raise in clear form the allegation that there was active participation by ministers and senior officials of Her Majesty's Government in the United Kingdom, and senior officers of the armed forces, in promoting through violence a policy of terror, intimidation and coercion by the Colonial Government and/or the British Army, and/or that ministers, senior officials and senior officers had a level of knowledge that through violence such policies were being practised. Further the Claimants contend that these individuals had such knowledge as to place them in breach of duty by not intervening to prevent or put a stop to such conduct. That goes to the heart of policy making at the highest level".

The defendant submits that the majority of those on the defendant's side who might have given material oral evidence on "policy making at the highest level" are now dead and that, therefore, in so far as the claimants seek to base their claims upon inferences from documents, the defendant is no longer able to meet that case with the oral evidence of those who created and/or received such documents.

8. In paragraph 35 of the Reply, the claimants say:

> "It is admitted that many, but no means all of the principal actors responsible for the Colonial Office, the British Army and the Colonial Administration are now dead or are unlikely to provide evidence at trial. Many of the key witnesses are still alive…. [Some are then named] …It is averred however that the nature of the claim, in particular the nature of the central issues likely to be in dispute, are such that the issues can be fairly determined by primary reliance, not least, upon extensive documentation."

9. It is accepted on behalf of the claimants that the burden of persuading the court to exercise its discretion under section 33 of the 1980 Act lies upon them. Both claimants and defendant agree that at the heart of the matter is whether a fair trial is still possible after the delay, but this is not the only factor: see immediately below. The court has an unfettered discretion as to whether a direction under section 33 should be made or not and the court's duty is "to do what is fair": *Horton v Sadler* [2007] 1 AC 307; *AB v Ministry of Defence* [2010] EWCA Civ 1317, at paragraph 96.

10. No one would, I think, dispute that the present case is not quite like any other that has been before the courts for consideration under section 33. The decided cases, therefore, can offer only limited assistance and then only on overarching principles. However, a reminder of a few of the salient features to be applied under section 33 is useful.

11. The current edition of *Civil Procedure* (2012, Vol. 2 paragraph 8-92, pp. 2383-4) ("The White Book") draws attention to the decision of the Court of Appeal in

McDonnell v Walker [2009] EWCA Civ 1257, summarising the court's judgment as follows:

> "(1) in applying s.33 a court is required to have regard to all the circumstances of the case and, in particular, to the circumstances referred to s.33(3), (2) a judge should not reach a decision by reference to one particular circumstance, or without regard to all the issues, but should conduct a balancing exercise at the end of an analysis of all the relevant circumstances and with regard to all the issues, taking them all into account, (3) it is important to stress that the test is not simply whether a fair trial of the issues was still possible, (4) the delay which is relevant where particular regard should be given to the circumstances referred to in paras (a) and (b) of s.33(3), is delay since the expiry of the limitation period, but the overall delay is relevant as part of all the circumstances of the case, (5) depending on the issues and the nature of the evidence going to them, the longer the delay the more likely and the greater the prejudice to the defendant, (6) the type of case where a defendant cannot show any forensic prejudice and for whom the limitation defence would be a complete windfall (e.g. *A v Hoare*, op cit, and *Cain v Francis,* op cit) is to be contrasted with the case where such prejudice is suffered because the defendant has not for many years been notified of a claim in any detail so as to enable investigation of it."

12. Much of the recent case law has concerned allegations of historic sexual abuse perpetrated upon children in an institutional setting. In *A v Hoare* [2008] 1 AC 844, where the House of Lords departed from its own previous decision in *Stubbings v Webb* [1993] AC 498 as to the proper construction of section 11 of the Act, observations were made upon the exercise of the court's discretion under section 33. Lord Hoffmann pointed in particular to the Law Commission's concern for a defendant's ability to defend a claim owing to lapse of time while recognising that the alleged abuse might have contributed to the delay in the making of a complaint: see paragraphs 49-50 of the speeches. By contrast in the same case Baroness Hale of Richmond noted that,

> "A fair trial can be possible long after the event and sometimes the law has no choice. It is even possible to have a fair trial of criminal charges of historic sex abuse. Much will depend upon the circumstances of the case."

13. Lord Brown of Eaton-under-Heywood, who perhaps dealt with section 33 more fully than the others of their Lordships in that case, said:

> "84. With regard to the exercise of the court's discretion under section 33 of the 1980 Act, however, I would make just three brief comments - not, let it be clear, in any way to fetter a discretion which the House of *Horton v Sadler* [2007] 1 AC 307 recently confirmed to be unfettered, but rather to suggest the sort of considerations which ought clearly to be in mind in

> sexual abuse cases in the new era which your lordships are now ushering in, first, by departing from *Stubbings v Webb* and, secondly, by construing section 14(2) so as to transfer from that provision to section 33 consideration of the inhibiting effect of sexual abuse upon certain victims' preparedness to bring proceedings in respect of it.
>
> 85. First, in so far as future claims may be expected to be brought against employers (or others allegedly responsible for abusers) on the basis of vicarious liability for sexual assaults rather than for systemic negligence in failing to prevent them, they will probably involve altogether narrower factual disputes than hitherto. As Lord Hoffman suggests, at para 52, that is likely to bear significantly upon the possibility of having a fair trial.
>
> 86. Secondly, through the combined effects of *Lister v Hesley Hall Ltd* and departing from *Stubbings v Webb*, a substantially greater number of allegations (not all of which will be true) are now likely to be made many years after the abuse complained of. Whether or not it will be possible for defendants to investigate these sufficiently for there to be a reasonable prospect of a fair trial will depend upon a number of factors, not least when the complaint was first made and with what effect. If a complaint has been made and recorded, and more obviously still if the accused has been convicted of the abuse complained of, that will be one thing; if, however, a complaint comes out of the blue with no apparent support for it (other perhaps than that the alleged abuser has been accused or even convicted of similar abuse in the past), that would be quite another thing. By no means everyone who brings a late claim for damages for sexual abuse, however genuine his complaint may in fact be, can reasonably expect the court to exercise the section 33 discretion in his favour. On the contrary, a fair trial (which must surely include a fair opportunity for the defendant to investigate the allegations - see section 33 (3)(b)) is in many cases likely to be found quite simply impossible after a long delay.
>
> 87. Hitherto, the misconstruction of section 14(2) has given an absolute right to proceed, however long out of time, to anyone able to say that he would not reasonably have turned his mind to litigation (more than three years) earlier (the *Bryn Alyn* test described by Lord Hoffmann, at para 36). It is not to be supposed that the exercise of the court's section 33 discretion will invariably replicate that position."

14. Similar observations on each of the competing factors are to be found in the judgment of Smith LJ in *Cain v Francis* [2008] EWCA Civ 1451, paragraphs 73 – 74. Further guidance is to be found in the judgment of the Court of Appeal, given by the same learned Lady Justice of Appeal in the *AB* case (supra). Observations were made as to

the application of each of the six particular factors appearing in section 33(3), but of course in the context of the particular facts of that case. Referring to paragraphs 98 and following of the judgment, and avoiding excessive citation, it seems to me that the following points emerge from the Court of Appeal's decision which are of some assistance in the present matter:

i) The court is again directed to "all the circumstances of the case" and the six factors set out in the section.

ii) Under subsection 3(a) (length of and reasons for the delay) the delay referred to is that which has occurred *after* the primary limitation period has expired, but there may well be delay going back to the time when the torts were committed, which would be relevant "in all the circumstances" of the case. The essential question is whether a fair trial of the primary factual issues is possible.

iii) Under subsection (3)(b) while the loss of cogency of evidence from the overall delay may be of significance, there will be some cases in which the delay after the expiry of the primary period will be of greater significance than might first appear. Proper attention must be given to any breakdown of the relevant periods that the parties may be able to supply. In some cases, the existence of a substantial contemporaneous documentary base may mitigate the lack of oral testimony.

iv) So far as necessary, even if a fair trial is still possible, the effect on cogency of the evidence any period of delay attributable to any individual claimant remains relevant: see paragraph 101.

v) The conduct of the defendant in the preservation/destruction of documents can be material.

vi) It is important under subsection (3)(e) (the extent to which a claimant acts promptly and reasonably once he knows of possible action) to consider the case of each individual claimant.

vii) Under subsection (3)(f) the court must not forget to have regard to the steps taken by each claimant to take legal/medical advice.

15. One factor emerging from the Court of Appeal judgment in the *AB* case is the extent to which the public interest in the claims being tried out is material. This is of particular relevance when I return to submissions made to me as to the relevance of a State's duty, under Article 3 of the European Convention on Human Rights, to investigate allegations of torture and the relevance of public international law with regard to torture. I shall return to these, but for the moment I recall paragraph 110 of the judgment where the following appears:

> "110. The judge also appeared to think that there is a public interest in the claims being tried out. We would agree that there can be said to be a public interest in establishing whether or not appropriate precautions were taken to protect servicemen and also whether servicemen have suffered ill health as a result of

> service in the tests. No doubt it was in order to investigate the latter that the NRPB studies were commissioned. We accept that there has been no public investigation into the adequacy of the precautions taken. We note that there does not appear to have been a coroner's inquest into any veteran's death which raised these issues. If it were thought that there should be an investigation, an attempt could be made to persuade the Government to order a public inquiry or some other form of investigation. However, we do not think that it is for the court to form a view that there should be such a public investigation and to take that perceived need into account when deciding whether to exercise the section 33 discretion."

16. The Court of Appeal also drew attention to "the broad merits test". This can be encapsulated from two sentences of paragraph 112 of the judgment where the court said,

> "It would be inappropriate for the court to allow an expensive and resource-consuming trial to take place if the prospects for the claimants' success are slight. If the prospects of success are even reasonable, those resource considerations fade into insignificance."

There is no doubt that this case would involve "an expensive and resource-consuming trial".

17. The decision of the Supreme Court in the *AB* case concerned principally the interpretation and application of section 14 of the Act. When it came to section 33, the court largely agreed with the approach and decision of the Court of Appeal and declined to extend the limitation period because of the very considerable difficulties facing the claimants in establishing their case on causation.

18. The Court of Appeal, in another case, has encouraged dealing with the limitation question at a preliminary hearing such as this one and has said that in cases where the court hears the section 33 question along with the substantive issues, it should take care not to determine the substantive issues before determining the issue of limitation and, in particular, the effect of delay on the cogency of the evidence. At the preliminary hearing the point has to be decided by reference to the pleadings, written witness statements and, importantly, the extent and content of discovery: see *KR v Bryn Alyn Community (Holdings) Ltd.* [2003] EWCA Civ 85, at paragraph 74, quoted by Lord Clarke of Stone-cum-Ebony MR (as he then was) in the judgment of the Court of Appeal in *B v Nugent Care Society* [2009] EWCA Civ 827, paragraph 12. Thus, in many cases where section 33 is invoked, the court has to make its decision at a time when it has only a very preliminary view of the evidence likely to be available at trial. The "broad merits test" will be, therefore, just that, "broad".

19. Also from the *Bryn Alyn* case, I should mention the following further points of principle. First, where the court is minded to grant a long extension it should take meticulous care in giving reasons for doing so. Secondly, the importance to the issue of forensic prejudice to the defendant appears from the following passage:

> "(viii) Where a judge has assessed the likely cogency of the available evidence, that is, before finding either way on the substantive issues in the case, he should keep in mind in balancing the respective prejudice to the parties that the more cogent the claimant's case the greater the prejudice to the defendant in depriving him of the benefit of the limitation period. As Parker LJ showed in *Hartley v Birmingham District Council* [1992] I WLR 968, 979-980, such a finding is usually neutral on the balance of prejudice: 'in all, or nearly all, cases the prejudice to the plaintiff by the operation of the relevant limitation provision and the prejudice which would result to the defendant if the relevant provision were disapplied will be equal and opposite. The stronger the plaintiff's case the greater is the prejudice to him from the operation of the provision and the greater will be the prejudice to the defendant if the provision is disapplied….as the prejudice resulting from the loss of the limitation defence will always or almost always be balanced by the prejudice to the plaintiff from the operation of the limitation provision the loss of the defence *as such* will be of little importance. What is of paramount importance is the effect of the delay on the defendant's ability to defend.'."

(C) <u>The bases of the claims in this action</u>

20. Following my judgment in July last year, the claimants presented their cases under four juridical heads of claim[1]. A fifth formulation of the claim, as originally pleaded, I held to be unviable and it was struck out. The heads of claim that survived, following the judgment, were these: 1) it was said that UK Government is directly liable to the claimants, as a joint tortfeasor, together with the Colonial Administration and the individual perpetrators of the tortious assaults, for having encouraged, procured, acquiesced in or otherwise having been complicit in, the creation and maintenance of a system under which the claimants were mistreated. Such liability is said to arise out of the role of the military/security forces under the command of the British Commander-in-Chief; 2) it was alleged that the UK Government is similarly jointly liable, through the former Colonial Office, for the acts complained of, because of its role in the creation of the same system under which detainees were knowingly exposed to ill-treatment; 3) it was said that the UK Government was liable to the claimants (and to the third claimant in particular) as the result of an instruction, approval or authorisation of particular treatment of detainees given on 16 July 1957; 4) it was alleged that the UK Government was liable to the claimants in negligence for breach of a common law duty of care in failing to put a stop to what it knew was systematic use of torture and violence upon detainees when it had a clear ability to do so.

21. The third of these heads of claim has been deleted by amendment, although the facts underlying it remain very relevant to the three other claims. In addition to those surviving claims, and indeed now at the forefront of them, the claimants have added, by amendment to the Particulars of Claim, a further head of claim, which had not previously been advanced. In paragraph 34 of the new statement of case, the

[1] Heads (2) to (5) identified in paragraph 13 of my previous judgment.

claimants now contend that the UK Government is vicariously liable for the assaults committed. The new paragraph 34 (omitting the particulars) reads as follows:

> "34. The United Kingdom government, through General Erskine and his successors, is vicariously liable for such assaults upon the Claimants as aforesaid as were committed by members of the Colonial Administration's security forces.
>
> a. Commander in Chief Erskine and his successors served as British military officers in right of the United Kingdom;
>
> b. They were at all material times responsible for the military and security measures necessary for the restoration of law and order during the Emergency;
>
> c. By operation of the 3 June 1953 Joint Directive (which remained in force throughout the Emergency), they either employed and/or exercised full command and control over the entire security apparatus within the colony and were in a position to prevent and were obliged to prevent tortious conduct by those under their command and control. That apparatus pursuant to the Joint Directive included all Colonial, Auxiliary, Police and Security Forces in Kenya ("security forces");
>
> d. By operation of the said directive, the United Kingdom government through General Erskine and his successors became vicariously liable for all assaults perpetrated upon the Claimants by members of the Colonial Administration's security forces in the course of or in close connection with the military and security measures required to restore law and order in the discharge of their duties;
>
> e. All assaults perpetrated upon the Claimant's by the members of the Colonial Administrations security forces were committed in the course of or in close connection with the military and security measures required to restore law and order and in the discharge of their duties."

That claim is sought to be expanded further in the arguments presented

to me.

22. The pleaded basis of joint liability has also been refined by the claimants' team since its formulation in the Amended Particulars of Claim dated 19 July 2011. In addition to the claim based upon "aiding, counselling and or procuring" and/or "joining with" the Colonial Administration in a system of torture, the claimants in the Re-Amended

Particulars of Claim also allege liability on the defendant's part by reason of a "common design to restore law and order". A new paragraph 35, in respect of the British Army, and an addition to paragraph 39, in respect of the Colonial Office, read (respectively) as follows:

> "*Joint liability by common design to restore law and order*
>
> 35. The Commander in Chief (Erskine and his successors), serving as British military officers in right of the Untied Kingdom, were at all material times charged by the United Kingdom government, including both the War Office and the Colonial Office, with the responsibility to restore law and order during the Emergency, and to that end by the June 3rd 1953 Joint Directive, exercised full command of the entire security apparatus within the colony. Acting in such capacity, General Erskine, and his successors, on behalf of the United Kingdom, pursued a common design with the Colonial Administration to restore law and order. Further and in particular, (i) they knew of the repeated use of torture and other forms of mistreatment of detainees perpetrated in the course of applying the processes and systems formally established to restore law and order, (ii) they had control over the security apparatus perpetrating such torture and mistreatment and (iii) deliberately refused to take any or any effective measures to put a stop to the same. In the aforesaid circumstances and/or by reason of the aforesaid common design the Defendant is jointly liable for the tortious acts perpetrated by all and any Colonial Administration servants of agents including prison guards insofar as such acts were perpetrated in the course of the discharge of their functions to restore law and order. The Claimants rely on the following further matters as evidence from which the aforesaid common design can be inferred.
>
> ……
>
> 39. Further or in the alternative the Colonial Secretary and/or his officials within the Colonial Office acted in common design with Colonial Administration to restore law and order in Kenya and/or in the establishment and maintenance of the system of torture and ill-treatment. By reason of such common design and/or designs the Defendant is jointly liable for the aforesaid torts committed against the Claimants which torts were committed by servants or agents of the Colonial Administration in the course of discharging their duties to restore law and order, and/or as an application of the system of torture established and maintained as aforesaid."

23. The defendant denies liability under each of these heads.

24. Mr Hermer QC for the claimants submits that I should give a direction under section 33 in respect of each of the routes to liability upon which the claimants' cases are put. However, he submits that, having examined each such route, it is open to me to allow the case to proceed on some bases but not on others. He relies in this respect upon the words in section 33(1) providing that,

> "…the court may direct that those provisions [i.e. the time bar provisions] shall not apply to the action, or *shall not apply to any specified cause of action to which the action relates.*" (Emphasis added)

He adds that, irrespective of the Limitation Act, it would be open to me to exercise the court's case management powers under the Civil Procedure Rules to prevent the action from proceeding upon any individual basis of claim, if I considered that to be the just course, while allowing the case to proceed under other heads of the claim.

25. As I see it, the availability of this "case management" approach was not contested by Mr Mansfield QC for the defendant. Nor was it contended that when section 33(1) speaks of "any specified cause of action" it is referring simply to individual torts themselves, such as "assault" or "negligence", as opposed to alternative routes to liability in respect of such a tort or torts. For my part, I am content to proceed on this basis and, in any event, it seems to me proper to hold that section 33(1) was not intended to be limited to the concept of "cause of action" as meaning (narrowly) "assault", "negligence" etc, such as would appear in a textbook on the law of torts. It seems proper to find that the section permits me to allow a claim to proceed on one or more routes to liability while not doing so in respect of other routes, if that appeared to be the just course. It is not necessary to discuss further Mr Hermer's alternative of a "case management" approach under the Rules.

26. In addition, Mr Hermer added a "backstop" position. He submitted that at the conclusion of this hearing I might find myself in a position in which I concluded that it was impossible at the present stage finally to decide the section 33 issue. He argued that, if that was the case, I should not shrink from so finding and should leave the matter to be determined at a full trial. He pointed in this respect to a decision of Neuberger J (as he then was) in *Steele v Steele* (Ch D) Case No. 6464/2000, 27.4.01 (Unreported). Mr Mansfield for the defendant robustly resisted this suggestion, in view of the agreed position in the proceedings for some time that the issue of limitation and section 33 of the Act is appropriate for preliminary decision. Obviously, the course of the action to date and the desirability of avoiding a very lengthy trial process, if the claims are bound to fail on limitation grounds, are strong factors against resorting to Mr Hermer's "backstop" solution. As already noted, moreover, in the decided cases the court is encouraged to decide these points at preliminary hearings if at all possible.

(D) The factual issues arising

27. The issues arising at a trial of the action are largely common ground: see paragraph 21 of the claimants' Reply and paragraphs 21 and 22 of the defendant's Rejoinder. At the start of the present hearing the fact of the torture/mistreatment of each of the individual claimants remained in issue between the parties. It remains so in respect of the late Mrs Ngondi, the defendant making no admissions in her case. However, in

respect of each of the other claimants, at the outset of his or her cross-examination, Mr Mansfield QC for the defendant, stated expressly that the defendant did not dispute that he or she had suffered torture and other mistreatment *at the hands of the Colonial Administration* (my emphasis). There remains, therefore, no outstanding issue as to the *fact* of those claimants' injuries and the manner of their infliction, although *legal responsibility* on the part of Her Majesty's Government in the United Kingdom remains hotly contested. While Mr Mansfield maintains certain points as to inconsistencies in certain parts of the claimants' accounts (which may go to other issues in the case, such as the status of the perpetrator of the injury in question and therefore the defendant's potential responsibility in law for his actions), the substance of what happened to these three claimants is no longer in dispute.

28. In broad summary, therefore, it seems to me that the following factual issues would arise at trial under one or more of the claims now raised:

i) When were the injuries inflicted on each claimant and where did the relevant ill-treatment occur? What was the official status of the perpetrators? Were they soldiers, African home guards, prison officers or other officials? What was the legal status of those individual perpetrators, vis-a-vis the Colonial Government, the British Army (and its Commanders-in-Chief[2]) and the Colonial Office in London respectively and does that status matter?

ii) What was the effect of the June 1953 Directive and what was its practical application in respect of the various organs of military, policing and detention activity in the colony?

iii) Did General Erskine (and each of his successors) have full command and the means of control over the entire "security forces" in Kenya? What did "security forces" mean in Kenya in the 1950s? Did the position change from November 1956 onwards and what did this mean in practice?

iv) Did the British Army commanders have either *de jure* or *de facto* control of officials and others serving in the detention facilities and villages, either in general or in particular in those in which each of the claimants suffered his or her injury?

v) What role did the War Council in Kenya/the British Army play in the "screening", interrogation and detention system?

vi) Was there a system of torture and/or other ill-treatment of detainees, such as the claimants? If so, what was the role of the British Commanding Officers in either creating or maintaining such a system? In short, what did each know about mistreatment of detainees and when?

vii) Whatever the constitutional formalities, what was the true nature of the relationship between the Colonial Office in London and the Colonial Administration in Nairobi? What was the extent and practicability of control by the former of the latter?

[2] I have used the term "Commander-in-Chief" for convenience to cover all three Generals. I am given to understand, however by the Defendant that Major-General Tapp's proper title was "General Officer Commanding" following the reorganisation of the command structure in July 1957.

viii) What were the "purposes and aims" of Her Majesty's Government in the emergency in Kenya (relevant to the vicarious liability and "common design" points)?

ix) What (if anything) did the Colonial Office know about abuses to detainees occurring in detention facilities and elsewhere and when did it have such knowledge?

x) Was there any cover up of any such abuses and, if so, by whom? What was the effect of any such cover up on the senior ranks of decision makers and commanders in Kenya and the UK? Was there an attempt to impede investigation of abuses?

xi) What occurred in and about the debated "instruction" telegram of 16 July 1957?

xii) Causation and Quantum of damages.

29. In respect of all these matters, the claimants contend that a fair trial is possible on the basis of the substantial documentary base that survives and the oral evidence of surviving witnesses in Kenya and the UK. The defendant says, "No, a fair trial is not possible": it acknowledges the existence of the documents and some witnesses, but it argues that the system of which the claimants complain has to be established from the bottom to the very top of government in the United Kingdom. The documents provide some pointers to each of the issues, but a fair trial of those issues would, it submits, have required that the directing minds of the British and Colonial Administrations be available to give oral evidence and to react and respond to the inferences that the claimants say are to be drawn from the documents. That, it is argued, is no longer possible, nor therefore is a fair trial possible.

(E) Background facts relating to the Section 33 factors

30. In considering the decided cases above, I have noted the importance of considering the individual factors under s.33 with regard to each claimant separately. However, in the present case, many of the relevant matters are common to each claimant alike. The points arising under section 33(3) (a), (d), (e) and (f) of the Act do not vary to any material degree.

31. Each of the surviving claimants is now elderly. Mr Nyingi is aged 84, Mr Nzili is 85 and Mrs Mara is about 73. Mrs Ngondi was 71 when she died. They each come from remote rural areas of Kenya and have worked in elementary farming communities. They have little education, even in their own languages; none has any significant knowledge or understanding of English. They have no experience, prior to this matter, of legal or other professional advice. They have minimal financial means. The possibility of any legal claim arising out of their now admitted ill-treatment was only brought to their attention by the Kenya Human Rights Commission ("KHRC") in cases of two of the surviving claimants in 2006 and in the case of the other in 2008. It was the KHRC who made contact with the solicitors who now act for the claimants and those solicitors travelled to Kenya to interview the claimants in May 2009. As noted above, the Claim Form in this action was issued on 23 June 2009.

32. As a matter of historical scholarship, two new works about the Kenya Emergency were published in 2005. Those works were *Imperial Reckoning: the Untold Story of Britain's Gulag in Kenya* by Professor Caroline Elkins of Harvard University and *Histories of the Hanged: Britain's Dirty War in Kenya and the End of Empire* by Professor David Anderson of Oxford University. Both these works, based on extensive research both in Kenya and the UK, reached the conclusion that there was regular and systematic abuse of detainees in screening centres and detention camps. It seems that each of these works played a significant part in the decision of the KHRC to search out the claimants and others in similar positions and to investigate the possibility of claims being brought by them. Published historical work on these subjects prior to 2005 had been much more limited and the documentary basis of the present claims had not been unearthed. Professor Elkins and Professor Anderson are now advising the claimants and have each provided three witness statements in the action. Subsequently, work by Dr Huw Bennett has researched in particular the role of the Army in the Emergency. Dr Bennett has also provided substantial written statements on behalf of the claimants.

33. A further important feature, acknowledged by each of the claimants who gave oral evidence before me, was that (quite apart from the illegal status of Mau Mau organisations prior to Kenyan independence) any collective organisation or meeting of Mau Mau activists or supporters was proscribed under legislation of the independent Kenya until 2002/3. Any act that could be considered to be "organising or taking part in any activity for or on behalf of" a proscribed organisation such as Mau Mau was punishable with up to 14 years imprisonment, a substantial fine or both. Each witness acknowledged that it was not practicably possible in that atmosphere for them to discuss with others what had happened to them while in detention or what possible remedies they might have. This factor cannot, as Mr Mansfield correctly stressed, be laid at the door of the defendant or its predecessors and yet it has contributed to the delay.

34. In oral argument Mr Mansfield for the defendant accepted that delay on the claimants' part in seeking to mount any claim was excusable, or at least understandable, until 2003, having regard to all these factors. However, he submitted that the period from independence in 1963 to 2003 was significant in giving rise to the significant forensic prejudice which, he submits, the defendant now faces and for which it is in no way responsible.

35. On the other side of the argument, quite apart from any formal proscription of discussing what occurred during the emergency in immediate post-independence Kenya, the claimants point to the seriously humiliating (and partly sexual) torture and other ill-treatment to which each was subjected. They say that this had a psychologically debilitating effect upon their ability to speak openly, or in some cases even privately, about what had happened to them. By way of example, Mrs Mara has still not felt able to discuss these matters with her husband. They are supported in this by expert psychological reports. While this factor does not constitute a "disability" within section 33(3) (d) of the Act, it is submitted (in my judgment correctly) that it is one relevant factor in the overall balancing exercise for the court.

36. Before moving on to consider the possibility or otherwise of a fair trial and the individual routes to liability postulated by the claimants, it is useful to set out, so far

as material, the evidence as to the status of the perpetrators of the abuse and where it is said to have been inflicted in the individual cases.

37. Mr Nzili attributes his most severe ill-treatment (castration) to a period in September 1957 at a detention facility at Embakasi at the hands of a man called Dunman (known as "Luvai"), assisted by an African police officer known as "Kwatanthi". This, he says, occurred about four days after his arrival there. Dunman himself was a Kenya Police Reserve Officer. There is no issue about the fact of Mr Nzili's ill-treatment, but the defendant takes issue as to whether it could have happened at the date claimed and/or whether Dunman was the perpetrator. It seems that the Embakasi centre or part of it may have closed in June 1957 and/or Dunman may not have been deployed there at the relevant time. Mr Nzili was further mistreated in other ways at Embakasi and Manyani. This is not disputed by the defendant, although the status of the perpetrators is not apparent from the witness statement. It seems that after leaving Manyani Mr Nzili was not beaten further.

38. Mr Nyingi was first arrested in December 1952. In the period up to the summer of 1954 he was detained at a number of locations: he mentions Kia Riua and Athi River. He details considerable mistreatment during this period in respect of which the claims are absolutely time barred, having occurred before 23 June 1954. (The section 33 discretion cannot be applied in respect of injuries suffered before that date: see *Arnold v CEGB* [1988] AC 228 and *McDonnell v Congregation of Christian Brothers and others* [2004] 1 AC 1101.)

39. In the period after the summer of 1954 Mr Nyingi was detained and severely mistreated in a number of camps at Lodwar, Kodiaga, Mageta Island, Athi River, Manyani and Mwea, a temporary prison in Nairobi and at Hola. Mr Nyingi was one of the detainees caught up in the beatings at Hola that led to the deaths of 11 men on 3 March 1959 (now known as "the Hola Massacre"). He had been left for dead, after the attack, among the corpses of his companions, but was found alive by a European doctor examining the bodies of those that had died.

40. At Lodwar, Mr Nyingi identifies an African corporal named "Kamende" and a British District Commissioner called Whitehouse as having been chiefly responsible for his ill-treatment. This consisted of regular and random beatings.

41. He also speaks, in his first statement, of a visit to this camp by Sir Evelyn Baring, the Governor of the Colony, and says that detainees complained to him about the beatings. In a second statement, however, he explains that it was a representative detainee who spoke to the Governor. Mr Nyingi did not speak to the Governor directly and in cross-examination he agreed that he had not heard what had been said by the detainees' representative to the Governor. In re-examination when asked about whether discussions had been held between the detainees' representative and other detainees, he could not be precise about what the representative had been asked to say or had said to the Governor. He said the representative was asked to speak about the problems they had. These problems were the conditions in which they were required to work on the construction of Whitehouse's house, the punishments meted out and the bad food. He said that when the representative returned they were told that he had given their message about these things to the Governor.

42. Mr Nyingi's evidence tells of consistent beatings throughout his period of detention until his release in about January 1961. He says that the ill-treatment was variously by "guards", "prison officers" and "soldiers". In his second statement he explains that he uses these terms interchangeably. He described these people in his oral evidence as all being "on the side of the Colonial Government".

43. In respect of his time at Mwea, Mr Nyingi speaks on various occasions of mistreatment of himself and others at the hands of a British man called Gavaghan. This is clearly Terence Gavaghan, described in the correspondence in June/July 1957 between the Governor and the Secretary of State for the Colonies as an "administrative officer", who was closely involved in the implementation of the "dilution technique"[3].

44. In respect of the Hola Massacre there is substantial documentation as to the participants which it is not necessary to recite here.

45. Mrs Mara was arrested and taken to the Gatithi screening camp where, in July 1954, she was sexually assaulted by vaginal penetration with a glass bottle in an attempt to extract a confession from her admitting to taking the Mau Mau oath. The assault was committed by a man called Edward Gakua, a member of the Home Guard, under the supervision and in the presence of a white District Officer, nicknamed "Waikanja".

46. Mrs. Ngondi was moved from her home during the villagisation programme and was then arrested and detained at Gatithi detention camp. She claimed to have suffered a similar sexual assault to that perpetrated on Mrs Mara.

(F) The two main rival contentions: Documents and Witnesses

47. I deal below with the competing considerations in respect of each of the potential "routes to liability" advanced by the claimants. However, it is useful to see where we are overall with regard to the availability of documents and witnesses and the cogency of the evidence overall.

48. At the time of the hearing last year, leading up to my judgment of 21 July 2011, a very substantial number of documents had been found, examined and commented upon by the historians, Professors Anderson and Elkins and Dr Bennett. Examination of those documents had permitted them, as history scholars, to reach conclusions on many of the issues which a court would have to decide at a trial of this action. I commented upon that work in paragraphs 32 to 36 of my earlier judgment. Some of the documents considered by the historians at that stage emanated from the collection of papers (contained in some 300 boxes) at Hanslope Park which had recently been discovered and had previously been overlooked in the defendant's initial searches for relevant materials but in advance of formal disclosure in the action. That collection was only beginning to be studied at the time of the last hearing. In the intervening 12 months a great deal of further work has been conducted on that collection by both sides. The historians robustly maintain, in additional witness statements prepared for the present hearing, that the new disclosure has only served to confirm the impressions and conclusions that they had expressed in their earlier statements about

[3] Mr. Gavaghan died in August 2011.

what they see to be the complicity of the British Army and Government in the infliction of abuses upon detainees.

49. As I observed in paragraph 36 of the previous judgment, it would be for the court at the trial of the action to draw its own conclusions from the documents and other evidence presented. Equally, while the precise status of the historians' statements as evidence in the case as a whole and at trial, has yet to be decided, it was agreed between the parties at a directions hearing before me on 29 May 2012 that those statements should be treated for present purposes as "akin to published academic articles by learned authors": see paragraph 6 of the order made that day.

50. Given the role to be played by those statements for present purposes, I consider that it is material to note the extent of the documentary basis that the historians tell me exists and to recognise the fact that this had enabled them, as historical scholars, to draw some very firm conclusions of their own. That is entirely within the proper ambit of the historians' contributions at this stage, as identified in the passages from the judgments of Tugendhat and Langstaff JJ at earlier stages of the action, quoted by me at paragraph 35 of my first judgment.

51. At a trial the court would have to conduct its own analysis of the documents to at least the same, and possibly even to a greater extent, than the historians have done in some areas of factual dispute. However, on the present evidence, some of which has been presented and collated for me by the parties for the purposes of the two hearings, I consider that I am justified in concluding that the available documentary base is very substantial indeed and capable of giving a very full picture of what was going on in government and military circles in both London and Kenya during the emergency.

52. Mr Hermer informed me, without contradiction on the part of the defendant, that the available papers included 2000 pages of War Council and Security Council official minutes, 5,400 pages of War Council memoranda, 4000 pages of Intelligence Committee reports, 2000 pages of Emergency Committee reports. He reported to me also that the understanding of the claimants' advisers is that at this stage only 40% of the Hanslope material has been inspected; the work will continue if the action is to proceed.

53. There is also an ongoing dispute between the claimants and the defendant as to the methodology adopted by the defendant in giving standard disclosure in the action pursuant to my order last year: it seems that relevance to the issues in the case has been assessed initially by the defendant's advisers by file title rather than by reference to individual documents. The claimants argue that that is an insufficient depth of inquiry. The defendant contends that it has fully and properly complied with its standard disclosure obligation under the Civil Procedure Rules and, to its credit, it has offered full access to the Hanslope material for the claimants' advisers, including the historians. However, it had not been possible for the advisers to take up this opportunity of full access by the time of the hearing.

54. I am anxious to emphasise (given the nature of some of the publicity about this case) that my clear impression is that, in the context of the present court proceedings and whatever may have happened in earlier years before claims were intimated, the defendant has sought scrupulously to comply with its disclosure obligations. It is not at all surprising, however, in a case of this novelty and complexity, that the lawyers

should find themselves at odds about whether the disclosure given has been adequate or not. Such genuine disputes arise frequently even in actions nothing like as complex as the present. I would also observe that, while it was Professor Anderson who initially expressed the opinion that some 300 boxes of documents returned from Kenya seemed to have gone missing, it was the assiduous nature of the enquiries made by an FCO official, Mr Edward Inglett, that ultimately uncovered what had happened to them. The defendant continues to take its disclosure obligations seriously and has reported the discovery of some further documents of potential relevance in a letter to the court of 30 July 2012 written after the conclusion of the present hearing.

55. In his third statement, Professor Anderson informs me that the Hanslope archive has revealed for the first time a number of documents giving a clearer and more detailed view of the extent of abuses in the camps and what was known about them higher up the chain of administration. Included in the papers are complete minutes of the War Council (on which all the British Commanders in Chief sat), revealing policies on detention, "screening" and interrogation. There are the papers of the Provincial and District Emergency Committees (on which British officers also sat). Significantly, he says, there are the papers and minutes of the Chief Secretary's Complaints Coordinating Committee, set up in 1954 to monitor and manage serious complaints made against the security forces and local administrators. The period covered by these documents is 1954 to 1959. These records reveal, it is submitted, examples of inadequate investigation and/or prosecution of serious abuses, of which examples were shown to me during the hearing. These papers were routinely sent to the Colonial Office in London. There is also correspondence and minutes passing between Kenya and London relating to abuse of detainees and the development of the so-called "dilution technique".

56. Professor Anderson's views are repeated and supplemented to similar effect in the third statements of Professor Elkins and Dr Bennett. I take these views into account in assessing the adequacy of the documentary material for the purposes of a trial. I remind myself, however, that the role of historical scholars is different from that of a trial court.

57. In the course of oral argument, and clearly as a result of most diligent work behind the scenes, Counsel presented to me a selection of the underlying documentation, which enabled me to obtain a good understanding of its nature and quality. This was not dissimilar to the exercise conducted at the hearing last year for rather different purposes. However, I remain conscious that each of these exercises has still only given me a number of snapshots of the events as they unfolded over a number of years in Kenya and London.

58. I am particularly grateful for the series of schedules on the documents produced by counsel for the defendant, collecting and referencing a number of documents under individual topic headings: e.g. "The Generals, the British Army and the War Council", "Responsibility for the camps and for handling surrendered terrorists", "The July 1957 Telegram…", "British Government knowledge of deaths and accusations of brutality…", and "Documents: management, destruction and detention". Similar schedules are presented in the appendices to the claimants' written submissions in reply: e.g. "List of War Council Minutes relating to detention camps and villagisation", "Documents going to vicarious liability", "Prevention of investigation and interference with the administration of justice", "Schedule of Parliamentary

Debates and Questions on Detainees" and "Examples of Documents going to Common Design to Commit Torture". I have studied these again since the conclusion of the hearing and have referred once more to a substantial number of the original documents there highlighted.

59. The defendant's case was presented in a manner designed to illustrate the point made on its behalf that the documents demonstrate more than one side to the story sought to be advanced on behalf of the claimants and that the picture could only have been satisfactorily completed at a trial with witnesses from the highest echelons of government and the military who could explain the background to what had been written at the time. It is submitted that that process is not now possible.

60. At the forefront of the submissions made by the defendant was that I should recognise and should not underestimate the important dichotomy that is said to have existed between the Colonial Office and Colonial Administrations which oral evidence from the policy makers would have illustrated more fully. Mr Mansfield referred at the start of his submissions to an extract from the 1955 Report by General Sir Gerald Templer on *Colonial Security* in a section entitled "The System of Colonial Government" where the following appears:

> "Any outsider rash enough to suggest to a member of the Colonial Office that, in certain circumstances, more positive direction from Whitehall might be desirable, will almost certainly be reminded that it was such action which led to the loss of thirteen Colonies at once. It is of course right that the date 1776 should be graven on the hearts of all who are concerned with Colonial affairs. But it makes it difficult for anyone charged, like myself, with putting up positive recommendations for action. One is reminded, firmly and correctly, that Governors exist to govern, that the Colonial Office does not run Colonial territories and that their job is to advise; if necessary to exhort; but rarely, if ever to command."

61. The claimants for their part have presented schedules, for which I am equally grateful, picking out a selection of documents which they submit demonstrate clear complicity of the British military High Command and the Government in London in torture and/or other abuse of detainees. They argue that the nature of those papers demonstrate that the lack of oral testimony is not as debilitating for the Court as the defendant submits.

62. Turning to witnesses, the defendant (at my urging at the directions hearing) produced a witness statement setting out its position on the availability or otherwise of important witnesses. The result was a statement from Mr Chanaka Wickremasinghe of 19 June 2012. It is the defendant's case that all relevant witnesses who would have been able to give evidence as to matters of "high policy" from the civilian or military side are now dead. It is pointed out that they include the three Secretaries of State for the Colonies (Lyttleton, Lennox-Boyd and Macleod), the three Commanders in Chief (Erskine, Lathbury and Tapp), the Governor for the bulk of the emergency period (Baring), the principal Ministers and Civil Servants of the Colonial Administration and the principal Civil Servants in the Colonial Office. The defendant argues that

there is not one of these who can speak to, or give personal explanation of, what the claimants seek to hold against them on the documents.

63. Mr Mansfield also relied strongly upon an analogy to the court's position in a case in which a claim for "wasted costs" is made against a lawyer and the lawyer finds himself unable to defend himself fully because of a refusal by his client to waive legal professional privilege in respect of the matter on which the claim for costs is based. He referred me to the decision of the House of Lords in *Medcalf v Mardell* [2003] 1 AC 120. In that case, their Lordships held that where the lawyer was unable to defend his conduct of a case by revealing his instructions and other relevant material, the court should not make a wasted costs order unless, proceeding with extreme care, the court could say that it was satisfied that there was nothing that the lawyer could, if unconstrained, have said to resist the order, and that it was in all the circumstances fair to make the order. Further, in the absence of the full facts, due to a refusal to waive privilege, it was held that the court was not entitled to speculate and to infer that there could not be any material upon which the lawyer could have been justified in acting in the manner criticised.

64. I was taken to the passage in the speech of Lord Bingham of Cornhill at paragraph 23, where his Lordship said,

> "*Legal professional privilege*
>
> 23 In *Ridehalgh v Horsefield* [1994] Ch 205, the Court of Appeal addressed the issue of legal professional privilege which may arise where an applicant seeks a wasted costs order against lawyers acting for an opposing part and said, at p 237:
>
> > "The respondent lawyers are in a different position. The privilege is not theirs to waive. In the usual case where a waiver would not benefit their client they will be slow to advise the client to waive his privilege, and they may well feel bound to advise that the client should take independent advice before doing so. The client may be unwilling to do that, and may be unwilling to waive if he does. So the respondent lawyers may find themselves at a grave disadvantage in defending their conduct of proceedings, unable to reveal what advice and warnings they gave, what instructions they received. In some cases this potential source of injustice may be mitigated by reference to the taxing master, where different rules apply, but only in a small minority of cases can this procedure be appropriate. Judges who are invited to make or contemplate making a wasted costs order must make full allowance for the inability of the respondent lawyers to tell the whole story. Where there is room for doubt, the respondent lawyers are entitled to the benefit of it. It is again only when, with all allowances made, a lawyer's conduct of proceedings is quite

> plainly unjustifiable that it can be appropriate to make a wasted costs order."

I do not for my part consider this passage to be inaccurate or misleading, and counsel did not criticise it. Read liberally and applied with extreme care, it ought to offer appropriate protection to a practitioner against whom a wasted costs order is sought in these circumstance. But with the benefit of experience over the intervening years it seems clear that the passage should be strengthened by emphasising two matters in particular. First, in a situation in which the practitioner is of necessity precluded (in the absence of a waiver by the client) from giving his account of the instructions he received and the material before him at the time of settling the impugned document, the court must be very slow to conclude that a practitioner could have had no sufficient material. Speculation is one thing, the drawing of inferences sufficiently strong to support orders potentially very damaging to the practitioner concerned is another. The point was well put by Mr George Laurence QC sitting as a deputy High Court judge in *Drums and Packaging Ltd v Freeman* (unreported) 6 August 1999 when he said, at para 43:

> "As it happens, privilege having been waived, the whole story has been told. I cannot help wondering whether I would have arrived at the same conclusion had privilege not been waived. It would not have been particularly easy, in that event, to make the necessary full allowance for the firm's inability to tell the whole story. On the facts known to D3 at the time it launched this application, D3 might very well have concluded that the firm would not be able to avoid a wasted costs order, even on the 'every allowance' basis recommended by Sir Thomas Bingham MR."

Only rarely will the court be able to make "full allowance" for the inability of the practitioner to tell the whole story or to conclude that there is no room for doubt in a situation in which, of necessity, the court is deprived of access to the full facts on which, in the ordinary way, any sound judicial decision must be based."

65. Mr Mansfield's submission was that the position of the defendant was similar to that of the lawyer defending himself "with his hands tied behind his back". The court would be being invited to draw inferences without the criticised party being able to explain his position with reference to the full facts.

66. The claimants acknowledge that an ideal trial would have occurred at a time when all the witnesses were available. However, they argue that the defendant has not given sufficient attention to the fact that a number of potential witnesses do survive, even if they were lower down the tree of authority during the material period. They point in

particular to Mr Ian Buist who, although relatively junior to the persons in the Colonial Office mentioned in the previous paragraph, was a participant in many of the important deliberations of the day and his name appears on a number of the documents in the case. It is clear from papers that I have seen that Mr Buist was very close to the policy makers and was providing them with practical advice to particular problems at the moment they arose.[4] He has provided a limited witness statement in which he speaks of his own failing recollections. However, I agree with the claimants' submission that little appears to have been done to enquire of Mr Buist about even general matters such as control of the Colonial Administration (or lack of it) from London, knowledge in London (or lack of it) about abuses in the camps and the reaction in London to the complaints that were being made at the time. Nor does Mr Buist seem to have been asked to comment even in outline on the claimants' pleaded case.

67. The claimants point out that no attempt seems to have been made to interview, for example, Mr John Cowan (after whom the term "Cowan Plan" was named) who would be a very important witness in relation to what happened at Hola in March 1959 and the administration of the camps generally. Mr Cowan's evidence would be directly relevant to Mr Nyingi's claim. He wrote a letter to the press giving a short but vigorous reaction to the publication of Professor Elkins' book when it was first published. The claimants also mention the likely availability of more junior participants in government and in military ranks of the time who would be able to give a contemporary account of events in which they participated, throwing light on the perceptions and actions (or lack of them) on the part of their superiors. Without seeking to attribute blame, Mr Hermer submitted that the defendant has failed to appreciate the avenues of enquiry open to them and/or they have failed to follow them up. He submits that those at the "top of the tree" are far from being the only available witnesses of fact.

68. The defendant argues that even the surviving witnesses are likely to be elderly, with similar failing recollections to that of Mr Buist. They submit, for example with regard to General Sir Frank Kitson (a senior officer below staff rank at the time but closely involved in military matters in Kenya) that he is reluctant to become involved and could not be expected to be a live witness at any trial. They submit that the same is likely to be true with others. The point can be made, however, that in present circumstances even if such witnesses do not give evidence in person at any trial the hearsay evidence provisions are sufficiently flexible to make even a witness statement, directed to the significant issues outlined above, valuable to the court.

69. To be added to the claimants' list of potential witnesses is Mr Ian Henderson, who seems to have had an important role in the Special Branch of the Kenyan Police. The role of the police in the screening and detention of suspects is clearly of significance, as is the force's relationship with the military and other branches of the security forces and administration.

70. Having considered these general points, I turn to the application of the statute to the individual causes of action/routes to liability. In particular, I will consider first the question of whether a fair trial is possible in respect of each of these.

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[4] See e.g. Paragraph 166.11 of the Claimants' skeleton argument. One example has a very familiar ring from well known advice to officials close to Ministers in our own time. Please see further below.

(G) The "Routes to Liability" and s.33

Vicarious Liability: Re-Amended Particulars of Claim paragraph 34

71. This head of claim, as I have said, was not advanced at the time of the applications which I heard last year. However, by paragraph 2 of my order of 21 July 2011, I gave permission for amendments to the Particulars of Claim.

72. It appears that the initial plea of vicarious liability, as set out in paragraph 34 of the Re-Amended Particulars of Claim, was premised solely upon the position of the Generals who held the position of Commander-in-Chief in Kenya during the period of the emergency. In its skeleton argument for the hearing of the preliminary issue, however, the claimants widened this to add a liability based upon "agency" and a liability in respect of prison guards (outside the "security forces" properly so called under the Joint Directive of 3 June 1953). In April 2011 the claimants' case disavowed any resort to vicarious liability at all.[5] In its skeleton argument for the present hearing, it is submitted on behalf of the defendant that the wider claim advanced in the claimants' new skeleton argument requires further permission to amend and that it is too late for such permission to be granted.[6]

73. The final submission by the claimants as to the effect of the Crown Proceedings Act 1947, in respect of this new route to liability, is that section 2(6) and 38(2) of that Act renders the Crown vicariously liable for servants and other officers paid out of the "designated funds" set out in section 2(6) and appointed directly or indirectly by the Crown; and for "agents" irrespective of remuneration and the nature of the appointment. In each case, the Crown is only liable, pursuant to section 2(1) of the 1947 Act, if a cause of action in tort would have arisen against the servant or agent respectively. The claimants contend that the defendant is vicariously liable for the tortious acts in so far as they were perpetrated by members of the British Army who were duly appointed servants paid out of the designated funds, members of the Colonial security forces as its "agents" and the servants or agents of the Colonial Administration, who were engaged in guarding either prisons or camps, as agents of the United Kingdom Government.

74. The defendant's oral argument accepted that the claim as so formulated was not the subject of a "strike out" application on the basis that it disclosed no reasonable cause of action. However, it was submitted that this new claim was a "weak" one. It is submitted that the claim is "on any view" a considerable extension of the law of vicarious liability.[7] In essence, it seems to me the argument of the defendant for present purposes, therefore, was that the claim failed the "broad merits" test, alluded to above, and for that reason it should not be permitted to pass over the hurdle of section 33.

75. The defendant goes on to submit that the court does not need to resolve these legal complexities because, even if the claimants' legal analysis is correct, it does not remove the need to find the primary facts to establish the relationships which give rise to potential liability. It is submitted that, on the basis of the claimants' statement of

[5] See paragraph 177(b) of the claimants' skeleton argument for the earlier hearing.
[6] Paragraph 155.
[7] See paragraph 158 of the Defendant's skeleton argument.

the factual issues arising on this head of claim, the case cannot fairly be determined without witness evidence which is no longer available[8].

76. In my judgment, the difficulties advanced by the defendant on these matters are more illusory than real.

77. First, on the law, little in the present case treads the route of the trite or the well-known. The issues raised by the claims are novel ones for the court to resolve. However, the bases of claim, which in my judgment of last year I considered to be viable in law and on the facts, all turn upon the same factual background and the legal relationship (if any) between the perpetrators, of what is now accepted to have been torture, and Her Majesty's Government in the United Kingdom. It matters little, in my view, whether one looks at the case through the legal microscope of the tort of negligence or vicarious liability for the tort of assault.

78. Further, the law in this area is in a continuous state of development. Four days before the hearing of this matter, the Court of Appeal handed down its judgment in *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938, in which Ward LJ delivered a very full and (if I may very respectfully say so) masterly review of the law in this area. In addition, on 23 July 2012, as I was informed, the Supreme Court was scheduled to hear an appeal from the Court of Appeal's earlier decision in *Various Claimants v The Catholic Child Welfare Society and the Institute of Brothers of the Christian Schools & ors.* [2010] EWCA Civ 1106. Each of these cases sought to apply the law of vicarious liability as developed in relation to the criminal acts of an employee perpetrated on an innocent victim in his care: see *Lister v Hesley Hall Ltd* [2001] UKHL 22.

79. Two very important developments in the law can be noted immediately from very short citations from the judgments of Hughes LJ in the *Institute of Brothers* case and of Ward LJ in the *JGE* case respectively. In the former, Hughes LJ said,

> "It is well-established now that the fact that D1 ["employee"] commits the tort outside his authority from D2 ["employer"], or directly against his orders, is not necessarily a bar to the existence of vicarious liability".

In the latter, Ward LJ said,

> "I can conclude that the time has come emphatically to announce that the law of vicarious liability has moved beyond the confines of a contract of service [i.e. a contract between employer and employee]".

80. The combination of these two developments of the law show that the idea that we learnt as students, that (subject to very limited exceptions) vicarious liability for a tort only arises where the primary tort is committed by an employee within the scope of his employment, is now far too narrow. The law has progressed well beyond liability solely for employees doing precisely what they were employed to do and beyond the acts and defaults of employees under a contract of service.

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[8] Loc. Cit. paragraph 162.

81. Bearing in mind the recognition of these significant developments, one can return to the speech of Lord Hobhouse of Woodborough in the *Lister* case. There His Lordship spoke of sexual abuse of pupils by a teacher as "the paradigm of those acts which an employee could not conceivably be employed to do" (c.f. an act of torture committed by a person exercising authority in a detention camp). He went on to say that the cases of liability for the acts of employees in such cases derived from the relationship to the victim,

> "…which imposes specific duties in tort upon the employer and the role of the employee … is that he is the person to whom the employer has entrusted the performance of those duties…
>
> The classes of persons or institutions that are in this type of special relationship to another human being include schools, *prisons*, hospitals, and even in relation to their visitors occupiers of land. They are liable if they themselves fail to perform the duty which they consequently owe. If they entrust the performance of that duty to an employee and that employee fails to perform the duty, they are still liable…The liability of the employers derives from their voluntary assumption of the relationship towards the plaintiff and the duties that arise from that relationship and their choosing to entrust the performance of those duties to the servant…" (Italics added)

82. The defendant in this case might protest that the vicarious liability is still primarily for the act of an employee and that in the *JGE* case Ward LJ in the end asked himself the question,

> "whether the relationship of the bishop and Father Baldwin is so close in character to one of employer/employee that it is just and fair to hold the employer vicariously liable."

In other words, the defendant argues that it is only when the relationship between defendant and perpetrator bears such a character of proximity to that of employer/employee that vicarious liability can arise. However, when one puts the words "employer" and "employee" into inverted commas as one now must do in the light of the newly developed legal principles, it is necessary to return to the underlying *basis* of liability in law rather than to historic *labels* in order to determine whether vicarious liability follows or not. See for example the mix of factors or "signposts" pointing to vicarious liability which Ward LJ found "most illuminating and helpful" in Professor Kidner's article which the learned Lord Justice quotes at paragraph 72 of his judgment. The citation is as follows:

> "(1) Control by the 'employer' of the 'employee'. Traditionally this has meant asking whether the employer can control not only what is done but also how it is done. This makes little sense and the variant of asking whether the employer has the legal *right* to control is merely circular. Rather this factor should look at the degree of managerial control which is exercised over the activity and this may depend on how far a person is integrated into the organisation of the enterprise. At

the one end of the spectrum a contractor will merely be asked to achieve an end result, or more ambiguously the specification of that end result may be so detailed as to amount to detailed control over how that result is to be achieved. At the other end of the spectrum, it is the person who is actually controlled in every detail of how things are to be done. Another way to look at the control test is to examine the degree to which the 'employee' is accountable to the employer; in other words to what extent is he subject to the managerial procedures of the employer in relation to such matters as quality of work, performance, productivity etc?

(2) Control by the contactor of *himself.* This is not about Mr Newall who took no orders from anybody [the *Mersey Docks* case] but is rather an element of the entrepreneur test and involves looking at how the contractor arranges his work, his use of assets, his payment etc.

(3) The organisation test (in the first sense of how central the activity is to the enterprise): This involves the question, how far the activity is a central part of the employer's business from the point of view of the objectives of that business. This element flows from the need to establish who it is that is engaging in the activity and the more relevant the activity is to the fundamental objectives of the business the more appropriate it is to apply the risk to that business.

(4) The integration test (i.e. the organisation test in the second sense of whether the activity is integrated into the organisational structure of the enterprise). This also looks at the traditional test of whether the function is being provided for the business or by the business and is also a part of the entrepreneur test for it asks whether the activity is part of the enterprise's organisation or of some other organisation. A service may be absolutely essential to the business or wholly peripheral to it, but if it is being provided by what is in effect a separate business it would be appropriate to apply the risk to the enterprise. It is a factor of both who is engaging in the activity and also who stands to gain or lose from it.

(5) Is the person in business on his own account (the entrepreneur test)? This is not really a separate test as it is intimately involved in the other four, but it needs to be highlighted so that the burden of proof is right. For the purpose of vicarious liability a person should not be regarded as an independent contractor simply because according to the technical requirements of employment law he is not an employee. Rather it needs to be established that he is actually behaving as an entrepreneur and is taking the appropriate risks and has the possibility of resulting profits. Thus even if a person's activity is peripheral to the enterprise and even if he is

> not for managerial purposes regarded as part of the organisation, a person could still be regarded as an 'employee' if it is clear that in relation to that business he is not acting as an entrepreneur. Agency workers would be an example."

83. It is also worth setting out this passage from the judgment of Davis LJ in *JGE* at paragraph 123:

> "123. That an appropriate level of control is ordinarily required for vicarious liability to be capable of arising is, I think, borne out by the authorities (including *Doe v Bennett* itself). That in fact accords with one of the underlying policy drivers which constitute the rationale for the doctrine. But, as the case of *Viasystems* also illustrates, the control does not have to be entire and absolute. What is the "appropriate" level of control for vicarious liability to be capable of arising? Obviously it will depend on the facts of the case. Further, it seems to me, in a context such as the present, pointers at this first stage are, if D can be vicariously liable for the torts of A, (1) that D has caused A to be placed in a position, or where D and A are otherwise in a relationship, whereby D is capable of having some control of A's activities; and (2) that the activities are performed on behalf of or are designed to further the aims or interests or purposes (the latter word seemingly favoured by Lord Wilberforce in *Launchbury v Morgans* at p. 134-5) of D. In addition, an assessment - not by way of the sole applicable test (that would be unprincipled) but as a factor required to be taken into account - of whether it is fair, just and reasonable to make D liable should, in my view, also be made in each case."

To paraphrase Davis LJ a little further, for the purpose of this case, the court might well find itself asking whether the perpetrators of these acts of abuse on these claimants in the present case were committed in the course of "furthering the UK Government's aims and purposes" in the Kenya Emergency: c.f. paragraph 129 in the judgment of the learned Lord Justice in *JGE*.

84. In the light of these developments, I am unable to characterise this formulation of the claims as "weak". It strikes me that, if my approach adopted in the earlier judgment is correct, it may be found at a trial that the detention of persons such as the claimants was part of a *joint* exercise by the UK Government and the Colonial Administration to control the rebellion, giving rise to duties such as those owed by the prison authorities to prisoners and attracting the same basis of liability as was found to exist in *Lister's* case and the other cases cited above. The liability may not be far different in character from that upon which the claimants seek to rely in the claim based upon "common design to restore law and order", to which I return below. As I venture to suggest below, the boundaries between these routes to common or joint liability in tort may be narrowing.

85. As the defendant states in its skeleton argument this aspect of the case raises "difficult questions of law"[9], but not ones so weak, in my judgment, as to fail the "broad merits" test derived from the cases decided under section 33.

86. Turning to the factual issues arising, it seems to me that these can be fairly and cogently resolved largely by reference to the documents. The relationship between the perpetrators and the UK government does not depend upon oral evidence and liability would not be dependent upon knowledge of the defendant or an intention on its part to commit torture. The outcome would turn, I think, upon the role of the Commander-in-Chief in relation to the security forces, the "control" of the detention facilities, the direction of policy towards them by the War Council (on which the C-in-C sat), and the position of the Commander-in-Chief in his responsibilities to the government in London. In short, apart from the aims and purposes of the Colonial Administration, were the perpetrators of these torts appointed and entrusted to further the "aims and purposes" of the UK government (c.f. Davies LJ in *JGE*)? The answers to those questions, to my mind, turn principally on documents not the evidence of witnesses.

87. In so far as permission further to amend the Particulars of Claim is still required in order to maintain the basis of vicarious liability advanced in argument, I am prepared in principle to grant such permission, subject to seeing the further proposed amendment in draft.

Common design to restore law and order: Re-Amended Particulars of Claim paragraphs 35 and 39

88. This claim too arises upon the Particulars of Claim as amended since the hearing last year: see paragraphs 35 and 39 of the Re-Amended Particulars of Claim. However, the principal decided cases upon which the claim is based were cited to me at the previous hearing. Those cases are *The Koursk* [1924] P 140 and *Brooke v Bool* [1928] 2 KB 578[10]. The claimants' case begins with the principal stated by Scrutton LJ in *The Koursk* as follows:

> "…two persons who agree on common action, in the course of, and to further which one of them commits a tort. These seem clearly to be joint tortfeasors; there is one tort committed by one of them on behalf of and in concert with another. "[11]

The claimants further rely upon the further passage in the same judgment of Scrutton LJ where he said:

> "I am of opinion that the definition [of joint tortfeasors] in Clerk and Lindsell on Torts, 7th ed. P. 59, is much nearer the correct view: "Persons are said to be joint tortfeasors when their respective shares in the common tort are done in furtherance of a common design…but mere similarity of design on the part of independent actors, causing independent damage

[9] Paragraph 156
[10] See paragraph 115 of my earlier judgment.
[11] See, for a fuller quotation, the same paragraph of the July 2011 judgment.

> is not enough; there must be concerted action to a common end…" ".

89. In contrast, the defendant refers me to the brief summary of joint liability for a tort in the judgment of Peter Gibson LJ in the patent case of *Sabaf v Meneghetti* [2003] RPC 14, at paragraph 49, as follows:

> "The underlying concept for joint tortfeasance must be that the joint tortfeasor has been so involved in the commission of the tort as to make himself liable for the tort. Unless he has made the infringing act his own, he has not himself committed the tort. That notion underlies all the decisions to which we were referred. If there is a common design or concerted action or otherwise a combination to secure the doing of the infringing acts, then each of the combiners has made the act his own and will be liable."

From this the defendant submits that in order to establish liability for assault under this head the claimants would have to show that the Colonial Office made the tortious acts committed upon the claimants "its own" – a very difficult task, it is submitted, on the facts. Clearly, there is force in that submission.

90. The claimants counter this by saying that the common design to restore law and order in Kenya was shared jointly between the UK and Colonial governments and that they joined together in devising the common strategies to implement the common goal (c.f. the joint project of the landlord and the lodger in investigating the gas leak in *Brook v Bool* (supra)). The assaults of which the claimants complain were committed in the course of implementing the strategies jointly so agreed and the British government had every reason to anticipate, as the documents reveal, that serious abuses would occur in the implementation of the strategies in pursuit of the common design.

91. The precise ambit of the principles discussed in *The Koursk* and in *Brook v Bool* is, I think, far from clear. I agree, as at present advised, with the defendant, that the claimants may well have an uphill task at trial in demonstrating a liability over and above and/or independent from their vicarious liability claims. However, in my judgment, the considerations arising under section 33 of the Act in respect of this route to liability are little different (if different at all) from those considered above in respect of the vicarious liability claims. From all that I have seen, while there are different cases to be made by each party on the documents, and on the likely oral evidence at trial, the materials will be adequate for the trial court fairly to decide the issues arising under this head of alleged liability also.

Joint liability for creation of a system of torture and ill-treatment: Re-Amended Particulars of Claim paragraphs 37and 39

92. This is the head of claim which I considered, with regard to fact and law, in Section (J) of my previous judgment. It is not necessary to traverse that ground again. Since that time, further work has been done by both sides on the documents. The results have been helpfully summarised for me in the schedules to which I have referred above. The claimants' case on the facts in outline can be seen from section 6 of the written argument prepared for reply to the defendant's submissions and a separate

bundle of papers on the "Dilution Technique", each with appendices. The defendant's case can be seen in overview in its schedule entitled "British government knowledge of deaths and accusations of brutality in the camps…"

93. The claimants contend that the documentation summarised in those schedules show a persistent pattern of abusive treatment of detainees throughout the period of the emergency, brought to the knowledge of all levels of the Colonial and UK governments, which was met with attempts to suppress independent investigation and to cover matters up rather than in proper attempts to eliminate it. On the other side, the defendant's case is that the documents show that, when abuses came to light, they were investigated and in some cases prosecuted and that, in London at least, the proper impression was that the situation was under control and was being adequately dealt with by the Colonial Administration on each occasion when questions about the treatment of detainees arose.

94. As I found before, and now on more substantial materials than in July last year, there is a case, based upon the present materials, upon which a trial court might conclude that there was instigation or procurement of torture pursuant to a common design in which the United Kingdom government participated. To say that "there is a case" imports the corollary that there is a case on the available materials to the contrary. The question now, however, is whether that case can fairly be tried, on cogent evidence, in the absence of witnesses at the top of the government and military trees to add to, and where necessary to explain, any impression that may be derived from the papers. This is the part of the case in which the personal knowledge and understanding of the main participants at each relevant time is at its most material.

95. I have reached the conclusion, however, that a fair trial of this part of the case does remain possible and that the evidence on both sides remains significantly cogent for the Court to complete its task satisfactorily. The documentation is voluminous, as I have said already, and the governments and military commanders seem to have been meticulous record keepers. The Hanslope material has filled gaps in the parties' knowledge and understanding and that process is still continuing. I am not satisfied that the defendant has adequately taken into account the number of potential witnesses, presently identified or otherwise, at levels of government and the army lower than the politicians, senior civil servants and generals, who might be able to supplement its case on the documents.

96. The failure to take any step to interview Mr Cowan is, I think, telling. He would clearly have things to say about the claimants' cases, as is apparent from his brief intervention in the press in response to Professor Elkins' book. On the other hand, while this case quite properly focuses on abuses in the camps, at trial surely there will be far more than presently available to demonstrate the monstrous acts perpetrated by some of the insurgents (not, it is to be emphasised, by these claimants themselves) and the reality of the problems with which the administration had to deal. The evidence on these matters does not need to come from those at the top of the Kenyan and British governments. Others would be able to give it.

97. On the present issue, the relatively complete sets of War Council minutes and papers and of records of the Complaints Coordinating Committee, copies of all of which seem to have reached London contemporaneously, the many other minutes, notes and inter- and intra-governmental communications and the materials discussed in

parliamentary debates[12] will, I consider, enable the trial court to assess whether there was a "system" such as that alleged and whether it was one to which the United Kingdom government was a party. I accept the claimants' submission that where a case on the document is unclear and oral evidence is lacking, the burden of proof that will lie upon them at trial is an important safeguard for the defendant.

98. In reaching this conclusion I accept as correct the defendant's submission that there is only one burden of proof in civil cases, namely proof on the balance of probabilities. It is not the law, as sometimes was said, that "the more serious the allegation, the more cogent the evidence needed to prove it": see the series of cases beginning with *Re H* [1996] AC 563 and continuing through to *Re S-B* [2010] AC 678. The claimants, in their initial arguments, relied upon the old, frequently cited statement and urged that it provided a particularly strong protection for the defendant in a case of this character where such serious wrongs are alleged: see paragraph 212 of their skeleton argument for this hearing. However, in later argument, the submission for the claimants was qualified to a contention that in a case of doubt on the documentary case, the claimants will simply lose on the burden of proof, because the court will not be convinced to the requisite standard on the papers alone in the absence of an opportunity to explain in oral evidence. As indicated, I accept that qualified submission in the circumstances of this case.

99. It is here that I think it is most appropriate to consider Mr Mansfield's forceful submission based upon *Medcalf v Mardell* (supra), although the point applies to the other routes to liability also. In my judgment, the trial court will be well aware of the limited availability of witnesses and of the caution that it must exercise in drawing inferences adverse to the defendant based upon the documents alone. The warning sounded by Lord Bingham in *Medcalf* will not be lost on a trial judge. That, in my view, is part of the process of conducting a fair trial; it is not a reason for not having a trial at all, if (as I consider is the case) there are other materials (including witness evidence) on the basis of which suitable inferences one way or another can be drawn.

100. In my judgment, a fair trial of this issue is fully practicable.

Negligence

101. In section (K) of my judgment last year, I dealt with the legal arguments on the claim in negligence. I summarised the competing contentions in paragraphs 135 to 137. The dispute then centred upon the existence or otherwise of a duty of care on the part of the UK government towards these claimants. In addition at trial there will be issues as to the standard of care, whether a breach of duty is established in respect of any one or more of the claimants, and whether any such breach caused the injury to the particular claimant or claimants. Is a fair trial of those issues possible?

102. As for the existence of the duty, the competing arguments appear in paragraphs 156 and 157 of the previous judgment. I agree with Mr Hermer that all of the points there set out depend upon analysis of the status of the various organs of government and army at the time of the emergency. Those points turn entirely upon the documents and, to some extent, upon the constitutional law and reality: see the quotation from

[12] A schedule of material parliamentary debates and questions was provided by Counsel for the claimants in Appendix 3 to Section 6 of their written argument in reply.

General Templer's report quoted above. In my judgment, it will be entirely possible at trial to determine from surviving constitutional and documentary material whether there was a duty of care as alleged.

103. The standard of care to be applied is a matter of law upon which no factual evidence is required at all. By this, I mean no more than the customary test of "reasonable care". The contrary has not been suggested. The question of what amounts to reasonable care is closely allied to the question of how the duty might be broken.

104. When one turns to the issue of breach of duty, it will be necessary to look at what happened to each of these claimants and the time at which the injury occurred. It will then be necessary to see what was known to the relevant authorities at that time and what might reasonably have been expected to have occurred to prevent the particular acts of torture occurring. I have set out above an outline of the history of ill-treatment of each claimant.

105. Looking at the task of the claimants in establishing their case on breach of duty (in very brief summary), they say that the practice of torture became apparent to General Erskine fairly shortly after his arrival in Kenya in June 1953. They accept that almost immediately (23 June 1953), the General issued a directive strongly disapproving of the "beating up" of the local population and stated that complaints about such conduct would be investigated. His attitude to such misconduct on the part of British officers, they say, appears to have remained the same as one can see, for example, from a letter to his wife in February 1954.[13] However, the claimants say, General Erskine's attitude towards *local* security forces (over which nonetheless he had "full command" under the Joint Directive of June 1953) was or became more ambivalent. In December 1953, he was recognising that some of the screening teams had used methods of torture, but advised that,

> "I very much hope that it will not be necessary for HMG to send out an independent inquiry. If they did they would have to investigate everything from the beginning of the emergency and I think the revelation would be shattering."

By June 1954, the claimants point out, the General was warning the War Council against a trial for murder of members of the Kikuyu loyalist guard because "they [the Council] may be faced with a deterioration in morale and perhaps some desertion from the Kikuyu Guard". The claimants also rely upon the limited nature of the various enquiries set up during the emergency which, they submit, were deliberately limited in nature to prevent the truth about excesses in the camps coming out into the open. These are summarised, on the claimants' case, in Appendix 1 to section 6 of the written argument in reply and dealt with more fully, with references to the original documents, in Professor Elkins' third statement, paragraphs 21-124.

106. As already pointed out above, the contrary case on the documents is presented in the schedule entitled "British Government knowledge of deaths and accusations of brutality…[etc.]".

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[13] "I simply won't have *British* officers torturing prisoners" (my emphasis), this in response to a case of a British officer accused of doing precisely that.

107. In addition, the debate upon the meaning of the "July 1957 Instruction" (section (I) of my earlier judgment) has continued. Mr Mansfield submitted, with force, that the documents suggest that the Secretary of State was not countenancing a continuation of the extreme version of "dilution technique" as described in the Memorandum by the Minister for Legal Affairs, annexed to the Governor's letter to the Secretary of State of 25 June 1957.[14] It may be that the Secretary of State was "only" giving his approval to the summary administration of severe corporal punishment to any detainee arriving at the Mwea camps who did not immediately evince and express a willingness to comply with orders, rather than agreeing to the use of extreme force such as that described in the Memorandum. That is another issue open for debate on the documents at any trial.

108. These documents that I have summarised above convince me that there is an amply sufficient documentary base to test what was known in London about excessive use of force in the camps throughout the period of the emergency and what London's reaction to that knowledge was for the purpose of resolving this aspect of the pleaded case. On the basis of that material, if necessary supplemented by the witness evidence that is likely still to be available (either in statements or orally in court), I am satisfied that a fair trial of any question of breach of duty in respect of each of the surviving claimants is possible.

109. Looking at those claimants' evidence, I think that it will be quite possible to determine sufficiently clearly where and when they suffered their injuries and the official status of those responsible for inflicting them. It will also be possible, on the documents arranged and collated chronologically, together with the other evidence, to determine whether or not the injuries occurred because of a breach of duty on the part of the United Kingdom government.

110. If that stage is reached, the quantification of any damages can be assessed upon well-known principles. It is not suggested that any problem arises in trying that issue fairly.

111. These conclusions are, to my mind, the most important in reaching a decision on the application of section 33 in this case. However, there are other matters which have been fully and carefully argued upon which I should state my views.

(H) Other Section 33 considerations

112. Three other aspects of the case must be considered. First, the claimants rely upon "the conduct of the defendant after the cause of action arose" (section 33(3) (c)). They argue that the destruction of documents and/or the difficulties in tracing surviving documents can be laid at the door of the defendant and that this has contributed to the delay in bringing these proceedings. They also submit that there was persistent failure, before independence, to investigate properly the allegations of abuse that continued to be raised. Secondly, there is the impact of the Human Rights Act 1998 and thirdly, there are arguments based upon public international law and the status of torture under that law. The latter two matters arise as further aspects of "the circumstances of the case" under section 33(3).

Conduct: section 33(3) (c)

[14] See Appendix B to my judgment of July 2011.

(1) Documents

113. It is clear that, in the run-up to independence, it was necessary for the Colonial Administration in Kenya to decide what documents should be passed on to the new independent government, which should be returned to the UK and which should be destroyed. The general policy, not specific to Kenya but general in relation to colonies nearing independence, is set out in paragraph 125 of the defendant's skeleton argument as follows:

> "*The policies*
>
> 125.1. there was a policy developed by the Colonial Office in London in respect of the management of official documents in the run-up to and upon independence. That policy was not specific to Kenya, but was a general one relating to all territories moving towards self-government;
>
> 125.2. in broad outline, the policy was to the effect that:
>
> > 125.2.1. as at point of independence, any official documents or records which remained upon the territory in question should be capable of being transferred to the successor government;
> >
> > 125.2.2. there was little point in transferring to a successor government documents which were "patently of no value" to local Ministers (in the run-up to independence), and hence to Ministers in any successor government;
> >
> > 125.2.3. there was no objection to the transfer of documents classified as 'Secret' or lower, provided that they had been suitably scrutinised so as to ensure that no documents were passed on which;
> >
> > > 125.2.3.1. might embarrass Her Majesty's Government or other governments;
> > >
> > > 125.2.3.2. might embarrass members of the Police, military forces, public servants or others (such as Police Agents or informers);
> > >
> > > 125.2.3.3. might compromise sources of intelligence;
> > >
> > > 125.2.3.4. might be used unethically by Ministers in the successor government.
> >
> > 125.2.4. papers of historical or administrative value which could not be transferred to local Ministers and thence to successor governments were to be sent to the Colonial Office in London (addressed to the librarian);

> 125.2.5. categories of documents falling into certain specific categories were subject to particular considerations (for instance correspondence in the 'Personal' series of correspondence between London and the Governor and senior officials in the Colonial Administration and 'Accountable' and 'Top Secret');
>
> 125.2.6. it was for the Colonial Administration to develop its own policies regarding the protection and disposal of records (and, in particular, 'sifting' such records in the period during the transition towards self-government by local ministerial government and thence to independence);"

I think that there is force in the claimants' submission[15] that the Colonial Office was permitting the destruction of "embarrassing documents not deemed to be of historical value", thus giving considerable leeway to the administration in Kenya to discard "embarrassing" records with regard to detainees. This may be of relevance later in the proceedings.

114. Under this policy substantial quantities of documents were, however, physically removed from Kenya. In particular, some 294 boxes, containing about 1500 files, were returned to the UK. These were the papers discovered at Hanslope in 2011. They included Executive Council and War Council records, minutes of the Council of Ministers, Intelligence Committee minutes and minutes of the Complaints Coordinating Committee. In addition, there were a further 13 boxes of "Top Secret" papers, containing sensitive material including intelligence reports, names of security officers and the like, which became separated from the Hanslope archive at some time after they were reviewed during the 1980s and later destroyed. It also seems the case, however, that the Public Record Office/the National Archive declined to accept the Hanslope papers on three separate occasions.[16] The fate of the various categories of documents has been thoroughly considered in witness statements made by officials who have been responsible for searching the records. Those officials were not required for cross-examination by the claimants and I accept their evidence.

115. Some documents were clearly destroyed in Kenya before independence, but the evidence suggests that a substantial quantity of what might have been thought to be potentially "embarrassing" documents were included in the papers returned intact to the UK, finding their way in the end to Hanslope. There is evidence that among the papers destroyed in Kenya were interrogation reports of suspected terrorists, personnel files of officers, Prison Administration complaints files, files entitled "Forced Labour" and "Rehabilitation".[17]

116. For the purposes of section 33 of the Act, it seems to me that, whatever the original suspicions of the claimants' advisers may have been, a very significant part of the

[15] See paragraph 11 of section 6 of the written argument in reply.
[16] See paragraph 9 of the Cary report commissioned by the Government to enquire into the circumstances in which the Hanslope documents were re-discovered. I have noted that in Public Records Office guidance of 1962 it was stated that at that time 3 million people in the Civil Service were producing 100 miles of documents per year: see defendant's schedule – "Documents, management, destruction and retention".
[17] See paragraph 47.4 and 47.5 of the claimants' skeleton argument.

documentation relevant to the issues in this action are already or will be later available for consideration by the court. It is also accepted by the claimants that, following the admission by the defendant that three of the claimants were indeed tortured as alleged, the main class of lost documents, those relating to treatment of individual detainees', has less potential relevance.[18]

117. Further, it is to be noted that the late disclosure of the Hanslope papers did not prevent the commencement of the action, since the work of the historians in the period up to 2005 changed the academic understanding of the period, based on papers already available in the public archives in this country and in Kenya. It seems to me that this was the principal trigger for the initiation of the claims. In any event, the political climate in Kenya after independence and until 2002/3 would not have permitted the potential claims to have been ventilated much sooner; that cannot be laid at the door of the UK government.

118. However, I do not wish to say more about the history of what happened to documents in the immediate run-up to independence, beyond what is strictly necessary for the determination of the preliminary issue, since the matter may still have a bearing upon issues that might have to be considered at a trial about the knowledge of abuses in the camps on the part of relevant participants. Clearly, deliberate destruction or concealment of embarrassing papers (if that occurred) could well be relevant to the case now made against the defendant. It would not be desirable after a brief consideration of this issue, in the context of a much wider ranging hearing, to reach final conclusions on the many points argued on this aspect of the case. It suffices to say that I do not consider that there is any question of "conduct" of the defendant relating to the loss of documents, now weighing in the scales against it, for the purposes of section 33(3) (c) of the Act, whatever relevance this subject may have at a later stage.

(2) Investigation

119. The claimants submit that the court should find that there was an inadequacy of investigation of alleged abuses at the time. If proper investigation had taken place then there would have been clearer material upon which to judge the issues now arising.[19] It is argued that the defendant has only its predecessors in government to blame for any absence of proper investigation into this problem.

120. Again, I do not wish to say more than is necessary for the resolution of the preliminary issue, since adequacy of investigation in the light of known abuses would be an issue at a trial of the substantive claims. I have considered some of these matters in paragraphs 98 to 102 above. Equally, one must bear in mind that the standards of public expectation with regard to inquiries into wrongdoing have probably changed considerably over the last half-century. All that said, it is not possible to leave the point without some finding as to how this reflects on the present preliminary issue.

121. Acknowledging the agreed limits to the status of the evidence given by the historians, I have reviewed their materials again, particularly their new evidence in the light of the Hanslope disclosure: see e.g. paragraphs 20-109 of Professor Anderson's third

[18] See paragraph 6 of section 3 of the written argument in reply.
[19] Section 3 of the claimants written submissions in reply.

statement and paragraphs 32-124 of Professor Elkins' third statement. It has still not been possible in the course of the hearing or in preparation of this judgment to review more than a sample of the documents to which the professors refer in their statements and accordingly I cannot positively endorse the conclusion which they reach. However, the documents which I have seen support those conclusions. I refer only to certain "headlines" covering the period encompassing the claims made in this action.

122. I have referred above to General Erskine's apparently ambivalent approach to misconduct on the part of the Kikuyu guard in his correspondence with London in late 1953. This seems to have led to limited terms of reference for the McLean enquiry.

123. In 1954, there were the judgments of the Kenyan courts, to which I referred in paragraphs 126 and 127 of my judgment last year and in January 1955 there was the resignation of Sir Arthur Young as Commissioner of Police, after an appointment of less than a year. Sir Arthur's resignation was because of what he saw to be executive interference in the conduct of his office; his resignation letter was not published. However, he said this about that letter:

> "It is clear that if my report had been published to Parliament, the Governor in the very least would have been recalled and the Colonial Secretary would have been in a very hazardous position."[20]

In a letter of 22 November 1954, Young had written to the Governor complaining about a lack of proper investigation of abuses as follows:

> "As things are at present there is no one who can investigate such allegations and no independent authority who is responsible for the conduct at these camps. An African who is unfortunate enough to suffer from the brutalities which are clearly evident has no one to whom he can complain and no one to regard his interests, since the local Administrative Officer is, himself, the authority for the camps. Moreover, the injured person is unlikely to appeal to the police for redress if they are to be regarded as subordinate to the Executive…I do not consider that in the present circumstances Government have taken all the necessary steps to ensure that in its Screening Camps the elementary principles of justice and humanity are observed."

124. In December 1954, Sir Vincent Glenday was appointed to conduct an enquiry with the following terms of reference:

> "(2) Terms of Reference: These were laid down in Mr.R.G. Turnbull's letter No.AA.45/26/2A/7 of the 18th of December, 1954 and for easy reference I quote;-
>
> > "To enquire into the general administration of the Screening Camps and Interrogation Centres which are

[20] See Elkins 1 paragraph 89 and Elkins 3 paragraph 47

> under the control of Provincial Commissioners, with particular reference to the following points:-
>
> (a) The selection and appointment of the European staff;
>
> (b) The selection and appointment of the African staff;
>
> (c) The length of time suspects are held for screening purposes and the legal authority for so holding them;
>
> (d) Measures taken to ensure that Camps are run in accordance with accepted standards of hygiene and discipline; including the arrangement for inspection and supervision;
>
> (e) Measures taken to guard against irregularities and abuse of office;
>
> (f) To examine any particular case of irregularity or malpractice which may be reported to you;
>
> and to make such recommendations as are thought fit."

When it came to item (f), Glenday reported (in July 1955) that the particular cases had occurred before the Amnesty of 18 January 1955 and were therefore ruled out of consideration.

125. I mention the Amnesty. On 2 September 1954, the Minister for African Affairs in the Kenyan government wrote to the Attorney-General as follows:

> "On each of my visits to Fort Hall the District Officers have expressed some concern about possible legal action against them at the end of the Emergency…What the District Officers fear is…an atrocities commission intended to show that the Administration have been guilty of innumerable war crimes. I need not stress the undesirability of a witch hunt of this sort. Would you please consult the Solicitor General and ask him what he has in mind by way of a general indemnity ordinance to cover the action taken by the administration and the Security Forces during the Emergency."

The Attorney responded (inter alia) that "atrocities would not be an appropriate subject for an indemnity but would be dealt with under the ordinary criminal law". However, notwithstanding this opinion, in due course in January 1955 a quite general amnesty was nonetheless pronounced.

126. The Holmes report into the matters covered by the judgment of Cram J in *R v Muiri & ors.* (Criminal Case No, 240 of 1954) was criticised by the President of the East African Court of Appeal in a letter to the Governor in March 1955, on the basis that

"no really searching inquiry" had been made and as a result the relevant part of the report was not published.[21]

127. In November 1955, Mr G.H. Heaton, a former Commissioner of Prisons in Kenya was asked by the Colonial Government to visit and inspect the prison establishments in the Colony. The background of the problem facing the prisons administration was summarised by Mr Heaton in his report of July 1956 as follows:

> "In 1952, the Staff of the Department, which at the time also included the Approved Schools and Probation Service, amounted to 43 European Officers and 1100 Africans.
>
> The daily average number of prisoners was 9,000 and they were accommodated in 58 prisons and 41 detention camps for the minor offenders.
>
> At the height of the present Emergency, the Staff of the Department was increased to 457 Europeans and 14,000 Africans, and the daily average number of prisoners increased to 86,634 in all establishments which also had to be increased from 97 to 176 by the construction of temporary camps. The Approved Schools and Probation Service had, by this time, been removed from the Department.
>
> 4. On the declaration of the Emergency, the European staff was augmented by local recruitment and by the secondment of men from the Kenya Police Reserve, the Kenya Regiment and later by contract officers recruited by the Crown Agents, at which I assisted, in the United Kingdom.
>
> Practically none of the men mentioned had previous experience of prison administration, and it was virtually impossible to give them the required training as their services were required immediately in the field, nor was it possible, for the same reason, to give the African recruits any lengthy training.
>
> 5. Camps were hastily constructed, equipped with such stores as were available in the Colony and staffed by the above-mentioned untrained personnel; there could be no alternative owing to the tremendous increase in admissions. As an example, at one Camp 5,399 prisoners were received in five days and this was by no means an isolated incident.
>
> No one but a trained prison officer could begin to understand what that entailed."

He went on to say this in paragraph 6 (a) of his summary report:

[21] See paragraph 127 of my judgment of July 2011.

> "6.(a) During my visits to numerous establishments, I found the morale and discipline of the Staff were good and the inmates were well fed, clothed and housed.
>
> I did not come across any form of rough handling of inmates by the Staff; this in itself impressed me for there is little doubt that many of the Kikuyu Staff have suffered grievously at the hands of the Mau Mau, and it is amazing that no serious reprisals did in fact take place. Knowing Africans as I do, it is possible that minor incidents may have occurred, especially with an untrained staff, but it is to the credit of all concerned that no case of serious assault on a prisoner has been reported.
>
> It should be remembered that all institutions are visited regularly by senior officers of the Prisons Department and by official visitors, and every opportunity is given the prisoners to make a complaint should they so wish."

Clearly, this report was favourable to the Administration so far as prisons were concerned.

128. However, at the same time as Heaton's inquiry, papers of the Complaints Coordinating Committee seem to reveal a continuing pattern of abusive conduct being reported to the Committee: see paragraphs 55 to 70 of Professor Anderson's third statement, which for one reason or another do not appear to have come within the range of Heaton's enquiry. Some examples of cases considered by the Committee are summarised in paragraph 42 of Professor Elkins' 3rd statement, one of which is another example of the type of violent sexual abuse such as that now accepted to have been perpetrated on Mrs. Mara. The selection of these papers which I have seen tend to support Professor Anderson's conclusion that,

> "In summary, the CCC cases show repeatedly that initial criminal investigations by police are suspended by the Attorney-General who then orders a Preliminary Investigation, after which the charge is altered in the records of the CCC without explanation and a conviction on that lesser charge then rapidly achieved. "[22]

129. I have already considered above some of the materials relating to the "Dilution Technique" and the UK government's response to what it heard about the practices in the Mwea camps up to June 1957. Past ill-treatment and detainee deaths were being raised in Parliament at the very time when the technique was being discussed in London between the Colonial Secretary and the Governor.[23] Whatever the true meaning and effect of the telegram of 16 July 1957, it was clearly sanctioning the use of summary (and severe) corporal punishment upon new arrivals at Mwea, based simply upon a contrived finding of refusal to accept orders. It does not seem that any enquiry was directed at that stage into the past use by Gavaghan and his subordinates

[22] See Paragraph 66 of Professor Anderson's 3rd statement.
[23] See the references to Parliamentary Questions by Barbara Castle MP on 16 and 27 July 1957 in Professor Elkins' 3rd statement paragraphs 82-84.

of the extraordinary conduct described on pages 2 to 4 of the original Memorandum provided to the Secretary of State on 25 June 1957. Later documents suggest that the old ways continued and that complaints about it were still being made about them directly to the Colonial Secretary by inmates.[24] A frank statement on "Rehabilitation Methods: Mwea Camp" (post July 1957) appears in a letter from the Officer in Charge Detainee Section, Special Branch, Embu to the Senior Assistant Commissioner of Police which gives a graphic description of what was actually happening:

> "3. On arrival at the camps there is a set procedure laid down, which entailes bringing in twenty detainees to the camp every half hour and these are dealt with in the following manner:-
>
> a) They are immediately given a hair cut and issued with new detainees clothing.
>
> b) They are then given a short talk by the Rehabilitation Assistants who inform them that they must comply with all prison regulations or they will be punished.
>
> c) They are then asked if they will comply with the regulations by the Officer in Charge of the camp, individually. Those who refuse are given a summary hearing by the Assistant Commissioner of Prisons who is present at each intake, and if he persists in his attitude of refusal, he is sentenced to twelve strokes with a regulation cane. The detainees who may have agreed to obey the regulations are placed in the compounds where they are given lectures by the Co-operators and Rehabilitation staff."
>
> This procedure is adopted for each batch of twenty entering the camp.
>
> 4. After the intakes have been given a meal and lectured by the responsible people, which usually lasts for about two to three hours, they are taken to the screening huts where they are separated and treated in the following manner:
>
> a) All the detainees wishing to make a confession are immediately screened.
>
> b) The remainder are asked individually if they have taken an oath. If they deny having taken an oath they are given summary punishment which usually consists of a good beating up. This treatment usually breaks a large proportion.
>
> c) If this treatment does not bear fruit the detainee is taken to the far end of the camp where buckets of stone are waiting. These buckets are placed on the detainee's head and he is made to run around in circles until he agrees to confess the oath.

[24] See annexes 14 and 15 to the claimants' note on the Dilution Technique, 3 April and 2 July 1958.

> On average the intake produces 80% admitting to the oath the same day, the remainder take about two or three days longer.
>
> At Thiba Works Camp, the treatment usually consists of beating the man with the regulation baton which to date and to my knowledge, has resulted in one person being placed in hospital with broken arms and a leg, and another person suffering a perforated ear-drum.
>
> At Gathiriri one person received injuries but to what extent I have been unable to ascertain as I was not present. Any other injuries that may have been caused have not been brought to my notice.
>
> 5. During the following two months the detainee will be screened again but with his dossier contents to admit to. If he refuses to admit to any of the accusations in his dossier he is given another good hiding or the bucket treatment. After a period of three months he is placed before the Special Branch representative for confirmation of his attitude and to check his confession. If he is rejected he will undergo a further screening and treatment."

130. In September 1958 a detainee named Kabugi died at the Aguthi Works Camp, one of the Mwea camps. A rehabilitation officer named Githu was prosecuted for assault occasioning actual bodily harm and was convicted, with the Magistrate holding that he was "satisfied that the story of the defence [was] a tissue of falsehoods". A character witness on behalf of Githu from the Ministry of African Affairs told the court that,

> "I am instructed by the Minister to say that the services of such a man are sorely needed by Government on account of his character and past work on behalf of the Government."

Githu was sentenced to two years imprisonment. However, it had been agreed by the Solicitor-General (Conroy) with Githu's lawyers that evidence about the wider use of the "Mwea technique" in the camps would not be called in Githu's defence.

131. It seems that Githu's conviction of any offence at all was not well received within the administration in Kenya. Professor Elkins quotes a document in which the opinion was stated that "Githu has been thrown to the wolves". In April 1959 (after Githu's conviction and after the Hola incident), the Permanent Secretary to the Minister for African Affairs noted the view that,

> "any rough stuff which occurred at Aguthi was mild compared to the reception treatment given to detainees in the Mwea…and that the A.G.'s refusal to allow evidence to be given on the Mwea procedure has seriously hampered the Defence."

132. After the Githu verdict, Gavaghan wrote to the Provincial Commissioner as follows:

> "My own experience in the Mwea Camps does not seem to differ widely from Samuel Githu. At any time I could have been in exactly the same danger of prosecution as he has been. Government, I believe, chose both of us among others for a certain degree of ruthlessness. Certainly in the case of the Mwea Camps Senior Government Officers were well aware of the policy adopted and the method of putting it into effect." (27 April 1959)

133. In March 1959 there came the Hola incident which I have already described. Following that, on 29 April 1959 and 1 May 1959, the Governor and Colonial Secretary exchanged telegrams containing these passages:

(Governor to Colonial Secretary)

> "As you know, I have in the past advised you to resist demands for a judicial enquiry. For this there have been, among others two main reasons… (i) The prisons and rehabilitation staff in detainee camps have a hard and thankless task. A large scale and highly publicised enquiry would undoubtedly have a bad effect on their morale… (ii)…The main aim of policy, both for political and humane reasons, should I have always felt, be to get the detainees down the "pipe-line" and on to release after an adequate check…An enquiry of the nature already mentioned is bound to hold up this process…The Hola affair is by far the worst which has occurred in Kenya and troubles me greatly. That, and the Aguthi judgment will, I know, cause you serious difficulties which I greatly regret. In these circumstances I think we should look carefully at our policy and actions for the future…Our main objective must therefore be to maintain Hola and its appendages (i.e. Aguthi…)"

He proceeds to recommend Mr Heaton, the author of the 1955 report into the prisons, as one possible person to conduct the enquiry.

(Colonial Secretary to Governor, apparently written without sight of the Governor's own letter)

> "We had also been turning over how best to meet the inevitable demand for an "impartial judicial enquiry" with a bias to raking up muck which will break upon us as soon as the Hola verdict is announced and members of Parliament have studied the Aguthi judgment…We agree with you that the aim of any enquiry should be to set Hola on its feet. An enquiry would not spotlight the tragedies but would overhaul the future administration of detention camps (but not prisons) where those who are virtually irreconcilable will stay with a view to ensuring that inspection and other arrangements are now in force to prevent a repetition of past tragedies…".

The Colonial Secretary, however, rejected Heaton as head of an enquiry,

> "whose long past services in Kenya previously reported, and close connection with Kenya prisons services might lead to accusations of partiality, however unjustified which would impair the value of his views if published."

134. These messages repay reading in full. However, while they indicate a number of other "policy" reasons for not holding a judicial enquiry, they do not appear to support a rigorous investigation of what had gone so seriously wrong at Hola or why.

135. The Colonial Secretary explained further his reasons for not wanting a lawyer on the Commission of Enquiry in a telegram to the Governor of 11 May 1959. He wrote,

> "Even if I had not already announced the names, I would on reflection be very doubtful about including a lawyer. We must I think stick firmly to the position that the past has already been the subject of an inquest in the case of Hola and legal proceedings in the case of Agusthi and may be the subject of further legal proceedings; there is therefore no case for a judicial enquiry or indeed any kind of further enquiry into the past. I think the inclusion of a legal expert might tend to erode this position a little in the public mind."

136. The ultimate terms of reference for the enquiry were,

> "to advise on the future administration of the four remaining emergency detention camps (Hola, Aguthi, Manyani and Athi River) and in particular on the arrangements for their systematic inspection and investigation of complaints by detainees."

The Secretary of State had been anxious not to mention Hola or Aguthi by name in the terms of reference and the suggested terms in a telegram to the Governor of 6 May 1959 omitted the passage in brackets above which I have taken from the report produced by Mr R.D. Fairn and his colleagues of 7 July 1959

137. When Fairn produced his findings, however, they included the following:

> "59. The committee has been informed of the former use of this method in inducing a detainee to break with Mau Mau, and have heard that ex-detainees have said that, having been "shocked" into Mau Mau in the first instance, they could only be brought out of it by similar "shock" methods. These methods have sometimes involved the use of corporal punishment, administered under regulation 17(a) of the Emergency (Detained Person) Regulations, 1954, whereby a detained person found guilty of a major offence can be given up to twelve strokes. Shock treatment, as we understand it, was based very largely on the creation of an artificial "command" situation, disobedience to which was followed by corporal punishment.

> 60. The Committee, without seeking to pass any judgement upon the former employment of such techniques, feels strongly that corporal punishment as a "shock treatment" should in no circumstances be employed in the future, believing that it can only harden the remaining detainees in their resistance.
>
> 61. One thing more must be said. We have seen and talked with injured men in the camps and we have had impressive testimony from responsible people on all sides that violence, not just corporal punishment, was often used in the past by the "screening teams" to compel confessions. For the most part this was violence done by Africans to Africans, lax supervision by Europeans sometimes being, no doubt, a contributory cause. The allegations went back over the years, and as they were, with one exception, nameless, it would not be possible even if it were desirable to disinter them. The facts of the specific case have been given to the Attorney-General. It is only fair to say that apart from Hola, we received no complaints of violence having been used after 1958. We look to the Special Commissioner to guard against lawless violence by whomsoever used in the future."

The Governor wrote to the Secretary of State on 11 July 1959 stating that paragraph 61 "would, as it stood, lead to an irresistible demand for a high-level inquiry into the past". It is noted that Fairn was disinclined to alter anything, but was agreeable to adding "a new sentence". Reading the Governor's message, it seems that the original paragraph 61 probably ended with the word "confessions" in the quoted passage and that the remaining sentences were inserted subsequently.

138. On 27 August 1959, the Secretary of State sent a telegram to the Governor stating,

> "Fairn Report
>
> Ministers are anxious that if possible Report of your views should be published during President Eisenhower's visit to ensure it receives no undue publicity. Visit ends next Wednesday September 2nd."

139. As the defendant points out, the result of the Hola incident was that an inquest was held, at which the judge reached robust conclusions. There was a disciplinary inquiry leading to the dismissal of two officers, the retirement of another and the resignation of a fourth. The Fairn Report reached some brief and firm conclusions about "Shock" Treatment. However, the impression that I have is that the process of enquiry and reporting was regarded by both governments in Nairobi and London as one of damage limitation rather than full investigation. It remains to be seen, however, whether the defendant is correct in its submission that the "Hola massacre was a terrible incident, but did not stem from anything London knew about".[25]

[25] Paragraph 15 on p.17 of the defendant's schedule on "Responsibility for the camps… [etc.]".

140. For present purposes, the application of section 33(3) (c) of the Act, I consider that there is good evidence of attempts by both governments, throughout the emergency, to limit enquiries and investigations into abuses committed in the camps. This I think is conduct that has some relevance to the exercise of my discretion under the section in favour of the claimants, although obviously it can only be a "make weight" over and above my view that I have reached that a fair trial of these issues on cogent evidence is still possible. It also detracts to some little degree from the intrinsic merit of the defendant's submission that those at senior levels who could give an account on behalf of the defendant are no longer alive to explain what happened and what is recorded in the documents.

Human Rights Act 1998

141. The point made by the claimants with regard to the Human Rights Act 1998 and the underlying European Convention on Human Rights is that,

> "…the Court should take into account the fact that permitting the claim to proceed could amount to the discharge of the State's obligations under Article 3 of the ECHR…to investigate credible allegations of torture." (Paragraph 82 of the claimants' skeleton argument)

142. Mr Hermer submits that, irrespective of any obligation that might have arisen prior to the coming into force of the 1998 Act, the discovery of the new materials revealed by the historians published materials in 2005 and the finding of the Hanslope documents was sufficient to trigger anew the procedural obligation to investigate crimes against humanity under Article 3 of the Convention. He submitted that this was a case where the procedural obligation of investigation was "revived": see *Brecknell v UK* (2007) 46 EHRR 957. The defendant accepted that a similar procedural obligation arose as an adjunct to Article 3 of the ECHR, as it does with regard to the investigation of deaths under Article 2. The crux of its submission, however, was that the obligation was not open-ended in respect of alleged historic breaches of the Convention and that the Strasbourg Court has never indicated that the requirements under Article 3 were any more rigorous than under Article 2.[26]

143. The claimants' submissions focused on the recent decisions in Strasbourg in *Šilih v Slovenia* (2009) 49 EHRR 996 and *Janowiec v Russia* (2012) (Appl. Nos. 55508/07 and 29520/09).

144. In *Šilih* the critical passage for present purposes is to be found in paragraphs 159 and following and, for the claimants' purposes in particular the last sentence of paragraph 163. That passage is as follows:

> "159. Against this background, the Court concludes that the procedural obligation to carry out an effective investigation under art.2 has evolved into a separate and autonomous duty. Although it is triggered by the acts concerning the substantive aspects of art.2 it can give rise to a finding of a separate and independent "interference" within the meaning of the *Blečić*

[26] See paragraph 109 of and footnote 50 to the defendant's skeleton argument.

> judgment. In this sense it can be considered to be a detachable obligation arising out of art.2 capable of binding the state even when the death took place before the critical date.
>
> 160. This approach finds support also in the jurisprudence of the United Nations Human Rights Committee and, in particular, of the Inter-American Court of Human Rights, which, though under different provisions, accepted jurisdiction *ratione temporis* over the procedural complaints relating to deaths which had taken place outside their temporal jurisdiction.
>
> 161. However, having regard to the principle of legal certainty, the Court's temporal jurisdiction as regards compliance with the procedural obligation of art.2 in respect of deaths that occur before the critical date is not open-ended.
>
> 162. 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.
>
> 163. Secondly, 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 art.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."

145. Following the decision in *Šilih* the Supreme Court in *Re McCaughey* [2012] AC 725 reconsidered the law in this country (as to the retrospective application of the Convention obligations), as previously decided by the House of Lords in *Re McKerr* [2004] 1 WLR 807. With reference to *Šilih*, the Supreme Court departed from the earlier House of Lords decision and held that the procedural obligations arising under Article 2 of the Convention applied to an ongoing inquest into deaths that had occurred before the entry into force of the 1998 Act. However, the trigger to those obligations was the subsisting inquest not a continuing obligation to investigate historic deaths. The crux of the decision, to my mind, appears in paragraph 61 of the judgment of Lord Phillips of Worth Matravers PSC which is as follows:

> "61. What difference has *Silih v Slovenia* 49 EHRR 996 made? I believe that the most significant feature of the decision in

> *Silih v Slovenia* is that it makes it quite clear that the article 2 procedural obligation is not an obligation that continues indefinitely. The spectre that the House of Lords confronted in *In re McKerr* is shown to be a chimera. Just because there has been an historic failure to comply with the procedural obligation imposed by article 2 it does not follow that there is an obligation to satisfy that obligation now. In so far as article 2 imposes any obligation, this is a new, free standing obligation that arises by reason of current events. The relevant event in these appeals is the fact that the coroner is to hold an inquest into Martin McCaughey's and Dessie Grew's deaths. *Silih v Slovenia* establishes that this event gives rise to a free standing obligation to ensure that the inquest satisfies the procedural requirements of article 2. That obligation is not premised on the need to explore the possibility of unlawful state involvement in the death. The development of the law by the Strasbourg court has accorded to the procedural obligation a more general objective that this, albeit that in the circumstances of these appeals state involvement is likely to be a critical area of investigation."

146. The claimants submit that the law has moved on yet again in the *Janowiec* case (the case before the European Court of Human Rights concerning the Katyn massacre of April/May 1940). In that case at paragraph 131 of the judgment, the court repeated the law as stated in its decision in *Šilih*. It went on to postulate further expansion of the need to investigate historic deaths. The claimants rely on two passages in the judgment in particular in paragraphs 133 and 139. First, in paragraph 133, the court said:

> "133. The Court also notes that there is little ground to be overly prescriptive as regards the possibility of an obligation to investigate unlawful killings arising many years after the events, since the public interest in obtaining the prosecution and conviction of perpetrators is firmly recognised, particularly in the context of war crimes and crimes against humanity (see *Brecknell*, cited above, § 69). Where there is a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing, the authorities are under an obligation to take further investigative measures. The lapse of time will, inevitably, be an obstacle as regards, for example, the location of witnesses and the ability of witnesses to recall events reliably (*loc. c.,* § 71). The extent to which the requirements of effectiveness, independence, promptness and expedition, accessibility to the family and sufficient public scrutiny apply will again depend on the particular circumstances of the case, and may well be influenced by the passage of time. Promptness will be likely not to come into play in the same way, since, for example, there may be no urgency as regards the securing of a scene of the

> crime from contamination or in obtaining witness statements while recollections are sharp. Reasonable expedition will remain a requirement, but what is reasonable is likely to be coloured by the investigative prospects and difficulties which exist at such a late stage (*loc. Cit.,* § 72)."

Then there is paragraph 139:

> "139. The Court is further called upon to examine whether the circumstances of the instant case were such as to justify the finding that the connection between the triggering event and the ratification could be based on the need to ensure the effective protection of the guarantees and the underlying values of the Convention. Far from being fortuitous, the reference of the underlying values of the Convention indicates that, for such connection to be established, the event in question must be of a larger dimension than an ordinary criminal offence and constitute a negation of the very foundations of the Convention, such as for instance, war crimes or crimes against humanity. Although such crimes are not subject to a statutory limitation by virtue of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (cited in paragraph 76 above), it does not mean that the States have an unceasing duty to investigate them. Nevertheless, the procedural obligation may be revived if information purportedly casting new light on the circumstances of such crimes comes into the public domain after the critical date. It cannot be the case that any assertion or allegation can trigger a fresh investigative obligation under Article 2 of the Convention. Given the fundamental importance of this provision, the State authorities must be sensitive to any information or material which has the potential either to undermine the conclusions of an earlier investigation or to allow an earlier inconclusive investigation to be pursued further (see *Brecknell*, cited above, §§ 66-72). Should new material come to light in the post-ratification period and should it be sufficiently weighty and compelling to warrant a new round of proceedings, the Court will have temporal jurisdiction to satisfy itself that the respondent State has discharged its procedural obligation under Article 2 in a manner compatible with the principles enunciated in its case-law (see the applicable principles in paragraph 133 above)."

147. The claimants argue in reliance on these developments that the discretion of the court under section 33 of the Act should be exercised now in such a manner as "to ensure the effective protection of the guarantees and underlying values of the Convention" (*Janowiec*, paragraph 139). They argue that the fruits of historical research in 2005 and the re-discovery of the Hanslope material provide a new trigger to the investigative obligation of the type envisaged in *Janowiec*.

148. The defendant submits that even in *Janowiec* the Strasbourg court recognised that the relevant obligation was not unlimited. The obligation only subsists, it argues, in

> "…the period in which the authorities can reasonably be expected to take measures to elucidate the circumstances of the death and establish responsibility for it." (See *Janowiec* paragraph 130).

149. Further, the defendant submits, the decision in *McCaughey* shows that the trigger for the application of the procedural obligation of investigation is not the death itself but the decision to hold the enquiry at all; there is no obligation to re-open old inquests or to hold inquiries into historic deaths: see the judgment of Baroness Hale of Richmond in *McCaughey* paragraph 93. It is submitted that such is the present limit in English law of the investigative duty and that this is a "powerful pointer that the Court should not take into account considerations arising under the ECHR in exercise of its discretion under s.33 of the 1980 Act"[27]. The defendant also submits that the *Janowiec* case was considering a situation where there was potentially

> "…a plausible, or credible allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing."

That, says the defendant, is not the case here.

150. I have quoted in paragraph 15 above the statement in paragraph 110 of the judgment of the Court of Appeal in *Ministry of Defence v AB & ors.* in which the court took the view that it was not for the court, which is considering an issue under section 33 of the 1980 Act, to form a view as to whether there was any need for a public investigation of the facts underlying that case or to take it into account in deciding whether to exercise the discretion under section 33. That conclusion, however, does not seem to have been reached in the context of any obligation upon the state to investigate crimes against humanity under the ECHR.

151. In my judgment, the law of England has not yet progressed as far as the claimants would have me travel in this respect. The investigative obligation, to my mind, goes no further than that envisaged by the Supreme Court in *McCaughey* and it is not for a judge at first instance to predict further advances: see *RJM v Secretary of State for Work and Pensions* [2009] 1 AC 311, paragraph 64.

152. For these reasons, I do not consider that the ECHR has relevance to my decision under section 33 of the Act.

153. Paragraphs 141 to 152 above were written before the delivery on the 4 September 2012 of the decision of the Divisional Court in *Chong Nyok Keyu & ors v Secretary of State for Foreign and Commonwealth Affair, and Anor* [2012] EWHC 2445 (Admin) (Thomas P & Treacy J), to which the parties have kindly referred me. It seems that in that case the Divisional Court reached the same conclusion as I had done with regard to the recent Strasbourg cases on this aspect of the matter. Accordingly, I see no need

[27] See paragraph 109.6 of the defendant's skeleton argument.

to add anything further, in spite of the helpful submission made in the Note from the claimants' counsel dated 7 September 2012.

Public International Law

154. So too public international law, I consider has no real relevance to my decision, notwithstanding the interesting and very learned arguments on the subject presented to me both orally and in writing by both parties and by Miss Gumbel on behalf of the intervener. I am grateful for all these arguments because they put the present claims into their proper international context. Like the arguments on the ECHR, it enables one to test the abstract "justice" of a case against accepted international legal norms. I do not think, however, that the law, so ably expounded before me, does more than demonstrate that there is no principle of public international law, directly applicable in domestic English law in respect of civil claims in tort for personal injury caused by torture, which affects the domestic law of limitation. It only demonstrates and emphasises the seriousness with which the court must approach issues such as those raised on this application. There is no danger of the court doing anything else. However, I do not intend to leave the subject without giving short reasons for the conclusions that I reach on this aspect of the case.

155. The submissions of the claimants and of the intervener can be summarised from two short passages from their respective written arguments. At paragraph 72 of their skeleton argument one finds this,

> "…The Claimants do not say that international law mandates that this court determine the domestic statutory test in the Claimants' favour. What the Claimants do say though is that where the Court enjoys a discretion to permit a claim to proceed, then the fact that the subject matter is torture, and the fact that international law deprecates limitation periods in such cases, should serve as a powerful factor in the exercise of this discretion."

In its skeleton argument the intervener concludes (in paragraph 12.2) by the submission that,

> "…in examining the limitation position in the unusual circumstances of claims involving torture, the Court may be assisted by considering the approach of international tribunals when adjudicating on claims arising out of torture".

156. I accept, as does the defendant, that the prohibition of torture is a peremptory norm of public international law (a *jus cogens*). As recently as 20 July 2012 in its judgment "*Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v Senegal)"* the International Court of Justice said this in paragraph 99 of its judgment,

> "99. In the Court's opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm (jus cogens).

> That prohibition is grounded in a widespread international practice and on the opinio juris of States. It appears in numerous international instruments of universal application (in particular the Universal Declaration of Human Rights of 1948, the 1949 Geneva Conventions for the protection of war victims; the International Covenant on Civil and Political Rights of 1966; General Assembly resolution 3452/30 of 9 December 1975 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), and it has been introduced into the domestic law of almost all States; finally, acts of torture are regularly denounced within national and international fora." (Questions relating to the Obligation to Extradite or Prosecute (Belgium v Senegal), judgment of 20 July 2012, para.99)

However, I accept the defendant's submission that the *jus cogens* of the prohibition of torture in international law adds nothing to the seriousness of the allegations which the court naturally takes into account in considering "all the circumstances of the case" under section 33 of the Act.

157. So far as international law's "deprecation" of limitation periods in respect of torture is concerned, I can find no customary rule of international law that prohibits the imposition in domestic law of just rule of limitation in civil actions. I refer again to the short passage on the sources of public international law which appears in paragraph 87 of my earlier judgment. I believe that I am correct in recalling that the international authorities relied upon by the claimants and the intervener in respect of limitation concern prosecution for crime. However, the claimants went on to submit that,

> "By logical extension [from criminal cases], the disapproval of time bars for torture cases extends to civil actions…" (paragraph 77 of the skeleton argument)

I consider that there is some force in the defendant's submission that the distinction between criminal law and civil law is of importance. It is interesting to note in this context that in *Al-Adsani v UK* (2002) EHRR 11 the European Court of Human Rights found there to be no breach of Article 6 of the ECHR in a case where the English courts had upheld a claim of state immunity in respect of a claim for damages in respect of torture brought against the government of Kuwait. The court held that notwithstanding the special character of the prohibition against torture in international law, the court was unable to discern in any of the relevant legal sources any basis for concluding that a state no longer enjoys immunity from civil suit in the courts of another state where torture was alleged; none of the primary international instruments referred to civil proceedings or to State immunity.

158. I do not consider that anything of significance is added by the submission by the claimants and by the intervener that international law imposes an obligation to provide an effective remedy for its breach: see e.g. the *Factory at Chorzŏw* case (1927) before the Permanent Court of International Justice. That is entirely understandable. Our domestic law does provide an effective remedy for civil wrongs, including torture. The fact that a limitation period is prescribed does not negate this.

No system of justice can contemplate the trial of civil wrongs, even when a fair trial of them is not possible. That applies as much in respect of torture as it does in respect of a traffic accident. The 1980 Act confers on the court the widest possible discretion, within bounds, to enable claims for personal injury to proceed outside the general limitation period where the justice of the case so requires. There is no need for reference to public international law to assist this concept. The seriousness of the allegations made obviously gives any court cause to pause for thought before it holds that the claim cannot be brought, while applying to the full the law that the burden of establishing the case for an extension of the permitted limitation period lies upon the claimant.

159. I believe that that is all that needs be said about the public international law arguments. In so far as further grounds for rejecting the submissions of the claimants and intervener on this issue are required, they are supplied fully and convincingly in Appendix 1 to the defendant's skeleton argument.

(I) Conclusions on Section 33

160. It will be understood from the foregoing that I find that Mr Nyingi, Mr Nzili and Mrs Mara have established a proper case for the court to exercise its discretion in their favour to direct that the provisions of section 11 of the 1980 Act shall not apply to the causes of action pleaded by them in the Re-Amended Particulars of Claim, as appear in section 2 of Bundle E before me and dated 25 May 2012. As indicated above, I am agreeable in principle to grant further permission to amend to add the wider basis of vicarious liability claim mentioned above, subject to sight of a draft and any argument that may arise upon it. I will therefore direct accordingly, and will allow those claims to proceed to trial.

161. Different considerations, however, apply to the claim of the late Mrs Ngondi. With regard to her claim the defendant has not made the admission of the fact of mistreatment as it has done in respect of the three other claimants. Further, notwithstanding the passage of time since the issue was raised at the time of the hearing last year, and repeatedly at directions hearings thereafter both on the delivery of judgment and in May of this year, no proper steps have been taken to re-constitute the action by applying to substitute a personal representative to pursue the claim on behalf of Mrs. Ngondi's estate. On 11 July 2012, however, an Application Notice was issued applying for an order under CPR 19.2.4(a) for the substitution of Mrs Ngondi's nephew in her place in order to pursue the claim. In a supporting witness statement it was said that steps were being taken in Kenya by the applicant to take out a grant of representation there. Having studied the relevant rule, I expressed a preliminary concern to Miss Kaufmann QC, who was advancing this part of the claimants' case, that it did not seem to me to meet the circumstances facing Mrs. Ngondi's claim. I suggested that what might be required properly to re-constitute the action would be an English grant of representation "ad colligenda bona" or similar (under the probate court's discretionary powers).

162. The heralded application under CPR Part 19 was never made and at the end of his submissions, Mr Hermer realistically recognised certain important difficulties with the status of Mrs Ngondi's claims. First, there is no signed witness statement from her, as there is from each of the other claimants (now of course confirmed by them in oral evidence). All that is available is an unsigned proof of evidence exhibited along with

other such proofs from other alleged victims included within exhibit LMW 4 to the witness statement of 11 November 2010 of Miss Lynne Wanyeki of the Kenya Human Rights Commission. That statement, of course however, was verified on oath by Miss Wanyeki before me. Secondly, unlike for the other three claimants, there is no medical report as to her injuries. Thirdly, Mr Hermer acknowledged the difficulties in respect of the status of Mrs Ngondi's estate before the court in the absence of a grant of representation. Fourthly and finally, Mr Hermer referred to the fact that this was not a case where a spouse or other close relative had survived the deceased. In the circumstances, therefore, I refuse any application for a direction under section 33 in respect of the late Mrs Ngondi's claim.