Neutral Citation Number: [2011] EWHC 1913 (QB)

Case No: HQ09X02666

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/07/2011

Before :

The Honourable Mr. Justice McCOMBE

- -

Between:

Ndiku MUTUA, Paulo NZILI, Wambugu NYINGI, Jane Muthoni MARA & Susan NGONDI	**Claimants**
- and -	
THE FOREIGN AND COMMONWEALTH OFFICE	**Defendant**

- -
- -

Mr Richard HERMER QC, Miss Phillippa KAUFMANN QC, Mr Zachary DOUGLAS, Mr Daniel LEADER & Mr Alex GASK (instructed by **Leigh Day**) for the **Claimants**
Mr Robert JAY QC, Sir Michael WOOD, Mr Alex RUCK KEENE, & Mr Jack HOLBORN
(instructed by **Treasury Solicitors**) for the **Defendant**

Hearing dates: 7th – 14th April 2011

- -

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.

.....

MR JUSTICE MCCOMBE

The Honourable Mr. Justice McCombe :

(A) Introduction

1. This is an action for damages for personal injuries brought by five claimants in respect of alleged torts of assault and battery and negligence, for which it is said the defendant is liable as representing Her Majesty's government in the United Kingdom. The injuries in respect of which the claims are made are said to have been deliberately inflicted on the claimants while they were in detention in Kenya, in varying periods between 1954 and 1959, by officers and soldiers of the Kenya police force, the Home Guard and/or the Kenya Regiment. The particulars of the injuries alleged to have been inflicted speak of physical mistreatment of the most serious kind, including torture, rape, castration and severe beatings. It is not necessary to describe the mistreatment alleged in greater detail for present purposes. Suffice it to say that if the allegations are true (and no doubt has been cast upon them by any evidence before the court), the treatment of these claimants was utterly appalling.

2. I have before me, an application by the defendant under Parts 3 and 24 of the Civil Procedure Rules ("CPR") for orders striking out the claims and/or for summary judgment for the defendant against the claimants dismissing their claims. This is not the trial of the action[1]. The principal issue before me is whether the claimants have a viable claim in law, and on the facts as presently known, against this defendant representing the UK Government. It is not denied by the defendant that, if the claimants' allegations are well founded, they would have had proper claims at the time against the perpetrators of the assaults and, most probably, also against the former Colonial Administration in Kenya on a vicarious liability basis. The issue is whether a claim can properly be brought now against Her Majesty's Government in the United Kingdom. There is also an application under CPR Part 17 by the claimants for permission to amend the Particulars of Claim.

3. Subject to the outcome of these present applications, there is also before me an application by the defendant for an order that the issue of limitation (under sections 11, 14 and 33 of the Limitation Act 1980) be tried as a preliminary issue. Clearly, at this length of time, issues of limitation will inevitably arise in the proceedings. However, at an early stage of the hearing, I expressed the view that it was logical that I should hear and determine first the applications under CPR Parts 3, 24 and 17, before proceeding (if then appropriate) to any questions of limitation. I took the view that the viability of the various legal formulations of the claims against the UK Government needed to be determined before one could know what issues of limitation might arise in relation to those claims. The parties did not seek to dissuade me from that view. No limitation issues were, therefore, argued before me.

(B) Procedural Principles to be applied

4. There is no dispute about the principles to be applied to the applications under our procedural law. The rules as to summary judgment under CPR Part 24 have been recently summarised by Simon J, and recited by the Court of Appeal as being

[1] I make this obvious point simply because some media reports have given the erroneous impression that I was hearing the trial.

uncontentious in *Attrill & ors v Dresdner Kleinwort & anor; Fahmi Anar & others v Same* [2011] EWCA Civ 229:

> "a. the Court must consider whether the Claimants have a 'realistic' as opposed to a 'fanciful' prospect of success: *Swain v Hillman* [2001] 1 All ER 91.
>
> b. A realistic claim is one that is more than merely arguable: *ED&F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8].
>
> c. In reaching its conclusion the court must not conduct a mini-trial: *Swain v Hillman.*
>
> d. This does not mean that a court must take at face value everything that a claimant says in statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED&F Man Liquid Products v Patel* [2002] EWCA Civ at [10].
>
> e. However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550.
>
> f. Although a case may turn out at trial not to be really complicated it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on a summary judgment hearing. Thus the court should hesitate about making a final decision without a trial, even when there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical 100 Ltd* [2007] FSR 3."

Adding to this Sir Andrew Morritt C said,

> "To that summary I would add a reference to paragraph 107 of the speech of Lord Hope in **Three Rivers DC v Bank of England** No 3 [2003] 2 AC 1, 264 where he said:
>
> > "Conversely, I consider that if one part of the claim is to go to trial it would be unreasonable to divide the history up and strike out the other parts of it. A great deal of time and money has now been expended in the examination of the preliminary issues, and I think that this exercise must now be

> brought to an end. I would reject the Bank's application for summary judgment." "

5. The law relating to applications to strike out actions which are said to disclose no reasonable grounds for bringing the claim (CPR r. 3.4(2) (a)) is summarised in Civil Procedure 2011 Vol. 1 paragraph 3.4.1. page 70:

> "Statements of case which are suitable for striking out on ground (a) includes those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides (*Harris v Bolt Burden* [2000] L.T.L., February 2, 2000, CA). A claim or defence may be struck out as not being a valid claim or defence as a matter of law (*Price Meats Ltd v Barclays Bank Plc* [2000] 2 All E.R. (Comm) 346, Ch D). However, it is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact (*Farah v British Airways, The Times*, January 26, 2000, CA referring to *Barrett v Enfield BC* [1989] 3 W.L.R. 83, HL; [1999] 3 All E.R. 193). A statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence (*Bridgeman v McAlpine-Brown* January 19, 2000, unrep., CA). An application to strike out should not be granted unless the court is certain that the claim is bound to fail (*Hughes v Colin Richards & Co* [2004] EWCA Civ 266; [2004] P.N.L.R. 35, CA (relevant area of law subject to some uncertainty and developing, and it was highly desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts))."

6. Finally, the rule relating to applications to amend is that permission to amend will not be given to raise a claim that is not maintainable in established law: Op. Cit. paragraph 17.3.6 page 488.

7. It is common ground that I should assess the viability of the claimants' case, in so far as it turns upon matters of pleading, on the basis of their proposed amended Particulars of Claim in the form appearing in section 9 of Bundle A before me.

(C) The Background to the Claims in Outline

8. The events with which the case is concerned arise out of the Mau Mau rebellion in Kenya in the 1950s which led to the proclamation of a state of Emergency by the Governor of Kenya, Sir Evelyn Baring, on 20 October 1952. The proclamation was issued under section 3 of the Emergency Powers Order-in-Council 1939. That Order had itself been made in exercise of powers conferred by Acts of the United Kingdom Parliament, namely the British Settlements Act 1887 and the Foreign Jurisdiction Act 1890. Political authorisation for the proclamation had been given by resolution of the UK Cabinet of 14 October 1952.

9. As a part of the process of proclaiming the Emergency, the Governor promulgated the Emergency Regulations 1952, pursuant to powers conferred by the 1939 Order. Those regulations contained wide powers of arrest and detention of suspected persons. From about March 1953 detention camps were constructed to accommodate the large numbers of persons detained under the Emergency powers. That state of Emergency continued until 12 January 1960. It was under the regime constituted by the proclamation of the Emergency that the torts alleged by the claimants were committed.

10. The "facts" of the case fall to be considered on four levels: (i) the constitutional structure; (ii) the administrative, military and security structure; (iii) the documents and (iv) the facts of the assaults upon the claimants and the identity of the perpetrators. It was in the context of the "structures" to be considered under (i) and (ii) and the documents in (iii) that the facts under (iv) occurred.

11. It is the essence of the defendant's case that the structures that can be identified under (i) and (ii) and the documents in (iii) show that the status of the Colonial Government and Administration in Kenya was separate and distinct from that of the UK Government and that it was only the former that could conceivably have been held liable for the torts at the time when they were committed. Such liability was never that of the entirely separate UK Government and did not become so upon Kenya's independence in 1963.

12. The claimants acknowledge the separate nature of the Colonial Administration and the liability that it may have incurred to the claimants for the actions of their servants or agents at the times when the individual torts were committed. However, they submit that the UK Government, as a separate and distinct entity, bears a separate and distinct liability.

13. The claim is presented under five heads. First, (1) it is said that the former liability of the Colonial Administration in Kenya simply devolved or was transferred, by operation of the common law, upon the UK Government at the time of independence in 1963. Secondly, (2) it is said that the UK Government is directly liable to the claimants, as a joint tortfeasor, 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 the "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. Thirdly, (3) it is 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. Fourthly, (4) it is said that the UK Government is liable to the claimants (and to the third claimant in particular) as the result of an instruction, approval or authorisation of particular treatment of claimants given on 16 July 1957. Fifthly, and finally, (5) it is alleged that the UK Government is liable in negligence for breach of a common law duty of care in failing to put a stop to what it knew was the systemic use of torture and other violence upon detainees in the camps when it had a clear ability to do so.

(D) The Constitutional Arrangements

14. The formal constitutional arrangements for the government of the area that came to be known as Kenya, from the Berlin Conference of 1885 to independence in 1963, are set out uncontroversially in paragraphs 18 to 44 of the defendant's original skeleton argument for these applications dated 15 April 2010. It is only necessary to describe the position as it was from 1952 to 1963.

15. Pursuant to the British Settlements Act 1887, by Order in Council made on 11 June 1920, known as the Kenya (Annexation) Order, it was provided that what had until then been known as the East Africa Protectorate (apart from the territories of the Sultan of Zanzibar) should "be annexed to and form part of Our Dominions, and shall be known as the Colony of Kenya". By Letters Patent of 11 September 1920, passed under the Great Seal by warrant under the King's Sign Manual, pursuant it seems to section 2 of the 1887 Act, detailed provisions for the government of the new colony were enacted.

16. Article 1 of the Letters Patent provided for the office of Governor and Commander-in-Chief of the Colony. By Article 3 it was provided as follows:

> "We do hereby authorise, empower, and command the Governor to do and execute all things that belong to his said Office, according to the tenour of these our Letters Patent and of any Orders in Council relating to the territories formerly known as the East Africa Protectorate, save in so far as any provision of any such Order in Council may be repugnant to any of the provisions of these Our Letters Patent, and of such Commission as may be issued to him under the Royal Sign manual and Signet, and according to such instructions as may from time to time be given to him, under the royal Sign manual and Signet, or by Order in our Privy Council, or by Us through one of Our principal Secretaries of State, and to such laws as are now, or shall hereafter be in force in the Colony."

17. Articles 6 and 7 constituted an Executive Council and a Legislative Council, in practice constituted as the King might direct by instructions under the Royal Sign Manual and Signet. Article 10 conferred upon the Legislative Council power and authority as follows:

> "… subject always to any conditions, provisos, and limitations prescribed by any Instructions under Our Sign Manual and Signet, to establish such Ordinances not being repugnant to the law of England, and to constitute such Courts and Officers, and to make such provisions and regulations for the proceedings in such Courts and for the administration of justice, as may be necessary for the peace, order, and good government of the Colony."

The same article conferred a gubernatorial power of veto to legislation and Article 11 went on to provide as follows:

> "We do hereby reserve to Ourselves, Our heirs and successors, full power and authority, and Our and their undoubted right, to disallow any such Ordinances, and to signify such disallowance through one of Our Principal Secretaries of State. Every such disallowance shall take effect from the time when the same shall be promulgated by the Governor in the Colony."

Article 12 reserved to the King an additional power on the advice of the Privy Council to make laws and ordinances for the Colony. Article 24 reserved for the King the power to revoke, alter or amend the Letters Patent. Article 22 provided:

> "And We do hereby require and command all Our officers and Ministers, civil and Military and all other the inhabitants of the Colony, to be obedient, aiding, and assisting unto the Governor, and to such person or persons as may from time to time, under the provisions of these Our Letters Patent, administer the Government of the Colony."

18. Again uncontroversially, the defendant submitted, relying upon extracts from *Commonwealth and Colonial Law* (1966) by Sir Kenneth Roberts-Wray, that the Governor, with no doubt the Executive Council, was the executive branch of government in the Colony, subject to instructions from the Sovereign or any Secretary of State and subject to the constitutional convention to heed the advice of Ministers in the Colony and the Secretary of State which, where necessary, he would solicit. The defendant quoted the following from the textbook (page 339):

> "Governors, in the exercise of their legal powers, are required to observe Her Majesty's Instructions. They may be given by Royal Sign Manual and Signet or conveyed less formally through a Secretary of State by despatch or telegram. And beyond that – a matter of constitutional law it is well understood that the secretary of state is entitled to intervene in any manner of administration within a Governor's authority, whether legal powers are involved or not."

Throughout the papers there are examples of formal instructions issued pursuant to Article 3 of the 1920 Letters Patent and other examples of less formal instructions and advice sought and/or given by letter or telegram from the Secretary of State or officials. The relevant Secretary of State was at all material times the Secretary of State for the Colonies. That office was held by the following during the relevant period: Mr. Oliver Lyttleton (October 1951 to July 1954), Mr. Alan Lennox-Boyd (July 1954 to October 1959) and Mr. Iain Macleod (October 1959 to October 1961).

19. In addition to the formal constitutional documents, the Secretary of State issued directions "for general guidance" to Colonial Governors, including the Governor of Kenya, under the Colonial Regulations. The 1956 version provided (relevantly) as follows:

> "103. The governor is the single and supreme authority responsible to, and representative of, Her Majesty. He is by virtue of his commission and the Letters Patent or Order in

> Council constituting his office, entitled to the obedience, aid and assistance of all military, air force and civil officers; but although having the title of captain General or Commander-in-Chief, and although he may be a military or air force officer senior in rank to the officer commanding the troops or air force, he is not, except on special appointment from Her Majesty, invested with the command of Her Majesty's regular forces in the colony. He is not therefore entitled to … take the immediate direction of any military or air operations, nor except in cases of urgent necessity, to communicate directly with subordinate military or air force officers without the concurrence of the officer in command of the forces, to whom any such exceptional communication must be immediately notified.
>
> 154. When a governor who is not actually in command of Her Majesty's forces shall have occasion to report upon, or bring under the consideration of the Secretary of State for the Colonies, matters which involve military or air force as well as civil considerations, which require the concurrence or decision of the Secretary of State for Air, he should if there is an officer commanding military or air forces in the colony, first communicate with that officer respecting the matters in question, and, having obtained that officer's opinion or observations thereon, he shall transmit the same, with his own report, to the Secretary of State for the Colonies, and shall in every case furnish the officer commanding with a copy of any report he may make involving military or air force considerations. If the officer commanding considers that these reports require the consideration of the Secretary of State for War or Air, he will forward the duplicates with his observations by the same mail which conveys the original report to the Secretary of State for the Colonies.
>
> 155. Similarly, under the Queen's Regulations, when the officer commanding the troops or air force in the colony desires to bring to the notice of his military or air force superiors any matter which may involve civil as well as military or air force considerations, he will first communicate with the Governor with a view to obtaining his opinion thereon. He will transmit with his own report any opinion or observations he may thus obtain; and will in every case furnish the governor with a copy of any reports he may make on subjects other than military or air force discipline and routine. If the Governor considers that these reports require the consideration of the Secretary of State for the Colonies, he will forward the duplicates in the same mail which conveys the original report to the Secretary of State for War or Air, as the case may be."

It is thought that the earlier versions of these Regulations, which were not available, were likely to have been in similar form in their material parts.

20. As already noted on 20 October 1952 the Governor proclaimed the state of Emergency and promulgated the Emergency Regulations 1952. At the outset of the Emergency an informal committee of administrators, police and military officials (known as the Situation Report Committee – "Sitrap") was constituted. In March 1953 this Committee was superseded by new informal Emergency Committees at three levels – Colony, Provincial and District. The Committees had at their respective heads the Governor, the Provincial Commissioner and the District Commissioner. On the Colony Committee were various officials and administrators, the General Officer Commanding East Africa Command (Lt. Gen. Cameron) and the Governor's Chief Staff Officer (Maj. Gen. Hinde). From a military point of view at this time East Africa Command was subordinated to the Commander-in-Chief Middle East Land Forces (MELF).

21. Shortly after this, however, the Colonial Secretary and the C-in-C MELF seem to have visited Kenya and to have concluded that the military command there needed strengthening. Contemporary minutes indicate that other UK Ministers and the Chief of the Imperial General Staff agreed. Mr Lyttleton so reported to the Prime Minister. As a result, it was agreed that East Africa Command should thereafter operate directly under the War Office, as a separate command apart from MELF, and that General Sir George Erskine should become Commander-in-Chief East Africa. It seems that the enhancement of the military profile following General Erskine's appointment was thought to entail the possibility of conflict between military and civil/political considerations. After an exchange of communications on this subject between the Colonial Secretary and the Governor at the end of May 1953, there followed on 3 June 1953 a joint Directive from the Secretary of State for War and the Colonial Secretary to the Governor and to General Erskine in the following terms:

> "(i) General Erskine is charged with the conduct of all military measures required to restore law and order in Kenya. For this purpose he will exercise full command of all Colonial, Auxiliary, police and Security Forces in Kenya.
>
> (ii) The Governor of Kenya will retain full responsibility for the government and administration of the Colony, but will give priority to such military and security measures as General Erskine may consider essential…
>
> (iii) In the event of any difference of opinion between the Governor and the C-in-C it will be the duty of both to report the matter to the Colonial Office and the War Office respectively."

On 7 June 1953 General Erskine arrived in Kenya to take up his command.

22. After another visit to Kenya by the Colonial Secretary in March 1954, two further steps were taken. First, an amendment was made to the Kenyan constitution by the giving of formal instructions creating a Council of Ministers to which most of the functions of the Executive Council were passed – this has been called the "Lyttleton Constitution"[2]. Secondly, a body known as the War Council was set up at much the

[2] Reading the preamble to the Instructions, it appears that various other formal instructions had been given in the intervening period since the issue of the Letters Patent in 1920 and 1954 which made other amendments to the

same time. The War Council consisted of the Governor, the Deputy Governor, General Erskine and a Minister without Portfolio in the Colonial Government (Mr. Michael Blundell). The defendant points out in its skeleton argument that the War Council was established as a political initiative of the Colonial Secretary after discussions in Kenya between the Governor and General Erskine had concluded that a small Emergency Committee or War Cabinet was required. Strangely, however, it seems the War Council was technically subordinate to the Council of Ministers and this led to political tensions. The tensions are illustrated usefully in extracts from contemporary documents quoted in the defendant's skeleton argument[3] to which it is not necessary, however, to refer further.

23. The 1920 Letters Patent were repealed by the Kenya Constitution Order 1958, section 1(3) and the First Schedule. However, section 3 of the 1958 Constitution re-produced a statement of the powers and duties of the Governor in closely similar terms to Article 3 of the old instrument. It read as follows:

> "(1) There shall be a Governor and Commander-in-Chief in and over Kenya who shall be appointed by her Majesty by Commission under Her Sign Manual and Signet and shall hold office during Her Majesty's pleasure.
>
> (2) The Governor shall have such powers and duties as are conferred or imposed upon him by or under this Order or any other law, and such other powers and duties as Her Majesty may from time to time be pleased to assign to him, and, subject to the provisions of this Order and of any other law by which any such powers or duties are conferred or imposed, shall do and execute all things that belong to his office (including the exercise of any powers with respect to which he is empowered or required by this Order to act in his discretion) according to such instructions if any, as Her Majesty may from time to time see fit to give him;
>
> Provided that the question whether the Governor has in any matter complied with such instructions shall not be enquired into in any court."

It will be noted that references to the Royal Sign Manual and Signet, Orders in Council and the Secretary of State have gone. That Order was in turn substantially revoked by the Kenya Order in Council 1963 which made preparations for independence which was to follow later that year. Section 21 of that Order made provision for instructions to the Governor in this form:

> "The Governor shall have such functions as may be conferred upon him by or under this Constitution or any other law and such other functions as Her Majesty may assign to him and, subject to the provisions of this Constitution and, in the case of

---

constitution (in March 1934, June 1935, April and December 1948, November 1951 and June 1953). However, my attention has not been drawn to these and I assume that they are not material.

[3] Paragraphs 260-265.

> functions conferred upon him by any law, subject to the provisions of that law or any law amending that law, shall exercise all the functions of his office (including any functions that are expressed to be exercisable by him in his discretion) according to such instructions as her Majesty may give him:
>
> Provided that the question whether or not the Governor has in any matter complied with such instructions shall not be enquired into in any court."

Section 63 provided this:

> "The executive authority of the Government of Kenya shall be vested in Her Majesty and, subject to the provisions of this Constitution, may be exercised on behalf of her Majesty by the Governor, either directly or by officers subordinate to him."

24. It is the defendant's submission that the subsistence of this constitutional structure, throughout the Emergency without any revocation or suspension of it from the UK, demonstrates that the relevant government operating in Kenya was the *Colonial* Government set up by the 1920 Letters Patent (as supplemented and/or amended from time). It is submitted that the detention camps where the individual claimants were held, and where (it is to be assumed for present purposes) they were mistreated, were administered and controlled by the Colonial Government. In all respects, it is argued, instructions and advice given to the Governor from London, and the assistance to the civil power afforded by General Erskine and elements of the British Army under his command, were aspects of the functioning of the Colonial Administration and not, in any respect, functions of Her Majesty's Government in the United Kingdom.

25. In paragraph 5 of its skeleton argument the defendant submits that the claims have been formulated as they are by the claimants' advisers so as to get round the constitutional difficulty that the perpetrators of the assaults alleged were servants or agents of the Colonial Administration which alone was vicariously liable for any wrongdoing. The defendant says that because the claimants are unable to show any vicarious liability of this kind on the part of the UK Government the claimants have been,

> "forced … to construct increasingly unorthodox and implausible arguments in an attempt to fix the Crown in right of the UK with the alleged torts of another".

26. Further, the defendant relies upon s.40(2)(b) of the Crown Proceedings Act 1948 which provides:

> "…nothing in this Act shall:-…
>
> (b) authorise proceedings to be taken against the Crown under or in accordance with this Act in respect of any alleged liability of the Crown arising otherwise than in respect of His Majesty's Government in the United Kingdom…or affect proceedings

> against the Crown in respect of any such liability as aforesaid…"

27. The claimants for their part do not deny the existence or functioning of the Colonial Government or the formal constitution and ongoing administration of the establishments in which the claimants were held by that government. On the other hand, they submit that it is not possible to "airbrush" the UK Government from the picture. That government too, they argue, was a functioning entity with a direct role and direct interest in resolving the Emergency just as much as the Colonial Government. They submit that the evidence discloses, at the very least, an arguable case that the UK Government, through the Colonial Office and the Army (under General Erskine), played a material part in the creation and maintenance of a system for the suppression of the rebellion, in part by means of torture and other mistreatment of detainees. For this, they submit, they have a properly arguable case that the UK Government as such has a direct and joint liability with the Colonial Administration for what occurred.

28. Kenya became independent on 12 December 1963, as a matter of English law by virtue of the Kenya Independence Act 1963. Section 1(1) and (2) of that Act stated:

> "(1) On and after 12th December 1963 (in this Act referred to as "the appointed day") Her Majesty's Government in the United Kingdom shall have no responsibility for the government of Kenya or any part thereof.
>
> (2) No Act of Parliament of the United Kingdom passed on or after the appointed day shall extend, or be deemed to extend, to Kenya, or any part of Kenya, as part of the law thereof; and on and after that day the provisions of Schedule 1 to this Act shall have effect with respect to legislative powers in Kenya."

Immediately prior to 12 December 1963 a new constitution for the independent Kenya was enacted by the Kenya Independence Order in Council 1963. For 12 months Her Majesty the Queen remained head of state of the independent Kenya and it was provided that the executive authority of the Government of Kenya was to be exercised on behalf of Her Majesty by a Governor-General who was "Her Majesty's representative in Kenya": see section 2 of the 1963 Order (enacting the Constitution of Kenya) and sections 31 and 72 of the Constitution. However, the new reality was that the Governor-General acted on advice of Kenyan ministers to the exclusion of ministers in the UK Government.

29. By Act of the Kenyan Parliament enacted on 23 November 1964, commencing on 12 December 1964, Kenya became a republic and ceased to form part of Her Majesty's dominions: see section 4 of that Act.

(E) Factual evidence

30. The factual background to these respective submissions will have to be addressed further a little later, in the next section of this judgment. However, it is to be remembered that this is a strike out/summary judgment application upon which the court is unable to resolve seriously disputed questions of fact. In the immediately

preceding section of the judgment I have deliberately refrained from putting any factual gloss upon the constitutional arrangements that I have endeavoured to describe. The reasons for this are as follows.

31. Quite properly, in view of the present application, no defence has been served by the defendant and so its formal response to the factual allegations made in the particulars of claim is yet to come. As a result, the factual presentation of the defence case, is essentially to be found in sections F and G of its skeleton argument served on 21 March 2011. Those sections are headed "Outline of the Emergency" and "Analysis of the Core Documentation". In introducing the second of these sections, it was submitted as follows (paragraph 215):

> "In summary, the FCO's position is that the weight of the documentary evidence does not support the Claimant's case in any of its formulations. It is, however, the case that the contemporary documentation rarely addresses the question before the Court in direct form, in large part because the questions that the Claimants now pose are largely ones that were simply never considered at the time. It is therefore necessary to proceed by reference to the mosaic of evidence."

32. The documentary evidence at the time of the hearing of the application was already voluminous, even when presented as "core documentation". On 24 June 2010, HH Judge Seymour QC (sitting as a Judge of the High Court) gave certain case management directions, among which was an order requiring the parties to serve evidence on which each intended to rely on the hearing of the applications. Witness statements were served accordingly. There was no order or other requirement of the CPR for any party to make full standard disclosure of relevant documents within their possession, custody or power, or indeed, any disclosure at all. As the defendant explained in its written evidence served in November 2010 its searches for documents had not been comprehensive.[4] The evidence served by the claimants in this process, in particular a statement by Professor David Anderson of Oxford University, made reference to his understanding that a number of documents relating to the Emergency had been removed from Kenya before independence in 1963; these were said to be contained in some 300 boxes. Professor Anderson stated that, from his own researches, he was unable to determine what had happened to these documents. As a result further enquiries were made within the defendant's organisation, including to a division known as the Information Management Group ("IMG") responsible for a section of records held at a property known as Hanslope Park in Buckinghamshire. An enquiry had been made in that quarter, by officials with conduct of these proceedings on behalf of the defendant, prior to the initial service of the defendant's evidence with its first tranche of documents in November 2010, but that enquiry had yielded no result. However, on the occasion of his second inquiry, on 17 January 2011, the relevant official within the defendant's organisation received a telephone call from IMG indicating that what appeared to be the missing 300 boxes had been found. The defendant then set in train a process of examination of the new papers and disclosure of those that they perceived to be relevant to the claimants.

[4] See paragraph 8 of the witness statement of Mr Edward Inglett of 18 November 2010.

33. The result has been that what was already a sizeable documentary base was being enlarged up to the start of the hearing. Moreover, it had not been possible for the claimants' historical advisers (Professors Anderson, and Elkins and Dr Bennett) to study fully the new materials, although all three produced supplementary statements stating what their initial reactions to the new files were.

34. I emphasise that, whatever criticism may be levelled at the absence of these papers from the public archive until now, the defendant's failure to disclose them earlier to the claimants in the course of the proceedings was not in any way a contravention of any requirement of the court rules or in breach of any order of the court.

35. From the claimants' side the factual presentation of the case, apart from the claimants own accounts of what happened to them while in detention, has been based principally upon the statements of the three academic historians already mentioned. Their evidence is founded upon extensive academic researches, including work at various archive centres and interviews of witnesses. The status of this evidence was summarised by Tugendhat and Langstaff JJ in judgments given by them at earlier stages of these proceedings. In his judgment of 18 October 2010 Tugendhat J said this of the proposed evidence of Professor Elkins which was yet to be served:

> "It also seems to me that for that purpose the skills and knowledge of Professor Elkins will be likely to be of assistance to the claimants and the court, but the scope of what she can be asked for that purpose is very much narrower than the scope set out in the application notice dated 12th October. She will be an expert in the sense that in many different cases only an expert can identify relevant factual evidence and obtain access to it in a form that can be put before the court. For example in the present case, what documents once did exist and what documents still do exist is a matter of fact but only somebody with the relevant historical expertise and skills would be able to identify the facts. Insofar as Professor Elkins were to do that, and I quote that just as a matter of example, then she would not be giving opinion evidence for which leave is required pursuant to CPR 35.4. That is a different form of expert evidence. It seems to me that for an exercise of that kind she could give evidence under paragraph 2 of the order of 24th June.
>
> I have not seen a draft of a report from her. It may be that, when the defendant has identified the issues as it is intended that the defendant should, or even possibly by reference to correspondence that has already taken place in this case, it may be possible for Professor Elkins to give other evidence which would be relevant to a Part 24 hearing. However, the parties will have clearly in mind that insofar as the hearing in January pursuant to Part 24 is concerned, the court is not at that point trying the issues, see for example, *Swain v Hillman* and *Three Rivers (No 3)* in the House of Lords. If, on the other hand, any of the issues are being tried as a preliminary issue, then of course the usual situation would apply as in any trial as to what is or is not admissible evidence. But at present it seems to me

> that the claimants do have an order which would permit them to put in evidence from Professor Elkins, but not evidence which is opinion as to the merits of the case or any particular issue. If evidence from her on opinion is required, then it would be under CPR 35, but I am not minded to give permission, at this stage in any event, for such evidence. It seems to me that the issues must be clarified before the court can decide whether opinion evidence is relevant or not."

In his judgment of 13 December 2010, Langstaff J said,

> "Tugendhat J dealt with the position of evidence which the claimants wished to call. That was the evidence of Professor Elkins. She had written one of the seminal texts in 2005. He accepted that her evidence was relevant in identifying documents or other material, but should not be admitted as expert evidence (that is evidence of opinion) as to what was to be inferred from those documents taken as a whole. Because of her familiarity with documents, she is thus able to identify documents which are likely to be of greatest use in the arguments of the respective parties. She has a greater facility for this than do the parties themselves because of her great experience gained over some ten years of looking through archives in the course of which she researched a text in which she has an interest. Plainly she makes efficient the process of identifying documents and material. It is important that I should remind myself that that is essentially her role. Her evidence has no particular value in this case, other than to identify relevant documents or to identify relevant witnesses who may be able to give effective and important testimony. Her position is very different from that of a witness who has herself directly seen something happen. It is also very different from the traditional role of an expert witness."

36. In the result, in the defendant's skeleton argument and in the evidence of the historians, I have had the benefit of rival factual assessments of historical documents and their significance in the context of the present case. At any trial, perhaps assisted by historical expertise in identifying relevant materials and understanding their full context or perhaps not, it would be for the court (and not for the witnesses (expert or otherwise)) to read the documents presented, draw all necessary inferences from them and make the findings of primary fact, for example, as to the respective roles of the Colonial Government, the British Army and the UK Government[5]. At present I have had what are, in effect, no more than submissions from both sides as to what the documents show and what inferences of fact should be drawn from them. The two accounts are very different from one another and I have no means to assess which is right after the piecemeal examination of a few of the documents that has been possible at the hearing and in the course of preparation of this judgment. Further, the historian

[5] I am anxious at this stage to avoid any formal determination of the proper role for expert historians at any trial of this action. That issue has not been argued before me and seems to me to be a matter for later.

witnesses are very critical of the process by which the Hanslope documents have been examined by the defendant and disclosed. They say that those charged with that task do not have the necessary expertise to carry out the inspection and disclosure of this material satisfactorily.

37. On the lack of reliability of the defendant's factual account in the skeleton argument Professor Elkins, in her second witness statement, says this:

> "The Defendant's Skeleton Argument is a reflection of a piece of historical writing that results from a cursory and partial reading of the "much relevant documentation [that] has always been in the public domain in London or in Nairobi". This is in some ways understandable as the defendant's Skeleton argument was not informed by the ten years of sustained research necessary to have a comprehensive understanding of the fragmentary files that do exist.
>
> The defendant has hand-selected documents that support a now, de-bunked thesis that the British colonial brutalities perpetrated during the Mau Mau Emergency were the result of one-offs, rather than any kind of systematic effort authorized at the highest levels of British colonial governance. A comprehensive and sustained reading of the documents publically available does not support the defendant's Skeleton Argument. "

To similar effect is paragraph 16 of Professor Anderson's second statement:

> "I have had the opportunity to read the historical analysis presented in the Defendant's skeleton argument. The Defendant's analysis is, in places inaccurate, and significantly fails to set out the evidence in full on a number of important points. I am concerned that this will leave the Court with an impression of the underlying facts which is misleading. I would want to deal with the Defendant's analysis point by point but in the time available I am only able to offer general comment."

Dr Bennett says this in paragraph 4 of his second statement:

> "At the outset I wish to state that I agree with Prof Anderson in that the historical analysis presented in the Defendant's skeleton argument is one sided and incomplete. Its authors appear to have reconstructed events on the basis of a selective and incomplete reading of the available documentation with little knowledge of the historical context and without full appreciation of the range of sources and evidence which are available, including surviving witnesses to the events themselves. I wish to deal with the key points raised in order."

38. I am unable to conclude whether these criticisms are justified or not, but they certainly cannot be dismissed out of hand. I have, therefore, no sound material from which to draw satisfactory inferences as to what the papers as a whole will reveal, but

the possibility must be recognised that the evidence in the end may justify the court in drawing inferences similar to those drawn by the historians. This makes it very difficult for me to accede to the defendant's application in so far as it is based upon CPR Part 24 and on the facts. In my judgment, the success or otherwise of the defendant's applications must depend upon whether its arguments of law are correct, taking the claimants' factual case at its highest.

39. With these reservations, I shall endeavour to outline the main features of the Emergency and how the claimants' cases fit into the historical context.

(F) Main Features of the Emergency

40. The key features of the Emergency are not substantially in issue. What *is* in issue is who bore responsibility for those features, both as a matter of fact and law.

41. Commencing with Operation Anvil in April 1954, the security forces (to use a neutral term) began a round up of suspected Mau Mau adherents. 16,500 were detained in Nairobi in the Anvil operation. Other operations were conducted elsewhere. The regime introduced three features of the detention process, to which repeated reference is made in the papers. These were "villagisation", "screening" and "dilution".

42. Professor Elkins describes the villagisation process as follows:

> "June 1954. The War Council mandated forced villagization throughout the Kikuyu reserves (i.e. Kimabu, Fort Hall, Nyeri and Embu Districts). By the end of 1955 1,050,899 Kikuyu were removed from their scattered homesteads and forcibly relocated into one of 804 villages, comprising some 230,000 huts. Emergency villages were highly restrictive: they were surrounded by barbed wire, spiked trenches, and twenty four hour guard. Villagers were forced to labor on communal projects."[6]

The fourth and fifth claimants were subjects of the villagisation programme. It is alleged that the fifth claimant, the late Mrs. Ngondi was subjected to what is said to have been one of the regular rapes perpetrated by soldiers and white settlers on the village women. While in the villages, it is said, each of them was identified as a Mau Mau sympathiser and was taken to Gatithi screening camp, and other locations, where each was subjected to further abusive treatment.

43. "Screening" is described by Professor Elkins in this way[7]:

> "Screening. Detainees were screened at the time of arrest, and multiple times during the course of detention until the time of release (many detainees were screened multiple times before being sent to a detention camp). Screening was a form of interrogation that (a) determined a suspect's level of indoctrination; (b) gathered intelligence for military and police operations; and (c) determined a suspect's screening category.

[6] Paragraph 24 of Professor Elkins' first statement.
[7] Loc cit. paragraph 32

> From the start of the Emergency until October 1956, detainees were classified as "white," "grey," or "black." Beginning in October 1956, the classification system was altered, with letters (e.g. Z, Y, YY, and XR) and numbers (e.g. Z1 and Z1). Civilian and military personnel carried out screening operations; these screening operations took place in numerous locations, including in gazetted and un-gazetted screening centres, police stations, detention camps, and home guard posts. Detainees were required to labor whilst in the Pipeline. Detainees who refused to labor were sent to a Special Detention Camp, where they could be forced to labor."

Screening, therefore, appears to be relevant to all the claims.

44. Mr Nyingi, the third claimant, was detained for part of his time in custody in the Mwea camps where the "dilution" technique was developed. This appears to have been "refined" under a Mr John Cowan at the Hola camp, where in March 1959, 11 detainees were killed. It is alleged by Mr Nyingi that on this occasion he was severely beaten, left unconscious and taken for dead. He says that he was then placed with the 11 corpses until a doctor realised that he was still living.

45. Professor Elkins describes the dilution technique as follows:[8]

> "Dilution Technique. John Cowan, senior Prisons Officer of the Mwea Camps, initially conceived of the dilution technique in December 1956 at Gathigiriri Camp, one of the five camps on the Mwea plain, comprising what would be known as the Mwea camps. This technique involved isolating small numbers of detainees from the larger group, and systematically using force, together with confessed detainees, to exact compliance and cooperation. In March 1957, the dilution technique was systematized in the Mwea Camps under the leadership of Terence Gavaghan, and its methods disclosed to the Colonial Office. The Colonial Secretary approved of the dilution technique, along with the use of "compelling force." "

Her description of the "refinement" is in these terms: [9]

> "Cowan Plan. Instituted in Hola Camp, the Cowan Plan was derived from the dilution technique. As with the Mwea Camps, the dilution technique was targeted at small batches of detainees (approximately 20) who were to be removed from the larger group and forced to work on the Hola irrigation scheme. "Should they refuse to work they would be manhandled to the site of work and forced to carry out the task", Cowan directed. The only significant difference between the earlier dilution technique practiced in the Mwea Camps and that which Cowan outlined in the Cowan plan was that the latter was written for

[8] Loc. Cit paragraph 35
[9] Loc. Cit. paragraph 37.

> internal distribution. The Cowan Plan led directly to the deaths of 11 detainees at Hola in March 1959."

46. There is a major dispute of fact between the parties as to the involvement of British soldiers in the handling (and screening) of detainees in the camps. The dispute emerges from the following passage in Professor Elkins' second statement, paragraphs 22 to 24:

> "22. Participation of the British Army in Screening and Interrogation. The defendant's Skeleton Argument, paragraph 229, claims that there is no substantial evidence showing British army involvement in screening "other than in the most cursory inspection of passes and the like". It also suggests in paragraph 234 that there is no evidence to suggest that MIOs were attached to the camps. In addition, they deny that the British Army participated in the work of the MMIC or that MIOS and Special Branch jointly toured camps in order to screen and interrogate detainees.
>
> 23. In the brief time I have had to review the Hanslope Disclosure, the documents suggest that the defendant's claims as outlined in paragraph 229 and 234 are incorrect. I shall here refer to the witness statement of Dr. Huw Bennett who ably outlines the precise documents that, with the minimal of time, he has specifically identified that place the Army and its MIOs and FIAs in an active role in the screening of Mau Mau suspects and with an active role in the camps. It is important to note that this documentary evidence supports the extensive oral evidence from multiple sources that I collected over the course of my ten years of research. The witnesses I have interviewed, including former senior British colonial officers, gave testimony of the British Army actively participating in screening, or interrogation in screening centres, villages and detention camps.
>
> 24. In addition, I interviewed detainees who themselves spoke of the presence of "Johnnies" and "Ng'ombe" during their screening both within and outside of the detention camps, including the screening that took place in the MMIC. In effect, from the oral testimony from former detainees, as well as from some former British colonial officers, the "Johnnies" and "Ng'ombe" were part and parcel of the screening ordeals, both within and outside of the camps. " (Underlining in the original)

47. Of the "dilution" technique, Professor Elkins says this in her second statement (paragraphs 40-42), following access to some of the recently disclosed Hanslope papers:

> "The Dilution Technique
>
> 40. Baring and the Colonial Office made deliberate efforts to render the detention camp Pipeline more systematically brutal over time. This is evidenced by the systematic violence of the dilution technique, which culminated in the Cowan Plan, as evidenced in my first witness statement. The dilution technique as practised in the Mwea Camps was known to involve brutalities, as clearly noted by the Attorney General in a document that the Colonial Office files. This is also cited in my first witness statement.
>
> 41. The Kenya Government and the Colonial Office approved of the dilution technique, despite knowing that a detainee had been killed in Gathigiriri Camp as a result of the dilution technique. This death is cited in Defendant's Skeleton Statement, paragraph 269(g).
>
> 42. The recent Hanslope Disclosures provide an impressive array of documentation on the Mwea Camps, which outline clearly the consistent level of brutalities and crimes committed by British colonial officials using the dilution technique. These brutalities were committed after the death at Gathigiriri Camp and after the approval of the dilution technique by the Colonial Office. Given the limited time that I have had to review the Hanslope Disclosures, it is striking that the documents on the Mwea Camps and the dilution technique reveal a level of brutality that expands greatly upon my previous knowledge of gross irregularities in the camps."

I refer further to the document from the Attorney-General of Kenya later in this judgment.

48. All these matters are in dispute on the facts. As I have said, it is not possible to resolve that dispute simply on the documents that I have seen to date.

49. I turn to the legal issues.

(G) The Quark Case

50. Central to the defendant's case, based on the constitutional arrangements, is the decision of the House of Lords in *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529 (hereafter "*the Quark Case*", or simply "*Quark*"). It is useful to summarise the effect of that decision at this stage.

51. The claimant in the case was a company registered in the Falkland Islands which applied to the Director of Fisheries for South Georgia for a licence to fish in the waters of South Georgia and the South Sandwich Islands. It had been granted such licences in the four preceding seasons but its application on this occasion was refused. The Director's decision was quashed on application for judicial review made to the Chief Justice of South Georgia. However, a few days later the Secretary of State for

Foreign and Commonwealth Affairs issued a formal instruction to the Commissioner of South Georgia and the South Sandwich Islands ("SGSSI") to direct the Director to issue licences for the season in issue to two named vessels, but no other, i.e. excluding the claimant's vessel. The instruction was issued under section 4 of the South Georgia and South Sandwich Islands Order 1985 which provided as follows:

> "The Commissioner shall have such powers and duties as are conferred or imposed upon him by or under this Order to any other law and such other powers and duties as Her Majesty may from time to time be pleased to assign to him and, subject to the provisions of this Order and of any other law by which any such powers or duties are conferred or imposed, shall do and execute all things that belong to his office according to such instructions, if any, as Her Majesty may from time to time see fit to give him through a Secretary of State."

SGSSI is a British Overseas Territory, now constituted under the British Overseas Territories Act 2002, but its constitution is apparently still governed by the 1985 Order. The similarity of section 4 of the Order to Article 3 of the 1920 Letters Patent will be noted.

52. After issue of the instruction the claimants challenged its lawfulness on traditional public law grounds in the English courts. It also claimed damages against the Secretary of State for breach of article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The challenge to the lawfulness of the decision succeeded in the High Court and in the Court of Appeal on which there was no appeal to the House of Lords. However, the claim to damages was struck out both by the High Court and the Court of Appeal. It was that issue that was the subject to appeal to the House of Lords. Two issues arose. The first issue (called in the House of Lords "the anterior question") was whether the Secretary of State in giving his instruction was acting for the Sovereign in right of the United Kingdom (as the claimant argued) or in right of SGSSI (as the Secretary of State argued). The second issue was whether a claim lay against the Secretary of State under sections 6 and 7 of the Human Rights Act 1998 for breach of the First Protocol. At first instance the judge decided both questions adversely to the claimant. The Court of Appeal disagreed on the anterior question, holding that the instruction had been given by the Secretary of State on behalf of the Crown in right of the UK but that nonetheless no claim lay under the 1998 Act. The House of Lords (by a majority) allowed the Secretary of State's appeal and dismissed the claimant's cross-appeal.

53. It was recognised that in law the Crown is divisible: see *R v Secretary of State, ex p. Indian Association of Alberta* [1982] QB 892. The issue between the parties on the anterior question was by what test was the relevant capacity of the Crown to be ascertained. The government argued that the answer was to be found by identifying the system of government within which the particular exercise of the power takes place. The Queen, so the argument continued, was the source of authority in the state of SGSSI; while instructions might be communicated to the Commissioner by the Secretary of State he did so, in constitutional theory, as the mouthpiece and medium of the Queen. He passed the Queen's instructions as Queen of SGSSI; he was not acting as a minister of the UK Government. The claimant on the other hand argued

that the political and diplomatic reality was that the instruction was an exercise of power on behalf of HMG in the UK.

54. Lord Bingham of Cornhill (in the majority) said this:

> "Any constitution, whether of a state, a trade union, a college a club or other institution seeks to lay down and define, in greater or lesser detail, the main offices in which authority is vested and the powers which may be exercised (or not exercised) by the holders of those offices. Thus if a question arises on what authority or pursuant to what power an act is done, it is to the constitution that one would turn to find the answer. Here, it is plain that the Secretary of State for Foreign and Commonwealth Affairs of the United Kingdom has no power or authority under the constitution of SGSSI (the 1985 Order, as amended) to instruct the Commissioner. Such power and authority can be exercised only by the Queen, who in this context is (and is only) the Queen of SGSSI. It is my view correct in constitutional theory to regard the Secretary of State as her mouthpiece and medium. This analysis points, in my view strongly, to the correctness of the Secretary of State's submission, … ."

Having examined the earlier authorities Lord Bingham decided that they did not determine the argument one way or the other, but he considered that the cases assisted the Secretary of State's argument to the extent that they showed that the existence of the exercise of powers by a paramount government did not preclude the recognition of the acts of a subordinate government as acts of the Crown in right of that subordinate government; and, moreover, in none of the cases had it been found necessary to examine facts pertaining to the motivation of the paramount government. Lord Bingham noted that the Court of Appeal had decided this question in the claimant's favour observing that there was considerable reservation of powers under the 1985 Order to the Secretary of State. Lord Bingham continued:

> "… But this is not so. There is a considerable reservation of powers to Her Majesty, as Queen of SGSSI, but none to the Secretary of State. It went on to suggest, at para 50, borrowing the language of Laws LJ in Bancoult, that "it would be an abject surrender of substance to form to treat the instruction given by the Secretary of State on behalf of Her Majesty as one given in right of [SGSSI]". But I do not think the issue is properly to be regarded as a contest between substance and form: it turns on identifying the correct constitutional principle. While the court accepted (para 51) that the reason why a particular decision is taken cannot be determinative of the construction of the instruction, it held that the instruction had nevertheless to be construed in the context of a factual matrix which included the political and diplomatic context of the instruction. Here, there is no issue of construction. What is in issue is the constitutional standing of the instruction. The factual matrix might, I accept, be relevant if there were in a

> given territory no government, or no government worthy of the name, other than the United Kingdom government. There would be no government other than that of the United Kingdom Government on whose behalf an exercise of executive power could be made, no other government in right of which the Queen could act. But that is not this case. Here, there is nothing to displace the initial inference that the instruction was given by Her Majesty, through the Secretary of State, in right of the government of SGSSI."

55. Lord Hoffmann, taking a similar view to that of Lord Bingham, said this:

> "…The test for whether someone exercising statutory powers was exercising them as a United Kingdom public authority is in my opinion whether they were exercised under the law of the United Kingdom. In this case they were not. The acts of the Secretary of State in advising Her Majesty and communicating her instructions to the Commissioner had legal effect only by virtue of the Order, which is the constitution of SGSSI and not part of the law of the United Kingdom. The court is neither concerned nor equipped to decide in whose interests the act was done. …"

Lord Hope of Craighead's opinion is encapsulated in paragraphs 75, 76 and 79 of the speeches where he first said this in respect of the "substance versus form argument" that had commended itself to the Court of Appeal:

> "In my opinion this construction places too much weight on the references in section 5 and elsewhere in the 1985 Order to the Secretary of State and too little weight on the references to Her Majesty. And the conclusion that it led to overlooks the constitutional reality. It was the constitution of SGSSI that provided the vehicle for the instruction. And it was the constitution of SGSSI that established the legal framework within which the instruction was given and which required the Commission to give effect to it."

Lord Hope continued:

> "If one approaches the 1985 Order, as one should, as an instrument which sets out the constitution of SGSSI, the references that it makes to Her Majesty fall to be read as references to Her Majesty in the exercise of her rights as Head of State and Queen of the territory unless there is a clear indication to the contrary. As I have already said, that is the meaning that one would give to the first reference that is made to Her Majesty in section 5(1). I can see no good reason for altering the meaning of the phrase when she is referred to again in the same subsection or elsewhere in the 1985 Order just because the references on these occasions are to her giving instructions through a Secretary of State. These references

> reflect the constitutional reality that the government of SGSSI is subordinate to that of the United Kingdom. It is subject to instruction from time to time as to what it can and cannot do. But the constitutional reality is that, although the government of SGSSI is a subordinate government, it is nevertheless the government of the territory. The Secretary of State is not acting, when Her Majesty gives instructions under section 5(1), on behalf of her Majesty as Head of State of the United Kingdom. What he is doing is providing the vehicle by which, according to the constitution of SGSSI, instructions are given and other acts done by Her Majesty as its Head of State. "

Finally, His Lordship addressed the question of the motive with which the instruction had been given and said:

> "But there is an underlying and, as I see it, an irremediable flaw in the argument. The reasons of policy that led to the giving of the instruction, or the motives that lay behind it, are irrelevant. The question is simply in what capacity was the instruction given by Her Majesty. The constitutional machinery provides the answer to it. It was that machinery that was being used to give the instruction. So it was in right of her position as Head of State of SGSSI that it was given by Her Majesty."

56. Lord Nicholls of Birkenhead decided the case simply on the basis of the second question. As to the first question he said,

> "Far from being an anterior question, it is in this context an irrelevant question".

Lord Nicholls held that the claimant's damages claim failed simply because the instruction had not been incompatible with Article 1 of the First Protocol. He considered that if the instruction had been incompatible the capacity in which it had been given would not have afforded a defence. In his view the only real issue was whether or not a convention right had been breached: see paragraph 47 of the speeches.

57. While commenting upon the apparent lack of reality in adhering to a strict theory of the divisibility of the Crown in the context of that case, Baroness Hale of Richmond in the end decided the case on grounds similar to those of Lord Nicholls.

58. It will be necessary to consider and apply this case at various stages in considering some of the bases of claim in issue on the present application. However, it is essentially the defendant's case (subject to a limited exception)[10] that all that was done in Kenya and in London, by British politicians, diplomats, civil servants and soldiers, in the context of the present case, whether by way of instruction, formal or informal, or by giving advice, was done as part of the machinery and operation of the Colonial Government of Kenya, not as acts of the UK Government.

[10] See paragraphs 60 and 117-8 below.

59. Referring to the passage in Sir Kenneth Roberts-Wray's book (quoted above), and relying upon *Quark*, the defendant submitted in its written argument (paragraphs 80-82) as follows:

> "This last clause from Roberts-Wray should be clarified. The 'intervention' referred to occurs within rather than without the existing constitutional structures. Thus, the Governor is entitled to seek political direction from the SofS for the Colonies (and in relation to matters of high importance the latter by constitutional convention might well seek similar political direction from Cabinet colleagues, either formally or informally), or may receive such direction unsolicited. The present litigation is strewn with examples of such occurrences.
>
> The 'Secretary of State' referred to at page 339 of Roberts-Wray was, by constitutional convention, the SofS for the Colonies. Not merely did he act through the Kenyan Constitution, in constitutional terms he was exercising her Majesty's reserve powers under the Constitution. On House of Lords authority, the SofS for the Colonies was therefore discharging Her Majesty's governmental functions in right of the Colony.
>
> The basic point is this. We are looking here at a hierarchy of instructions/direction/advice emanating from London, with formal Royal Instructions at the top tier and informal advice from the SofS for Colonies at the bottom, with several degrees of formality in between. However, the essential constitutional principle remains the same: that the executive decision, whether made under instruction from London or not, is always the decision of the Governor acting on behalf of Her Majesty in right of Kenya; and, furthermore, that the instruction from London, in so far as it may cause that decision to be made, is also always given in right of Kenya (and in so far as it does not, it has no legal force)."

60. Nonetheless, the defendant did not go so far as to argue that this principle ruled out *any* possibility of legal liability on the part of the UK Government for what happened in Kenya during the time when the Colonial Government existed. It was accepted that such a liability might arise in certain circumstances. I return to this in section (J) of the judgment below: see in particular paragraphs 117 and 118.

61. The claimants submit that the defendant's argument reads far too much into the *Quark* decision. On their behalf Mr Hermer QC submitted (with happy reliance on the speech of Lord Bingham in *Quark* itself – paragraph 12, quoted above) that on all these questions one looks to the rules or constitution of the "club" (or Colony) in question. Where, therefore, a relevant instruction was given, under powers prescribed by the Kenyan constitution, then that instruction was given by Her Majesty in right of Kenya, but through the "mouthpiece" of the Secretary of State – see *Quark*. However, where the Secretary of State or the UK Government acted in any other respect in relation to Kenyan affairs, outside the four corners of the Kenyan constitution, each

acted as a UK minister and as the UK Government respectively, not on behalf Her Majesty in right of Kenya.

62. Mr Hermer submits that the alleged creation of the abusive system in the detention camps was the responsibility of the Colonial Administration, but with the knowledge and support of the UK Government as such, acting outside its functions and Her Majesty's functions reserved under the Kenyan constitution, for quite separate political reasons pertaining to the UK.

63. The *Quark* case is obviously binding on me and must be applied to its full logical extent. However, Mr Hermer submitted that the case was distinguishable in many respects in the manner in which the claimants' case is formulated. To these distinctions I will return more fully in due course in examining the various ways in which the claimants' case is put. Moreover, Mr Hermer argued, there should be no inclination on my part to apply the decision more extensively than its precise ratio, particularly as one of their Lordships party to the decision in *Quark* (Lord Hoffmann) appears to have retreated from his support for the decision made in that case. He did so having read the trenchant criticism of it in a paper by Professor Finnis to which I also was referred.

64. In *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2008] UKHL 61 at paragraphs 47-49 Lord Hoffmann said:

> "…But Her Majesty exercises her powers of prerogative legislation for a non-self-governing colony on the advice of her ministers in the United Kingdom and will act in the interests of her undivided realm, including both the United Kingdom and the colony: see *Halsbury's Laws of England*, 4th ed reissue, vol 6, para 716:
>
> > "The United Kingdom and its dependent territories within Her Majesty's dominions form one realm having one undivided Crown … To the extent that a dependency has responsible government, the Crown's representative in the dependency acts on the advice of local ministers responsible to the local legislature, but in respect of any dependency of the United Kingdom (that is, of any British overseas territory) acts of Her Majesty herself are performed only on the advice of the United Kingdom Government."
>
> Having read Professor Finnis's paper, I am inclined to think that the reason which I gave for dismissing the cross-appeal in *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529, 551 was rather better than the reason I gave for allowing the Crown's appeal and that on this latter point Lord Nicholls of Birkenhead was right.
>
> Her Majesty in Council is therefore entitled to legislate for a colony in the interests of the United Kingdom. No doubt she is also required to take into account the interests of the colony (in the absence of any previous case of judicial review of

> prerogative colonial legislation, there is of course no authority on the point) but there seems to me no doubt that in the event of a conflict of interest, she is entitled, on the advice of Her United Kingdom ministers, to prefer the interests of the United Kingdom."

In his paper Professor Finnis notes (plaintively) that the passage from *Halsbury* cited here by Lord Hoffmann had been specifically approved by Sir Robert Megarry V-C in *Tito v Waddell (No 2)* [1977] Ch 106, at 231 and 306 and in the *Indian Association of Alberta* case [1982] QB 892, 921-2, each of which had been cited in *Quark* without reference to these passages[11]. All this, however (as the late Walton J would doubtless have said) is "*nihil ad rem*", since *Quark* is binding on me.

65. I believe the time has come to address the five specific formulations of the claimants' case. I will deal with them in the order (1), (4), (2), (3) and (5). I take (1) and (4) first (devolution/transfer of the claims on independence and the 1957 "instruction") because no substantial issue of fact arises upon them.

(H) (1) Transfer of liabilities of the Colonial Government on independence

66. It is common ground between the parties that, in principle, the claimants would have had a viable cause of action in Kenyan law against Her Majesty's Government in right of Kenya which could have been pursued by them at the relevant time through the Kenyan courts.

67. Just as the Crown Proceedings Act 1948 provided for claims to be brought against the Crown in the English courts, similar provision was made in Kenya by the Crown Proceedings Ordinance 1956. Section 4(1) of that Ordinance provided as follows:

> "Subject to the provisions of this Ordinance, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject-
>
> a) in respect of torts committed by its servants or agents;
>
> b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and
>
> c) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property:
>
> Provided that no proceedings shall lie against the Crown by virtue of paragraph *(a)* of this sub-section in respect of any act or omission of a servant or agent of the Crown, unless the act or omission would, apart from the provisions of this Ordinance, have given rise to a cause of action in tort against that servant or agent or his estate."

[11] See p. 11 of the paper, D5/80/1905 of the hearing bundles.

Section 34(1) of the Ordinance was in these terms: [12]

> "(1) Nothing in this Ordinance shall apply to proceedings by or against, or authorise proceedings in tort to be brought against, Her Majesty in Her private capacity.
>
> (2) Except as therein otherwise expressly provided, nothing in this Ordinance shall- …
>
> …b) authorise proceedings to be taken against the Crown under or in accordance with this Ordinance in respect of any alleged liability of the Crown arising otherwise than in respect of Her Majesty's Government in the Colony, or affect proceedings against the Crown in respect of any such alleged liability as aforesaid; …"

68. Therefore, prior to independence claims could have been brought by these claimants against the Kenyan Colonial Government in the Kenyan courts in respect of torts committed by employees of that government. The practice was to bring proceedings against the government in the name of the Attorney-General: see section 12 of the 1956 Ordinance.

69. In the period leading up to independence the constitutional arrangements for Kenya underwent a number of changes. The 1958 Order in Council preserved the status of existing laws (including, therefore, the Crown Proceedings Ordinance): see section 73. As noted earlier, the 1958 Order in Council in turn was largely replaced by the Kenya Order in Council 1963, but that too preserved existing laws: see section 4. This 1963 Order came into force in the spring of 1963 (some on 19 April 1963 and others on 1 June 1963) and so, in the half year up to independence, the position would have remained that any claims in tort against the Kenyan government, or Her Majesty in right of Kenya, were brought under the 1956 Ordinance with the Attorney-General named as defendant.

70. In the defendant's submission, through Mr Jay QC, as a matter of English law the tortious liabilities of the Colonial Government passed by "seamless transmission", rather than by transfer, first to the new independent monarchy in December 1963 and remained with the independent state when it became a republic in December 1964.

71. I was told that in cases where former colonies retained Her Majesty as head of state on independence it was standard practice to make no reference to transfer of such liabilities, but for an express transfer to be made in cases where the colony concerned became a republic. I was told that there was no mention of liabilities of the colonial governments in the instruments effecting the grant of independence to other colonies that retained the Queen as head of state. However, in cases where the new state became a republic an express transfer of rights and liabilities sometimes was provided in the independence Order in Council. This practice is referred to in Hendry & Dickson's *British Overseas Territories Law* (2011) p. 284:

[12] C.f. CPA 1948 ss. 2(1) and 40(2)(b).

> "Where a territory became a republic on independence, the independence Order in Council transferred to the republic the property assets, and the rights liabilities and obligations under the law of the territory, of the Crown in right of the government of the territory; this was not necessary where the territory continued under the Crown after independence".

A footnote adds:

> "Contrast eg Kiribati Independence Order 1979 (SI 1979/719), ss 9 and 10, with Solomon Islands Independence Order 1978, which includes no such provisions. Kiribati became a republic on independence, whereas Solomon Islands retained Her Majesty as Head of State".

72. I was shown in this respect the Order in Council conferring independence on Malawi and Zambia where no express provision was made for the rights and liabilities of the old government. However, I also have in the bundles statutes of the independent Kenya and Malawi setting up new republican constitutions after the initial grant of independence. In each case, an Act, passed shortly after independence had been granted, made provision for some or all liabilities of Her Majesty in respect of the government of the state to be liabilities of the new government. In the case of Kenya, section 26 of the Constitution of Kenya (Amendment) Act 1964 provided this:[13]

> "(1) All rights, liabilities and obligations of-
>
> a) Her Majesty in respect of the Government of Kenya;
>
> and
>
> b) the Governor-General or any public officer in respect of the Government of Kenya on behalf of that Government; and
>
> c) the Government of Kenya
>
> shall on and after 12th December 1964 be rights, liabilities and obligations of the Government of the republic of Kenya.
>
> (2) In this section, rights, liabilities and obligations include rights, liabilities and obligations arising from contract or otherwise (other than any rights referred to in section 25 of this Act.)"

The Kiribati Independence Order 1979 s.10 provided this:

> "(1) All rights, liabilities and obligations of-
>
> a) Her Majesty in respect of the Government of the Gilbert Islands; and

[13] See to similar effect s.12 of the Republic of Malawi (Constitution) Act 1966.

> b) the Governor of the Gilbert Islands or the holder of any other office under the Crown in respect of the government of the Gilbert Islands on behalf of that Government, shall, as from Independence Day, be rights, liabilities and obligations of the Republic and, subject to the provisions of any law, shall be enforceable by or against the republic accordingly.
>
> (2) In this section, rights, liabilities and obligations include rights, liabilities and obligations arising from contract or otherwise (other than any rights referred to in the preceding section and any rights, liabilities or obligations of Her Majesty arising under any treaty, convention or agreement with another country or with any international organisation."

73. However, section 26 of the Kenyan Act of 1964 appears in a series of sections introduced by a heading *"Land, Property and Contracts"*. The expert witness on Kenyan law instructed by the claimants, Professor Githu Muigai of the University of Nairobi, is of the opinion that this section does not operate by that law to clothe the government of the Republic of Kenya with the liabilities in tort of the British Colonial Administration.

74. He takes two main points. First, he points out that, under Kenyan law, marginal notes to statutes must be taken into account for the purposes of interpreting the statute: see *Estate of Shamji Visram and Kurji Kassan v Bhatt & ors.* [1965] EA 789, 794 (Court of Appeal at Nairobi). Therefore, he argues, making allowance for the heading for this group of sections, any liabilities transferred exclude liability in tort, even though the wording of the section itself is quite general with regard to liabilities. Secondly, in his opinion, the reference in section 26 to "liabilities of Her Majesty in respect of the Government of Kenya" can only refer to the liabilities of Her Majesty as Head of State of the independent government of Kenya after December 1963. He argues that liabilities (and, one might have thought, rights) not expressly transferred by the Independence Act or other instruments would only have been assumed by the Republic under express statutory language. However, Professor Muigai goes on to say,

> "The rights, liabilities and obligations of the colonial government before 12th December 1963 remained intact not having been transferred from the Colonial Administration to the dominion Government or assumed by the Government of the Republic of Kenya. There can be no logical or legal reason for the independent government to assume liabilities not otherwise imposed by the 1963 Act."

75. Obviously, I am in no position to gainsay the presently unchallenged opinion of a distinguished Kenyan lawyer on a matter of Kenyan law. However, that does not resolve the matter for the purposes of English law.

76. It is obvious, of course, that no thought was given to the potential governmental liability for mistreatment of persons such as the claimants in the circumstances alleged in this case. However, some thought must have been given to questions of Government liability for torts generally. For example, what was to happen to any

potential liability for government servants in respect of everyday road traffic accidents, negligent damage to property or claims in nuisance against the government as a landowner? The fate of the present liabilities ought in principle to be no different.

77. In my judgment, it must have been the understanding, as Mr Jay submits, that under English law such liabilities (and rights, e.g. debts owed to the Colonial Government) passed "seamlessly" to the new independent government in December 1963 to be enforced by and against it as previously by and against the Colonial Government. The principle was simply that a new independent government should take over from the old colonial one, with the minimum necessary disruption to the functions, rights and responsibilities of the institution of government, whatever its status.

78. As Mr Jay submitted, after 12 December 1963, the government still remained (in the eyes of English law) Her Majesty in right of Kenya, the only difference lay in the source of the advice taken by the Crown (through the Governor-General) in exercising Crown functions: the advice thereafter came from Kenyan ministers alone to the exclusion of British ministers. Kenyan liabilities (and rights) remained Kenyan liabilities (and rights); British liabilities (and rights) were British liabilities (and rights). This was reflected by section 40(2) of the Crown Proceedings Act 1948 and section 34(2) of the Kenyan Crown Proceedings Ordinance, both of which remained in force in the respective jurisdictions. What happened in Kenya thereafter was a matter for the Kenyan parliament with which HM Government in the UK was not concerned. It would have been open to that parliament, for example, to enact legislation to prevent the Kenyan government being sued in the Kenyan courts in respect of such pre-December 1963 government liabilities as it chose. The remedy lay in the hands of an independent Kenya – a result which is hardly repugnant to the concept of a free and independent state.

79. Thus far, it seems to me, that the liability for present claims (in so far as available against the Colonial Government) would have passed to/remained with the new independent monarchy in December 1963. It was a matter for the Kenyan parliament to decide whether it wished to exclude such claims by separate legislation thereafter.

80. This analysis is consistent with the short passage from Hendry & Dickson's work (supra). However, Mr Hermer advanced a further argument based upon the tenets of public international law as he submitted it to be. Discouragingly for a judge at first instance, the claimants' skeleton argument states:

> "The Court's task in assessing this issue is a difficult one because whilst the answer is to be found in the common law, common law has never previously been asked to address this question. The Court is in uncharted territory".

I turn to this question now, although there remains an issue of limitation under Kenyan law, as the matter stood with regard to these claims in 1963, to which I return below.

81. The claimants' submissions are best expressed in the words of their counsel in the written argument as follows:

> "a. Neither the Kenya Independence Act 1963, nor any other UK statute or instrument, addresses the question of the succession of liabilities of the Colonial Administration for assaults against the Claimants. The question must therefore be resolved under the Common Law.
>
> b. A source of the common law is customary international law, including principles on state succession.
>
> c. In accordance with the principles of customary international law, private rights enjoyed by the local population are to be preserved as far as possible in all cases of state succession.
>
> d. In accordance with the principles of customary international law relating to the creation of a new state in the context of decolonisation (the successor state), a liability of the colonial administration of the predecessor state in respect of tortious acts committed against the native population devolves to the predecessor state upon independence. Therefore, under the common law, the liability to compensate the Claimants for injuries inflicted by the Colonial Administration of the Crown in right of Kenya devolved to the Crown in right of the United Kingdom upon the independence of Kenya.
>
> e. This conclusion is supported by the principle that English law should be interpreted as far as possible to ensure that the United Kingdom is not in breach of an international obligation. If the liability to compensate the Claimants for injuries inflicted by the Colonial Administration of the Crown in right of Kenya were not to devolve to the Crown in right of the United Kingdom upon the independence of Kenya, then the United Kingdom would have committed a breach of the European Convention on Human Rights and a breach of its obligations in customary international law.
>
> f. By virtue of the foregoing, the Claimants are entitled to pursue claims for damages in tort against the Crown in right of the united Kingdom pursuant to section 2 of the 1947 Act, and the exception in section 40 (2) (b), read consistently with the principle of legality, does not apply because the "*alleged liability of the Crown"* arises "*in respect of His Majesty's Government in the United Kingdom*." "

82. The first submission, that the matter is to be resolved by the common law, is said by the claimants to be a matter of agreement between the parties. As I have endeavoured to explain, I do not think that that is so. Mr Jay's submission, which I have held to be correct, is that the matter is properly covered by the true construction and effect of the independence instruments. For practical purposes, that is the end of the submission based upon customary international law, because the matter is resolved on the true construction and effect of the statutes. As Lord Denning MR said in *Trendtex Trading Corp. v Central Bank of Nigeria* [1977] QB 529, 557-8,

> "…the rules of international law are incorporated into English law automatically and considered to be part of English law *unless they are in conflict with an Act of Parliament*". (Emphasis added)

83. In this case, there was no express transfer of rights and liabilities to the new Kenyan state by the Independence Act. However, the mechanism of the Act and related instruments was to leave the rights and liabilities of the old Kenyan administration with the new Kenyan administration. As I have said, it was for the independent Kenya to determine the extent to which it wished to exclude its government from such liabilities before its own courts for the future.

84. Mr Jay's submission is also, in my view, consistent with the examples of British state practice set out in paragraph 119 of the claimants' skeleton argument, in so far as these are concerned at all with liabilities arising under the domestic law of the newly conquered territory (which the defendant does not accept – see p.6 of the claimants' counsels' speaking note on this subject (13 April 2011)). In paragraph 119 of their paper, counsel for the claimants point to three examples where the UK was a "new state" power in three overseas territories: Burma (1885); The Boer Republics (1900); and the Transvaal (1915). In each case, the UK Government disclaimed responsibility for the liabilities of the old state. The following passage is cited from a Law Officers' Opinion in these terms:

> " [i]t has never been laid down that the conquering State takes over liabilities for wrongs which have been committed by the Government of the conquered country and any such contention appears to us to be unsound in principle."

85. In those cases, there was no "seamless transmission" of functions from one government to another by legislation, with preservation of existing laws (including a Crown Proceedings Act). The new government could disclaim any previous liability at will. The position is no different when the matter is left to the wishes of a new independent legislature to assume or renounce liabilities of the old government as it chooses.

86. If that is wrong, it is necessary to address the remaining paragraphs of the claimants' submission set out above. The claimants' points b and c (paragraph 81 above) are amplified in the written argument, but the points there made are uncontroversial and no more needs to be said about them here, save in respect of one small point. When one looks at paragraphs 134 and 135 of that argument, it seems clear that all point c is concerned with is the survival of private law rights under the *domestic* law of the territory upon the succession of a new state. Paragraph 4 of the Kenya Independence Order in Council (supra – preservation of existing laws) is cited. This is not in dispute and indeed, as seen above, plays an important part in the *defendant's* argument on this issue. The battleground between the parties in international law is on points d and e.

87. It is generally accepted that the sources of public international law are those appearing in Article 38 of the Statute of the International Court of Justice which states:

> "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

(See also Halsbury's Laws of England 5th Edn. Vol. 61 paragraphs 2 - 9.) To establish a rule of customary international law (such as that for which the claimant contends) it needs to be shown that the relevant state practice is "both extensive and virtually uniform" (*North Sea Continental Shelf Cases*, (1969) ICJ Reports p.3, 44 paragraphs 74 and 77.)

88. In developing their submissions on these points, the claimants rely upon three strands of authority. First, reference is made to the Vienna Conventions on Succession of States in Respect of Treaties (1978) and on Succession of States in respect of State Property, Archives and Debts (1983). Secondly, they refer to decisions such as *Robert E Brown (United States) v Great Britain* (US – GB Arbitral Commission, 23.11.23) and *FH Redward & ors (Great Britain) v United States* (same commission, 10.11.25). Thirdly, they rely upon decisions in the French, German and Dutch courts arising out of the pre-independence actions of the pre-existing colonial governments in Algeria, Tanganyika (Tanzania) and Indonesia.

89. With regard to the first of these categories I accept the defendant's submission that it really takes the matter nowhere as it clearly deals with the succession of states in respect of obligations assumed to other states. It has nothing to do with liability of a newly independent state under municipal law for torts of a previous government committed on private individuals. Equally, the second category is unhelpful as it deals with claims between the *governments/states* of the United States and the United Kingdom respectively on the international plane. We are concerned with claims by private individuals, against one or more governments, on one or more domestic planes.

90. The third category of materials is more promising from the claimants' point of view, in my judgment. Here we are concerned with decisions of domestic courts on claims made by private individuals or entities against former colonial powers. The claimants rely on these cases for the following proposition:

> "In the context of decolonialisation it has been accepted by predecessor states that liabilities for tortious acts of their colonial administrations in respect of the suppression of an

> insurrectional movement should be opposable to the predecessor state upon independence".

91. The claimants rely upon a statement of the French Ministry of Foreign Affairs of 20 March 1962, cited in paragraph 145 of its written argument[14] and the following passage from an article by R. Pinto in the *Journal du Droit International* (1976) Vol2, p. 389, making the same point:

> "First of all, this country's (Algeria's) accession to independence was preceded by a prolonged conflict during which a certain number of measures were taken by the French government in order, specifically, to prevent such accession to independence. It could not be envisaged, regardless of what the two countries' relationship might be in the future, that the Algerian authorities would agree to take over the obligations contracted in this way by the French state. Consequently, it is normal to consider that the litigation arising out of these measures, taken in order to quell the insurgency movements, does not involve the Algerian state pursuant to the Protocol. This is in line with a distinction made long ago by international law theorists who, whilst they accept that the successor State must take over part of its predecessor's liabilities, always exclude debts known as war or regime debts, that is to say debts that were incurred in order to prevent annexation or to oppose emancipation."

92. The distinction drawn is illustrated by the following from the decision of the French Conseil d'Etat in *Institut des Vins de Consommation Courante v Chabane* (1966) 47 ILR 94:

> "[T]he totality of the rights and duties contracted by France on behalf of Algeria was transferred to the Algerian State on the date of its accession to independence. Thus, all the acts which, whoever may have been their authors, had been performed by the French authorities in the exercise of the powers which have now devolved upon the Algerian authorities, must be regarded as coming, at the date of independence, within the legal order of the new State. In cases of *exces de pouvoir*, actions brought against such acts concern the Algerian state and do not, therefore, fall within the competence of the tribunals of the French state. In so far as concerns contentious litigation regarding, in particular, claims for payment of sums a right to which is conferred by the legislation and regulations in application of which acts of the above-defined nature were performed, and claims for the reparation of loss due to faults committed by the authorities which took the action, the totality of the duties which, under these various heads, would have fallen on France on behalf of Algeria was transferred to Algeria

[14] I refrain from quoting it because of my own word-processing difficulty in transposing the accents used in the French text into this judgment.

> on the day of its independence. Therefore actions regarding disputes in this second category must similarly be regarded as concerning the Algerian State and as having, in consequence, ceased to pertain to the jurisdiction of the French tribunals. However, the application of these general rules of interpretation would not have the effect of involving the transmission to the Algerian authorities of actions concerning either the measures taken especially and directly with the aim of checking any insurrectionary movements or acts which, by their nature and in particular because they concern public services which remain French or agents belonging to the French public service or seconded to it, produce their final effects within the French legal order."

93. Again, however, I think that there is force in the defendant's submission that the French cases (to which I was not taken individually or in any detail) seem to have turned upon the agreements known as the Evian Accords and Protocols and were, in effect, decisions on specific treaties made on the creation of the independent Algeria. It is argued that this series of cases cannot, therefore, simply be transposed onto the circumstances of the Mau Mau uprising and the subsequent independence of Kenya.

94. Nor was I taken to the German cases. However, the defendant submitted, and was not contradicted, that the liability of the UK Government in respect of liabilities of the previous government of Tanganyika that was sought to be established in those cases was specifically excluded by the Treaty of Versailles. The second case, I am told, concerned a liability for war debts of the German administration in the same territory contracted during the First World War.

95. I do not intend to delve further into these cases which, as I say, were not explored in any detail. I agree with the defendant, however, that the claimants have not been able to establish with any clarity a sufficiently "extensive and virtually uniform" rule of customary international law to constitute it as the basis of a claim under the common law of England.

96. The problem with the claimants' argument is illustrated by a number of passages from the writings of distinguished jurists on international law which are cited in the defendant's counsels' speaking note. One example suffices. Professor D.P. O'Connell writes in *State Succession in Municipal Law and International Law,* (1967) Vol. 1 Chapter 19 p. 482:

> "It has been taken for granted that a successor State is not liable for the delicts of its predecessor, but what remains unclear is whether the reference is to international delicts giving rise to State responsibility, or to torts in municipal law. Although a tort in municipal law may constitute an international delict, this is not necessarily the case; conversely, an international delict may not amount to municipal law tort. The failure to characterize the event properly has produced a defective jurisprudence on the part of international and municipal tribunals which have pronounced upon the effect of State succession upon international responsibility."

97. I must turn finally to the "quirk" of the Kenyan law of limitation (briefly mentioned in paragraph [80] above) which arises in the context of this first formulation of the claimants' case.

98. Section 2 of the Kenyan statute known as the Public Officers Protection Ordinance provided for a 6 month limitation period for claims against persons for acts done,

> "…in pursuance or execution or intended execution of…any public duty or authority, or in respect of any alleged neglect or default in the execution of any such…duty or authority…".

So, the argument ran, these claims were already statute barred in Kenya at the date of independence and would not have survived so as to pass to either the new government of Kenya or (*a fortiori*) to the UK Government.

99. In *A-G v Hayter* [1958] EA 303, the Court of Appeal at Nairobi held that the Crown was entitled to rely upon the same limitation period as would have been available to the officer in respect of whose tortious act the claim had been brought. Mr Jay submitted that, while the reasoning of the Court of Appeal in that case was susceptible to criticism, it was decisive, for the purposes of Kenyan law, in deciding that the liability was "negatived" on expiry of the limitation period: see per Forbes JA, giving the judgment of the court, at p. 396. Mr Hermer submitted that the limitation period was merely procedural and did not extinguish the substantive right of action.

100. In my judgment, in view of my conclusions as to the transmission of claims in tort against the Crown upon independence, it is not necessary to decide the effect of the *Hayter* case upon the present claims and I do not do so.

101. However, I hold that the claimants' case, so far as founded upon formulation (1) must fail, whether considered in the context of CPR Part 3 or Part 24. The relevant paragraphs of the Particulars of Claim will be struck out and I refuse permission to re-introduce them under any amendment.

102. I do not think that this part of the claim falls within the point made by Lord Hope of Craighead in *Three Rivers DC v Bank of England (No. 3)* [2003] 2 AC 1, as it simply raises distinct points of law which do not turn upon any substantial expenditure of money on examining factual and legal issues that inter-relate with other heads of claim. As will appear below, I do not intend to strike out certain of the other formulations of the claims or to enter summary judgment in the defendant's favour on them. The facts, however found at trial, will not, as I perceive the matter, affect the viability or otherwise of this head of claim. The issue would remain open to the claimants on any subsequent appeal, subject to the issue of permission to appeal which I would propose to adjourn generally.

(I) (4) The July 1957 "Instruction"

103. The core of the claimants' allegation in this respect appears at paragraph 36 of the proposed amended Particulars of Claim as follows:

> "…the Claimants (and in particular the Third Claimant) reserve their position to argue[15] that the Government of the United Kingdom is liable for the assaults perpetrated as a result of the application of the dilution technique on or after 16 July 1957. On or after that date all such assaults and in particular the Hola incident took place pursuant to the instruction issued by the Secretary of State for the Commonwealth [sic Colonies] in the circumstances particularised at paragraphs 15-19 above authorising the use of overwhelming force to punish recalcitrant detainees during the dilution process. Such force as was authorised included repeated beatings of detainees, on occasion to unconsciousness, knocking detainees to the ground and forcing sand into their mouths".

A copy of that part of the pleading containing paragraphs 15 to 19, as referred to here, is annexed as Appendix A to this judgment. A set of copy documents upon which the claim is based appears as Appendix B.

104. In their skeleton argument for the applications the claimants accepted that *Quark* presented an insurmountable obstacle to this basis of claim and accepted that it should be struck out. It was maintained, however, that there was a compelling ground for granting permission to appeal on the point because of the significant academic criticism of the *Quark* decision and the apparent change of heart on the part of Lord Hoffmann manifested in the *Bancoult* case (supra).

105. This concession was made, as I understood it, on the basis that the approval of the Secretary of State for the course of action canvassed in the documents, copies of which are in Appendix B, amounted to an "instruction" within the meaning of Article 3 of the 1920 Letters Patent, giving it the same status as the instruction issued by the Secretary of State to the Commissioner of SGSSI in the *Quark* case. However, in the course of his submissions on Friday, 8 April 2011, Mr Jay for the defendant said that it was factually incorrect to regard what happened in July 1957 as an "instruction" under the Kenyan Colonial constitution at all; the Secretary of State merely authorised or approved the course of action proposed. He submitted that this made no difference because, under the *Quark* principle, the greater included the lesser (I paraphrase); a formal instruction led to action by the Kenyan executive on behalf of Her Majesty in right of Kenya and the same was also true of any lesser approval, authorisation, advice or however else one characterised the communication from the Secretary of State to the Governor. What was done subsequently, Mr. Jay argued, was done by Her Majesty in right of Kenya.

106. Mr Hermer seized upon this argument to submit that, if what happened in July 1957 was not an "instruction" under the Letters Patent after all, it did not fall within the framework of the Kenyan constitution and the rule in *Quark* did not apply; the action of the Secretary of State was an action of the UK Government.

107. It seems to me that, while the instruction given to the Commissioner in the *Quark* case was contained in a formal legal document, neither the SGSSI Order nor the 1920

[15] There is then the footnote: "Currently, it is not open to the Claimants to argue this basis of claim in view of the House of Lords decision in [*Quark*]".

Letters Patent for Kenya required such formality in order to be covered by the relevant paragraphs of those instruments. The one refers to "instructions, if any, as Her Majesty may from time to time see fit to give…through a Secretary of State"; the other speaks of "such instructions as may from time to time be given…by Us through one of Our principal Secretaries of State". An instruction properly so called, however transmitted, is therefore within "the *Quark* principle".

108. Pointing to the document in Bundle C1 Volume 3 Tab 165 p. 995 (appendix B p. 24) the claimants say that the telegram from the Secretary of State containing the message "for Turnbull from Baring", approving the course proposed in the earlier paper, constituted the Secretary of State's "authorisation" of the proposals. This was not, as is now common ground, an "instruction" and the claimants argue it was not within Article 3 of the Letters Patent nor, therefore, within the "*Quark* principle" at all.

109. In view of my decision on the remaining aspects of the claim, it perhaps matters not what view I take of this fine distinction and, in view of the uncertainty, I would not strike out this formulation anyway, but it is I think my responsibility to indicate so far as necessary where my decision on the point falls.

110. One has a choice. One can hold that every communication (whatever it is called) between the Secretary of State and a Colonial administration is always part and parcel of the actions of Her Majesty in right of the colony. Alternatively, one can take the narrow view that one simply looks at the "rules of the club" as written down in the constitutional instruments and decides whether the action is within the four corners of the wording. If it is, then the act is "in right of the colony". If not, then the act is "in right of the UK".

111. After some hesitation, I favour the latter approach which seems to me to be consistent with paragraph 12 of Lord Bingham's speech in *Quark* (see above). It is submitted by the claimants that this was not an "instruction" at all. No power is reserved to the Sovereign under article 3 of the Letters Patent to issue "approvals" or "authorisations" of actions of the Governor. Under such constitutions as these the Sovereign has power to "instruct" in exercise of the reserve power of the paramount authority, but short of that the colonial government has authority to act within the four corners of the powers conferred upon it. It may choose to consult, to seek advice from any quarter that it might wish, including the government in the UK. It might also find it desirable in practice to seek approval of certain steps from the government, advising the Sovereign who had power to give formal instructions, power to remove the Governor and (if thought fit) to revoke the constitution entirely. However, (while making no final decision on the point) short of an act under the constitution, it seems to me that the Secretary of State acted as one of Her Majesty's Ministers in the United Kingdom.

112. As I say, I do not consider that my view on this matter matters significantly in the context of these applications as a whole, because it seems to me that the series of documents in Appendix B remain important in the factual context of the other formulations of the claims and they will have to be reviewed there in any event. If my hesitant conclusion as to their status in the context of the *Quark* principle is wrong, it can be corrected at that stage after a full review of the facts.

(J) (2) and (3) Liability of the UK Government for "having encouraged, procured acquiesced in or otherwise having been complicit in "a tortious system": (a) through "the British Army"; (b) through the Colonial Office

113. The torts alleged by the claimants are ones of trespass to the person, i.e. assault and battery. There is no doubt that on the facts alleged in the Particulars of Claim the claimants were subject to unlawful assaults and batteries. The relevant torts were described by Lord Denning MR in *Letang v Cooper* [1965] QB 232, 239 as follows:

> "If one man intentionally applies force directly to another, the [claimant] has a cause of action for assault and battery, or if you so please to describe it, in trespass to the person…"

He went on to say,

> "…If he does not inflict injury intentionally but only unintentionally, the [claimant] has no cause of action today in trespass. His only cause of action is in negligence, and then only on proof of want of reasonable care."

114. The defendant submits that the claimants are unable to demonstrate any arguable case of the intentional infliction of unlawful force upon these claimants by anyone for whom the UK Government was responsible. Negligence alone is possible on the facts, but precluded by the absence of any duty of care (infra). It is argued that the perpetrators were (as they are alleged in the draft amended Particulars of Claim to have been) "employees and agents of the British Colonial Administration in Kenya": see paragraph 1 of the draft pleading. Thus, there was no liability on the part of the UK Government for the assaults for which only the actual perpetrators and their employers, the Kenyan government were liable.

115. The claimants rely upon the principles of joint liability for torts. For present purposes these are summarised in a short passage in the leading text book as follows:

> "…concerted action is required. Where one person instigates another to commit a tort they are joint tortfeasors; so are persons whose respective shares in the commission of a tort are done in furtherance of a common design…".[16]

In *Petrie v Lamont* (1842) Car. Marsh. 93, 96 Tindal CJ said,

> "All persons in trespass who aid, counsel, direct or join, are joint trespassers".

Somewhat fuller is that statement of Sargant LJ in *The Koursk* [1924] P 124, 159 to this effect:

> "The definition of joint tortfeasors in Clerk and Lindsell on Torts, 7th ed., pp. 59, 60, is as follows: "Persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design. 'All

[16] Clerk & Lindsell on Torts 20th Ed. (2010) paragraph 4-04 p. 274.

> persons in trespass who aid or counsel, direct, or join, are joint trespassers.' If one person employs another to commit a tort on his behalf, the principal and the agent are joint tortfeasors, and recovery of judgment against the principal is a bar to an action against the agent. But mere similarity of design on the part of independent actors, causing independent damage, is not enough; there must be concerted action towards a common end." And the discussion in Salmond on torts, 5th ed., p. 84, is to much the same effect. Stress is laid there on the feature that there must be responsibility for the same action, the imputation by the law of the commission of the same wrongful act to two or more persons at once. The examples given are under three heads: agency, vicarious liability and common action."

116. The claimants submit that the facts alleged in paragraph 34 of the draft amended pleading, if established at trial, would permit the court to draw the inference of instigation by the UK Government of the system that led to the specific torts committed on the claimants, through the Army and the Colonial Office, because there was a "common design to commit torture".[17] I attach a copy of paragraph 34 of the draft pleading as Appendix C.

117. The defendant's skeleton argument recognised that if there was such a system of torture, as the claimants alleged, then liability on the part of the UK Government in certain circumstances could follow. Paragraph 39 of that document was in the following terms:[18]

> "In order to succeed on this formulation, the Claimants – having carefully defined the 'system' in which the 'British Army' allegedly participated – would need to demonstrate that:-
>
> (i) Their revised pleaded case raises a cause of action with a real prospect of success.
>
> (ii) The 'British army' did participate in the creation of such a system and/or performed acts which were both necessary and sufficient to amount to the creation of a 'system'.
>
> (iii) The 'British Army' and the Colonial Administration, acting through their servants or agents, were pursuing a common object or goal in creating the posited 'system', namely

[17] I noted Mr Hermer's oral submission made in afternoon of Monday, 11 April 2011 as follows: "We say in fact there was a common design to commit torture".

[18] Footnote 12 on pages 15-16 of the skeleton argument said: "A useful historical parallel which illustrates the point would be the products of the policy directives of the Wannsee Conference held on 20th January 1942. It is not suggested that the Claimants need to prove atrocities on this level and scale, unparalleled in history, but it is submitted the "system" case does require proof of far more than violence that was widespread and frequent". I agree that the parallel is useful. There could surely be little doubt that the prime movers at the 1942 conference would have been personally liable to their victims, for systematic torture, under an English law of tort. I must admit to personal surprise and regret, wherever legal liability may lie, that one reads about what happened in this British Colony so soon after the lessons of that historical parallel ought to have been well learnt.

> a 'system' whose essential feature was the infliction of violence.
>
> (iv) The perpetration of assaults of this nature was an integral and necessary part of the posited 'system', in the sense of flowing directly from statements of policy or decisions made by colonial Administration, which statements or decisions were themselves tortious (the tort would be complete as soon as damage was caused, and not before).
>
> (v) The 'British Army' had a direct participation in (iii) above, in the sense of sharing in the making of such policies or decisions.
>
> (vi) The 'British Army' was acting in right of the UK in participating in the creation of such a 'system'.
>
> (vii) The existence of a direct casual link between the posited 'system' and the individual acts of assault perpetrated on the Claimants."

118. In his oral submissions, Mr Jay made a similar acknowledgement of a potential liability in such circumstances, but he argued that to succeed on this part of the claim the claimants would have to identify individuals who they could say procured the commission of the torts. He said that the only individual identified was General Erskine; if there was evidence that he participated in the issue of a policy which procured the torts we have, he acknowledged, the makings of joint liability. He argued, however, that "given what happened in the camps was not his [General Erskine's] responsibility, there is no basis for drawing the inference". Nonetheless, these concessions of potential liability demonstrate that the most extreme view of the extent of the *Quark* principle (i.e. that nothing done by the British government in respect of colonial Kenya could be other than an act of Her Majesty in right of Kenya[19]) was not argued before me.

119. For their part, the claimants argue that, on the evidence, what happened in the camps was very much General Erskine's responsibility – and the responsibility of the War Office in London. The general was in overall command of all relevant security forces and directly responsible for that command to London.

120. It is here, of course, that one comes up immediately against the stark evidential dispute that exists between the parties, as demonstrated by the contrasting submissions on the facts which are made in the defendant's skeleton argument and in the statements of the three distinguished historians respectively.

121. It is illustrative of this feature of the case that, immediately after the oral submissions made by Mr Jay, as recorded in paragraph 118 above, he proceeded to refer to a letter written by General Erskine in 1953 which (he submitted) demonstrated that, far from sharing a common aim or purpose in procuring the infliction of assaults and batteries, General Erskine was endeavouring to discourage them. I assume that he was referring

[19] See section (G) paragraph 60 above.

to the letter of 10 December 1953 to the Secretary of State for War (C1/Vol. 3/178/1184-7) and/or the letters in footnote 190 on page 116 of the skeleton argument, in one of which General Erskine wrote condemning any beating up of Kenyans and ordering that,

> "…every officer in the police and in the Army should stamp at once on any conduct which he would be ashamed to see used against his own people… ".

122. Professor Elkins, on the other hand, comments on such material in paragraph 38 of her second statement in these terms:

> "Despite knowing that their tact[ic] of asking for an end to brutalities was not working and, in fact, the level of brutality only increased over the course of the Emergency, as the recent Hanslope Disclosure supports, Erskine, Baring and Lennox Boyd never sought any other course of action. In fact, nearly all of their public declarations to end the brutalities took place early in the Emergency, that is during 1953. These declarations were made prior to the overwhelming amount of documentary and witness evidence available with regard to brutalities perpetrated by members of the British colonial administration and security forces".[20]

123. There are copious further examples in the skeleton arguments and in the papers in which factual disputes as to the role of the British Army emerge. The defendant's skeleton argument makes the case that the British Army had no significant role in the administration of the detention camps and the handling of detainees. It is argued that the camps were the responsibility of the civil administration and local police and military forces. As a matter of law it is submitted that the British Army elements simply afforded military assistance in aid of the civil power: see the "*Overview*" in paragraph 219 of the defendant's skeleton argument. In paragraph 220, it is argued that the Army ceased to play any role at all in Kenya after 17 November 1956.

124. All the historians dispute this. For example, in paragraphs 13 to 15 of his second statement Dr. Bennett says,

> "13. The FCO claim in paragraph 206 [of their skeleton argument] that General Erskine was only responsible for "the conduct of all military measures", therefore excluding detention camps, screening camps and other policy areas in "the civilian sphere". This distinction between the civil and military spheres is based upon a fundamental misunderstanding of the nature of counter-insurgency conflict, where the military are normally deeply involved in apparently civilian spheres, simply because the civilian agencies cannot function on their own. This was the case in Kenya, where General Erskine and his subordinates frequently exerted a decisive influence over civilian policy areas.

[20] "Security forces" over which General Erskine had "full command".

> 14. More specifically, the War Council, created in 1954, in which Erskine and his successors played a central role, approved military and civilian operations, including screening, interrogations, villagisation and detention policies in the knowledge that widespread abuses were ongoing. In addition, the Army played a central role in the Provincial and District Emergency Committees which I outline at para. 7 to 9 of my first statement. The records of the War Council, the Provincial and District Emergency Committees and the Intelligence Committees provide numerous examples to demonstrate significant military influence over civilian policy during the Emergency. Furthermore, military and civilian intelligence structures were intertwined to the point that Military Intelligence Officers were embedded in Police Special Branch but remained under the Military Chain of Command (a fact confirmed by Frank Kitson in his interview with the FCO's lawyers). I explain this in more detail below.
>
> 15. It is also of central importance to note that Erskine and his military successors retained <u>full</u> operational control over all Kenya security forces, regardless of where they were operating, throughout the Emergency. This included both the Police Special Branch and the Home Guard, both of whom were known by the Army to abuse detainees during interrogations and screenings."

As for the supposed cessation of army involvement in November 1956, Dr. Bennett says:

> "At para 220 the FCO assert that the British Army ceased to play any role after 17 November 1956. This is incorrect. Whilst military operations came to an end on that date, the British Army continued to play a central role in the counter Emergency throughout the Emergency as follows:
>
> i) The British Army retained ultimate operational control over all security forces throughout the Emergency, even after Police and Administration assumed responsibility for law and order in late 1956.
>
> ii) The British Army continued to play a central role in the War Council and Provincial and District Emergency Committees and participated in all major decisions taken at each level.
>
> iii) The British Army military intelligence operation worked hand in glove with Kenya Special Branch, including screening and interrogations in centres and detention camps. The Army had ultimate responsibility for intelligence policy.
>
> iv) The British Army worked with Kenyan special forces on counter insurgency operations involving "pseudo-gangs". "

125. It is common ground that the Directive from the two Secretaries of State made on 3 June 1953 put General Erskine in full command of "all Colonial, Auxiliary, Police and Security Forces in Kenya". There is ample evidence even in the few papers that I have seen suggesting that there may have been systematic torture of detainees during the Emergency. In such circumstances, where the Commander-in Chief of the forces responsible had ample power and resources to stop such abuses occurring, it seems to me to be impossible to say that a court at trial could not conclude that the time came when the Commander was "instigating or procuring" the torture of detainees pursuant to "a common design". On the present state of the evidence it is impossible to rule that out.

126. I would add that the possible existence of a system of torture of detainees emerges not only from historic research but also from the contemporaneous judgments of Kenyan courts, examples of which are quoted by Professor Anderson in his second statement. I will quote two examples from the judgments. First, in *Criminal Appeals 988 and 989 of 1954*, it appears that the court was concerned with two accused who were tortured repeatedly in a screening camp in 1954. The judgment concluded with the following passage:

> "We cannot, however, conclude this judgment without drawing attention once more to the activities of the so-called 'screening teams'. … From this case and others that have come to our notice it seems that it may be a common practice when a person is arrested in the commission of a terrorist offence, or on suspicion of such offence, for the police to hand him over to the custody of one of these teams where, if the accounts given are true, he is subjected to a 'softening up' process, with the object of obtaining information from him. To judge by the same, the function of a 'screening team' is to sift the good Kikuyus from the bad; but if that was its only function, there could not have been, in the instant case, any reason to send the appellant to such a team for he had been arrested in the actual commission of an offence carrying capital punishment. What legal powers of detention these teams have or under whose authority they act we do not know. The power to detain suspected persons given in Emergency Regulation No.3 would not seem to be exercisable in this case and the right of a police officer to detain in police custody pending trial … does not authorise the handing over of the person detained into some other custody. It has certainly been made clear to us by the disclaimer made to Mr Brookes for the Crown and respondent that the Attorney General is not in any way responsible for screening teams and there are some indications that they are not under the control of the police but are under administration officers. But, whatever the authority responsible, it is difficult to believe that these teams could continue to use methods of unlawful violence without the knowledge and condonation of the authority. Such methods are the negation of the rule of law which it is the duty of courts to uphold, and when instances come before the courts of allegations that prisoners have been subjected to unlawful

> criminal violence, it is the duty of such courts to insist on the fullest enquiry with a view to their verification or refutation."

Secondly, in *Criminal Case No. 240 of 1954 (R v Muiru & ors)* (10 December 1954) Cram J said:

> "Looking at the evidence in this case that there exists a system of guard posts manned by headmen and chiefs and these are interrogation centres and prisons to which the Queen's subjects whether innocent or guilty are led by armed men without warrant and detained and as it seems tortured until they confess to the alleged crimes and are then led forth to trial on the sole evidence of those confessions, it is time that this Court declared that any such system is constitutionally illegal and should come to an end and these dens emptied of their victims and those chiefs and headmen exercising arbitrary power checked and warned."

127. Of the second of these judgments, Professor Anderson says in his second statement:[21]

> "Governor Baring unsuccessfully tried to suppress publication of the judgment. When the judgment was published it attracted widespread attention in the United Kingdom and an investigation was ordered in Kenya, presided over by Judge Holmes. The Holmes Enquiry as this investigation became known, produced its report in two parts, dealing with the specific issues raised in the Cram judgment arising from the Ruthagathi case, and more generally with the operations of African Courts. As mentioned above, the President of the East African Court of Appeal subsequently wrote to the Governor on 11 March 1955 and asked for Part 1 of the Holmes report not to be published on the grounds that:
>
> "This report as it stands will give the impression to the casual reader in Kenya that the criticisms of the judge in criminal case No. 240 of 1954 (Regina v Muiri & Others) have been answered, when in fact they have not; and will not satisfy the trained critic in London who will detect at a glance that no really searching enquiry has been made."
>
> As a result, Part 1 of the Holmes Report was not published, with the agreement of the Secretary of State for the Colonies."

128. The materials evidencing the continuing abuses in the detention camps in subsequent years are substantial, as is the evidence of the knowledge of both governments that they were happening and of the failure to take effective action to stop them. I repeat my conclusion for this early stage of the proceedings is as set out in paragraph 125 above. On such materials it is not possible to say that the inference of instigation by the Commander-in-Chief of a system of torture, giving rise to the torts committed

[21] Paragraphs 33 and 34 of that statement.

upon the claimants, could not be drawn upon full examination of the materials at trial. The matter is not conclusive, but it is a proper issue for trial.

129. Turning to the joint liability of the UK Government through the Colonial Office, the primary facts which the claimants seek to establish at trial are set out principally in paragraphs 38 and 47 of their draft amended statement of case. I append copies of these paragraphs as Appendix D to this judgment. A very substantial part of the factual allegations contained in those paragraphs are matters of public record and many are documented in the materials already produced. For example, the materials upon which the statement in paragraph 47(p) (the July 1957 "Instruction") is based have been annexed above. It will be seen that the conclusions which the claimants invite at trial are set out at the beginning and end of paragraph 38 in these terms:

> "It is averred that the Colonial Secretary and/or officials within the Colonial Office, encouraged, procured, acquiesced in or were otherwise unlawfully complicit in the torture and ill treatment inflicted upon the Claimants thereby making them liable as joint tortfeasors and the Defendant vicariously liable for the same torts…".
>
> "It is averred that the acts of suppression set out in (c) above were all undertaken in the knowledge and with the intention that the system of abuse would be maintained".

130. All these matters are, in my judgment, properly triable issues on the evidence before me, including the evidence of the continuing and still incomplete disclosure by the defendant of previously unseen materials. The evidence shows that those new materials were removed from Kenya upon independence precisely because of their potential to embarrass the UK Government.

131. I do not ignore the defendant's submission that all the matters complained of took place under the aegis of the Colonial Government. However, its acknowledgement of the factors set out in paragraph 39 of its skeleton argument as giving rise to a potentially arguable claim and the submissions of Mr Jay set out in paragraph 118 above seem to me to force the acceptance of the undoubted fact that the UK Government remained a subsisting entity which was capable of pursuing its own ends in the Emergency in Kenya and capable of participating in its own right in the instigation of a system such as that alleged.

132. The existence of a Colonial Government does not preclude, in my view, a separate and individual role for the paramount Government of the country whose colony a particular territory is. Alliances may be formed between independent governments and I see no objection in principle to alliances, or in the language of joint liability in tort, "common designs" being formed between a Colonial Government and the superior Government of the colonial power. Each is a distinct legal entity capable of forming such a common design. In the present case, the evidence so far available suggests that this colonial power played a distinctly "hands on" role in the management of the Emergency. It was not standing aloof, merely offering advice and assistance when the local government asked for it. As Professor Elkins says in her evidence (paragraph 41 of her first statement),

> "In addition to the Colonial Secretaries, several members of the Colonial Office were in direct, daily correspondence with the Kenya administration and members of the British government during the time of the State of Emergency…"

133. What I am trying to say is that I can see no place for some form of *Salomon v Salomon*[22] rule precluding the viability of the claimants' causes of action here in respect of the role played by the UK Government on its own behalf in its separate and distinct interest as colonial power.

134. For the avoidance of doubt on the part of any persons interested in the outcome of these applications, beyond the direct circle of the parties and their advisers who will appreciate the ambit of my decision, I am NOT finding that the defendant *is* liable for the injuries inflicted upon the claimants. I am simply deciding that the issue of whether it is so liable, on these formulations of the claimants' case, is fit for trial. Nor am I deciding there *was* a system of torture of detainees in the camps in Kenya during the Emergency; I merely decide that there is viable evidence of such a system which will have to be considered at trial.

(K) (5) Negligence

135. The pleaded allegation made on the claimants' behalf in paragraph 40 of the draft amended Particulars of Claim reads as follows:

> "…it is averred that the Defendant owed a duty of care to take all reasonable and necessary steps to prevent the systemic use by the British Army and/or Colonial Administration of unlawful violence in the form of excessive force by members of the security forces responsible for enforcing law and order in the course of the Emergency, including in the detention camps, prisons and screening centres operated by and/or under the Colonial Administration. The said duty arose in law by reason of the Government's ultimate responsibility on behalf of the Queen for the Colony of Kenya and for the discharge of her duty of protection towards Her subjects therein. Further and/or alternatively it is averred that the Defendant assumed a responsibility for the Claimants by virtue of (i) the Government's ultimate responsibility as particularized above and/or (ii) their knowledge as to the abuses and/or (iii) their power to prevent such abuses."

136. As can be seen, the claim is based upon the UK Government's ultimate responsibility for the colony and upon a voluntary assumption of duty because of that responsibility, its knowledge of the abuses and its power to stop them happening.

137. In summary, the defendant's answer to that claim appears in paragraph 348 of its skeleton argument in the following terms:

---

[22] *Salomon v A. Salomon & Co. Ltd.* [1897] AC 22. (For non-lawyer readers, the case emphasises the distinction in law between a corporate body, such as a limited company, and its corporators or shareholders)

> "As a point of departure for any proper analysis of this claim, it needs, with respect, to be reformulated somewhat less ambitiously because:-
>
> (i) it is not arguable that there could be a duty to take 'necessary steps'.
>
> (ii) it is not arguable that the British Army systematically used unlawful violence *vis-à-vis* the Claimants, still less that it did or could have done so in any circumstance '*in the form of excessive force by members of the security forces'*. These members, as the Claimants accept were servants or agents of the Colonial Administration.
>
> (iii) the two formulations of the posited duty collapse into the first. It is not arguable that HMG in right of the UK voluntarily assumed responsibility for anything: it did nothing other than to create the basic constitutional structures for the Colonial Administration in the first place, and the matters relied on by the Claimants as suggesting that it did are only logically capable of being relevant to a duty arising on account of the Government's 'ultimate responsibility'. Further, such a voluntary *assumption* would require proof of actions taken in Kenya in right of the UK: any action was clearly in right of Kenya."

It is suggested in paragraph 349 that the claim could only be formulated thus:

> "that HMG in right of the UK owed a duty to take reasonable care, including the taking of reasonable steps and measures, to safeguard British Subjects in the Colony and Protectorate of Kenya against the infliction of trespass to the person by servants or agents of the Colonial Administration and/or against breaches of any direct duties of care owed to them by the Colonial Administration."

It is submitted that, even as so revised, the claim does not have a real prospect of success, essentially because there is no relevant duty of care.

138. My decision on this issue is that this formulation of the claim should not be struck out. This is for three reasons: first, for the reason specified by Lord Hope in the *Three Rivers DC* case, quoted above, namely I have already decided that part of the case must go to trial on its facts for the reasons given above and it would be unreasonable in any event to divide the history up and strike out parts of the claim based on the same facts. Secondly, it has been held more than once that where the law is far from clear it is undesirable to strike out claims, on the basis of the absence of a duty of care, on untested facts: see e.g. *Barrett v Enfield DC* [2001] 2 AC 550, 557 per Lord Browne-Wilkinson, and *Farah & ors. v British Airways & anor.* (Court of Appeal transcript, 6 December 1999) per Lord Woolf MR (as he then was). Thirdly, for reasons which I expand below, I am independently satisfied on present evidence that the claimants have a properly arguable case that there was a duty of care owed by the

UK Government to persons in the position of the claimants in the particular circumstances pleaded.

139. The unusual nature of the present cases forces one back to first principles. I have read and re-read, in the context of this case, the passages in Clerk & Lindsell on Torts (20th Edn., 2010) dealing with the test for the establishment of a duty of care in law. It does no harm to set out again the famous formulations of the test, first by Lord Atkin in *Donoghue v Stevenson* [1932] AC 562, 580 and then by Lord Bridge in *Caparo Industries plc v Dickman* [1990] 2 AC 605, 617-8. Lord Atkin said,

> "The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably forsee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

Lord Bridge's words were:

> "What emerges is that, in addition to the forseesability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other."

140. It is also correct that the general rule of law is that in the absence of a voluntary assumption of responsibility or of a "protective relationship", the common law does not impose liability for mere omissions to act: see Clerk & Lindsell Op. Cit. paragraphs 8-46 et seq.) However, in my judgment one can put aside the concept of mere omission in the present case at this stage. There is to my mind a very significant factual dispute as to the role of the UK Government (through the Army and otherwise) in the control of the detention camps. If the claimants' factual case is established, it suggests to my mind the distinct possibility of an active direction of policy and an active part in its implementation on the part of Her Majesty's Government in this country which went well beyond mere omission to act. I think that it is only at trial that it will be possible satisfactorily to carry out the exercise envisaged for the court in the passage in the speech of Lord Scott of Foscote in *Mitchell v Glasgow City Council* [2009] 1 AC 874, 893 (paragraph 40) where he said,

> "The requisite additional feature that transforms what would otherwise be a mere omission, a breach at most of a moral obligation, into a breach of a legal duty to take reasonable steps to safeguard, or to try to safeguard, the person in question from

> harm or injury may take a wide variety of forms. Sometimes the additional feature may be found in the manner in which the victim came to be at risk of harm or injury. If a defendant has played some causative part in the train of events that have led to the risk of injury, a duty to take reasonable steps to avert or lessen the risk may arise. Sometimes the additional feature may be found in the relationship between the victim and the defendant: (eg employee/employer or child/parent) or in the relationship between the defendant and the place where the risk arises (eg a fire on the defendant's land as in *Goldman v Hargrave* [1967] 1 AC 645). Sometimes the additional feature may be found in the assumption by the defendant of responsibility for the person at risk of injury (see *Smith v Littlewoods Organisation Ltd* [1987] AC 241, 272, per Lord Goff of Chieveley). In each case where particular circumstances are relied on as constituting the requisite additional feature alleged to be sufficient to cast upon the defendant the duty to take steps that, if taken, would or might have avoided or lessened the injury to the victim, the question for the court will be whether the circumstances were indeed sufficient for that purpose or whether the case remains one of mere omission. "

141. In paragraph 371 of its skeleton argument, the defendant argues that the interposition of the Colonial Administration between the UK Government and the claimants means that the claimants cannot demonstrate the necessary elements of proximity.

142. Throughout its submissions the defendant was again at pains to stress the constitutional arrangements under which the government of Kenya was the responsibility of the Colonial Administration under the Governor. The defendant objects to the concept that the UK Government should have owed a duty to the claimants directly. It was argued in paragraph 352 of the defendant's skeleton that,

> "[t]his formulation [of the case] implicitly accepts that it would not avail the claimants to contend that HMG failed to take action within the existing constitutional framework, since such action would have been in right of Kenya and barred by s.40 of the Crown Proceedings Act 1947".

A little later (in paragraph 360) it was submitted that the claimants' case was

> "…based upon the erroneous assertion that it [HMG in the UK] owed a duty to safeguard the Claimants from (i) the actions of the servants or agents of another entity (i.e. the Colonial Administration and (ii) the actions of its own servants or agents (i.e. "the British Army")".

Again, it was argued that,

> "Action could only have been taken outside the existing constitutional structures if these had first been dismantled by

> primary or secondary legislation in Westminster, alternatively by further Letters Patent or orders in Council abrogating altogether the Colonial Administration".

143. I do not accept, at least at this early stage of the proceedings, this slavish "*Salomon v Salomon*"[23] style approach to the question "who is my neighbour". We are dealing here with alleged acts of *torture* said to be known to both governments. On such a hypothesis, it is strange to suggest that, as a matter of fact or law, a paramount colonial government has to go through the elaborate rigmarole of dismantling the colonial constitution before it can stop the torture. Of course, the constitution of Kenya remained in place and was not revoked. However, the government in the UK had a separate existence and an active and very present interest and participation in the handling of the Emergency. The present evidence suggests to me that the Colonial Administration would have followed insistent instructions from the British government in London and the security forces would have followed such instructions from General Erskine, without any need to revoke the constitutional arrangements or even to threaten to do so. London was apparently paramount and "what London said, went". The idea that torture of the type alleged could have been perpetrated as widely as it appears to have been if the British government or General Erskine had genuinely wanted it to stop seems, at least arguably, unlikely.

144. It appears to me to be arguable that the apparent continuance of this conduct in the circumstances alleged in the claimants' present draft pleading would detract from the force of the formal constitutional arguments such as those quoted above. The time must come when standing by and doing nothing, by those with authority and ability to stop the abuse, becomes a positive policy to continue it. If some evidence of this is wanted, it suffices to read again pages 2 and 3 of the June 1957 memorandum from the Kenyan Minister for Legal Affairs. Moreover, the idea that the conduct described on those pages could be rendered lawful by the anodyne amendment to regulations proposed on page 9 of the memorandum is a surprising one. The document is significant support for an argument (to be tested at trial) that the UK Government participated in its individual capacity with the Colonial Government in a system of abuse such as that alleged. It may ultimately be found not to be the case. However, all this is for trial.

145. I do not consider that the claimants' case amounts to an assertion of a general duty to provide for the well-being of persons such as the claimants of such a type as was rejected by Ouseley J in *Chagos Islanders v BIOT & anor.* [2003] EWHC 2222 (QB). In that case, as the defendant accepts, the duty arose because of the specific action that had been taken to remove the claimants from their homeland which amounted to a voluntary assumption of responsibility. The learned judge said,

> "The duty to take reasonable steps to avoid that harm arises not just from its arguable reasonable foreseeability, but also from the fact that it was the Defendants' acts, which put them in that position of risking harm about which they had limited choice".

146. *Attorney-General of the British Virgin Islands v Hartwell* [2004] UKPC 12 is also instructive. In that case a police officer, having abandoned his post, entered a crowded

[23] See paragraph 133, footnote 22 above.

bar where his partner worked as a waitress and, in a fit of jealous rage at finding her there with another man, fired shots at her with a police revolver, taken from a strongbox at the police station to which he had access. The claimant, a bystander, was seriously injured. He claimed damages against the government, relying on two earlier incidents of misbehaviour involving weapons as demonstrating that he was "not a fit and proper person to be given access to firearms".

147. As Lord Nicholls of Birkenhead noted this was a case of deliberate wrongful conduct intervening between the defendant's alleged negligence and the plaintiff's damage. However, he went on to state:

> "This case does not fall on the "omissions" side of the somewhat imprecise boundary line separating liability for acts from liability for omissions. In a police case this distinction is important. Here the police are not sought to be made liable for failure to carry out their police duties properly. This is not a case such as *Hill v Chief Constable of West Yorkshire* [1989] Ac 53 where liability was sought to be imposed on the police in respect of an alleged failure to investigate the Sutcliffe murders properly. In the present case the police authorities were in possession of a gun and ammunition. They took the positive step of providing PC Laurent with access to that gun. Laurent did not break into the strongbox and steal the gun. The police authorities gave him the key. True, Laurent disobeyed orders taking the gun as he did. But the fact remains that the police authorities chose to entrust Laurent, who was on the island by himself, with ready access to a weapon and the ammunition needed for its use. The question is whether in taking that positive step the Government, through the police authorities, owed a relevant duty to Mr Hartwell.
>
> The second feature of cardinal importance is that the alleged duty of care relates to entrusting PC Laurent with access to a hand gun and ammunition. Loaded handguns are highly dangerous weapons. They are easy to carry and potentially lethal. One would expect to find that in deciding whom to entrust with such weapons the police would, expressed in general terms, owe a duty to exercise reasonable care. This would not impose a special duty on police authorities. One would expect a like duty to exist on everyone who entrusts another with a loaded firearm. That is eminently fair and reasonable. The serious risks involved, if a gun is handed over carelessly, are obvious. The precautionary steps required of a careful person are unlikely to be particularly burdensome."

148. At this stage of the proceedings it seems to me that there is a substantial body of evidence suggesting that both governments well knew that those in charge of the camps and/or those under their command were "not fit and proper persons" to be given custody of prisoners. There are many examples in the evidence, including the judgments of the Kenyan courts quoted above, demonstrating the extent of continuing misconduct in the treatment of detainees and of both governments' apparent

knowledge and condonation of it. At trial the evidence may point the other way, but such a conclusion cannot be ruled out at present.

149. I note again the distinction between this case and the *Hartwell* case, to the extent that the liability found in that case was that of the government immediately in control of the territory, whereas here the liability is sought to be imposed upon a government at one removed from that: see the defendant's submissions in paragraphs 368 to 373 of its written argument. My answer would remain as set out in the immediately preceding paragraphs. It is not necessary to delve further for these purposes into the *habeas corpus* cases relied upon by the claimants.

150. I have had very much in mind in my review of the submissions on this part of the case the requirement that a duty of care does not arise in law unless it is fair, just and reasonable that it should do so: see per Lord Bridge in *Caparo* (supra). As Clerk & Lindsell states:

> "…the expression means little more than that the court should only impose a duty of care if it considers it right to do so[24]. It has been referred to as an exercise of judicial pragmatism, which is the same as judicial policy"[25]. As such it encompasses a wide range of considerations. At its narrowest, it focuses on justice and fairness between the parties. At a broader level, it will consider the reasonableness of a duty from the perspective of legal policy, focussing on the operation of the legal system and its principles. At a wider still but more controversial level, it may take account of the social and public policy implications of imposing a duty."[26]

151. In this context, I have considered carefully the submission of the defendant that the courts have expressed reluctance to impose a duty in areas where public policy issues, in the sense of political judgments, arise. The cases are summarised in paragraphs 381 and following of the defendant's written argument. The strongest statement of the relevant considerations is perhaps that of Lord Hutton in *Barrett v Enfield LBC* (supra) at p. 580H-581A, where his lordship said,

> "I consider that subsequent decisions have shown that the underlying principle to be derived from the passage in the judgments of Lord Reid and Lord Diplock in the *Dorset Yacht* case relating to negligence in the exercise of a statutory discretion is that the courts will not permit a claim for negligence to be brought where a decision on the existence of negligence would involve the courts in considering matters of policy raising issues which they are ill-equipped and ill-suited to assess and on which Parliament could not have intended that the courts would substitute their views for the views of ministers or officials."

---

[24] *Glaister v Appleby-in-Westmorland Town Council* [2009] EWCA Civ 1325 per Toulson LJ
[25] *Alcock v Chief Constable of S. Yorks Police* [1992] 1 AC 310, 365.
[26] Op Cit paragraph 8-17.

152. I also bear firmly in mind the passage from the judgment of Brennan J in the High Court of Australia in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1, 43-44, adopted by Lord Bridge in *Caparo*, as follows:

> "It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable "considerations which ought to negative, or to reduce or limit the scope of the duty or class of person to whom it is owed" ."

To similar effect, a few years later, is the judgment of Phillips LJ (as he then was) in *Reeman v Dept. of Transport* [1997] PNLR 618, 625 where he said,

> "When confronted with a novel consideration the court does not…consider these matters [foreseeability, proximity and fairness] in isolation. It does so by comparison with established categories of negligence to see whether the facts amount to no more than a small extension of a situation already covered by authority, or whether the finding of an existence of a duty of care would effect a significant extension to the law of negligence. Only in exceptional cases will the court accept that the interests of justice justify such an extension."

153. These are weighty considerations. It may be that, in the end, these factors will prevail to negate the existence of a duty of care, but, on any footing, this is an "exceptional case" and it is of such a nature that judicial policy might positively demand the existence of a duty of care. In *A v Secretary of State for the Home Department (No.2)* [2005] UKHL 71, the House of Lords trenchantly asserted the inadmissibility, as vidence in our courts, of material obtained by means of torture. One could choose any one of a number of passages from the speeches in that case encapsulating the revulsion with which English law regards torture. I make no excuse from choosing one and setting it out in full as a reminder of what is in play when legal technicalities are deployed to negate the justiciability of cases where redress is sought for the use of torture:

> (Lord Hoffmann)
>
> "My Lords, on 23 August 1628 George Villiers, Duke of Buckingham and Lord High Admiral of England, was stabbed to death by John Felton, a naval officer, in a house in Portsmouth. The 35-year-old Duke had been the favourite of King James I and was the intimate friend of the new King Charles I who asked the judges whether Felton could be put on the rack to discover his accomplices. All the judges met in Serjeants' Inn. Many years later Blackstone recorded their historic decision: "The judges, being consulted, declared unanimously, to their own honour and the honour of the English law, that no such proceeding was allowable by the laws of England."

> That word honour, the deep note which Blackstone strikes twice in one sentence, is what underlies the legal technicalities of this appeal. The use of torture is dishonourable. It corrupts and degrades the state which uses it and the legal system which accepts it. When judicial torture was routine all over Europe, its rejection by the common law was a source of national pride and the admiration of enlightened foreign writers such as Voltaire and Beccaria. In our own century, many people in the United States, heirs to that common law tradition, have felt their country dishonoured by its use of torture outside the jurisdiction and its practice of extra-legal "rendition" of subjects to countries where they would be tortured: see Jeremy Waldron, "Torture and Positive Law: Jurisprudence for the White House" (2005) 105 Columbia Law review 1681-1750.
>
> Just as the writ of habeas corpus is not only a special (and nowadays infrequent) remedy for challenging unlawful detention but also carries a symbolic significance as a touchstone of English liberty which influences the rest of our law, so the rejection of torture by the common law has a special iconic importance as the touchstone of a humane and civilised legal system. Not only that: the abolition of torture, which was used by the state in Elizabethan and Jacobean times to obtain evidence admitted in trials before the Court of Star Chamber, was achieved as part of the great constitutional struggle and civil war which made the government subject to the law. Its rejection has a constitutional resonance for the English people which cannot be overestimated.
>
> During the last century the idea of torture as a state instrument of special terror came to be accepted all over the world, as is witnessed by the international law materials collected by my noble and learned friend, Lord Bingham of Cornhill. Among the many unlawful practices of state officials, torture and genocide are regarded with particular revulsion: crimes against international law which every state is obliged to punish wherever they may have been committed."

154. In my judgment, it may well be thought strange, or perhaps even "dishonourable", that a legal system which will not in any circumstances admit into its proceedings evidence obtained by torture should yet refuse to entertain a claim against the Government in its own jurisdiction for that government's allegedly negligent failure to prevent torture which it had the means to prevent, on the basis of a supposed absence of a duty of care. Furthermore, resort to technicality, here the rules of constitutional theory (viz. *Quark* and the notional divisibility of the Crown)[27], to rule such a claim out of court appears particularly misplaced at such an early stage of the action.

[27] See paragraphs 142-3 above and paragraph 157 below.

155. In his submissions on this point, Mr Hermer for the claimant presented what he called nine "key factors" indicating that there existed a duty of care on the part of the UK Government to the claimants. He submitted that some of these factors individually would be sufficient to establish the duty and that collectively they put the matter beyond doubt.

156. The nine factors, Mr Hermer argued, were these:

i) The victims were all Her Majesty's subjects, owing allegiance to the Crown.

ii) The claimants were not residing in a foreign country but in a colony created by the Crown.

iii) The source of the risk of harm to the claimants was the Colonial Government itself. This is not a claim alleging a duty of government to protect a citizen against random acts of individuals: c.f. *Van Colle v Chief Constable of Hertfordshire Police* [2008] UK HL 50.

iv) Responsibility for law and order was that of a senior British officer, responsible for *all* security forces in the Colony and reporting directly to the War Office in London.

v) The Colonial Government constantly sought and received advice from the Colonial Office and Cabinet in London.

vi) Advice was taken and given in the knowledge of widespread torture and the taking of positive steps to hinder prospective investigation of complaints.

vii) The UK Government was financing and underwriting the costs of the Colonial Administration in dealing with the Emergency.

viii) The UK Government was responsible in international law for the affairs of the colony. In this respect, Article 73 of the United Nations Charter requires that,

> "Members of the United Nations which have or assume responsibilities for the administration of territories whose people have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and to this end:
>
> (a) to ensure…their just treatment, and their protection against abuses…"

ix) This is a case involving torture where the UK owes a specific international duty to protect against it. Article 14 of the UN Convention against torture and other cruel, inhuman or degrading treatment (1987) provides:

> "1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of a victim as a result of an act of torture, his dependents shall be entitled to compensation…".
>
> (Of course, I note this Convention post-dates the events in this case by many years but it is only an echo of principles to be found in the European Convention on Human Rights and Fundamental Freedoms of 1950, which jurists from this country had played a significant part in drafting.)

157. Mr Jay's responses to these "key factors" were largely similar to the arguments that I have already summarised above: (a) the absence of any general duty of protection on the part of the UK Government, (b) the limited nature of General Erskine's command of operational matters and his acting merely in an advisory capacity to the Kenyan administration, (c) the absence of any duty on the part of the Secretary of State to intervene in the constitutional arrangements, (d) the powerlessness of the UK Government absent a dismantling of those arrangements, (e) the irrelevance of international law to the existence of a duty of care and (f) the duty to protect against torture as an obligation of the Colonial Government rather than an obligation of the UK Government.

158. I accept these are countervailing considerations to Mr Hermer's "key factors" However, I am unable to accept them as conclusive against the existence of a duty of care in this case at the present stage of the proceedings. I will not traverse the ground again but, for reasons already outlined, I consider that this formulation of the claimants' claims is also a properly arguable one and fit for trial.

(L) Conclusion

159. For these reasons, save in respect of the first formulation of their claim, I refuse the defendant's applications under CPR Parts 3 and 24, and I allow the claimants' application under Part 17. As for the first formulation of the claim, the relevant paragraphs of the existing Particulars of Claim will be struck out and leave to make the proposed amendment will be refused.