Neutral Citation Number: [2016] EWHC 600 (QB)

Case No: HQ13X02162

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
KENYAN EMERGENCY GROUP LITIGATION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 18th March 2016

Before:

MR JUSTICE STEWART

Between :

Eloise Mukami Kimathi & Ors	**Claimant**
- and -	
Foreign & Commonwealth Office	**Defendant**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Simon Myerson QC, Brian Cox QC, Zachary Douglas QC, Mary Ruck, Sophie Mitchell & Stephen Flint (instructed by **Tandem Law**) for the **Claimants**
Guy Mansfield QC & Peter Skelton QC (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 2 & 3 March 2016

Judgment
As Approved by the Court

Mr Justice Stewart:

Introduction

1. This is the Court's ruling in relation to the application made by the Defendant by application notice dated 18 November 2015 asking for an order "directing that the issues of double actionability and limitation be heard and determined as preliminary issues". In fact, for reasons which I do not need to set out, it is not appropriate at this stage to determine whether to try double actionability as a preliminary issue. The Defendant may/may not renew this part of the application after Easter.

2. The main evidence in support of the application is a statement from Andrew John Robertson, dated 17 November 2015. Mr Robertson is a Government Legal Department (GLD) lawyer. However, there is material in the third statement of Samantha Howard and the first statement of Anju Lohia, dated 18 November 2015 and 17 November 2015 respectively, which is of relevance to the application in relation to limitation.

3. While some dates are somewhat fluid in the future progress of this litigation and will be determined having regard to the outcome of this application as well as other outstanding factors, the following can be stated:

   (i) Witness evidence will be heard from the Test Claimants in a period between May and July 2016. Some will give evidence by video link, some will attend at Court in England.

   (ii) The remainder of the trial including a substantial number of witnesses for the Claimants and the Defendant is due to commence in the autumn of 2016. It is a massive piece of litigation and if heard on all matters will last well into 2017.

   (iii) The action commenced in 2013 and was subject to two case management hearings before the Senior Master. I was then appointed the Managing Judge.

   (iv) In March 2014 I conducted the first cost and case management hearing. A number of issues were dealt with. For present purposes I shall list the following:

   - A mechanism for selecting test cases was set out. This was to be completed by 31 October 2014.

   - Permission was given to instruct Single Joint Experts in the test cases in relation to general medicine and psychiatry.

   - The next CMC was listed for December 2014 to deal in particular with projected costs up to and including trial of the generic issues and to give directions for trial.

   (v) After a further contested hearing an order was made on 23 May 2014. This cost budgeted the costs of the Claimants and Defendant and five other Claimants' solicitors from May 2014 to 12 December 2014. Forty randomly selected test cases were ordered, it being envisaged that the Court would try 25 test cases and 15 standing as reserve. Three of the 40 have since died.

(vi) A further CCMC took place resulting in an order on 11 December 2014. This dealt with matters relating to the group register, the pleadings, witness statements, appointment of the joint experts and disclosure. That order listed a provisional trial window of 5 May 2016 to 7 November 2016.

(vii) On 24 March 2015, an application by the Claimants' solicitors for the test Claimants' evidence to be heard in the summer 2015 was refused. So was the application that evidence be taken on deposition in Kenya. The lead solicitors were given permission to renew that application in November 2015. This was also the case in relation to special measures for vulnerable witnesses. The following order was made – with no objection from the Defendant – :

> "Trial
>
> 5. The trial shall commence on 16 May 2016 for the purpose of hearing the witness evidence of the test case Claimants only. The Court will sit for that purpose between 16 May and 27 May 2016, and between 7 June and 8 July 2016."

(There may be a little slippage in these dates but everything is geared to hearing the test Claimants' evidence so that it is completed by the end of July 2016 at the latest.)

(viii) The order of 24 March 2015 also required the joint medical experts to consider the fitness of the test Claimants to give evidence at trial in England and to deal with the need for special measures. This was an add-on to their job of examining the test Claimants. This work was done by the medical experts in the summer of 2015 in Kenya over a period of a number of weeks.

(ix) By order of 30 March 2015, after a hearing, costs from that date until the end of February 2016 were budgeted.

(x) Following hearings in November and December 2015, I made an order dated 16 December 2015 which:

a. Limited certain lay and hearsay witness evidence.

b. Refused evidence from historians sought to be called on behalf of the Claimants.

c. Ordered that those Claimants who were fit to give evidence should attend in London and those who were unfit (at that stage 16 in number) to be permitted to give evidence by video link from Kenya.

(xi) The parties have since agreed special measures in relation to vulnerable witnesses and, subject to relatively minor though important details, the broad timetable fixed as long ago as December 2014 is being adhered to.

(xii) There is a final cost budgeting hearing fixed for April 2016.

4. The above summary does not set out many other directions, and indeed separate orders, made over the last couple of years with a view to disposing of this case finally as quickly as is possible consistent with the overriding objective.

Civil Procedure Rules

5. I do not propose to set out the relevant rules in full. Nevertheless the most important rules are:

- The overriding objective: rule 1.1(1), (2)(b), (c), (d) and (e).
- Rule 1.4: Court's duty to manage cases. Rule 1.4(1), (2)(c) and (d).
- The Court's general powers of management Rule 3.1(1), (2)(i) and (j).

Steele v Steele[1]

6. In the above case Mr Justice Neuberger (as he then was) dealt with a case listed as a preliminary issue as to whether the Claimant's claims or any of them were barred by the Limitation Act 1980. He reached a conclusion that it would not be appropriate to determine the preliminary issue. He set out the questions which he said should be asked, at any rate in a case such as that, when considering whether or not to embark on a preliminary issue. He said:

> "The first question the court should ask itself is whether the determination of the preliminary issue would dispose of the case or at least one aspect of the case…
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> Second question…is whether the determination of the preliminary issue could significantly cut down the cost and time involved in pre-trial preparation or in connection with the trial itself…
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> Thirdly, if… the preliminary issue is an issue of law, the court should ask itself how much effort, if any, will be involved in identifying the relevant facts for the purpose of the preliminary issue. The greater the effort, self-evidently the more questionable the value of ordering a preliminary issue...
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> Fourthly, if the preliminary issue is an issue of law, to what extent is it to be determined on agreed facts? The more the facts are in dispute, the greater the risk that the law cannot be safely determined until the disputes of fact have been resolved. Indeed, the determination of a preliminary issue, if there are serious disputes of fact, will run a serious risk of being either unsafe or useless. Unsafe because it may be determined on facts which turn out to be incorrect, and this could even risk unfairly prejudicing one of the parties; useless because, having been determined on facts which turn out to be wrong, it would be of no value….

[1] [2001] CP Rep 106; transcript 20 April 2001

> Fifthly, where the facts are not agreed, the court should ask itself to what extent that impinges on the value of a preliminary issue….
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> …a sixth factor which the Court should at least take into account when considering whether or not to order or to determine a preliminary issue… whether the determination of a preliminary issue may unreasonably fetter either or both parties or, indeed, the Court, in achieving a just result…
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> Seventhly, the Court should ask itself to what extent there is a risk of the determination of the preliminary issue increasing costs and/or delaying the trial. Plainly, the greater the delay caused by the preliminary issue and the greater any possibility of increase in cost as a result of the preliminary issue, the less desirable it is to order a preliminary issue. However, in this connection, I consider that the Court can take into account the possibility that the determination of the preliminary issue may result in a settlement of some sort. In other cases the court may well decide that, although the determination of a preliminary issue would not result in a settlement, it will result in a substantial cutting down of costs and time….
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> Eighthly, the Court should ask itself to what extent the determination of the preliminary issue may be irrelevant. Clearly, the more likely it is that the issue will have to be determined by the Court, the more appropriate it can be said to be to have it as a preliminary issue….
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> Ninthly, the Court should ask itself to what extent is there a risk that the determination of a preliminary issue could lead to an application for the pleadings being amended so as to avoid the consequences of the determination….
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> Tenthly, the Court should ask itself whether, taking into account all the previous points, it is just to order a preliminary issue. In this connection, it should be mentioned that the nine specific tests overlap to some extent…."

7. Other guidance was given by David Steele J in McLoughlin v Jones[2] where he said:

> "The right approach to preliminary issues should be as follows:
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> (a) Only issues which are decisive or potentially decisive should be identified;

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[2] [2002] QB 1312; [2001] EWCA Civ. 1743, paragraph 66

(b) The questions should usually be questions of law.

(c) They should be decided on the basis of a schedule of agreed or assumed facts;

(d) They should be triable without significant delay, making full allowance for the implications of a possible appeal;

(e) Any order should be made by the court following a case management conference."

Limitation

8. There is House of Lords authority that causes of action arising prior to 4 June 1954 are time barred. The Claimants seek to distinguish this. It is agreed that this could be dealt with as a short preliminary issue.

9. On the pleadings three further issues are raised in relation to limitation, namely:

   (i) The Claimants' date of knowledge.

   (ii) Deliberate concealment.

   (iii) Section 33 Limitation Act 1980; Discretion.

10. If the Defendant succeeded on all these 3 limbs of the defence of limitation then that would dispose of the entire case.

11. As regards date of knowledge, the Claimants' pleaded case (paragraph 46 of the Amended Generic Particulars of Claim (AGPOC) is that it was only after the decision of Mr Justice McCombe in 2011 in the Mutua case that they had date of knowledge. Whatever the merits of this argument may be, if it stood alone and subject to other considerations, it is something that could properly be tried as a preliminary point after the Test Claimants have given evidence in the summer of 2016. That is common ground. However, whichever way the ruling went, it would not put an end to the case on the issue of limitation.

12. The second limb of limitation is deliberate concealment under section 32 of the Act. In the AGPOC, paragraph 46, this is based on alleged destruction of documentation by the Defendant at the end of Colonial rule in Kenya. From this it is said that the court should draw the inference that this was likely to be, at least in part, for the purposes of concealing information and not simply to dispose of documents. The Claimants say this was discovered in 2011.

13. The Defendant's response on deliberate concealment is that the Claimants have to show that a fact relevant to the right of action has been deliberately concealed rather than the evidence to prove it (Arcadia Group Brands Limited v Visa [2014] EWHC 3561 (Comm)).

14. Section 32(1)(b) of the 1980 Act requires "Any fact relevant to the Plaintiff's right of action has been deliberately concealed from him by the Defendant", so as to stop a period of limitation beginning to run until the concealment has been discovered or

could with reasonable diligence have been discovered. The Claimants say that the potential findings in respect of section 32 if heard as a preliminary issue are such that the Claimants may succeed or fail, but there is a third possibility. This is that the concealment alleged is capable of being deliberate concealment under section 32, but whether or not on the facts there was concealment requires detailed consideration of documentary evidence, and this would be a lengthy exercise adding to the costs.

15. Pausing therefore it seems to me that looking at the first nine points made in the Steele case, it is appropriate to deal with the 1954 time bar, date of knowledge and deliberate concealment as preliminary issues. Though they may not determine the case, it would be sensible to get them out of the way as early as possible. If the Claimants succeeded on section 32, then, strictly, consideration of section 33 would appear to be unnecessary. However, it seems to me that it would be right to continue in those circumstances to continue to hear the case as a whole, for reasons which I detail below in the discussion section relating to section 33. If the possibility arises that I determine that there needs to be further detailed consideration of the facts, then it will be open to me to defer the ruling on section 32 to the end of the litigation.

Limitation: Section 33

16. I remind myself of section 33(1) of the 1980 Act where the decision to be made is whether "it would be equitable to allow an action to proceed" having regard to prejudice to the Claimants and prejudice to the Defendant. In RE v GE [3] the Court of Appeal said this:

> "77. The overriding question is whether in all the circumstances of the case it is "equitable" to allow the action to proceed. "Equitable" means fair; and that means fair to both Claimant and Defendant, not just to the Claimant.
>
> 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…In Cain v Francis Smith LJ 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 the merits…""

17. In KR v Bryn Alyn Community (Holdings) Limited [4] a care homes abuse case, the Court of Appeal said at paragraph 74:

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[3] [2015] EWCA Civ 287
[4] [2003] QB 1441,

> "…(vi) Wherever the judge considers it feasible to do so, he should decide the limitation point by a preliminary hearing by reference to the pleadings and written witness statements and, importantly, the extent and content of discovery….It may not always be feasible or produce savings in time and cost for the parties to deal with the matter by way of preliminary hearing, but a judge should strain to do so wherever possible."

Also to be born in mind from the KR case is paragraph 19 where, in the circumstances of the case when the judge did not deal with limitation as a preliminary issue, the Court found that "This order of treatment appears to have affected his reasoning on the limitation issues, particularly those under section 33."

18. There are therefore particular factors in personal injury limitation cases arising from the words in section 33 "would be equitable to allow an action to proceed", the strong guidance from the Court of Appeal as to the desirability of dealing with such cases by way of preliminary hearing and the risks of not doing so. Those risks are set out in sub paragraphs vii and viii of paragraph 74 of the KR case. Sub paragraph (vii) states:

> "(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 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."

19. In the Mutua case [2012] EWHC 2678 (QB) McCombe J dealt with limitation as a preliminary issue. The bases of the claims are contained in paragraphs 20 – 22 of the judgment. The factual issues which would have arisen at trial are summarised by the judge in paragraph 28. In paragraph 27 it is recorded that, unlike in the present cases, the Defendant admitted that the live Claimants had suffered torture/other mistreatment "at the hands of the Colonial Administrations". In short the generic issues hinged on the potential liability of the Defendant arising from their role in Kenya and their relationship with the Kenyan Government during the emergency. Two generic issues which arise in the present litigation but did not arise in Mutua are the legitimacy of the conduct of the emergency, particularly policies and implementation of detention and villagisation and liability of the Defendant for somebody who was their alleged servant or agent (particularly British Army soldiers) who caused injury. Apart from the generic issues, the individual claimants are said to have to prove the relevant facts and matters substantiating their alleged mistreatment and the relevant regulations

which govern the position. In Mutua, there were no complaints of unlawful detention/villagisation or forced labour. I was taken through the pleadings of Test Claimant 12, who alleges arrest and mistreatment in various prisons and where the Individual Defence avers that there are practically no records which enable the Defendant to deal with the claim. Similar problems of dealing with the claim were exemplified in the case of Test Claimant 39, a villagisation claim. Whether, and if so to what extent there are records which enable the Defendant properly to meet the claims of these and other Claimants is, however, a matter of dispute which is not capable of clear decision at this stage.

20. There is evidence before me from the GLD (Mr Robertson, Ms Howard and Ms Lohia) which deals in detail with the massive resources which the Defendant has so far committed to obtaining witness evidence. They set out a number of difficulties which the Defendant has had in facing the Claimants' allegations. For example they arise from a lack of precision about dates, periods and locations in the test cases, difficulty in tracing witnesses, many of whom are dead or unable to assist, and the difficulty in finding contemporary documents relevant to particular allegations.

Limitation – Discussion

21. Before I turn to the Claimants' case it is to be noted that unusually and because of the stage of the litigation which has been reached, the Defendant's application is that the preliminary issues be heard after the Test Claimants have given evidence in the summer of 2016. This is because their evidence is already scheduled; they are elderly and should not have to await any preliminary issue determination before their evidence has been heard. Everybody agrees that this timetabling should not be disturbed. Indeed, contrary to Mr Robertson's witness statement where he said that the issue could be determined on the papers, the Defendant now submits that it is positively advantageous that I hear their evidence first.

22. The Claimants address the questions raised in the Steele judgment.

23. First they accept that if the Defendant succeeded on all limbs of the limitation defence then that would end the case.

24. Secondly, the Claimants submit that a preliminary issue on section 33 would not reduce preparation at all and would reduce trial costs only if the Defendant succeeded. I accept that a very substantial amount of preparation has already been done and is to be done. I am not convinced that a preliminary issue would not reduce preparation at all, but accept that it would reduce it much less than is normally the case when a preliminary issue is heard early and/or the ambit of the dispute more restricted. The Defendant estimates that a limitation hearing would take two to three weeks (in addition to the test Claimants' evidence). Taking this as a very rough estimate, the trial costs would be substantially reduced if the Defendant succeeded, since, on the estimated timings I have, over six months' evidence and submissions would be avoided. However, the Claimants submit that, even if the Defendant succeeded, any saving in time would be much more modest and, if the Defendant failed on limitation, the trial would be lengthened. The reasons the Claimants give are:

    (a) In order to consider the Claimants' evidence in the context of section 33, the Court will have to consider a very large number of documents in detail.

An example given is that there are allegations that hygiene in camps was bad: for example detainees had to drink toilet water and faeces were mixed in with food, such that they suffered diseases. Although the Defendant may not have any witnesses to deal with such an allegation, there are a number of references in the documentation. In order to determine whether the issues can be fairly tried the Court will have to go through the documentation.[5]

(b) Such is the extent of this exercise, any preparation of trial bundles for section 33 would overlap considerably with trial bundles for a final hearing.

(c) Given that each of the test Claimants has to be looked at individually and the facts and documents relevant to their claims will differ (they are selected as test Claimants because they cover a range of different issues), the length of a preliminary s33 hearing would be considerably longer than two to three weeks.

(d) If the Claimants succeeded on a preliminary issue on section 33 then the trial would be lengthened because the same documents would have to be gone through again for different purposes.

(e) Also there is evidence in some of the documents that other relevant documents are missing because of (what the Claimants alleged to be) the deliberate and wrongful destruction by the Defendant. This would be a factor to take into account in deciding whether it was equitable to proceed.

25. Thirdly, the Court has to consider how much effort will be involved in identifying the relevant facts for the purpose of the preliminary issues. The facts may be very substantial in this regard, though somewhat less than compared with the facts of a full hearing. Nevertheless, the effort involved in identifying the facts for the s33 issue should not be underestimated. To borrow from what McCombe J said in Mutua:

> "No one would, I think, dispute that the present case is not quite like any other that has been before the courts for consideration under section 33." (Paragraph 10)

26. The fourth point, namely to what extent are facts agreed, has to be read in the context of the personal injury cases, namely KR and RE. In those cases the Court of Appeal emphasised the test under section 33 and the strong desirability, if feasible, of determining limitation as a preliminary issue whilst making clear to first instance judges the risks of not doing so. This deals with Neuberger J's fifth point also. A main thrust of the Defendant's case is that it is not fair and just to ask it to meet this case precisely because of the factual disputes.

27. Sixthly, would the determination of a preliminary issue possibly unreasonably fetter the parties/the court in achieving a just result? The Defendant has not yet served all its witness evidence. It is therefore, as the Claimants say, not possible to assess the

[5] The Defendant says that this does not prove that individual Claimants were so affected. This is the type of dispute to which I refer in paragraph 19 above.

difficulty the Defendant actually faces at this stage. This, however, does not necessarily militate against deciding limitation as a preliminary issue. By the time the preliminary issue came to be heard all the evidence would be in and the court would be in a position to make an assessment which would not fetter the court in achieving a just result. It may be, however, that the Court would be so fettered if the preliminary issue was decided in favour of the Defendant, there was then a successful appeal and the trial had to restart part heard some years on. (See later).

28. Seventhly, is there a risk of determination of the preliminary issue increasing costs and/or delaying the trial? The Claimants accept that the issue of limitation is plainly going to have to be dealt with by the court and to that extent there is no increased cost. There may be some duplication of time and cost as set out in paragraph 24 above. The delay in completing the overall trial is likely to be modest in the context of the case as a whole. That assumes I rule against the Defendant. If I rule in its favour then the case will finish somewhat earlier and at reduced cost. The extent of these factors is difficult to determine. They would not be insubstantial but may well be much less substantial then the Defendant submits. Again, I deal with the risk of appeal later.

29. Eighthly, the Court has to ask itself to what extent the determination of the preliminary issue may be irrelevant. It clearly is highly relevant.

30. Ninthly, is there a risk that the determination of a preliminary issue would lead to an application for pleadings to be amended so as to avoid the consequences of the determination? In Steele the judge referred to the real risk of the Claimant reformulating her claim if he were to determine some or all of the issues of limitation against the Claimant. I cannot see that that has any relevance here.

31. Tenthly there is the question of overall justice. This must be considered in the light of the overriding objective and other rules to which I have made reference. It also has to be decided in the context of the guidance given by the Court of Appeal in the KR case. Various matters here arise and I deal with them:

    (a) From the first hearing before Senior Master Whittaker in July 2013 the Claimants' case has been that limitation be dealt with at the conclusion of the evidence. It was not until November 2015 that the Defendant applied for limitation to be tried as a preliminary issue. Nevertheless, it consistently indicated from early 2014 onwards that it was likely to ask for a preliminary issue trial, but would only be able properly to decide after pleadings and disclosure were sufficiently advanced. The Defendant says that it has become clearer as the problems have emerged in obtaining documentation, seeing the Claimants' pleadings and evidence and difficulties in obtaining their own witness evidence, that its view that limitation should be dealt with preliminarily has been reinforced.

    (b) If limitation is decided in the Claimants' favour then there will be no saving; perhaps there would be a moderate increase in cost and delay.

    (c) If limitation is determined in the Defendant's favour then there may be an appeal. Potentially this could hold up the litigation for 2 – 3 years if the matter fell to be decided by the Supreme Court. This is only a risk, but it

is a realistic risk which cannot be discounted. Normally it would not be a factor. This case is, however, different.

(d) In the event of an appeal the case may well have to resume 2 – 3 years after the test Claimants had given evidence. This would be extremely unsatisfactory, to say the least. Further, the rest of the evidence, including that of the doctors, corroborative witnesses to be called on behalf of the Claimants and such evidence as the Defendant has (they have so far served 18 statements of witnesses of fact and suggest they may have up to 50 witnesses) would probably be compromised. The vast majority of the lay witnesses for both sides are very elderly and may not be capable of giving evidence in 3 – 4 years' time. If the hearing did resume and finished within a further 9 – 12 months of a Supreme Court decision on limitation then, given the numerous other legal issues in the case, there could well be further appeals with the potential that the litigation would not finish until some 5 – 6 years hence. [Indeed it is possible that, because of the further lapse of time, that limitation would be raised afresh because of death/incapacity of witnesses.] If the Claimants were ultimately successful they would have been kept out of their money and many are likely to have died before receiving it. I am told that during the course of this litigation 1500 of the cohort represented by the Lead solicitors (about 7%) has died. Of the 40 test Claimants, 3 have died.

(e) An additional risk in proceeding effectively part heard after hearing the evidence of the test Claimants is that I would be tied to the case potentially for some 3 years longer than if the case was heard as a whole. If for any reason, e.g. ill health or death, I was not able to continue then that would have a disastrous effect on the continuation of the litigation in a resumed trial after a successful appeal. The whole process of selecting test Claimants, having them medically examined in Kenya and giving evidence would have to be gone through again. This has been a difficult and time-consuming process so far.

(f) Even if the test Claimants' evidence was not heard in the summer (contrary to everybody's expectation and agreement), so that the case was not part heard, in the event of a successful appeal in 2 – 3 years time, it is likely that a number of the test Claimants would not be then able to give evidence. Again the process of selection, medical examination and evidence would then have to be gone through.

(g) Nor would it be possible to hear section 33 as a preliminary point and, if the Defendant succeeded, to continue with the trial. By definition I would have determined that a fair trial could not take place.

(h) It has to be accepted that if section 33 is not heard as a preliminary issue then, at the end of a full trial, I need to address whether a fair trial has been possible. If I determine this then it seems illogical then to decide that, had it been possible, the Claimants would have succeeded. Although there is the theoretical possibility of appeal by the Claimants with a consequential requirement to make findings afresh on other issues, this possibility is much more remote.

(i) The Defendant submits that it cannot be right that because the Claimants started late and are very old, that that should militate against hearing s33 as a preliminary issue. I see some logic in this but have to look at the overriding objective as a whole.

32. This is an extremely difficult decision. I have had due regard to the authorities and in particular the strong guidance given by the Court of Appeal in KR. Assessing the various risks depends on a substantial amount of crystal ball gazing. I have not lost sight of the fact that an early ruling in section 33 (particularly if in the Claimant's favour) may result in negotiations and settlement. Nevertheless I have come to the clear conclusion that it would not be in accordance with the overriding objective and would not be just in the particular circumstances of this highly unusual case for me to try limitation as a preliminary issue. I have balanced the pros and cons of all the relevant factors put before me as best as I can at this stage of the litigation. I will in due course in the litigation remind myself very strongly of the guidance in KR, paragraph 74(vii) set out earlier in this judgment.

Summary

33. I therefore order:

(i) That the issues relating to the pre1954 time bar, section 11 and section 14 Limitation Act 1980 and section 32 Limitation Act 1980 be tried preliminarily as soon as practicable after the test Claimants have given evidence. This is likely to be early in the Michaelmas term.

(ii) The application for the section 33 Limitation Act 1980 preliminary issue to be tried as a preliminary issue be refused.