Neutral Citation Number: [2017] EWHC 938 (QB)

Case No: HQ13X02162

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
27/04/2017

B e f o r e :

MR JUSTICE STEWART

Between:

Kimathi & others	**Claimants**
- and -	
The Foreign and Commonwealth Office	**Defendant**

Simon Myerson QC, Mary Ruck & Stephen Flint (instructed by Tandem Law) for the Claimants
Neil Block QC, Niazi Fetto & Stephen Kosmin (instructed by Government Legal Department) for the Defendant

Hearing date: 06 April 2017

HTML VERSION OF JUDGMENT APPROVED

Mr Justice Stewart:

The Application Notice

1. On 9 March 2017 the Claimants issued an application seeking an order granting permission to amend the Generic Particulars of Claim (GPOC) and the Individual Particulars of Claim (IPOC) in this case. In support of the application is a witness statement from Steven Martin, dated 9 March 2017 (Mr Martin's eighth witness statement) and another statement from Mr Martin dated 22 March 2017 (Mr Martin's ninth witness statement). The Defendant relies on a witness statement from Alice Ka Ki Lam dated 30 March 2017. Test Claimants will be referred to as "TC". This judgment does not deal with some amendments which are uncontroversial and will therefore be permitted.

Outline Chronology of the Litigation

2. A Group Litigation Order ("GLO") was made on 4 November 2013. By paragraph 6, Tandem Law were appointed the Lead Solicitors for the Claimants.

3. In May 2014 the GPOC were served. In October 2014 the Generic Defence was served. In November/December 2014 the IPOCs were served. The major CMCs before me were on 12/13 March 2014, 10/11 December 2014, 18/19 March 2015 and 2/3 March 2016. Other notable dates were:

   10.12.2014 Amended Generic Defence.

   18.12.2015 First 10 Individual Defences served.

   February 2016 Remaining Individual Defences served.

   March 2016 Amended IPOCs, Amended Generic Reply and Individual Replies served.

4. The trial commenced in May 2016. During June and July 2016 the evidence from 24 then living Test Claimants was heard.[1] Various applications were dealt with in July/August and September 2016. October 2016 was set aside for (a) preparation for the remainder of the trial and (b) preparation of (other) preliminary issues to be heard in the weeks commencing 7 November 2016 and 14 November 2016. Thereafter the Claimants began to open their case based on the enormous amount of documentation. This was not completed by the end of the Michaelmas term. The Hilary term has been spent hearing expert medical witnesses and lay witnesses from both parties, hearing further applications and completing the Claimants' opening. There has already been a not insubstantial amount of chopping and changing in this very complex litigation, due to the substantial overrunning of that opening and to try to accommodate the needs of witnesses.

5. Trinity term is scheduled to be spent hearing a number of the Defendant's witnesses and the Defendant's opening case on the relevant documents. It is not expected that the final submissions will finish before spring 2018, after which there will be a substantial period required for writing the judgment.

Legal Outline

6. CPR Rule 17.1 provides:

> "(2) If his statement of case has been served, a party may amend it only –
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> (a) with the written consent of all the other parties; or
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> (b) with the permission of the court."

7. In Quah Su-Ling v Goldman Sachs International[2] Mrs Justice Carr reviewed the authorities on determining late applications for permission to amend. I am not the first judge to be grateful to her for having done this. I repeat paragraph 38 of her judgment:

> "a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;
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> b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;
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> c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;
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> d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;
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> e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;
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> f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;
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> g) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations

not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

8. The Claimants submitted in their skeleton argument that the application to amend was not "late" within the meaning of Su-Ling. They relied upon paragraph 18 of the judgment of Mann J in the Various Claimants case,[3] where, referring to Su-Ling, he said, "In that context a 'late' application is one made at a time when it would force the abandonment of the trial date if granted." In my judgment the principles in Su-Ling apply. Principle (c) has to be modified to take account of the fact that a very late amendment in the present context is one made during the trial, particularly if it will/may well cause disruption to the trial timetable. Principle (d) is important in considering "lateness".

False Imprisonment

9. In Mr Martin's eighth witness statement he says as follows:

> "15. The Claimants had previously pleaded false imprisonment and that allegation was removed based upon the re-amended Generic Particulars of Claim dated 22 March 2016.[4]
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> …
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> 19. As regards to the reinstatement of the claim for false imprisonment, the litigation has developed further and the Defendant now seeks to rely upon and plead regulations and legislation and has issued an application accordingly on 8 March 2017.
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> 20. In the circumstances therefore, this tort was previously pleaded and the Defendant has therefore previously considered those matters. The Claimants alternatively base their claims for detention on the assault and battery suffered, therefore the claim is not new. Any prejudice to the Defendant is therefore limited.
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> 21. The Claimants contend that with the development of the litigation, proportionality has tipped the other way and the Court should now have the opportunity to assess the issues square on, particularly as the Defendants now wish to say that the detention of the Claimants was lawful."

10. The reference to the Defendant seeking to rely upon and plead regulations and legislation needs a brief explanation. On 9 February 2017 I handed down judgment in relation to a preliminary issue. This concerned the burden of proof in relation to identifying the Emergency Legislation potentially applicable to conduct alleged by the Claimants to have been unlawful, and by the Defendant to be rendered lawful pursuant to that Emergency Legislation; secondly proving that that conduct fell outside or within the terms of the Emergency Legislation.[5] I made rulings in respect of the torts of assault, battery and negligence, and also on joint liability, vicarious liability and knowledge. The answers to the preliminary issues are to be found in paragraphs 35-37 of the judgment.

11. Subsequent to that ruling the Defendant applied for permission to amend its generic and individual defences. Subject to the right to raise Part 18 Questions, this was not opposed by the Claimants.

12. The Claimants' case on false imprisonment is:

12.1 There is evidence of this in the cases of Test Claimants who were villagised and those who were detained without trial. The Claimants accept that their claim for false imprisonment is not a claim involving personal injury. The only way the Claimants can succeed in relation to limitation is if their reliance upon section 32 of the Limitation Act 1980 is upheld in due course.

12.2 The draft Re-Re-Amended GPOC seeks to add the following:

(i) At paragraph 8(3) a claim for detention/false imprisonment.

(ii) Paragraph 13A – a claim that the Claimants will claim for false imprisonment in camps and villages; in particular:

a. they could not leave of their own free will;

b. they were detained in camps and villages without lawful authority.

(iii) A referral back to paragraph 13A in paragraph 31.

12.3 There is reference to false imprisonment in the existing claim for trespass to the person. For example in paragraph 8(1)(b) of the GPOC the allegation is made that the Claimants suffered:

"(a) Assaults and batteries, which may or may not have caused personal injury in the course of:

(i) Forced removal from their homes;

(ii) Detention/ false imprisonment;

(iii) Forced labour without remuneration;"

[See also paragraphs 9(2), 10(2), 13(4) and 31(4)]. It is also correct, as the Claimants state, that substantial evidence has been given in relation to villagisation, detention and forced labour. The Individual Particulars of Claim (IPOC) of the Test Claimants, their witness statements and those of the witnesses who have been called by the Claimants in support have also referred to these matters. Further, the Claimants, in opening their case on the numerous documents, have taken me in detail to contemporaneous evidence on these points.

13. It is important to set out some further background history in relation to the pleading of false imprisonment:

(i) Prior to its removal by the Amended GPOC on 30 May 2014, there had been a CMC on 12/13 March 2014. During that CMC the Defendant contended in its Skeleton Argument that the GPOC needed greater particularisation. In principle this was conceded by the Claimants. Paragraph 8 of the Order of 14 March 2014 required the Claimants by 30 May 2014 to serve a final GPOC which addressed, insofar as

possible, the matters identified in a document from the Defendant to be served by 28 March 2014. That document incorporated by reference a draft schedule which had been prepared for the CMC, which in turn contained requests for particulars of the then pleaded allegation of false imprisonment at sub-paragraph 8(3) and paragraph 24 GPOC. When the Amended GPOC was served on 30 May 2014 sub paragraphs 8(3) and 24 had been deleted. It is worthy of note that a specific request which was not then required to be answered was whether sub-paragraph 8(3) allegedly differed from the cause of action in sub-paragraph 8(1)(b)(ii).

(ii) Whether or not the failure/inability to provide particulars in response to the requests served pursuant to the March 2014 Order led in any way to the deletion of the claim for false imprisonment, it is not possible to say. What can be said is that, had it not been abandoned at that stage, the Claimants were under a duty by reason of that Order to provide particulars of the allegation. By deleting the allegation the necessity to provide the particulars lapsed.

(iii) No claims for false imprisonment were contained in the IPOCs served in November/December 2014.

(iv) Thereafter there has been no suggestion of a pleading of false imprisonment until this application.

14. There is no proper explanation in Mr Martin's witness statements as to the timing of the application to reintroduce the allegation of false imprisonment nearly three years after it was originally removed. Mr Myerson QC told me that the original deletion was caused by counsel error. I have to have regard to the statement of Carr J in the Su-Ling case[6] and also these paragraphs in the Court of Appeal judgment of Swain-Mason v Mills and Reeve LLP[7]:

> "72. …the court is and should be less ready to allow a very late amendment than it used to be in former times, and that a heavy onus lies on a party seeking to make a very late amendment to justify it, as regards his own position, that of the other parties to the litigation, and that of other litigants in other cases before the court….
>
> 106. …there is a heavy burden on a party who seeks to raise a new and significantly different case so late as the opening of the trial. The party applying to amend needs to show why the change is sought so late and was not sought earlier…"

Counsel error is not a potent factor justifying a late amendment and there is still no real explanation as to "why the change is sought so late".

15. The IPOCs are applied to be amended to include claims for false imprisonment. They have never so far included such a claim. For example TC27's IPOC has throughout had allegations of detention and physical assault at 13 places during dates which are not clear. Apart from one amendment (paragraph 30), relating to the Claimant's allegation that he was issued with a Governor's Detention Order when he was at Murang'a police station, there is no proposed amendment to the particulars. In paragraph 102 under the summary of the Claimant's claim the substantive amendment is "b. An action for detention/false imprisonment."

16. The Defendant says that the Claimants have not indicated whether they are alleging that they were falsely imprisoned because (i) the formalities of their detention were not complied with or (ii) because their detention was not justified.[8] This leads into another point which has merit, since it raises the matter of burden of proof. As stated above, in February 2017 I gave a ruling in respect of the burden of proof[9]. It is apparent from the judgment that this ruling on a preliminary point was extremely complex and contentious. The Defendant submits that, if the false imprisonment amendments were allowed, there would be a further contentious hearing as to the burden of proof. They say that the allocation of the burden of proof has not been considered in the authorities to date in respect of allegations of joint liability where the primary tortfeasor is not a party to the proceedings. In respect of this:

    (a) I cannot second-guess the outcome of any such preliminary point.

    (b) If the Defendant was found to bear the burden of proof then in my judgment it is likely to exacerbate the prejudice to which I refer below, particularly because the Defendant would have to plead and prove justification of the detention of each TC, something it has not so far done.

    (c) These problems reinforce the serious questions as to why the application was not made earlier. During the hearing of the preliminary point on 16 January 2017 specific reference was made to the fact that false imprisonment was no longer a pleaded issue.

17. As regards prejudice I do not accept what Mr Martin said, namely that "any prejudice to the Defendant is…limited." In this regard:

    17.1 Mr Myerson QC said that false imprisonment is an issue in the case because it is still pleaded at paragraph 8(i)(b) of the GPOC. Further, there have been references to false imprisonment in the Defendant's response to the Claimants' Opening[10] and other documents.[11] However:

        a) A background claim of detention in relation to the torts of assault, battery and negligence is substantially different from a pleading. The Defendant was not considering false imprisonment as a cause of action as opposed to a backdrop to the other alleged torts. Sub-paragraph 8(1)(b)(ii) is a specific allegation of assault and battery in the course of (*inter alia*) detention/false imprisonment.

        b) Hitherto the Defendant has been concentrating primarily on violence and the apprehension of violence.

        c) There is a difference between taking into account the context of detention and focusing on detention as an issue that sounds in damages.

        d) Although there is some inter-relationship between the legality of villagisation and detention and the legality of any assault during such villagisation/detention, the two are far from synonymous. The Defendant's main focus has been upon alleged serious assaults which they accept cannot be justified by regulations.

    17.2 Ms Lam says[12] that the Defendant would have approached the cross-examination of the TCs very differently in June to July 2016. In respect of

false imprisonment based on villagisation she says that cross-examination, "Would have covered not simply village life in general terms, but the details of the circumstances in which the Claimants came to reside in given locations, the reasons provided to them for the same, the precise length of time of restrictions on movements, the hours of curfew and the circumstances of curfew and penalties imposed and other matters." This is supplemented by the Defendant's submission which refers to compliance by the Colonial Government with any formal requirements for detention, persons responsible for any restrictions on movement, and the extent which the TCs may have disregarded or breached any restrictions or curfews. The Claimants took issue with Ms Lam's evidence that, in order to avoid any substantial prejudice to the Defendant, the TCs would have to be recalled. They submitted that it was unnecessary as to liability for false imprisonment since the relevant matters had already been explored in cross-examination. Further, Mr Myerson took me in some detail through the Defence to the IPOC of TC 30 to illustrate that matters relevant to false imprisonment had been investigated and carefully pleaded by the Defendant. It is correct that there was cross-examination of the TCs which would be relevant to the tort of false imprisonment. Nevertheless, Ms Lam in her witness statement, drafted in conjunction with counsel in the Defendant's legal team, says that the Defendant would have approached cross-examination very differently had false imprisonment been pleaded as a cause of action. This evidence does not lack credibility and I must therefore take it into account.[13] Mr Myerson said that any cross-examination not done so far would go only to quantum. It may be that a substantial part of it would do so, but I do not accept that it goes only to quantum. In the careful exploration of detail of imprisonment many matters may well arise which are relevant to liability. As to quantum, Mr Myerson submitted that since the burden of proof is on the Claimants, if they did not prove the relevant matters, their claim would be appropriately assessed. This does not fully address the point. On the evidence in the case so far inferences may have to be drawn as to details of detention, which inferences would have been controversial had detailed facts been elicited. It is not an answer to this to say that the Defendant should, as it were, have the better of the inferences. If detailed evidence has not been given then, to use the hackneyed phrase, the Court does not know what it does not know. I therefore find that there would be real prejudice to the Defendant in not recalling the TCs.

17.3 It would be wholly disproportionate to recall the Test Claimants to deal with these wide ranging matters if false imprisonment were to be fully pleaded out. The evidence of the TCs was taken in the summer of 2016 before the opening of the case because of their age and frailty. Some of them were not able to travel to England, and gave evidence by videolink from Nairobi. Some travelled to England. One has subsequently died.[14]

17.4 Ms Lam also refers to the documentary searches which would have been done had the pleadings contained an allegation of false imprisonment.[15] Proportionate, though very extensive, searches have been done based upon the matters in issue in the pleadings. Ms Lam says that there was no focus on documentation that might assist in showing that detention was lawful. The Defendant knows that there are records of detention held at the Kenya National Archives (KNA). The Defendant is aware that there are ledgers

detailing detainees held at Mackinnon Road camp and files full of copies of detention orders. A number of other files of detention orders and files which contain names of detainees were not searched. Nor were files held at The National Archive (TNA) insofar as they include, by way of example, a file called "Transit and Screening Camps" dated 1953-1955, "Screening Camp at Embakasi" 1953-1957 and "Persons held by Kikuyu Guard Posts" 1953-1954. Ms Lam says that undertaking such additional research would take some weeks and would occupy members of the legal team currently engaged in other work. In short the Defendant submits that there would have to be further searches with a focus on documents going both to liability and quantum for false imprisonment claims. All this has the real potential for serious disruption of an already substantially extended hearing.

The Claimants also challenged this alleged prejudice. In outline they say:-

> (a) There has been detailed evidence given by the Defendant in previous applications as to the very extensive document searches already done, including with a view to possibly rendering the name of witnesses on whom the Defendant might rely and relevant to the claims of individual TCs; yet they now say that the searches were limited.
>
> - I see nothing inconsistent with this. This evidence was in the context of the pleadings as they stood and the documentary searches were limited in that regard and took account of proportionality.
>
> (b) The examples given of ledgers and other files would have been searched for the names of the TCs and it is difficult to see in those circumstances that they could yield any further information relevant to false imprisonment. Mr Block convincingly responded to this by saying that the searches had been of ledgers/files most likely to contain the names of TCs and a point was reached where a judgment call was made. In the absence of a claim for false imprisonment the relevance of dates and times was not so critical and therefore the files/ledgers referred to were not searched.
>
> (c) The Defendant has a substantial number of counsel and the time disruption alleged has not been justified. The answer to this is that this is the evidence of the Defendant's best estimate; also the relevance of documents needs some supervision/input from senior counsel involved in the day-to-day proceedings of the trial.

I therefore accept that there is likely to be not insubstantial further disruption and delay caused by document searches if I allowed this amendment. There is also the possibility of prejudice from the lack of identifying potential Defendant's witnesses on false imprisonment, though I am not persuaded that there is a substantial risk of prejudice for this reason alone.

18. This trial has now been proceeding for some 10 months. On latest estimates it is not due to finish until early in 2018 at best. This includes some vacation sittings in the past and planned for the future. While this is a very important and very substantial case, the overriding objective nevertheless requires in dealing with the case justly and

at proportionate cost, that there be as much proper regard as possible to timetables and the need to complete the case.[16]

In order to accommodate the exigencies of a trial such as this and the difficulties for the parties, the Court has accepted a number of departures from the normal trial timetable. Test Claimants' evidence was heard before the Claimants' opening. The Claimants' opening has spanned two terms during which other evidence, including a number of weeks' medical evidence was interposed and substantial applications have been heard whilst the trial has been up and running. There is a limit to the strains which can be imposed upon the trial process.

When the further disruption as to documentary searches is allied to:

> (a) The lack of explanation for the deletion of the original allegation; a deletion which the Defendant relied on and to which it has regularly referred.
>
> (b) The need to recall and cross-examine the Claimants and
>
> (c) The fact that there has been a lengthy ruling on burden of proof, without including the matter of false imprisonment,
>
> - my judgment is that this amendment should not be allowed.[17]

19. The Defendant says that the Claimants must plead and prove facts going to the issue of imprisonment, giving particulars in their pleaded case of places, dates and times of day during which they allege they were imprisoned. Ms Lam, at paragraph 62, gives the example of TC27's IPOC draft. She says the lack of particularisation makes it extremely difficult for the Defendant to consider how it relates to issues of limitation amongst other things. The Claimants' response that they have done the best they can based on the evidence. Had the claim been made at the outset, and had the Defendant had the opportunity to cross-examine the TCs in relation to false imprisonment, I may well have agreed with the Claimants. This is of course without prejudice to the Defendant's primary case in relation to the expiry of the limitation period. Nevertheless, at this stage of proceedings, having regard to the other factors which I have set out above and to the principles governing applications for permission to amend, this is yet another point which militates somewhat against permitting this amendment.

20. Finally, in relation to the false imprisonment claim, this is a "new claim" within the meaning of section 35(2) of The Limitation Act 1980. Unless section 33 of that Act is relevant, section 35(3) prohibits the Court from allowing a new claim to be made in the course of any action after the expiry of the limitation period. Section 33 has no relevance to the claim for false imprisonment. The other exception is under section 35(4) and (5) of the 1980 Act. These sub-sections lead to CPR rule 17.4(2) which provides:

> "(2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings."

Here again the Claimants are in difficulty for these reasons:

(a) the Claimants have not shown that the claim for false imprisonment arises out of same or substantially the same facts as are already in issue.[18] As the Defendant says, this issue has not been adequately addressed by the Claimants. In particular:

- The Claimants have not set out the facts upon which they rely in advancing the proposed false imprisonment claim.
- The factual basis of a false imprisonment claim is very different from one which relies on allegations of incidents of physical violence. So for example the villagisation claim may, on the Claimants' case, have been accompanied by physical violence, but keeping people in villages does not necessitate assault/battery during the false imprisonment.
- Such "facts as are already in issue"[19] on any claim in the present pleading go to background matters on a false imprisonment claim, and are not the same or substantially the same as would be the case in a pleaded tort of false imprisonment, though there would be some overlap.

(b) (Alternatively) it is for the Claimants to prove that the Defendant's limitation defence is not reasonably arguable, something which they clearly cannot do.[20]

The Dilution Technique

21. This concerns paragraph 37 of the GPOC. The amendments are to sub-paragraphs 37(c) and (d). They deal with the alleged joint liability of the Defendant for the acts of the Colonial Administration in Kenya. The relevant period is 1957 onwards, when the number of detainees had substantially reduced and the question was how best to lead up to the release of as many as possible of those who remained in detention.

22. The present pleading alleges that there was an instruction by the Secretary of State for the Colonies dated 16 July 1957 which authorised the use of "overwhelming" "beating" and "compelling" force in the context of so-called "psychological shock" treatment against detainees. The instruction of that date is now sought to be deleted; the alleged responsibility of the Defendant for such acts against detainees is to be based not on the instruction, but that the policy authorised by the Colonial Secretary was that a regulation[21] could be used to license systemised violence to break down detainees by caning, that that licence gave rise to a risk that caning would be employed in certain circumstances and that the Colonial Secretary knew or ought to have known that the use of the cane was an adjunct to the use of unlawful force against detainees; in particular that the authorisation of "compelling force" was regularly discussed between the Defendant and those in Kenya and that the Colonial Secretary understood or ought to have understood that the distinction had no proper basis in law or fact.

23. The proposed re-amendment therefore, by the deletion of the reliance upon an instruction dated 16 July 1957, accepts the denial in the Amended Generic Defence of any joint liability based on such an instruction[22]. Unsurprisingly the Defendant accepts this part of the amendment. Nevertheless, the proposed amended positive case is objected to.

24. The following factors are relevant in relation to this amendment:

(a) As the Defendant concedes, the amendment proposed reflects the way the case has been put in detail in opening since 8 February 2017. The Claimants have recently spent a number of days going through a large number of documents supporting that part of the Opening.

(b) The Defendant accepts it would not have cross-examined the TCs in respect of these allegations. Therefore no question arises as to recalling the TCs, a key factor in my refusing permission to amend to plead false imprisonment.

(c) Though no specific reason has been given for this proposed amendment and its lateness, it has been apparent throughout the hearing that there is a huge amount of documentation. Further, new documents have been found or have come to light as the case has proceeded. The Defendant has been critical of the Claimants' disclosure. I do not wish to go into this in any detail save to say (i) there is some merit in the Defendant's criticism but (ii) whereas in ordinary litigation both parties should make proper disclosure and generally speaking that should be the end of the matter, it seems to me somewhat unrealistic to require that given the particular circumstances of this case. Therefore there has been some more flexibility allowed than would otherwise be normal.

(d) The amendment is clear.

(e) The main factor militating against allowing this amendment is that the Defendant would need to conduct further research at TNA and potentially elsewhere. This is to obtain more evidence concerning the background to the Colonial Office discussions on dilution, or at least to rule out the existence of those discussions. According to Ms Lam[23] the necessary further research would take some weeks and would require redirecting key members of the Defendant's legal team. There is a possibility that searches for further documents would lead to the discovery of further witnesses from whom the Defendant may need to take evidence and the Defendant would not be in a position to file an amended pleading in response to this new allegation for at least 2-3 months. Therefore the proposed timetable for adducing the Defendant's documents as part of the Defendant's opening of the case, which is currently agreed to commence no later than 17 July 2017, would have to be put back to accommodate the work. The Claimants do not accept these points and (a) refer to the positive case pleaded in paragraph 62 of the Amended Generic Defence, saying that of itself this required the Defendant to do full investigation on the dilution technique and (b) challenge the extent of the disruption alleged by Ms Lam. I believe there may be some extra cost and delay but it is difficult to estimate. I am not convinced it will be major in the context of the litigation.

25. This allegation is a very important building block in the Claimants' case on joint liability of the Defendant with others. Of course, this cuts both ways in that the absence of an amendment would be very beneficial to the Defendant. It seems to me that having regard to the overriding objective it is appropriate to allow this amendment. The potential injustice to the Claimants if the amendment is refused and the other factors in the overriding objective weigh in favour of permission being granted and I so grant it. There will be no need to recall witnesses and the substance of the allegation has been in the pleadings throughout.

Injuries

26. Four sample IPOCs have been provided. The reason for the limited number is that the review of the medical evidence and pleadings takes some time and the Claimants wish to have this application considered as soon as practicable after the medical evidence has finished. The medical evidence in respect of the four Test Claimants is:

(i) NK (TC1)

Dr White, physician, report 24 August 2015, oral evidence 9 January 2017

Professor Abel, psychiatrist, report 28 August 2015, oral evidence 28 February 2017.

(ii) Maina Ngaari (TC27)

Dr White, physician, report 26 August 2015, oral evidence 10 January 2017.

Professor Abel, psychiatrist, report 31 July 2015, oral evidence 1 March 2017.

(iii) HM (TC30)

Ms McGuinness, physician, report 14 August 2015, oral evidence 22 February 2017.

Professor Fahy, psychiatrist, report 22 August 2015, oral evidence 14 February 2017.

(iv) Robert Njire Ngethe (TC31)

Dr White, physician, report 26 August 2015, oral evidence 10 January 2017.

Professor Fahy, psychiatrist, report 21 August 2015, oral evidence 15 February 2017.

[All the doctors answered Part 35 Questions in the autumn of 2015]

27. With three exceptions the proposed amendments for these four Claimants go no further than updating their age and removing some alleged injuries in the light of medical evidence. The exceptions are:

(i) TC30: an amendment in relation to the scarring to her legs.

(ii) TC31 which now reads "he was beaten ferociously all over his body, including to the scrotal area". The Claimants say that this is a clarification of the case where the injury to the scrotal area is consistent with being beaten ferociously all over his body.

(iii) In each of the original drafts the words "medical evidence is being sought in accordance with the Order of the Court" have been deleted and replaced by these words (or similar): "The Claimant will refer to and rely upon the written and oral medical evidence provided to the Court by Dr White, Consultant Physician and Professor Abel, Consultant Psychiatrist." (Of course in some cases the names of the doctors are different).

28. The Claimants state that the proposed amendments provide clarification of the particular claims in the light of the medical evidence and remove claims no longer pursued. They say the amendments are only to deal with issues established by the medical evidence which are consistent with what is already pleaded. In other words, despite the apparent generalisation of the whole of the medical evidence of the doctors, whether written or oral, the Claimants do not seek to amend so as to rely upon any specific injuries not already pleaded in the Particulars of Injury. There were a number of examples of these in the medical evidence.

29. The main issue in respect of injuries was the general statement that the Claimant will refer to and rely upon the written and/or medical evidence of the doctors. On analysis there is little if anything between the parties on this. The Claimants say it is there only to deal with issues established by the medical evidence consistent with what is already pleaded. This necessitates that there be no amendment allowed of the particulars of injuries save to that limited extent. During the hearing a redraft was provided to add the words "insofar as it refers to matters already pleaded". On that basis permission is granted to amend to include this general statement and (a) it is clearly understood that reliance on the medical evidence will not allow the Claimants to allege anything beyond what has been specifically pleaded[24] (b) as the drafts of the other IPOCs become available, these will be carefully scrutinised by the Defendant. Any unresolved issues will have to be the subject of a ruling by the Court.

30. Against that backdrop I can, with reference to the other two exceptions, briefly deal with the proposed amendments to the particulars of injury in the IPOCs.
    - TC1:

      Paragraph 52: the amendment is allowed.

    - TC27:

      Paragraph 110: the amendments are allowed.

    - TC30:

      Paragraph 52: having dealt with the point about the medical evidence, the only objection made by the Defendant is that, although it accepts the deletion of the allegations that the Claimant sustained permanent scarring on her legs, it objects to the replacement of this with an

allegation that the scarring faded with time. The medical evidence supported the latter and it is a lesser allegation. Therefore I allow it.

- TC31:

  Paragraph 54: The Defendant objects to the inclusion of the wording "including the scrotal area". I allow this amendment since I accept that it is consistent with being beaten ferociously all over the body.

Claimants' reliance on documents in the IPOC

31. I now deal with some further amendments specific to the IPOCs of some TCs.[25]

(i) TC1, paragraph 24: There are no dates in relation to TC1's detention in the IPOC. Paragraph 24 now seeks to add an amendment that she was probably detained towards the end of 1954 or alternatively the latter part of 1955 in some form of camp or alternatively a punitive village. Five documents are relied upon in support of this. They are not documents specific to TC1 but rather general documents dealing with the movement of detainees, control of villages etc. The Defendant says that TC1's oral evidence is consistent with the incident complained of being prior to June 1954. Without wishing to comment in too much detail upon the oral evidence, it is right to say that there is room for argument about dates, these being based on the Claimant's stated date of birth and her recollection as to her age at relevant times.

(ii) TC30, paragraph 42 and 43: The substance of the amendments here is similar to those in respect of TC1, paragraph 24. In summary, the Defendant's case is that the oral evidence is consistent with the pleaded defence so the incidents complained of were prior to June 1954. The amendment pleads that it is probable that TC30's detention was in late 1954 and early 1955 having regard to "The documentation in support of her claim…by way of example…". There are then three documents listed.

(iii) In relation to these amendments:

(a) They come after the service of the original IPOCs, Schedules of Loss, Part 18 Responses, Replies and witness statements, each of which has been signed with a statement of truth. They also come after the TCs have given their oral evidence.

(b) There is no explanation as to from when the Claimants' lawyers have been in possession of the documents, why they were not discussed with TCs when instructions were taken from them, when the significance of these documents was appreciated and why the TCs were not referred to them in the course of their oral evidence.

(iv) Nevertheless, on analysis:

- The present IPOCs do not specify particular dates
- If the amendment is not permitted, the IPOCs, being open as to dates, the Court will be able to make the appropriate findings on the evidence, oral and documentary. It will be perfectly

possible for the Court to say that (for example) the Claimant is mistaken as to dates in the light of the documents.

- In those circumstances the proposed amendments do no more than particularise the claim. If the amendments as to dates are permitted, as they are, the Defendant accepts that there could be no proper objection to the amendments including the documents supporting those dates.

Specific Amendment to the IPOCs of TC27 and TC30

32. TC27

(i) TC27, paragraph 21: The present allegation is that the claimant was electrocuted at Kangema camp. The proposed amendment was "Alternatively, he was electrocuted in a manner as hereinafter pleaded while at Murang'a police station." It has now been redrafted to allege the electrocution was at Murang'a. TC27 gave evidence on 19 July 2016. He was asked in chief

> "Q. I would just like to ask you about one matter that you mentioned in paragraph 18 of your first witness statement. That concerns an incident of electrocution.
>
> A. Yes.
>
> Q. At which camp do you say that incident occurred?
>
> A. At Murang'a police station."
>
> When asked in cross-examination by Mr Skelton QC for the Defendant why he had not corrected that in his witness statement and Part 18 Response he said "Kangema we just passed through on our way to Murang'a, Fort Hall."
>
> The Defendant says despite the fact that the Claimants' legal team knew the position before asking the witness to correct his statement, no amendment was applied for or intimated either before or after he gave evidence. It is correct that it is not explained why this amendment is now proposed many months later. Nevertheless the rationale for the amendment is clear: it is to bring the IPOC into line with the oral evidence given. The Defendant says that no attempt was made to cross-examine Mr Thompson, the Defendant's witness, who gave evidence about Murang'a (Fort Hall) police station, on this issue. However, that is a matter I can take into account on final submissions, if appropriate. There is not alleged in evidence to be any specific prejudice arising from this amendment.[26] Of course that is not determinative of the matter but having regard to the principles as to late amendments and the overriding objective, I allow this amendment.

(ii) TC30, paragraph 48(i) – the present allegation is that the Claimant lost her livestock. In accordance with the evidence given the proposed amendment is that she was forced to leave her family's livestock behind. The Defendant said this should not be allowed as livestock owned by her is not a loss which she can claim. However, the Claimants have clarified that it is not a claim for

special damage but only for loss of amenity and the Schedule of Loss attached to the IPOC has been amended consequentially. On that basis it is allowed.

"Customary International Law"

33. In each of the 4 draft amended IPOCs there is a proposed amendment to the Particulars of Negligence and/or Trespass to the Person. I take TC1's IPOC as an example. The amendments are (as underlined below):

> "(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."

34. I am not prepared to allow these amendments as presently pleaded.[27] They are inadequately particularised in the following regards:

> (a) Establishing a rule of customary international law requires that the relevant settled state practice is extensive and virtually uniform[28].
>
> (b) The state practice is on the understanding that the states are bound by the rule 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.

Summary

35. In brief the amendments in revised drafts are permitted, save those which relate to false imprisonment and customary international law.

Note 1 TC 25 has since died.

Note 2 [2015] EWHC 759 (Comm)

Note 3 Various Claimants v News Group Newspapers [2016] EWHC 961 (Ch)

Note 4 This is an error. It was removed by the Amended GPOC dated 30 May 2014.

Note 5 The judgment is reported at [2017] EWHC 203(QB).

Note 6 Paragraph 38(b).

Note 7 [2011] EWCA Civ 14. I bear these principles in mind in relation to all the proposed amendments.

Note 8 In fact, (ii) includes (i). Further complaint that the Claimants have not said whether a cause of action will be pursued in respect of those TCs who on their own case were imprisoned as a result of a court ordered criminal sanction was dealt with in argument. It will not be so alleged.

Note 9 [2017] EWHC 203(QB)

Note 10 October 2016 (after the TCs had given evidence). See paragraphs 242 and 243, 347–360 and paras 360–410 dealing with villagisation.

Note 11 E.g. a schedule that the Defendant produced in or about July 2016 referring to false imprisonment in the context of forced eviction and villagisation in the regulatory framework.

Note 12 Paragraph 61

Note 13 Mr Block QC made it clear that if I allowed this amendment, the Defendant would apply to have the TCs recalled.

Note 14 The Claimants did not make a fall-back submission that it would be proportionate to recall the TCs.

Note 15 Ms Lam's statement paragraphs 63-67

Note 16 The Defendant, relying on the case of Kooltrade Limited v XTS Limited [2002] FSR 49 suggested that the Claimants' actions were abusive in that they deprived the Defendant of any opportunity to defend itself against consequences of the proposed cause of action. The Kooltrade case dealt with successive joinder of different Defendants after the original Defendant against whom judgment had been obtained had gone into liquidation. I do not think it is of assistance in an application for permission to amend, which is to be dealt with in accordance with well established principles.

Note 17 The Defendant also relied on the fact that advice has been given on the pleadings as they stand. While I do not dismiss this, it is a modest factor in the context of the application to amend re false imprisonment/dilution.

Note 18 See Mercer Limited v Ballinger [2014] EWCA Civ 996 where at paragraph 37 the Court of Appeal made it clear that ""The same or substantially the same" is not synonymous with "similar"."

Note 19 In s35(5)(a) Limitation Act 1980.

Note 20 See Chandra v Brooke North [2013] EWCA Civ 1559

Note 21 Regulation 17 of the Emergency (Detained Persons) Regulations 1954

Note 22 Paragraphs 67 and 68. Paragraph 68 makes the case that the Defendant denies it authorised the use of any unlawful force or treatment.

Note 23 Paragraphs 50-52.

Note 24 The reasons for this are found in outline in paragraphs 30 and 31 of the Defendant's Skeleton.

Note 25 See also the reference to TC27 paragraph 30 in the False Imprisonment section above.

Note 26 Indeed the Claimant was cross-examined on this point and there are allegations of other assaults at Murang'a such that document investigation will have been focused on this.

Note 27 Similar amendments have previously been permitted by consent to the GPOC. However, it is time, in the IPOCs, that they were fully particularised.

Note 28 North Sea Continental Shelf Cases (1969) ICJ Reports page 3 paragraphs 73 and 77