Neutral Citation Number: [2018] EWHC 2066 (QB)

Case No: HQ13X02162

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/08/2018

Before:

THE HON MR JUSTICE STEWART

- -

Between:

Kimathi & Ors	**Claimant**
- and -	
The Foreign and Commonwealth Office	**Defendant**

- -
- -

Mr Simon Myerson QC, Mr Bryan Cox QC, Mr Andrew Haslam QC, Ms Mary Ruck, Ms Lorraine Mensah, Mr Stephen Flint, Ms Sophie Mitchell and Ms Louise Cowen (instructed by **Tandem Law**) for the **Claimants**
Mr Guy Mansfield QC, Mr Neil Block QC, Ms Clare Brown, Mr Niazi Fetto, Mr Simon Murray, Mr Mathew Gullick, Mr Richard Wheeler, Mr Jack Holborn and Mr Stephen Kosmin (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 19-22 June 2018, 25-29 June 2018, 2 August 2018.

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Approved Judgment

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

.....

Mr Justice Stewart:

Introduction

1. This Test Claimant is the first to be the subject of final submissions. I will refer to him, and to subsequent Test Claimants, as "TC", followed by their number. This is for ease of reference. It implies no discourtesy to him. He is subject to an anonymity order.

2. TC34 has provided two witness statements, the first dated 27 October 2014 and the second 30 March 2016. He gave evidence in person on 22 July 2016.

3. There is a brief Glossary attached to this judgment. This contains abbreviated terms and short descriptions of previous judgments given by me in this litigation. Although they are explained the first time they appear, the Glossary enables the reader to have a readily available checklist. The abbreviations and terms used in the Glossary will be used without further explanation in future judgments in the case.

4. There are also some 'Caselines' references. These are to pages in an electronic document management system used in the litigation.

Background

5. This case concerns allegations of abuse by persons for whose conduct it is alleged the Defendant is liable, arising out of the Kenyan Emergency.

6. On 20 October 1952 the Governor of Kenya, Sir Evelyn Baring, proclaimed a State of Emergency throughout the Colony and Protectorate of Kenya. In a short statement dated 20 October 1952, but not for publication before 00:30 hours BST on 21 October 1952, the Colonial Office Information Department said:

> "A state of emergency was declared in Kenya tonight (Monday, October 20, 1952) throughout the Colony and Protectorate of Kenya. This action has been taken to enable the police to detain the persons believed to have been mainly responsible for organising disorder and lawlessness in the Colony during recent months.
>
> Whereas previously Mau Mau perpetrated their crimes at night and by stealth, the situation became progressively worse during September and early October. The assassination of one of the most revered African chiefs, Senior Chief Waruhiu, on the High Road – in broad daylight – shows the length to which the Mau Mau are prepared to go to carry their campaign of terrorism. It became obvious that action must be taken to detain the persons who are behind this organisation but the measures could not be put into operation until adequate forces were available to maintain law and order and to discourage outbreaks of violence by Mau Mau supporters. The timing of the operation was therefore arranged to coincide with the arrival of troops (from the Middle East and from Uganda and Tanganyika).
>
> This step has been taken with great reluctance but there was no alternative in the face of mounting lawlessness, violence and disorder in a part of the Colony."

7. On 12 January 1960 the State of Emergency ended. Two constitutional conferences took place in London in 1960 and 1962 and, after elections leading to Jomo Kenyatta being invested as Kenya's first Prime Minister on 1 June 1963, Kenya became independent from Britain as a constitutional monarchy on 12 December 1963. On 12 December 1964 Kenya became a republic with Jomo Kenyatta as the first President.

8. Mr. Myerson QC mentioned some matters which he said assist in the general background of the determination of TC34's claim. I shall now set out a summary of what he said.

9. Until the Anvil operation in Nairobi in April 1954 detainees were split into: (i) those charged with criminal offences who would be taken to court and tried in the usual way, or (ii) those who were arrested and categorised as not Mau Mau (categorised as white/light grey) who were sent back to the reserves, or (iii) a small category against whom there was no admissible evidence but who were thought to be implicated in the Mau Mau. They were made the subject of Governor's Detention Orders (GDOs).

10. After Anvil the position changed. Over 30,000 people had been picked up. They could not all be sent back to Nairobi because that would negate the point of the exercise. They could not be sent back to the reserves because there were too many of them, and the loyalists in the reserves understandably objected that it did not help to transfer the problem from Nairobi to the reserves.

11. Therefore, Delegated Detention Orders (DDOs) were brought in. These permitted the Governor to delegate to the Provincial Commissioner (PC) or the District Commissioner (DC) the power to detain without trial.

12. First, those who had been arrested were screened. They went through various camps, the "pipeline"[1], until ultimately, they were regarded as fit for release or they ended up in a sort of internal exile in Hola, which TC34 says he did. This was for people who were regarded as very dangerous and could not be released to normal life in Kenya.

13. An important part of the system was grading detainees. The initial grading system was white, grey and black - black being those who were regarded as the most dangerous. Over time this changed to classification by letter. The equivalent of black was then "Z".

14. Mr. Myerson said that by "screening" different things were meant, namely:

    i) Interrogation such as TC34 describes[2]. That meant that if someone was caught who was suspected of having current information, the Army wanted to know it so as to conduct military operations against Mau Mau gangs.

[1] For a broad overview of the Pipeline see paras 6-9 of the Report of the Committee on Emergency Detention Camps (the Fairn Report).

[2] Mr Myerson said that this was in line with what was recorded in a 2011 attendance note of a meeting with Sir Frank Kitson. He was a Military Intelligence Officer (MIO) during the Emergency. At para 7 of the attendance note it says: "if the MIOs were given a prisoner we could talk to them, if we wanted to keep them we would need to get authority to do so and if not they would be handed to CID. FK saying he was not interested in what crimes prisoners may have committed, FK saying he was interested purely in the intelligence angle e.g. who was in what gangs and where were these gangs and what were their intentions".

ii) Screening by the administration so as to assess the detainee's role with the Mau Mau.

iii) Screening at the point when it was expected to be able to liberate the detainee.

The Mutua Case

15. The first claim made in the United Kingdom was commenced in 2009 by Leigh Day, Solicitors. There were 5 Claimants. That claim resulted in two Judgments given by McCombe J (as he then was). In the first[3] the learned Judge refused the Defendant's application to strike out the claim on the basis that no claim could properly be brought against the UK government. Of course, the procedural principles governing striking out a case are very different from deciding an issue at trial. This point is still a live one in the present proceedings and I have heard evidence and some argument upon it. It is not yet to be determined, and will fall for consideration when I hear final submissions on generic issues. The second Mutua Judgment[4] decided limitation as a preliminary issue. The only matter before the court was whether the discretion under Section 33 of the Limitation Act 1980 should be exercised in the Claimants' favour. By that time, Mr. Mutua had discontinued his claim. The Judge ruled in favour of 3 Claimants and against one Claimant[5].

16. There are many differences between the Mutua litigation and the present litigation. Some important ones are:

- Mutua was not Group Litigation within the meaning of CPR Part 19.

- The only allegations against the Defendant were of deliberately inflicted injuries by perpetrators in circumstances where it was said the Defendant was liable for those acts. The Claimants in the present case brought claims on a much wider range of alleged tortious behaviour.

- The Claimants in Mutua did not rely on Section 32 of the Limitation Act 1980. The present Claimants did so. I ruled against them in May 2018[6]. The effect of my previous judgments in this case is that there now remain, as was always the case in Mutua, allegations only of trespass to the person, i.e. batteries.

- In respect of the 3 Claimants who succeeded in Mutua, at the outset of the cross examination on the Section 33 preliminary issue:

  > "Mr. Mansfield QC for the Defendant stated expressly that the Defendant did not dispute that he or she had suffered torture and other mistreatment *at the hands of the Colonial Administration* (my emphasis). There remains, therefore, no outstanding issue as to the *fact* of those Claimant's injuries and the manner of their infliction, although *legal responsibility* on the part of Her Majesty's Government

[3] [2011] EWHC 1913 (QB).
[4] [2012] EWHC 2678 (QB).
[5] Mrs Ngondi, in respect of whom there were special circumstances irrelevant to the TCs in the present case. See Mutua 2nd paragraphs 161-162.
[6] [2018] EWHC 1169 (QB).

> in the United Kingdom remains hotly contested. While Mr. Mansfield maintains certain points as to inconsistencies in certain parts of the Claimant's accounts (which may go to other issues in the case, such as the status of the perpetrator of the injury in question and therefore the Defendant's potential responsibility in Law for his actions), the substance of what happened to these 3 Claimants is no longer in dispute."[7]

- The Defendant has made no such admissions in the present litigation. This is a very important distinction between the two cases.

- As I have mentioned, in Mutua, limitation was heard as a preliminary issue. The Defendant applied in the present proceedings for me to do the same. The Claimants objected. I ruled in the Claimants' favour[8]. Subsequently, the Defendant has stated in open court on more than one occasion that it considers in retrospect that I was right so to rule.

17. What happened after the second Mutua judgment is best encapsulated in the statement by the then Foreign Secretary, The Rt. Hon. William Hague, made to Parliament on 6 June 2013. I shall reproduce it in full:

> "With permission, Mr Speaker, I would like to make a statement on a legal settlement that the Government has reached concerning the claims of Kenyan citizens who lived through the Emergency Period and the Mau Mau insurgency from October 1952 to December 1963.
>
> During the Emergency Period widespread violence was committed by both sides, and most of the victims were Kenyan. Many thousands of Mau Mau members were killed, while the Mau Mau themselves were responsible for the deaths of over 2,000 people including 200 casualties among the British regiments and police.
>
> Emergency regulations were introduced: political organisations were banned; prohibited areas were created and provisions for detention without trial were enacted. The colonial authorities made unprecedented use of capital punishment and sanctioned harsh prison so-called 'rehabilitation' regimes. Many of those detained were never tried and the links of many with the Mau Mau were never proven. There was recognition at the time of the brutality of these repressive measures and the shocking level of violence, including an important debate in this House on the infamous events at Hola Camp in 1959.
>
> We recognise that British personnel were called upon to serve in difficult and dangerous circumstances. Many members of the colonial service contributed to establishing the institutions that underpin Kenya today and we acknowledge their contribution.

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[7] Mutua 2nd [27]. The 3 successful claimants in Mutua gave names and roles of perpetrators and dates and places [37]-[45].
[8] [2016] EWHC 600 (QB).

However I would like to make clear now and for the first time, on behalf of Her Majesty's Government, that we understand the pain and grievance felt by those who were involved in the events of the Emergency in Kenya. The British Government recognises that Kenyans were subject to torture and other forms of ill treatment at the hands of the colonial administration. The British government sincerely regrets that these abuses took place, and that they marred Kenya's progress towards independence. Torture and ill treatment are abhorrent violations of human dignity which we unreservedly condemn.

In October 2009 claims were first brought to the High Court by five individuals who were detained during the Emergency period regarding their treatment in detention.

In 2011 the High Court rejected the Claimants' argument that the liabilities of the colonial administration transferred to the British Government on independence, but allowed the claims to proceed on the basis of other arguments.

In 2012 a further hearing took place to determine whether the cases should be allowed to proceed. The High Court ruled that three of the five cases could do so. The Court of Appeal was due to hear our appeal against that decision last month.

However, I can announce today that the Government has now reached an agreement with Leigh Day, the solicitors acting on behalf of the Claimants, in full and final settlement of their clients' claims.

The agreement includes payment of a settlement sum in respect of 5,228 Claimants, as well as a gross costs sum, to the total value of £19.9 million. The Government will also support the construction of a memorial in Nairobi to the victims of torture and ill-treatment during the colonial era. The memorial will stand alongside others that are already being established in Kenya as the country continues to heal the wounds of the past. And the British High Commissioner in Nairobi is also today making a public statement to members of the Mau Mau War Veterans Association in Kenya, explaining the settlement and expressing our regret for the events of the Emergency Period.

Mr Speaker this settlement provides recognition of the suffering and injustice that took place in Kenya. The Government of Kenya, the Kenya Human Rights Commission and the Mau Mau War Veterans Association have long been in favour of a settlement, and it is my hope that the agreement now reached will receive wide support, will help draw a line under these events, and will support reconciliation.

We continue to deny liability on behalf of the Government and British taxpayers today for the actions of the colonial administration in respect of the claims, and indeed the courts have made no finding of liability against the Government in this case. We do not believe that claims relating to events that occurred overseas outside direct British

> jurisdiction more than fifty years ago can be resolved satisfactorily through the courts without the testimony of key witnesses that is no longer available. It is therefore right that the Government has defended the case to this point since 2009.
>
> It is of course right that those who feel they have a case are free to bring it to the courts. However we will also continue to exercise our own right to defend claims brought against the Government. And we do not believe that this settlement establishes a precedent in relation to any other former British colonial administration.
>
> The settlement I am announcing today is part of a process of reconciliation. In December this year, Kenya will mark its 50th anniversary of independence and the country's future belongs to a post independence generation. We do not want our current and future relations with Kenya to be overshadowed by the past. Today we are bound together by commercial, security and personal links that benefit both our countries. We are working together closely to build a more stable region. Bilateral trade between the UK and Kenya amounts to £1 billion each year, and around 200,000 Britons visit Kenya annually.
>
> Although we should never forget history and indeed must always seek to learn from it, we should also look to the future, strengthening a relationship that will promote the security and prosperity of both our nations. I trust that this settlement will support that process. The ability to recognise error in the past but also to build the strongest possible foundation for cooperation and friendship in the future are both hallmarks of our democracy."

Outline Chronology of these proceedings

18. The claim form was issued on 28 March 2013:

- A Group Litigation Order was made by the then Senior Master on 6 November 2013. Subsequent to that, I was appointed as the managing Judge for the Litigation.

- The first case management conference took place on 14 March 2014. I do not propose to go through all the orders made before and after the trial commenced. I will, however, refer to some of them.

- Single joint medical experts were appointed pursuant to the Order of 11 December 2014. Each Claimant was to be examined by a Physician/Consultant in Emergency Medicine and also by a Psychiatrist.

- The medical experts examined and reported in the summer/autumn of 2015.

- By Order dated 16 December 2015 (a) I refused to permit the Claimants to rely on historians' witness statements prepared for the Mutua litigation and also ruled in relation to "corroborative" witnesses sought to be called for the Claimants; (b) I decided which Test Claimants should come to the UK to give

evidence and which would give evidence by video link. The Judgments in support of these rulings are: [2015] EWHC 3432 (QB) ("the historians' evidence and corroborative witnesses Judgment") and [2015] EWHC 3684 (QB) ("the evidence by video link Judgment").

- On 18 March 2016 I ruled that limitation should not be heard as a preliminary issue: [2016] EWHC 600 (QB) ("the preliminary issues Judgment").

- The trial commenced in May 2016 and, so that they would be heard as soon as possible, the Test Claimants gave evidence in June/July 2016.

- From October 2016-April 2017, a substantial amount of the time was taken up with the Claimants presenting their opening submissions and taking me through the documents which they wished to adduce.

- In my Judgment dated 24 November 2016, [2016] EWHC 3004 (QB) I refused the Defendant's application to cross-examine the translators used by the Claimants ("the translators' Judgment")[9].

- In January/February 2017 I heard oral evidence from all 8 medical experts.

- On 9 February 2017 I gave Judgment on where the burden of proof lay in respect of certain issues: [2017] EWHC 203 (QB) ("the burden of proof Judgment").

- In March 2017 I heard evidence from a number of lay witnesses called by the Claimants.

- In my Judgment dated 27 April 2017, [2017] EWHC 938 (QB) ("the refusal of false imprisonment judgment"): (1) I refused the Claimants permission to amend to plead false imprisonment (2) I allowed some amendments in relation to "the dilution technique" (3) I also allowed some relatively modest amendments to the Individual Particulars of Claim (IPOC) of TC1, TC27, TC30 and TC31.

- In June 2017 I heard evidence from witnesses called by the Defendant. Some of these were witnesses as to what happened in Kenya in the 1950s/1960s; others were procedural witnesses who gave evidence as to procedural matters in the case, such as attempts to locate potential witnesses and relevant documentation.

- In 2016, the Defendant had provided an outline response to the Claimants' written opening.[10] Between July and November 2017 the Defendant adduced documents and presented them to the Court. In addition to general documents they adduced 27 lever arch files of documents on 17 separate topics.

- On 18 August 2017 I gave Judgment in relation to proposed amendments by the Claimants of the Test Claimants' IPOCs: [2017] EWHC 2145 (QB) ("the

[9] On the same date I struck out TC11's claim as a nullity – see [2016] EWHC 3005 (QB).
[10] Revised and re-filed 17 July 2017.

liability amendments Judgment"). The Judgment is 25 pages. The schedule dealing with amendments runs to 176 pages. It covers proposed amendments to the IPOCs of 21 TCs. These include TC34. Some amendments were allowed, many were not.

- On 31 October 2017 I gave Judgment in respect of proposed amendments to the Particulars of Injury in the IPOCs: [2017] EWHC 2703 (QB) ("the particulars of injury Judgment"). There is a schedule to that Judgment which is 161 pages long dealing with the details of the proposed amendments to 20 TCs, including TC34. Some were allowed, and many were not.

- On 20 December 2017 I ruled on the admissibility of Parliamentary material: [2017] EWHC 3379 (QB) ("The first Hansard Judgment").

- On 20 March 2018 I ruled that the Claimants needed relief from sanctions so as to rely on documents not previously listed for use in the individual final submissions of the Test Claimants: [2018] EWHC 605 (QB) ("the relief from sanctions Judgment").

- On 28 March 2018 I refused the Claimants' application seeking to vary an order dated 27 October 2016 in relation to the long-stop limitation date from 4 June 1954 to 4 June 1953: [2018] EWHC 686 (QB) ("the 1954 Judgment").

- On 18 April 2018 I gave Judgment on the Claimants' relief from sanctions application. This dealt only with TC20 and TC34, because of the exigencies of time, and because these were the first two TCs whose final submissions were to be heard. This I shall refer to as "the TC20 and TC34 documents Judgment". There is a lengthy schedule in relation to each of the two TCs. In relation to the majority of documents, relief from sanctions was not allowed.

- On 9 May 2018 I ruled on the dispute about particular documents arising from the first Hansard Judgment: [2018] EWHC 1070 (QB) ("the second Hansard Judgment").

- On 24 May 2018 I gave Judgment in the Defendant's favour on the basis that there had been no deliberate concealment pursuant to Section 32 Limitation Act 1980: [2018] EWHC 1169 (QB) ("the Section 32 Judgment").

- On 24 May 2018 I gave Judgment ruling that fear alone did not amount to personal injury for the purpose of Section 33 Limitation Act 1980: [2018] EWHC 1305 (QB) ("The Fear Judgment").

19. The plan now is that I deal with individual Test Claimant submissions, beginning with TC34. In the TC submissions generally, my task will be to decide:

- Has the TC proven that the facts giving rise to the causes of action post-dated 4 June 1954? If not, they are irremediably time-barred, subject to the Supreme Court departing from previous decisions.

- Is it equitable to extend the Limitation Period under section 33 Limitation Act for that TC's personal injury claims arising after 4 June 1954, subject to the generic issues?

- If so, to what extent, if any, has that TC proven the claims on the balance of probabilities? In this regard, the Defendant's submission is that the Claimant has failed to prove his case[11].

- What sums of general damages should be awarded on any claims so proven?

If all, or any TCs, have succeeded up to that stage, the Court will be asked to determine generic issues on which the TCs must also succeed if they are to receive damages. Section 33 will also be relevant to some of those issues, for example whether the Defendant would be vicariously/jointly liable, or liable in negligence, for the torts committed by primary tortfeasors. Other important generic issues include whether the Defendant was acting in right of Kenya or in right of the United Kingdom[12]. In this judgment, I have avoided, wherever possible, consideration of disputes which touch on the generic issues, or on the claims by the other TCs, as I have not yet heard the parties' full submissions on them.

Trial not Inquiry

20. It is important that I say at the outset that this litigation is a court process. It is not an inquiry. There are fundamental differences. The then Foreign Secretary in his statement to the House of Commons in June 2013 included in his statement that "the British government recognises that Kenyans were subject to torture and other forms of ill treatment at the hands of the Colonial administration." He added: "the British government sincerely regrets that these abuses took place, and that they marred Kenya's progress towards independence." Later in the statement he made it clear that, although a settlement had been reached in the cases then notified, the government continued to deny liability in the courts.

21. Therefore, the Defendant has admitted the fact that there were abuses, as a result of which people suffered grievously. It also settled a number of cases following the rulings in Mutua. That is a background, but the claims must stand or fall on established principles of civil litigation.

22. My primary focus at this stage of proceedings is on the case presented by each individual Test Claimant. My task is governed by rules of Law and Procedure, which I am duty bound to apply. In the Defendant's response to the Claimants' opening, paragraph 52, it said: "The court is presently concerned with a trial of serious allegations with a view to reach conclusive findings of fact in respect of which the TCs seek to recover damages from the Defendant. It is not engaged in a historical seminar or in an inquiry. It is for the Claimants to establish that there can yet be a fair

[11] See Abrath v North Eastern Railway (1883) 11 QBD 440, 447; Rhesa Shipping Co SA v Edmunds ("The Popi M") [1985] 1 WLR 948, 955-956. In Rhesa Shipping it is made clear that a judge may "say simply that the evidence leaves him in doubt whether the event occurred or not, and that the party on whom the burden of proving that the event occurred lies has therefore failed to discharge such burden". Sometimes deciding a case this way on the burden of proof "is the only just course…to take".

[12] The issue in the strike-out application determined in Mutua 1st.

trial of the facts and issues in respect of the individual cases, for them to succeed under s33". The Claimants responded:

> "The parties are agreed that, per the Defendant's Response §52 the court is "not engaged on a historical seminar or in an inquiry". The court is engaged upon a forensic fact-finding exercise within a legal framework. It needs to determine whether the Claimant can make out their claims and whether that exercise can be done fairly..."[13]

The approach to the Test Case Submissions

23. A critical issue is the Law of Limitation.

24. An action for personal injury must be brought within 3 years from the date on which the cause of action accrued or the date of knowledge (if later) of the person injured[14]. The causes of action accrued, on TC34's case, in the 1950's and possibly into 1960. The Claimants have not alleged that their date of knowledge[15] was any later than when the injuries were allegedly caused.

25. For claims not based on personal injury the limitation period is 6 years from the date on which the cause of action accrued[16]. The Claimants relied upon section 32 Limitation Act 1980, asserting that facts relevant to the Claimants' right of action had been deliberately concealed from them by the Defendant. Had this succeeded, the period of limitation would not have begun to run until the Claimants had discovered the concealment, or could with reasonable diligence have discovered it. This provision was potentially applicable to all heads of claims. I ruled against the Claimants on this[17]. Therefore, all non-personal injury claims are barred under the provisions of the Limitation Act 1980 and cannot proceed[18].

26. The parties provided me with the following written submissions:

- TC34 Closing Submissions (68 pages)
- Test Cases – General Closing Submissions (Claimants): 78 pages
- Defendant's General Closing Submissions to accompany the Test Case Closing Submissions: 108 pages with 94 footnotes and 16 Appendices – a total of 10 lever-arch files
- Defendant's Written Closing Submissions Test Case 34: 238 pages with 212 footnotes and 6 Appendices

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[13] In oral submission Mr Myerson made certain comments about the broad historical background and suggested that the Government had overreacted to the Mau Mau threat. This is not something which I can or should judge in this case.
[14] Section 11 Limitation Act 1980.
[15] As defined by Section 14 Limitation Act 1980.
[16] Section 2 the Limitation Act 1980.
[17] The section 32 judgment.
[18] The order recites and declares: "Subject to the discretionary provisions of section 33 of the Limitation Act 1980 which apply to personal injury claims only, the claims of all Claimants listed on the Group Register are barred pursuant to the provisions of the Limitation Act 1939 and/or the Limitation Act 1980, section 26 of the 1939 Act and/or section 32 of the 1980 Act having no application."

- Response to the Defendant's General Submissions and Submissions regarding TC34: 111 pages with 44 footnotes

These submissions were drafted on a comprehensive basis, before recent judgments narrowed the remaining claims to trespass to the person causing personal injury. The case as it now is requires consideration of many but not all of those submissions. More importantly, it requires a shift of focus so as to concentrate on whether it is equitable to allow the remaining (now much more limited) claims to proceed and whether they have been proven, subject to the generic issues. Had the court been deciding on the wide raft of previous claims - based on lengthy detention, forced labour, living in fear for a number of years and damage to/destruction of property - the core allegations to be determined would have been on a much broader canvas[19]. As it is, many of those matters have fallen by the wayside, to the extent that their relevance is limited to setting the scene and whether there is consistency and reliability in a TC's evidence such that it is equitable to allow the personal injury claims to proceed and, if so, to decide whether they have been proven. I shall set out the relevant law more fully later in this Judgment.

27. As already mentioned, based on two decisions of the House of Lords, the section 33 discretion applies only to personal injury claims that accrued from 4 June 1954 onwards. The Claimants conceded that this court was bound by those authorities, but reserved their decision to argue in the Supreme Court that they should be departed from. If a TC does not prove that a claim arose after 4 June 1954, I must find that it is absolutely time-barred. Nevertheless, given that the point has been reserved for argument in the Supreme Court, I will, where pre-4 June 1954 events arise in the Test Cases, decide whether I would have exercised my discretion under section 33 and, if so, whether the Claimant has proved his/her case in respect of those events.

28. Since I am deciding the section 33 issue along with the substantive issues in the case, I have to take care not to determine the substantive issues (including liability, causation and quantum) before the issue of limitation and, in particular, the effect of delay on the cogency of the evidence[20].

Outline of TC34's allegations

29. Before I begin to look carefully at TC34's allegations, I will have to deal with many other matters. So as to give the minimum context at this stage, I will reproduce the summary of the allegations made by TC34 from paragraph 4 of his written closing submissions as follows:

> "He went through the pipeline and seeks to prove that:

[19] Also there are no surviving claims for Special Damages. The claims are now limited to General Damages for pain, suffering and loss of amenity.

[20] See KR v Bryn Alyn [2003] EWCA Civ 85 paragraph 74 (7); B v Nugent Care Society [2009] EWCA Civ 827 paragraph 21. In B, paragraph 22 the Court of Appeal continued "that is however simply to emphasise the order in which the Judge should determine the issues. When he or she is considering the cogency of the Claimant's case, the oral evidence may be extremely valuable because it may throw light both on the prejudice suffered by the Defendant and on the extent to which the Claimant was reasonably inhibited in commencing proceedings…".

(a) He was interrogated and tortured after his arrest in 1954/55. He witnessed the violent rape of a young girl…

(b) He was detained at Langata and then Manyani, in which he suffered poor conditions and in which latter camp he was stung by scorpions and refused medical treatment; that he was forced to work and assaulted at Manyani by prison guards…

(c) He was detained at Mackinnon Road and assaulted there…

(d) He was forced to work at Mackinnon Road, Mwea, and Gathigiri without remuneration…

(e) He was assaulted and rearrested in 1959, and was again assaulted after being rearrested…

(f) He was again detained and sent to Embakasi – despite not being convicted – in poor conditions and was threatened with castration… He was detained at Fort Jesus, Mukoe Camp in Lamu and Hola where he was assaulted…"

30. The alleged assaults for which damages are sought will be referred to in this Judgment as "the core allegations". They are those mentioned in the above subparagraphs (a) where the assault is said to have taken place in the Ngong Forest, (b) alleged assault at Manyani camp, (c) alleged assault at MacKinnon Road camp, (e) alleged assault at TC34's home village of Gikuni and (f) alleged assault at the open camp in Hola.

Pleadings

31. The following are the relevant pleadings which I have to consider:

Re-Re-Re-Amended Generic Particulars of Claim ("RRRGPOC")

Re-Re-Re -Amended Generic Defence ("AGD")

Re-Re-Re-Amended Reply to Defence ("AGR")

Rejoinder ('GRej')

TC34's Individual Particulars of Claim ("IPOC")

TC34's Individual Preliminary Schedule of Loss ("SOL")

TC34's Proposed Amended Individual Particulars of Claim, ruled on in the Liability Amendments Judgment ("proposed AIPOC")

TC34's Amended Individual Particulars of Claim ("AIPOC")

TC34's Amended Individual Schedule of Loss ("ASOL")

Re- Amended Individual Defence ("RAID")

Amended Individual Counter-Schedule ("AICS")

TC34's Reply to Defence ("Reply")

32. I now deal with a number of further matters of principle which arise in TC34's case and are likely to be relevant to most, if not all, TCs.

Pleadings and evidence: proof

33. The first matter of principle is that the contents of a statement of case are not evidence in a trial, even though verified by a statement of truth. This is the effect of CPR rule 32.2 and CPR rule 32.6. In Arena Property Services Limited v Europa 2000 Limited[21] Arden LJ said at [18]:

> "Mr Banning submits that there was an allegation of an easement in the Pt 20 claim, which was verified by a statement of truth. This does not assist since an allegation so verified is not evidence for the purposes of the trial (see CPR 32.6(2))."[22]

34. The position is that contained in CPR rule 32.2 namely:

> "32.2 – (1) The general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved –
>
> (a) at trial, by their oral evidence given in public;
>
> …
>
> (2) This is subject –
>
> (a) To any provision to the contrary contained in these rules or elsewhere; or
>
> (b) To any order of the court."

35. Clearly, if a Claimant or witness adopts in his or her oral evidence the whole or any part of a pleading (e.g. Part 18 responses) then they are evidence in the trial. Otherwise, the evidence from a Claimant is only that contained in his or her witness statement verified in oral evidence, together with such oral evidence as the Claimant/witness gave on oath/affirmation. I do not accept the Claimants' submissions. First, they say that refusing to consider as evidence at trial matters verified in a statement of case elevates a general rule into a statute. It does not. It is the clear effect of a procedural rule, made under Statutory Instrument, as to how facts are to be proved. Secondly, they say that in the above authorities, there was nothing from the parties that assisted their case and the issue was whether evidence existed,

[21] [2003] EWCA Civ 1943.
[22] See also De Beers UK Limited v Atos Origin IT Services UK Limited [2010] EWHC 3276 (TCC) at paragraphs 353-355.

not how statements were to be classified, adding: "Here the facts exist. D's complaint is that because they are in the wrong place, they should be categorised as something other than facts". This is not the point. Rule 32.6 is clear that "any fact…is to be proved….at trial by their oral evidence given in public" (my underlining). That is why witnesses specifically adopt statements in their oral evidence, thus proving them for purposes of the trial. If facts have been proved as required by Rule 32.6, then there is no need to attempt to rely on Statements of Case; if they have not been so proved, then, at trial, the Statements of Case (unless adopted in oral evidence) do not prove those facts.

Pleadings – additional matters

36. In the AIPOC the following appears:

> "45 The defendant, by its servants or agents, perpetrated trespasses to the claimant and/or breached its duty to the claimant as follows:
>
> PARTICULARS OF NEGLIGENCE AND/OR TRESPASS TO THE PERSON
>
> …
>
> (6) Failed, if it be the defendant's case that the claimant was treated as set out here in pursuant to lawful regulations, to ensure the regulations as set out in annex 4A and 4C of the Generic Claim, were compatible with recognised international standards of basic human rights;
>
> …
>
> (8) Failed to ensure that their servants or agents adhered to international standards of treatment pertaining to those involved in or caught up in conflict;
>
> (9) Failed, either adequately or at all, to enforce international standards of treatment pertaining to those involved in or caught up in conflict…"

37. None of the "international standards" are particularised. In the refusal of false imprisonment judgment, the Claimants sought to amend each of the four draft IPOCs. I took TC1's IPOC as an example of the proposed amendments (those proposed amendments being underlined). They were:

> "(7) Failed to ensure that their servants or agents adhered to the international standards of treatment pertaining to those involved in or caught up in conflict, as required by the common law giving effect to customary international law;
>
> (8) Failed, either adequately or at all, to enforce the international standards of treatment pertaining to those involved in or caught up in conflict, as required by the common law giving effect to customary international law."

I refused the amendments on this basis:

> "34. I am not prepared to allow these amendments as presently pleaded. They are inadequately particularised in the following regard:
>
> (a) Establishing a rule of customary international law requires that the relevant settled state practice is extensive and virtually uniform.
>
> (b) The state practice is on the understanding that the states are bound by the rules as a matter of international law.
>
> (c) The relevant customary international law in relation to the TCs, the standard relied upon and the acts complained of need to be set out."

38. Therefore I refused, for lack of particularity, proposed amendments the effect of which was to seek to add some detail to what is contained in paragraphs 45(8) and (9) of TC1's IPOC. By parity of reasoning with my previous judgment, I do not give any effect to the "international standards" referred to in paragraphs 45(6), (8) and (9) of TC34's AIPOC.

Pleadings and evidence: relationship

39. TC34's final submissions are dated 1 December 2017. They contain some matters which (a) are in conflict with the pleadings, in particular the AIPOC and (b) (in some cases) were the subject of proposed amendments refused by the court in the liability amendments judgment. I shall deal with the latter as they arise, but the rulings in that judgment will not be undermined.

40. This conflict with the pleadings was the subject of some exchanges with Mr Myerson QC, on which the Defendant relies, particularly what was said on 10 April 2018, as follows:

(1) (Mr Myerson) "…we accept that once we have pleaded 1953, for the sake of argument, and it turns out, on the face of the documentation, that it appears to be 1955 but everything else is accurate, we can't get a remedy for that. It's too late, we didn't amend it in time, it's not our case."

(2) (Mr Myerson) "We are advancing a case, on a number of Test Claimants, in some circumstances where we say that they have got dates wrong. Now, it may be that your Lordship decides that because of that their account is not reliable on the incident completely. So let's take this hut burning –

Mr Justice Stewart: No, I understand that. But assuming I say "well, they are reliable generally but the problem is it's pleaded as December 1953 and on the evidence it would have been January 1955.

Mr Myerson: Well, then in those circumstances we are shut out and there can't be a remedy because we pleaded it as being 1953, and we say now it's more likely to be 1954."[23]

[23] See also transcript 27 February 2018 at pages 122-123.

41. This acceptance is consistent with authority. So for example in Credit Suisse AG v Arabian Aircraft and Equipment Leasing Co[24] Moore-Bick LJ said:

> "17. Particulars of claim are intended to define the claim being made. They are a formal document prepared for the purposes of legal proceedings and can be expected to identify with care and precision the case the Claimant is putting forward. They must set out the essential allegations of fact on which the Claimant relies and which he will seek to prove at trial, but they should also state the nature of the case that is being made in order to inform the Defendant and the court of the basis on which it is said that the facts give rise to a right to the remedy being claimed…"

42. Therefore, TC34's claim is defined by his pleadings and not just as to dates. Substantial/material deviation from the pleadings in the closing submissions cannot give rise to a remedy. That said, it is for the court to decide what is substantial/material in the circumstances. The pleadings are not a complete straitjacket. The aim of them is so that each party knows the case it has to meet and is not unduly disadvantaged by any divergence from the pleaded case.

43. The Defendant refers to the Liability Amendments Judgment at [25] and [28][25]; the reasoning set out in those paragraphs is still valid, but, at this stage of proceedings, where the more wide-ranging allegations have fallen by the wayside, the effect of imprecision or inconsistency as to dates must be measured in that context. So, the potential prejudice to the Defendant of an inaccurate timeline would be greater when claims for time in detention and forced labour over long periods were still live. That is not to say that there is no enduring potential effect on the core allegations; that will depend on the effect on the cogency of TC34's evidence and the Defendant's ability to meet the case, especially as regards the Defendant's investigations and possible witness or documentary evidence. In respect of these, the question must be asked whether inconsistency as to the main dates pleaded for where TC34 says he was at the time of the core allegations can be said to have affected the availability or presentation of evidence or the fairness of the trial. It will become apparent later in this judgment that, despite massive efforts by the Defendant, there is no piece of documentary evidence and no witness specific to TC34's core allegations, or even as to his presence in the various camps in which he says he was detained. This is a position common to the other TCs.

44. Any timeline divergence may also: (a) have an effect on any background evidence relied on by the Claimants as supporting the core allegations and (b) be capable of counting against a Claimant in terms of cogency of the evidence presented. The effect of date changes on TC34's reliability requires attention to the detail. It must be said that in general terms it would be understandable if a witness such as TC34, at this remove of time, was uncertain on dates or made errors. Indeed (a) it would be surprising if he did not and (b) that is one of the reasons why the Defendant says it is too late to have a fair trial and it is not equitable to allow the action to proceed.

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[24] [2013] EWCA Civ 1169.

[25] Also to the reasons given for refusing amendments in the particular cases of TCs 19 & 21.

Translators

45. On 24 November 2016 I handed down the translators' judgment. In this I refused the Defendant's application to require the translators utilised by the Claimants for witness statements and Part 18 responses provided by the TCs, to attend court for cross-examination. The reason for the application was "so that the Defendant and the court can understand the process by which documents were created and make judgment as to the reliability and accuracy of the documents in portraying the true account of the witness."

46. An important part of the background, not just in relation to translators, but also to the taking of witness statements with which I will deal subsequently in this judgment, is set out at [12] of the translators' judgment. It states:

> "12 At a CMC in December 2014 it became apparent that the procedure for taking the witnesses' evidence had been that the lead solicitors prepared English statements first, checked the accuracy of the document by reading the English version back to the witness in the witness's own language and then corrected errors in the English version. As no native language statement had been taken from the witness, the Defendant agreed that checking the accuracy of the statement with the witness and producing a native version statement and correcting any errors in the English version was the most appropriate way to proceed. The lead solicitors confirmed that that was what they were to do and have since confirmed that that is what they did."

47. The Defendant had themselves obtained translations of the Kikuyu version of the TCs' witness statements and Part 18 responses from Wolfestone Translation Limited ("Wolfestone").

48. In outline there were six major concerns raised by the Defendant. I shall summarise these and what I said about them in the judgment. Full details appear at paragraphs 23-44 of the translators' judgment.

49. The first point was who created the documents? The Defendant said that the person verifying the translations declared that the translations exhibited were accurate, and did not say that they themselves created the translations by translating the witness statements or Part 18 responses. My response to this was that, while it is correct that CPR 32PD 23.2 requires the translator to make and file an affidavit, this could properly be addressed by a witness statement/affidavit from the translators.

50. The Defendant's second point was that there were spelling/grammatical errors in the verifying affidavits. The Defendant gave examples and said that they caused concern in terms of the translators' ability accurately to translate. My response to this was that in such a vast mass of translation, the errors could not possibly, by themselves, merit the cross-examination of the translators and that the Defendant could make submissions in closing its case.

51. The Defendant's third point was that there was a lack of information regarding the translators' qualifications and experience. I referred to CPR 32PD 4.1 and said that

the requirements of the Practice Direction could be fulfilled ex post facto. I added that information about the translators' experience or qualifications was not required by the CPR or the Practice Direction, but should in this case be provided.

52. The Defendant's fourth point was that there were discrepancies in the Part 18 responses. My response was that some of the discrepancies appeared to be of relatively little import; also, discrepancies could have been put to the Claimants when they gave their evidence. I said that matters were capable of being dealt with by the Claimant and/or the court interpreter. Some had been so dealt with. I added "further, or alternatively, they are matters for comment/submission in due course."

53. The Defendant's fifth point was as to the meaning of particular words or phrases. Two specific examples were given. The first was the translation of "njoni". This word had been translated as "British military", "British officer" or "British soldiers". The Test Claimants had been asked what they meant by the word and had given a variety of answers. The second example was the word "muthigari". The issue here was whether it meant "police officer" or a "prison guard" or a "guard" or "home guard" or "prison officer". I was of the view that cross-examination of the translators would not add anything of substance on this point. I said "the differences of meaning have been explored with the TCs and with the court interpreter. Final submissions can address the weight I give to this."

54. The Defendant's sixth point dealt with certain specific matters which had been the subject of cross-examination of the Test Claimants. Examples were given in respect of TC22 and TC25. My decision on this was as given in relation to the Defendant's fifth point and for the same reasons.

55. The order I made following the translators' judgment is dated 24 November 2016. I ordered affidavits or witness statements from the translators for the Test Claimants to cover the following:

> "(1) The details required by CPR 32PD 4.1(1) to (4) as pertained at the time of creating their first such affidavit (indicating whether those details have subsequently varied and if so, how)
>
> (2) The qualifications and experience of each translator at the time of creating their first such affidavit, and thereafter if advised
>
> (3) Setting out whether the translator (1) created and/or (2) modified each of:
>
> (i) the English language document, and
>
> (ii) the Kikuyu/Meru document
>
> exhibited to each of the relevant affidavits; if so, when and if not, who if anyone (to the best of their knowledge) created and/or modified those documents

> (4) Setting out the process by which the content and accuracy of each set of documents exhibited thereto was verified with each Claimant…"[26]

56. Six translators provided witness statements in January/February 2017.

Experience

57. All six witness statements contained the statement "I am also proficient in the English language and can read, write and understand the same. English is a recognised, official language of Kenya and I use this language socially." In respect of the individual experience:

i) Gathoni Waweru states:

> "At the time of me creating my first affidavit I was educated to college level and attained a certificate in computer packages. Throughout the course of my studies lectures were delivered in English. I have therefore applied my knowledge of this language to a high standard culminating in the achievement of my qualification as listed above.
>
> …
>
> 16 In addition to my role at Miller & Co Advocates, I have previously undertaken work which has required me to utilise my bilingual skills to complete the task in hand. For example, I have worked for Johari Productions, translating scripts from English into Kikuyu for the Kikuyu audience."

ii) Jason Kibe Kimotho:

> "7 At the time of me creating my first affidavit I was educated to university standard having attained a BSc in media science at Moi University. Throughout the course of my studies lectures were delivered in the English and Kiswahili languages. I have therefore applied my knowledge of these languages to a high standard culminating in the achievement of my qualification as listed above.
>
> …
>
> 16 In addition to my role at Miller & Co Advocates, I have previously undertaken work which has required me to utilise my bilingual skills to complete the task in hand. For example, translating documents, recordings, and survey questions from Kiswahili to English and vice versa. Most of these works are from an online working platform Elance… where I worked as a freelance translator (written). I have also translated orally in campus (Moi University) where some Americans were involved in a programme that aimed to instil computer skills to the local community and students. I was part of the team involved in

[26] There was a specific order in respect of the translation of the witness statement of TC25.

teaching. Translation took place when the Americans needed to talk to the locals, where some had difficulties understanding English."

iii) Bernard Muchiri Kariuki:

"7 At the time of me creating my first affidavit I was educated to secondary standard having attained a Kenya certificate of secondary education at Sacred Heart High School. Throughout the course of my studies, lectures were delivered in the Kiswahili and English languages. I have therefore applied my knowledge of these languages to a high standard culminating in the achievement of my qualifications as listed above."

iv) Joseph Kamau Kiiru:

"At the time of me creating my first affidavit I was educated to university standard having attained a bachelor of laws (LLB) at Duomo Kenyatta University of Agriculture and Technology. Throughout the course of my studies, lectures were delivered in the English language. I have therefore applied my knowledge of this language to a high standard culminating in the achievement of my qualifications as listed above."

v) Ann Njeri Kamau:

"At the time of me creating my first affidavit I was educated to university standard having attained a diploma in mass communication at the Mombasa Polytechnic University. I was also a licensed emergency medical technician 1. Throughout the course of my studies, lectures were delivered in the Kiswahili and English languages. I have therefore applied my knowledge of these languages to a high standard culminating in the achievement of my qualifications as listed above.

…

16 In addition to my role at Miller & Co Advocates, I had previously undertaken work which has required me to utilise my bilingual skills to complete the task in hand. For example, I am a TV host on Inooro TV which is a Kikuyu station. I have also been an actor in local play productions that were done in my mother tongue, Kikuyu."

vi) Hiram Thume Kimotho:

"At the time of me creating my first affidavit I was educated to diploma level having attained a diploma in performing arts. Throughout the course of my studies, lectures were delivered in English. I have therefore applied my knowledge of this language to a high standard culminating in the achievement of my qualifications as listed above.

…

> 16 In addition to my role at Miller & Co Advocates, I have previously undertaken work which has required me to utilise my bilingual skills to complete the task in hand. For example, I have worked for Masafa arts production (theatre group) translating, writing and directing film scripts from English to Kikuyu languages and vice versa and also worked with Inooro television which is a Kikuyu television station. I am also an actor, and I perform in three languages; Kikuyu, English and Kiswahili."

58. I have set out in full the experience. It is worthy of note that:

(a) None had legal translation experience

(b) Three had some translation experience

(c) None had an English language qualification or a qualification in translation.

Evidence of preparation of translations

59. All the six witness statements contain the following paragraphs:

> "9 The main purpose of my role was to translate the contents of witness statements and part 18 responses from the English language into the Kikuyu language, and vice versa, to attest the accuracy of those translations. I would also act as an interpreter during the course of the Test Claimants interviews, which would entail providing an accurate and truthful translation of the Test Claimants recollection of events arising out of the state of emergency.
>
> …
>
> 11 Due to the passage of time I am unable to recall every document that I created or modified.
>
> 12 Also due to the passage of time I am unable to state on oath exactly when I created the documents attached to each of my affidavits and if they were not created by me who was responsible for creating or modifying those documents attached to my previous affidavit.[27]
>
> 13 Where I have signed an affidavit, I can confirm that I was present during the interview and accompanied by a UK lawyer when the Test Claimant confirmed the accuracy of the document they were signing by thumb printing the document after this had been read to them line by line in their native language. Any corrections that were required such as spelling or alterations were made whilst the Claimant was present as part of the interview process and read again to the Claimant before they thumb printed the same.

[27] In the witness statements of Joseph Kamau Kiiru and Hiram Thume Kimotho this paragraph is slightly varied and reads "12 Also due to the passage of time I am unable to state on oath who was responsible for creating or modifying those documents attached to my previous affidavit."

> 14 At the time of conducting the translation process with the Claimant I had access to the original English statement and a translated Kikuyu version of this document which I read out to the Claimant from the Kikuyu version in order to verify the contents as being correct. The translated Kikuyu version of the statement was translated from English by a member of Miller & Co Advocates translation team. I was involved in this process of converting the documents from English into Kikuyu. A Kikuyu statement that I verified with the Claimant may not necessarily have originally been translated from English into Kikuyu by me.
>
> 15 Part 18 responses to the questions were prepared entirely on the basis of information provided by the Test Claimants during the course of their respective interviews, which were subsequently approved by the Test Claimants on the date of their thumb print as found in the part 18 responses."[28]

60. Four of the six translators "specifically recall creating or modifying Test Claimants' documents[29]." This is a small percentage of the overall documents. As to the rest, it is not clear that any translator actually created that document. This is because of the sentences in the witness statements which say that the translated Kikuyu version of the statement was translated from English by a member of the Miller & Co Advocates translation team. The evidence from the individual translators is then that they were involved in the process of converting the documents from English into Kikuyu, and "a Kikuyu statement that I verify with a Claimant may not necessarily have been translated from English into Kikuyu by me."

61. The other two translators specifically stated that they "did not create any of the original translated documents" and "only read the documents out to the Claimants".

62. There remain two translators who did not file witness statements. Mary Kathome Riungu could not be traced and Lawrence Murage Mwiga agreed to attend Miller & Co, the lead solicitors' agents' offices in Nairobi. He then failed to turn up and could not thereafter be traced[30]. There is no detail of their qualifications and experience, or any other information in respect of the translations they are said to have carried out.

63. Apart from the concerns which appear in the above analysis of the six translators' statements, and the fact that there is no statement or any information from the other two translators, the court takes account of those to which I have made reference in the

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[28] Joseph Kamau Kiiru says at paragraph 13 that he had been asked to provide an explanation as to why some content was not present in the Kikuyu version that appeared in the English statement. He said he was unable to provide an explanation and added "this document was not a document initially created by me. I did do the oral translation, reading the Kikuyu statement to the client. I have however failed to notice the error when checking the accuracy of the translation before signing the affidavit."

[29] These are: (i) for Gathoni Waweru – the two witness statements and Part 18 response of TC1; (ii) for Jason Kibe Kimotho – witness statements all dated 4 April 2016 for TCs 1, 5, 13, 14, 19 and 24, and a witness statement for TC34 dated 30 March 2016; (iii) for Bernard Muchiri Kariuki – a witness statement for TC23; (iv) for Ann Njeri Kamau – a witness statement and Part 18 response for TC24, both dated 18 April 2015.

[30] This information comes from two witness statements from Peter Wagaki Wena dated 1 February 2017 and Stella Wangari Wamae dated 8 February 2017.

translators' judgment.[31] In addition, the process of obtaining evidence before the translators became involved in the formal witness statements and Part 18 replies reduces confidence in these documents.

TC34 translation

64. As far as translation of the key TC34 documents is concerned:

- His first and main witness statement is dated 27 October 2014. It is in English. It is thumb printed by TC34 and contains two declarations by the case worker[32]. There is also an endorsement "I Freddie Cosgrove-Gibson solicitor was present throughout throughout (sic) taking of this statement and signature 27/10/2014." This accords with how Mr Myerson QC told the court on 10 December 2014 the first witness statement for each of the Test Claimants had been taken. There was no Kikuyu translation "because what happened was those claimants were seen, the interpreter was there, the statement was written in English and read back to them being translated by the person who had translated it into English."

- There is then an affidavit from Lawrence Murage dated 10 April 2015. He says he is proficient in the English language. He also says that he read the witness statement attached. This is in Kikuyu. He states that TC34 appeared to understand the documents and approved its content as accurate and the declaration of truth and the consequences of making a false declaration. He made his mark in the presence of Mr Murage. Mr Murage says that the English translation of the document (the original statement of 27 October 2014) is a faithful translation from the Kikuyu language.

- On the same day, 10 April 2015, the Part 18 responses were prepared. Here there is a Kikuyu version and an English version of the same date. The translator is again Mr Murage.

- There is a supplemental statement from TC34 dated 30 March 2016. This is in English and Kikuyu. The translator is Jason Kibe Kimotho.

65. It will be recalled that Mr Murage was one of the translators who failed to respond to further attempts to communicate with him and from whom there is no witness statement complying with the court order.

66. The Defendant prepared a schedule[33] to TC34's closing submissions. This set out 17 differences between the translation of the Part 18 response served by the Claimant and the Wolfestone translation obtained by the Defendant.

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[31] In this judgment I have only made brief reference to these. For fuller details see the translators' judgment, particularly at paragraphs 15, 27-29 and 34-44.

[32] The first declaration is "in the presence of Martin Kariuki (case worker) having first confirmed that I had familiarised myself with its contents by having the translation read to me and confirm this statement is a true account of the matters stated herewith." The second declaration is "I, Martin Kariuki (case worker), confirm I have read this statement to the claimant, the claimant has indicated they understood and agreed the contents and has signed or made his/her mark in my presence."

[33] Appendix F.

67. The Defendant chose to highlight two particular differences. They are these:

i) In paragraph 22 of the AIPOC it states: "on arrival at the Mackinnon Road camp, the claimant was questioned by a British officer and an African regarding the whereabouts of some guns." The Part 18 question asks for details about the British officer. The Part 18 response records:

> "The claimant cannot state in any more detail a description of the uniform. All he can say is that they were white and spoke English. The claimant does not know his name…"

The Wolfestone translation is slightly different but, the Defendant says crucially, does not contain the statement "all he can say is that they were white and spoke English." The Defendant says that this reference to skin colour and language are highly material additions to the Claimant's translation given the liability issues in the case.

ii) Paragraph 32 of the AIPOC alleges that whilst at Gikuni camp a man hit him with the butt of a gun asking him why he did not stand up. The Part 18 request asked for details of the man and the recorded response is "it was a Home Guard. He cannot remember his name." The Wolfestone translation is "he was a guard and the claimant cannot remember the name. No. The claimant does not have any other information apart from what he said before. The claimant does not know whether they had been employed by the British government, the rest is an argument of law." The Defendant says that given the identity and employment status of alleged perpetrators are material issues in the case, the Claimant's translation contains a material addition, i.e. the "Home Guard", and a material omission, namely ignorance as to employment status.

Conclusions as to translations in TC34's case

68. I have carefully considered the two material differences and also read the remaining differences in the schedule relating to TC34's Part 18 responses. Although I can see some merit in the Defendant's concerns, as to pure translation matters, these do not weigh heavily on my mind. The two referred to are of some relevance, but many are much less so. The second one is mentioned later in this judgment when I come to the Gikuni core allegation. In any event, the Defendant has had the relevant documents translated by Wolfestone and, if necessary, any benefit of doubt might, depending on the circumstances, be given to the Defendant on these translation issues. In summary, in TC34's case, I do not consider the discrete matter of translation of witness statement and Part 18 response from the Kikuyu to English (both of which we have) to be an outstanding matter of real significance.

The evidence gathering process

69. I have already cited above, from the translators' judgment at [12], as to how, apparently, evidence was taken from witnesses in English. There is no documentation specific to TC34 in relation to how he first gave details of his claim. However, there is such documentation in respect of TC11[34]. It will be apparent from the pro forma nature of the documentation, that it is likely that the system was used to obtain initial information from all potential Claimants.

70. There are three pro forma documents, namely a "Claimant questionnaire", a "claim overview – form 1" and an "existing client – evidence pack". There is a box on the questionnaire for the Claimant's full witness statement. In TC11's case this is described as "attached"[35]. There is a thumb/fingerprint of the Claimant confirming that the statement is true and to the best of his knowledge, that he agrees to and understands the content of the document and that it has been explained to him in his own language.

71. The Claimant questionnaire records a number of formal details. It is a document from Griffin Legal, who are subsequently described as case workers on behalf of Tandem Law. In addition:

- There is a heading "type of injury: (please tick applicable box)". There are three boxes capable of being ticked, namely "rape", "torture" and "detention". Later there are three boxes headed "details of physical injuries sustained", "details of psychological injuries sustained" and "details of property lost & damaged." Two further boxes are "if injuries sustained whilst based at a detention camp, provide name and location of camp" and "medical history – GP/hospital attended, if any: (please provide date, name and location of GP/hospital attended)."

- There is then a Claimant identification number, a space for the identification card, Claimant's signature and clear image of Claimant's thumb/fingerprint. That document is dated and the name of the interviewer is given.

72. The claim overview form 1 again asks for formal details, but in addition asks for the address during the state of Emergency, occupation during the state of Emergency and presently, and marital status during the state of Emergency and presently. The name of the interviewer and the position and employer (Griffin Legal case worker, on behalf of Tandem Law) are completed, as is the total travelling time from Nairobi to the location. However, details of date and time of interview, total time taken to interview witness and "name of interpreter (if you had one)" have not been filled in.

There is then a section headed "incident details" which is followed by "(please make sure the claimant understands each heading)". The first heading is

"<u>FORCIBLY REMOVED</u>

- DO YOU ALLEGE THAT YOU WERE FORCIBLY REMOVED FROM YOUR HOME: YES/NO

[34] TC11's claim was struck out as he had died prior to his name being entered on the group register. See the judgment reported at [2016] EWHC 3005 (QB).
[35] There is a half page hand written witness statement.

- AGE AT THE TIME"

There are similar questions in relation to detention, forced labour, physical assault, sexual assault and other losses. Finally, there is the client's statement which provides as follows:

> "PLEASE ENSURE THE CLIENT IS AWARE OF THE ALLEGATIONS AND CLAIMS THEY HAVE MADE
>
> PLEASE ASK THE CLIENT TO SIGN THE BELOW IF THEY AGREE
>
> *"I have been told that the purpose of this questionnaire is to enable Griffin Legal to categorise my potential evidence and that the questionnaire will not be the evidence I give in court"*.

There is then provision for signature or fingerprint. This form is undated.

73. The final document is the 16 page "existing client – evidence pack". This is a detailed document filled in on 2 August 2013 by a Griffin Legal case worker on behalf of Tandem Law. There are multiple pro forma questions under the headings "forcibly removed", "detention" and "forced labour". Broadly, the questionnaire follows a similar format asking for example:

> "Do you allege that you were forcibly removed? Yes No
>
> Who removed you? British Military Kenyan Police Home Guard Other
>
> Did you sustain any injury during the removal? Yes No"

There is then the option of circling various parts of the body if injury has been alleged. There is a line "alleged perpetrator British Military Kenyan Police Home Guard Other". There are similar multiple-choice questions in relation to detailed types of physical assault.

74. It seems therefore that the information was recorded only in English. The evidence pack is thumb printed by the Claimant "in the presence of the undersigned witness, having first confirmed that he/she had familiarised themselves with its contents by having a translation read to them." TC11's evidence pack is witnessed by the case worker who signs this declaration.

75. The Defendant points out the following:

i) The questionnaire is in English and contains leading questions on matters of importance

ii) In the question about psychological injury four possibilities are set out, namely "anxiety", "nightmares", "flashbacks" and "other". The Defendant says there is no indication of how these terms were explained in the native language.

iii) The headings in the questionnaire are similarly used in the witness statement and AIPOC of TC34 (and other TCs).

76. It is perhaps unsurprising that a questionnaire was used for efficiency purposes. However, I do bear in mind that there may be some risks in a format of such leading questions, rather than taking a statement in the traditional manner.

Test Claimant cross-examination

Vulnerability

77. The psychiatric evidence in respect of TC34 did not present him as a particularly vulnerable witness. Professor Mezey said that there were no clinical features with regard to his psychiatric presentation which would prevent him from giving proper (i.e. complete, coherent and accurate) evidence. In response to questions from the Claimants' solicitors she did not recommend any particular measures apart from:

- Having someone to support TC34 during questioning, preparing him in advance as to what to expect in the line of questions he would be asked, and taking the questions slowly and sensitively about experiences of trauma.
- Providing TC34 with regular breaks.
- It being helpful but not essential to have an intermediary. She said TC34 should be asked for his preference. An intermediary could merely be his son, or a family member, to support him and make him feel more secure when giving evidence.

78. The parties agreed a memorandum of understanding regarding special measures. That memorandum was attached to the order dated 18 March 2016. So far as material, it provided:

- That the witnesses should be given breaks during their evidence.
- That both translator and witness should be visible at all times during the video link.
- That the witness would be allowed a companion in the room whilst he or she gave evidence.
- That wigs and gowns would not be worn.

It was agreed that intermediaries would not be used, it being impossible to find a suitable intermediary.

79. The Defendant relies upon the passage in J (a child)[36] where at paragraph 92 McFarlane LJ said "it must be a given that the best way to assess reliability, if the witness can tolerate the process, is by exposure to the full forensic process in which oral testimony is tested through examination in chief and cross-examination." McFarlane LJ added:

[36] [2014] EWCA Civ 875.

> "92 … Just as the sliding scale of practical arrangements rises from "no fresh involvement" to "the full forensic process", there will be a corresponding scale in which the degree to which a court may be able to rely upon the resulting evidence will increase the nearer the process comes to normality…
>
> 93 Where special measures have been deployed it is, however, necessary for the judge who is evaluating the resulting evidence to assess the degree, if any, to which the process may have affected the ability of the court to rely upon the witness's evidence…"

80. TC34 gave evidence in person. The Defendant relies upon its submissions in a skeleton argument for the CMC on 18/19 March 2015 to suggest that it was being asked to avoid cross-examining in a manner normally to be expected in litigation such as this. The Defendant says that cross-examination of the Test Claimants was less detailed than it would otherwise have been to reflect, amongst other things, their age, frailties and failing memories.

81. TC34 gave evidence from 09:30am to 11:53am with one break of 17 minutes. He was offered another break but declined. His cross-examination was perfectly polite and not insensitive. However, there was nothing to indicate that it was hypersensitive.

82. In terms of vulnerability alone, and having regard to J (a child), I do not regard anything in the process of TC34 giving evidence before the court to have affected the ability of the court to rely upon his evidence, nor as a reason in itself why the Defendant could not properly cross-examine him on the important issues.

TC34's cross-examination

83. There are many other matters to consider later in relation to the reliability of TC34's evidence. However, it is necessary to deal with one other factor at this stage. In paragraph 7 of TC34's closing submissions, the following is submitted:

> "D's failure to challenge TC34 on key points is a matter for D. It plainly has the evidential consequence that the evidence was not challenged and should be accepted. It has the wider consequence of undermining D's pleaded case that it cannot address the issue. D cannot credibly make that submission having deprived itself of the opportunity of establishing it in evidence. D's failure to seek to do so is no more than a (well-founded) fear that TC34's answers would further bolster his account. Without documents or cross-examination to undermine the account the court should accept it – particularly after D's evidence that what documentation remains in its own files provides a reliable picture of events."

84. It is common ground that there are no witnesses and no documents in this case which are specific to TC34[37]. The effect of that is that the Defendant could not put a positive case to TC34. On 14 June 2016, Mr Skelton QC for the Defendant presaged

[37] To be dealt with in detail later.

this, before the Test Claimants gave evidence. I do not reproduce the statement in full. This extract, however, is relevant to the present point:

> "…the Defendant is not able to put forward a positive account of what happened to the individual Test Claimant. The perpetrators, or alleged perpetrators of the assault on the claimant are dead or untraceable, and so too are the senior colonial government officials who were responsible for the villages and camps where the Claimants live. They cannot answer the factual allegations made by the Claimant and they cannot give instructions to the Defendant's counsel during the course of this trial. The Defendant has not found or been provided with contemporaneous documents which could clarify what happened to the individual Claimants, such as whether they were moved from their homes, and if so, when and why. All of this makes cross-examination of them extraordinarily difficult. It means that when asking questions the Defendant cannot advance its own alternative narrative of events, except at a level of generality, to contradict or undermine the factual allegations made by the Claimants in their evidence.
>
> The claimants are elderly, most of them are frail, many of them cannot read or write, and none of them speaks English. This vulnerability presents additional forensic difficulties for the defendant which will be addressed in submissions later in the course of this trial, however for present purposes the defendants' counsel wish to make clear that we are committed to ensuring that the claimants are treated properly throughout these proceedings. We will endeavour to question the claimants with sensitivity, notwithstanding that the subject matter may be uncomfortable for them at times. We will take time to ensure that the claimants understand the questions being asked. We will not, except occasionally and where necessary, be putting contemporaneous documents to them, even though there are documents that, as we will submit in due course, contradict their claims. As has previously been agreed, we will also not be putting every perceived evidential inconsistency to each claimant. However, we will, where possible, ask questions about significant inconsistencies and we will provide such inconsistencies to the court in a table prior to each claimant giving evidence…."

On 27 June 2016, Mr Myerson made this statement:

> "My Lord, I want to make this entirely clear. The way in which the rules of evidence work as we apprehend them is not that a witness must repeat in cross-examination something that was said in examination-in-chief by way of witness statement. The purpose of cross-examination, if challenge is made, to make that challenge, so that if in due course the defence wish to say these witnesses' account is not credible, then although I have said of course to my learned friend Mr Skelton, and repeated it to your Lordship, that not every point has to be put, there can be no challenge to the centrality of the claimant's evidence mounted on the basis of walking around the outside and sniping at the details."

85. It has been apparent throughout this litigation that the Defendant's primary case was that it would not be equitable to allow the action to proceed pursuant to s33 of the Limitation Act 1980. In the circumstances of this case, it was understandable and proper not to put a positive case challenging TC34's evidence. It does not mean that evidence should be accepted. I therefore reject the Claimants' submission on this point.

86. The matter does not, however, end there. The Individual Defences to the TCs' IPOCs plead in effect that the Defendant is unable to respond to a number of allegations. The question arose between the parties as to how to approach the cross-examination of TCs and other Claimants' witnesses who could not read (or could not read English). The parties agreed that the Defendant would serve on the Claimants the documents upon which it relied in order to ask cross-examination questions, but that the Defendant would not be required to ask the witness to look at the documents. This was an agreement based on proportionality. However, that did not resolve the question of the challenges the Defendant would make, merely that did not need to put the documents to the witness.

87. The position has now arisen that the Defendant relies on inconsistencies in TC34's evidence. Some of these inconsistencies were known prior to TC34 giving evidence. Some were served in a List of Inconsistencies ("the List of Inconsistencies"). Some arose during TC34's evidence. While acknowledging that it is entirely for the Defendant to decide how to put its case, the Claimants submit that the Defendant should not be entitled to rely on an inconsistency unless TC34 was given the opportunity to comment on, and potentially explain, it. They say that a purpose of cross-examination is to test the cogency of evidence and the extent of any prejudice.

88. The Claimants drew my attention to Markem Corporation v Zipher[38].That was a case where witnesses were disbelieved by the judge, despite their not having been given a fair opportunity to deal with them. In TC34's claim the Defendant does not submit that TC34 is lying and should be disbelieved. That is a case that could never properly be put on the (lack of) evidence it has. It does rely on a number of inconsistencies to challenge the cogency and reliability of TC34's evidence, and therefore to submit that it is not equitable to allow the action to proceed, or, if it is, that TC34 has not proved his claims.

89. In Markem the Court of Appeal referred not only to the House of Lords authority of Browne v Dunne[39] but also to the Australian case of Allied Pastoral Holdings v Federal Commissioner of Taxation [40]. At page 623 onwards of Allied Pastoral Hunt J had said:

> **"**It has in my experience always been a rule of professional practice that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matter, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a

[38] [2005] EWCA Civ 267 at [49]–[61].
[39] (1893) 6 R 67
[40] (1983) 44 ALR 607

rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inferences to be drawn from it, and to allow the other party the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn. That rule of practice follows from what I have always believed to be rules of conduct which are essential to fair play at the trial and which are generally regarded as being established by the decision of the House of Lords in *Browne v Dunn* (1894) 6 R 67….

Hunt J then considered the speeches in Browne v Dunne and continued:

"These statements by the House of Lords led to the formulation of a number of so-called "rules". They have been stated in various ways in the cases and by text-book writers, and it is fair to say that there is some room for debate as to their correct formulation.

For example, in *Cross on Evidence* (2nd Australian ed, 1979) the authors state (at para 10.50): "Any matter upon which it is proposed to contradict the evidence in chief given by the witness must normally be put to him so that he may have an opportunity of explaining the contradiction, and failure to do this may be held to imply acceptance of the evidence in chief."……

I remain of the opinion that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matters, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings."

90. The Court in Markem commented:

"61.We think all that applies here. It is not necessary to explore the limits of the rule in *Browne v Dunn* for this case falls squarely within it. Indeed the position is stronger here, for the Judge was not even asked to disbelieve the witnesses."

91. The Defendant says that Markem has no relevance because it has no case to put and it does not seek to contradict TC34's account. Further, that if the limits of the rule in Browne v Dunne are to be explored, they must take into accounts the developments in civil litigation such as exchange of witness statements and Part 18 Requests. In my judgment, however, if there is a substantial inconsistency on the face of a party's evidence and/or between his evidence and other evidence (usually the medical experts in the present case), and the other party seeks to rely on that inconsistency as undermining the case then, generally speaking, a witness should be given the opportunity to comment on that inconsistency.

92. There is room for argument that this is not necessary if the inconsistency was flagged up prior to TC34 giving evidence, either in the List of Inconsistencies or in Part 35 questions to the medical experts. It may be that these situations were within Hunt J's proviso, namely: "unless notice has already clearly been given of the cross-examiner's intention to rely upon such matter". Nevertheless, it would still have been preferable for the Defendant to have put such inconsistencies to TC34 when they had not been dealt with by way of supplementary statement from him, or in his evidence-in-chief.

93. That does not mean that the Defendant cannot make the point now. In F&S v TH[41] Langstaff J said:

> "48. Mr Fewtrell did not cross examine directly on the account of abuse which each Claimant gave. This was because Father M died in 2004. The allegations had never been put to him. There was no way of the Defendant knowing – unless it uncritically accepted the evidence of the Claimants, and that evidence was consistent – that the abuse had occurred. Directly to challenge accounts of abuse which may well have occurred ran the risk of aggravating an injury which had already been caused. The Church could not in conscience cause this further pain. This did not, however, mean that the accounts which F and S gave were accepted as true: Mr Fewtrell invited me to conclude that, after this passage of time, the evidence was insufficiently reliable to justify any findings that the abuse had probably occurred, even if it ***might*** have happened.
>
> 49. I understand this approach. However, there are features of the accounts which are unusual and might have merited close examination to see if, and to what extent, they stood up to close scrutiny: for instance…I must bear these circumstances in mind in my overall evaluation of the case, but cannot, without close testing of the evidence, take them significantly into account when considering whether the evidence now available is a reliable basis for a fair conclusion as between the parties"

94. These comments reinforce my view that, when examining inconsistencies on which the Defendant relies, I will have to be careful to consider whether TC34 was given an opportunity to comment on them and, if not, the extent to which those inconsistencies can then be taken into account in the evaluation of the evidence.

The approach to evidence

95. In recent years there have been a number of first instance judgments which have helpfully crystallised and advanced learning in respect of the approach to evidence. Three decisions in particular require citation. These are:

- Gestmin SGPS SA v Credit Suisse (UK) Limited[42] - Leggatt J (as he then was)
- Lachaux v Lachaux[43] - Mostyn J
- Carmarthenshire County Council v Y[44] - Mostyn J

96. Rather than cite the relevant paragraphs from these judgments in full, I shall attempt to summarise the most important points:

i) Gestmin:

- We believe memories to be more faithful than they are. Two common errors are to suppose (1) that the stronger and more vivid the recollection, the more likely it is to

[41] [2016] EWHC 1605 (QB)
[42] [2013] EWHC 3560 (Comm).
[43] [2017] EWHC 385 (Fam); [2017] 4 WLR 57.
[44] [2017] EWFC 36; [2017] 4 WLR 136.

be accurate; (2) the more confident another person is in their recollection, the more likely it is to be accurate.

- Memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is even true of "flash bulb" memories (a misleading term), i.e. memories of experiencing or learning of a particularly shocking or traumatic event.

- Events can come to be recalled as memories which did not happen at all or which happened to somebody else.

- The process of civil litigation itself subjects the memories of witnesses to powerful biases.

- Considerable interference with memory is introduced in civil litigation by the procedure of preparing for trial. Statements are often taken a long time after relevant events and drafted by a lawyer who is conscious of the significance for the issues in the case of what the witness does or does not say.

- The best approach from a judge is to base factual findings on inferences drawn from documentary evidence and known or probable facts. "This does not mean that oral testimony serves no useful purpose… But its value lies largely… in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth".

ii) Lachaux:

- Mostyn J cited extensively from Gestmin and referred to two passages in earlier authorities[45]. I extract from those citations, and from Mostyn J's judgment, the following:

- "Witnesses, especially those who are emotional, who think they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the

[45] The dissenting speech of Lord Pearce in Onassis and Calogeropoulos v Vergottis [1968] 2 Lloyd's Rep 403, 431; Robert Goff LJ in Armagas Ltd v Mundogas SA [1985] 1 Lloyd's Rep 1, 57.

imagination becomes more active. For that reason, a witness, however honest, rarely persuades a judge that his present recollection is preferable to that which was taken down in writing immediately after the incident occurred. Therefore, contemporary documents are always of the utmost importance…"

- "…I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective fact proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities…"

- Mostyn J said of the latter quotation, "these wise words are surely of general application and are not confined to fraud cases… it is certainly often difficult to tell whether a witness is telling the truth and I agree with the view of Bingham J that the demeanour of a witness is not a reliable pointer to his or her honesty."

iii) Carmarthenshire County Council:

- The general rule is that oral evidence given under cross-examination is the gold standard because it reflects the long-established common law consensus that the best way of assessing the reliability of evidence is by confronting the witness.

- However, oral evidence under cross-examination is far from the be all and end all of forensic proof. Referring to paragraph 22 of Gestmin, Mostyn J said:

"…this approach applies equally to all fact-finding exercises, especially where the facts in issue are in the distant past. This approach does not dilute the importance that the law places on cross-examination as a vital component of due process, but it does place it in its correct context."

97. Of course, each case must depend on its facts and (a) this is not a commercial case (b) a central question is whether the core allegations happened at all, as well as the manner of the happening of an event and all the other material matters. Nevertheless, they are important as a helpful general guide to evaluating oral evidence and the accuracy/reliability of memory.

98. I now turn to a quartet of alleged sex abuse cases against the Catholic Child Welfare Society and others. These were decided by Judge Gosnell sitting as a High Court

Judge[46]. In all four cases Judge Gosnell referred to the relevant passage from Gestmin and also the guidance given by Robert Goff LJ, which Mostyn J relied on in the Lachaux case. He also set out Bingham J's observations[47]. The three main tests which in general give a useful pointer as to where the truth lies, although their relative importance will vary from case to case are:

> "(1) The consistency of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred;
>
> (2) The internal consistency of the witness's evidence;
>
> (3) The consistency with what the witness has said or deposed on other occasions."[48]

99. Judge Gosnell exercised his discretion under section 33 of the Limitation Act 1980 in different ways:

- In AB he refused to allow the action to proceed. One of the factors was clear evidential prejudice to the Defendant due to the passage of time, the most significant prejudice being the inability to call specific witnesses at trial.

- In CD he allowed the action to proceed on the basis that the effect of the delay on the cogency of the evidence was not significant, given the fairly narrow enquiry to establish whether the abuse took place, and the benefit of expert evidence and voluminous documentation to assist on the effects of the abuse. Most of the witnesses relevant to the allegations were still alive and able to give evidence for the Defendant.

- In EF the judge refused to allow the action to proceed. Amongst other things there were concerns about the cogency of the evidence in terms of the Claimant's vagueness on details, and the fact that two of the three alleged perpetrators who had given evidence had no memory of the Claimant. There was little or no contemporaneous documentation and the experts agreed that the paucity of documentation made their assessment of causation very difficult, if not verging on impossible.

- In GH the judge allowed the action to proceed, albeit that the Claimant was "not a convincing witness" [65]. The main alleged perpetrator was available to give evidence. He denied sexual abuse and the judge said "it can be said that his evidence would have been no clearer 24 years ago than it is now. It is not something that he is likely to have forgotten." There are explanations as regards three other potential witnesses for the Defendant. The judge said that the documentation in GH was "both extensive and illuminating" and that

[46] AB [2016] EWHC 3334 (QB); CD [2016] EWHC 3335 (QB); EF [2016] EWHC 3336 (QB); GH [2016] EWHC 3337 (QB).
[47] The judge as juror: the judicial determination of factual issues – Current Legal Problems [38].
[48] Bingham J regarded the credit of the witness in relation to matters not germane to the litigation as more arguable and the demeanour of the witness as not being a reliable pointer to honesty.

> "what little documentation was unavailable had very little, if any, impact on the fairness of the trial."[49]

100. These are, then, some of the most important factors in approaching the evidence in this case generally and in relation to each Test Claimant:

(a) The three principles referred to in Bingham J's article[50].

(b) "With every day that passes memory becomes fainter and the imagination becomes more active"[51].

(c) Memories are fluid and malleable, being constantly rewritten. This is true even of memories of experiencing a particularly shocking or traumatic event.

(d) Nevertheless, in my judgment, memories of a state of affairs, perhaps particularly very unpleasant ones, which take place and persist over a lengthy period of time are less likely to be erroneous as to their central facts, though many details will fade over the years.

(e) The court must be aware of the biases introduced by the process of civil litigation as outlined in Gestmin.

(f) Oral evidence given under cross-examination is the gold standard and a vital component of due process. The correct context is that the value of oral evidence lies largely in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny, and to gauge the personality and motives of a witness, rather than in testimony of what a witness recalls of particular events.

(g) As the Claimants state[52], the Claimants could not look at the documents. They were unable to read them, had no context against which to assess their contents, and lacked the ability to bring themselves to a point where they could sensibly comment. Their vulnerability left them (as both parties agree) able to rely only on recollection (and, occasionally, a map they had marked with the assistance of their legal representative) whilst giving evidence. The Claimants suggest that this means that they were disadvantaged as opposed to the Defendant. There is some force in this, but there is also force in the fact that they could not be cross-examined

[49] GH's claim failed in that he failed to satisfy the judge on the balance of probability that he suffered sexual and physical abuse.
[50] The caution in relation to assessing demeanour is even more relevant when evidence is given via an interpreter.
[51] Lord Pearce in the Onassis case.
[52] General submissions at [9].

on documents. To what extent that would have been relevant in any event, given the lack of documents which pertained specifically to them, is difficult to assess. Further, the Claimants say that when the TCs' recollections do correspond with the documentation, that provides a high degree of confidence that the evidence is reliable and accurate. This will need to be considered on a case by case basis.

(h) I have been referred to an abundance of documents in this case and will need to consider to what extent these documents assist in testing/corroborating oral evidence[53]. A matter of some importance is that, unlike in many cases, there is nobody to comment on or put into context what documents there are.

(i) There are no contemporaneous documents which refer to any incident of assault or battery alleged by a Test Claimant and, in particular, no medical or other records. There is no Defendant witness who is an alleged perpetrator of any tort on any TC. In TC34's case there is no witness from either side, who can give direct evidence of any of the core allegations or of anything at all about him. The lack of documentation relevant to a particular Test Claimant means that the ability to test or respond to the Claimant's oral evidence against any contemporaneous documents, coupled with the fact that the Defendant was not in a position to put a positive case to any Test Claimant, means that the potency of that evidence is reduced. The Defendant did call some witnesses, but it was very rare for a witness to have been the author of a document such that the document could properly be put into context by that witness.

Corroborative Witnesses

101. The Defendant criticises the lack of any corroborative evidence called by the TCs. Apart from TC18, there is no witness who corroborates details in the individual accounts. This is the position with TC34. This point calls for a little exploration:

- The Claimants say it would be astonishing if there were corroborative witnesses to the particular assaults alleged. Further, the beatings alleged by TC34 (apart from possibly at Hola) would, on his account, have been witnessed by hardly anybody else. The Claimants postulate an extreme case: even if TC34 had been beaten every day at Manyani, that would amount to no more than 300 beatings; if each beating had been witnessed by 20 different people, only 6000 people would have ever witnessed TC34 being beaten there; if all were alive, the odds would be heavily stacked

[53] The Claimants submit that there is a remarkable coincidence. Again, I will have to look at this on a case by case basis.

against finding a corroborative witness to a beating. I accept that it is likely to be difficult to trace any such person, even if still alive. Whatever the chances, however, (a) no evidence was given by the Claimants of any attempts to trace such witnesses; (b) if TC34 had been able to call substantial credible evidence which directly corroborated his account of the core allegations, that would have been a factor in his favour in the determination of whether there can still be a fair trial, and, consequentially, whether it is equitable to allow his claims to proceed;[54] (c) the lack of witnesses is the position now; that is not to say there were not witnesses who could have been available much nearer the time.

- It is difficult to say whether there is any merit in the Defendant's argument that there is nothing from any family member, friend or associate who corroborates at least part of the case, e.g. as to TC34's removal to a camp, presence in a camp or the happening of some of the core allegations[55] or injuries. I do not know whether any such witnesses still exist or could be found. I have no evidence of any attempts made by the Claimants to trace any of them. Whether or not they could now have been found and called as witnesses, the position in relation to at least some core allegations, e.g. those at Ngong Forest and Gikuni, is that they were said by TC34 to have been witnessed by people not engaged by the Administration. In the absence of any direct evidence, the chances of those witnesses being available to give evidence must have diminished over time.[56] It may also be that, had this trial taken place much nearer the time when TC34 says he suffered the assaults, he could have identified and obtained evidence from (for example) other detainees who witnessed those assaults in Manyani, MacKinnon Road and Hola. We shall never know. What we do know is that there is, for whatever reason, no evidence now that corroborates TC34's account of any of the core allegations.

- In the course of dealing with some matters later in this judgment, I shall refer to the evidence of some witnesses whom the Claimants submit are corroborative. Apart from questions of whether they can materially corroborate TC34's account, they are all Claimants in this litigation, a factor which may be of some relevance. On the other hand, they do not, apparently, know each other and there is nothing to suggest that their evidence was cross-contaminated or tainted in any other way.

Section 33 Limitation Act 1980

102. S33 of the Limitation Act 1980 ("the Limitation Act") provides, so far as material:

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[54] See Raggett: [2009] EWHC 909 (QB) [23]-[32], [123]-[124]; [2010] EWCA Civ 1002

[55] The core allegations at Ngong and Gikuni were said to be in the presence of other, non-administration, people: see below.

[56] The Defendant suggested that TC34 could have called friends or family members also to give previous consistent statements by him. For example, that when he left the camps he told them many years ago of the core allegations. Although both parties agreed that such evidence would be strictly admissible under the Civil Evidence Act 1995, I disregard this point. Such evidence would have carried little, if any, weight in my judgment.

"(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—

> (a) the provisions of section 11 … of this Act prejudice the plaintiff or any person whom he represents; and
>
> (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents;

the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.

…

(3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to—

> (a) the length of, and the reasons for, the delay on the part of the plaintiff;
>
> (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11…….;
>
> (c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
>
> (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
>
> (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
>
> (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."

Application of Section 33 in the present case

103. Section 11 of the Limitation Act 1980 is applicable where damages are claimed for negligence, nuisance or breach of duty and "consist of or include damages in respect of personal injuries…". By section 38 ""Personal injuries" includes any disease and

any impairment of a person's physical or mental condition…". In the Fear Judgment I ruled that fear alone did not amount to personal injury.

104. In respect of claims arising after 4 June 1954, subject to the section 33 discretion, all the personal injury claims were statute-barred three years after they were alleged to have occurred. The only exception to this was that, for those TCs who were minors, who do not include TC34, the claims were not barred until they achieved majority, some of them in the 1960s.

The Court's approach in determining section 33 discretion

105. In AB v Ministry of Defence[57] the Court of Appeal said this:

> "96. The judge began this section of his judgment by observing, correctly in our view, that the burden of proof under section 33 lies on the Claimant…recognising that the suggestion made in KR v Bryn Alyn Community Holdings Limited [2003] QB 1441 that it is a heavy burden is no longer good law. The discretion to disapply section 11 is unfettered and the Court's duty is to do what is fair: see Horton v Sadler [2007] 1 AC 307 and A v Hoare."

106. How is the Court to determine the section 33 issue when it has heard all the evidence on the substantive issues? In B v Nugent Care Society and others[58] the Court of Appeal at [12] reproduced the starting points set out at [74] of the Bryn Alyn case, having said at [11] that they were still relevant, subject to amendment in the light of A v Hoare.[59] The most significant starting points at this stage are:

> "(iii) Depending on the issues and the nature of the evidence going to them, the longer the delay the more likely, and the greater, the prejudice to the defendant.
>
> (iv) Where a judge is minded to grant a long "extension" he should take meticulous care in giving reasons for doing so.
>
> (v) A judge should not reach a decision effectively concluding the matter on the strength of any one of the circumstances specified in section 33(3), or on one of any other circumstances relevant to his decision, or without regard to all the issues in the case. He should conduct the balancing exercise at the end of his analysis of all the relevant circumstances and with regard to all the issues, taking them all into account.
>
> (vii) Where a judge determines the section 33 issue along with the substantive issues in the case, he should take care not to determine the substantive issues, including liability, causation and quantum, before determining the issue of limitation and, in particular, the effect of delay on the cogency of the evidence. Much of such evidence, by

[57] [2010] EWCA Civ. 1317 – the appeal to the Supreme Court did not affect this statement.
[58] [2009] EWCA Civ. 827; [2010] 1 WLR 516.
[59] These were points (ii) and (vi) see [20]

> reason of the lapse of time, may have been incapable of being adequately tested or contradicted before him. To rely on his findings on those issues to assess the cogency of the evidence for the purpose of the limitation exercise would put the cart before the horse. Put another way, it would effectively require a defendant to prove a negative, namely, that the judge could not have found against him on one or more of the substantive issues if he had tried the matter earlier and without the evidential disadvantages resulting from delay.
>
> (viii) Where a judge has assessed the likely cogency of the available evidence, that is, before finding either way on the substantive issues in the case, he should keep in mind in balancing the respective prejudice to the parties that the more cogent the Claimant's case the greater the prejudice to the defendant in depriving him of the benefit of the limitation period. As Parker LJ showed in Hartley v. Birmingham City District Council [1992] 1 WLR 968, 979 G-H, such a finding is usually neutral on the balance of prejudice:
>
> '…in all, or nearly all, cases the prejudice to the plaintiff by the operation of the relevant limitation provision and the prejudice which would result to the defendant if the relevant provision were disapplied will be equal and opposite. The stronger the plaintiff's case the greater is the prejudice to him from the operation of the provision and the greater will be the prejudice to the defendant if the provision is disapplied …as the prejudice resulting from the loss of the limitation defence will always or almost always be balanced by the prejudice to the plaintiff from the operation of the limitation provision the loss of the defence *as such* will be of little importance. What is of paramount importance is the effect of the delay on the Defendant's ability to defend."

The Court of Appeal in B continued:

> "We should not leave these remarks of Parker LJ without noting that they were qualified in Nash v Eli Lilly & Co… where this Court said that there could be instances of weak claims where disapplication of the limitation provision could cause Defendant's considerable prejudice in putting them to the trouble and expense of successfully defending them and then not being able recover costs against impecunious Claimants."

107. The Court in B endorsed the previous comments about the order in which the judge should determine the issues. However, at [22]-[25] they clarified the relevance of the cogency of the Claimant's case including the oral evidence. Dealing with the Hartley case and referring to other authority, the Court continued:

> "All he[60] was intending to say was that the prejudice to the defendant of losing a limitation defence is not the relevant prejudice to be addressed. The prejudice to be addressed is that which affects the

[60] Parker LJ in Hartley.

> defendant's ability to defend. Clearly the strength of the Claimant's case is relevant…If the action in a case, where liability has been admitted, is commenced a day late but the Defendant is in no way prejudiced in defending the claim, the limitation defence would be a windfall and so as in Hartley the discretion will be exercised in favour of the Claimant…"

The Court later referred to the judgment of Smith LJ in Cain v Francis[61], saying that her formulation was consistent with the Court's approach when she said at [73]:

> "It seems to me that, in the exercise of the discretion, the basic question to be asked is whether it is fair and just in all the circumstances to expect the Defendant to meet this claim on its merits, notwithstanding the delay in commencement. The length of the delay will be important, not so much for itself as to the effect it has had. To what extent has the defendant been disadvantaged in his investigation of the claim and/or the assembly of evidence, in respect of the issues of both liability and quantum? But it will also be important to consider the reasons for the delay. Thus, there may be some unfairness to the Defendant due to the delay in issue but the delay may have arisen for so excusable a reason, that, looking at the matter in the round, on balance, it is fair and just that the action should proceed. On the other hand, the balance may go in the opposite direction, partly because the delay has caused procedural disadvantage and unfairness to the Defendant and partly because the reasons for the delay (or its length) are not good ones."

108. Finally, in B the Court of Appeal said:

> "25. In considering the exercise of his or her discretion under section 33 the judge must consider all the circumstances including of course any prejudice to the Defendant. That involves considering what evidence might have been available to the Defendant if a trial had taken place earlier or it had learned of the claim earlier. We accept Mr Faulks' submission that it is not sufficient for the court simply to hear the evidence of the Claimant, and indeed any other evidence now available, and to decide the issue of limitation on the basis of it, without considering what evidence would or might have been available at an earlier stage…"[62]

109. A more recent authority which is entirely consistent with the above principles is Bowen and the Scouts Association v JL[63]. In that case the Court of Appeal criticised

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[61] [2008] EWCA Civ. 1451; [2009] QB 754.

[62] See also Raggett v Society of Jesus Trust [2010] EWCA Civ. 1002 where at [20] Thomas LJ (as he then was) said: "When this court observed that the judge must decide the issue on the exercise of the discretion under s.33 before reaching the conclusions on liability, it was enjoining a judge to decide the s.33 question on the basis, not of the finding that abuse had occurred, but on an overall assessment, including the cogency of the evidence and the potential effect of the delay on it. It was not seeking to prescribe a formulaic template for the construction of a judgment; it was leaving the judge to decide the best way to write the judgment which would expound the analysis that the law required"

[63] [2017] EWCA Civ. 82

the trial judge on the basis that he had not taken into account adverse factual findings which he had made against the Claimant. Two short citations deal with this:

i) Burnett LJ (as he then was):

> "It is not realistic to shut one's eyes to findings and conclusions reached following a full trial. It is what is done with them in the context of the substance of the reasons for the limitation decision that matters…."

ii) Sir Ernest Ryder SPT:

> "It is simply unreal to fail to appreciate adverse findings and conclusions reached at the end of a trial where limitation is in issue i.e. where it has not been dealt with as a preliminary issue. The correct approach is to adopt an overall assessment of the evidence and the effect of the delay on the same."

110. Burnett LJ pointed out[64] that the logical fallacy with which paragraph 21 of B was concerned:

> "…was proceeding from a finding on the (necessarily partial) evidence heard that the Claimant should succeed on the merits of the conclusion that it would be equitable to disapply the limitation period. That would be to overlook the possibility that, had the Defendant been in a position to deploy evidence now lost to him, the outcome might have been different."

111. Thus, it is apparent:

i) That the legal burden under section 33 rests throughout upon the Claimant.

ii) That I must approach section 33 as guided by the Court of Appeal in B and subsequent authority.

iii) That the issue is whether "It would be equitable to allow the action to proceed." That is the language of section 33(1). As Burnett LJ said in Bowen:

> "18. The language of section 33(1) is clearly discretionary (may direct etc.) but the question for the court is whether it would be equitable to allow the action to proceed. The Court may allow the whole or part of the claim to proceed. But it cannot be doubted that if a judge concluded that it would be equitable to allow the claim, or part of the claim, to proceed having regard to the relative prejudice to the parties, he should do so. The breadth of the discretion comes from the untrammelled evaluation of relevant factors that a judge may take into account, and the weight he gives to each. The factors identified in section 33(3) are

[64] At [26]

all relevant but the decision on whether it is equitable to proceed will be based upon a broad consideration of all the circumstances."

112. It is clear from the authorities that:

i) The central question is therefore whether it would be "equitable to allow an action to proceed", having regard to prejudice to the Claimant and prejudice to the Defendant. Whether a fair trial can still take place is a very important question. So in McDonnell v Walker[65], Waller LJ said

"In *Cain v Francis* the Court of Appeal allowed the appeal and disapplied the limitation period under s.33 but it is important to stress that the court was not simply applying some rather broad test as to whether a fair trial was still possible. The fact that the defendant could not show any forensic prejudice and that the limitation defence would have been a complete windfall was the key feature"

If a fair trial cannot take place it is very unlikely to be "equitable" for the Defendant to meet the claim. But if a fair trial can take place that is not the end of the matter. The possibility of a fair trial is a necessary but not sufficient condition for the disapplication of the limitation period. In RE v GE[66] McCombe LJ said:

57. Ms Gumbel argues that…..the judge went wrong in failing to put at the centre of his consideration the question whether a fair trial of the claim was possible and in asking whether it was fair for a trial to take place…...

58. Having had the benefit of argument on the point, I do not consider that this first ground of appeal is a good one. The question for the court under section 33 is whether it "would be equitable to allow the action to proceed", notwithstanding the expiry of the primary limitation period. That question is to be answered by having regard to all the circumstances of the case, including in particular the factors identified in section 33(3).

59. Whether it is "equitable" to allow an action to proceed is no different a question… from asking whether it is fair in all the circumstances for the trial to take place …. That question can only be answered by reference (as the section says expressly) to "all the circumstances", including the particular factors picked out in the Act. No factor, as it seems to me, can be given *a*

[65] [2009] EWCA Civ 1257 para 21 (a road traffic claim)

[66] [2015] EWCA Civ. 287 (a family sex abuse case where the Court of Appeal upheld the decision not to exercise section 33 discretion in circumstances where, inter alia, there were some records and there had been an earlier divorce hearing in which the Defendant, who was still available to defend himself in the civil proceedings, had had to meet the allegations previously)

priori importance; all are potentially important. However, the importance of each of those statutory factors and the importance of other factors (specific to the case) outside the ones spelled out in section 33(3) will vary in intensity from case to case. One of the factors will usually be the one identified by the judge in paragraph 29, by reference to the judgment of Bingham MR in *Dobbie v Medway HA* [1994] 1 WLR 1234, 1238D-E, namely that statutory limitation rules are

"…no doubt designed in part to encourage potential claimants to prosecute their claims with reasonable expedition…but they are also based on the belief that a time comes when, for better or worse, a defendant should be effectively relieved from the risk of having to resist stale claims".

Nor must it be forgotten that one relevant factor is surely the very existence of the limitation period which Parliament has decided is usually appropriate."

Lewison LJ agreed with McCombe LJ and said:

"75. ……Organisations maintain document destruction policies fashioned according to limitation periods….

78. Whether a fair trial can still take place is undoubtedly a very important question. However, it seems to me that if a fair trial cannot take place it is very unlikely to be "equitable" to expect the defendant to have to meet the claim. But if a fair trial can take place, that is by no means the end of the matter. In other words, I would regard the possibility of a fair trial as being a necessary but not a sufficient condition for the disapplication of the limitation period. Nor is it the case that in *Cain v Francis* …the court applied a broad brush test as to whether a fair trial was still possible. That was expressly disavowed by the Court of Appeal in *McDonnell v Walker* ….at [21]"

ii) The basic question is whether it is fair and just in all circumstances to expect the Defendant to meet the claim on the merits notwithstanding the delay in commencement[67].

iii) Prejudice to the Defendant involves asking whether the Defendant has been disadvantaged in the investigation of the

[67] Cain v Francis, paragraph 73; Hartley v Birmingham City Council at page 980; McDonnell v Walker at paragraph 21-22. At paragraph 22 the Court said in relation to Cain v Francis "That type of case must be contrasted with the case where forensic prejudice is suffered by a Defendant who has not for many years been notified of a claim in any detail so as to enable him to investigate it."

claim and/or the assembly of the evidence in respect of issues of both liability and quantum[68].

113. Two quotations from A v Hoare[69] are of assistance in this regard. These are:

i) Baroness Hale of Richmond

> "60. …A fair trial can be possible long after the event and sometimes the law has no choice. It is even possible to have a fair trial of criminal charges of historic sex abuse. Much will depend upon the circumstances of the particular case."

ii) Lord Brown of Eaton-under-Heywood

> "86. …through the combined effects of *Lister v Hesley Hall Ltd* and departing from *Stubbings v Webb*, a substantially greater number of allegations (not all of which will be true) are now likely to be made many years after the abuse complained of. Whether or not it will be possible for defendants to investigate these sufficiently for there to be a reasonable prospect of a fair trial will depend upon a number of factors, not least when the complaint was first made and with what effect. If a complaint has been made and recorded, and more obviously still if the accused has been convicted of the abuse complained of, that would be one thing; if, however, a complaint comes out of the blue with no apparent support for it… that would be quite another thing. By no means everyone who brings a late claim for damages for sexual abuse, however genuine his complaint may in fact be, can reasonably expect the court to exercise the section 33 discretion in his favour. On the contrary, a fair trial (which must surely include a fair opportunity for the defendant to investigate the allegations – see section 33(3)(b)) is in many cases likely to be found quite simply impossible after a long delay."[70]

114. In B[71] the Court of Appeal pointed out that Lord Hoffman and Lord Walker had agreed that the paragraphs in which Lord Brown expressed caution were "particularly valuable" and that they agreed with them. This followed the Court saying that A v Hoare had made it easier for claimants in historic sex abuse cases in that (i) it was no longer necessary to establish systemic negligence and (ii) evidence of the claimant that he or she was inhibited by the abuse was now relevant to the discretion whereas previously it was not, adding: "This is an important point because it stresses the broad nature of the discretion and that it does not focus solely on whether there has been prejudice to the defendant."

A helpful recent summary

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[68] Cain v Francis, paragraph 73.
[69] [2008] UKHL 6; [2008] 1 AC 844.
[70] These passages were cited to and considered by the Court of Appeal in RE v GE with reference to the importance of a fair trial.
[71] At [17]-[18]

115. In Chief Constable of Greater Manchester Police v Carroll[72] the Master of the Rolls provided a helpful summary of the general principles upon which the Court must act. He said:

> "42. Section 33(3) of LA 1980 requires the court, when exercising its discretion under section 33(1), to have regard to all the circumstances of the case but also directs the court to have regard to the five matters specified in sub-sections 33(3)(a)-(f). There are numerous reported cases in which the court has elaborated on the application of that statutory direction in the context of the particular facts of the case. In many of the cases the court has stated various principles of general application. The general principles may be summarised as follows.
>
> (1) Section 33 is not confined to a "residual class of cases". It is unfettered and requires the judge to look at the matter broadly: Donovan v Gwentoys Ltd [1990] 1 WLR 472 at 477E; Horton v Sadler [2006] UKHL 27, [2007] 1 AC 307, at [9] (approving the Court of Appeal judgments in Finch v Francis unrptd 21.7.1977); A v Hoare [2008] UKHL 6, [2008] 1 AC 844, at [45], [49], [68] and [84]; Sayers v Lord Chelwood [2012] EWCA Civ 1715 [2013] 1 WLR 1695, at [55].
>
> (2) The matters specified in section 33(3) are not intended to place a fetter on the discretion given by section 33(1), as is made plain by the opening words "the Court shall have regard to all the circumstances of the case**"**, but to focus the attention of the court on matters which past experience has shown are likely to call for evaluation in the exercise of the discretion and must be taken into a consideration by the judge: Donovan at 477H-478A.
>
> (3) The essence of the proper exercise of the judicial discretion under section 33 is that the test is a balance of prejudice and the burden is on the claimant to show that his or her prejudice would outweigh that to the defendant: Donovan at 477E; Adams v Bracknell Forest Borough Council [2004] UKHL 29, [2005] 1 AC 76, at [55], approving observations in Robinson v St. Helens Metropolitan Borough Council [2003] PIQR P9 at [32] and [33]; McGhie v British Telecommunications plc [2005] EWCA Civ 48, (2005) 149 SJLB 114, at [45]. Refusing to exercise the discretion in favour of a Claimant who brings the claim outside the primary limitation period will necessarily prejudice the Claimant, who thereby loses the chance of establishing the claim.
>
> (4) The burden on the Claimant under section 33 is not necessarily a heavy one. How heavy or easy it is for the Claimant to discharge the burden will depend on the facts of the particular case: Sayers at [55].
>
> (5) Furthermore, while the ultimate burden is on a Claimant to show that it would be inequitable to disapply the statute, the evidential

[72] [2017] EWCA Civ 1992.

burden of showing that the evidence adduced, or likely to be adduced, by the Defendant is, or is likely to be, less cogent because of the delay is on the defendant: Burgin v Sheffield City Council [2015] EWCA Civ 482 at [23]. If relevant or potentially relevant documentation has been destroyed or lost by the defendant irresponsibly, that is a factor which may weigh against the defendant: Hammond v West Lancashire Health Authority [1998] Lloyd's Rep Med 146.

(6) The prospects of a fair trial are important: Hoare at [60]. The Limitation Acts are designed to protect defendants from the injustice of having to fight stale claims, especially when any witnesses the Defendant might have been able to rely on are not available or have no recollection and there are no documents to assist the Court in deciding what was done or not done and why: Donovan at 479A; Robinson at [32]; Adams at [55]. It is, therefore, particularly relevant whether, and to what extent, the Defendant's ability to defend the claim has been prejudiced by the lapse of time because of the absence of relevant witnesses and documents: Robinson at [33]; Adams at [55]; Hoare at [50].

(7) Subject to considerations of proportionality (as outlined in (12) below), the Defendant only deserves to have the obligation to pay due damages removed if the passage of time has significantly diminished the opportunity to defend the claim on liability or amount: Cain v Francis [2008] EWCA Civ 1451, [2009] QB 754, at [69].

(8) It is the period after the expiry of the limitation period which is referred to in sub-subsections 33(3)(a) and (b) and carries particular weight: Donovan at 478G. The court may also, however, have regard to the period of delay from the time at which section 14(2) was satisfied until the claim was first notified: Donovan at 478H and 479H-480C; Cain at [74]. The disappearance of evidence and the loss of cogency of evidence even before the limitation clock starts to tick is also relevant, although to a lesser degree: Collins v Secretary of State for Business Innovation and Skills [2014] EWCA Civ 717, [2014] PIQR P19, at [65].

(9) The reason for delay is relevant and may affect the balancing exercise. If it has arisen for an excusable reason, it may be fair and just that the action should proceed despite some unfairness to the defendant due to the delay. If, on the other hand, the reasons for the delay or its length are not good ones, that may tip the balance in the other direction: Cain at [73]. I consider that the latter may be better expressed by saying that, if there are no good reasons for the delay or its length, there is nothing to qualify or temper the prejudice which has been caused to the defendant by the effect of the delay on the defendant's ability to defend the claim.

(10) Delay caused by the conduct of the claimant's advisers rather than by the claimant may be excusable in this context: Corbin v Penfold Company Limited [2000] Lloyd's Rep Med 247.

> (11) In the context of reasons for delay, it is relevant to consider under sub-section 33(3)(a) whether knowledge or information was reasonably suppressed by the claimant which, if not suppressed, would have led to the proceedings being issued earlier, even though the explanation is irrelevant for meeting the objective standard or test in section 14(2) and (3) and so insufficient to prevent the commencement of the limitation period: Hoare at [44]-[45] and [70].
>
> (12) Proportionality is material to the exercise of the discretion: Robinson at [32] and [33]; Adams at [54] and [55]. In that context, it may be relevant that the claim has only a thin prospect of success (McGhie at [48]), that the claim is modest in financial terms so as to give rise to disproportionate legal costs (Robinson at [33]; Adams at [55]); McGhie at [48]), that the claimant would have a clear case against his or her solicitors (Donovan at 479F), and, in a personal injury case, the extent and degree of damage to the claimant's health, enjoyment of life and employability (Robinson at [33]; Adams at [55]).
>
> (13) An appeal court will only interfere with the exercise of the judge's discretion under section 33, as in other cases of judicial discretion, where the judge has made an error of principle, such as taking into account irrelevant matters or failing to take into account relevant matters, or has made a decision which is wrong, that is to say the judge has exceeded the generous ambit within which a reasonable disagreement is possible: KR v Bryn Alyn Community (Holdings) Ltd [2003] EWCA Civ 783, [2003] 3 WLR 107, at [69]; Burgin at [16]."

116. I have already dealt in some detail with principles 1-7. Principle 5 must be at the forefront of the Court's mind in respect of the evidence as to prejudice relied on by the Defendant. It will be further considered under section 33(3)(b).

117. I would add one further citation as to principle 6: Lord Wilson in AB v Ministry of Defence[73] said:

> "6. The statutes of limitation, which stretch back to 1540, have been in place for two main reasons. One is to protect defendants from being vexed by stale claims. They are Acts of peace…The other is to require claims to be put before the court at a time when the evidence necessary for their fair adjudication is likely to remain available, or, in the words of the preamble to the 1540 Act…, at a time before it becomes "above the Remembrance of any living Man …to…know the perfect Certainty of such Things"."

118. Principles 8-11 fall for consideration under section 33(3)(a). Principle 13 is not a matter for me. That leaves principle 12. I shall deal with this briefly later.

Other factors

119. In having regard to all the circumstances of the case, the Claimants rely on two particular matters:

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[73] [2012] UKSC 9; [2013] 1AC 78, paragraph 6.

i) They say that the case involves consideration of conduct that breaches Articles 3, 4, 5 and 8 ECHR, and that to the extent that the UK Government may be responsible for widespread and deliberate breaches of voluntarily assumed international obligations to its own citizens, it is repugnant to public justice that it should seek to prevent a trial. In this regard they rely also upon Article 73 of the UN Charter and the UN Convention against torture, as well as the Forced Labour convention. The submission is that this is more than the resolution of a private dispute, and that any argument that the Claimants have only a limited time to ask the Courts to enforce their international rights is diminished by this analysis.

ii) They say this is group litigation which the Claimants have brought to trial within five years of the first contact between clients and solicitors. Therefore they say that the speed of litigation has been truly remarkable. They accept this does not affect the cogency of the evidence. They submit it affects whether there ought to be a trial in the sense that the Claimants have unquestionably both exerted themselves and succeeded in moving an enormous legal action through its preparatory stages, and to substantive trial, in an impressive period of time.

120. In response to the first point, the Defendant refers to the AB case in the Court of Appeal. The first instance Judge had relied upon there being a public interest need for the issues to be ventilated. In this regard the Court of Appeal said this:

> "110. The Judge also appeared to think that there is a public interest in the claims being tried out. We would agree that there can be said to be a public interest in establishing whether or not appropriate precautions were taken to protect servicemen and also whether servicemen have suffered ill health as a result of service in the tests. No doubt it was in order to investigate the latter that the NRPB studies were commissioned. We accept that there has been no public investigation into the adequacy of the precautions taken. We note that there does not appear to have been a Coroner's inquest into any veteran's death which raised these issues. If it were thought that there should be an investigation, an attempt should be made to persuade the governments to order a public enquiry or some other form of investigation. However, we do not think that it is for the Court to form a view that there should be such public investigation and to take that perceived need into account when deciding whether to exercise the section 33 discretion."[74]

[74] [2010] EWCA Civ 1317; The Court of Appeal in AB also rejected any suggestion that section 33 could take into account the subjective issues of a party's wish to have its day in court or a party's subjective view of the merits – see [105]-[109].

121. Similar arguments were raised by the Claimants in Mutua. McCombe J considered them in detail and rejected them.[75] The net result is that it is not permissible for me to take such factors into account.

122. As regards (ii), there has been reasonable speed in getting such a massive case through the litigation process from the time of the case's inception in 2013. However, I do not regard this of itself to be a relevant factor in the exercise of my discretion.

123. I now turn to deal with the statutory factors under section 33(3), whilst not losing sight of the fact that they are examples and not definitive of all the matters which the Court is entitled to take into account. Apart from section 33(3)(b), and the overall exercise of the discretion, I shall deal in this section with the section 33(3) (and some other) factors, so far as they relate to the TCs generally and TC34 individually.

Section 33(3)(a): The length of, and reasons for, the delay on the part of the plaintiff

124. The Court has to have regard in particular to "(a) the length of, and the reasons for, the delay on the part of the plaintiff."

125. The *length of the delay* under this subsection is delay since the expiry of the limitation period[76]. Nevertheless, in Donovan v Gwentoys Limited[77] the House of Lords said that the Court, under section 33(1), had to have regard to the degree of prejudice which the parties would respectively face; prejudice relating to the date on which the Defendant had first been notified of the claim was a relevant consideration to be taken into account. Therefore, a Claimant's inaction prior to the expiry date of the limitation period could be taken into account under section 33(1). Lord Griffiths said at pages 479-480:

> "It does not, however, follow that, in weighing the prejudice to the defendant, the court is not entitled to take into account the date upon which the claim is first made against the Defendant…The primary test of the limitation period is to protect a Defendant from the injustice of having to face a stale claim, that is, a claim with which he never expected to have to deal. The Defendants' insurers never suffered from that disadvantage in Thompson v. Brown and thus the degree of prejudice they suffered was slight. By contrast in the present case, the Defendants are faced with a truly stale claim first made upon them five years after the event. The degree of prejudice they suffer is manifestly incomparably greater than the degree of prejudice suffered by the defendants in Thompson v. Brown and it would be absurd if this could not be taken into account by a judge in the exercise of his discretion. I agree entirely with the following passage from the judgment of Stuart-Smith L.J.:
>
> "The time of the notification of the claim is not one of the particular matters to which the court is required to have regard under section 33(3); although it may come in under paragraph (e). But to my mind it

[75] Mutua 2nd at [150]–[159]
[76] Thompson v Brown [1981] 1 WLR 744 at page 751.
[77] [1990] 1WLR 472

> is an extremely important consideration, and is always so regarded by judges who have to consider these questions. I cannot accept Mr. Tillyard's contention that it is irrelevant, presumably because it is not specifically referred to in section 33(3).""

Lord Oliver added:

> "The argument in favour of the proposition that dilatoriness on the part of the plaintiff in issuing his writ is irrelevant until the period of limitation has expired rests upon the proposition that, since a defendant has no legal ground for complaint if the plaintiff issues his writ one day before the expiry of the period, it follows that he suffers no prejudice if the writ is not issued until two days later, save to the extent that, if the section is disapplied, he is deprived of his vested right to defeat the plaintiff's claim on that ground alone. In my opinion, this is a false point. A defendant is always likely to be prejudiced by the dilatoriness of a plaintiff in pursuing his claim. Witnesses' memories may fade, records may be lost or destroyed, opportunities for inspection and report may be lost. The fact that the law permits a plaintiff within prescribed limits to disadvantage a defendant in this way does not mean that the defendant is not prejudiced. It merely means that he is not in a position to complain of whatever prejudice he suffers. Once a plaintiff allows the permitted time to elapse, the defendant is no longer subject to that disability, and in a situation in which the Court is directed to consider all the circumstances of the case and to balance the prejudice to the parties, the fact that the claim has, as a result of the plaintiff's failure to use the time allowed to him, become a thoroughly stale claim, cannot, in my judgment, be irrelevant."

126. The Court's *approach* to delay and the reasons for the delay is that set out in paragraphs 73 and 74 of Cain v Francis, namely:

> "(i) The basic question is whether it is fair and just in all the circumstances to meet this claim on the merits, notwithstanding the delay in commencement.
>
> (ii) The length of the delay is important, not so much for itself as to the effect it has had, namely to what extent the Defendant been disadvantaged in investigating the claim and/or the assembling evidence in respect of both liability and quantum.
>
> (iii) It is important to consider the reasons for the delay. If there is some unfairness to the Defendant due to delay but delay may have arisen for so excusable a reason that looking at the matter in the round it is fair and just that the action should proceed. On the other hand, the balance may be in favour of the Defendant, partly because the delay has caused procedural disadvantage and unfairness to the Defendant

> and partly because the reasons for the delay or its length are not good ones.
>
> (iv) It will always be relevant to consider when the Defendant knew that the claim was to be against him and the opportunities the Defendant has had to investigate the claim and collect evidence (Donovan)."

127. In considering the *reasons for the delay*, the cases have determined that the Court has to undertake a subjective enquiry for the delay on the part of the Claimants. In Coad v Cornwall and Isles of Scilly Health Authority[78] Ward LJ said at page 195:

> "The Court is required to conduct an inquiry into two factual situations. The first is the length of the delay; the second is the reason for delay on the part of the plaintiff. To add "on the part of the plaintiff" indicates that it is a subjective inquiry in which the Court is there engaged."

128. The next stage is for the Court to decide whether the reason(s) for the delay are good or bad. Ward LJ in Coad continued:

> "Having found what the reason is, the Court must decide whether it is a good or bad reason or, in the language of Russell LJ in Halford v. Brookes…whether the plaintiff is culpable or not."

129. As to developments in funding claims being a reason for delay, there is High Court authority of Mr Justice Wright in Hodgson v Imperial Tobacco Limited (No 3)[79]. The pleaded case was that it was reasonable for each plaintiff to delay the initiation of proceedings (1) until the Legal Aid Board had determined it was not going to fund any action by lung cancer sufferers arising from smoking; (2) until the Claimants' solicitors and counsel had agreed to take action under a CFA. The learned judge first dealt with the subjective inquiry stating:

> "When I come to consider the evidence given by the individual plaintiffs, it becomes apparent that none of the factors, save only the willingness of the plaintiffs' and counsel to act under CFAs, had any material in impact upon the individual minds at all…no plaintiff suggests that his delay until 1996 was because he was waiting for some firm of solicitors to undertake to conduct the action on the basis of the CFA. The reality, it is plain, in my judgment, is that the advertised willingness of those solicitors to conduct the litigation upon that basis was the stimulus that ultimately led all these eight plaintiffs to instruct Messrs Leigh Day to bring proceedings on their behalf."[80]

130. In considering the CFA funding point Wright J concluded at page 23:

> "Therefore I am satisfied none of them did anything effective to pursue any claims against the tobacco companies until Mr Day advertised for

[78] [1997] 1 WLR 189.
[79] Unreported 9 February 1999.
[80] Pages 9-10.

> Claimants or subsequently made offers of CFAs to facilitate litigation. I cannot believe that the underlying policy of section 33 of the 1980 Limitation Act was ever intended by Parliament to permit an injured person…simply to lie in wait until the time became opportune to present a claim, whether because of a change in the law, or an improvement in his own financial circumstances, or any state of affairs arising for what ever reason which would permit him to bring an action which he had hitherto regarded himself as being unable or unwilling to bring. As I said in the outset of this judgment, the whole purpose of the Limitation Act is to ensure that claims are litigated properly and that stale claims should be discouraged."

131. This statement has to be considered with some care. The circumstances were that (at least) some claimants had not processed their claims expeditiously until a CFA was available; hence the reference to lying "in wait". If the facts are that a litigant was ignorant of his/her legal rights until CFAs became available, then that may be a very important factor to be placed on the Claimant's side of the balance[81].

132. Further recent decisions of the High Court which emphasise the fact that reasons must be given are:

(a) AB v Catholic Child Welfare Society[82] where the Judge said at [46]:

> "Whilst I recognise and appreciate that it is typical for a victim of child sexual abuse to want to both repress the memory and avoid disclosure of the abuse, the justification for non-disclosure is not self-proving and requires some assessment of the individual alleged victim."[83]

(b) F&S v TH[84] where Langstaff J said:

> "No particular reason has been advanced why either Claimant should have delayed as long as each did. Their delay after having known of the abuse, and being able to talk freely about it, in both years exceeded the 3-year primary limitation period applicable to their claims, yet no clear explanation was advanced for this"

Length of and reasons for delay – TC34

133. TC34 was added to the group register on 30th May 2014. Therefore that is when he became a party to the proceedings[85]. Thus the length of the delay in TC34's case is approximately 56 years from the date of the expiry of the limitation period in his first claim.

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[81] Halford v Brookes [1991] 1 WLR 428 per Nourse LJ.
[82] [2016] EWHC 3334 (QB).
[83] AB was one of a number of linked cases where the Court carefully examined the evidence for the reasons for delay by the Claimants and distinguished between them based on that evidence – see CD [2016] EWHC 3335 (QB), EF [2016] EWHC 3336 (QB) and GH [2016] EWHC 3337 (QB). Further, in relation to lack of good reason being provided for delay – see Barrand v British Cellophane Limited, The Times 16 February 1995 (Court of Appeal) at page 19; Berry v Calderdale Health Authority [1998] Lloyds Report Med 179, CA – Stuart-Smith LJ at page 185.
[84] At [81]
[85] See [2016] EWHC 3005(QB) at paragraph 14.

134. TC34 gave no evidence, whether in his witness statement or orally, in relation to the reasons for his delay.

135. In TC34's closing submissions, nothing is put forward to explain the reasons for the delay. However, in the general closing submissions, said to be submissions that TCs may have in common, there is a short section referring to this issue.

136. It is said that the TCs (with few exceptions) are illiterate, do not speak English to a conversational standard, are unsophisticated (as their evidence demonstrated) and are largely impecunious in terms of being able to fund a legal action against the UK government. It is further said that legal aid is unavailable to them and that the defendant did not argue against a QOCS[86] order.

137. TC34 gave evidence that he could read and write and that the reason he had not signed his statement is because he was not asked to sign it but asked to put a thumb print on it[87]. Nevertheless, he did not speak English and was relatively unsophisticated. There is no evidence as to his means, so it may well be the case that he is "impecunious in terms of being able to fund a legal action against the government of the UK." I also accept that legal aid is unavailable to the TCs and probably has been since the mid-1990s, though it may have been available before then[88]. In any event, there is no express evidence that any of these are the reasons why the claim was not previously brought by TC34.

138. Next the Claimants say, "Cs were members of a proscribed organisation until September 2003." The defendant accepts that the Mau Mau was a proscribed organisation in Kenya until September 2003. However, TC34 gave no evidence that this was any reason for his delay. Nor can I draw any inference to that effect[89].

139. In the second Mutua Judgment[90] at [30]-[46], McCombe J said:

    (1) The claimants had little education, no significant knowledge or understanding of English and no experience, prior to that claim, of legal or other professional advice. They had minimal financial means. The possibility of a claim being

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[86] Qualified One-Way Costs Shifting

[87] There appears to be a signature on his Identity Card.

[88] I asked for clarification on this during the hearing. The Claimants researches are that Section 7 of the Legal Aid Act 1949 seems to allow anyone to obtain advice in England to sue in England, subject to Regulations. Regulation 3 of the Legal Aid (General) Regulations provided that people desiring legal aid for any claim could apply for a certificate to a local committee in London if they were not resident in the UK. They had to provide proper information and documentation. On that basis legal aid would not have been available to the Claimants between 1949 and 1962, unless they came to the UK. From 1962 until CFAs were introduced in the 1990s, it is possible it would have been available to the Claimants.

[89] Also, the Defendant points out there is no evidence from any Test Claimant that proscription of the Mau Mau disqualified them from seeking advice or redress in respect to wrongs said to have been committed during the Emergency. They refer to evidence that during the Emergency there were Detention Order Appeals, a Mau Mau Sentences Review Committee and other documents indicating the redress in the courts; also to a claim (unsuccessful) brought in 1976 in Kenya by members of Mau Mau, [Munyua 1976 Kenya Law Reports 68] and evidence in the press clippings bundle that Mau Mau Veterans demonstrated publicly from at least 1999 in respect of claims for redress against the UK government for alleged wrongs committed during the Emergency. The Claimants say that the inference is that litigation in England was not a live issue for anyone until the early 2000s.

[90] [2012] EWHC 2678 (QB).

brought was only brought to their attention by the Kenya Human Rights Commission (KHRC) in 2006 and 2008.

(2) Historical scholarship in 2005 "played a significant part in the decision of the KHRC to search out the Claimants and others in similar positions and to investigate the possibility of claims being brought by them".

(3) "A further important feature, and acknowledged by each of the Claimants who gave oral evidence before me, was that (quite apart from the illegal status of Mau Mau organisations prior to Kenyan Independence) any collective organisational meeting of Mau Mau activists or supporters was proscribed under legalisation of the Independent Kenya until 2002/3. Any acts that could be considered to be "organising or taking part in any activity for on behalf of" a proscribed organisation such as Mau Mau was punishable by up to 14 years imprisonment, a substantial fine or both. Each witness acknowledged that it was not practicably possible in that atmosphere for them to discuss with others what had happened to them while in detention or what remedies they might have."

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

140. Against that background, and in that case, Mr. Mansfield for the Defendant "accepted that delay on the Claimants' part in seeking to mount any claim as excusable, or at least understandable, until 2003, having regard to all the factors" i.e. on the evidence there was what appears to have amounted to a concession.

141. However, apart from TC34's education and relative lack of sophistication and the admitted fact that Mau Mau was proscribed in Kenya until 2003, none of that evidence has been adduced in the present case. It must be recalled that in Mutua section 33 was dealt with as a preliminary issue. Here it is being dealt with after all the evidence has been presented.

142. It is not permissible for me to translate findings in Mutua to this case. I do not have any of the evidence that was in Mutua to support the findings. In particular, it appears, as reflected in the present Claimants' own submissions[91], that Mau Mau Veterans' Associations were involved in Mutua. There has been no exploration of whether the proscription, viewed subjectively, was or would have been a factor or regarded as a risk, by TC34, or any Claimant who had assisted the Mau Mau during the Emergency, but who had had nothing to do with them since. Even looking at the terms of the

[91] See below

proscription as recorded in Mutua [33], I do not know whether, objectively speaking, such a person would (or might) have fallen foul of the proscription.

143. I have to deal with the evidence before me. More than that, the Claimants in their general submissions distance themselves from the findings in Mutua. They say this:

i) The Claimants could not have brought an action prior to the issue of these proceedings, which were preceded by a letter notifying the Defendants of the claim dated 10th October 2012. They say that there is no evidence that these TCs were approached by bodies such as the Kenyan Human Rights Commission, unlike the Claimants in Mutua, and that an inference should be drawn that the TCs were not on the lists of the various Veteran Associations with whom the Defendant settled Mutua.

ii) It is likely therefore that the TCs first heard about the case when the Kenyan Agents of Tandem Law[92] began to make clear that Tandem Law were prepared to take these claims on a CFA. Most Cs (and most TCs) did not conclude a retainer until post April 2013. That can sensibly be adopted as the date upon which they were aware that it was possible for them to bring a claim.

144. On the last point, the advertisements and surrounding publicity leading to the GLO probably inform me as to why TC34 has now brought the claim. They do not inform me as to why TC34 did not before bring the claim. The problem with all these submissions is that there is just no evidence from TC34. Clearly there was evidence from the Claimants in Mutua. Why there is not in this case, I do not know. Reasons for delay are not self-proving. It is also unsatisfactory to be asked to draw inferences when Claimants have given written and oral evidence and have said nothing on the reasons for their delay. Indeed, drawing inferences in such circumstances, when the matter could, and on the authorities should, have been addressed, is something which should only be done if the inferences are compelling. It may be the case that the Claimants were in the position for which their lawyers contend, but in the absence of direct evidence it would be wrong to infer that all, or any, were. As the Defendant said, why should the court draw inferences when TC34 did not say what the reasons were and, therefore, his evidence was not tested?

145. Absent any evidence from TC34 to explain the reasons for his delay, the Claimants sought to rely on reasons pleaded in paragraph 53 of the Reply[93]. The pleading says:

> "…Specifically as to the Section 33 discretion under the Limitation Act 1980, this particular Claimant relies on the following in addition:
>
> (a) He is a victim of trauma and is thereby vulnerable;

[92] Tandem Law are the lead Solicitors for the Claimants.

[93] The Reply is not evidence at this stage of the case. See CPR 32.6(2) discussed earlier in this judgment. Further, c.f. the preliminary remarks about cross-examination on 14 June 2016, where Mr Skelton said: "The defendant will not cross-examine the claimants in respect of allegations that are pleaded in the individual particulars of claim but are not supported by evidence in the claimants' statements".

(b) The Claimant could reasonably only be said to be aware of a possible claim of merit against the Defendant after the claim was advertised by Order of the Court and aired on Kenyan Radio in November 2013;

(c) The Claimant is impecunious and was unable to pay for the legal advice in Kenya;

(d) He is unsophisticated and from a rural area and would not have the means to approach lawyers in England;

(e) He could not reasonably be expected to believe that he could bring a claim against the British government, or that he would be compensated;

(f) It was illegal to be a part of or speak of Mau Mau in Kenya before 2003 and the Claimant would have faced possible legal consequences or retribution had he attempted to raise his complaints; and

(g) Had he attempted to do so, he would have faced insuperable difficulties and would have been at such a disadvantage vis a vis the Defendant as to prevent him being in a realistic position to bring a claim. The Claimant will rely upon the Defendant's conduct of this litigation in support of this pleading."

146. The Claimants argued that, even if the Reply is not evidence, it is "there" and I should take it into account. I do not know how I can take into account something which does not constitute evidence. However, although there is no evidence to support this pleading, I shall briefly deal with it, following the same lettering:

(a) There is psychiatric evidence in respect of TC34 (see below), but there is no evidence that this was in any way a reason for the delay in bringing proceedings.

(b) There is no evidence of when TC34 first became aware of a possible claim of merit. In any event, specifically in relation to the pleading that TC34 could only be said to have been aware after November 2013, other Claimants issued in March 2013 and the lead Solicitors had been previously engaged in Kenya (probably since 2011). There is no evidence before the Court as to when TC34 first instructed solicitors. Further, at paragraph 51 of the Reply it is said, verified by the Statement of Truth: "this Claimant was told not more than 5 years ago by people at the Chief's Camp where he lived that he could claim for what happened to him during the Emergency. He had not considered making a claim before. He signed some forms which were taken away. Then about 2 years ago he was told to go to the Offices of Miller &

Company in Nairobi where he signed some more forms and was told he could make a claim." The Reply is dated 18 March 2016. This paragraph sits ill with paragraph 53(b).

(c) There is no direct evidence of this.

(d) I accept that TC34 is unsophisticated and comes from a rural area. There is no evidence as to his means.

(e) There is no evidence as to the date from which he had, or could be expected to have had, this belief. See (b) above.

(f) I have already dealt with this.

(g) I have already dealt with this also.

147. The Defendant submits that TC34's case (and the other Test Cases) are clearly covered by what Mr. Justice Wright said in Hodgson, and that this shows the risks of relying at trial on reasons given in a pleading when those reasons have not been affirmed in evidence. There, one of the pleaded reasons for the delay was "the Defendant's professed determination to contest liability in each and every case brought against them, and their publicly stated refusal to concede that they were manufacturing an addictive product…". As recorded previously in this judgment, Wright J said that on the evidence of the individual plaintiffs, it was only the willingness of the plaintiffs' Solicitors and Counsel to act under CFAs that had any material impact on their individual minds at all. He later made reference to the further pleaded case that the reason for the delay was the Defendant's professed determination to contest liability and their public refusal to concede that smoking was dangerous to human health. Again, the Judge focused upon the evidence from the individual plaintiffs. He said:

> "No plaintiff suggests that he was deterred from taking any steps to bring proceedings by such matters… None of the other plaintiffs suggested that they were influenced by any public statement by the tobacco company in any way. It is a matter of some concern to me that I have been driven to the conclusion that reasons pleaded in the various statements of claim of the product of the ingenuity of the plaintiffs' legal advisors, and do not represent either the reality, or the instruction given by each individual plaintiff. I can only say that this is to be deprecated"[94]

148. The pleading in Hodgson would have pre-dated the coming into effect of the Civil Procedure Rules, and so would not have been verified by a Statement of Truth. Nevertheless, the point does still have some validity as, in the present case, I simply do not know what the individual Claimants, including TC34, would have said had they given evidence at trial about the reasons for the delay. Some, perhaps a majority,

[94] This passage was opened to me and I commented upon it in argument when the Defendant was making opening legal submissions on limitation in December 2017.

perhaps all, would have verified the reasons put forward on their behalf. Some may not have verified all of them.

149. On reasons for delay, the Claimants referred to evidence from Professor Mezey that TC34 had nightmares for about 10 years after the Emergency and was an alcoholic. She diagnosed current and historic PTSD and suggested that for 20 years TC34 used alcohol to deal with avoidance symptoms, which led to functional impairment. She said: "…it was very clear, linked to the cognitive and behavioural avoidance of reminders of the stressor, that thinking or talking about what happened was very distressing for Mr M. ″

150. I have re-read Professor Mezey's evidence on this. First, there was no evidence from TC34 that this was any part of the reason for the delay in bringing the claim; secondly, as to the alcohol abuse in particular, though consistent with PTSD and avoidance of painful memories and trying to forget what he says he had been through, this was not linked on the balance of probabilities to that. This was the subject of Part 35 questions and cross-examination. It culminated in this evidence:

"MR BLOCK: ….I would suggest to you that a more appropriate way of dealing with the increased alcohol intake would be to say that it is well recognised that some persons exposed to traumatic events abuse substances and it's possible that that is why this Test Claimant did so.

A. Yes.

Q. But that is as far, as an expert witness, as you can go. You can't say that is the reason.

A. No, I would accept it. I completely accept your wording. It is certainly consistent with what we know about individuals"[95].

151. Also, the first time this point was raised was in the Claimants' response dated 1 June 2018. It had not been pleaded[96], argued or relied upon at any stage before for this purpose. There was, understandably in those circumstances, no cross-examination of TC34 on it. It should be noted that I refused to permit these matters to be pleaded by way of amendment to TC34's Particulars of Injury, on the basis (inter alia) that they should have been pleaded before TC34 gave evidence.

152. For all those reasons it is not possible to find that, to quote the words in Carroll at [49(11)]: "knowledge or information was reasonably suppressed by the claimant which, if not suppressed, would have led to the proceedings being issued earlier".

153. There is one specific matter to which I must have regard. TC34 did not give evidence that this (or anything) was a reason for his delay. Nevertheless, his case and his evidence were to the effect that he was detained throughout[97] from about 1955 until

[95] Caselines 33-8800

[96] It was not in the section on reasons for delay in the Reply, unless it could be said to come within the general statement: "(a) he is a victim of trauma and is thereby vulnerable"

[97] Apart from a very short period when he returned to his home village in Gikuni – see below

about 1963. There is some evidence by way of documents produced by the Defendant of access to lawyers[98]. However, they seem to be few and far between.

154. It seems to me right, for this period alone, to infer that that was little or no access to legal advice on the possibility of making a claim. Even if I am wrong on this, I would be prepared to take this matter into account as one of "all the circumstances of the case" under section 33(3).

155. The Claimants asked me to take into account also as part of "all the circumstances of the case", the other matters of which there is evidence, primarily (i) TC34 does not speak English, has little education and is relatively unsophisticated; (ii) that only one action was attempted prior to Mutua[99], and (iii) the potential inability to fund an action. They say I should infer from these that in reality an action could not have been brought earlier. I am prepared to put (i) into the balance generally in exercising my discretion, though not to operate with as much weight as if TC34 had given evidence that it was a reason for the delay. The lesser weight is because the effect of this was not explored by the Defendant in cross-examination, in relation to how it may or may not have in fact operated as a cause of the delay in TC34's case. As to (ii) and (iii), while these may have been relevant to the delay, absent any other evidence, particularly nothing specific from TC34 on either of them, I am not justified in drawing a similar conclusion.

2011-2012

156. I shall deal briefly with a matter common to all Test Claimants. The lead solicitors were in Kenya dealing with potential clients from a date in 2011. Mr. Cosgrove-Gibson[100] became involved in August 2011. As at April 2012, he headed a team of over 22 people in the UK and supervised and directed a permanent team of more than 45 people in Kenya. He initially instructed counsel in April 2012. Between May and July 2012, the lead solicitors were in communication with Leigh Day, the solicitors for the Claimants in Mutua. Although they were considering applying to intervene in the Mutua litigation, they eventually decided not to. The first letter to the Defendant from Tandem Law was 10 October 2012. The claim form in the present proceedings was issued on 28 March 2013. The first protocol letter had been sent on 13 March 2013. The Defendant seeks to rely on some additional delay between sometime in 2011 and 2013. In the context of this case, I do not regard this point as of any real significance.

Conclusion re Section 33(3) delay

157. In TC34's case, the length of the delay is up to 56 years. I am not able to find any reasons for the delay, there being no evidence as to such, save for during the period while TC34 remained in detention. It is not permissible to draw any further inferences. Apart from that period, I cannot put into the balance, when exercising my discretion, any good reason excusing the delay. The relevance of that period will have to be explored when I look at cogency of the evidence. I will, however, take into

[98] For example, CCC 20 November 1957 min. 885; 26 January 1959 min. 978.
[99] Munyua 1976 Kenya Law Reports 68 –see above
[100] First witness statement 18 October 2013.

account TC34's relative lack of education and sophistication when I carry out the section 33(1) balancing exercise.

158. I shall now mention the remaining subparagraphs of section 33 (3) before considering section 33(3)(b).

Section 33(3)(c): The conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the Defendant

159. The Claimants first intimated their claim in this action by a letter dated 10 October 2012. On the authorities it is only conduct after that date which is relevant under section 33(3) (c). The support for this proposition is in Halford v Brookes where Russell LJ said:

> "Mr. Scrivener contended that the conduct of the first defendant in allegedly coercing the second defendant to make his second statement to the police and the conduct of the first defendant in allegedly giving perjured evidence at the second defendant's trial were both features of the case upon which he could rely pursuant to sub-paragraph (c). I do not agree. In my judgment sub-paragraph (c) is concerned with purely procedural matters, where the forensic tactics of a defendant may lead to delay."

160. Therefore sub-paragraph (c) deals with the conduct of the Defendant procedurally in relation to the Claimants/their advisers[101].

161. I accept the Defendant's submission that allegations of destruction of documents in the early 1960s, and of failure to keep proper records, are not relevant to the exercise for the discretion under this sub-paragraph. Any relevance they might have would be in the overall exercise of the discretion under section 33(1), and the Court having "regard to all the circumstances of the case" under section 33(3). They are also potentially relevant (if proved) under section 33(3)(b)[102]. The Claimants say in their General closing submissions that they make only one complaint of the Defendant's conduct, namely that there was no attempt to capture all available oral evidence. They say that they do not submit that this conduct is particularly reprehensible and "speaks of institutional self-defence, rather than an attempt to ascertain the truth…". Any potential relevance of this is also under section 33(3) (b). I deal with it in that section of the judgment.

162. In the Claimants' Response they reiterate that they do not level, against the Defendant, accusations of bad faith or failure to comply with court imposed obligations; further they accept that the Defendant does not have to admit anything, but refer to the fact that in Mutua the Defendant admitted the fact of injury and that it was suffered at the hands of the Colonial Administration. They say that this "is exactly what D avoided cross-examining about here", adding "D created its own

[101] See also Beattie v British Steel 6 March 1997 Court of Appeal unreported at page 11.
[102] See general principle (5) and the Hammond case, cited above in Chief Constable of Greater Manchester Police v Carroll.

forensic prejudice by its cross-examination of TC34. In its efforts to limit the damage the evidence might do, D simply did not ask questions about key events and did not ask for explanations of inconsistency. This seems to have been deliberate, and a number of such instances are addressed herein. Equally, D chose not to help its own witnesses by showing them documents." These points are not matters of 'conduct' section 33(3)(c). Again, any relevance they may have is under section 33(3)(b), where I will consider them.

Section 33(3)(d): The duration of any disability of the plaintiff arising after the date of the accrual of the cause of action

163. The only relevant disability in this case is for those few Claimants who were minors at the time of the alleged torts. They attained their majority many years ago. The parties agree that there is no significant distinction between the Claimants on this basis.

164. The Claimants in written submissions referred also in this regard to evidence from Professor Mezey that TC34 had nightmares for about 10 years after the Emergency, was an alcoholic, and had suffered from historic PTSD leading to functional impairment. I have already mentioned these under section 33(3)(a). On section 33(3)(d), these matters fall at first base because the definition of disability for the purposes of the Limitation Act in general (including section 33(3)(d)) is restricted to lack of capacity, within the meaning of the Mental Capacity Act 2005, to conduct proceedings[103]. There is no evidence of this.

Section 33(3)(e): the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages

165. Subsection (e) requires actual knowledge, not constructive knowledge, on the part of the Claimant[104]. In the section 32 judgment I found that the Claimants had actual knowledge for the purposes of sections 11 and 14 at the time or shortly after the torts are said to have occurred[105]. There is no evidence as to any later date of knowledge by TC34 of *"*whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages".

166. The Court must consider whether each Claimant acted promptly. It must also consider whether each Claimant acted reasonably. To some extent there is an echo of section 33(3)(a) in this subsection. However, the important point of distinction is the objective standard in subsection (e). This is apparent from Dale v British Coal Corporation[106] where Stuart-Smith LJ said in relation to this sub paragraph:

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[103] See McGee Limitation Periods 7th Edition paragraph 19.007: "Other incapacitating events which may make it more difficult for the claimant to pursue his action do not count as disabilities for limitation purposes. The point has arisen especially in relation to s.33 of the 1980 Act, where one of the factors required to be taken into account is any disability of the claimant arising after the cause of action accrued. It is now clear, after some earlier doubts, that "disability" in this context has the same limited meaning as is given by s.38 of the Act."

[104] See Eastman v London Country Bus Services Limited transcript 8 November 1985 (Court of Appeal).
[105] See [54]-[56].
[106] [1992] PIQR P373 at 383.

> "It is plain that the judge is there applying a wholly subjective test of reasonableness, since he has already indicated what a reasonable man in the position of the plaintiff should do. In my judgment he was wrong to approach the matter in this way. The test is an objective one, namely, what would a reasonable workman in the position of the plaintiff do?"

167. In terms of section 33(3)(e), the Claimant did not act promptly, and there is no evidence on which to base a finding that the Claimant acted reasonably, in not bringing proceedings until he did.

Section 33(3)(f): the steps, if any, taken by the Claimant to obtain medical, legal or other expert advice and the nature of any such advice he may have received

168. The Claimants submitted that there was no suggestion that the Claimants could have obtained earlier legal or medical advice or that they did. They said that TC34 does not give detailed evidence about this, that he was not asked and that he had very little by way of medical records. The problem is that the burden is upon a Claimant. There is no evidence about the steps taken by TC34 to obtain any such advice or as to why he did not do so.

169. The Claimants said that when agreeing joint medical experts the Claimants told the Court from their legal team's own knowledge, that psychiatric evidence was essentially unavailable in Kenya, and that this was accepted. This has little relevance as the main focus of the claims which remain for me to deal with is the alleged beatings. The predominantly material expert advice in this context is legal and non-psychiatric medical evidence.

Proportionality

170. Having considered all the factors in section 33(3), not just those specifically mentioned under (a)-(f), the Court has to take account of the proportionality of granting relief[107]. This is summarised in Jackson & Powell on Professional Liability 8th Edition (2017) as follows:

> "Given the requirement that all exercises of discretion under s.33 are proportionate, both the quantum of the claim and its merits will be relevant to the Court's decision, so that, if the Claimant's substantive claim is minimal or the case is weak, that will weigh against relief from the ordinary consequences of the limitation rules."[108]

171. In Robinson it was said that "courts should be slow to exercise their discretion in favour of a claimant in the absence of cogent medical evidence showing a serious effect on the claimant's health or enjoyment of life and employability…".

172. I do not regard proportionality as a relevant factor in the present case. Given the nature and seriousness of the allegations, and the fact that is Group Litigation

[107] See Robinson v St Helen's Metropolitan Council [2002] EWCA Civ 1099 at [30]-[31]; Malone v Relyon Heating Engineering Limited [2014] EWCA Civ 904 at 49.
[108] See also the summary in general principle 12 in Chief Constable of Greater Manchester Police v Carroll [2017] EWCA Civ 1992.

involving over 40,000 Claimants, if there can be a fair trial and it is otherwise equitable to allow the action to proceed, even if the amount of recovery in any individual case was very modest, that would not weigh against that claim proceeding.

Other factors

173. The Claimants went further and said that the case involved consideration of conduct that breaches Article 3 and, potentially, other articles of the ECHR. Despite the fact that there is no direct ECHR cause of action, the Claimants submitted that this is an appropriate factor to consider in the exercise of the discretion. I disagree. This point was considered in some detail in the second Mutua case[109] and rejected. At [152] McCombe J said: "I do not consider that the ECHR has relevance to my decision under section 33 of the Act." Later, when dealing with public international law, he said "The 1980 Act confers on the court the widest possible discretion, within bounds, to enable claims for personal injury to proceed outside the general limitation period where the justice of the case so requires. There is no need for reference to public international law to assist this concept. The seriousness of the allegations made obviously gives any court cause to pause for thought before it holds that the claim cannot be brought, while applying to the full the law that the burden of establishing the case for an extension of the permitted limitation period lies upon the claimant."

174. I respectfully agree with these observations. It must not be forgotten that the fact that the Claimants in the Mutua case had suffered torture and other mistreatment at the hands of the colonial administration was accepted, unlike in the present case. I must first decide if a fair trial can take place. If it cannot, it is very unlikely to be "equitable" for the Defendant to meet the claim. The decision I have to make is whether it would be equitable to allow the action to proceed having regard to the prejudice to the Claimants and the prejudice to the Defendant.

175. The fact that this is group litigation is relevant, as I have already said, to the issue of proportionality. It can also be said that since the claim started, given its complexity, it has proceeded at a good pace.

Section 33(3)(b): the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the Claimants or the Defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11

176. It is common ground that under subsection (b) the relevant delay is the delay after the expiry of the limitation period. However, under section 33(1) the Court should have regard to the total period of delay in considering issues of cogency of the evidence of the Claimants or the Defendant. As Longmore LJ said in Davidson v Aegis Defences Services (BVI) Limited[110] at [19]:

> "PREJUDICE TO DEFENDANT WITHIN THE LIMITATION PERIOD
>
> …
>
> Prejudice during this period may not be relevant under section 33(3)(a) or (b) but is clearly relevant as part of the overall picture."

[109] At [141]-[159].
[110] [2013] EWCA Civ 1586 ; see also the citations from Donovan and Carroll at [42(8)]

In Nash v Eli Lilly & Co[111] the Court said:

> "Generally under section 33, when deciding whether it would be equitable to allow the action to proceed, having regard to the balance of prejudice to the respective parties under section 33(1)(a) and (b), "cogency" within section 33(3)(b) is, in our judgment, directed to the degree to which either party is prejudiced in the presentation of the claim or defence because the evidence is either no longer available or has been adversely affected by the passage of time."

177. A number of matters are regularly relevant in terms of cogency. There are two common factors.

(i) Witness availability and quality of evidence

178. In Sayers v Hunter[112], Jackson LJ referred to the death of an important witness for the Claimant saying: "His witness statement can, of course, be put before the court, but…(he)…will not be available for cross-examination." Further, the only person with relevant knowledge for the Defendant was aged 90 and: "With each year that passes her ability to give relevant evidence diminishes".

179. In Davidson the Court of Appeal said at [17]:

> "…the position was made worse (or exacerbated) by that delay. That is not just a reference to the loss of (possible relevant) documentation but also to the well-known fact that memories become less and less reliable, the staler an action becomes. If authority is required for that assertion of common-sense**,** it can be found in Donovan v Gwentoys [1190] 1 All ER 1018 at 1024, 1991 LLR 472 at 479, Roebuck v Mungovin [1994] 1 All ER 568 at 574, [1994] 2 AC 224 at 234 and Price v United Engineering Steels Ltd [1998] PIQR P 407 at 414…"[113]

180. Two other points can be made from recent authority:

(a) The Court has emphasised the importance of the availability of the alleged primary tortfeasor in highly fact sensitive cases. In Bowen, a priest, now dead, had pleaded guilty to sexually assaulting the Claimant. Before his death he had provided evidence

[111] [1993] 1 WLR 782, page 406 G-H.
[112] [2012] EWCA Civ 1715 at [63].
[113] These matters of cogency based upon investigation of the claim by the Defendant and the availability of witnesses and the quality of their evidence must be determined on the facts relevant to the individual case. For examples of two cases where the factors were very different, see: Dale v British Coal Corporation (No 2) The Times 2 July 1992 [an accident case] and RAR v GGC [2012] EWHC 2338 (QB) a sexual abuse case where the Defendant had pleaded guilty to indecent assault in 1977, he was still available and there was no evidence that he no longer recalled the events, and there were medical records charting the progress or lack of the Claimant's psychiatric state following the abuse.

to the church in connection with his petition to leave the priesthood. In that evidence he said that he had pleaded guilty for reasons other than having actually committed the offences. The account he had given was consistent with the Claimant having consented to the alleged assault. Burnett LJ, rejecting a submission that the availability of the alleged perpetrator would have added little, if anything, on the question of consent said at [39]-[40]:

> "39 In my opinion, the overall delay in bringing the proceedings relating to the mid to late 80s had a profound impact on the evidence and the ability of the Archbishop and the Scouts to discharge the burden upon them to show that Fr Laundy was wrongly convicted. Mr Levinson submits that the convictions were important. They provided strong evidence that Fr Laundy committed the offences (including those alleged between 1990 and 1999) and the evidence to undermine them was weak. In making that submission he reminds us of Lord Brown's observations in paragraph 86 of the A v Hoare case (quoted above) that if there has been a conviction, I paraphrase, the problems of investigating antique events may be of less consequence. In the overwhelming majority of such cases that may be so because the conviction proves the tort. That is not to say that there might be great difficulty in exploring the consequences of an assault, or series of assaults, and other reasons why the limitation period should not be disapplied.
>
> 40 This case is different. The question of consent was at the heart of the defence run by both appellants and was supported by evidence from Fr Laundy. Even without any oral evidence from Fr Laundy, or any detail in a witness statement, the judge concluded that the appellants had discharged the burden in proving that the sexual touching was consensual during JL's adulthood. On his behalf, it is submitted that Fr Laundy's evidence would have added little, if anything, on the question of consent. I regard that submission as being unrealistic. Consent is the live issue in countless allegations of criminal sexual misconduct in respect of which juries hear both sides of the story, and ordinarily need to hear both sides to make the necessary judgments. Whilst the fact of sexual touching would not have been in issue, the immediate circumstances in which each event occurred would have been highly material to the question whether that touching was consensual. Moreover, and importantly, JL's case was a general one that his dealings with Fr Laundy over a period of about eight years before the assaults began resulted in his will being overborne. The court was deprived of evidence from Fr Laundy relating to that matter altogether, as well as other evidence that would possibly have been available if the trial had come on much earlier. The absence of Fr Laundy, in the context of a reverse burden of proof, was highly prejudicial to the appellants. In my view this is all the more apparent in view of the findings of the judge that JL was in many respects an unreliable witness, prone to exaggeration and with a number of significant inaccuracies apparent in the core accounts he had given."[114]

[114] For a case where the discretion was exercised in favour of the Claimant despite the unavailability of the primary tortfeasor, see the discussion later in this judgment of Raggett at first instance.

(b) In F & S v TH Langstaff J referred to problems in the experts' evidence, saying at [82]:

> "It is clear that the important evidence as to quantum given by the experts would have been more cogent had they had the opportunity of considering the brothers' cases closer to the time of the alleged abuse. The sequencing difficulties, and difficulties with recollection of dates, which each brother has affects cogency. The claim for special damage was presented by way of reconstruction…on a fanciful basis, but in any event, it is clear that the prospect of establishing clearly what the loss actually might have been, if any, has been significantly affected by the delay. The delay has caused the evidence of Father M (the alleged perpetrator) no longer to be available."

Also in the Chagos Islanders case[115] at [707] Ouseley J said:

> "…there are issues as to whether any Claimant suffered in fact the alleged personal injury eg was Claimant A depressed, did he or she suffer from stomach or respiratory disorders? The evidence of the Claimants was sufficiently unreliable to suggest that that itself would be a major issue. Yet how could that now be tested for a period of perhaps thirty years? Some of that may be a diagnosis unsupported by any medical evidence; if it is, there has been no disclosure of even one contemporaneous medical report to illustrate the point, nor of any hospital records. The Defendants' prospects of evidence challenging factual assertions as to past ill-health are obviously significantly and adversely affected."

However, as far as the discretion relates to difficulties in the assessment of quantum, the Court of Appeal in Raggett[116] endorsed the approach that "to the extent that there is any prejudice in relation to the issue of causation, it is likely to operate to the detriment of the claimant since he will bear the burden of proving his loss". This was on the facts of the case, with the Court of Appeal recognising that in general it would be correct to say that, as it is always the claimant's burden to establish the extent of his loss, it would not be right in principle to say that there was no prejudice to a defendant simply because the burden fell on the claimant.

(ii) The effects of the availability, or unavailability of documentation.

181. There are many judicial statements on this subject. In the Catholic Child Welfare Society cases the Judge looked at the different claims on their merits. So, in EF[117], he said:

> "There is no doubt that the absence of some of the records is potentially prejudicial to the Defendants and that it has made the task of the experts reporting on causation particularly difficult."

On the other hand, in AB[118], the Judge said:

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[115] Chagos Islanders v Attorney General [2003] EWHC 2222 (QB); see also: Kamar v Nightingale [2007] EWHC 2982 (QB) at [20]-[24].
[116] Court of Appeal at [23]-[26], commenting on Bryn Alyn at [81]
[117] [2016] EWHC 3336 (QB) paragraph 51.

> "In one sense the evidence of the Defendants' witnesses was just as cogent despite the passing of time. Whilst none of the alleged perpetrators actually remembered the Claimant specifically they were all able to put forward robust denials and give reasons why those denials should be accepted. They did not need to refer to documentation in order to be able to do so. It is clear that the amount of background documentary evidence in this case is very limited, particularly when compared with the case of IJ where there were 15 volumes of documents. Here there were two volumes of which half of the first volume was taken up by statements of case, witness statements and expert reports. It would be wrong however to judge every case by the standards of the case of IJ and find automatic prejudice to the Defendants due to the absence of a huge range of documents many of which had no real bearing on the case…"[119]

182. I mention briefly in this passage under section 33(3)(b) cases which involve allegations of a "system". This is because the Claimants rely upon evidence of a system in support of their allegations of trespass to the person and negligence. In KR and Bryn Alyn, on the law as it then stood prior to the House of Lords decision in A v Hoare, the Claimants had to prove systemic negligence. The Court of Appeal pointed out the particular difficulties in such a case given the full range of issues which had to be considered. After A v Hoare, the Court of Appeal in B said:

> "14. It is in our opinion important to note the distinction between the questions being considered in Bryn Alyn and those being considered since A v Hoare [2008] AC 844 and thus in the instant appeals. There are two critical points of distinction to which we have already referred. The first is that previously it was necessary for the evidence to cover the whole system being operated in the relevant home over a long period and for the court to consider whether there was a relevant breach of duty. Now no such analysis is required…..
>
> 17. …it is no longer necessary to establish systemic negligence, whereas previously it was, and allegations of systemic negligence presented particular difficulties for Defendants after the passage of time, whereas the same may be less true of the allegations of abuse, which was previously only one aspect of the facts to be considered…"

The Court then went on to consider in some detail the law under section 33. I have already referred to this case previously in this judgment on those points[120]. The problems which Claimants have under section 33 when they have to prove systems are not of central relevance to this judgment. The relevance of those problems at the stage of the generic issues in this case is yet to be addressed.

Documents

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[118] [2016] EWHC 3334 (QB) at paragraph 49.

[119] See also CD [2016] EWHC 3335 (QB) at paragraph 54 and GH [2016] EWHC 3337 (QB) at paragraph 50.

[120] In the circumstances of a case about running a care home, EL v The Children's Society [2012] EWHC 365 (QB) Haddon-Cave J at [72] referred to the fact that "an inquiry into vicarious liability in this would inevitably include an investigation as to the systems and organisation in place…and how the house was run in practice by Mr and Mrs Bibby from day to day. Vicarious liability is…a fact sensitive matter."

The evidence of Mr. Robert Deane

183. Mr. Deane is head of the Knowledge Management Department, Department Records Officer at the FCO. He has overall responsibility for the management of all electronic and paper records held by the FCO. He made two statements. The first is dated 17th December 2015. The second is dated 13th June 2017. He gave oral evidence on 19th June 2017.

184. Some points made in Mr. Deane's statements were:

- The vast majority of relevant documents ever held by the FCO have now been transferred to the National Archive (TNA) pursuant to the Public Records Act 1958.

- The Defendant has not conducted a review akin to disclosure for the purposes of the present litigation and has not re-reviewed the majority of the files reviewed during the Mutua litigation. Therefore, there will be documents relevant to the litigation in the National Archive and Kenya National Archive (KNA) which have not been obtained by the Defendant. All such documents are publicly available and could have been obtained by the Claimants. However, the Defendant believes that given the methods and wide-ranging nature of its research, alongside the fact that documents are publicly available, it is unlikely that any substantial quantity of documents of significance has been missed. Where contemporaneous documents are unavailable regarding an issue, it is likely that they were never produced or have subsequently been destroyed.

- The FCO's current document management practice is for an initial weeding of documents to be carried out by the relevant department after three years. Any documents which are deemed to have corporate or historical value are then transferred to the main archive at Hanslope Park. Around two years before documents are due to be transferred to TNA under the statutory regime (the Public Records Act), the Defendant will commence the process of selecting files for transfer. The number of years in which this transfer must take place has changed over time, but since 1968 until recently it has been 30 years.

- The proportion of documents selected for permanent preservation will vary according to the nature and the purpose of the documents. Documents not selected for permanent preservation are usually destroyed, although they may occasionally be transferred out of the public records system and held in institutions such as academic libraries.

- It is reasonable to think that the Colonial Office's historic approach to document retention and destruction would have been similar to the Defendant's current approach.

- Therefore, if the claims had been brought promptly, say within three years of the events complained of, the Defendant would have had access to Colonial Office documents which were weeded out at department level before being sent for archiving. The precise length of time would depend on matters such as whether the file was still in use, either for filing further material or for

reference. It would have been within this initial period when the Defendant would have had the best opportunity to defend the allegations. There would have potentially been significantly more Colonial Office documents available, and the Defendant would also have been able to speak to those individuals responsible for the documents to put their content into context.

- Had the claims been filed soon after the initial weeding exercise was completed, the Defendant would have potentially been able to speak to those handling the records, both in the Colonial Office and in Kenya, to establish what had been destroyed. Had the Defendant had the opportunity, following notification of the claims, to speak to the people who had dealt with the documents on a daily basis and who had carried out the weeding exercise, it would have been able to present evidence in that regard to the court.

- The delay of over fifty years in bringing claims means that not only were some records destroyed or relocated in the initial weeding exercise, but the Defendant will also have carried out the Public Records Act review for many of the relevant documents. At that stage, documents not selected for preservation would have either been destroyed or sent elsewhere e.g. to academic libraries. Mr. Deane says he cannot say how much documentation has become unavailable to the Defendant.

- The lack of available documents, coupled with the difficulty in knowing what there once was, or indeed may still exist outside the FCO's possession, but be undiscovered, severely prejudices the Defendant's ability adequately to defend the claim.

185. From the above statement evidence and from Mr. Deane's oral evidence the following emerges:

- Had the claims been brought within the limitation period, the Defendant would probably have been able to obtain access to full unweeded files held by the Colonial Office (and War Office), including those sent back to the UK in the period preceding independence, and to records in Kenya which did not come back to the UK and are not, or have not been found, in the KNA. This may well have been the case, for the most part, even had the claims been brought within 3 years of independence, having regard to the fact that TC34's case is that he was detained until then.

- As to documents left in Kenya, it can be properly presumed that it would have been much easier to trace them in the early to mid 1960s, than after 2013. Everything would have been fresher in people's minds. Many more people with knowledge of the documents would have been contactable, including a number who stayed on in Kenya, some of whom worked for the new government. It cannot be known with any precision what the records would have contained, save that the Watch policy[121] required that as much material as possible should be left for the functioning of the succeeding independent government and for the proper recording of the past. These were described as "legacy" documents. Documents which did not fulfil either of those functions

[121] See the Section 32 Judgment especially at [108]-[120].

could be destroyed. Those which had importance or antiquity, and which fell foul of the criteria inhibiting some documents being passed to the successive government, were to be retained. I deal later in this judgment with the problem of now knowing what was destroyed, retained or passed on to the successor government.

- In respect of documentation in the UK, apart from the Hanslope archive documents, Mr. Deane referred to Colonial Office practice by reference to the present FCO policy. He said he thought that, at the initial weeding out, Colonial Office files would have left anything of material substance. The initial weeding would typically take place within three years of the file being closed. The exact practice would vary, but that would be the guideline. It would be highly unusual for it to be less than three years; it would be three years or perhaps somewhat more, depending on the backlog in the registry, the number of staff available etc. Therefore, it seems that the probabilities are that anything in the UK in the early 1960s would not have been weeded until the mid 1960s at the earliest. However, even if the claims had been filed soon after the initial weeding exercise was completed, the Defendant would potentially have been able to speak to those handling the records in the Colonial Office and in Kenya to establish what had been destroyed. Mr Deane said that the registry clerks who did that job would have been able to say what sort of thing had gone. So, had the claims been brought within the limitation period, or within 3 years of independence, again the probability is that documents which were initially weeded would have been available. Even if not all still available, the Defendant may well have been able to find out from the registry clerks what had been weeded and so what was missing. This would have presented a much clearer picture. This picture will undoubtedly have progressively become less clear as the years progressed, people have moved on and memories, particularly collective memory, have been lost.

- At the thirty-year review in the UK, Mr. Deane agreed that papers would only be offered to academic institutions if they were not selected for preservation at the TNA[122]. When asked whether what would remain after this process, is that which would be required to get a proper sense of what was happening during the period, he responded: "I think in broad terms that would be correct. Obviously some details would not be there, but the broad policy directions I would hope have been preserved. That's certainly the intention of the exercise."

- He said that, at the initial weeding, essentially ephemeral material would be weeded out and we could "remove quite a bit of the content of the file" and, at the second review, "anything of particular importance in the formulation of British government policy….. submissions to Ministers on policy issues of the day, that sort of thing" would be retained. The pool of documents available to the Defendant would therefore have been reduced again, and Mr Deane could not say how much documentation has thus become unavailable to the Defendant. Although the Defendant would not know what was removed at the

[122] Or another place of deposit as provided for under Section 4 of the Public Records Act

initial weeding, typically the thirty-year review would not reduce the contents of a file very significantly.

- It goes without saying that no part of Mr Deane's evidence was that any criterion for keeping documents would be because they might be relevant to future litigation.

- Mr. Deane did not know to what extent the Hanslope archive was weeded prior to arrival in the UK, though there has been no subsequent weeding of that archive in the UK.

- In referring to the FCO's own holdings (held at Hanslope Park, and among which the 'Hanslope archive' of documents sent to the UK from Kenya was discovered), on review of the files there, Mr Deane said he was satisfied that a significant cache of documents had not been missed, in the sense that the Defendant had a detailed inventory of all file holdings. By looking at the high-level file plan, one can see broadly what the documents cover. It is potentially the case that there are documents in there which have not been reviewed and which may be relevant, but all of the documents in the FCO's possession are covered by the high-level file plan with a high degree of confidence.

186. From the evidence[123] it can therefore be deduced:

(i) Documents which did not fall foul of the Watch criteria should have been passed to the successor government on independence. As far as one can tell, this appears to have happened, at least to a substantial extent, as there are numerous documents in the KNA. Also, the Watch Policy emphasised that as much material as possible should be left for the functioning of the succeeding independent government and for the proper recording of the past. It is not known what may have been subsequently destroyed or what has been lost by the passage of time. Mr. Walton's witness statement, paragraph 29, based on information from Junior Counsel attending the KNA, said "it appears likely that not all Kenyan Colonial Government files were preserved." The KNA retains documents, but these are not easily searched as they are not computerised.

(ii) Documents which did fall foul of the Watch criteria, but which were not thought to be of historical significance, were to have been destroyed in Kenya pursuant to the Watch policy. There is, however, no comprehensive list of destroyed documents.

(iii) As appears in the section 32 judgment at [94]:

"[the Claimants] accepted that they cannot prove what has been destroyed, save by inference in relation to 2/3 classes of

[123] see also the section 32 judgment

documents. These were the Prison Standing Order 1957 documents; also personal detainee files containing a dossier for each detainee and records of interrogation which may/may not have been kept in the personal detainee files".

This acceptance is important as it quite properly exemplifies the difficulty in knowing to what extent the Policy was fully implemented. It is also the case that the Policy would have left significant leeway to individual interpretation and discretion. As to the 2/3 classes of documents which the Claimants said they could prove were destroyed, I did not accept this submission. My findings are at [96]-[98] of that Judgment.[124] This means that these documents, among many others which have not been available to the Court, may still exist or may have been lost or destroyed in Kenya over the years.

I dealt first with the Prison Standing Order documents:

"96. The Defendant points out that the duty to keep those documents was on the officer in charge of a prison. Detention camps were at different times and places under varying types of control. Importantly, there was no requirement to keep the documents centrally, whether in the KNA or elsewhere. There is no direct evidence that any such record was destroyed at all. Nor is it safe to infer that they were destroyed or, if so, by the Colonial Government or the Defendant. Some may still exist for the reasons already given. Some may have been destroyed, or lost, not by the Colonial Government or the Defendant. There was no statutory duty on the new Kenyan government to keep them. It may even be that the individual establishments did not in fact keep such records.

97. In my judgment there are various possibilities other than that these documents were deliberately destroyed by the Colonial Government or the Defendant. I cannot find on the balance of probabilities that they were so destroyed…."

As to the detainee records/records of interrogation, I said:

"98. For similar reasons I do not feel able to draw any inference that, on balance of probabilities, the other classes of documents, i.e. the detainee records/records of interrogation were deliberately destroyed by the Colonial Government/Defendant. If they were sent to the central registry in Nairobi, and do not still exist, were they destroyed? Just as there is no evidence of destruction taking place at

[124] These paragraphs were among those subject to the Supplementary note at [187]-[188] of the section 32 judgment; however, there is no reason to modify or qualify them in any way.

camps, so also there is no evidence of destruction at the central registry."

(iv) Any documents which could not be left for the successor government but which had any political importance or antiquity were not to be destroyed. Many documents were clearly sent back to the UK. There are notes in May 1963[125] which appear to be in a London document. They suggest that Kenya was/would be sending back more than just documents of historical interest. There is this handwritten endorsement: "Kenya are unlikely to have the time to ponder too long over the historical potential of the papers being reviewed by them. It is better for too much, rather than too little, to be sent home – the wholesale destruction, as in Malaya, should not be repeated." This endorsement gives a snapshot of the position in the 1960s compared to now. There would have been witness and documentary evidence available of what had been sent back and what happened to it subsequently; also of what was weeded and when, sometime 3 years after the seemingly large amount of written material arrived in the UK.

(v) A number of documents considered properly to be essentially ephemeral material would have been weeded out of the UK files at the first review stage and again at the second review stage, although the files sent back from Kenya and ultimately deposited at Hanslope were not weeded in the UK.. Precisely what was weeded out is not known. They would not have been weeded by reference to relevance in litigation. The registry clerks would, had the claim been brought within the limitation period, or even later, have been able to assist in explaining and piecing together the documentary material, or, at least in explaining what had been destroyed.

(vi) Thirteen boxes of Top Secret files have been irretrievably lost. They have been searched for but it is not known what has happened to them. The probability is that they would have been available had the claim been brought in time, or perhaps thereafter.

187. I refer also to my findings in the section 32 judgment, from [83] to [179], in particular at [86]-[87], [97]-[98], [101], [147]-[151][126].

188. From the above, what is clear is that there is a great deal which is not clear. Apart from what we have, it is unknown what was destroyed in Kenya, what was returned to the UK, what remains in Kenya or has been lost/destroyed there. As regards the documents which did come back to the UK, apart from the 13 boxes of Top Secret files irretrievably lost, we know in very broad terms from Mr. Deane the level of

[125] Caselines 32-73880 & ff. See footnote 118 to the section 32 judgment

[126] Some of these paragraphs are also among those subject to the Supplementary note at [187]-[188] of the section 32 judgment; however, there is no reason to modify or qualify them.

importance of documents which should have been weeded at the initial and 30 year stages.

Documents not available – documents relating to TC34's detention

189. No documents are available in relation to TC34's detention despite extensive searches carried out by the Defendant. The Defendant's case is encapsulated by Mr Murphy[127] who says:

> "The Defendant's fundamental position in relation to the Test Cases remains the same: it is unable to respond positively and with particularity to the factual allegations made by the Test Claimants."

190. There is a dispute as to whether any documents which authorised TC34's alleged detentions were ever lawfully made. I do not propose to go into this, since the claim is now limited to the core allegations, and it is not necessary for me to attempt to decide whether the alleged detentions were lawful or not.

191. The relevance of the documentary record of TC34's detentions is therefore that there is nothing to prove or challenge whether he was detained, if so if he was where he says he was, and, if so, to clarify the timeline. Moreover, the Defendant submits that if the claims had been brought timeously and such documents had been available, they would have led to investigations which yielded material witnesses.

192. There are various theoretical possibilities why there are no such documents in relation to TC34 (or any TC) e.g. such documents were not located despite being available and despite the Defendant's extensive searches and/or the documents were lost or destroyed during or after the Emergency and/or there never was any such document; alternatively that TC34 was not detained at all or at some of the places where he says he was detained.

193. There is detailed evidence of the searches which the Defendant has undertaken. These have been on a massive scale, but still not exhaustive. There is also evidence that the documents evidencing detention and which are in the trial bundle represent only a small percentage of the detainees who would have been subject to DDOs. The Defendant says about 7000 DDOs have been found in KNA. It may in fact be about 5000 due to gaps in the numbers. The majority of these appear from the lists[128] to relate to Manyani.[129] Whether the others were lost or destroyed, or still exist, or were never made, is not known. They have been checked in Kenya. This is to be found in the evidence of Ms Alice Lam, Case Officer with the Defendant[130]. None of these DDOs relates to TC34. However, they do show that a substantial number of DDOs

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[127] Defendant's lawyer, 7th Witness Statement paragraph 25. Although searches were done 6 months either side of alleged key dates, this does not fully answer the problem the Defendant faces with a shifting timeline; the searches had necessarily to be selective and a change of date, even by 3 months, would potentially lead to different results. Having said that, it seems that the likelihood of the Defendant finding any document material to TC34 would be remote, whatever the date.

[128] Caselines 32-76275 [AH]/8 [AH]

[129] In the Jack report (see below) page 12 it states: "During the peak period in the years 1954, 1955, and 1956, there were at some times 18000 accommodated in the camp, and altogether more than 44,000 detainees passed through Manyani".

[130] 1st Witness Statement dated 6 January 2016 at paragraphs [35]–[47] and 3rd Witness Statement dated 13 June 2017 at paragraphs [29]–[36]

existed, and, as Ms Lam states[131]: "I understand from Junior Counsel that it is not possible to determine whether further registers for Manyani or other detention camps may be held at KNA but not included on the typed and handwritten indexes copied by the Defendant". She also exhibits[132] a note from Junior Counsel, Mr Holborn, who examined the DDOs in the lists. He says:

"*AH Ministry of Defence series*

5. Amongst the AH series, class AH/21 includes several dozen files described as "Detention Orders" or "DDOs" or some similar description. From my review of a select number, it appears most contain dozens or even a few hundred copies of Delegated Detention Orders. These appeared to show the name of the detainee, a reference number, and sometimes a short explanation for detention.

6. Many of the detention orders I reviewed were on a thin paper, not dissimilar to tracing paper, or carbon copy paper (although I cannot recall if this applied to every detention order I reviewed). It did not appear to me that the detention orders were necessarily original signed orders. I would speculate that it is more likely that they are contemporary copies.

7. I base this inference in part upon my experience with other files where I have seen multiple copies of documents. Sometimes one copy is on proper paper whilst other (identical) copies are on thin paper of a similar nature to the detention orders I describe above. Where there are handwritten markings or a signature on an original document, that writing or signature may not be on the thin paper copy.

I also refer to the annexed document disclosed by the Defendant in these proceedings dated 19 June 1954. The document appears to be an instruction issued by the Secretary for Defence to the Commissioner of Prisons and others in the Colonial Administration concerning the issuance of Detention and Restriction Orders under Emergency Regulations in respect of Mau Mau convicts due for release. Pages 3-4 of this document describes the process by which District Commissioners should follow when preparing Delegated Detention Orders in this context. The process described suggests that the practice was for multiple copies of such Delegated Detention Orders to be kept, several of which were unsigned. I also note that it is specified that the original copy of the Detention Order was to be given to the detained person. It is therefore possible that the detention orders retained by the Kenyan Ministry of Defence on thin paper referred to above were these copies."

194. There is also evidence that a nominal roll of persons detained in each district and their dossiers should have been sent to the Hon. Chief Secretary by District Commissioners. Although the Claimants make comments on these latter documents[133], and although there were shortcomings in the records at camps[134], the probabilities favour that there would have been DDOs for TCs subject to detention.

[131] 1st Witness Statement at [46]
[132] Ms Lam's 3rd Witness Statement at AKL 4
[133] See in particular their submissions in Response at [143]-[146].
[134] See Fairn report [90]-[91].

There is no good evidence that there were not such, at least 5000 have been found even after all this time, and there was a system of appeals (albeit criticised by the Claimants). The selection of appeal documents I have seen contain the DDO reference number for each detainee in the letter forwarding the appeal.

195. I find that on the balance of probabilities, TC34 (and other TCs) would have been subject to DDOs and there would have been contemporaneous documents (e.g. Admissions Registers, the reference number of the detainee, and a dossier on each detainee[135]) evidencing their detention[136]. If DDOs and other contemporaneous documents relating to TC34 were available, they would show where and when he was detained, and so potentially lead to relevant witnesses. The absence of such documentary evidence means that TC34's evidence as to his detention in various camps cannot be confirmed or undermined. Nor can the context of his core allegations in those camps be investigated.

196. Even if the Court had not been able to find that there probably did exist DDOs and other documentation for TC34 (and the other TCs), the Defendant would have been prejudiced. This is because, as a result of the passage of time, it would be in the position of not being able to prove whether or not they had existed for the TCs at the various camps. This prejudice in proving prejudice is something I shall explore later.

197. In fact, the Claimants accepted the probability that there will have been some documents evidencing TC34 being in the 3 camps where he alleges assault, namely Manyani, MacKinnon Road and Hola; also that there would have been documents evidencing that TC34 was at certain times in those camps, but not necessarily that they would have shown the dates of his arrival and leaving[137].

198. Returning to detainee dossiers, I have seen examples of these in the cases of detainees who appealed their DDOs. The few I have vary in detail and quality of information. A less detailed one[138] merely states: "A Mau Mau money collector and scout in the Bahati District. Source: Manyani Screening Team". A more detailed one says[139]:

"This man has been reported by 5 reliable sources as being a most active member of the Thika Central Committee. He was present at a meeting of the Committee when it was decided to bring 3 armed terrorists into the area to pursue a policy of murder of loyalists. He was also active in the organisation of collection and distribution of Mau Mau funds including the purchase and distribution of ammunition. If permitted to do so he will continue his subversive activities unabated, therefore this man should be detained."

The Court does not know what information was recorded about TC34. At one end of the spectrum he may have been recorded as being a model detainee at all 3 camps in which he says he was detained. At the other end of the spectrum, there may have been records which would seriously put into context and substantially undermine his credibility e.g. if there was a record evidencing that he had made demonstrably false

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[135] Both of these are also in the appeal documents I have seen
[136] This, notwithstanding criticisms of record keeping e.g. in the Jack report and the Fairn report
[137] Fairn report at [90]-[91] cited in the next paragraph of the judgment
[138] Caselines 32-35750d
[139] Caselines 32-77364

allegations while he was detained. Yet further, he may have been one of those detainees referred to at [90]-[91] of the 1959 Fairn report[140] which says:

"90. We found many of the dossiers of such detainees as we examined to be defective. Not only did they lack substance to justify detention. They failed to provide any record of the detainee's movements from camp to camp or even to an outside police station where he might have been for days at a time.

91. The occurrence books kept at the camp gates often left much to be desired. In one case pages had been torn out."

The extent of this problem is impossible to assess. None of the 3 members of the Fairn Committee, or its secretary[141], is available to give evidence. It is also not possible to say whether it may have affected the dossier/other records of TC34.

199. The Claimants further accepted that the documents at the time would have shown the names of staff in the camps. There were staff lists and payment records. There are staff lists in the Hanslope documentation. I asked why staff records would not, had TC34's claims been brought in the 1950s (or in the 1960s) have been of potential assistance to the Defendant, who might have been able to discover the names of the staff on duty at material times, especially at the time of the core allegations. The Claimants replied that they would not assist. One reason they gave was that, in a telegram dated 9 February 1959[142] from the Acting Governor to the Secretary of State, prior to the Hola massacre, the Acting Governor said, among other things: "Effective enquiry will be difficult, since many of the camps about which allegations made, are either closed, or, as in the case of Manyani, reduced to a fraction of their original size". This, in my judgment, does not answer my question.[143]

200. The Claimants' next submission was that two documents[144] demonstrate that in respect of Officers, personal records were to be retained and sent back to the UK and confidential material which referred to operations against the Mau Mau were to be destroyed as non-legacy material. Therefore, other documents which evidenced who was working, where and at what time, were probably similarly destroyed no later than independence on 12 December 1963 as non-legacy material – whether they referred to officers or the many other employees in the camps.

In respect of this:

(i) On reading the documents it does not follow that because the types of documents there referred to were to be dealt with as described, then other documents evidencing who was working, where

[140] Administrative Enquiry into Allegations of Ill-Treatment and Irregular Practices Against detainees at Manyani Detention Camp and Fort Hall District Works Camps (1959)
[141] Mr RD Fairn (died April 1986), Sir George Beresford-Stooke (died April 1983), Canon TFC Bewes (died January 1993) and Lt Col JRL Rumsey (Sec.) (died January 1999).
[142] Caselines 32-63617.
[143] Similarly, Governor Baring's letter to the Secretary of State dated 29April 1959 (Caselines 32-65174).
[144] Telegram 29 September 1961 from the Governor to the Secretary of State (Caselines: 32-72973); Document from Permanent Secretary in the Governor's Office May 1962 (Caselines 32-73770). (The first document refers to only about 1000 files.)

and when, would also have been destroyed.

(ii) More importantly, the second document was dealt with in the section 32 Judgment at [131]. In particular, I said:

"Copies of the above were to be destroyed but the "retaining authority" (generally the Civil Service Commission) would hold its own copy or the original who could note such a document for destruction "at a later date". It is unknown if or when this retaining authority copy was destroyed and, if so, on whose authority."

(iii) The Defendant does not know what in fact happened to such documents, save that they existed at the time and they now do not exist, or cannot be found.

(iv) In any event, as the Claimants accept, all TC34's claims were time-barred under the primary limitation period by the date of independence. Had the claim been brought before then, the Defendant would, in any event, had the opportunity to obtain those records.

(v) Further, even had the claim been brought in the mid-1960s, the Defendant would have had much more access to people and documents who could have potentially explained where such records were, or what had happened to them and when.

201. The Claimants also accepted that they cannot dissent from the proposition that there might have been documents that led to witnesses, but they refuted any suggestion that one can go from that to prejudice being inevitable either in law or on the facts. They said that, even if there were people who remembered TC34 and could have given evidence about him or his conduct, or even deny that the core allegations of which he complains took place, nevertheless a court of law 50 years ago would have had to look at his allegations in the context of a number of abuses which happened in Kenya at the time, and the general attitude of the administration which they say was averse to any proper enquiry. This requires some analysis:

(i) Of course a court of law would, assuming that the claims were brought in time (or section 33 discretion exercised in TC34's favour), have had to consider all the available material evidence. That is the court's function.

(ii) The context of other proven, or alleged, abuses would also have been assessed. Such evidence as there now is will be assessed in relation to its materiality to the section 33 discretion, and its probative value in TC34's case. What must not be lost

sight of is the extent to which such other allegations are themselves compromised by the passage of time.

(iii) As to the general attitude of the administration, and its stated general aversion to any proper enquiry, this is a generic issue. I have not heard full submissions upon it. In any event, such alleged aversion would have been of little, if any, relevance had an action been commenced in the late 1950s or the 1960s.

(iv) The problem which faces the court now, all these years later is, to repeat a well-worn phrase in the litigation: The court "does not know what it does not know." What would any witnesses have been able to say about TC34? Or about the core allegations? Or about their immediate or other relevant context?

202. Apart from the documents to which I have already referred, the Defendant's case is that they cannot, because of the passage of time, say which documents may or may not have been available and whether those documents would have led to witnesses. If they did lead to witnesses, then the court has no idea what, if anything, those witnesses might have said either about the core allegations in particular, or about their immediate and more general context.

203. In relation to showing prejudice, whether by reason of lack of documents, or witnesses, or otherwise, there is an evidential burden on the Defendant. However, some of the Defendant's prejudice arises at first base in this litigation. Often, in a section 33 case, a Defendant can point to a document lost or destroyed, or to a material witness who has since died. On the core allegations and many other potentially important contextual matters, the Defendant does not know the names of any witness, or any means of beginning a process of identifying, much less tracing, them. The passage of so many years in this case entails that the Defendant cannot even begin any proper investigation of the core allegations. It does not know who allegedly carried out the assaults or when. It knows nothing about TC34 apart from what he himself has said. To put the matter at its lowest, fifty plus years ago, the Defendant potentially could have found documents which could potentially have led to information about TC34 and to potential alleged tortfeasors or witnesses. At the very least it probably would have known which documents had been kept and which had been lost/destroyed. All these are, at a minimum, realistic possibilities; some are probabilities. After all these years, the position is that, apart from certain prejudice that the Defendant can prove, there is further prejudice in that it has been deprived in certain aspects from proving specific prejudice arising from lack of documentary or witness evidence.

204. It is this which I have previously described as the prejudice in proving prejudice. It is of importance since one of the Claimants' responses was that prejudice must be dated. In general terms this is correct. If a key witness dies within a limitation period then there may be no force in any contention by a Defendant that its evidence is thereby less cogent if a claim is then started late. However, if, for example, documents which may have given, or led to potentially material evidence, no longer exist/can be found despite serious endeavour, and, as a result of the passage of time, the Defendant can show that it does not know what happened to them, in circumstances where in the 1950s/1960s, the investigation would have been at least begun, and with a realistic prospect of a positive result, that in itself is prejudice proven by the Defendant.

205. A particular example of the above is in relation to staff rotas. The Claimants refer to the Prison Standing Orders 1957 Appendix IV. This is headed 'Disposal of Obsolete Records and Prison Books etc." Under the sub-heading 'Administrative Record' is the entry; "Duty Register". The Period this is to be kept after completion is said to be "1 Year" and the Method of Disposal is "Destroy". Hence, say the Claimants, which staff were on duty and where is unlikely to have been available, even if the claims had been brought in time, or in the 1960s. This specific argument was raised by the Claimants in response to the Defendant's oral submission and so was not further investigated in court. From the information I have:

- The Prison Standing Orders may have applied to detention camps, since Regulation 18 of the Emergency (Detained Persons) Regulations 1954 applied the Prisons Ordinance and Prison Rules 1949 to detention camps, subject to modification. However, I have received no submission that this was assuredly the case[145].

- Appendix IV is introduced by Chapter 14 paragraph 42 as follows:

  "42. Prison Records will be examined annually by the Officer-in-Charge with a view to the disposal, by destruction, or otherwise, of those no longer required. The period for which such records should be preserved and the method of disposal are shown in Appendix IV"

- There is therefore a requirement to examine the records annually, and what appears to be some element of judgment by the Officer-in-Charge in deciding whether to destroy after the minimum preservation period, albeit with the expectation that destruction will then occur.

- Assuming that destruction was the norm in prisons after 1 year, there is no evidence, assuming that Appendix IV applied to camps, whether or not it was in fact the norm in those camps. Indeed, the Claimants elsewhere severely criticise records in the camps, saying, for example[146]: "Cs submit that the evidence shows that record keeping was not taken seriously, and the statutory provisions were simply ignored". There may be some force in this submission. There are some strands of evidence to support it[147]. But if that is so, or may be so, how can the court know, one way or another, whether all or any of the Duty Registers at Manyani, MacKinnon Road or Hola were destroyed within 1 year, or at all, and, if so, when? Had the investigation started in the 1950s or 1960s, apart from the possibility that such records may have been found, there may also have been people who could have told the court whether those records were in fact destroyed, or not, in accordance with Appendix IV. Even if the Duty Register for one of the 3 camps had been located, it may have led to witnesses who put a very different complexion on TC34's evidence generally.

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[145] The Prison Standing Orders document is referred to in the section 32 judgment in a somewhat different context. I there worked on the assumption that it it did apply to detention camps. See [95].
[146] Claimants' General Submissions at [90]
[147] Again see Fairn at [90]-[91].

- Finally, two of TC34's core allegations do not apply to camps. These are those at Ngong and Gikuni. Therefore, Appendix IV cannot be said to be relevant to any staff on duty relevant to those allegations. Even assuming that all Duty Registers in the camps were destroyed within a year, for the reasons given in the last bullet point, namely that evidence in relation to either or both of those may have undermined TC34's credibility generally, that does not mean that the Defendant may only be prejudiced in relation to those two core allegations.

206. Further, any submission that there may be no prejudice to the Defendant as to relevant documentary evidence sits ill with the section 32 Judgment at [150], where I recorded the Claimants' submission as follows:

> "In paragraphs 15 and 16 of Mr Myerson's skeleton argument he says that the destroyed documents would have enabled the Claimants to plead the precise dates of their detention and the punishments "for which no authority was given. They would enable the identification of the individuals responsible and provide information as to who employed and controlled the individuals.[148] Instead the Claimants must rely on memory, inference and general facts". He says that what has happened is that Test Claimants have misremembered dates and then efforts to consider thousands of documents suggested the correct date…"

It is to be recalled that I rejected that submission on the basis that there is: "no good evidence as to which documents were destroyed, when, and, if so, by whom". The underlined section clearly demonstrates how the Claimants perceived the position for the purposes of their case in the hearing a few weeks prior to this one.

Documents not available – documents as to the allegations of assault

207. There are no documents relating to any assault on TC34. Given the circumstances of the allegations, it is perhaps unlikely that there ever would have been documents directly evidencing the assaults. However, for example, documents relevant to setting the context of the core allegations, documents leading to potential perpetrators and witnesses etc, so as properly to determine the reliability of the allegations, are a different matter. I will deal with those when I turn to consideration of the specifics of the core allegations.

The reason for non-availability of detention documents

208. The Claimants assert that the vast majority of such documents that do not now exist have been destroyed by the Defendant, entirely independently of the Watch classification issue. This is an assertion and it is not one I accept as being supported by evidence. It is of course a possibility that some were so destroyed. However, as summarised above, documentary records evidencing detention of the TCs (assuming they were detained): (a) could have been destroyed at the time of the Watch policy as not being useful for the functioning of the successor government or for the proper recording of the past, (b) could have been destroyed or lost by the Kenyan government, (c) might have been weeded out at the first (or subsequent) weeding by the registry clerks as not being matters of any real import worth preserving – it being

[148] Not underlined in the judgment, but here for purposes of emphasis.

perfectly comprehensible that such documents may well not have been considered as broad policy direction material, or of particular importance in the formulation of British Government policy, (d) might still exist and have not been located, or (e) might possibly have been in the lost 'Top Secret' files.[149]

209. In any event, an allegation made by the Claimants to the effect that relevant or potentially relevant documents have been destroyed or lost irresponsibly is misplaced. It has not been proven that such destruction or loss as there was, was "irresponsible"[150]. The fact that any destruction by or on behalf of the Colonial government was deliberate is insufficient. Absent litigation or other requirement to preserve documents, if a claimant does not bring a claim timeously and documents are destroyed or lost, then there is no factor weighing against the Defendant by reason of such destruction. It must be remembered (a) that a vast number of documents has been preserved and (b) this would have been only a proportion of what would have had to be destroyed in circumstances where it is not possible to retain everything. The Claimants have not been able to prove the breach of any duty in this case.

210. The Carroll case at [42(5)] cited Hammond v West Lancashire Health Authority[151] in relation to irresponsible loss or destruction of documents. In Hammond the Defendant, between about December 1987 and March 1988, treated the deceased. She died, having been transferred to another hospital's care, in August 1988. Her estate brought a claim in 1994. Pursuant to a policy initiated in 1993, X rays were destroyed after 3 years as opposed to 5 years. A request had been made for the Claimant's medical records in March 1988. The trial judge, deciding the section 33 matter, said:

"The affidavit of Mr Callary explains that the Defendant's procedure was if a letter before action only requested medical records, then the Department of Radiology would not be informed and any x-rays would be destroyed and if no further request was made, because for unexplained reasons, the Defendant did not consider that the x-rays were part of the patient's notes. This I find wholly unacceptable. If it is still the case I believe the Defendant should reconsider the policy immediately. It shows a cavalier disregard for the rights of patients to have access to their records. How anyone could think that the x-rays were not part of the patient's medical records is beyond me. If the Defendant is so remiss as to have such a system in place, then this Court will pay little regard to any prejudice to their case that they may claim later."

In the Court of Appeal, Ward LJ, giving the judgment of the Court commented:

"To take that view of the relevance of the X-rays to the notes and to take the view that when notes have been requested the X-rays ought to be sent with them is, in my judgment, a permissible view to form and certainly not one with which I would wish to interfere as being plainly wrong. It seems to me, therefore, that the learned judge was perfectly entitled to have regard to that prejudice, but to discount it significantly."

The facts of that case have only to be recorded to show that they are of no significance to the situation here.

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[149] The Claimants have given no evidence as to the extent of their searches.
[150] See further, below, on this
[151] [1998] Lloyd's Rep Med 146

211. Given that I do not accept that I can find that the lack of records evidencing the detention of TCs is attributable to destruction by the Defendant/Colonial government, or that any loss or destruction was irresponsible, I do not need to deal in great detail with the Claimants' further submission on irresponsible destruction. However, I will briefly touch upon it:

(i) At [138]-[139] of the section 32 judgment, I referred to the evidence of Mr Philip Green who was Senior Desk Officer at Headquarters in Nairobi in 1961, and was transferred to Central Province where he was Provincial Head of Special Branch until 1963. I found that his evidence undermined any suggestion that Special Branch destroyed Mau Mau records. In the Supplementary Note to that judgment, at [187] I refer to a dispute between the parties as to whether or not findings (including the one at [139]) were final and binding. The Claimants seek to introduce two documents which have not previously been adduced and are said to be adduced to correct a false impression and in answer to the Defendant's general submission that it is prejudiced by the absence of material.

(ii) I do not allow those documents to be adduced because:

(a) The order sealed on 31 March 2017 stated "22… the Claimants shall not be permitted to rely upon further documents without the permission of the Court save in response to documents adduced by the Defendants." These documents are not "in response to documents adduced by the Defendants."

(b) Adducing the documents at this stage, especially in circumstances where they have not been put to the Defendant's witness, namely Mr Green in relation to the first document, and the Defendant's procedural witnesses who could deal with the second document, would be prejudicial to the Defendant's case.

(iii) In any event, the documents do not assist the Claimants because:

(a) The first document, namely minutes of meetings held in the Ministry of Defence on 15 March 1963, refers at minute 2 to "Progress report on the purging of documents" and at (c) to Special Branch "cleansing" itself. It is said that it shows that Special Branch was destroying documents without preserving copies. That assumes, without evidence, that "purging" and "cleansing" meant "destroying". There is no evidence to that effect and indeed the document on its face suggests that purging at least included merely getting rid of documents out of particular departments. In minute 2(c) it is said that "no material would go to the Governor's Office as it was not considered to be of historical value. Earlier, in relation to the Ministry of Legal Affairs, and under the same heading "…Purging of Documents", there is mention of hoping to reduce two filing cabinets of "W" material to one, which will have to go to the Governor's Office on Internal Self-Government.

(b) The second document is from the Defendant's Library and Records department. It is dated 7 July 1982. It is headed "Kenya: Migrated Record". It says that Kenya records sent to London consisted of over 1500 files and 307 boxes occupying 123 feet of racking. There is then the entry that the vast majority of the files concern the Emergency "e.g. intelligence reports and summaries, African Associations, activities of Africans, unrest in the Districts,

collective punishment, detainees and detention camps, Corfield report working papers." It is also said that the remainder include what is then set out in a list lettered from (a) – (o). The last such category is "a complete set of Provincial and District Intelligence summaries for the Colony and Protectorate from March 1953 – August 1961 when the series went clean. The summaries deal with the "grass roots" of Administration and Intelligence and cover the Emergency years in some detail." The Claimants say that, given that Mr Deane is satisfied that nothing has been missed in London (this somewhat overstates his evidence), it may be all these files are/were among the Top Secret files that were destroyed or lost. It is said that because they should have been preserved this would be "irresponsible"; also that there is no longer a complete set of Provincial and District Intelligence summaries[152]. This, too, is said to be "irresponsible". Mr Deane was not asked about this document, nor was any other of the Defendant's procedural witnesses who might have been able to deal with it. That said, there is nothing in those classes of documents which suggests on the balance of probabilities that they would have included DDOs, or specific detainee records for individuals including TC34. It is a possibility, but no more, that the author of the 1982 document was referring to specific records of detainees; even if he was, there is no information as to how many of these there were in the documents.

(c) There is therefore no basis to find that the Defendant has destroyed or lost the documents relevant to TC34's detention, much less that they have been destroyed or lost "irresponsibly".

212. The Claimants also refer to a document recording Mr. Turnbull's (then Minister of African Affairs) concern in September 1954 that DOs in Fort Hall thought there may be legal action against them at the end of the Emergency; also a letter from Mr. Johnston (the Provincial Commissioner, Central Province) of 2 February 1956 that he had a concern that the Commission of Enquiry would mean that everybody from the Governor down would be in danger of removal. The Claimants say that it would be surprising, in those circumstances, were the policy on destruction and retention of documents not to be framed with a view to ensuring that all exculpatory material was rigorously preserved. I reject this point. The Watch policy and the guidance from London about preservation etc. of documents came many years later and was similar for other colonies moving towards independence[153]. Even on their face, these two documents (plus another from Turnbull in December 1954 about possible criminal charges against the Kikuyu Guard by Mau Mau) have no relevance for the point I am considering.

213. Therefore I find that on the balance of probabilities there were records of detention camp occupancy, DDOs and other contemporaneous documents relating to TC34 and other TCs, if, as they say, they were detained in camps. What has happened to them and when is not clear. What is clear is that the Defendant has been prejudiced, either because it can show that the documents would probably have been available, or, if not, because the lengthy delay in bringing the claims has deprived it of the opportunity of properly investigating whether some or all of such documents could be made available and, if not, from when they became unavailable. The Defendant has therefore shown that the evidence is less cogent as a result.

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[152] A matter disputed by the Defendant and upon which I have not heard submissions and do not rule.

[153] See the section 32 judgment

Documents available – those relied upon by the Claimants

214. The Defendant notes that the documents relied on by TC34 are documents at the highest level of generality, indicating, for example, that certain detention camps existed or that abuses did take place.[154] It is correct that these do not permit the testing of TC34's core allegations. Also, care has to be taken as to what these documents do indicate in terms of their date, location etc. Some are of little, if any, probative value. I shall address the more important documents when I deal with the detail of TC34's claims.

Witnesses

General

215. Consideration of witnesses has to be undertaken at two levels. The first is the hierarchy of potentially relevant witnesses. The second is at the level of the alleged perpetrators of the individual assaults and potential witnesses who might have been sufficiently proximate to the alleged events so as to give clearly relevant evidence. Some of the points to be made in respect of lack of witnesses have already been touched upon; some will become clearer when I deal in detail with the core allegations.

Hierarchy, availability and potential relevance

216. The Defendant gives a general outline of the hierarchy as it understands it to be. This is:

- Governor/General who was Commander-in-Chief in the field.[155]
- Colonial Government Ministers.
- War Council attendees.
- Senior Civil Servants in Nairobi, Senior Army Officers, Commissioner of Police, Court of Appeal Judges, High Court Judges, the Commissioner of Prisons, persons serving on the Complaints Coordinating Committee and other Colony level committees.
- Provincial Commissioners, Army Generals, Police Superintendents, resident full-time Magistrates, prison Superintendents.
- District Commissioners, Army Majors, Police Inspectors, Officers in command of prisons or detention camps.
- District Officers (including District Officers (Kikuyu Guard etc)), Army Captains or Lieutenants, police officers, senior staff in prisons and detention camps

[154] There is, as the Defendant says, also documentation that the Mau Mau abused people, including by beatings
[155] There is a dispute as to General Erskine's role, but it is not material at the present time

217. As far as the Colonial Administration is concerned, the Defendant has not been able to produce any witness who was at the time a District Commissioner or above.[156] Nobody is alive of the rank of Provincial Commissioner or higher status in the Police or Special Branch. Many of the key players were alive and presumably available for many years after the Emergency finished.[157] No British Army soldier has given evidence.

218. It must clearly be the case that most potential witnesses died long before this claim was initiated. In 2015 Mr Thayre of the Defendant extracted information from the Colonial Lists 1950 - 1963, the Kenya Gazette lists 1952-1963, Who's Who, and DFID pension records. Of 10,040 individuals on the list 7391 were deceased and an additional 81 were presumed deceased as exceeding 112 years of age.[158] The Defendant attempted to carry out a massive tracing exercise over a period of some 2.5 years.[159] There has been no real criticism of the enormous extent and work which has gone into this tracing exercise. I therefore do not reproduce the details of it.

219. Apart from the witnesses whom the Defendant has called to give evidence, everybody named in TC pleadings and evidence and mentioned in the Defences is believed by the Defendant to be deceased, untraceable or uncontactable. In no TC case has an alleged perpetrator or direct witness to an alleged tort been found by the Defendant to be identifiable, traceable and contactable.

220. There was some debate as to whether the Defendant could have had witness evidence from others whom it decided not to interview fully, or to call as a witness. The Defendant produced a Note clarifying the position. Paragraphs 16-18 of the Note read:

> "**D's claim of privilege**
>
> 16. D maintains its privilege in:
>
> a. Legal advice it has received or communications about legal advice.
>
> b. Names of individuals from whom it has not served or called evidence.
>
> c. Discussions or communications with (or about) individual witnesses including about their personal circumstances (such as state of health, ability to deal with the process etc).
>
> d. The reasons why particular individuals may or may not have been proofed or called.
>
> 17. The Court cannot draw any inference adverse to D from its having maintained privilege in this regard.

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[156] The most senior Kenya Officer called was Mr Thompson, who died shortly after he gave evidence. He was a DO who became a District Commissioner towards the end of the Emergency. He was then at Tana River District, not far from Hola. A document showing the Administration stations and officers as at 1 September 1955 (32-37851m) demonstrates that there were full lists and that these were passed on as legacy material.

[157] The detail is in the witness evidence of Ms Lohia and Ms Pollock – see exhibits ASL16, ASL28, ASL29, ASL30 and MP7.

[158] Mr Thayre gave evidence that of the 7490 (or 7491) deceased by 2015, about 80 had died by 1986 and thereafter about 11.5% by 1990, 50.3% by 1999 and 85% by 2010.

[159] The evidence is primarily given by Ms Lohia and Ms Pollock. I do not propose to go into detail.

Prejudice

18. Instead, what the (unanswered) evidence before the court shows is prejudice to D by reason of the unavailability to it of potential witnesses so long after events:

a. D has not been able to obtain evidence from anyone identified as having direct knowledge of the specific circumstances of detention and/or mistreatment alleged to have been sustained by any selected TC. By definition, D has not been able to obtain evidence from anyone who could have spoken directly to the assaults alleged by TC34.

b. D has attempted to trace persons named by TCs in their pleadings and witness evidence, save for family members, people they would be expected to call, and people they have said are deceased – see para 3.26.10 of D's general submissions.

i. Every such person in TC34 has been found to be deceased or untraceable. (In fact, the only person named by TC34 and not traced is TC34's father.)

ii. Every such person in TC20 has been found to be deceased or untraceable.

iii. In respect of the other 23 TCs, for which D has not yet prepared its closing submissions, D can say that in every instance that a person is named person in a TC's pleading or evidence to which the individual defence pleads is to a person found to be deceased, untraceable or uncontactable.

c. D has not had information or assistance from anyone who held senior rank in Kenya during the Emergency about matters occurring within the Emergency period. (Its most senior witness was Mr Thompson, who was a DO for most of the relevant time and a DC latterly.) For example:

i. D has not had information or assistance from any commandants of the 'main' camps, or from anyone who was in charge of a camp at which a TC alleges he/she was detained over the alleged period of that detention.

ii. D has not had the benefit of information or assistance from anyone with knowledge of the consideration given by senior officials to complaints of mistreatment, save for Mr Thompson's recollection of an initial reporting encounter concerning the Hola incident in 1959. No member of the Complaints Coordinating Committee has been spoken to."

221. In Ms Lohia's tenth Statement at [10] she said "I am able to confirm that to date the Defendant has not obtained evidence from any individual identified as having direct knowledge of the specific circumstances of detention and/or mistreatment alleged to have been sustained by any particular Test Claimant."

222. The Claimants accepted that the Defendant does not have any witness evidence which is material in this sense. However, the Claimants said that the Defendant's evidence does not go as far as to say that, in the early stages of the Defendant's investigations, a potential material witness was not discarded because he did not help the

Defendant's case. They said this is not an imputation on Ms Lohia, and arises from the privilege claimed by the Defendant as to the selection criteria for witnesses. I responded in open court that I was intending to draw an inference on the material placed before me. The inference was that the Defendant would not have put the case in the way it had, if the selection criteria authorised the discarding of a witness who could give material evidence on a Test Claimant, on the basis that the evidence would be unhelpful to the Defendant's case. I heard nothing further on this matter and therefore I draw that inference.

223. The Defendant says that officials of different levels would have had different knowledge of, and insights into, the events and circumstances alleged by the TCs, and of their accuracy and credibility. For example, had the claim been brought within the primary limitation period, middle ranking and senior people would have been able to provide assistance on:

- Document management e.g. retention, disposal, and availability of records; e.g. which documents were passed on and/or destroyed[160].
- Allegations about the alleged culture of abuse in specific areas and camps and the attitude to such allegations.
- Incidence of violence in the community, including Mau Mau reprisals of which there is some documentary evidence.
- Use by Mau Mau of disguises which could have made the identification of perpetrators erroneous or uncertain.
- False complaints and other tactics adopted by the Mau Mau.
- Comprehensive accounts of changes of uniform, in circumstances where there was a rapid expansion of security forces.
- Evidence from officers in detention camps where TC34 says he was kept, at different dates, so as to test the plausibility and accuracy of the accounts, for example as regards the hierarchy of the camps, layout and general administration, discipline, the incidence of unlawful violence, violence between detainees.
- Evidence from people conducting inquiries into alleged misbehaviour e.g. Mr Fairn, Mr Davis and Mr Jack, or any members of their panel, and from those whom they interviewed at the time and against whom allegations of misconduct have been made. In particular reports into allegations of misconduct made by Mr Shuter, Mr Meldon etc.
- The role of the Army, the Kenya African Rifles (KAR) and the Home Guard, showing where they were, what they did, how they conducted themselves in particular areas, their role with detainees and prisoners and how they interacted with Special Branch.
- The role of the CID.

224. The potential relevance of the lack of evidence from this type of witness needs to be examined in this Judgment, with reference to the core allegations, the material used to support them and the material which may have had the potential to undermine them.

[160] Mr Miller was seemingly involved in sifting and possibly destroying documents, but he had no present recollection about it.

Alleged perpetrators and other proximate witnesses – TC34

225. There are no witnesses in relation to TC34's core allegations. The Defendant's case is that it does not know who they are or how they could possibly be traced, if still alive at this stage[161]. The Claimants have not called anybody. They have given no evidence as to the reasons for this.

226. It is useful to set out the information provided by TC34 in relation to the alleged perpetrators:

(i) Ngong Forest –

- In the AIPOC paragraphs 12 and 13, TC34 says 3 British Officers with guns were present when he was driven to Ngong Forest. One of the British Officers fired a gun just missing TC34's head. One British Officer slapped him on the face. A British Officer forced soil into his anus.

- In the Part 18 Response to questions asking the name of the British Officers and providing any other information that would assist in identifying them, TC34 responded that he did not know their names. They were white and spoke in English. He said he could not remember what they were wearing.

- In his Part 18 Response to a question seeking information to identify the British Officers who had asked him questions earlier, TC34 replied that what identified them as British Officers was "they had on different uniforms and they were also in charge." He said he could not remember clearly what they wore.

- In oral evidence he said four soldiers took him to Ngong Forest and the four included the soldier who had asked him questions earlier. The soldier who fired the shot was the one who beat him. Two soldiers forced soil into his anus.

(ii) Manyani –

- AIPOC. TC34 pleads in paragraph 20 that he was beaten by a prison guard.

- In his Part 18 Response to information on the guard's name and any other information that would assist in identifying him, TC34 responded "the Claimant did not know them; they just used to call them "Afande."[162]

(iii) Mackinnon Road –

[161] I reiterate that I am not dealing at this stage with generic issues, especially those by which the Claimants seek to fix the Defendant with liability for the actions of the alleged primary tortfeasors, namely vicarious liability, joint liability and negligence.

[162] Earlier in a response to a question about an allegation that he had been searched by prison guards, he said that they were the Kenyan police. He did not know them.

- In the AIPOC (paragraph 25) TC34 states that prison guards would order him to make furniture for them and, on one occasion, a guard hit him with a baton and he hit him back with a mallet. He was then taken to a room and assaulted.

- In his Part 18 Response to a request for the names of the prison guards who ordered him to make furniture for them and any other information that would assist the identifying of people, the response was "the Claimant does not know their names."

(iv) Gikuni –

- Paragraph 32 of the AIPOC pleads that a man who the Claimant describes as the Home Guard, but who was probably a Tribal Policeman, assaulted him.

- In response to a Part 18 request asking who the man was, his name and any other information that would assist in identifying him, TC34 responded: "It was a Home Guard. He cannot remember his name."

(v) Hola –

- In the AIPOC at paragraph 37 TC34 pleads that he was whipped on his back and buttocks by the guards whilst harvesting cotton.

- When asked for their names and any other information that would assist in identifying them, TC34 responded "the Claimant did not know their names."

227. The net result is that it is impossible for the Defendant to identify anybody who might have been directly responsible for the alleged assaults. Nor is there any evidence as to attempts made by TC34, or on his behalf, to identify the alleged perpetrators.

228. The Claimants submit that the failure by TCs to identify alleged perpetrators is more likely to be evidence of deliberate policy, given that even what was lawful was brutal, and that the Defendant produced no evidence that anyone engaged in law and order wore a name badge or introduced themselves. There is no evidence, nor can it be inferred, that there was a deliberate policy that people could not be identified, or indeed, that people could not in fact be identified.[163]

229. In relation to the Home Guard/Tribal Policeman who is alleged to have been responsible for the assault on TC34 at Gikuni, the suggestion from the Part 18 response is that TC34 cannot now remember his name but that he did know it at the time. That would also fit with the person being a Home Guard/Tribal Policeman in a small village, which was TC34's home village. On that basis it can properly be said that the passage of time has probably deprived the court of the opportunity of the perpetrator being identified and being available to give evidence.

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[163] I note that the detainees statements in the Jack Report refer to some names of officers in camps, including Shuter himself.

230. As to the other core allegations, the inference from the Part 18 responses is that TC34 perhaps never knew the names of the perpetrators. It may be that TC34 did never know the names of the perpetrators, though this cannot be said with any degree of confidence. In respect of those at the camps, he may have heard their names referred to and, had this claim been brought in time, have remembered those names. There is evidence that some guards in camps had nicknames. Whether the alleged perpetrators had nicknames, whether those nicknames were known to TC34 and whether, if so, those nicknames would have enabled the Defendant to trace those people 50 plus years ago, we will never know. Similarly, it is possible that TC34 might have heard, and remembered for a time, the name of those at the Ngong Forest. In addition, the passage of time can properly be said to have had these effects:

    i. TC34's memory as to various important features of the allegations would have been better some 50 years ago. His recollection as to the timeline, description of the perpetrators and the uniforms they wore will have been adversely affected. There is also evidence of different uniform and insignia worn by different types and ranks of guard/officer.

    ii. The Defendant could have investigated who was working at the CID in Nairobi at the time and, potentially with the assistance of documentary records, discovered who was responsible for questioning TC34. Not only might this have been entirely possible 50 plus years ago, but also TC34's recollection as to the probable date of the questioning would have been much clearer, thereby narrowing and assisting such enquiries. Thus, considerable light could have been cast upon the allegations relating to the Ngong Forest matter.

    iii. Although it may have been more difficult to pinpoint the alleged one-off perpetrators of the alleged assaults at Manyani and Mackinnon Road, similar points can be made. The reality is that the Defendant has been deprived of any opportunity properly to investigate these allegations.

    iv. In relation to the Hola core allegation, this is not a single alleged assault. There is no detail as to how often the alleged assaults took place, or any description of any of the persons responsible – something which TC34 would have been in a better position to recall 50 years ago; also, this type of allegedly regular abuse could have been addressed by officers in Hola, who could have given evidence of the incidence/prevalence of unlawful violence in the period when TC 34 alleges he suffered it. To some extent this type of evidence may have been relevant to the one-off allegations at Manyani and Mackinnon Road. However, here its main importance would be to respond to the general corroborative evidence which TC34 relies upon to suggest that, because there were other incidents of violence at those camps, there can be a fair trial of his core allegations.

231. The Claimants submit that complaint and independent enquiry were discouraged during the Emergency. They then deal[164] with a number of matters which are contentious, and whose importance would arise more in the context of generic issues

[164] Paragraph 183 of their Response to the Defendant's General Submissions

on which I have not heard detailed submissions. Nevertheless, I can take them at this stage largely at face value. They include:

- The Defendant called witnesses who worked as police officers in Kenya. Their evidence was that the police did not exercise any investigatory role in the camps.

- The number of cases that reached the Advisory Committee on Detainees was relatively few and given the numbers detained and the illiteracy of the detainees, it is implausible that TC34 would have any awareness of any right of appeal.

- The policy was to prevent letters of complaint getting out of the camps, and there had to be "a bit of brake" on complaints to the officer in charge "otherwise 500 prisoners would have been wanting to see the officer in charge"[165]

- Detainees were not consulted for the Jack Report and the Davis Report.

- There was no independent judicial inquiry. The Claimants say that there is evidence that this was because the Administration did not wish there to be the rigorous investigation which that might entail.

232. A number of points can be made:

- Had TC34 issued his claim within the limitation period, or many years ago, the Defendant would have been in a far better position to obtain witness evidence, and any documentation, relevant to the core allegations.

- There was no opportunity until very recently for the Defendant to investigate TC34's core allegations because no formal complaint was made. Had TC34 made such complaint years ago, and the Defendant had investigated or chosen not to, then that could have been weighed in the balance.

- Accepting for the sake of argument that there was a policy to prevent or discourage complaint while TC34 was detained, there is no evidence that that was relevant after independence.

- With reference to the Jack report[166], detainees were consulted. The detail of this will be considered later. However two matters are of significance: (i) the author of the report is not available to answer criticism of it, (ii) there is a certain irony in the Claimants' criticism that insufficient detainees were consulted for that report to be regarded as fair, whilst at the same time submitting that there can now be a fair trial of the core allegations when the Defendant has no knowledge or evidence of any alleged perpetrator.

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[165] Evidence of Mr Jones.

[166] This featured in argument much more than the Davis report; also TC34 relied on it for corroboration for his Manyani core allegation

- The reason for the lack of a judicial inquiry would need to be explored in detail in generic issues. The Claimants submit that, whatever the reason, there was no such inquiry and, had there been, some of the arguments that there cannot now be a fair trial may have been different, and this should be a factor in my s33 decision. A full judicial inquiry would have yielded different evidence. The evidence it would have contained and the conclusions to which it would have come are unknown. It is further unknown what impact, if any, they might have had on TC34's case.

- As to appeals against DDOs, I have already referred to the appeal system.[167] There is some evidence from TC34 that he was unaware of his right to appeal[168]. A document dated 4 May 1955[169] says that the Advisory Committee on Detainees had been engaged for two years in hearing appeals from GDOs and, more recently, had heard a small number of cases from DDOs[170]. At that point there were two committees of two members. Another document[171] records that, by the end of May 1959, the Advisory Committee had heard 2319 appeals from detainees and recommended release in 1088 cases. It is difficult to make a judgment as to whether in fact TC34 was aware at the time of his right to appeal. It may be that, in common with others according to some documents, he was not; or that, given that there were over 2000 appeals, he was so aware at the time; or that he was informed of it at some camp(s) but not at others. His memory some 60 years later is not a reliable indicator of this. I do not regard it as "implausible that TC34 would have any awareness of any right of appeal."[172] This is particularly so given (i) he was not illiterate and (ii) as an active supporter of the Mau Mau, he may well have realised that he had no realistic prospect of success on appeal. In any event, as TC34 had been an active Mau Mau member, I am not clear how the Claimants can make much, if anything, in his case, of any shortcomings in the appeal system.

233. Therefore, even taking these matters substantially at face value, they do not support the Claimants' submission that it is hypocritical for the Defendant now to complain that a fair trial is no longer possible, because witnesses are not available, when the absence of "identifying witnesses" is entirely the Defendant's fault, not a consequence of any tardiness by TC34. I reject that submission.

The Defendant's witnesses

234. From the General submissions of both sides arises a dispute as to the reasons and consequences of the fact that the Defendant did not show documents to its witnesses

[167] The right of appeal arose under the Emergency Regulations

[168] Supplementary Witness statement at [24]; oral evidence at Caselines 33-3215aq; also c.f. the Fairn report at [20] and [24]. The Defendant provided a detailed note commenting on this evidence. I do not need to go through that.

[169] Council of Ministers Resettlement Committee (Caselines 33-33726)

[170] DDOs had been in operation for about a year at that time.

[171] A Kenyan Ministry of Defence memorandum dated 12 June 1959 (Caselines32-66355) para 19

[172] Claimants' response submissions at [183c]

when they made their witness statements [173]. In TC34's case, the relevance of any lay evidence called for the Defendant as to the core allegations is tangential. Also, the relevance of this point is minimal in TC34's case. Thus, further exposition of, and comment on, this dispute is not merited. It would not have any impact of any substance on my decision.

The Medical Evidence in TC34's case

235. I had medical reports from Mr. Heyworth, a Consultant Emergency Medicine Physician, dated 7 August 2015 and from Professor Mezey, a Consultant Forensic Psychiatrist, dated 15 August 2015. There were also Part 35 responses by each Doctor. They both gave oral evidence before me[174].

236. There are conflicting submissions as to the relevance of the medical evidence. I shall synthesise and comment on these in this way:

(a) Whether a fair trial is now possible and, if so, whether TC34's account should be accepted in whole or in part is, of course, a matter for the Court. The fact that a witness impresses a doctor does not mean that a fair trial is possible or that the evidence of that witness should be accepted. It is also likely, in terms of diagnosis and effect of both physical and psychiatric symptoms, that the quality of the medical evidence has been adversely affected by passage of time.[175] Further, inconsistencies which are apparent from the medical evidence must be considered as to what extent they may impair TC34's claim.

(b) In a number of regards, it is correct, as the Defendant says[176], that the expert is able to do no more than conclude that his or her findings are 'consistent' or 'compatible' with the Claimant's account. The expert is in the present case heavily dependent on the history given. That is not to say that, on occasions, there are matters in the medical evidence which go beyond mere recording of history and to which the Court should have regard. An example is this from Professor Mezey: "the incident involving the intestines was particularly vivid, and clearly for him, but also in my mind, just because of

[173] Claimant General submissions e.g. at [127.3]; Defendant general submissions at [3.27]-[3.60]; see also TC34's response at [91]-[92].

[174] In TC34's case there is no claim for psychiatric injury. .

[175] Cf F&S v TH at [61] and [66]; this is notwithstanding Professor Mezey's evidence that: "I don't think it would necessarily have been easier in this gentleman's case to make a diagnosis three or five years after the event. One of the complicating factors which we've just been talking about is his alcohol use... The fact that he was drinking very heavily could have affected his ability to give an account of what happened in a clear way or to be able to assess some of the symptoms that are associated specifically with PTSD. The fact that he has now been completely sober for a number of years would probably assist in terms of his memory and his capacity to provide a clear and coherent narrative."

[176] AICS

the very dramatic change in his persona when he was talking about it, he was virtually retching in front of me"[177]. Of course, the Court does not have to accept such statements, or to give them the weight which the doctor did; but they should not be dismissed as not capable of carrying any weight. That approach is not at odds with the decision in SA (Somalia) v SSHD[178] where the Court of Appeal noted that the medical report relied on as corroboration amounted to no more than a record of (a) the appellant's history as recounted to the doctor and (b) the appellant's own explanations for the old injuries found on examination. Nor is it at odds with the caution expressed, albeit in the context of other confounding effects in a deportation case, by the IAT in HE (DRC – credibility and psychiatric reports)[179]. This Court is fully alive to drawing the line between the recording of a reliance on subjective recounting of events/symptoms to a doctor, and objective signs which are capable of providing some corroboration.

(c) The Defendant says in relation to Mr. Heyworth that he is a consultant in emergency medicine and his evidence should be confined to that discipline. This is correct but it must be recalled that, in terms of proportionality, the court required jointly instructed medical experts and limited them to two per TC, one an expert in General Medicine and the other a psychiatrist. In the former category, for all the TCs two were consultants in Emergency medicine and two were physicians.[180] Mr Heyworth's expertise was appropriate to comment on the matters which he did. The proper place for any specific concern would be as and when it arises on the detail of the evidence. The Defendant also says that Mr. Heyworth's evidence should not be approached or adopted uncritically[181]. The court does not approach or adopt any evidence in the case uncritically; the Court does properly evaluate that evidence as to what it is/is not capable of proving, taking into account the fact that

[177] Similarly, her evidence: "I was just very struck with this gentleman about the way that within the interview he appeared to almost relive some of the events he was describing. His manner changed, his presentation changed. He became very, very overtly distressed sitting in the room with me when he was being asked to talk about some of these specific events. That was very convincing and compelling"

[178] [2006] EWCA Civ 1302 at paras 24-28; in the Tribunal hearing the doctor had not given oral evidence.
[179] [2004] UKIAT 321 paras 18-19; cited in S (Ethiopia) v SSHD [2006] EWCA CIV 1153 at paras 29-30
[180] I understand that Mr. Heyworth was the Defendant's nomination. He is experienced in his field and had experience as a Royal Navy doctor in the Falklands war.
[181] The Defendant refers in particular to him initially reaching conclusions about causation on the basis of TC34's account alone, and to his (a) not heeding or giving significance to a medical record showing a cut to TC34's left hand in about 2010/11 (b) not photographing any scarring referred to in his report and not carrying out radiological investigation e.g. x-raying TC34's hips.

these were jointly instructed experts, who (a) were sent a jointly drafted and agreed letter of instruction (b) were the subject of detailed Part 35 questions and (c) gave oral evidence – unusual for joint experts, but to which both parties agreed and which, in the circumstances of this case, I accepted as necessary and proportionate. I will comment if and when appropriate when I deal with the detail of TC34's evidence. However, in no sense is Mr. Heyworth's evidence to be regarded as generally unreliable or flawed.

237. Another matter on which the Defendant relies to allege that there cannot be a fair trial after all these years is the dearth of medical records. I remind myself that while the ultimate burden is on a Claimant in section 33, "the evidential burden of showing that the evidence adduced by the Defendant is, or is likely to be, less cogent because of the delay is on the defendant"[182]. If the section 33 discretion is exercised in favour of TC34, the burden is then on him to prove his case. The Defendant relies on the absence of contemporaneous medical records in the periods pre and post the core allegations, against which TC34's account cannot be compared[183].

238. The first question is as to what medical records were ever available. The only reference TC34 made of any medical treatment arising from an alleged battery was when he told Mr. Heyworth that, following an incident at Mackinnon Road, he was taken to hospital for treatment to the injuries to his eyes. He reported that he was prescribed eye ointment which he applied for a period of days. This is not one of the pleaded allegations and no recovery is sought for it.[184]

239. There is no proper evidence on which I could find that any medical records relevant to the alleged assaults the subject of TC34's claims were probably made; nor that any other medical records relevant to put the claims in context were ever available. The only available evidence on this is that of TC34 to the effect that he was not medically treated for any of the injuries he says he suffered from the core allegations of assault. He may, of course, be wrong about this. His memory on such a matter cannot be regarded as reliable. It would have been more reliable 50 plus years ago.

240. There is evidence from Professor Khan, who was a doctor at Manyani, that he kept clinical notes on the medical records, as one would expect. It is therefore possible that TC34 did have clinical notes at one or more of the camps in which he says he was detained. It is also possible that those notes referred to one or more of the assaults he says he suffered – either confirming or casting doubt on his present account. It is also possible that there were other entries which would have been relevant to assessing the reliability of the core allegations. It cannot be put any higher than that. Nevertheless, it is now not possible properly to investigate whether there were any such contemporaneous records or what effect they may have had.

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[182] The Carroll case at para 42(5)

[183] The Defendant notes, for example, Mr. Heyworth saying: "My conclusions are based on the limited evidence available and my examination findings. Given the absence of documentation, medical records and the significant interval which has elapsed, it is obviously difficult to be precise regarding the causative link."

[184] The point is made by the Defendant in the context of criticism of TC34's claim following his alleged eye injury at Ngong Forest.

241. What I cannot assume is that what happened in the UK from the 1950s onwards vis-à-vis medical records would have been replicated in Kenya generally, i.e. outside the camps. In relation specifically to the lack of such medical records relevant to the period pre and post the core allegations, and in the circumstances of my review of those allegations later in this judgment, I cannot find that the delay in bringing the claim has resulted in the evidence adduced being less cogent.

242. What can be said is that the court does not have the assistance of any contemporaneous medical records, whether during the particular periods of TC34's detention or later, a factor which has been relevant in the authorities in deciding whether there can be a fair trial.

Status/Age

243. TC34 says he is a Kenyan national and was, at the material time, a British subject by virtue of Section 1(1) of the British Nationality Act 1948. The Defendant admits that the citizens of the United Kingdom and Colonies were British subjects but, as with other individual Claimants, makes no admission as to TC34's status.

244. TC34's evidence is that he was born in 1927 or 1928, although his ID card states he was born in 1932. His explanation for the discrepancy, in common with some other TCs, is that his date of birth was changed during registration to avoid paying the tax that Kikuyu had to pay. The ID card in evidence was issued on 16 October 1996. The Defendant points out that this was well after the Emergency and could have been changed. The card gives the place of birth as Kiambu District, Kikuyu division, Kabete location, Nyathuna sub-location.

245. The Defendant makes the following points:

- TC34's names appear to be common in Kenya. On the group register 69 people have his forename, 69 have his forename as their middle name and four have his surname[185].
- The Claimant has been put to proof that he is who he says he is[186].
- The Defendant has not been in a position to contradict TC34's identity (or any of his evidence) by way of a positive case.
- The identity card, being erroneous as to year of birth, means that it proves no more than that is what TC34 told those issuing it.
- The wrong date of birth is evidence of TC34's lack of truth.
- There is no witness evidence of anybody who can corroborate anything TC34 alleges happened to him during the Emergency[187].

[185] A further four have a surname with only the final letter differing.
[186] RAID paragraphs 6 and 7.
[187] The Defendant refers to potential witnesses such as TC34's family members, employers, business associates, other Mau Mau, fellow detainees or medical practitioners who have treated him over the last 50 years. The Defendant relies on the comments of Langstaff J in F&S v TH [2016] EWHC 1605 (QB) at [60] and [78].

- The Claimants have given no evidence as to what research (if any) they have undertaken to seek corroborative witnesses or explain the failure to call such witnesses. Nor have they provided any evidence of what efforts, if any, they have made to obtain documentation referring to TC34 at any stage whether before during or after the Emergency[188].

- No explanation has been given by the Claimants as to how they did researches. Mr Myerson said on the first day of the trial, 23 May 2016:

  > "The parties have been coming at it, if I may say so from different directions… they have, it seems, searched the documents with an emphasis on the individual test claimants and their experiences, whereas we have sought to put together an overall picture and slot the individual claimants in thereafter. But we are, I think, converging on a quite separate class of document which may elucidate particular experiences even though it does not mention test claimants directly. That is an exercise, I acknowledge frankly, we are still having to do."

  The Claimants' disclosure in 2015 was almost entirely of material provided to them by the Defendant. There was late disclosure by the Claimants of around 1000 documents in May 2016, just before the start of the trial. Further late disclosure came in September 2016 and at the time of the close of the Claimants' case in April 2017. There has never been a full explanation of the researches undertaken or the nature or extent of document searches made by the Claimants.

246. Some of these points may be significant in relation to other evidential issues. In that regard, they will be considered later. Specifically in relation to the matter of TC34's identity card, I have to take into account that it is a legal requirement to have such in Kenya. It does record what TC34 says is a historic untruth. The effect of that (admitted) lie in the circumstances in which it was given, could be taken into account generally in terms of TC34's credibility, though I must say that it does not really affect my assessment. There was little exploration in cross-examination of the detailed background to the identity card. Nor was it suggested that TC34 might not be who he said he was. The inference seems to be that he had had an identity card for a number of years and had lied about his birth date so as to avoid the Kikuyu tax at the time of the Emergency. This suggests that his name has remained constant since that date and his photographs have been renewed. If that is so then, save as to the birth date, the probabilities are that his identity on the card has been consistent since the 1950s (at least). It has also been consistent since 1996 when the present identity card was issued. Further corroboration of identity comes from the, albeit scanty, medical records, namely an "endoscopy service investigation report" dated April 2011 from North Kinangop Catholic Hospital and a "patient card" from the Karangatha Health Centre dated February 2012.

247. The Defendant's submissions as summarised above will need to be considered in the context of TC34's allegations and evidence generally. Nevertheless, in my judgment, TC34's evidence as to identity is not undermined.

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[188] Apart from the ID card, there is a "endoscopy service investigation report" dated April 2011 from North Kinangop Catholic Hospital and a "patient card" from the Karangatha Health Centre dated February 2012.

248. On the balance of probabilities I find that TC34 was a British subject during the Emergency and that he was born in 1928/1929. Apart from that, the other details on his ID card are likely to be accurate. I should perhaps clarify that, although this finding appears before a number of matters affecting TC34's credibility, and the question of whether it is equitable to allow the action to proceed have been determined, I have taken into account, before reaching it, all factors that appear subsequently.

Timeline of TC34's Case

249. In oral argument, Mr Myerson accepted that TC34 could not be right about the dates and, in particular, the amount of time he had spent in Manyani and MacKinnon Road. He also accepted that had the claim been brought within the primary limitation period, or presumably within a reasonable time thereafter, TC34's recollection as to dates and periods spent in the camps would probably have been more accurate.

250. There is a substantial issue between the parties based on the dates in the AIPOC and TC34's closing submissions. I shall set out the particulars in some detail by reference to those two documents and subsequent commentary by the Defendant and the Claimants.

TC34's individual closing submissions - commentary and discussion

251. As to the initial arrest and detention, the closing submissions state that TC34 pleads that these were sometime in 1955 [14], but aver that he was probably arrested between September 1954 and March 1955. They also say that his arrest was sometime in the summer of 1954 [97], though, in oral submissions, Mr Myerson distanced himself from that statement. The closing submissions say that the documentary evidence enables more precision and put matters in this way: TC34 is likely to have been sent to Manyani after September 1954 [14a]. His arrival was perhaps sometime after October 1954 [14b]. TC34 thought he was there for about a year [14b]; in evidence, he said he was there for not quite a year [14d]. TC34 arrived at Langata before 31 March 1955, as no new detainees were accepted after that [14c].

252. The position is that the pleaded case is removal and arrest in Nairobi in 1955[189] followed by a few weeks' detention, including two weeks at Langata, before transfer to Manyani. On the basis that Langata accepted no new detainees after the end of March 1955, the pleaded case and the evidence are capable of consistency by indicating initial arrest in the first few weeks of 1955.

253. TC34's closing submissions state that it was likely that he was moved to Mackinnon Road in August/September 1955 [78], where he alleges he remained for 1½ years [95][190]. As to this:

[189] His witness statement at paragraph 8, adopted by his evidence in chief, said "I was forcibly removed around 1955…"

[190] At [33] of his witness statement he says he was detained at Mackinnon Road for 1½ years. However, [34] could possibly suggest that he was "detained there for six months".

(i) The AIPOC pleads that he remained in Manyani for about a year. If he arrived in, say, February/March 1955, that is not consistent with an arrival at Mackinnon Road in August/September 1955.

(ii) The inference from one document is that Mackinnon Road closed in December 1955[191]. Nevertheless, there are documents which suggest that a population[192] of about 150 detainees remained at Mackinnon Road as a "working party" until the end of May 1956[193].

(iii) Therefore, on the pleaded case, the earliest date upon which TC34 would have arrived at Mackinnon Road would have been about the end of 1955, and he would have remained there until approximately the summer of 1957. Even assuming that TC34 was one of the relatively few who remained in Mackinnon Road until the end, there is a discrepancy of at least a year.

254. In TC34's closing submissions he says he was at Mwea for about 6-8 months, and certainly less than a year [106]. During that time he was at Gathigiriri for two weeks [106]. TC34 was held at Waithaka Detention Camp for a few weeks [112][194]. It is unclear from the submissions when exactly TC34 was taken to Waithaka. From there, he was taken to the District Officer's office at Wangige [114] (according to TC34's submissions, TC34 thought this may have been 1959 [115]).

255. The total period covered by the preceding paragraph is somewhat less than a year. On the pleaded case up to and including his removal from Mackinnon Road, the approximate date for his transfer to Mwea was the summer of 1957. Therefore, he would have been taken to the District Officer's office at Wangige in Spring/Summer 1958. His pleaded case is that this was in 1959 and this is adopted in his submissions. However, in the closing submissions it is also said that he arrived in Mackinnon Road in August/September 1955, remained there for 1½ years, (i.e. until about February/March 1957). Adding a little less than a year to that would mean that he was taken to Wangige in early 1958, at the latest.

256. TC34 describes the stage at Wangige as his release. His submissions deal with this stage in the following way: He was held at the District Officer's office for three days [115]. TC34 was then transferred to Gikuni, his home [116]. He says he was assaulted by a Home Guard there [117], after which he was taken to a court approximately ten miles away from Gikuni [121]. He was then taken to Embakasi Camp via Waithaka Camp and Langata Camp [121]. TC34 was taken back to Waithaka for two nights [123]. He was then taken to Langata for three days and then on to Embakasi [125]. In his witness statement he said that he stayed at Embakasi for two months [126], but in evidence he said he was not there for more than four days [126]. TC34 claimed he was threatened with assault at Embakasi [126][195]; following the assault he was immediately taken to Fort Jesus Camp [126]. TC34 remained at

[191] Detention Camps Report No. 23.

[192] This was not a stable population, in that some people arrived and some people left. In January 1956 the population was 78 but then increased.

[193] Detention in Camps Progress Reports No 24-29; also see Resettlement Committee Meeting, 27 March 1956. TC34 was a carpenter and the Claimants say that this makes it more likely that he was one of those retained as a "working party" member.

[194] The Defendant says the documents referred to in the RAID indicate that Gathigiriri closed end September 1958, and camp in October 1958, with camps in the Mwea by the end of November 1958.

[195] Not a core allegation since no personal injury is alleged to have resulted from the threat.

Fort Jesus camp for approximately two weeks [131]. He was then moved to Mukoe Camp for 2-3 months and up to around 6 months [133].

257. In relation to Embakasi Camp, in TC34's witness statement at [55], he says "Embakasi was a Detention Camp where people would be held for a few days before being transferred. The camp was mainly for questioning. We were held in a police cell for about two months. I did not do any forced labour while at Embakasi." In oral evidence he said he was there for no more than four days[196].

258. The Defendant submits that the last Progress Report mentioning Embakasi was in April 1958[197], and that this is inconsistent with the pleaded case of 1959. The Claimants' response is that if the Camp was being mainly used for interrogation, this is consistent with the work having come to an end and the Camp being in use for other purposes e.g. interrogation. Apart from one document, which may possibly support this[198], the Court has not been referred to any evidence which corroborates interrogation at Embakasi in 1959.

259. TC34 says he then went to Fort Jesus camp for some two weeks. The latest document relating to Fort Jesus is dated 11 April 1958[199]. The Claimants rely on it to demonstrate that Fort Jesus was open and operational in 1958. The document details the intake of detainees (ex-Fort Jesus) at Embu District Works Camps. There is no document which corroborates Fort Jesus being open in 1959.

260. In his witness statement TC34 said that he stayed at Mukoe Camp for 2-3 months, after which he was taken to Hola. In evidence he said this was up to around 6 months[200].

261. TC34's closing submissions say that he was then taken to Hola Camp, where he was detained for about 6 months before being freed from detention [137]. He stayed at Hola for approximately three years [137]. TC34 alleges that he was assaulted at Hola Camp [139].

262. Although TC34's pleading and evidence therefore cover arrest in Nairobi, followed by detention in a number of places, the allegations of assault are restricted to the Ngong Forest (during first interrogation), Manyani camp, Mackinnon Road camp, Gikuni (his home village) and Hola. These are the core allegations upon which I have to decide whether it is equitable to allow the claim to proceed and, if so, whether (and if so to what extent) TC34 has proved his claims.

Pre-4 June 1954?

263. The Defendant accepts that on TC34's pleaded case no allegation of assault occurred pre-4 June 1954 so as to attract the insuperable limitation bar. Yet the Defendant

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[196] The Claimants say he was very tired by that time and caution is warranted. Nevertheless (a) that is the period of time pleaded by way of amendment in paragraph 35 AIPOC (b) the Defendant points out that two minutes later he told the Court that he was "not really tired" and refused the offer of a break.

[197] Progress Report No 51.

[198] Security Council Advisory to the Government, 3rd February 1959 – where at paragraph 99 there is reference to the General Service Unit required for duty in Nairobi being accommodated at Embakasi.

[199] Report on the Intake of Z Category Detainees ex-Fort Jesus, Mombasa on 10.04.1958 by the Staff Office for the Embu District Works Camps to the Commissioner of Prisons at [32-59502a].

[200] Hence the amendment to the pleading

refers to a section of the evidence in cross-examination, where TC34 revealed for the first time that he had taken a second Mau Mau oath when he was living in Nairobi. He was asked when this was and his evidence was that it was after the Emergency had been declared. When then asked how long after, the transcript continues:

"A About one year

Q So in 1953?

A Yes"

In re-examination he said that he was arrested a very short time, about three or four months, after he had taken the second oath. This would put the initial arrest before the opening of Langata camp and Manyani. If he was in those camps, then his arrest must have post-dated these dates.

264. The Defendant submits that the court should not permit TC34 to succeed, whether on the substantive element of his claim or in the exercise of the discretion under section 33, when there is an unexplained difference between the pleaded case and evidence which deprives the Defendant of the benefit of the pre-June 1954 time bar. Alternatively, that it is wholly unclear when he was arrested and when he arrived in Manyani. It could have been before June 1954, and the alleged assault at Ngong could have pre-dated 4 June 1954. In support of this, the Defendant says the only way that TC34 could have spent about a year in Manyani and about 18 months in MacKinnon Road, prior to the latter's final closure in May 1956 at the latest, is that it is possible that TC34 arrived in Manyani in the summer of 1954.

265. The Claimants refer to the fact that in cross-examination TC34 had said that his mother's house had been burned down about a year after he had taken the second oath, when the question he was asked was whether it was a few weeks.

266. There is clearly some inconsistency here. There are many possible explanations for this such as, at one extreme, TC34 was not telling the truth, or that he became confused/tired.

267. I take into account all the circumstances of the case, both those to which I have already adverted, and those yet to come. Despite the problems, it seems to me unlikely that TC34 was arrested and detained prior to 4 June 1954. His description of Manyani, and where he was located in Manyani[201], leads to a probability that his arrest was after that date.

268. I have determined this factual issue on the balance of probabilities since I have to do so. Despite the fact that, in determining the section 33 issue, the court should be careful not to make findings which 'put the cart before the horse', in terms of deciding whether it is equitable to proceed, it is first necessary to decide whether TC34 has proven that all his allegations post-date 4 June 1954. If any one of them does not, then it is time-barred and there is no discretion to allow it to continue.

Timeline- conclusions

[201] For details see TC34's closing submissions at [14a]. I take no account of the two documents referred to therein which are not admissible in evidence [Caselines 32-18325; 32-22332].

269. The Defendant says that these inconsistencies lead to a very confused picture as to where TC34 was and when. It cannot be a coherent and consistent account and there are few extraneous objective facts by which properly to measure the reliability of TC34's evidence. Therefore TC34's evidence is (a) not cogent, (b) to the extent that TC34 relies on corroborative evidence[202], the dates are of importance to set the alleged corroboration in context and the extent, if any, to which it supports TC34's case.

270. In terms of where he was on the occasions of the core allegations, TC34 has been consistent as to locus and as to sequence i.e. (1) Ngong Forest, (2) Manyani, (3) MacKinnon Road, (4) Gikuni and (5) Hola. This is of some importance. Nevertheless, I must bear in mind, as part of the decision-making process on the cogency of TC34's evidence, and when evaluating any corroborative evidence/prejudice to the Defendant, the undoubted confusion as to dates. There is no doubt that TC34's evidence has been rendered less cogent by the delay in issuing the claim. If it were not already evident, or evident as a matter of common sense, it would be amply demonstrated by two further facts

. (i) In TC34's closing submissions at [13] it is said:

> "Understandably, given his age and the time gap, the Claimant is imprecise as to dates. He acknowledged this himself: he explained that it is very difficult for him to keep track of time because he did not have any knowledge of the date whilst in prison and that he does not have any records of the time he spent in each camp …"

. (ii) The extract previously cited from the section 32 Judgment at [150].

Allegations of Assault in TC34's case

Ngong Forest

Pleadings – AIPOC paragraphs 12-13

271. The allegations are that the Claimant was driven to Ngong Forest from the CID which was near the Supreme Court in Nairobi. He was placed in a Land Rover with a young Kikuyu girl aged 18 to 20 years. At the Ngong Forest the Claimant was handcuffed to a tree. There were three British Officers present with guns. The Claimant was questioned about the whereabouts of some guns. One of the British Officers fired a gun just missing the Claimant's head. The Claimant was slapped on his face by a British Officer. The impact caused him to start to lose the sight in his right eye. His handcuffs were removed and he was forced to kneel down. His hands were tied in front of him and his trousers removed. A British soldier forced soil into TC34's anus with a stick and he was then hit with the butt of a gun on his hip, ankle and knee.

272. Whilst the Claimant was being beaten it is said (paragraph 14 AIPOC) that the young Kikuyu girl was stripped naked with her legs held apart. She was questioned on the whereabouts of the Mau Mau. A bottle was pushed into her vagina every time she

[202] Particularly re Manyani and MacKinnon Road

was asked a question. The Claimant witnessed this as he lay on the ground, causing him further distress. He feared for his life.

Initial observations

273. These are very serious allegations. If accurate, TC34 suffered a horrible and degrading assault.

274. The Defendant knows nothing about the Ngong Forest; nor can it call any evidence as to the core allegation, or as to its lead-in or aftermath. There are no witnesses, just TC34's account and the evidence of the doctors. The Claimants say that male sexual assault was not uncommon and cite an allegation by TC27 at Manyani. I regard this allegation of an assault by different people, at a different place, and in wholly different circumstances, as of no significance in supporting TC34's allegation. Further, the Claimants say, in relation to TC34's account of the sexual assault alleged on the girl, that there is a reference to a similar assault at the Makadara Home Guard Post, some 15 miles from Ngong. This, too, is of not of any significance in circumstances where that latter allegation was not an allegation against the CID and was in another place. Further, it was investigated by the CID, (Mr Duncan MacPherson, the Assistant Commissioner of Police). On 11 January 1955, he wrote a report to the Commissioner of Police, copied to the Attorney-General. In it he concluded[203]:

"..if one is to accept the story of the women, corroborated as it is by medical evidence and certain other circumstances, the Guard Post at Makadara is nothing more or less than a torture post, used by certain members of the Tribal Police and Kikuyu Guard, together with the Headmen and Chiefs of the Administration, to endeavour by completely unlawful means to obtain information regarding Mau Mau offences….Such information need not, in fact, be of a truthful nature as, under conditions of torture, it is only reasonable to suppose that the person being tortured will say anything whatsoever, true or otherwise, in order to compel his or her torturers to cease their operations;"

275. There is a further letter dated 27 January 1955. It is from Mr Small, the DC for Nairobi. He adds some more detail about the investigation and proceedings against the assailants etc. Inter alia he says that none of the alleged female assailants had any right of arrest at all; in effect they were nothing to do with the Security Forces; they were "prostitutes of the hardest type. Some of them decided to throw their lot in with the Government having seen the strength of the Security Forces in the Locations".[204]

276. The Makadara incident illustrates an aspect of the general difficulty in having a fair trial many years later without potential key witnesses, even where that witness may not be the primary tortfeasor. Assume that the victims of the Makadara assault had been TCs and only Mr. Macpherson's letter had been found. One can see how easily the discretion to allow the action to proceed might have been exercised in the

[203] Caselines 32-28637. The report records that six women had been sentenced by the Magistrate to imprisonment/hard labour for the assaults they had perpetrated on two women.

[204] Caselines 32-29277; Mr Kearney who gave evidence worked with Mr Small. He said in his first witness statement at [11] that Mr Small "was a most efficient gentleman and well-liked by all". Mr Kearney was cross-examined on the Makadara incident. He said he had never heard of it and believes that by then he had left the area.

Claimants' favour, even absent any witness for the Defendant. Their evidence would have corroborated each other and also would have been seemingly well corroborated by Mr. MacPherson's letter. With the knowledge of Mr. Small's letter, the Court may well come to a different conclusion, namely that a fair trial on whether somebody for whom the Defendant was potentially vicariously liable had committed the assault would be not be possible without contextual witness evidence, e.g. from Mr Small himself, so as to explain the circumstances which would raise a potential defence, and to have his evidence tested. I merely cite this as an example of the sort of problem that can arise where full documentation may not be found and/or witnesses who might put allegations into context are no longer available. How to exercise the discretion in respect of each of the core allegations must be looked at on its own merits.

277. Mr. MacPherson was in charge of CID in Nairobi from June 1954. He was also Assistant Commissioner of police (Crime). In the Claimants' written Opening he is relied upon as somebody who attempted, despite hostility, to bring abuses to light. Yet, on TC34's account, the CID under Mr MacPherson's command was using the same horrendous tactics on a young woman at about the same time he wrote condemning the Makadara incident.[205] This is possible, though, if anything, the Makadara documents make the incident alleged by TC34 less, rather than more, likely. In any case, the documents are no corroboration of TC34's account of what he says happened to the girl or to him at the Ngong Forest.

278. Mr MacPherson died in 1989. Examples of matters which would have been important to explore with him are: (i) were these sorts of abuses that might have occurred in the department of which he was in charge at this time? (ii) did any information of that type of treatment by CID ever reach him? (iii) if so, what did he do about it? (iv) who were the junior officers responsible under him? (v) what supervision or checks were there on the junior officers or anybody under them? (vi) were British Army soldiers ever responsible for interrogation at, or upon taking a detainee from, CID offices?

279. There are now no records which can show whether, and if so by whom, TC34 was interrogated, or which might lead to the identity of the girl who was allegedly abused. Nor can the Defendant now investigate with others, such as Mr MacPherson, the Police Commissioner Sir Richard Catling (died 2005), Superintendent Henderson of Special Branch (died 2013) and other high-ranking officers who would be over 100 years old. Had the claims been brought in time or even in, say, the mid-1960s or somewhat later, they could have spoken about police practice, they would known their contacts within the force with the potential to lead to the alleged primary perpetrators. They could also have explained to the court the general context of CID investigations, thereby potentially shedding light on the reliability of TC34's allegations[206].

280. As to documents, the more material ones which may well have existed and been useful for the testing of TC34's evidence are (for example) paperwork relating to his arrest, detention in the places prior to the Ngong Forest allegation and documents, e.g.

[205] See also the Manual for Kenya Police 4 February 1954 para 11 which prohibited ill-treatment during interrogation.

[206] e.g. the likelihood of being taken to the Forest for interrogation.

screening records[207], which may well have led to ascertaining witnesses/alleged perpetrators of the core allegation[208].

281. Further, Mr Green and Mr Thompson, witnesses for the Defendant, said[209] that there were card indices of Mau Mau intelligence. It is reasonable to assume that TC34, as active Mau Mau, may have appeared on those records and there may have been important background information on him. This point has particular relevance for the initial interrogation of TC34. It is also of relevance in relation to all the core allegations. Nothing is known of TC34 save that which he has himself said.

TC34's individual submissions – commentary and discussion

282. The Claimants submit that, as TC34 did not cooperate or provide information under interrogation, it is unsurprising that the interrogation continued and became more violent [34]. The Defendant takes issue with this, pointing to documentary evidence of instructions that people being interrogated should not be ill-treated as it achieved nothing and was illegal[210]. This is a factor I take into account but, of itself, it does not greatly assist the Defendant. I am not prepared to accept the Claimants' contention that it was unsurprising that the interrogation became more violent; nor am I prepared to accept the Defendant's submission that the allegation was "particularly surprising." If there could be a fair trial, this allegation would stand or fall on its own merits. Reliance by both sides on the generality of points such as these is perhaps an indicator of the problems in having a fair trial at this juncture.

283. The Defendant called a witness, Mr. Kearney. In 1952 he was transferred to Parklands Police Station in Nairobi as Station Commander (Chief Inspector). He was subsequently promoted to Assistant Superintendent and took command, by turns, of most of these divisions in the cities. His recollection was that he was in Nairobi in 1954 but had left by 1955. He said he never witnessed any brutality and nor would his staff or he have tolerated it. He commented on the allegations in a number of TCs' cases. In relation to TC34 he said:

- The CID was situated opposite the Cathedral of the Highlands which was on the main Ngong road and not near the Supreme Court as TC34 states[211].

- Although he believes he would not still have been at the department's police station in 1955 (the pleaded time on TC34's case), he commented in his first witness statement on some of TC34's evidence as follows:

  "50. The suggestion that six officers were used to question one detainee at headquarters is implausible and exaggerated. The allegation about the severed heads[212] is also totally implausible make-believe: police had daily meetings where all officers of Nairobi including Special Branch and CID would attend. Such a subject would have come up formally or informally in these meetings,

[207] Cf 32-44897; 32-44940; 32-44941
[208] Also potentially police notebooks; cf the evidence of Michael Nazer.
[209] 31-2755-2756; 31-539. Mr. Green said that they were still there after independence and were not destroyed.
[210] For example, Kenyan Police Interrogation Manual February 1954 issued by Director of Intelligence and Security
[211] AIPOC at [11].
[212] Referred to later in this judgment.

> and it never did. I am certain I would have heard of it, and a lot of people would have got into trouble. We simply would not have stood for it. If anything untoward happened you had to report it to the 999 service, and it was recorded and investigated."

284. Mr. Kearney was however police and not CID/Special Branch. He was not cross-examined specifically about what he said in relation to TC34's allegations. He also said that Special Branch were very secretive and kept very much to themselves.[213] In relation to the precise allegations of what went on in the Ngong Forest, Mr. Kearney's evidence cannot really assist me.

285. What Mr Kearney's evidence does is to give the court an indication of how the Defendant is prejudiced, not only in relation to Ngong Forest, but also all other core allegations. Apart from the alleged primary tortfeasors, there would in the past have potentially been many witnesses who could have given real context to the reliability of TC34's evidence in the way that Mr Kearney's evidence begins to do. I cannot place too much weight on Mr Kearney's recollection because (a) it is so long ago (b) he was not posted in Nairobi at the time TC34 says he was first interrogated (c) it is uncorroborated by other witnesses (d) it is uncorroborated by the type of record and investigation to which he refers. If a court had been able to find that Mr Kearney was probably correct in his description of TC34's evidence as to the severed heads, then this may well of itself had a serious impact on the remainder of his allegations. If there had been other similar witnesses in relation to the core allegations or surrounding matters in TC34's evidence, the assessment of TC34's case may well have been radically affected.

286. The Claimants submit that TC34's Part 18 response that it took about half an hour to drive from Nairobi CID to Ngong Forest is consistent with the geographical location on the maps of Nairobi and the outer areas. A map has been produced which shows Nairobi and what appears to be a township of Ngong, and to the south, Ngong hills. On the scale of the plan, from Nairobi to these areas is roughly 10 miles. The Defendant says that the Ngong Forest is not shown on the map, nor is its proximity to Ngong, the Ngong hills, or the river that runs through the Ngong hills from Ngong. There is also no evidence about the roads or terrain which had to be followed. The most that can be said in this regard, is that there is nothing on the map which is inconsistent with TC34's time estimate.

287. In the individual submissions [36] it is said:

> "D challenged neither this account nor TC34's evidence that he was violently slapped on the face by a British Officer and hit in the right eye, resulting in him experiencing blurred vision and losing sight in his right eye….. Mr. Heyworth's evidence is that causation was established, limited to two months loss or impairment…. TC34 consistently described "violence" and "severe" assaults….. he was probably slapped hard multiple times as he told Mr. Heyworth he

[213] He was also asked about a document dating from 1959 about allegations of brutality in the Embu District committed by Special Branch Officers on Africans in custody. Mr. Kearney said he knew nothing about Embu. However he added that he would not know about abuses by Special Branch unless it came through the "back door". He also said that CID were totally independent from Special Branch.

> "found the repeated violent slappings to be exceptionally painful and distressing".

288. I have dealt previously in the judgment with the point on lack of challenge. It is understandable that this was not the subject of specific cross-examination.

289. I now turn to the alleged injuries. These are pleaded[214] as follows:

> "The Claimant suffered pain as a result of each assault as described by him and as detailed in the medical evidence and, specifically unbearable pain in his right eye, knees, shoulder, ankles, back and anus. He experienced permanent blurring of vision, particularly in his right eye. He is unable to walk without the use of a stick.
>
> Impairment of vision from assault lasted about two months.
>
> Assault to the anus caused extensive bleeding and pain relieving himself for about week, with full recovery within 6 months and no long term consequences;
>
> Symptoms from beatings to various parts of his body as alleged probably resulted in pain for approximately three or four months[215]."

290. I am not at this stage considering a comprehensive assessment of the medical evidence, much less possible quantum. I am examining the medical evidence in the context of the consistency/inconsistency in TC34's account and its consequences. I will also adopt this approach in relation to the subsequent core allegations.

291. The following matters need to be highlighted. In TC34's witness statement at [19] he said "I was slapped on my face and hit violently on my eye. This was so severe I started to suffer from eye problems from that time. I suffered an injury that led to me losing my good sight in my right eye. My vision is blurred." As to this:

a. TC34's closing submissions [148] accept that the medical evidence does not support permanent damage, adding: "his belief will add to his distress." Thus it was suggested that TC34 honestly believes that he has permanent right eye damage even though he has not and should be taken into account in assessing quantum[216]. This is an apparent explanation also of the rather confusing and apparently contradictory part of the particulars of injury in the AIPOC which continues to refer to permanent blurring of vision, particularly in his right eye…." and "impairment of vision from assault lasted about two months"

[214] Amendments, as underlined, were inserted post September 2017
[215] There are references to Mr. Heyworth's cross-examination in parts of the amended pleadings.
[216] I understand that this is no longer maintained after exchanges during oral submissions.

b. In his medical report Mr. Heyworth said that TC34 reported that he was slapped violently to the face resulting in loss of vision affecting both eyes, particularly in the right eye. He also reported significant continuing impairment of vision affecting both eyes for a period of two months following this event. Mr. Heyworth's opinion was that it was reasonable to consider that the blurring of vision followed the assaults; examination did not elicit any major structural injury affecting the eyes, though there were cataracts visible. Mr. Heyworth said that on the balance of probabilities it was reasonable to consider that the current and ongoing impairment of vision reported by TC34 is the result of changes associated with advancing years. In evidence he said that he thought the duration of symptoms was probably about a two-month period. He said that this could be caused by a mechanism including a condition known as hyphaemia, a collection of blood in the anterior chamber of the eye associated with a blunt blow. He accepted that such an injury would usually be unilateral. It would be unusual to have it in both eyes unless there were bilateral blows. He said that a hyphaemia could only be determined by an ophthalmological examination.

292. From the above there is certainly an inconsistency that, from TC34's evidence which suggests unilateral long term loss of vision in the right eye, the claim is now bilateral eye injury lasting two months, on the basis that the only explanation for blurring is cataract. There is no suggestion in TC34's evidence that his vision was affected for a period and then the blurring came on later in life. Further, there is no evidence from TC34, apart from what was reported to Mr. Heyworth, that there was significant blurring for a period of two months following the event. Whatever other decision there is to be made in this case, it would not be open to the Court, in my judgment, to find on the balance of probabilities any more than a very short term blurring to the right eye[217].

293. With regards to the consequences of the sexual assault, TC34's evidence was that he was in agony and screamed. It was very humiliating. It went on for 3-5 minutes. It was very painful for him to relieve himself for about a week and he had to use his fingers to scrape out the soil that had been inserted. This was over a period of days. As set out above, the amended pleading amplifies this evidence by referring to extensive bleeding. It also refers to full recovery within 6 months. In Mr. Heyworth's medical report at paragraph 10 it states: "the pain continued for a period of six months. During this period (TC34) continued to experience significant pain whenever he opened his bowels." Therefore there is an inconsistency in the period during which TC34 experienced pain when relieving himself. Such an injury, if inflicted, would be distressing and humiliating. It would also no doubt be very painful and probably cause bleeding. The inconsistency may well relate to the difficulties of recollection but, again, it would not be open to the court, on the balance

[217] See also, as noted in the Medical evidence section above the fact that TC34 told Mr. Heyworth that he suffered injury to his eye at Mackinnon Road and went to hospital as a result. This was not pleaded and is not claimed for. This is a further confounding report about the eyesight problems.

of probabilities, to find that the period of time for which TC34 could recover for this injury would be more than about a week.

294. I now turn to the incident alleged by TC34 of being hit by the butt of a gun. His pleading and witness statement[218] allege that a white solider used the butt of his gun to hit/smash his hip joint and to hit his ankle and knee. At the end of his witness statement [74] he says that he uses a walking stick whilst walking, this being the result of beatings on his back. TC34's submission [153] alleges ongoing intrusive pain around the sacroiliac and hip joints which is not solely accounted for by degenerative change. It is said that this is "probably properly regarded as being at a nuisance level by now, given the contribution of degenerative change in any event". There is no reflection of this assault in Mr. Heyworth's report, though there is the record: "(TC34) also reports that he was beaten with sticks to his body. There was severe pain at the sites of the blows sustained and subsequently extensive bruising developed."

295. On this matter the Claimant was put on notice, in the List of Inconsistencies served prior to TC34 giving evidence, of the discrepancy between the account pleaded/given in his witness statement and the account given to Mr. Heyworth. He did not clarify the matter in his supplemental witness statement or in examination in chief. Further, the closing submissions do not address the matter.

296. In cross-examination the evidence was:

MR SKELTON: What is Yatta?

A. It was a detention -- it is a detention camp in a place called Yatta in the Embu area.

Q. How long were you there for?

A. About six to eight months, six or eight months.

Q. Is this a different place from Mwea?

A. It is Mwea, it is part of Mwea.

Q. So in your statement where you refer to the Mwea works camp, is that the Yatta camp?

A. It is the same.

Q. In your statement you say you were not assaulted while working at that camp; is that correct?

A. You must be kidding. It was proper beating. To this day I can't see well because of the slaps I got on the face….

[There was then a discussion about whether to take a break. However TC34 said he would carry on]

[218] AIPOC paragraph 13, witness statement at [21]

…

MR SKELTON: Now the critical passage, I think, comes in the last three sentences of paragraph 42 where, in the English version, you say you were not assaulted while working, although the type of work was hard and back-breaking compared to other types of work, and then go on to describe the work. Is that statement true or false?

A. It is true.

Q. So you were not assaulted while working at Mwea?

A. No.

Q. But you do allege that it was elsewhere that you were assaulted?

A. Yes.

MR JUSTICE STEWART: Sorry, he says he wasn't assaulted while working at Mwea. Was he assaulted at all at Mwea?

A. No, I was not assaulted. The punishment was to be overworked. We worked very hard. Hard labour."

297. In the reply to the Defendant's closing submissions, the Claimants refer to TC34's evidence and then say:

> "…it may be that he was confused in his account to Mr. Heyworth, as he mentions the right hip and back in relation to Mwea Camp. It is entirely possible he was confused as in his oral evidence to the court, he says he was not beaten at Mwea.[219] On the balance of probabilities, he was beaten at Ngong Forest, as he said in his evidence, and it is entirely probable that it caused injury, including injury to his hip when the perpetrators smashed at it."

The difficulties with this are as follows:

i. The accounts are entirely inconsistent.

ii. The reference to Mwea, in the history to Mr. Heyworth is "(TC34) then reports that he was repeatedly kicked sustaining blows to his lower back and right hip in particular"[220].

iii. It is entirely this sort of substantial confusion, if that is what it is, which the Defendant relies upon as part of the problem in having a fair trial.

[219] The Claimants say that he may have meant he was beaten at Yatta, which he regarded as part of Mwea and that he was consistent in not being beaten at Mwea proper. I have to say I did not get that impression and it does not sit easily with what he apparently reported to Mr. Heyworth; nor was it mentioned at all in his witness statement or in his pleading.

[220] He told Professor Mezey, on the same day as he saw Mr. Heyworth, that he was not assaulted at Mwea.

iv. More detail is given about the allegation at Mwea in Mr. Heyworth's report. This is that TC34 experienced pain at the sites of these blows to his lower back and right hip with extensive bruising and swelling and marked impairment of overall mobility. It is said that the symptoms were particularly troublesome for three months following the incident after which there was limited improvement. However there is no pleading, witness statement or submission which can support such a claim from Mwea.

298. I will deal with a number of other matters:

i. TC34 reported to Mr. Heyworth that during the incident in the Ngong Forest he was subject to further violent slappings and that "he lost a total of seven teeth, four lower teeth and three upper teeth." The Claimants referred to Mr. Heyworth's response to a Part 35 request from the Defendant (which was not specifically directed to the matter of the teeth) in which he said: "…..it is not uncommon for patients to provide additional information in the course of a personal consultation to that previously provided in witness statements…. in my view it is not unreasonable for any Claimant to provide additional more detailed information regarding specific incidents……" They also refer to Professor Mezey who responded to a general question about inconsistencies in the statements of Test Claimants as follows:

> "I would only state that inconsistencies in recollections of trauma are extremely common, and particularly where there has been such a long time delay (e.g. Hepp et al 2006). There is nothing out of the ordinary or unexpected that I found in the account provided by the Test Claimants I assessed with regard to this specific issue."

This may be so, but if a represented Claimant omits the loss of seven teeth from a central allegation, that is nevertheless a difficulty when the Court is evaluating cogency and whether there can be a fair trial.

ii. Paragraph 12 of the AIPOC said there were three British officers present with guns, whereas in cross-examination he said there were four soldiers.

iii. Professor Mezey reported at [56] that on the journey to Ngong Forest "he was repeatedly slapped, which he believes has left him with chronic eye problems." This is not consistent with TC34's other accounts.

iv. As to the sexual assault, the AIPOC and witness statement say that this was carried out by one British solider. For example,

in his witness statement at [20] TC34 said "one of them picked soil from the ground and started putting it in my anus with a stick." In cross-examination he said that two soldiers forced soil into his anus.

299. The Claimants say that in the points in the preceding paragraph the Defendant seizes upon a variety of slight differences of a traumatic event and that there is no significant inconsistency about the assault or the injury. As the above review of the totality of the evidence shows, there are a number of inconsistencies of some substance. The Claimants also criticise the Defendant for not cross-examining on the inconsistencies.

300. It may be helpful if I reproduce TC34's cross-examination relating to the core allegation in the Ngong Forest. It was:

"Q. Were you then taken to the Ngong Forest?

A. Yes……

MR SKELTON: Was it the same soldier who took you there?

A. There were four.

Q. Did the four soldiers include the soldier who had asked

you questions earlier?

A. Yes, he was.

Q. Is he the soldier who you say fired a shot at you?

A. Yes.

Q. Is he the soldier that you say beat you?

A. Yes.

Q. Is he the soldier that you say forced soil into your anus?

A. There were two of them.

Q. Two soldiers who did that?

A. Yes. There were -- two of them were with me and the others, they were with the girl.

MR SKELTON: The others were ...?

THE INTERPRETER: With the woman.

MR SKELTON: Did the two who were with you include the soldier who had interrogated you and fired the gun at you?

A. The one who shot at me, I wouldn't -- I -- yes, I cannot tell if he was on my side or on the side of the woman because these are not -- I did not know these people and they looked fairly alike because of the uniforms that they wore.

Q. This is the camouflage you described earlier?

A. Yes.

Q. Who was in charge of this group?...

A. I wouldn't know who was the leader……"

301. I bear in mind fully what I have previously set out in some detail on the question of inconsistencies in TC34's evidence. The headlines are: First, the Defendant could not put a positive case. Secondly, the Defendant is entitled to point to inconsistencies on the face of the Claimants' own documents and jointly instructed medical evidence. Thirdly, I have to take care in taking them into account where TC34 was not given an opportunity to comment on them. It would certainly be wrong for me to draw any conclusion on the balance of probabilities that TC34 was not being truthful. Indeed the Defendant does not suggest this. What can properly be said in respect of these inconsistencies is: (i) they may well illustrate confusion and difficulty of recollection at this remove of time (ii) if it were necessary to determine which of different versions (e,g on duration of symptoms) is to be accepted on the balance of probabilities, the Defendant would generally be given the benefit of the doubt.

302. Further the Claimants say that TC34 provided detail that adds to the overall cogency of his evidence. They give examples such as the discharge of a gun close to his head and his description of being accompanied by the girl and witnessing what happened to her. They submit that these details serve no purpose if not true. This is very much a "makeweight" point. It does not follow by any means that, because a witness gives such details, the evidence is reliable.

303. In respect of each of the core allegations, I will set out my preliminary views on whether the evidence is less cogent as a result of the delay in bringing the claim. I shall then deal, under the later heading "The Broader Picture", with some other factors which may be of importance in affecting these preliminary views. I shall then reach my final conclusions as to whether it is equitable to allow the action to proceed, by carrying out the required balancing act having regard to all the circumstances, but particularly those in section 33(3), to the extent that they are material.

304. As regards the core allegations in the Ngong Forest, TC34's own account is not wholly lacking in cogency, even though there are substantial concerns arising from the above inconsistencies and the problems with the Timeline.

305. In relation to the questions of cogency of the evidence apart from that of TC34, in summary:

- There is no person, apart from Mr. Kearney, who can give evidence about the CID in Nairobi in 1955. His evidence is of little assistance for the reasons I have stated.

- The Defendant cannot call any witnesses who may well have been able to put the allegation into context e.g. Messrs. MacPherson, Catling and Henderson; or any other people employed in the CID at Nairobi at the time[221].

- TC34 makes his main allegations against soldiers, not police. No witnesses are available to comment on the extent to which soldiers were involved in CID investigations. So as to give some insight into the lengths to which the Defendant has gone in terms of researching possible available witnesses and documents, I have provided a short Appendix to this judgment. The Appendix contains the evidence of Ms Lohia on the attempts to locate any relevant Army personnel. Including Ms Lohia there was a total of 61 such procedural witness statements from 21 witnesses. With their exhibits they fill more than 30 Lever Arch files. A number of those procedural witnesses gave oral evidence.

- It is not possible for the Defendant to even begin to investigate who might have been responsible for the assaults alleged by TC34.

- There are no documents relevant to the alleged assaults.

- There are no contextual documents about TC34 or his initial interrogation.

- The Defendant cannot call any witnesses to the alleged assaults.

- Had the allegation been made in time, the Defendant would have been in a much better position. I refer back to the previous sections in this judgment dealing with documents and witnesses. In summary, documents and witnesses would probably have been available. Enquiries and investigations could have been made. The Court would, in all probability, not have been faced with anything like the present situation, namely having to rely on the uncorroborated account of TC34 devoid of any proper context. TC34's own recollection would have been far fresher, and therefore more reliable. For obvious reasons in relation to witnesses, and for reasons previously given in relation to documents, the foregoing would also probably have been the case if the claim had been brought in, say, the mid-1960s. Further, or alternatively, the passage of time has caused the Defendant to suffer prejudice in not being able to prove some specific aspects of prejudice.

- As time has gone on, so the prejudicial effect of the delay is likely to have increased, though, save as to the dates of death of certain potential witnesses, precise dates for this cannot be given.

- Therefore, to cite the Carroll case at [42(7)] "…the passage of time has significantly diminished the opportunity to defend the claim on liability."

Manyani

[221] Although I am focusing at this stage on what is said to have happened in the Ngong Forest, i.e. the core allegation, the context is that TC34 says he was driven there from CID in Nairobi where the severed heads incident (see later) had occurred and that the soldiers at Ngong included the one who had questioned him at the CID offices.

Preliminary

306. Apart from the core allegation and the timeline, there are other matters in relation to Manyani which call for some comment.

307. In his Witness Statement [27]-[28] TC34 describes arriving at Manyani Camp by train, being stripped and searched at the entrance, given shorts which were yellow in colour and then being detained in Camp No. 30. His statement says: "the camps were numbered from 1-30." In his Supplemental Witness Statement he refers to the buildings at Manyani being A-shaped. Albeit there is a dispute about dates and the numbers of people dying, he refers to nobody being inoculated against typhoid whilst he was there but very many people dying of the disease.

308. There is some corroboration from other TCs, and witnesses for the Defendant, that detainees arrived at Manyani by train. Other TCs described being stripped and being given a pair of yellow shorts. Further, a report from Dr. Stott, dated 12 October 1954 (before TC34's pleaded arrival date) refers to three camps with ten compounds in each camp, a total of 30 compounds.[222]

309. In TC34's closing submissions he refers to a number of documents which he says corroborate his account of conditions at Manyani. The Defendant, relying in part on TC34's pleaded case, says that most of these documents do not assist because they are not contemporaneous with the period when TC34 says he was detained at Manyani. The restricted nature of the core allegation does not now require consideration of these documents. What I can say is that TC34's evidence, and such corroboration as there is, point to a finding that TC34 was detained for a considerable time at Manyani.

Manyani core allegation: Pleadings – AIPOC paragraph 20

310. The central allegation is that whilst at Manyani TC34 was ordered to carry dead bodies to a trench. He then had to bury them. He had to work in this manner for 8 days. As he was carrying a body, the intestines fell onto the Claimant's face. The Claimant dropped the body in horror. A prison guard beat him, as a consequence. He was hit with a baton on his head and shoulders. His nose was caused to bleed.

TC34's individual submissions – commentary and discussion

311. The submissions adopt the slightly amplified version in TC34's witness statement [90]. This states that the dead body seemed to have a cut on the stomach like an operation cut that had not been stitched properly. When the intestines spilled out onto his face, he almost swallowed some of the intestines. His witness statement says: "I felt disgusted and threw the body down. The prison guard saw this and beat me very much and ordered me to pick the body up. The prison guard beat me with a baton on the head and shoulders my nose was also bleeding."

312. It is correct to say that the account of the incident has a certain consistency and that the carrying of the dead body and the intestines spilling out would be an unusual incident for a person to fabricate (which was not alleged); also, that it is understandable that a detainee might be beaten for what TC34 says then happened.

[222] See also paragraph 20(c)(ii) of the RAID in TC 19's case.

Further, in support of the fact that detainees had to bury dead bodies at Manyani, the Claimants rely [91] upon the evidence of other TCs. I will consider this shortly when I look at the alleged corroboration for Manyani.

313. In his supplemental witness statement at [18] TC34 said that very many people died of typhoid whilst he was there, and he would see about twenty people a day going to be buried as a result of dying from typhoid. He was cross-examined about this and said that was the rate of death. When asked whether it might have been a hundred people or fewer over the course of the year he said: "it must be much more than that." The Defendant made these points:

- There is no document to support the allegation that TC34 was required to carry dead bodies.

- Professor Khan was not asked about this, he being the Doctor in charge of Manyani from the summer of 1956 until February 1957 (therefore he started a few months after TC34's pleaded case indicates he himself left).

- Mr. Burt gave evidence for the Defendant that he started at Manyani in December 1954 and left in May 1957. He was not asked about this either. He was one of the prison officers who were mostly European or of European descent.

- Prior to March 1955, when detainee deaths across the entire detention system were recorded on a monthly basis, there are narrative reports referring to the number of deaths during the typhoid outbreak at Manyani in 1954. The Manyani reports show deaths as 59 in the period 28 August to 2 October 1954, 53 deaths during October 1954. By the beginning of 1955 there was an appreciable fall in the number of cases under treatment and the medical authorities were lifting the typhoid quarantine "compound by compound." By January 1955, quarantine had been lifted at Manyani and the movement of detainees in and out of the camp had resumed. There was then a slight increase in the number of typhoid cases and so movement was again stopped. Quarantine was partially lifted by the beginning of April 1955, and lifted in respect of all compounds during April or early May 1955.

- From March 1955 onwards, the total deaths in detention camps across the estate of camps was 162 in the 8 months from March 1955 to October 1955 inclusive. There is no figure for November as the report in the trial bundle is incomplete. For the four months December 1955-March 1956 the total deaths across the estate were 59. Therefore, the average number of deaths between March 1955 and March 1956 was about 18 a month, at a time when the population of Manyani accounted for approximately one third of the total detention camp population[223].

- The statistics therefore do not accord with TC34's evidence that whilst he was at Manyani (pleaded as early 1955 for about a year), people died every day and about 20 people a day were buried as a result of dying from typhoid.

[223] Total population over 40,000 detainees; Manyani population between 10,000 and 16,500

- In oral evidence Professor Khan said that when he arrived there were problems with infections and diseases and there were 40 to 50 deaths a day. By the time he left he said there was not one death. On this basis the Claimants say that the documents about typhoid at Manyani are likely to be incomplete or unreliable because they suggest the first epidemic ended in January 1955, long before Professor Khan arrived. They say that Professor Khan is likely to be accurate, that he was not challenged on this and it is unlikely that he would forget an epidemic.[224] The Defendant responds that, after he had given the figure of 40 to 50 deaths a day, Professor Khan was taken to his annual report. He was asked about many things in it, but not the number of deaths. As regards those other matters, he said that his report was a fair portrait of what happened in the year. The Defendant says that it is likely that the documents are correct and that Professor Khan's recollection about the number of daily deaths when he arrived is wrong.[225]

- In summary, there is a difficulty about Professor Khan's recollection in oral evidence and there is some merit in the Claimants' submissions that he is unlikely to have forgotten an epidemic when he arrived. Nevertheless the documents indicate to the contrary, and it is difficult to explain this discrepancy by suggesting that there may be missing or unreliable documents. In particular, Professor Khan's annual report for 1956 recording 23 deaths in Manyani for the whole of that year, and the documents as to deaths across the estate, tend to suggest that Professor Khan's memory as to deaths was incorrect. I add in passing that is noteworthy that the Claimants' primary case for much of this litigation is that the documents speak for themselves and would not be substantially bettered, or contradicted by oral evidence. On this point, where I have heard the oral evidence and can evaluate it against the documents, I agree. It also shows how, even when somebody like Professor Khan was doing his best to assist the court, on the balance of probabilities his memory appears to be wrong on something as noteworthy as the scale of deaths in the camp when he arrived.

- The Claimants respond by saying that TC34's recollection of conditions, and in particular the number of deaths, at Manyani suggests that he arrived there in the latter months of 1954, which accords with considerable numbers of detainees shown on the documents as being transferred from Langata to Manyani in this period, the numerous documents evidencing the typhoid epidemic and the higher rate of deaths at the end of 1954, prior to January 1955.[226] Therefore, the account of TC34 as to conditions generally in Manyani and the number of deaths is more consistent if he arrived there in the autumn of 1954 as opposed to the pleaded date of sometime in 1955. Even then his estimate as to the number of deaths is higher than the records state.

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[224] These were matters where it may well have been helpful if Professor's Khan's evidence had been further elucidated.

[225] The Defendant also relies upon an inspection report of 20th August 1956 which does not refer to deaths or a typhoid epidemic and a letter from the Commandant to the Commissioner of Prisons of 23 August 1956 referring to a recommendation by the Medical Officer of Health Teita for typhoid inoculations "for the prevention of a typhoid epidemic." The Defendant also refers to some other documents in August/September 1956

[226] See in particular progress reports 9-12 (September 1954-January 1955), Dr. Scott's report 1954 and his reconsideration in November 1954.

- Having gone through this matter in some detail, it may indicate simply that TC34's recollection was inaccurate both as to dates and as to numbers of deaths. This is not without some consequence on TC34's cogency but it does not have much significance.

Corroboration Manyani

314. The Claimants rely upon a number of matters as corroboration of TC34's core allegation at Manyani. The Defendant submits that these matters are not corroboration but can only be put forward as similar fact evidence, without any distinguishing hallmark that assists TC34's single allegation of assault at this camp. The Defendant describes them as an accumulation of makeweight matters of high prejudicial and little or no probative value. It is correct that they do not directly corroborate TC34's allegation. At one stage Mr Myerson described some of the more general allegations as the 'mood music' of what happened at Manyani. There are also these specific matters which must be borne firmly in mind:

- None of these allegations, save those given by live witnesses, can now be tested.

- The ones given by live witnesses, all part of the GLO cohort, suffer from the same sort of general problems of testing as TC34. I cannot deal with this with any precision since I have not heard final submissions in their cases. There is no direct corroboration, nor any live witness to their accounts.

- A number of the documents which evidence general allegations about Manyani are anonymous.

- There is a possible context which may affect some complaints. There is evidence that it was a Mau Mau tactic to engender false and exaggerated complaints. This of course does not mean that there were not abuses, but it is evidence that not all allegations can necessarily be taken at face value and, in order to have weight, need to have been properly investigated and tested. Appendix 10 to the Defendant's General submissions provides details but, by way of example:

  (i) In a War Council Memorandum dated 8 March 1957 is the following:

  "8….Any hard-core detainee is always ready to tell an interested visitor a good story and we have recent instances of this. A self-inflicted wound can be used as a most useful example of bad behaviour from both our staff and warders.

  9. Therefore while great care must be exercised to prevent the ill-treatment or injury of detainees, equal precautions must be taken to prevent the making of false charges against rehabilitation staff."

(ii) In Sir Frank Kitson's[227] Book 'Gangs and Counter Gangs" (page 46) he wrote:

"When, however, certain sections of the press expressed indignation at one or two apparent lapses on the part of authority, the Mau Mau, advised by their legal friends, were quick to realise that they had a powerful weapon within their grasp. By cashing in on an atmosphere which the newspapers had built up they could spread completely false stories about certain people who were particularly effective at frustrating their plans…."

- Dates may be of some importance. A number of the documents appear not to date from a period when TC34 says he was in Manyani. It is difficult to be confident about when TC34 was in Manyani and, in any event, TC34's complaint was that the assault occurred in an 8-day window when he was put to work disposing of dead bodies.

- Insofar as the complaints allege widespread brutality at Manyani, that is not TC34's own case. Although he complains of conditions there, the core allegation is the only mention he makes of brutality at Manyani.

315. With those preliminary observations I turn to the detail:

(i) Mr Burt, a prison officer in Manyani from November 1954 to May 1957, said in effect that his heart told him that abuses did not happen but his head told him they did. He said: "what I'm saying is when you get a large group of people things happen".

[The Defendant says the context of this remark is entirely different in that he was talking about what happened at screening at the camp[228] in which prison guards were not involved. He denied any systematic beatings or other use of unlawful force or any deaths resulting from beatings[229]. He did not remember a mortuary at the camp as alleged by TC34[230]. He said he found TC34's allegation to be extremely unlikely[231].]

(ii) Detainees carrying dead bodies at Manyani:

- TC 13 in his Witness Statement at [23] said: "the dead would be buried by the detainees. I never buried anyone."

- TC 19 in his Witness Statement at [22] said: "trenches were dug and bodies were buried there. The Prison Guards would guard detainees and take them to bury the dead detainees."

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[227] Sir Frank Kitson is still alive. He is aged 91 years. In Ms Lohia's 3rd Witness Statement she says he was contacted in January 2016. He said he had no recollection of events that happened 60 years ago and that he could not be a witness. She said that although she is not medically trained he sounded confused, he repeated the same thing and the conversation was disjointed.

[228] See Witness statement at paragraphs 24-27

[229] Paragraphs 21 & 42

[230] Paragraph 43

[231] Paragraph 44

- In his oral evidence TC 31 said: "there was a group that would transport the dead to go and bury them."

(iii) Detainees beaten, some for not doing what they were told or not doing it well enough, or more general violence:

(a) A complaint by KPRO John Knights. The Defendant has tried unsuccessfully to trace Mr Knights[232]. The complaint was that in August 1954: "at Manyani the unfortunate detainees have to run the gauntlet of a double row of African prison warders, who do no hesitate to belabour them with various weapons they carry. On several occasions I have seen and heard the sound of blows being given." This is not accepted in a response from the Camp Commandant, Mr Knowlden, in a letter dated 21 August 1954. He says that Mr Knights "has drawn a very lurid picture". He adds that "in a few isolated instances members of a moving party became truculent and would not move and such men were helped on by batons". The staff lists show that Mr Knowlden was born in 1898 and so must be presumed dead. He cannot be asked about this matter, nor the next matter.

(b) A response, also 21 August 1954, from Mr Knowlden[233] to an anonymous complaint says: "There are the most stringent orders against any beatings up. In July when there was some trouble in four Compounds a certain amount of deterrent roughness was employed but this was controlled." The response further records: "Several askaris whose feelings have got the better of them and who have used batons unnecessarily have been punished for so doing."

(c) An anonymous letter from Manyani detainees to Parliamentary delegates[234]. It is undated but refers to events in 1956 at Manyani. Amongst other things it says: "we refuse to work riot squad get into our compounds and beat us"; also "we claim for accomplishing to be beatten [sic] by officers and their warders. To be forced to work."

(d) A further letter to the Secretary of State from Manyani detainees dated 10 April 1956. This refers to deaths at Manyani in 1954/5. It says: "It is believed that a "riot squad" of warders in the camp, and which always was "alert" at any call was an outcome of a good portion of these deaths. Many detainees have witnessed their fellow men dying in the scene of operation of the riot squad in the Manyani compounds, by the hands of these assailants." This letter appears to be based possibly on hearsay of others.

(e) Another letter from a detainee (Githui) dated 20 February 1956 says: "..those people who came from camps and who are acting as the screening team have got a very bad habit of beating people…Some are calling themselves the Special Branch and some call themselves the CID".

[This relates to screening and not to allegations of brutality by prison officers]

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[232] Ms Pollock 5th Witness statement MGP13.

[234] There was a Parliamentary delegation visit in early 1957, so the letter may date from then.

(f) An anonymous detainees' letter dated 1 August 1957 alleges beatings and deaths, said to be at the hands of warders; also that the riot squad punished detainees and forced them to work.

(g) An anonymous detainees' complaint of January 1958 makes reference to running the gauntlet.

(h) A Manyani Special Detention Camp detainees' complaints letter dated 15 February 1958, with 5 named authors. The detainees claim: "Rehabilitation beats us on patriotic principle just as it bullies us on manly principle. Can the mental mutation be achieved through punishments, torture, bullying, inhibition and all iniquitous infernal treatments?" The letter further says: "to induce confession and self-incrimination, prison and rehabilitation officers unreasonably make onslaughts on detainees".

(i) Allegations by Victor Shuter, a prison officer who arrived at Manyani in November 1955. These included that group punishment was "common practice at Manyani"[235]. The response, in a document described as 'Shuter Report'[236], refuted his allegations but accepted, for example, that "Some members of the 'riot squad' on occasions no doubt overstepped the mark in the heat of the moment when combating trouble". The Jack Report itself (see later) concluded that not one of Shuter's 19 allegations about Manyani had been established, but that a few contained the germ of truth, adding "other isolated incidents of genuine brutality, not alleged by Shuter, came to light….."

(j) As to matters in the Jack Report of 1959, there is evidence of abuse at Manyani from people who were not detainees. For example: First, Jimmy Jeremiah, who visited Manyani (1954-1957) about six times. He says he saw no signs of any detainees being beaten and also "no specific cases of beating were raised, but it was a general complaint of warders using sticks on them when in working parties." Secondly, Reginald Potter, a hospital Superintendent who was at Manyani from about 25 March 1955 to August 1956. He says he saw an officer, Ray Morrell,[237] beating recalcitrant detainees with a plastic hose. He gave the date as being somewhere between August and December 1955.

I summarise later the evidence from the detainees interviewed for the Jack report. So as to give a more detailed flavour of that evidence, I refer to the following: first, a detainee Mr Gichini says he was in Manyani from November 1955 until January 1957. He says he was treated very well as were other detainees in his compound, but goes on to say: "I could hear detainees in the other compounds shouting as they were being beaten. I could see the persons being beaten, but I do not know any of their names. They were being beaten with sticks, shaped liked handles of a hoe. They were beaten by prison warders. I do not know any of the warders. There would be no Europeans

[235] Not what TC34 complains of.
[236] This appears to be a Westminster briefing note of June 1959 post-dating the Jack report and using that as the source of information.
[237] Potter said that Morrell was a Special Branch officer.

present…..Apart from this I saw no other ill-treatment at Manyani" [This was in Compound 12 and related to hard-core detainees who refused to be screened. Gichini also said he never heard of detainees complaining they had been beaten by screeners. He also refers to people being aware of appeals and exercising that right]. Next, Mr Kimani, at Manyani November 1955 to January 1957, says that on arrival if persons did not walk fast enough, the warders hit them with their rifles and with canes; he did not see anyone injured as a result of this; in another incident, recaptured escapees were beaten with canes[238]; also that two named officers hit detainees with kibokos. Finally, Mr Kenyari, in Manyani December 1955 to June 1957, described escapees being beaten for escaping, as many as 10 hard-core detainees beaten by warders till they were unconscious and a detainee being slapped in the face by the Commandant for disobeying a compound headman.

(k) The Jack Report also contains a statement from Brigadier Durrant who had been responsible for Manyani from April 1956 to February 1957. In his statement he said he investigated every complaint that came to his notice; his difficulty was to "sift camp rumour, malicious gossip and fact…..I was…left with unconfirmed suspicions of ill treatment. These suspicions were not allayed by a minority of the Europeans…This minority did not possess the attributes for the proper handling of Africans. The Deputy Commissioner and the Commissioner both admitted to me in private that some of the officers were bad, but they denied me any disciplinary powers over officers…. I had little confidence in my superiors by the latter part of 1956…". The Defendant has tried unsuccessfully to trace Brigadier Durrant[239].

(l) The Claimants criticised the Jack Report as "entirely focused on Shuter's specific allegations, many of which cited particular individuals", and said: "This was not an independent enquiry, not least because it failed to obtain evidence from non-cooperating detainees…. Notwithstanding the limited scope of the enquiry, the statements obtained revealed evidence of widespread unlawful violence…"[240].

(m) The Defendant says it has tried to trace all the 12 Europeans against whom allegations are made and who are listed in Category 1 of the Jack Report from page 14 onwards; also the 4 Europeans mentioned as Category 3 i.e. witnesses named by Shuter as corroborating his allegations. They are all deceased or untraceable. These are witnesses in the Jack Report said to corroborate TC34's case.

(m) Mr Wanjama, who was a witness for the Claimants[241], said that whilst he was working at the quarry in Manyani "if any stones were broken, the officers would hit us with canes. On one occasion when some stones were dropped about four Kenyan Police Reserve Officers beat me until my body because [sic] swollen and twitching in pain." He says he worked in the quarry until

[238] Was this lawful corporal punishment?
[239] MGP11 to Ms Pollock's 5th Witness statement
[240] The Claimants' position is set out in their written opening at [810B].
[241] He is also a claimant in the GLO.

1957. He says when he arrived the Commandant was Mr Terry[242]. He therefore alleges abuse by KPR officers at the quarry, not prison guards at the camp.

(o) Of the Test Claimants seven spent time at Manyani. Five said they were beaten there and one saw others beaten.

(p) TC13 says he was beaten on arrival at Manyani[243].

(q) TC 17, who worked in the quarry, said: "We would work in the quarry up to about 3 pm without rest, food or water to drink. During this forced labour we were guarded by the Kenya Police Reservists who also hit us whenever they thought we were not working well, fast enough or resting. I was hit severally using the handles of 'jembes' on my shoulders and back."[244].

(r) TC 19 said he was questioned about three times while at Manyani and each time there was random violence. He added[245]: "I and others were just beaten for no reason; if you refused food you would be beaten. If one person did something wrong, collective punishment was dealt out to everyone." In oral evidence he said he was beaten once during interrogation.

(s) TC 26 said[246] that on arrival at Manyani: "the Kenyan Police frantically whipped at everyone passing with small clubs and canes for no reason. I was hit on the head, shoulders and every part of my body." Also: "I was once assaulted by a Kenyan Police officer in the Camp. There were two of us carrying buckets full of human waste. I dropped the bucket and the human waste went all over the ground. The Kenyan Police Officer slapped me on my face and beat me with a club. I then had to scoop up with my bare hand the human waste into the bucket."

(t) TC31 said[247] that there was collective punishment where prison officers stood in two lines, the detainees had to walk through the line and the warders beat them. He says he was beaten all over his body, shoulders, back, legs, arms and head.

316. I have dealt with these matters quite fully since there is much more support claimed for the Manyani core allegation than for the other core allegations. What conclusions may I draw from this alleged corroboration? Apart from the Jack report to which I will come in a moment, they are these:

(a) There is some reasonable corroboration, albeit from fellow TCs, that detainees were required to carry dead bodies.

(b) The probative value of the evidence in items (iii) (a)-(h) must be evaluated. A number of the documents are anonymous. There is the possibility that some of them

[242] At Manyani July 1955 to May 1956
[243] Witness statement at [18].
[244] Witness statement at [36].
[245] Witness Statement at [25].
[246] Witness Statement at [18] and [24].
[247] Witness statement at [24] and [25]

were deliberately false allegations; some account must also be taken of the fact that many relate to dates when TC34 says he was not at Manyani [(a), (b), (e)-(h)].

(c) I now turn to the evidence of Mr Wanjama and the other 7 TCs, five of whom said they were assaulted and one (TC27) who said he saw others assaulted. The Claimants say that they were selected as randomly as possible from the 20,000 litigants that Tandem Law represent. That may be so, but (i) they are all Claimants bringing claims for abuse during the Emergency and so are in effect a self-selected cohort (ii) TC34's allegation is not one that is of any particular type, or which has any hallmark shared by the others – a suggestion that he was beaten, in common with TC17, TC26 and TC31 during forced labour or for making a mistake, is of some consequence but does not amount to a distinctive feature of real significance (iii) while I have not heard full submissions on the evidence from the other TCs, I understand that it suffers generally from the same problems of lack of documentation and witnesses as TC34's, and therefore cannot be properly investigated or tested.

(d) Therefore, the evidential value of this suggested corroboration is weak.

317. As to the Jack report, this was set up to investigate allegations by Mr Shuter of abuse at Manyani and Fort Hall. The following can be said:

- I did not at this stage hear full submissions on the Report. I will do my best to make of it what I can.

- I have already recorded some of the allegations from the report in relation to Manyani. Jack interviewed many witnesses. Of these 8 were Manyani detainees.[248] They are numbered and named in Category 2 as "Detainees Confined at those Detention Camps at which Shuter served. A brief analysis is as follows:

  1 - He said he was beaten once.

  4 - He was beaten by warders when hard-core detainees threw stones at them.

  5 - He said he was never ill-treated at Manyani.

  6 - He never saw brutality by prison staff against detainees at Manyani.

  7 - He was never beaten at Manyani nor saw any ill-treatment there.

  11 - He saw no ill-treatment of detainees, only an official caning. But he did see an officer, Hartley, hit a detainee on the head. He said the detainee became deaf, dumb and paralysed.

  [Detainees 2 and 3 were Messrs Gichuni and Kimani whose evidence I have previously set out in more detail].

- Jack concluded from this evidence:

[248] In fact Mr Kenyari whose evidence I have set out previously had also been a Manyani detainee, but he was listed under 'Category 3" i.e. witnesses mentioned by Shuter as corroborating certain complaints.

> "…the first eleven persons in this category were detainees all of whom had been confined in one or more of the camps in which Shuter served. They represented that class of persons on whose behalf Shuter has made allegations of cruelty at the hands of prison officers. One might, therefore, reasonably have expected considerable corroboration of Shuter's allegations from this particular quarter, if such allegations were founded upon true facts. But in the event, there was hardly any corroboration discovered in the specific allegations made…
>
> It is now on record that some of these detainees did receive ill-treatment from prison officers, but the instances are isolated and there is no indication whatever from this category that there was any systematic cruelty practised whether at Manyani or Fort Hall. It must be borne in mind that a number of these detainees were "hard-core Mau Mau" and that the truth of their statements fell to be considered in the light of this self-confessed stigma. Nevertheless, it was necessary from the point of view of my enquiry to place their testimony on the record along with that of the others."[249]

- The criteria for selection of the interviewees are not clear. What we do have is Jack's above statement that they "represented that class of persons on whose behalf Shuter has made allegations of cruelty…."

- Mr Jack also interviewed many other witnesses[250]. These were: " Category 1-Prison Officers against whom Shuter has made specific allegations" (13 in total); "Category 3-Witnesses Mentioned by Shuter as Corroborating Certain Complaints and Supporting his Statements" (7 in total); "Category 4-Medical Officers and Staff" (10 in total); "Category 5-Visiting Committees" (12 in total); "Category 6-Miscellaneous" (17 in total); Category 7-Additional witnesses (7 in total) and "Category 8-Prison Officers as in Category 1 above interviewed in the United Kingdom" (8 in total).

- Some of these witnesses I have already referred to and supported some abuse at Manyani. So did some other witnesses.

- Nevertheless, Jack's conclusions were:

  "the scarcity of such examples of brutality must be set alongside the very great quantity of evidence recorded. The only reasonable and logical conclusion to be drawn from such comparison is that there was no systematic brutality at Manyani".

318. The Claimants made criticisms of the Jack report, one being that he interviewed a limited number of detainees. In Mr Myerson's reply in oral submissions he introduced some further critical analysis of the report. He said that there are 88 witnesses in Jack,

[249] As to the allegation by Detainee 11, Jack said: "F.H.9. – the aforesaid allegation by Shuter in connection with the deaf and paralysed detainee received strong support from Absolom. According to Absolom such double incapacity was inflicted upon a detainee by Hartley as a result of a single blow on the head, and the same detainee was struck down at the same time into the bargain. This was a most extravagant assertion…"

[250] These were for Manyani and Fort Hall

but a total of 183 people are named in the report. Of those named 50 were interviewed. These 50 were part of the total 88 interviewed. Therefore 133 were not interviewed. Of the 88 interviewed, there are 67 occasions when people say they cannot remember or do not know the name of somebody, though it is not clear how many of those relate to Manyani. Mr Myerson also said that the evidence is that Manyani had about 2,500 African staff and 60 European staff; of the latter only 31 are named in the report because Jack asked for names and received 31 names. 28 of these names were provided by Mr Thatcher and 11 by Mr Kenyari, there being overlap save as to 3 names. Therefore the submission was that this was suggestive of the fact that even then staff lists/rotas were not exactly readily available and that documents were not exactly easy to find, because when Jack went to Manyani it was still open.

319. Mr Myerson relied on a paragraph in a section headed 'Preliminary' in the Jack report. It says:

"Every effort has been made to collect information from as wide a source as possible, from prison officers, from those who have been detained, from visitors, from medical officers and from administrative officers. The object has been to obtain as general a picture of the detention camps as possible without emphasising any one particular point of view"

320. Therefore the Claimants submit that either it did not in fact matter very much to Mr Jack who was in the camps at material times, or it did matter to him but he could not obtain a reliable documentary source so he had to ask people.

321. It is not possible properly to evaluate these criticisms. Mr Jack is no longer available to explain his modus operandi in the light of what is said, or to comment on the conclusions I am asked to draw. What we do know is that, despite the comments in the Preliminary section, Jack was investigating specific allegations made by Shuter. There is also a substantial difference between this type of inquiry and full-blown adversarial litigation. Had the Defendant been investigating TC34's claim as part of a massive claim by over 40,000 former detainees in, say, the 1960s, it probably would have left as few stones unturned as possible, as it has done in this case. Had it been investigating TC34's case alone at that time, his memory would have been fresher, he would have been more accurate as to dates; staff lists and other relevant documents may well have been available. In fairness to Mr Myerson, he did not overstate the case. He said about the staff lists: "That is, we submit, rather suggestive of the fact that staff lists weren't exactly readily available." That is not, of course, to say that they may not have been found by the Defendant at the time, or even in the 1960s. Therefore, for both relevant witnesses and documents, what Jack and his assistant Superintendent Page refer to, is not convincing as to what may well have been available at the time to a fully resourced legal team facing an adversarial claim for damages such as this one.

322. I add also on the point made that of the 88 interviewed, there are 67 occasions when people say they cannot remember or do not know the name of somebody, that I received no analysis of the number of occasions when witnesses did know and provide names. I have not done that analysis myself, but there appear to be quite a number. This is in contrast to TC34 who now cannot provide any names; it is

unknown whether 50 plus years ago he could have done so, or at least provided descriptions, or other information, leading to identification of potentially relevant witnesses. There must at least have been a real prospect of this.

323. We do not now know, nor can we now find out, why Jack did not interview more detainees. If one presumes that he could have easily found the names of many more current and former detainees at Manyani, then, on Mr Myerson's analysis, this, too, could be because it did not in fact matter very much to Mr Jack who was in the camps at material times. That would be a wholly unfair conclusion to draw, when Mr Jack is not here to explain why, particularly in circumstances where his actual remit was to investigate the Shuter allegations.

324. Reminding myself of the preliminary observations I have previously set out, the alleged corroboration adds little to TC34's case. It amounts to evidence given of examples of abuse at various times at Manyani, the reliability of which cannot be tested and/or no clear pattern emerges which assists TC34's core allegation. It must not be forgotten when considering the criticisms of Jack's interviewing of detainees, or in putting the extent of the allegations made into some context, that more than 44,000 detainees passed through Manyani[251]. If I consider, by way of some point of reference, the decision in Raggett, and the quality of the corroboration in that case, both by witnesses and in the letter from the (deceased) alleged primary tortfeasor, this evidence is not remotely comparable.

325. The Claimants also rely on Professor Mezey's evidence about TC34's vivid recollection of the intestines spilling on him. I have already referred to this, but I will set out her evidence in some detail:

(i) In her report at [107] she said: "..[TC34] became visibly distressed, holding his head in his hands and taking a few minutes to compose himself, when describing the incident when he was covered with the intestines of a dead man, whose body he had been carrying from the mortuary."

(ii) In her report at [128] she said: "..he still experience flashbacks, in particular "feeling" and "smelling" the man's intestines as they spilled over him.."

(iii) In oral evidence she said:

> "I was just very struck with this gentleman about the way that within the interview he appeared to almost relive some of the events that he was describing. His manner changed, his presentation changed. He became very, very overtly distressed sitting in the room with me when he was being asked to talk about some of these specific events. That was very convincing and compelling."

326. I have given this evidence careful consideration. First, at most it is potential corroboration of the fact that TC34 experienced a horrible incident with intestines falling on his face. It is not direct corroboration of a beating, but of what TC34 says was the immediate precursor to a beating. Secondly, I am sceptical as to the faith that Professor Mezey puts in what she saw on examination. I am not saying that the

[251] Jack report page 12

incident described by TC34 did not occur, nor that Professor Mezey may not be correct. What I am saying is that I do not find it to be very convincing evidence of what TC34 says occurred[252]. There are various other possible explanations for the presentation. Whilst I of course have due regard to Professor Mezey's expertise, I also remind myself of what Leggatt J said Gestmin , namely:

"16. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.

17. Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. ……External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory). …..

19. The process of civil litigation itself subjects the memories of witnesses to powerful biases…."

Professor Khan

327. Professor Khan provided 3 witness statements and gave oral evidence. There is also a statement dated 26 January 1959 from him in the Jack Report. I shall limit reference to his evidence to that relating to alleged physical abuse at Manyani.

328. In his first witness statement Professor Khan said:

"39…I saw three or four instances where I thought that people were acting unreasonably when caning people…..There were three or four instances where I thought the prisoner was mentally disturbed or in a lot of pain because he was yelling a lot. I told the person with the cane to stop it and on each occasion he did…

42. There was one sadistic prison officer that I remember. He came to my attention when he brought a detainee to me for treatment. I noticed that the detainee had broken, bleeding nails and I formed the view that someone had tried to pull them out. The prison officer told me that he had hurt his nails because he "fell down" and I was furious. I told him that treating detainees in this way was totally unacceptable and if anyone ever did it again, I would report them to the Brigadier. Amongst all the prison officers, there were only three or four instances which caused me concern among 20,000 detainees. I was never aware of any systematic punishment".

[252] See also below in relation to the severed heads allegation

329. For his second witness statement Professor Khan was shown what he had said in the Jack Report. He said he did not remember giving evidence as it was such a long time ago, but that he was satisfied that his evidence in the Report was more accurate than his present recollection. His witness statement in that Report says:

> "…I remember one incident which is clear in my mind in which I had to deal with at least a dozen casualties of detainees which included fractures. One of the detainees, I particularly remember, had a fracture of the humerus. I heard that there had been trouble at the camp. I did not go into the matter deeply. These 12 detainees had been brought to the hospital. The injuries on the 12 amounted to minor bruises to the fracture described above (sic). They were brought to the hospital by a European prison officer and warders. In the long space of time I would not and cannot recall his name. I understood that all the detainees came from one compound….
>
> ….I have treated detainees for minor injuries such as small bruises and occasional contusions. The injured detainees always alleged that they had been beaten. There were always conflicting stories on these injuries, the other party, both European officers and warders, mainly European officers, who said the party had been injured by working in the quarry and working parties. Some of these injuries could have been caused by pieces of flying rock. I have no recollection of any particular incident. These cases which came to my notice were indeed very few, and few and far between. As Medical Officer in Charge there was nothing to show that a policy of systematic beatings and ill-treatment of detainees was being practised in the camp….
>
> As Medical Officer I did frequent camp inspections. I could and did go anywhere within the camp. This included the detainee quarters and compounds. Never did I see or find injured detainees in any of the huts. I spoke to the detainees on my tours of the camp. I never had any allegations of ill-treatment raised to me by them…"

330. Professor Khan was cross-examined. Amongst many things, he said that part of his professional duty was to witness corporal punishment. At Manyani he kept clinical notes in the medical records, though he would not have recorded the name of the warder who brought the detainee for treatment. He went to all the compounds about once a week and did a full inspection. He would go into detainee huts about once a week depending on his workload.

331. Professor Khan's evidence is clearly limited in its ambit. It does not indicate that there was abuse in Manyani on anything like the scale alleged. He may be mistaken, he may not have seen what was really going on and the majority of detainees may not have been brought to him for treatment. Nevertheless, his witness statement in the Jack report is perhaps the nearest that one gets to an independent overview of Manyani at the time he was there. That said: (i) even in 1959, there were some details he had forgotten, (ii) his evidence is background only, (iii) it is from one perception only. It would be wrong to place substantial weight on it. What it does do, however, is give an insight into the fact that, many years ago, there may well have been a number of other witnesses who would have had a very different narrative from the one I am being asked to find is fair and convincing as corroboration of TC34's case.

Medical Evidence - Manyani

332. I now consider the medical evidence and allegations of injuries:

i. (a) In TC34's closing submissions [94] it is alleged that there was permanent scarring to the wrist and left hand and said: "this injury is not pleaded, but Cs submit that it is consistent with a defensive injury." TC34 had given no account of this to anyone save Mr. Heyworth[253]. As far as quantum is concerned, I could take no account of this since in the Liability Amendments Judgment the Claimants sought to include an injury to the left hand, on the basis that the Claimant did not seek to add this injury to his Particulars of Injury, but that the injury was significant because it was likely to be defensive. I refused that amendment for the reasons given in the schedule culminating with this: "(v) although the submission can still be made as this is not to be relied on as a cause of action, it would be so undermined by the above prejudice that it would not have a real prospect of success."

(b) There is in fact an inconsistency here. The only report of an injury to the left hand at Manyani was to Mr Heyworth. It was not mentioned in the AIPOC, TC34's witness statements or to Professor Mezey. This was the subject of a Part 35 question to Mr Heyworth. The question and his response were:

> "7. Do you agree that, in contrast with the account given by the Claimant to you, his Particulars of Claim and the Claimant's witness statement: …..
>
> (b) do not describe the Claimant's alleged "*injury to his left hand which resulted in a wound with subsequent scarring*" when allegedly at Manyani Camp or the mechanism of that injury (see page 5 §7 and page 14 §7 of your report)?"
>
> ……..
>
> "7. I will preface my comments to these questions by noting that it is not uncommon for patients to provide additional information in the course of a personal consultation to that previously provided in witness statements. ….
>
> (b) I would agree with this statement"

The inconsistency was not put to TC34 for comment, so I give

[253] Not even in his account to Professor Mezey who examined him on the same day as Mr. Heyworth. There is also a 2012 medical record of a cut to the left hand. Had the claim been brought in the 1960s we would have known whether the scar then existed.

little weight to it.

ii. Later, in the submissions on quantum, at [165], TC34 says: "symptoms from beatings to various parts of TC34's body probably resulted in pain for approximately 3-4 months [33-8141-42: 33-8144-45]." The problem is that there is no evidence to support pain lasting for 3-4 months. The reference is to Mr Heyworth's evidence, but that was specifically in relation to MacKinnon Road where TC34 himself had reported a period of pain for a period of four months following the incident[254]. I accept what the Claimants say, namely that there would be an acute phase of pain and (probably) bruising, swelling and inflammation of soft tissues, followed by a recovery period. Absent any evidence, I cannot infer that, on the balance of probabilities, the recovery period would have been more than days, rather than weeks or months. To find a recovery period of more than some days would require evidence, of which there is none. This is not a matter of proportionality; it required no more than a line in TC34's evidence.

Manyani - Overview

333. (i) The identity of the alleged primary tortfeasor, or any other witness to the alleged assault, is unknown.

(ii) There is no proper corroborative evidence as to the core allegation. If I had decided that the alleged corroboration had any substantial weight, I would have to have had regard to the fact that none of the witnesses whom the Defendant might have called to deal with those other allegations are now available.

(iii) Witnesses may well have been available to give relevant contextual evidence such as the number of deaths, how bodies were dealt with, medical records and whether there was a mortuary. One example is Dr Stott, the medical officer in the Labour Department, who visited Manyani at the time of the typhoid epidemic in 1954[255]. Others are those who worked with the doctors. The only evidence about Manyani in general was from Mr Burt and Professor Khan. More than 50 years ago there would have been many more witnesses, with much fresher memories, who would have had potential importance in testing TC34's general reliability as to what he says happened at Manyani, as to the dates he was there and perhaps about him as a person.

334. In relation to documents which could have been investigated at Manyani:

[254] 28-213; see also discussion in court at 33-18280-33-18284

[255] Professor Khan did not know Dr Stott. He said he did not take over from anybody and that there had been a gap.

(a) There would probably have been Admission Registers, DDOs, a dossier and perhaps other documents, for example other information about TC34 which might be relevant to his reliability as a witness[256]

(b) Staff records may well have been available, thus leading to the identity of staff on duty at different times and places, most particularly at the time of the core allegation. They could have been narrowed down to the compound in which TC34 says he was detained and/or those supervising work - so as to comment on whether they knew him and any other relevant information in the investigation.

(c) Records of screening; TC34 says he was questioned in Manyani.

(d) Lists of detainees on transfer to and from camps, so as to confirm TC34's movements and, more importantly, dates of movements.

(e) Although TC34 gave no evidence of medical treatment at Manyani, there may have been medical records on him.

335. I now set out my preliminary views in relation to the Manyani allegation.

336. As regards the core allegation, TC34's own account does not of itself lack cogency.

337. In relation to the questions of cogency of the evidence apart from that of TC34, in summary:

- The Defendant cannot call any witnesses who could give evidence about TC34's core allegation at Manyani.
- The Defendant cannot call any witnesses who may well have been able to put the allegation into context.
- It is not possible for the Defendant even to begin to investigate who might have been responsible for the assault alleged by TC34.
- There are no documents relevant to the alleged assault.
- There are no contextual documents about TC34 or his screening.
- Had the allegations been made in time, the Defendant would have been in a much better position. I refer back to the previous sections in this judgment dealing with documents and witnesses. In summary, documents and witnesses would probably have been available. Enquiries and investigations could have been made. The Court would, in all probability, not have been faced with anything like the present situation, namely having to rely on the account of

[256] Mr. Bird who was an Officer at Othaya camp said from time to time he would receive a list from the DO's office with the names of those individuals who could be released. He also said that there were a number of documents which were important in the prison service. "Each prisoner who arrived would have a warrant from the court with details of the offence and sentence. These would be looked at by an Admissions Officer and forwarded to the Officer in charge. We would then open a booklet for each prisoner which included a précis of the offence taken from the information in the warrant and the list of the possessions they had." To what extent, if any, this was replicated (with the necessary modifications) for detainees in camps is not clear.

TC34, devoid of any proper context or of any corroboration of real weight. TC34's own recollection would have been far fresher, and therefore more reliable. For obvious reasons in relation to witnesses, and for reasons previously given in relation to documents, the foregoing would also probably have been the case if the claim had been brought in, say, the mid-1960s. Further, or alternatively, the passage of time has caused the Defendant to suffer prejudice in not being able to prove some specific aspects of prejudice.

- As time has gone on, so the prejudicial effect of the delay is likely to have increased, though, save as to the dates of death of certain potential witnesses, precise dates for this cannot be given.

- Therefore, to cite the Carroll case at [42(7)] "…the passage of time has significantly diminished the opportunity to defend the claim on liability."

MacKinnon Road

Preliminary

338. I have previously detailed the problems with the timeline alleged and evidenced for TC34's stay at Mackinnon Road.

339. In his witness statement TC34 describes his arrival and initial interrogation at MacKinnon Road. He says that the detainees alighted from the train and were paraded in a line. Prison guards stood on both sides guarding them. There was an army truck which followed from behind which went at speed and which made them run four miles to the camp. There they were questioned and put into groups. There were three groups namely black, white and grey and they were given a bracelet which was the colour they had been graded. If you were grouped black you were regarded as a criminal and were detained. TC34 was initially grouped as black. He was questioned about the Mau Mau oath, where the guns were and how they carried them. He did not confess. He was not assaulted while being questioned. This happened twice.

340. TC34 then describes the assault the subject of the core allegation and, in his statement, says that he was subsequently reclassified as grey and transported by army trucks to Mwea. He was not given water or food during the journey and was not assaulted.

341. The defendant says that one cannot safely conclude that TC34 was ever detained at MacKinnon Road, as he alleges. Taking all matters into account, although there is uncertainty about the dates, in my judgment it is probable that TC34 was detained for a period at Mackinnon Road. I appreciate that there are no documents supporting this. Nevertheless, I find no reason to doubt TC34's reliability on the broad proposition that he was detained there for some time. Further, his description of being classified as black and therefore detained until he was released, and then reclassified as grey, fits in with the general picture. So, for example, in the Defendant's Outline Response to the Claimants' Written Opening:

> "440. Around this time (Spring 1955), it appears that Manyani and Mackinnon Road became the main camps for holding category "Z"

> detainees because such detainees were being transferred there from other camps where attempts to rehabilitate them had been unsuccessful, or where they had otherwise revealed themselves as representing the "hard-core" Mau Mau element. This became the settled approach as of April 1955.
>
> 441. In the meantime, an intensive re-screening process, including use of Special Branch input, meant that the populations of Manyani and Mackinnon Road would reduce significantly by way of transfers of detainees to work camps."

342. I appreciate that on 9 December 1954 an amended system of classification of detainees was introduced such that rather than using, for example, "black", such persons were classified as Z1 or Z2[257]. Yet it would not be surprising if the old terminology was still used in the camp on a day to day basis. Also, it may well be that TC34's knowledge derived from the colour of his bracelet. Nevertheless, those who were unclassified were sent to Langata, Manyani or Mackinnon Road for classification[258]. By around September 1955, the Defendant says that Manyani and MacKinnon Road housed only "Z" detainees. There were around 15,000 between these two camps. A plan was therefore drawn up to house all the "Z" detainees at Manyani and to close MacKinnon Road[259].

The core allegation: Pleadings – AIPOC

343. TC34 pleads that at MacKinnon Road he was required to work as a carpenter. Prison guards ordered him to make furniture for them. On one occasion a guard hit him with a baton and the Claimant hit him back with a mallet. The guard stated he would be beaten. The Claimant was taken to a room. He was slapped, causing him to fall to the floor. He was hit with a wooden frame baton on his hip, knee, right shoulder and ankle. It took him 3-4 months to recover.

TC34's individual submissions – commentary and discussion

344. In TC34's closing submissions [102]-[103] it is said that a prison guard asked TC34 to make a bed for him. Following signs of resistance he was assaulted and threatened with further assault, having fought back. During his detention at Mackinnon Road he was badly beaten. While packing his carpentry tools away, a prison guard hit TC34 with a baton. TC34 retaliated, striking the prison guard with a mallet, causing him to fall. He was told he would be beaten for this. He describes being "taken later", but resisting, throwing a stone, causing an officer of the Kuria tribe to be hit by it. He was violently slapped. He was caused to fall to the floor. He was repeatedly beaten with sticks and batons sustaining blows to his right shoulder, hip, joints, knee and ankle,

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[257] Defendant's Outline Response to Claimants' Written Opening at [436].
[258] See Defendant's Outline Response at [437], relying on a document dated 21 December 1954
[259] Defendant's Outline Response paragraph 443

causing him pain, swelling and bruising for about 3-4 months. It is also said the Defendant did not challenge TC34 at all on these matters.

345. TC34's Witness Statement states:

> "37. One day a Prison Guard came and ordered us to make a bed for him. We asked him to buy us a cigarette and mandaazi but he refused. He went and reported us to the officer in charge. Being the one in charge of the detainees in the workshop I was called since I was in charge. I told the officer in charge that he had refused to bring nails which we needed. He was ordered to bring the nails for us. When he came we told them to bring us mandaazi and cigarettes but he still refused. I went back and told the officer in charge that the Prison Guard had refused to bring the nails.
>
> 38. As I was packing my tools the Prison Guard came and hit me with a baton. I then hit him on the head with a mallet and he fell down. I fled without closing the workshop. It was said I would be beaten. I was later taken but I resisted. I threw a stone and one officer ("Kuria tribe") was hit. I was slapped. I fell to the floor. I was hit on the head, knee, joint, right shoulder and the ankle by the wooden frame baton in the same places I had previously been assaulted. I suffered from bruises and I was swollen. It took about 3-4 months for me to recover."

346. Mr. Heyworth recalls TC34 describing an incident at Mackinnon Road, "in which he was violently slapped whilst carrying a load of sand. As a result of the blow, (TC34) reports that he fell to the floor and was then repeatedly beaten with sticks and batons, sustaining blows to his shoulders, hips, lower back and face."

347. Professor Mezey says that at MacKinnon Road on one occasion TC34 refused to make a bed for a prison warder unless he was given some cigarettes. The prison warder refused and started to beat (TC34) repeatedly on his shoulders, hips and legs with his baton. (TC34) retaliated by hitting the warder with a mallet. He then picked up stones and started throwing them." This resembles more closely TC34's statement, though it differs to some extent. Nevertheless, two somewhat differing accounts appear to have been given by TC34 to the medical experts on the same day.

Corroboration - MacKinnon Road

348. The Claimants rely upon the following as corroboration of TC34's core allegation at MacKinnon Road:

(a) Mr Nyoro was a witness for the Claimants. He said he was also detained at Manyani. After Manyani, on his evidence, he arrived at Mackinnon Road in about early 1955. There he says that there were regular beatings and gave details of a number of particularly distressing assaults[260]. He is also a Claimant in the GLO. His evidence was read as he had died. Therefore he could

[260] Witness Statement at [36]-[55].

not be cross-examined. His statement says he was in MacKinnon Road till 1960 – some 5 years after it had closed.

(b) TC 27 says he was detained at Mackinnon Road. In his Witness Statement at [44] and [47] he says that Mackinnon Road was brutal and that detainees, including himself, were beaten up on a regular basis. Further, that whites would set dogs on detainees to bite and injure them. TC27 says he was at MacKinnon Road at the end of 1958. This date must be wrong because it had closed down by then. The Claimants asked me to infer that probably he was there towards the end of the period when it was open.

(c) A complaints letter to the Governor from Mackinnon Road detainees. This is dated 28 July 1954 and states "we are severely punished by corporal punishment when one does a slight mistake." This is not consistent with any time when TC34 says he was at MacKinnon Road. It is not clear whether this was lawful corporal punishment. There is also a response to this letter[261], dated 7 September 1954, which says that the Camp Commandant is fully aware of the rules governing corporal punishment and refers all cases to the Commissioner for confirmation.

349. The comments on Manyani corroboration apply with equal, if not greater, force to the corroboration alleged in relation to MacKinnon Road. In short, it amounts to little, if any, support for TC34's core allegation. As shown above, some of these statements contain inaccuracies on their face.

350. On TC34's reliability as to Mackinnon Road generally, the Claimants submit that:

(i) He discriminated in relation to his experience there so that, for example, he said that the British soldier in charge came and told the prison guards not to beat him.

(ii) He was not cross-examined at all about Mackinnon Road and had no opportunity at all to have his evidence tested.

(iii) When describing the core allegation he makes a statement against his own interest in saying that he hit the prison guard on the head with a mallet and he threw a stone at an officer.

[261] Caselines 32-22073; there is a paper trail which leads eventually to this response. I do not reproduce it here.

351. On these points: (i) and (iii) can properly be made but they are not of real significance in the scheme of things. They are the sort of matters which may indicate truthfulness, but that is not the only explanation. Nor do they particularly assist on reliability of evidence.

352. In relation to point (ii), it is correct that TC34 was not cross-examined about his time at MacKinnon Road. The Defendant seeks to rely, upon the inconsistencies in the accounts which I have set out earlier. It submits that they greatly undermine the credibility/reliability of the pleaded case and the fairness of awarding damages on the basis of the Claimant's evidence alone. None of the inconsistencies was in the List of Inconsistencies. The inconsistency in the medical evidence was put in a Part 35 question to Mr Heyworth, and responded to by him as follows:

"7. Do you agree that, in contrast with the account given by the Claimant to you, his Particulars of Claim and the Claimant's witness statement:

……

(c) do not describe the alleged incident "*in the course of [the Claimant's] detention at McKinnon Road Camp in which he was violently slapped whilst carrying a load of sand*", following which the Claimant allegedly was "*repeatedly beaten with sticks and batons, sustaining blows to his shoulders, hips, lower back and face*" as he is reported as having alleged at page 6 §2, and §§6-7 of your report?

(d) describe an alleged incident during which the Claimant alleged he was beaten following his striking a prison guard with a mallet (see §25 of the Particulars of Claim and §38, c.f. page 6 of your report)?"

…….

"7. I will preface my comments to these questions by noting that it is not uncommon for patients to provide additional information in the course of a personal consultation to that previously provided in witness statements……

(d) I would agree with this statement.

(e) I would agree with this statement"

353. Once more I keep in mind what I have previously said on the matters of inconsistencies which were not the subject of cross-examination, and which were further summarised in relation to the Ngong Forest core allegation. Here again, they may illustrate confusion and difficulty of recollection at this remove of time. I do not place substantial weight on them.

354. The Defendant again makes the point that there are no witnesses, nor any evidence that the Claimants have sought corroborative witnesses, either to the fact that TC34 was detained in Mackinnon Road or, more particularly, to the allegation that he was assaulted there – in respect of which TC34 says in his Witness statement at [36] that

he was in charge of a group of 6 carpenters, and that his assault began in the workshop as he was packing his tools[262]. Nor is there any documentary evidence.

355. In respect of witnesses, the Defendant would have wished to speak to, for example, the people in charge of MacKinnon Road at the time TC34 was there. I have already set out the problems with the Timeline in respect of dates of alleged detention at this camp. In addition, the Defendant would have wished to interview Mr. Thacker (died 2007), Mr. Crawley (presumed deceased as born in 1905) and Mr McCann (died 2005). All these were (Assistant) Superintendents of prisons. MacKinnon Road was under the supervision of prisons department officials. They would have been a starting point to evidence of what happened on the ground at MacKinnon Road. They could have dealt with whether a British soldier was in charge, as TC34 alleges. The witness and document trail potentially would have led to the person in charge at the time of the alleged assault, the British soldier who, according to TC34, came and told the guards not to beat him, and to the alleged perpetrator(s).

356. In relation to documents which could have been investigated at Mackinnon Road there would have been:

(a) Probably, Admission Registers, DDOs, a dossier and perhaps other documents, for example other information about TC34 which might be relevant to his reliability as a witness[263].

(b) Staffing records leading to the identity of staff on duty at different times and places, most particularly at the time of the core allegation.

(c) Records of screening; TC34 says he was questioned twice at MacKinnon Road.

(d) Lists of detainees on transfer to and from camps, so as to confirm TC34's movements and, more importantly, dates of movements.

Although TC34 gave no evidence of medical treatment at MacKinnon Road, there may have been medical records on him.

357. I now set out my preliminary views in relation to the MacKinnon Road allegation.

358. As regards the core allegation, TC34's own account is not wholly lacking in cogency, though the inconsistency of account, albeit not put to TC34, must raise some concern.

359. In relation to the questions of cogency of the evidence apart from that of TC34, in summary:

- The Defendant cannot call any witnesses who could give evidence about TC34's core allegation at MacKinnon Road.

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[262] "As I was packing my tools the Prison Guard came and hit me with a baton. I then hit him on the head with a mallet he fell down. I fled without closing the workshop" [38]. It is not clear whether any of the 6 colleagues witnessed this, or if TC34 recalls whether or not they did.

[263] See again the footnote about Mr. Bird at Othaya, previously mentioned in relation to Manyani.

- The Defendant cannot call any witnesses who may well have been able to put the allegation into context.

- It is not possible for the Defendant even to begin to investigate who might have been responsible for the assault alleged by TC34.

- There are no documents relevant to the alleged assault.

- There are no contextual documents about TC34 or his screening (on two occasions).

- Had the allegations been made in time, the Defendant would have been in a much better position. I refer back to the previous sections in this judgment dealing with documents and witnesses. In summary, documents and witnesses would probably have been available. Enquiries and investigations could have been made. The Court would, in all probability, not have been faced with anything like the present situation, namely having to rely on the uncorroborated account of TC34, devoid of any proper context. TC34's own recollection would have been far fresher, and therefore more reliable. For obvious reasons in relation to witnesses, and for reasons previously given in relation to documents, the foregoing would also probably have been the case if the claim had been brought in, say, the mid-1960s. Further, or alternatively, the passage of time has caused the Defendant to suffer prejudice in not being able to prove some specific aspects of prejudice.

- As time has gone on, so the prejudicial effect of the delay is likely to have increased, though, save as to the dates of death of certain potential witnesses, precise dates for this cannot be given.

- Therefore, to cite the Carroll case at [42(7)] "…the passage of time has significantly diminished the opportunity to defend the claim on liability."

Gikuni

Preliminary

360. Apart from the core allegation and the timeline, there are some matters raised in respect of Gikuni with which I must deal.

361. In the IPOC at [32] it is said that after Waithaka "the Claimant was transferred to Gikuni Camp." The heading to his witness statement at [45] is "Gikuni Camp". The Reply at [33] says "…. there is an error in the Claimant's Individual Particulars of Claim. It should be that the Claimant returned to his home in Gikuna (*sic*) rather than to Gikuna Village Camp. This misunderstanding is not the fault of the Complaint and the account given to Professor Mezey is correct." The Defendant says that no explanation for the error has been advanced and refers to TC34's statement which confirmed he had had read to him the Kikuyu version prior to thumbprinting. He said in cross-examination: "Gikuni is not a camp, it is my home."

362. There is some evidence of the existence of Gikuni village at that time in a CCC minute from March 1957 which refers to "Gikuni Village."[264]

363. I do not regard this matter of any great significance. TC34's statement at [45]-[46] suggests that he was in "the village" and, after the incident which is the core allegation, he went home.

Gikuni core allegation: Pleadings – AIPOC paragraph 32

364. The alleged assault is pleaded as follows[265]:

> "32 the Claimant was then ~~transferred to~~ went back to his home in Kikuyu in about 1959 ~~camp.~~ Whilst ~~at Gikuni Camp~~ there, a man whom the Claimant describes as a Home Guard, but who was probably a Tribal Policeman entered the house of a friend he was visiting. The man hit him with the butt of a gun asking him why he did not stand up. The Claimant hit the man back…."

TC34's individual submissions – commentary and discussion

365. TC34's closing submissions at [117]-[119] state:

> "117. TC 34 gave evidence about an incident that occurred when visiting a friend's house in Gikuni. A man whom TC34 describes as a Home Guard (probably a Tribal Policeman because the Home Guard were absorbed into the Tribal Police in 1955 …..came in and hit TC34 twice on his shoulder with the butt of his gun, causing TC34 to fall to the ground….. Mr Heyworth supported causation for these injuries…..
>
> 118. The man asked TC34 why he did not stand up and TC34 hit him. TC34 openly gave evidence about this, and was forthcoming with detail consistent with his previous evidence. He said he "assaulted or attacked the Home Guard". He accepted losing his temper; he did not seek to minimise his actions. He accepted that "by good or bad luck I saw a knife on the table. I grabbed it and stabbed the Home Guard in his lower back". This was in self-defence; he had been stuck (*sic*) and caused to fall to the floor…….
>
> 119. Professor Mezey thought that it was interesting that TC34 did not portray himself as "completely innocent" and was impressed by his openness. "He was willing to talk to me about some of the things that he had done that had perhaps involved law breaking or violence"…. Cs submit that it is to TC34's credit, and his credibility, that he was so open"

366. The Defendant points to the following inconsistencies:

i. The account of Professor Mezey[266] was not, as pleaded and in the original witness statement, that TC34 hit the man back, but

[264] Caselines 32-53566
[265] Amendment post October 2017 shown by striking out and underlining

that TC34 grabbed a knife and stabbed the Home Guard in the low back/buttocks region.

ii. The summary in Mr. Heyworth's report is "(TC34) described an incident which occurred whilst visiting a friend's house when (TC34) reports that he was violently slapped by a member of the Home Guard."

367. The Defendant also says that although TC34 is specific about the village in which the assault by the Home Guard is alleged to have taken place, it is affected in a similar way to other allegations by inconsistency and lack of proper particularisation as to time, place and identity of individuals involved. He has not identified the friend he was visiting at the time or the name of the person who allegedly hit him. There is no evidence as to what, if any, steps the Claimants took to identify this potential witness.

368. There is a further issue about the person TC34 described as Home Guard. The Claimants now say he would have been a Tribal Policeman by the time this assault is alleged to have taken place. That may be the position, but TC34 would have to prove that the alleged assailant was still officially an agent of the Defendant. Might he just have been a former Home Guard? There is evidence that not all former Home Guards became Tribal Policemen. TC34 had recently arrived back at Gikuni, and so may have been mistaken. Further there is the translation problem on this point[267].

369. The Claimants say that the man described by TC34 had a gun and therefore was likely to have been a Tribal Policeman; I would add that the sequel to this incident, as described by TC34, namely his arrest and subsequent developments as set out later, may give some weight to the suggestion that he was a Tribal Policeman[268]. That said, it is now impossible for the matter to be investigated. At the time there may have been payroll records since there is evidence indicating that the Tribal Police were paid[269]. Even without such records, it would have been entirely possible nearer the time to investigate with those in charge, and others, possibly with reference to other documents, who was officially a Tribal Policeman in a small village like Gikuni.

370. Any claim for damages would have to be limited to the pleaded case, which is that the man hit TC34 with the butt of a gun. There is no specific injury pleading from this allegation. TC34's witness statement goes no further than saying that he was hit with a gun butt on the shoulder. His supplemental statement says he was hit twice on the shoulder with the butt of the gun. In this incident, Mr. Heyworth says nothing more than "(TC34) reports that he was violently slapped by a member of the Home Guard".

371. TC34's case is that he was subsequently arrested by Home Guards and later that day was handcuffed and taken to a Land Rover, where he was left overnight and the next

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[266] The account given to Professor Mezey is pleaded in the Reply and is in paragraph 22 of TC34's supplemental witness statement and said to be correct.

[267] See at [67(ii)] above.

[268] In his Reply in oral submissions, Mr Myerson suggested that the appointment of a Tribal Police Officer would be gazetted in the Kenya Gazette. However, the Defendant said this was not correct and that Emergency (Amendment of Laws) (No. 16) Regulations 1953 required gazetting only of the areas within which Tribal Police could be appointed. This appears correct; I said I would work on this basis unless the Claimants made a further submission on the matter.

[269] Tribal Police Ordinance 1929, section 13, Caselines 49-9432; Tribal Police Ordinance 1958, section 20, Caselines 35-900.

day he was taken to Court. He does not plead or give any evidence of being beaten in this subsequent incident. However Mr. Heyworth records "(TC34) was subsequently arrested by a number of Home Guards and British Officers. (TC34) reports that he was then subject to repeated beatings, including blows from sticks, being kicked and blows from the "butt of a gun". Therefore, Mr. Heyworth's description of blows all over his body relates to the subsequent arrest by a number of Home Guards and British Officers. This is not supported by the pleadings or by TC34's witness statements.

372. Nevertheless, the injury claim in the closing submissions [179] states: "he sustained two blows to the right shoulder with a gun butt. He was violently slapped and subjected to repeated beatings, including blows from sticks, being kicked and blows from the butt of a gun." As previously stated, based on the pleadings and evidence, only the two blows to the right shoulder could possibly be the subject of damages. There was no application made to amend the alleged additional assault/injuries. Unsurprisingly, the Defendant says that had it been made, it would have been opposed. Thus, any recovery for the core allegation at Gikuni would be limited; no adverse effects, other than the initial pain from being struck, have been evidenced either by TC34 or in Mr. Heyworth's report.

373. There was some questioning of TC34 about Gikuni, and about the core allegation, but the inconsistencies were not specifically put to him in cross-examination. However, prior to TC34 giving evidence:

- The Defendant had pointed out[270]: "..the Defendant notes that the Claimant admitted to Professor Mezey that he was later arrested in or around 'Gikuni' after he had stabbed a Home Guard with a knife 'on his buttocks' [sic]. This account does not appear in the Claimant's Particulars of Claim, Witness Statement and/or Part 18 Response."

- A Part 35 question had been put to Mr Heyworth prior to trial. The question and his response to it were:

  "7. Do you agree that, in contrast with the account given by the Claimant to you, his Particulars of Claim and the Claimant's witness statement: ….

  (g) describe the Claimant allegedly being hit on his shoulder with the butt of a gun by a man following the Claimant's entry into a house of a friend at Gikuni Camp (see §32 of the Particulars of Claim and §45 of the Claimant's witness statement), rather than having been (i) "*violently slapped by a member of the Home Guard*" (see page 7 §1 of your report), and/or (ii) "*subject to repeated beatings, including blows from sticks, being kicked and blows from the butt of a gun ... sustaining blows all over his body in the course of these assaults*" (see page 7 §§2-3 of your report)?"

  ……..

  "7. I will preface my comments to these questions by noting that it is not uncommon for patients to provide additional information in the course of a

[270] RAID at [38]

personal consultation to that previously provided in witness statements……

(g) I would agree with this statement."

374. In the List of Inconsistencies the Defendant set out the differing accounts in the IPOC at [32], on the one hand, and, on the other hand, the reports of Mr Heyworth, Professor Mezey, the Supplemental Witness statement at [22] and the Reply at [33].

375. Subsequent to the assault, TC34's Witness statement relates:

"46. When I went home, other Home Guards came to my home with a British officer. They knocked at my door. I asked who it was and they said it was the District Officer. I told them to come back the next day "It was not convenient". They said if I did not open they would break the door and kill me. They started counting 1, 2 and on the 2nd count I removed the lock on the door. This made one of the Home Guards to fall in the house and also the District Officer fell also they became very agitated.

47. The British Officer did not take me to the cell he took to his garage and handcuffed me on the Land rover so that I could not sleep. In the morning the rest of the detainees were taken to court at around 10 am they forgot about me. I was still standing District Officer removed the handcuffs and was taken to Kikuyu court. I was released but I was told the acts I did were considered as bad as Mau Mau I would be detained. I was taken to Embakasi camp".

376. In paragraph 34 of the Reply it says: "the court that he was taken to was the Kikuyu court held nearby". The Defendant suggests that this implies that TC34 was taken to a Tribal Court, though in evidence he explained that he was taken to the Law Courts in the town of Kikuyu, which he said was about 10 miles from Gikuni. There he appeared before a white Judge, pleaded not guilty to assaulting the Home Guard, and was acquitted by the Judge. He was then arrested outside the court building by the police and detained. The Claimants submit that it is consistent that, having been involved in a local incident after having been released from detention, notwithstanding his acquittal, TC34 was re-detained. This is because TC34 was Mau Mau and the authorities may have considered him not safe to be released back into the community.

377. I now set out my preliminary views in relation to the Gikuni allegation.

378. As regards the core allegation, TC34's own account is not wholly lacking in cogency, though the inconsistencies in the account, albeit not put specifically to TC34 for comment, must raise some real concern.

379. In relation to the questions of cogency of the evidence apart from that of TC34, in summary:

(a) The Defendant cannot call any witnesses who could give evidence about TC34's core allegation at Gikuni. The Claimants accepted that it is likely that years ago TC34

would have known the name of the Home Guard/Tribal Policeman who he says assaulted him. Now he cannot recall it.

(b) The Defendant cannot call any witnesses who may well have been able to put the allegation into context. In this regard there is, for example (i) the British Officer who TC34 says was the District Officer, (ii) the Home Guards who, according to TC34, accompanied the District Officer when calling at his home, (iii) anybody involved in the court proceedings to which TC34 refers.

(c) It is not possible for the Defendant to even begin to investigate who might have been responsible for the assault alleged by TC34.

(d) There are no documents relevant to the alleged assault. For example, if the name of the Home Guard/Tribal policeman had been known, enquiries years ago may have yielded documents which did/did not support any official status he had[271]. Alternatively, if the case had commenced many years ago and the District Commissioner had been available, he could have cast light on relevant documents and perhaps on who was a Tribal Policeman in Gikuni at the time.

(e) If TC34 is accurate that he went to a court with a white judge, there would presumably have been some record of the proceedings, what was alleged against TC34 at the time, and what his defence was. Did he give an account about the Tribal Policeman's actions at the time which is consistent with his core allegation? Were there other witnesses? Was TC34 acquitted, or, for example, was the case not proceeded with because he was going to be re-detained in any event? What other outcome was there?[272]

(f) Had the allegations been made in time, the Defendant would have been in a much better position. I refer back to the previous sections in this judgment dealing with documents and witnesses. In summary, documents and witnesses would probably have been available. Enquiries and investigations could have been made. The Court would, in all probability, not have been faced with anything like the present situation, namely having to rely on the uncorroborated account of TC34, devoid of any proper context. TC34's own recollection would have been far fresher, and therefore more reliable. For obvious reasons in relation to witnesses, and for reasons previously given in relation to documents, the foregoing would also probably have been the case if the claim had been brought in, say, the mid-1960s. Further, or alternatively, the passage of time has caused the Defendant to suffer prejudice in not being able to prove some specific aspects of prejudice.

(g) As time has gone on, so the prejudicial effect of the delay is likely to have increased, though precise dates for this cannot be given.

(h) Therefore, to cite the Carroll case at [42(7)] "…the passage of time has significantly diminished the opportunity to defend the claim on liability."

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[271] The Emergency (Amendment of Laws) (No. 16) regulations 1953 state "the District Commissioner…may from time to time appoint any fit and proper person to be a special tribal police officer for such period as he may consider necessary…"

[272] This was not explored in cross-examination, but that does not detract from the fact that at this point in time, there is only TC34's word and no documents to corroborate or undermine it.

Hola

Pleadings – AIPOC paragraph 37

380. The pleaded case is:

> "37. Whilst at the Hola detention camp the Claimant was allocated a 4-acre area of land being used as a cotton plantation. He was ordered to harvest the cotton. Whilst doing so he would be whipped on his back and buttocks by the guards. After 6 months he was able to lease the 4 acres and his family was allowed to join him. He remained at Hola for about three years in all, until shortly before Independence in 1963"[273].

TC34's individual submissions – commentary and discussion

381. In his Witness Statement at [62]-[70], TC34 describes his time at Hola camp. He says "I think there were about 1,600 people at Hola." He then describes the houses and says that during his stay at the camp he had to work on a cotton plantation. He adds: "..these were the lands that we were working on after being released, and after the Emergency some people were given 4 acres of land each. The four acres would be divided into 8 pieces and we had to harvest all the cotton." He says that whilst harvesting the cotton on the large plantation, they were whipped on their backs and buttocks, because the guards would think that they had not done the work required. He went to speak with the District Commissioner for Tana River district, who was a white officer, and asked him to allow families to be brought to the plantation to assist to harvest. He also says he made some furniture for him. The families were brought and TC34 was allowed to bring his wife and two children. He had two wives, though he was only allowed to bring one. He says "I think I was at Hola camp as a detainee for 6 months before I lease (sic) the 4 acres and was freed to be able to work on 4 acres that had been allotted to me." After release he stayed at Hola from 1960-1963. He says that all the dates and times he has given are to the best of his recollection.

382. The DC for Tana River at the time was Mr Thompson. He said in his witness statement at [86] that it may have been him to whom TC34 says he spoke. However, he did not believe that TC34 did any carpentry for him. Mr Thompson said he visited Hola only about 2-3 times a year. He was, however, at the closed Hola camp for a number of months after the Hola massacre in March 1959. There were two camps at Hola: the closed camp and the open camp. It is the latter that TC34 appears to be describing, as Mr Thompson said this at [25] in his 2nd Witness statement:

> "I have looked again at the Claimant's [TC34's] witness statement, and note his account of being accommodated in 'houses', of detainees working on the cultivation of cotton on nearby land, which continued after release, and of handover of that land to the detainees after the Emergency. That does not fit with my recollection of Hola detention camp. I think he may be referring to Hola open camp, which was a completely separate area, for rehabilitation. The main camp had a barbed wire fence. The farmlands were completely separate."

[273] The underlined section was added by way of amendment after September 2017.

383. The closing submissions of TC34 at [137]-[138] and [141] conform quite closely to TC34's statement with some additional commentary.

384. The Defendant refers to the fact that TC34's account is not supported by documents, and says that the documents he positively relies upon relate to a different time from that which he alleges he was at the camp. The following further points need mentioning:

(i) The Defendant says that TC34 appears to describe going to Hola at the end of 1959 or thereabouts, and his evidence that there were around 1600 people detained at Hola is not consistent with the last Progress Report to the Governor in 1959 recording 509 restrictees (not detainees) at that point; previous Progress Reports in 1959 do not evidence a number which approaches anything like 1,600 people.[274] I do not regard this apparent overestimation as being of any great significance.

(ii) The Defendant says that the documents relied upon by TC34 in the closing submissions relate to the period prior to the March 1959 Hola massacre. TC34 does not suggest that he was at Hola at this time. His evidence must be that he was there subsequently i.e. from a later point in 1959/1960 to a point in 1963. The Claimants accept that the open camp at Hola was entirely separate from the closed camp; also that TC34's evidence suggests he arrived after March 1959 and was in the open camp. Therefore, an incident which occurred in Hola closed camp in August 1958, and the Hola massacre, are not corroborative of TC34's Hola allegations.[275]

(iii) There is validity in the Claimants' submission that Mr Thompson confirmed that detainees who behaved went to the open camp, were given land, and, in due course, were permitted to be joined by their families. Hence, it would be surprising if TC34 could give this description of his time at Hola open camp if he had not been there at all.

(iv) There are obvious potential witnesses who are not now available. These include those who were in charge of the open camp and those who were guards there. Since TC34 alleges that his beating there was not a single incident, it may well have been even less difficult to obtain evidence many years ago from alleged perpetrators, or other direct witnesses, for the Hola allegations than the other core allegations.

(v) Also, the Defendant would have wanted to speak, for example, to Mrs. Henley-Colgate, a Community Development Officer at the open camp. She died in 1987[276]. Mrs. Henley-Colgate is a person actually named on a document we have[277], but there were no doubt others working in the open camp who could have assisted and who would have been traceable in the past. Further potential named witnesses the Defendant cannot now call would have been: Mr. Hopf (DO – died 1992), Mr Cowan, Acting Commissioner for

[274] The Claimants refer to Progress Report no. 63 April 1959 which shows 144 detainees and 598 restrictees and Progress Report no. 66 of July 1959 showing 17 detainees and 607 restrictees.

[275] It might be thought that after the Hola massacre and the international outcry which followed, the likelihood of abuse would have diminished.

[276] Ms Pollock exhibit MGP11

[277] In an Intelligence Report for the period ending 31st October 1958, Caselines 32-61040, it says: "Mrs. Henley-Colgate who was posted to Hola in the middle of October, is in charge of Welfare in the village and the health and feeding of the children as well as the general welfare of the families is satisfactory and the work of Mrs. Henley-Colgate is greatly appreciated by the Settlers".

Prisons, who died in 2012 and Mr Sullivan[278], the camp commandant (presumed dead as he was born in 1908). Although they dealt with Hola closed camp, the Defendant says it is possible they could have given some material evidence on the open camp.

(vi) Documents would have been expected to include detention records and other documents evidencing TC34's restriction, as well as staff records, duty records etc.

(vii) Closer to the time, TC34 would have been able to give better details of the alleged assaults and the perpetrators; also of others who were allegedly beaten.

385. A further matter is that the Defendant submits that the alleged assault could equally have been after the Emergency finished - a period in which there are no allegations in this litigation. However, I believe that this is unlikely to be a good point, since the tenor of TC34's evidence is that he was whipped whilst he had to undergo forced labour in the initial months of his time at Hola, when he was a detainee and not, as subsequently, a restrictee with his own land[279].

386. I now consider the alleged injuries. TC34 reported to Mr. Heyworth that he was repeatedly whipped sustaining blows to his back and buttocks. In response to a Part 35 question by the Defendant, Mr. Heyworth said that the absence of marks or scars does not exclude the possibility of somebody being subject to the assaults alleged, particularly after a significant interval prior to the examination. The Claimants seek general damages for likely multiple whippings over the same sites aggravating the pain. The Defendant says that there is no evidence as to the frequency of the whippings, or their duration, or the degree of pain caused or any injury resulting.[280] This lack of specifics is correct. However, it would not make a fair trial on quantum impossible. The Court would be able to make an assessment of a recoverable minimum amount based on the general evidence given.[281]

387. I now set out my preliminary views in relation to the Hola allegations.

388. Mr Thompson attested to some of the details of the open camp given by TC34, for example the houses, families joining restrictees and the system of land partition. This is corroborative evidence of the fact that TC34 was in Hola open camp.

389. As regards the core allegations at Hola, TC34's own account is not lacking in cogency. It amounts to allegations of whipping during a period which seems to have commenced in 1959 at some time after the Hola massacre. In relation to the questions of cogency of the evidence apart from that of TC34, in summary:

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[278] I do note, however, that Mr Sullivan was found to be an "unreliable witness" by the Report Enquiring into the disciplinary charges against Mr Sullivan and Mr Coutts at [100], and found him to have acted in dereliction of duty at [101], though there was good character evidence about him at [103]. Also, there is evidence that Mr Hopf was not an unblemished character: see e.g. The letter from Mr Conroy, the Attorney-General to Governor Baring dated 6 July 1959, Caselines [32-67838].

[279] This transition from detainee to restrictee has also some corroboration in the documentation referred to above.

[280] The Defendant also points out that the allegation that the circumstances were "designed to cause fear and distress" is not supported by evidence – though the allegation that they were to ensure that he worked harder is supported by TC34's evidence.

[281] Cf Raggett discussed above.

(a) There is no person, apart from Mr. Thompson, who can give evidence about the Hola open camp. His evidence is limited to that of an occasional visitor.

(b) The Defendant cannot call any witnesses who may well have been able to put the allegations into context. In addition to those in charge of, and others who worked in the open camp, these include Mrs Henley-Colgate, Mr Hopf, Mr Cowan and Mr Sullivan.

(c) It is not possible for the Defendant to even begin to investigate who might have been responsible for the assaults alleged by TC34.

(d) There are no documents relevant to the alleged assaults.

(e) There are no contextual documents about TC34 or his initial interrogation.

(f) The Defendant cannot call any witnesses to the alleged assaults.

(g) Had the allegations been made in time, the Defendant would have been in a much better position. I refer back to the previous sections in this judgment dealing with documents and witnesses. In summary, documents and witnesses would probably have been available. Enquiries and investigations could have been made. The Court would, in all probability, not have been faced with anything like the present situation, namely having to rely on the uncorroborated account of TC34, devoid of any proper context. TC34's own recollection would have been far fresher, and therefore more reliable. For obvious reasons in relation to witnesses, and for reasons previously given in relation to documents, the foregoing would also probably have been the case if the claim had been brought in, say, the mid-1960s. Further, or alternatively, the passage of time has caused the Defendant to suffer prejudice in not being able to prove some specific aspects of prejudice.

(h) As time has gone on, so the prejudicial effect of the delay is likely to have increased, though, save as to the dates of death of certain potential witnesses, precise dates for this cannot be given.

(i) Therefore, to cite the Carroll case at [42(7)], "…the passage of time has significantly diminished the opportunity to defend the claim on liability."

The Broader Picture

390. At this section of the Judgment I will select what seem to me to be the most significant other factors put forward by the parties so as to assist me in deciding whether it is equitable to allow TC34's claims to proceed, with particular reference to Section 33(3)(b), and whether there can be a fair trial.

Mau Mau Oaths

391. In his witness statement TC34 said he took an oath. His father had sold his goat. TC34 says he was angry and his father told him they would go to get the goat. In the evening when they went to get the goat, they entered the room and TC34 found people there. He learnt that his father was one of the people who were administering the oath. He then took the oath. This was before the State of Emergency was declared.

392. This is the only oath which was pleaded (and verified) in the original IPOC. In the AIPOC, after TC34's cross examination, TC34 pleads that he took the oath "on a second occasion in about 1953." The evidence as to the second oath only emerged once there was some questioning by the Defendant as to date, TC34 having said in evidence he took the oath in 1955. He was then asked how many oaths he had taken and he said two. He said he took the second oath because of the anger that was within him. He took it in his village with very many young men. He swore an oath and promised to do whatever he would be asked to do thereafter. There was a ceremony where the oath was taken whilst holding soil and raising hands.

393. The Claimants initially completed a Pro-Forma, to which I have already made reference. This asked a Yes/No question as to whether the person had taken the oath. Witness statements were taken subsequently, from the pool of 40 potential TCs, in the presence of qualified solicitors who act in this litigation. Mr Myerson accepted that it could be inferred that TC34 had the opportunity to say that he had taken the oath more than once. I add that it might be surprising, in a structured process of taking the statement, albeit through interpreters, if the question as to how many oaths had been taken was not directly asked. Other TCs stated they took the oath on more than one occasion[282].

394. The Defendant also refers to Professor Mezey's report at [28] which records that prior to the state of Emergency TC34 had been "tricked" by his father into taking the oath when he was about 18 years old. She relates that TC34 said that he had not fully understood what was happening at the time, and he was frightened that he might be killed if he refused to comply. He was not happy about what his father had done[283].

395. The Claimants say that TC34 was not asked why he had not mentioned the second oath before. Nevertheless, and giving due regard to that, this sort of omission from the verified IPOC and the witness statement does raise some concern as to TC34's general reliability.

Assisting the Mau Mau

396. Hitherto in this judgment there has been reference to the fact that TC34 was active Mau Mau. Indeed that is now prayed in aid by the Claimants to say that his categorisation as 'black', and his journey along the Pipeline, ending in Hola (which was for the hard-core Mau Mau) is a consistent account. However, it did not always appear that way. So:

- There is nothing in TC34's witness statement or IPOC which refers to any assistance he gave to the Mau Mau.

- Indeed his witness statement suggests the opposite, as Mr. Myerson accepted. Referring to his interrogation at Ngong Forest it says:

  "One of the British officers fired a gunshot aimed at my head but it missed…This was to threaten me to confess to being mau mau and also were

[282] TCs 17, 26, 27, 30 and 39

[283] There is also some inconsistency about the date of the father's arrest and the oath dates. It is not of any real significance in my judgement

(sic) the guns were. At that time I was not worried about dying. This was because I did not know anything about the guns and if I lied to them they would have asked me to take them to where the guns were…"

- Paragraph 28 of Professor Mezey's report records that "(TC34) did not consider himself to have been Mau Mau".

- The Reply at [5] says:

"….the Claimant accepts he took the oath, but denies as a result he was or could properly have been characterised as being Mau Mau (or associated Mau Mau) and/or in the alternative a threat to public safety."

The Reply was signed with a statement of truth. The Claimants say this paragraph was responding to a specific matter raised in the Defence at [67h] as to inferences from the fact of taking the oath. This is correct. The quoted section nevertheless gives a misleading impression to the Defendant and to the Court. He denied that, as a result of taking (what was then pleaded as) the one oath (under pressure), "he was or could properly have been characterised as Mau Mau". Yet he knew all along that he had been active Mau Mau.

397. In cross-examination, TC34 said that after he had taken the second oath he alternated between being in Nairobi and in his village. He said he was helping the Mau Mau at that stage finding ways of how to acquire guns and bullets. He went to the soldiers' camp with a girl and would give them a girl and the girl would bring them what they wanted i.e. the girl would offer sexual favours in return for ammunition. The girls stole guns as well as bullets. He estimated that he managed to obtain about 30 guns during this period of time.

398. TC34 further said that his friends who were Mau Mau told him that the government wanted him. Thereafter an incident occurred when three white men came to his mother's home asking for him, but he managed to avoid detection.

399. It is correct that this evidence, as with the matter of the second oath, came out voluntarily in cross-examination, albeit after what might be regarded as a 'trigger' of an inconsistency as to oath date; also it was not explored with him why this had not been stated before. It would have been more helpful if this had been so explored. For that reason I do not place great weight on it. However, such an omission from the witness statement and pleadings, in the context of the documents which suggested that he had nothing to do with Mau Mau, must be another cause for concern as to the reliability of the evidence-taking process and/or of TC34's evidence. I do not know why there are these omissions. Mr Myerson urged on me that, at worst, TC34 was telling the whole truth in oral evidence. That may be so, in that regard. But misleading information in witness statements and other documents signed with a statement of truth cannot be totally airbrushed out in this way. It must have some effect on the court's overall assessment of TC34's evidence, though this is limited given that TC34 did not have the matter specifically put to him for his comments.

Arrest and Interrogation at CID in Nairobi

400. I do not propose to go through the details concerning TC34's alleged arrest in Nairobi. The Defendant[284] points out certain inconsistencies; the Claimants suggest that a document is corroborative of the greater administrative control from June 1954.[285] Although I have taken some note of these matters, they do not influence my decision.

401. The next matter relates to what TC34 said was an interrogation at CID Nairobi before he was then driven to the Ngong Forest. It has generated a good deal of submissions. It is also part of the backdrop to the Ngong Forest core allegation. However, as it does not amount to a core allegation in itself, I shall deal with it as briefly as possible. The Defendant submitted that TC34 has given inconsistent accounts. It puts the matter in this way:

- The AIPOC at [11] says:

  "He was placed in a room with a cupboard. There were 2 British Officers and 4 Kenyan Policemen in the room. <u>They were all white people.</u> A slim, white British Officer wearing a green uniform with shoulder epaulets of a different color. He went to the cupboard and opened a draw (sic) which contained 14 human heads. One head was lifted up and placed on top of another. The officer told the Claimant that his head would be on the table if he did not tell them where he had hidden guns."

- In his witness statement at [15], TC34 says:

  "I was taken into a room which had a cupboard. One of the drawers was open; I saw 14 heads of dead people that had been put there. One head was lifted up and placed on top of another. I was told my head would be the table if I did not tell them where we hid the guns. I was told there was a space for my head in the drawer…"

- The Defendant pleaded[286] that it had no knowledge and could find no record of British officers or Kenyan Police having severed a head during the Emergency, or of severed heads having been collected or kept in a cupboard or other storage medium, or having been shown to detainees. In his Reply at [14] TC 34 responded:

  "…the Claimant would like to clarify that he cannot be precise about the number of (sic) though he thinks it was more than three or four [contrary to paragraph 15 of his witness statement]…..He remembers clearly, however, that they moved one head and held it above another head, making a space. They told him the space was for his head if he did not reveal where the guns were hidden".

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[284] Particularly at [99] in its submissions

[285] This is a report by the Nairobi Extra-Provincial District Emergency Committee on the situation in Nairobi following Operation Anvil. This report is dated 30th June 1954. It is admitted as a document in TC34's case only as to its title, date and the sentence on Caselines 32-19570 that "Two chiefs have been installed in the railway locations of Makongeni and Muthurwa."

[286] RAID at [17]

- In TC34's supplemental witness statement at [7] he says that he had no time to count the heads. He continues: "When the officer got one head from the middle drawer. He held one head above another head making a space. I was told the space was made for my head if I did not reveal where the guns were hidden. There were more than 3 or 4 heads in that drawer".

- TC34 told Professor Mezey that he was shown the severed heads of three or four people[287].

- When cross-examined TC34 said: "he took out a head and removed it and put it on top of other heads which were there and he told me that the space he had created by removing a head would be occupied by my own if I refused to answer…."

402. Apart from the above inconsistencies, the Defendant said that there is no support for this account beyond TC34's own evidence. There are no documents which might support it. If true, it seems to amount to an allegation that the Colonial government's central police administration in the capital, under the leadership of Mr MacPherson, was arranging for, or accepting, the beheading of corpses, and collecting their heads in a drawer in an office or an interrogation room so as to produce them to intimidate suspects. Where the corpses came from, what happened to them, how long the heads would, or could, be kept in the drawer, who would have had to be complicit in such an arrangement and to what level of officer – the answers to all these questions, and no doubt others, are unknown.

403. Given the evidence forthcoming for the first time in cross-examination that TC34 helped the Mau Mau acquiring guns and bullets, it is understandable that he would be interrogated. Inconsistencies of recollection are not particularly troubling at this remove of time. Yet this is an extraordinary allegation, as the Defendant submits. Mr Myerson conceded that on its face it was indeed "absolutely extraordinary".

404. The Claimants point to some documents that they say are evidence of screening teams deploying psychological methods. Even on the face of the Claimants' submissions, these go nowhere near providing any sort of real corroboration for what TC34 alleges happened at CID Headquarters in Nairobi (in or about 1955). They are in different places and at different times and, on the Claimants' allegation, refer to enforced solitary confinement, sleep deprivation and spreading fear by rumours and beating people.[288]

405. The Claimants also rely on Professor Mezey's evidence, not just as to the reliability of TC34's account on the severed heads incident, but also as 'compelling' evidence in support of his credibility and reliability generally. Her evidence was:

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[287] There is also an inconsistency about whether the drawer was already open or not

[288] The Defendant at [255] in its submissions takes pains to refute the effect of these documents. It is unnecessary for me to deal with the particulars of this dispute. The same goes for the Claimants' reliance on something in an account given by Eileen Fletcher. As for John Grounds (Defendant's witness) confirming that the Kenyan African Rifles (KAR) cut off hands for identification purposes, and the McLean enquiry in 1953 reporting that sometimes soldiers cut the hands off dead Mau Mau fighters – this evidence does not in any meaningful way corroborate TC34's severed heads account. Nor do other allegations of brutality on which the Claimants rely e.g. at [163]-[164] of their Response submissions.

> "He described extreme feelings of fear and distress, and he said that he has never forgotten the sight of those heads; even today he feels unable to think about it or talk about it as it makes him feel so bad. And the way that he described it was again very characteristic of an experience that he was trying to avoid and to put into the background because, again, physically and in the room, it was possible to see him becoming increasingly distraught, simply by having to describe events…..
>
> I considered that what he was describing in terms of the thoughts about the severed heads and the way that he was presenting in the interview was consistent with him actually experiencing a flashback in the room, because there was a sense in which he was not in control, fully, of his emotions, and actually becoming rather overwhelmed by the experience of that memory. So we had to quickly move on to another subject because he was becoming so distressed. I would describe that as a flashback".[289]

406. Were the severed heads incident a core allegation, it would be subject to all the problems well rehearsed earlier in this judgment whereby, after the great lapse of time, it is impossible for the Defendant to begin to investigate. Even without such evidence, I am troubled as to the reliability of TC34's account. It is not the inconsistency in detail that particularly concerns me, but rather the sheer unlikelihood, in the absence of any proper corroboration from any source whatsoever, that this sort of incident ever occurred.

407. Although I have considered carefully the evidence of Professor Mezey, I am again sceptical as to the faith she puts in what she saw on examination. That is not to say that it could not possibly have happened; nor to say that Professor Mezey may not be correct. My views on this evidence are similar to those I have stated above where Professor Mezey was impressed by TC34's account of the spilling of the intestines at Manyani.

408. I accept that there is some force in the Claimants' response that the Defendant could have tested TC34's evidence or sought an explanation. As such he did not have the opportunity to explain or respond to a suggestion that the incident is so bizarre that it is unlikely it ever happened. It is tempting at first blush to weigh this incident in the balance as a fact tending to undermine TC34's reliability in the round, rather than the contrary, as the Claimants contend. I do not do this. I do not take it into account against TC34. It would, however, be wrong to take it into account against the Defendant (a) because of its inherent unlikelihood and (b) because the Defendant has been deprived by the passage of time of any prospect of investigating it.

409. In short, I disregard this incident for the purpose of my consideration of the core allegations.

Langata Detention Camp

[289] Professor Mezey gave other evidence that she was impressed by him, that he was not psychologically sophisticated and it was very, very unlikely that he could be hiding symptoms or the cause of the symptoms.

410. I do not deal with this. There is some issue between the parties as to evidence/credibility. However, nothing in relation to what is alleged about Langata assists me, one way or another, on the core allegations.

Mwea works camp

411. When dealing with the allegation at Ngong Forest, I referred to the inconsistency in the evidence as to whether TC34 was beaten at Mwea. He told Mr Heyworth that he had been and, at one point in his cross-examination he repeated this in forceful terms. However, there is no claim for assault occurring at Mwea.

412. Apart from that matter, nothing in relation to what is said about Mwea assists me on the core allegations[290]. The fact of being moved to a works camp such as Mwea, after reclassification as grey (then X or Y), is supported generally[291].

Waithaka

413. No subsisting claim arises from the alleged detention at Waithaka. TC34's case is that he was held there for a few weeks before being released to Gikuni and (by amendment in the AIPOC, following TC34's cross examination) briefly on his way to Embakasi Camp. This was via Waithaka and Langata.

414. I have not dealt with the Waithaka timeline in any detail. There are documents which suggest that Waithaka was closed by January 1958, that it closed in November 1958 and that as late as May 1959 it was used to hold the small number of detainees destined for Hola[292]. Again, none of the points made in respect of Waithaka assist me on the core allegations. The same goes for Wangige and the second brief mention of Langata[293] .

Embakasi

415. After being at Gikuni and, according to his AIOPC and oral evidence, going via Waithaka and Langata[294], TC34 said he was taken to Embakasi Camp. There is no subsisting claim for anything that happened there. I have dealt previously with timeline matters in relation to Embakasi.

416. Apart from the above there is substantial discussion in the closing submissions as to allegations of brutality relating to Embakasi. This appears to be in the context of the TC34's evidence that he was threatened with castration with a burdizo tool used for

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[290] The Defendant refers to the Liability Amendments Judgment where I refused TC34's application to introduce an allegation about Yatta Camp. The Claimants say that documents in respect of Mwea support TC34's overall credibility.

[291] e.g. See paragraph 443 of the Defendant's Outline Response

[292] See a report to War Council January 1958 (32-58513); appendix to the Davis report (32-71584); progress report 14th May 1959 (32-65687)

[293] I appreciate that TC34 did not mention in his witness statement/IPOC being taken from Waithaka to the DO's office in Wangige where said in evidence that he spent 3 days. Nor did the witness statement/IPOC mention that when he was taken after court, following his stay in Gikuni to Embakasi, his oral evidence that, en route to Embakasi, he spent 2 nights in Waithaka and 3 nights in Langata. Nevertheless, failure to mention these short periods, where nothing of major significance is said to have occurred, is not particularly surprising or significant, in my judgment. He was not asked why he had not previously mentioned them.

[294] See above footnote in relation to this

castrating bulls and that, fearing for his life, he pushed a female officer back onto a tent pole whereupon the tent collapsed, another officer arrived and TC34 was removed, reported what had happened and was then immediately taken to Fort Jesus Camp. Given that there is no allegation of an assault giving rise to a claim for damages, I do not propose to review this evidence. It does not assist me in determining the issues on the core allegations.

Fort Jesus

417. There is some discussion in the parties' submissions about documents evidencing the existence and purpose of Fort Jesus. I do not deal with these since they do not assist me in relation to determining the core allegations.

Mukoe

418. Although there is no core allegation arising out of TC34's alleged time at Mukoe, there are some matters which warrant brief discussion.

419. The first is that there are documents from 1955-1958 which evidence the existence of Mukoe (or Mkowe). TC 34 said Mukoe camp was in Lamu. Further, a document dated 4 November 1958[295], refers to recent intakes at Hola from Mukoe. TC34 said he was taken from Mukoe to Hola. The Defendant said that these documents do not assist, other than in the most general sense of indicating the existence of a camp at Mukoe, given that the documents are not from the period when TC34 says he was detained there, i.e. in 1959. However, the documents are of some significance in indicating the existence of the camp at Mukoe, and the November 1958 document is some corroboration of TC34's account that he was transferred from Mukoe to Hola.

420. Next, Mr. Aspinall was a witness for the Defendant. He was asked to take over the running of the Mukoe Camp for a couple of months at the end of 1957. Clearly this was before TC34 says he arrived. He confirmed that the description of Mukoe Camp given in TC34's witness statement at [59] is, as far as he could remember, accurate. However, he said that TC34's description of the clothes given to inmates as being yellow shorts and no upper clothing is not consistent with his clear recollection that inmates were provided with khaki shorts and shirts. He added: "of course, I cannot speak as to what the uniforms were before, or after, my time working in the camp." In his statement at [10] Mr. Aspinall says Mukoe was a camp for reformed Mau Mau who had confessed. The Defendant says that TC34 does not suggest he confessed. Finally, Mr Aspinall said that it would have been very unusual for someone to be sent to Mukoe and then to Hola, though this evidence seems at odds with the later November 1958 document referred to above.

421. Notwithstanding the Defendant's points, I regard Mr. Aspinall's evidence as being of some corroboration that TC34 was indeed detained for a period at Mukoe.

422. Finally, there is the matter of assault at Mukoe. There is no claim for an assault there. In his witness statement TC34 says he was not assaulted at Mukoe. He stated this also to Professor Mezey. TC34 saw Professor Mezey on the same day as he saw Mr Heyworth. Mr. Heyworth said that TC34 reported that during the course of his

[295] Hola Camps Intelligence Report for the period ending 31st October 1958

detention at Mukoe he was subject to repeated beatings, which included assaults with sticks, batons and being kicked. He sustained blows all over his body and reported significant pain associated with these blows at the sites of the injuries sustained. The Claimants submit that confusion is the most likely explanation for this. However, confusion or not, it cannot be wholly ignored and is something which is be taken into account in evaluating TC34's reliability as a witness. It cannot weigh heavily against TC34 since he was not given the opportunity to comment on it.

Conclusions

General

423. It is impossible fully to appreciate the situation during a State of Emergency in a former colony subject to what at first was, on the one hand, a serious revolt with many active and passive supporters and, on the other hand, the Administration and a substantial number of loyalists. Presumably, there were also those who wanted nothing more than to get on with their lives, but who were caught up in it all. As time went on, so the colonial government took control, but for a long time problems remained. These included who could be trusted for release, and how they could be safely re-settled in the Kikuyu, Embu and Meru communities.

424. It is common ground that abuses occurred. The statement of the Rt. Hon. William Hague M.P., the former Foreign Secretary, accepted this.

425. It was also accepted by Mr Mansfield QC that it is probable that the cohort of Claimants in this GLO include a number of abuse allegations which are true.

426. The potential for unreliable allegations in a very large group of Claimants may be unavoidable in a GLO. Nevertheless, a GLO is the most effective means of achieving justice in such a case. In order to proceed in a proportionate way, Test Claimants are selected with a view to being as representative as possible of the cohort as a whole.

427. The evidential scope of many GLOs is much narrower. This is the case for example in a factory explosion which spreads noxious chemicals over a local community, or a medicine which is alleged to have gravely deleterious side-effects.

428. This GLO is different. Such evidence as is available, both witness and documentary, has covered a large number of detention camps, villages[296] and other venues where abuses are alleged to have taken place. The central time span for what was happening in Kenya is from 1952 to 1963. In addition, there has been detailed evidence, particularly regarding difficulties with witnesses and documentation, from then until the present day. Further, the geographical area of the alleged abuses includes the capital, Nairobi, and vast areas of Kenya which are home to the Kikuyu, Embu and Meru tribes.

429. Against that backdrop, the GLO must, apart from the generic issues, have its first and main focus on the Test Claimants. The Claimants said[297]:

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[296] These are alleged by the Claimants to be punitive villages. I make no further comment about them here as TC34 was not said to be in such a village.

[297] Submissions in response at [131]

"……these are *Test Cases*. If D's assertion is simply that *these* TCs cannot fairly have their cases adjudicated then it must be said of all TCs. Otherwise the GLO has failed to achieve its object…. The logical outcome is that many people were abused, but none of the 40,000 people in this action can show *they* were abused……."

This is correct. The corollary is that if it is equitable to allow all the TCs' claims to proceed and they prove their cases, then, subject to the Claimants also succeeding as necessary on the generic issues, those decisions should provide a template for the resolution of the remaining 40,000 plus claims.

430. TC34 is the first of the TCs to have his case considered. There have been extensive written and oral submissions as particularised in paragraph 26 of this judgment. The first question I have to ask myself is whether to exercise my section 33 discretion. The statutory test is easily stated. I must decide whether: "……it would be equitable to allow (the) action to proceed having regard to the degree to which – (a) the provisions of section 11…prejudice the (claimant)…and (b) any decision of the court….would prejudice the defendant…". In so deciding I must have regard to all the circumstances of the case and in particular to those in subsections 33(3)(a)-(f). I must make a decision on each core allegation separately, as it is open to a court to allow one or more claims to proceed, while refusing to exercise the discretion in favour of a Claimant on other claim(s).

431. It is important to recognise in this situation as in numerous others that: "No man is an island entire of itself"[298]. TC34's claim must be seen in context. It is for that reason, and the potential importance of the findings in this first Test Case, that both parties have been so wide-ranging in their submissions. This is against the backdrop of a trial which has so far lasted over two years.

432. I have given as careful scrutiny as possible to all points made. I have sifted them, evaluated them and attributed to them the weight I believe they deserve. This has required delving into matters individually in minute detail. It has then required standing back and looking at the overall picture.

433. As I said in open court, and have repeated in this judgment, I accept that TC34 was detained for some periods of time during the Emergency in Manyani, MacKinnon Road and Hola open camp.

434. Each core allegation calls for individual attention. As to the core allegations:

- Three are said to have occurred in camps: Manyani, MacKinnon Road and Hola open camp.
- Two of the camp allegations (Manyani & MacKinnon Road) are said to have corroboration in the form of other abuses occurring at those camps.
- The Hola open camp allegation is one of regular beatings over an undefined period of time. TC34 says that the other four allegations (Ngong Forest, Manyani, Mackinnon Road and Gikuni) were one-off occasions of assault.

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298 John Donne: Meditation XVII Devotions upon Emergent Occasions.

"Equitable to allow an action to proceed"

435. In these conclusions I will draw on the detail of what I have set out earlier in this judgment. I take into account everything I have previously said, but, nevertheless some important matters are worthy of repetition.

436. The essence of the proper exercise of the judicial discretion under section 33 is that the test is a balance of prejudice, and the burden is on the claimant to show that his or her prejudice would outweigh the prejudice to the defendant. Refusing to exercise the discretion in favour of a Claimant who brings the claim outside the primary limitation period will necessarily prejudice the Claimant, who thereby loses the chance of establishing the claim. This is a very important matter. I have attributed to it all the weight which it is proper for me to do.

437. Whether it is "equitable" to allow an action to proceed is no different a question from asking whether it is fair in all the circumstances for the trial to take place. That question can only be answered by reference to "all the circumstances", including the particular factors picked out in the Act.

438. I have to conduct the balancing exercise at the end of my analysis of all the relevant circumstances and with regard to all the issues, taking them all into account. The factors identified in section 33(3) are all relevant, but the decision on whether it is equitable to proceed will be based upon a broad consideration of all the circumstances. The importance of each of those statutory factors, and the importance of other factors (specific to the case) outside the ones spelled out in section 33(3), will vary in intensity from case to case.

The length of and reasons for the delay

439. The length of the delay under section 33(3)(a) is delay since the expiry of the limitation period. The dates are somewhat fluid in TC34's claims. The expiry of the Ngong Forest claim limitation period was probably not later than sometime in early 1958, and the expiry of the Hola open camp claim limitation period probably not later than sometime in 1963. The expiry in the other claims will have been between these dates. TC34 became a party to the proceedings in May 2014. Therefore, the length of the delay covering all claims is probably somewhere between 51 and 56 years.

440. The authorities also establish that the Court may have regard to disappearance of evidence and the loss of cogency of evidence from the time at which section 14(2) was satisfied until the claim was first notified. They are not strictly relevant under section 33(3)(a), but rather under section 33(1).

441. The length of the delay is important, not so much for itself as to the effect it has had.

442. Turning to the reasons for the delay, these are clearly relevant and may affect the balancing exercise. If it has arisen for an excusable reason, it may be fair and just that the action should proceed despite some unfairness to the defendant due to the delay. If, on the other hand, the reasons for the delay or its length are not good ones, that may tip the balance in the other direction. The latter may be better expressed by saying that, if there are no good reasons for the delay or its length, there is nothing to

qualify or temper the prejudice which has been caused to the defendant by the effect of the delay on the defendant's ability to defend the claim.

443. Reasons for delay are not self-proving. No express evidence was given by TC34 about the reason(s) for the delay in his case. It is unsatisfactory to be asked to draw inferences when TC34 gave written and oral evidence and did not address the matter. Any such reasons were not therefore tested in cross-examination.

444. I am prepared, however, to infer that while TC34 was in detention, which would be until about 1963, he had little or no access to legal advice about the possibility of making a claim. If I am not entitled to take this into account under section 33(3)(a), I do so as part of all the circumstances of the case. I also take into account as part of all the circumstances of the case the fact that TC34 has little education and is relatively unsophisticated. These factors I put into the balance when considering whether it is equitable to allow the action to proceed. However, there is no evidence of a good reason for delay after 1963.

Conduct of the Defendant

445. The relevant conduct to be considered under section 33(3)(c) is conduct post-dating the intimation of the claim in 2012. There is no ground for criticising the Defendant's conduct on that basis.

Disability of TC34

446. Disability under section 33(3)(d) means lack of capacity within the meaning of the Mental Capacity Act. This is irrelevant in TC34's case.

The extent to which TC34 acted promptly and reasonably

447. On the evidence TC34 cannot be said to have acted promptly and reasonably once he knew whether the act or omission of the defendant to which the injury was attributable might be capable at that time of giving rise to an action for damages.

The steps taken by TC34 to obtain medical, legal or other expert advice

448. There is no evidence of TC34 having taken any such steps prior to the involvement of the present solicitors.

Section 33(3)(b) - Preliminary

449. Under this subsection I have to consider the effect of the delay in issuing the claims on the cogency of TC34's evidence and of the evidence of the Defendant.

450. The authorities make it clear that it is a well-known fact that memories become less and less reliable the staler an action becomes. This is most relevant to TC34's evidence. The witnesses whom the Defendant was able to call – Mr Kearney, Mr Burt, Professor Khan, Mr Thompson – all suffered from the same problem, but their evidence was of very little significance on the core allegations.

451. The prejudice to the Defendant of losing a limitation defence is not the relevant prejudice to be addressed. The prejudice to be addressed is that which affects the

Defendant's ability to defend. That involves considering what evidence might have been available to the Defendant if a trial had taken place earlier or it had learned of the claim earlier. It is not sufficient for the court simply to hear the evidence of the Claimant, and indeed any other evidence now available, and to decide the issue of limitation on the basis of it, without considering what evidence would or might have been available at an earlier stage. That would be to overlook the possibility that, had the Defendant been in a position to deploy evidence now lost to it, the outcome might have been different.

452. The prospects of a fair trial are important. The Limitation Acts are designed to protect defendants from the injustice of having to fight stale claims, especially when any witnesses the Defendant might have been able to rely on are not available, or have no recollection, and there are no documents to assist the Court in deciding what was done or not done and why. It is, therefore, particularly relevant whether, and to what extent, the Defendant's ability to defend the claim has been prejudiced by the lapse of time because of the absence of relevant witnesses and documents.

453. However, the Defendant only deserves to have the obligation to pay due damages removed if the passage of time has significantly diminished the opportunity to defend the claim.

454. Further, while the ultimate burden is on a Claimant to show that it would be inequitable to disapply the statute, the evidential burden of showing that the evidence adduced, or likely to be adduced, by the Defendant is, or is likely to be, less cogent because of the delay is on the Defendant.

455. In their General closing submissions the Claimants said:

> "4. The approach in *Gestmin SGPS Skeleton Argument v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) is, in Cs' submission, the appropriate approach to take. In essence (§§15-22) the Court relied first on the documentation and then on oral recollection, the latter largely to gauge the witness's approach.
>
> ……
>
> 6. Submissions will be made as to how the individual TCs' recollection matches the documentary record. In general Cs submit that the correspondence is remarkable, particularly given the TCs' illiteracy. It is powerful evidence in support of the general submission that the TCs gave their evidence without guile and in an effort to assist, that the documentary record corresponds with their account."

456. At the time when those submissions were filed, the issues were very much wider than is now the case. The documentary record may have been of assistance in determining some of those issues. Later in that document the Claimants wrote:

> "144. As to cogency and reliability, it must be the case that *Gestmin* and the cases that follow it have a clear effect on the approach to S33. A legal system which relies mainly on oral evidence, either because very little is reduced to writing, or

> because oral evidence is regarded as being something that a Judge can reliably assess for truth, reliability and accuracy, or both, is bound to look at the effect of the passage of time on memory, and be concerned about delay. Once that legal system recognises both that documentation increasingly became the medium of communication as the 20th century went on, and that memory can be unreliable for many other reasons than the mere passage of time, the approach obviously alters. Memory can be tested, and documentation is likely to be more reliable – both as against memory and as a reliable record of what happened."

457. I have summarised the effect of Gestmin and other authorities previously in this judgment under the heading: "The approach to the evidence".

458. Albeit that I am cautious in applying, to the disadvantage of the Claimants' case, the full rigour of Gestmin and the other authorities, nevertheless, the problems of relying on the uncorroborated, or largely uncorroborated, evidence of TC34 at this remove of time are clear. TC34's memory would have been much fresher and therefore more reliable. He may also have been able to give some critical information, e.g. a much better timeframe or names, or at least a description, of the alleged primary tortfeasors. These all affect the cogency of his allegations.

459. Mr Myerson accepted that TC34 could not be right about the dates and, in particular, the amount of time he had spent in Manyani and MacKinnon Road. The problems with the timeline go further than that, as detailed earlier in this judgment. It is highly likely that 50 plus years ago TC34's recollection as to dates and periods spent in the camps would have been more accurate. So would his recollection as to the dates of the Ngong Forest and Gikuni allegations. In relation to the core allegations, TC34 has been consistent as to locus and as to sequence. Nevertheless, I must bear in mind the undoubted confusion as to dates and length of periods and the consequences of this when evaluating the cogency of TC34's evidence. There are few extraneous objective facts by which properly to measure the reliability of his evidence. The greater accuracy and precision which there would have been if the claim had been brought, say 50 plus years ago, would have assisted the Defendant's investigations in locating relevant documents and witnesses against which TC34's evidence could have been tested. Finally, to the extent that TC34 relies on corroborative evidence[299], the dates are of some importance to set the alleged corroboration in context and the extent, if any, to which it supports TC34's case. However, for the reasons given the corroborative evidence is weak, in part because it is itself incapable of now being tested and properly evaluated.

460. In addition, there are examples of lack of cogency as set out in relation to the core allegations and the section sub-titled "The Broader Picture". These include a number of inconsistencies. I have been very careful in the weight I have attributed to the latter where they have not been put to TC34 for comment, but (a) some were, e.g. whether TC34 was assaulted at Mwea[300] (b) they cannot in any event be wholly disregarded when deciding whether TC34's evidence is cogent at this remove of time.

461. In summary, there is no doubt that TC34's evidence has been rendered significantly less cogent by the delay in issuing the claim.

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[299] Particularly re Manyani and MacKinnon Road

[300] See under the Ngong Forest sub-heading

462. Having examined the core allegations in detail, I very briefly summarise the loss of cogency on other evidence. Important contextual witnesses, e.g Mr MacPherson for Ngong and Mrs. Henley-Colgate for Hola (among several others) can be identified as having died many years ago, but also many years after the limitation period expired. On the core allegations and other important or potentially important contextual matters, the Defendant does not know the names of any witness, or have any means of beginning a process of identifying, much less tracing, them. The passage of so many years in this case entail that the Defendant cannot even begin any proper investigation of the core allegations. It does not know who allegedly carried out the assaults or when. It knows nothing about TC34 apart from what he himself has said. To put the matter at its lowest, fifty plus years ago, the Defendant potentially could have found documents which could potentially have led to information about TC34 and to alleged tortfeasors or witnesses. At the very least it probably would have known which documents had been kept and which had been lost/destroyed. All these are, at a minimum, realistic possibilities; some are probabilities. Here, after all these years, the position is that, apart from the clear prejudice that the Defendant can prove, there is further prejudice in that it has been deprived in certain aspects from proving specific prejudice arising from lack of documentary or witness evidence. For example, documents which may have given, or led to potentially material evidence, no longer exist/cannot be found despite serious endeavour to find them; as a result of the passage of time, the Defendant can show that it does not know what happened to them. In the 1950s/1960s, the investigation could have been at least been properly embarked upon, and with a realistic prospect of a positive result. That in itself is prejudice proven by the Defendant.

463. In short, the strong probability is that the Defendant would have been in a very substantially better position to defend the core allegations well into the mid-1960s. As time has passed, so the ability to defend has diminished, such that it is now essentially impossible for the Defendant to have any proper opportunity to find documentary or witness evidence with real relevance to the core allegations.

464. Mr Kearney's evidence as to the severed heads allegation at the CID in Nairobi indicates how the Defendant is prejudiced in relation to all core allegations. There would in the past have been many witnesses who could have given real context to the reliability of TC34's evidence in the way that Mr Kearney's evidence begins to do. Similarly, Professor Khan's evidence on alleged abuse at Manyani gives an insight into the fact that, had the Defendant had the opportunity to investigate TC34's case when the allegations were reasonably fresh, there may well have been a number of other witnesses who would have given a very different narrative from the one I am now being asked to find is fair and convincing as corroboration. Such witnesses may well have radically affected the assessment of TC34's reliability and the core allegations.

Witnesses - Authority

465. In relation to witnesses, it is helpful to remind myself of some authority. I have already cited some of this in the general section on the law, but I wish to repeat and amplify some citations.

466. First, it is, according to the House of Lords, a 'false point' to say that, because the law permits a Claimant to disadvantage a Defendant by dilatoriness within the limitation

period, the Defendant cannot then complain of prejudice once that period has expired. So, even if the position were that the Defendant would have had difficulty tracing witnesses if the claim had been issued some time after the core allegation(s) but within 3 years of them, the point as to prejudice could still be made. In Donovan[301] Lord Oliver said:

"A defendant is always likely to be prejudiced by the dilatoriness of a plaintiff in pursuing his claim. Witnesses' memories may fade, records may be lost or destroyed, opportunities for inspection and report may be lost. The fact that the law permits a plaintiff within prescribed limits to disadvantage a defendant in this way does not mean that the defendant is not prejudiced. It merely means that he is not in a position to complain of whatever prejudice he suffers. Once a plaintiff allows the permitted time to elapse, the defendant is no longer subject to that disability, and in a situation in which the Court is directed to consider all the circumstances of the case and to balance the prejudice to the parties, the fact that the claim has, as a result of the plaintiff's failure to use the time allowed to him, become a thoroughly stale claim, cannot, in my judgment, be irrelevant."

467. In Dale, an accident case, Stuart-Smith LJ, cited Lord Griffiths in Donovan, and said:

"In my judgment where the existence of a claim and sufficient particulars of it are given so late that it is virtually impossible for the defendants to investigate it, either because witnesses cannot be traced, memories will inevitably have faded or vital documents are lost, a defendant is gravely prejudiced if section 11 of the Act is disapplied, because he is almost powerless to defend the case on its merits. In such a case it will require exceptional circumstances to outweigh the prejudice and to bring the scales down in favour of the plaintiff. As Lord Griffiths made clear in the passage I have quoted, the whole purpose of the Limitation Act is to protect defendants from the injustice of having to meet stale claims."

468. Of course, the individual circumstances of the case must be taken into account. There is more background information in the claims in the present litigation. Yet the core allegations are single incidents which, apart from Hola, allegedly took place involving a few individuals. I therefore must take some note of this citation.

469. The passage by Burnett LJ (as he then was) in Bowen is of importance in this context. He also referred to what Lord Brown said in A v Hoare[302]. That passage bears repetition. Lord Brown said in relation to what Burnett LJ described as "the problems of investigating antique events":

"Whether or not it will be possible for defendants to investigate these sufficiently for there to be a reasonable prospect of a fair trial will depend upon a number of factors, not least when the complaint was first made and with what effect. If a complaint has been made and recorded, and more obviously still if the accused has been convicted

[301] At 479H-480B
[302] Both passages are cited previously in this judgment.

of the abuse complained of, that would be one thing; if, however, a complaint comes out of the blue with no apparent support for it… that would be quite another thing. By no means everyone who brings a late claim for damages for sexual abuse, however genuine his complaint may in fact be, can reasonably expect the court to exercise the section 33 discretion in his favour. On the contrary, a fair trial (which must surely include a fair opportunity for the defendant to investigate the allegations – see section 33(3)(b)) is in many cases likely to be found quite simply impossible after a long delay."

Lord Hoffman at [52] said he agreed with all of Lord Brown's speech and added: "..but I respectfully think that his observations on the exercise of the discretion are particularly valuable.." Lord Walker and Lord Carswell fully endorsed Lord Brown's (and Lord Hoffman's) speech.

470. In TC34's case there was no complaint at all at or until over 50 years after the core allegations are said to have taken place. It may be said that the complaints did not come 'totally out of the blue' nor that they had "no apparent support" – in that there were a number of complaints of abuse during the Emergency arising from, in particular, Manyani, MacKinnon Road and Hola. But those other complaints of abuse, by other people and at other times, some of which were investigated by non-judicial inquiries in the 1950s[303], some of which were the subject of court cases in Kenya, detract little, if at all, from the prejudice suffered by the Defendant. The Defendant had no notice whatsoever of TC34's core allegations until more than 50 years had passed, and when its ability to investigate and defend has undoubtedly been severely prejudiced.

471. Further, in A v Hoare the underlying assumption was that the individual tortfeasor was named and could give evidence. If a named tortfeasor is dead and has had no opportunity to comment upon the allegations made against him, then it would take very persuasive evidence to exercise the discretion against that person and then to find against him. The unfairness of making a serious finding of abuse against someone who has had no opportunity to defend himself is patent. If that is so with a named tortfeasor now dead, how can a Claimant be in a better position when he cannot even name the tortfeasor but seeks recovery?

472. I have had full regard to the fact that the section 33 discretion can be exercised in favour of a Claimant, notwithstanding the unavailability of the primary tortfeasor and other evidence. In Raggett v The Society of Jesus[304], Swift J did so in a historic sex abuse case where the alleged tortfeasor, a schoolmaster priest, had died prior to proceedings. The circumstances were:

- The tortfeasor was identified
- The Judge said [123]-[124] it was difficult to envisage circumstances in which a denial by the tortfeasor would have prevailed over the evidence of the Claimant and his witnesses. She pointed out that there were 11 witnesses who supported the Claimant's allegations "to a remarkable degree"[305]. Further, that

[303] The nature and extent of those investigations/inquiries being criticised by the Claimants.
[304] [2009] EWHC 909 (QB); upheld by the Court of Appeal: [2010] EWCA Civ 1002
[305] For details of their evidence, as summarised by the Judge, see [23]-[32].

the tortfeasor "could have had no plausible innocent explanation for the contents of his letter of 28 June 2000[306].

- The Judge found on the facts of that case that it was "highly unlikely that the availability of other member of staff of the College would have improved the second defendant's prospects of succeeding on the issue of liability." [124]

473. There was, therefore, a host of very significant factors in Raggett which are not present in TC34's case.

474. Further, although again I must take into account that all cases differ on the facts, the essence of what the Court of Appeal said in KR v Bryn Alyn at [82] has relevance:

"It should be remembered that the reason for limitation provisions is to protect defendants from the injustice of having to meet stale claims. And a judge, when considering whether to disapply under section 33, particularly where, as here, there is difficulty in testing old and unsupported complaints, should not form a concluded view on their validity for the purpose of determining the existence and extent of potential prejudice to claimants of being deprived of a remedy. Such allegations are so easy to make and so difficult to refute that the danger of injustice is acute. Here, the Judge had to bear in mind the possibility of them being fabricated or exaggerated for financial gain in the wake of publicity about Bryn Alyn and about other care homes where similar conduct had been alleged. Yet his findings, both on the substantive issues and the effect of delay on cogency were based mostly on the strength of the claimants' evidence alone and without rigorous testing by way of cross-examination derived from instructions or contemporaneous records, or of possible contradictory evidence that might have been available if the claims and the trial had been earlier. It was, as he acknowledged in his opening remarks on the section 33 issue, an inherently difficult task, involving inevitable prejudice to the defendants in attempting to meet uncorroborated claims of this sort so long after the event….."

Exercise of Discretion

475. TC34 has not proved in respect of any of his core allegations that his prejudice would outweigh that of the Defendant.

476. The prejudice to TC34 in losing the chance of establishing his claims is of substantial importance. Those claims, though diminished in cogency for the reasons I have given, cannot be demonstrated to be lacking in merit.

477. The length of the delay is very substantial. In Mold v Hayton, Newson[307] at [21] Schiemann LJ, in the context of a clinical negligence claim where the delay had been some 18 years, said:

"If a judge is minded to give such a huge extension of time under section 33, then he is under a duty to explain his reasons with meticulous care."

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[306] The letter, and other correspondence are detailed at [46]-[47]

[307] [2000] MLC 207, CA; cited also in B at [12] and Bowen at [23(iv)]

478. On the evidence I have in TC34's case, it is not possible to explain the reasons to extend time for a period of over 50 years.

479. The effect of the delay in issuing the claims on the cogency of TC34's evidence and, in particular, on the evidence of the Defendant is very significant. The Defendant has had no fair opportunity to investigate the core allegations. There was probably some additional effect before the expiry of the limitation period. This can be taken into account. My decision would, however, be the same without this additional effect.

480. The Defendant's ability to defend has been severely compromised by the delay. Had the claim been brought in time, or even at some stage during the mid-1960s, the evidence available to the Defendant, both documentary and witness, would have been much greater.

481. It is difficult, given the loss of witnesses and documents over time, to determine up to when there could have been a fair trial of some or all of TC34's claims. Had the claim been brought in, say, the 1970s or even later, the evidential position then obtaining would have had to be examined in the sort of detail in which it has now been done. What is clear is that there cannot now be a fair trial of any of the core allegations. That is because of the delay.

482. In coming to my decision I have had regard to all the circumstances of the case, but specifically those under section 33(3).

483. I should add that my decision would have been the same even if I had been able to put into the balance all the reasons for delay which had been pleaded in the Reply, and the others which were the subject of the Claimants' submissions. These reasons, and others if evidenced, may well also have had an effect in TC34's favour under section 33(3)(e) and (f). Nevertheless, the unfairness to the Defendant in defending TC34's core allegations would have still outweighed the prejudice to TC34. Even with those reasons to qualify or temper the prejudice to the Defendant, it would not have been fair and just in all the circumstances to expect the Defendant to meet the claims on the merits.

484. In short, I must refuse to exercise my section 33 discretion in TC34's favour on all his claims for personal injury arising from the core allegations. The position is encapsulated in the words of Lord Brown in A v Hoare already cited: "By no means everyone who brings a late claim for damages….. however genuine his complaint may in fact be, can reasonably expect the court to exercise the section 33 discretion in his favour". In Davies[308] Tomlinson LJ said at [55] that section 33: "…is a corrective for injustice where the circumstances allow." The circumstances do not so allow in TC34's claims.

GLOSSARY PART A

[308] Davies v Secretary of State for Energy and Climate Change [2012] EWCA Civ 1380

'AGD'	Re-Re-Re -Amended Generic Defence
'AGR'	Re-Re-Re-Amended Reply to Defence
'AICS'	Amended Individual Counter-Schedule
'AIPOC'	Amended Individual Particulars of Claim
'ASOL'	TC34's Amended Individual Schedule of Loss
'CCC'	Complaints Coordinating Committee
'CID'	Criminal Investigation Department
'DC'	District Commissioner
'DDO'	Delegated Detention Order
'FCO'	Foreign and Commonwealth Office
'GDO'	Governor's Detention Order
'GLO'	Group Litigation Order
'GRej'	Rejoinder
'IPOC'	Individual Particulars of Claim
'KAR'	Kenya Africa Rifles
'KNA'	Kenyan National Archive
'KPR'	Kenya Police Reserve
'KPRO'	Kenya Police Reserve Officer
'MIO'	Military Intelligence Officer
'PC'	Provincial Commissioner
'RAID'	Re- Amended Individual Defence
'RRRGPOC'	Re-Re-Re-Amended Particulars of Claim
'QOLS'	Qualified One-Way Costs Shifting
'SOL'	TC34's Individual Preliminary Schedule of Loss
'TC'	Test Claimant

'TNA' National Archive

'W' Watch material

GLOSSARY PART B

This part explains the short descriptions used for the various judgments given in this litigation

(i) The historians' evidence and corroborative witnesses Judgment:

Judgment dated 26 November 2015 refusing to permit the Claimant to rely on historians' witness statements prepared for the Mutua litigation; also ruling in relation to "corroborative" witnesses sought to be called for the Claimants.

(ii) The evidence by video link Judgment:

Judgment dated 16 December 2015 setting out which Claimants are to give evidence via video link.

(iii) The preliminary issues Judgment

Judgment dated 18 March 2016 deciding that issues relating to the pre-1954 time bar, and ss. 11, 14 and 32 of the Limitation Act 1980 would be tried preliminarily; the application for the s 33 of the Act preliminary issue to be tried as a preliminary issue was refused.

(iv) The translators' Judgment

Judgment dated 24 November 2016 dismissing the Defendant's application to cross-examine 11 translators, who had translated witness statements of the Claimants.

(v) The burden of proof Judgment

Judgment dated 2 February 2017 deciding where the burden of proof lay on certain issues in the pleadings.

(vi) The refusal of false imprisonment Judgment

Judgment dated 27 April 2017 refusing the Claimants' application to amend the pleadings to include false imprisonment, allowing certain amendments in relation to the 'dilution technique', and allowing amendments to the Individual Particulars of Claim of TC1, TC27, TC30 and TC31.

(vii) The liability amendments Judgment

Judgment dated 18 August 2017 allowing some proposed amendments to 21 of the Claimants' IPOCS and refusing others. The judgment also dispensed with a statement of truth as to the amendments which were allowed.

(viii) The particulars of injury Judgment

Judgment dated 31 October 2017 allowing the Claimants' proposed amendments to the IPOCS where previously pleaded psychological injury had been downgraded to psychological symptoms consequent upon physical injury, and refusing permission to amend where the Claimants sought to rely upon a specific named psychiatric injury/condition; the full rulings on amendment were set out in a Scott schedule.

(ix) The first Hansard Judgment

Judgment dated 20 December 2017 ruling on the admissibility of Parliamentary material as evidence and further concluding that Parliamentary privilege cannot be waived.

(x) The relief from sanctions Judgment

Judgment dated 20 March 2018 ruling that the Claimants need relief from sanctions in order to rely on documents not previously listed for use in the individual final submissions of the Test Claimants.

(xi) The 1954 Judgment

Judgment dated 28 March 2018 refusing the Claimants' application seeking to vary an order dated 27 October 2016 in relation to the long-stop limitation date from 4 June 1954 to 4 June 1953.

(xii) The TC 20 and TC34 documents Judgment

Judgment dated 18 April ruling on the Claimants' application for relief from sanctions, dealing only with TC 20 and TC34. In relation to the majority of documents, relief from sanctions was refused.

(xiii) The second Hansard Judgment

Judgment dated 9 May 2018 ruling on the dispute about particular documents arising from the first Hansard judgment; a Scott schedule sets out the alternative documents that can be relied on, as well as the relevant amendments allowed.

(xiv) The section 32 Judgment

Judgment dated 24 May 2018 ruling that there had been no deliberate concealment pursuant to s.32 Limitation Act 1980.

(xv) The Fear Judgment

Judgment dated 24 May 2018 ruling that Fear does not amount to personal injury for the purposes of s.33 Limitation Act 1980.

APPENDIX

I. Extract from Ms Lohia's First Witness Statement dated 18 November 2015.

"BRITISH ARMY RECORDS

Searching the British Army Records

54. As set out at paragraph 10.b above, a further source of potential witnesses was identified as being those individuals who served with the British Army in Kenya during the Emergency, particularly given that allegations have been made against the British Army in some of the test cases. The legal team has therefore taken steps to identify and contact individuals who served with the British Army.

55. However, the factors described at paragraphs 17 and 45 above apply as much to the identification of individuals from British Army records as from Colonial Office records.

56. Further, save for occasional references to the appearance of uniforms, the test case Claimants have largely failed to identify the basis upon which they recognised certain persons to be member of the British Army: indeed, at times the test case Claimants seem to assert that a given individual was a member of the British Army by reason of the mere fact of that individual's race alone. As such, the Defendant has been confronted with the need to identify which regiments were active in relevant parts of Kenya during the relevant periods. Where the locations named in the test case Particulars of Claim are inconsistently spelled, poorly described, or imprecise, this task has been made very difficult. Of course, that difficulty is compounded where the pleaded date is also uncertain or not stated at all.

57. To address the challenges referred to immediately above, the Defendant therefore compiled a list of regiments active in Kenya during the Emergency. This list is exhibited at ASL8. The Defendant's searches for potential witnesses were focussed on this list.

58. The Defendant requested the Ministry of Defence ("MOD") to search for records of British Army personnel of those that served with the listed regiments. Between May to July 2015, the MOD conducted a number of internal enquiries to seek to locate personnel records of those individuals. Reasonable and proportionate enquiries were made at:

a. the Army Personnel Centre, which holds current personnel records of all serving personnel;

b. the Defence Business Services Management Information Centre of Excellence, which is an arm of the Defence Business Services section of the MOD and holds information about former servicemen; and the Defence Business Service Pensions, which is an arm of the Defence Business Services of the MOD holding pension records.

59. The results returned by the enquiries were as follows:

a. The Army Personnel Centre was not able to provide any personnel names for individuals relevant to the alleged events during the Emergency as they do not hold any data for personnel who served during the 1950s and 1960s. These enquiries accordingly produced nil results.

b. The search for personnel records at the Defence Business Services Management Information Centre of Excellence returned 17 results of individuals who served in Kenya and were thought to be still serving personnel when records started to be stored in this manner during the 1970s.

c. The search for records at the Defence Business Service Pensions produced nil results. However, the names obtained from the Defence Business Services Management Information Centre of Excellence were cross referenced and their contact details obtained. As to the contacting of these 17 individuals, see further below.

Searching Regimental Museums

60. As the MOD was unable to locate details of serving personnel, save for the 17 individuals described above, the Defendant contacted the regimental museums for a number of regiments in August and September 2015. The purpose of contacting the regimental museums was to obtain a list of those who served with the relevant regiments during the relevant period.

61. Regimental museums were contacted for the 49th Brigade, King's Shropshire Light Infantry, Gloucestershire Regiment and the Royal Air Force and the 70th Brigade. Not all of the regiments listed have regimental museums. The National Army Museum was also contacted.

62. However, none of the museums contacted were able to provide a list of personnel.

Searching the National Archives, Imperial War Museum and Hampshire Records Office

63. During the course of conducting research on regiments, the legal team identified that the National Archives, Imperial War Museum and Hampshire Records Office might hold some incomplete lists of regiments.

64. In September 2015, the legal team therefore visited the National Archives and identified the "Army Lists" at the National Archives. The "Army Lists" were incomplete lists of those serving in the relevant regiments. The "Army Lists" did not contain service numbers of individuals.

65. In September 2015, the legal team also visited the Imperial War Museum and identified a number of photos with the names and positions of those serving with the British Army. Those photographs were not a complete record of those serving with the British Army. Again, as with the "Army Lists", those photographs lacked the service numbers of the individuals depicted.

66. In October 2015, the Hampshire Records Office provided the legal team with an incomplete list of army personnel serving in Kenya in a number of different regiments including the Kenya Regiment, Rifle Brigade, Black Watch and Royal Irish amongst others.

Again, as with the lists referred to immediately above, the lists from the Hampshire Records Office did not contain service numbers of individuals.

Contacting individuals identified by means of the British Army records

67. Having obtained the names, but not the service numbers of a number of British Army personnel from the relevant period from the National Archives, Imperial War Museum and Hampshire Records Office as described above, in October 2015, the Defendant's legal team asked the MOD to obtain contact details for the individuals from their pension details. If the service number of a particular soldier is known then it is a considerably less onerous task for the MOD to try to ascertain whether that soldier is known to be alive or dead, and if alive where living. With only the names of individuals this task quickly becomes impracticable. For example it appears that there have been 8000 soldiers bearing the name Wilson contained in the MOD'S pensions database. It is not possible to filter this information by location, date of birth or a range of dates of birth. Of course, as explained above, the Defendant had been unable to access the service numbers of the individuals in the lists from the National Archives, Imperial War Museum and Hampshire Records Office, so that there was no proportionately practicable way to process that information to ascertain whether those individuals were alive, and, if so, their current addresses.

68. As the Defendant does not yet hold any contact details for British Army personnel in the lists from the National Archives, Imperial War Museum and Hampshire Records Office, despite its extensive research, it would not be possible for statements from any such individuals to be served by 18 December 2015.

69. Accordingly, the only individuals who served in the British Army during the Emergency with whom the Defendant was in a position to make contact were the 17 individuals identified by the Defence Business Services Management Information Centre of Excellence. Contact details were obtained for these individuals from the Defence Business Services Management Information Centre of Excellence. Letters requesting their assistance were sent out on 3 September 2015. The letters requested a response within two weeks about whether the recipient would assist in this Kenyan Emergency Group Litigation. The letter attached an FAQ sheet and reply slip. A standard form copy of the letter, FAQs and reply slip (without individual details) is enclosed at Exhibit ASL9. Chaser letters were sent out on 24 September 2015, enclosed at ASL10.

70. Of the 17 individuals to whom letters were sent, 7 responses were received. None of the individuals was willing to assist in this litigation as a witness. The responses were as follows:
a. None were willing to assist;
b. 1 was unwilling to assist;
c. 4 were unable to assist due to not having relevant experiences;
d. 2 were unable to assist due to health; and
e. 5 letters were returned marked: undelivered/individual had moved.

71. The responses were such that the searches for individuals identified by means of the British Army records are markedly less advanced than equivalent searches undertaken by means of the Colonial Office lists.

72. In addition, should it be possible to obtain contact details for any of the individuals in the lists from the National Archives, Imperial War Museum and Hampshire Records Office, the extensive difficulties set out in paragraphs 38 to 48 above in relation to Category 1A and 1B witnesses with respect to interviewing witnesses, cross referencing them against test case allegations and finalising their statements would also apply to any of the witnesses in the above categories. These difficulties are not repeated here, save to say that the nature of these tasks puts the Defendant in a position where it is unable to serve witness statements of witnesses in these categories prior to 5 February 2015, if not later still."

II. Extract from Ms Lohia's Sixth Witness Statement dated 9 December 2016

"28. The process of seeking the names of British Army personnel who served in Kenya during the Emergency and subsequent process of obtaining contact details for these individuals was extremely lengthy and difficult (see paragraphs 54 to 72 of my first statement).

29. For example, even once names of individuals had been identified, it was not possible to obtain contact details for these individuals from the Ministry of Defence ("MOD"). As set out in paragraph 67 of my first statement, there were 8,000 soldiers bearing the name 'Wilson' contained in the MOD's pension database. It was not possible to filter these individuals in any sensible or proportionate way, such as by location served, dates of birth or range of dates of birth.

30. Of the names identified, and as explained in my earlier evidence, the Defendant traced a proportionate sample of 240 of these individuals who served in a cross-section of regiments, parts of which regiments had been deployed in Kenya at the relevant times. It was not however possible, prior to tracing and attempting to contact these individuals, to establish whether or not any particular individual had themselves served in Kenya with their regiment.

31. No statements have been served from this sample. Of the 240 individuals traced, 54 were identified as alive and contactable and contact was established with 41 of these. Of the 41 with whom the Defendant's legal team were able to establish contact, the majority had never been to Kenya at all or had not been posted to Kenya as part of their military service. Of those whom had served in Kenya, none had direct knowledge of the test claimants with whom the Defendant's legal team had identified a potential association (see the process described at paragraph 23d. above). All these potential witnesses have fallen away.

32. This category is therefore complete."