Case No: HQ13X02162

Neutral Citation Number: [2018] EWHC 1305 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
KENYAN EMERGENCY GROUP LITIGATION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/05/2018

Before:

MR JUSTICE STEWART

- -

Between:

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

- -
- -

Simon Myerson QC & Mary Ruck (instructed by **Tandem Law (Lead Solicitors)**) for the **Claimants**
Neil Block QC, Clare Brown and Simon Murray (instructed by the **Government Legal Department**) for the **Defendant**

Hearing date: 9 May 2018

- -

Judgment

Mr Justice Stewart:

Introduction

1. In this case the Claimants claim damages against the Defendant for alleged abuses arising during the course of the Kenyan Emergency during the 1950s. The Claimants have served final submissions in respect of all Test Claimants (TCs) and the Court is due to start hearing those final submissions in June 2018. It was decided that, prior to that stage, it would be sensible if the Court ruled on two matters, namely:

   (1) Whether the Defendant was guilty of deliberate concealment so that section 26 Limitation Act 1939/section 32(1)(b) Limitation Act 1980 operated so as to stop time running against the Claimants. I have decided this matter in favour of the Defendant. See the judgment at [2018] EWHC 1169 (QB).

   (2) Whether fear, caused either by the tort of negligence or trespass, amounts to personal injury so that the Court has the discretionary power to exclude the 3-year limitation period which arises under section 11 of the 1980 Act.

2. In the light of my ruling against the Claimants on deliberate concealment, the class of allegation covered by this judgment will be irredeemably time barred unless the Court has discretion under section 33 Limitation Act 1980.

The Statutory Provisions

3. By section 2 of the Limitation Act 1980, an action founded on tort shall not be brought after the expiration of 6 years from the date on which the cause of action accrued.

4. In respect of personal injury actions, section 11(2) disapplies the 6-year period provided for by section 2. In its place, section 11(4) substitutes a period of 3 years from (a) the date on which the cause of action accrued or (b) the date of knowledge (if later) of the person injured. Date of knowledge is defined by section 14. The position now is that all the TCs' claims are statute-barred unless the Court has a discretion under section 33 Limitation Act 1980. Where a Claimant alleges a straightforward personal injury, the Court will have to address in due course whether or not to exercise its discretion. The dispute between the parties which this judgment will resolve is whether fear alone amounts to a personal injury and, therefore, whether the Court has the discretionary power under section 33 in those claims.

5. Relevant sections of the Limitation Act 1980 are:

> **"11. Special time limit for actions in respect of personal injuries.**
>
> (1) This section applies to any action for damages for negligence, nuisance or breach of duty…where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.…

…

33 Discretionary exclusion of time limit for actions in respect of personal injuries or death.

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

(a) the provisions of section 11…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.

…

38. Interpretation.

(1) In this Act, unless the context otherwise requires —

…

"personal injuries" includes any disease and any impairment of a person's physical or mental condition, and "injury" and cognate expressions shall be construed accordingly;"

Causes of Action

6. The claims with which I am concerned in this judgment are based on negligence and trespass to the person. It is trite law that negligence is not actionable per se. Proof of damage is an essential element in the tort of negligence. Therefore, in the circumstances relevant to this judgment, if fear does not amount to personal injury, then the tort of negligence cannot succeed in any event. However, trespass to the person is actionable per se; i.e. proof of damage is not essential to complete the action. I have not been fully addressed on to what extent, trespass i.e. the intentional causation of fear, would sound in damages.

7. If the claims had been in time, then, for the reasons I have just given, it would have been important to decide as a matter of substantive law whether fear amounted to personal injury. If it did then the claims would have been capable of succeeding in both negligence and trespass. If it did not then the claims would have potentially succeeded in trespass alone (assuming in both cases that all the other ingredients essential to liability were proven against the Defendant). This demonstrates that the definition of personal injury is a matter of substantive law and that section 38(1) Limitation Act 1980 does not restrict that definition. The subsection does not purport to be comprehensive, since it defines personal injuries as including "any disease and any impairment of a person's physical or mental condition."

Summary Factual Matrix

8. In very broad terms the TCs relevant to this issue claim that they were detained in villages or detention camps. Further, that the threat of force compelled them to remain in the villages/detention camps and also to carry out labour. There is no claim for false imprisonment on the pleadings. The Claimants applied to amend so as to plead this cause of action but I refused this for reasons given in the judgment reported at [2017] EWHC 938 (QB). In any event, a claim for false imprisonment would have been statute-barred once I had ruled that section 26 Limitation Act 1939/section 32(1)(b) Limitation Act 1980 did not assist the plaintiffs.

9. I have not heard argument as to whether all the allegations made by the TCs do, on the facts, amount to trespass to the person/negligence. For the purposes of this judgment I am to assume they do.

10. The Claimants seek to exemplify the allegations of trespass and negligence causing fear only, by reference to the final submissions in the cases of TC20 and TC24. I shall briefly summarise those allegations.

TC20

11. TC20's allegations are:

(1) She was living in Majengo and there was a 4am raid in her neighbourhood, when her husband was arrested and she opted to go to Gikonda. She was frightened and submits that this fear was an injury which should sound in damages.

(2) She lived in Gikonda for about a year and then she was assaulted when removed from Gikonda to Thuita. She was badly beaten. Her home was burned. She was made to walk to Thuita which was a journey of about 3 hours.

(3) She was detained at Thuita village for about 2 years. She had no freedom of movement, was required to live where she was told and to engage in work. At Thuita she was assaulted whilst being interrogated about taking the Mau Mau oath and she sustained repeated assaults while working.

(4) She was made to work between 8 am and 4 pm without food or rest during her 2 years at Thuita village and was guarded by the Home Guard while working. The conditions there were harsh.

(5) Being required to stay in the village was a substantial disruption and change. Prior to the Emergency she stayed on her own piece of land. This was not so in the village. Prior to the Emergency she had her own house and grew food crops. She earned money from farming and could buy things she required. When she was in the village she had to sneak out to get food and share it, and would have been severely punished if caught.

(6) After approximately 2 years at Thuita, TC20 was transferred to Githanga, another village. She was made to work hard at Githanga. There were no pit latrines and people had to relieve themselves in the compound and in nearby bushes. Conditions were such, and the beatings so harsh, that when she had the

opportunity she ran away. She could only do this when pass restrictions were lifted. Prior to this point she had no choice but to comply with directions to remain in the village and work. She was in fear of further violence.

12. In those circumstances the following claims are made for damages based on fear alone:

(1) The removal from Majengo – it is said that she had no option and was in fear from the presence of security forces. Events are said to have been likely to have taken longer than an hour and a claim of £500 is made.

(2) 3 hour walk to Thuita – the allegation is that TC20 was forced to leave Gikonda and walk 3 hours to Thuita in Fort Hall. She had no choice. She had already been beaten and her family hut was burned behind her. She feared immediate unlawful violence and her fear was well founded. A claim for damages for these 3 hours is made.

(3) Living in fear at Thuita for 2 years – the claim is for apprehension of unlawful violence for 2 years[1].

(4) Removal to Githanga – it is said that TC20 had no choice but to transfer to Githanga. She does not describe a particular atmosphere of hostility and fear but it is likely that there was such an atmosphere. Therefore, a claim is made.

(5) Living in fear in Githanga for 2 to 3 years – the claim is made on the basis that living conditions at Githanga were the same as at Thuita. TC20 is said to have been under apprehension of violence for 2 to 3 years and a claim is made for this[2]. The case on fear is summarised in the following way:

> "13. What happened to TC20 engaged her basic human rights and the court is invited to so find…
>
> 14. Villagised Cs were required to live under conditions of restriction and curfew where they were subjected to violence and were put in fear.
>
> 15. TC20 lived in a state of fear and distress in punitive conditions. TCs in villages and camps were unable to leave because they knew that they would be apprehended immediately and, most likely, beaten. Cs submit that this conduct is tortious in 2 separate ways:
>
> 15.1 The threat of beating in order to confine TC20 is itself an assault if:

[1] The claim for forced labour at Thuita is made on the basis that she was regularly beaten and is on the basis of a daily rate to take into account the beatings and the forced labour. This may have to be further scrutinised on final submissions in relation to TC20. However, I do not attempt to analyse it at this stage. Subject to proof and section 33 of the Limitation Act 1980, TC20 would be entitled to recover for beatings. However, the requirement to do forced labour is said to be enforced by the apprehension of violence.

[2] The same issue arises in relation to beatings/forced labour in Githanga. I have dealt with this in the previous footnote in relation to Thuita.

15.1.1 It caused fear and distress; and

15.1.2 there was no legal instrument permitting curfew or confining of TC20 to a particular area...

16. …Cs submit they should also be compensated for the conduct outlined at 15.1. Such fear and distress is capable of amounting to a personal injury because of the body's physiological response to fear, perceived by the person as a physical response…"

TC24

13. TC24's case has been chosen as an example as he does not allege that he was beaten. His allegations are that he was forced out of his house and taken to a police post where he was detained. Thereafter he was detained in Kabare village where he lived in insanitary conditions in fear of being punished and shot. At Kabare he was forced to work without remuneration. He says he was detained for approximately 5 years. Therefore, absent success based on section 26 Limitation Act 1939/section 32 Limitation Act 1980, TC24 is left with any remedy statute-barred, unless his allegations of trespass/negligence causing fear amount to a personal injury. As it is put in his final submissions, TC24 represents a cohort of people forced into detention away from their ordinary family lives and jobs but who did not suffer actual bodily harm.

14. In summary, TC24 alleges:

(1) He was forcibly removed from his home in 1953 – 1954 by Home Guards with spears and arrows. His removal was a punishment. He was forced to construct a temporary shelter using the materials from his previous house. He was moved from his shamba in Kabare to Kabare Post which was surrounded by trenches and spikes.

(2) He was then detained in Kabare village where it is said he lived in insanitary conditions. The allegation is that he was likely to have been in a punitive village and could not leave because he was in a confined area and not free to leave.

(3) At Kabare village he had to work 4 days a week without remuneration. He had no time to cook prior to work. He knew that if he did not comply with his detention or the requirement to work, he would be beaten. The submission is that he worked unpaid for at least 3 years. He was required to clear bushes which he regarded as a form of punishment.

(4) His claim for damages is as follows:

- Forced removal to Kabare post – the removal probably took the best part of a day. Total claim £3,300.

- Detention at Kabare post and village – 5 years detention. He was required to work in fear daily and subjected daily to that which was causing him fear, for a period of some 5 years. The way this has been assessed is that a

cross check is given to awards for detention/false imprisonment assessed at £5,000 per year. Therefore, the claim is £25,000.

Procedural Background

15. There is a substantial procedural history to this issue. I have already mentioned the fact that the Claimants applied to amend to allege false imprisonment, which I refused. Further, in my judgment of 31 October 2017[3], I set out in 14 paragraphs my reasoning for my rulings on proposed substantial Particulars of Injury (and other) amendments. In summary (and without consideration of limitation): (i) I allowed amendments "where previously pleaded psychological injury has been "downgraded" to psychological symptoms consequent upon physical injury… because each case will need to be dealt with on its merits during final submissions"[4] (ii) I refused amendments "where the Claimants have sought to amend to rely for the first time upon a specific named psychiatric injury/condition"[5]. There is a lengthy Schedule attached to that judgment which deals in detail with each proposed amendment. It is clear from that Schedule that there was medical evidence that TC20 suffered from a psychiatric condition, namely Post Traumatic Stress Disorder, but a proposed amendment to plead this was refused. There was no evidence that TC24 suffered from a recognised psychiatric condition. The Schedule demonstrates that other TCs fell into one or other category. Had the proposed amendment alleging TC20's PTSD (and the alleged psychiatric injury of other TCs in her category) been permitted, the section 33 discretion would have been available to her.

16. It is therefore not the case, for a number of TCs, that there was no evidence of psychiatric injury arising from their alleged experiences during the Kenyan Emergency. Had, the amendments been permitted, recovery for such psychiatric injury as they may have proved to have been caused by alleged tortious behaviour by the Defendant would have had the potential, pursuant to s33 Limitation Act 1980, to overcome the limitation bar.

House of Lords/Supreme Court authority

17. The starting point is the clear distinction traditionally drawn between fear or other distress short of a psychiatric injury on the one hand, and a personal injury on the other hand.

18. In Hicks v Chief Constable of the South Yorkshire Police[6] Lord Bridge, with whom the other Law Lords all agreed, said:

> "It is perfectly clear that fear by itself, of whatever degree, is a normal human emotion for which no damages can be awarded. Those trapped in the crash at Hillsborough who were fortunate enough to escape without injury have no claim in respect of the distress they suffered in what must have been a truly terrifying experience. It follows that fear of impending death felt by the victim of a fatal injury before that injury is inflicted cannot by

[3] [2017] EWHC 2703 (QB).
[4] Judgment para 8.
[5] Judgment para 9-13.
[6] [1992] 2 All E.R. 65 at 69.

itself give rise to a cause of action which survives for the benefit of the victim's estate."

19. In Rothwell v Chemical and Insulating Co Ltd[7] the House of Lords dismissed claims for symptomless pleural plaques. Part of the way the Claimants' case was put was that the plaques caused anxiety. This was dealt with in the following way by their Lordships:

(i) Lord Hoffman:

> "2. Proof of damage is an essential element in a claim in negligence and in my opinion the symptomless plaques are not compensatable damage. Neither do the risk of future illness or anxiety about the possibility of that risk materialising amount to damage for the purpose of creating a cause of action, although the law allows both to be taken into account in computing the loss suffered by someone who has actually suffered some compensatable physical injury and therefore has a cause of action. In the absence of such compensatable injury, however, there is no cause of action under which damages may be claimed and therefore no computation of loss in which the risk and anxiety may be taken into account. It follows that in my opinion the development of pleural plaques, whether or not associated with the risk of future disease and anxiety about the future, is not actionable injury."

(ii) Lord Hope:

> "50…I would hold however that there is no cause of action because the pleural plaques in themselves do not give rise to any harmful physical effects which can be said to constitute damage, and because of the absence of a direct causative link between them and the risks and the anxiety which, on their own, are not actionable…"

(iii) Lord Scott:

> "65. In considering these issues a number of well-established principles of law, not in dispute before your Lordships, nor I believe at any stage in this litigation, need to be kept firmly in mind. First, a cause of action in tort for recovery of damages for negligence is not complete unless and until damage has been suffered by the Claimant. Some damage, some harm, some injury must have been caused by the negligence in order to complete the Claimant's cause of action. In Page v Smith (1995)…, a case about a psychiatric illness caused by a motorcar accident…, Lord Lloyd of Berwick said that "personal injuries include any disease and any impairment of a person's physical or mental condition". In Cartledge v E

[7] [2007] UKHL 39.

> Jopling & Sons Ltd (1963)… this House held that a physical condition caused by a negligent act or omission had to reach a certain threshold "beyond the minimal" in order for it to constitute an injury for which damages in tort could be claimed."
>
> 66. Second, it is accepted that a state of anxiety produced by a negligent act or omission but falling short of a clinically recognised or a psychiatric illness does not constitute damage sufficient to complete a tortious cause of action. This has been the law for a long time. Lord Wensleydale in Lynch v Knight (1861)… said that "mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act contained of course is that alone". He went on, however, to comment that: "…where a material damage occurs, and is connected with (the mental pain or anxiety), it is impossible a jury, in estimating it (i.e. the material damage), should altogether overlook the feelings of the party interested." So, anxiety simpliciter cannot constitute the damage necessary to complete the tortious cause of action; but if there is some such damage the fact of the anxiety can enhance the amount of damages recoverable."

(iv) Lord Rodger:

> "89…Counsel for the Claimants accepted that, by itself, the present risk that they might eventually develop asbestosis or mesothelioma does not give rise to claim for damages. He also accepted, on the authority of Hicks v Chief Constable of South Yorkshire Police (1992)… that even extreme anxiety amounting to fear of impending death is not actionable. By itself, therefore, the anxiety felt by the Claimants about the risks of developing serious disease in the future is not actionable."

20. In Dryden v Johnson Matthey[8], the Supreme Court allowed appeals by Claimants who had suffered a platinum salt sensitisation which was asymptomatic and whose effect was only that any further exposure to platinum salts would lead to a full-blown allergy involving physical symptoms. Lady Black, with whom the other Supreme Court judges agreed, said this:

> "11…The terms "physical injury" and "personal injury" tend to be used interchangeably in the authorities, and in the documentation in this case, and this is reflected in this judgment, there being no psychiatric injury to complicate the matters.
>
> ...

[8] [2018] UKSC 18.

> 23. The speeches in the Rothwell case possibly shed a little further light on the identifying features of actionable personal injury…
>
> 24. First, it seems to have been accepted that the concept of personal injuries includes a disease or an impairment of a person's physical condition…
>
> 25. Secondly, it was underlined that to be actionable, the damage had to be more than negligible…
>
> 27. It can be seen from the passages referred to above that, as well as the usual reference to "pain, suffering and loss of amenity": personal injury has been seen as a physical change which makes the Claimant appreciably worse off in respect of his "health or capability"…, and also "impairment". Furthermore, it has been established that it can be hidden and symptomless (the Cartledge case)."

21. From paragraph 37 onwards in the Dryden case is Lady Black's discussion from which I shall select some passages:

> "40. The physiological changes to the Claimants' bodies may not be as obviously harmful as, say loss of a limb, or asthma or dermatitis, but harmful they undoubtedly are. The Cartledge case…establishes that the absence of symptoms does not prevent the condition amounting to actionable personal injury, and an acceptance of that is also implicit in the sun sensitivity example, in which the symptoms would only be felt upon exposure to sunshine, just as the symptoms here would only be felt upon exposure to platinum salts. What has happened to the Claimants is that their bodily capacity for work has been impaired and they are therefore significantly worse off. They have, in my view, suffered actionable bodily damage or personal injury, which, given its impact on their lives, is certainly more than negligible.
>
> …
>
> 47. I would distinguish this case from the Rothwell case…the sensitisation of the Claimants in this case marks that they have already been exposed to platinum salts, but unlike the plaques, it constitutes a change to their physiological make up which means that further exposure now carries with it the risk of an allergic reaction, and for that reason they must change their everyday lives so as to avoid such exposures. Putting it in other way, they have lost part of their capacity to work or, as the Claimants put it in argument, they have suffered a loss of bodily function by virtue of physiological change caused by the company's negligence."

22. The Claimants set out a number of propositions, some of which are clearly established by the case law[9]; others are wholly impermissible on authority at all levels, including in the House of Lords/Supreme Court[10]:

(1) The line between whether something amounts to a personal injury can be difficult to draw in certain cases. Thus:

- Unwanted conception is a personal injury as "the resultant physical change in her body resulting from conception was an unwanted condition which she had sought to avoid by undergoing the sterilisation operation"[11].

- Loss of semen is not a personal injury as "it would be a fiction to hold that damage to a substance generated by a person's body, inflicted after its removal for storage purposes, constitutes a bodily or "personal" injury to him"[12].

- Failure properly to address dyslexia is a personal injury. In Adams v Bracknell Forest BC[13] Lord Hoffman said:

> "19. In Robinson v St Helens Metropolitan Borough Council [2003] PIQR P128 Sir Murray Stuart-Smith examined the authorities to which I have referred and drew the following conclusion, at p136:
>
> > "Dyslexia…may in itself be an "impairment of a person's mental condition". It is not of course caused by the Defendant; but negligent failure to ameliorate the consequences of dyslexia by appropriate teaching may be said to continue the injury, in the same way that the negligent failure to cure or ameliorate a congenital physical condition so that it continues, could give rise to an action for personal injury. Although as I understand it dyslexia cannot be cured, a dyslexic person can be trained to overcome the difficulties in reading and writing which he experiences."
>
> 20. In my opinion, this summary of the effect of the cases is correct. But on what basis can the lack of the ability to read and write be a personal injury? We know very little about the way the brain works. Some mental disabilities are caused by congenital and irremediable defects in the brain circuitry. But the brain has the most remarkable capacity to compensate for defects or injuries by calling upon other parts of the circuitry…it seems to me that Evans LJ was quite right to draw an analogy with negligent failure to treat a physical injury which the Defendant did not itself cause. It would be drawing

[9] See (1) – (2) below.
[10] See (3) below.
[11] Walkin v South Manchester Health Authority [1995] 4 All E.R. 132 at 139j.
[12] Yearworth v North Bristol NHS Trust [2010] Q.B. 1 at para 23. The "not merely mental distress but a psychiatric injury, namely a mild or moderate depressive disorder" (para 10) was recoverable.
[13] [2005] 1 AC 76.

too fine a distinction to say that the neglect caused no injury because nothing could be done to repair the congenital damage in the brain circuitry and the other parts of the brain which would have to be trained to compensate had never been injured. What matters is whether one has improved one's ability to read and write. Treating the inability to do so is an untreated injury originally preceding from other causes produces a sensible, practical result."

(2) In physical cases the threshold for actionable personal injury is low:

- In Cartledge v Jopling[14] Lord Pearce said:

"…In no case is it laid down that hidden physical injury of which a man is ignorant cannot, by reason of his ignorance, constitute damage…there is no legal principle that lack of knowledge in the plaintiff is to reduce the damage to nothing or make it minimal."[15]

- In Carder v Exeter University[16] Lord Dyson MR said, in the context of a case of asbestosis:

"22. It can be seen that, in the context of asbestosis, the words "disease" and, "impairment", "injury", "disability" are used interchangeably. I do not find this helpful. With respect to the House of Lords in Rothwell's case…it is unprofitable to consider whether a particular medical condition should be characterised as "disease" or an "injury". Instead the focus should be on whether, to sue the language of Lord Hoffman, the medical condition has made the Claimant worse off. Most diseases or injuries do make a person worse off, but that is not always the case as Rothwell's case demonstrates…"

- Dryden's case from which I have cited above.

(3) The central proposition in the Claimants' skeleton is in paragraph 38 where it says:

"38. Awarding damages for fear is an extension of the existing law only if a distinction is drawn between physical and mental injuries. No such distinction is justifiable: robustness and determination to carry on – both demonstrated to a considerable extent by the TCs – is a factor in assessing damages, not determining whether there has been an injury. Once the law has determined that minor insults are recoverable if they consist of an injury, the protection is provided by the rule that trifling damage is irrecoverable. The law does not require a further,

[14] (1963) A C 758.
[15] pp 778-9.
[16] [2016] EWCA Civ 790.

new, protection discriminating between different manifestations of physiological change."

As to this:

(a) People may argue that the distinction between the physical and psychological consequences of a tort is not justifiable. However, that distinction is precisely one that has been drawn throughout the authorities and over many years. It is, in my judgment, now so firmly embedded that the Supreme Court would have to depart from its own previous decisions in order to find that fear alone without any recognisable psychological injury amounts to a "personal injury". I heard evidence from 4 psychiatrists, over a number of weeks. They were asked to (and did) draw the distinction from a medical perspective between what did and did not amount to a diagnosable psychiatric condition. Where they gave evidence that a Test Claimant suffered from such, then, had it been properly and timeously pleaded, the court would have had the discretion under s33 to allow the (otherwise time-barred) claim to proceed and, if proven, to succeed against the Defendant.

(b) I have already cited in this regard the relevant passages from Hicks, Rothwell and Dryden. Nowhere have any of the principles enunciated in Hicks ever been doubted. The dividing line the courts have drawn between the physical and psychological consequences of a tort, and what amounts to a "personal injury" cannot, I would respectfully suggest, be better stated for present purposes than by reconsidering the quotation I have already made from Lord Bridge's unanimously agreed speech in Hicks[17].

23. Indeed, the closing submissions on behalf of TC20 refer to the citation from Hicks in saying that "the law prior to the Human Rights Act 1998 was clear."[18] Further, paragraph 112 of those submissions cited the case of RK and MK v Oldham NHS Trust[19] for the proposition that "the situation regarding damages for distress was reappraised after the Human Rights Act 1998… first, parents could not recover for emotional distress as a result of their child being taken into care." In RK claims were brought under the HRA and the Convention based on infringement of the right to family life. One of the preliminary issues before the court was whether the medical evidence in relation to the child, MK, disclosed an injury for which the law recognised a remedy. It was submitted that MK had suffered "an injurious interference with her well-being as a result of separation from her parents" whilst it

[17] Unsurprisingly, this is reflected in the many textbooks e.g. Kemp & Kemp, 'Quantum of Damages' at para 1-001.6 "It has long been established that unpleasant emotions do not constitute a psychiatric illness and such emotions which are not associated with a physical injury will not qualify as an actionable personal injury on their own"; Clerk & Lindsell on Torts 22nd Edition para 1-32 "As a general rule, torts that require proof of damage do not count "mere" distressful injury to feelings as compensatable loss. So with a claim in negligence for "pure" psychiatric harm (i.e. psychiatric harm that is not consequent on physical injury to the Claimant) there can be no claim for emotional distress, anguish or grief…"

[18] The closing submissions were drafted before the Supreme Court decision in Dryden but, as Lady Black said at para 11 of Dryden, in that case there was "no psychiatric injury to complicate the matters."

[19] [2003] Lloyd's Rep Med 1.

was recognised that no psychological injury was caused by the separation. Simon J (as he then was) said:

> "The difficulty with these submissions is that they are directly contrary to the law established by numerous authorities over many years in English law that no damages are awarded unless there is physical harm or there is a recognisable psychiatric disorder. No physical harm is alleged in this case and Mr Radcliffe found no evidence of a psychiatric disorder: in these circumstances it is not open to a court to find that there is an injury of sufficient severity to entitle a claimant to damages. See for example Reilly v Merseyside RHA (1995)… Emotional responses to unpleasant experiences of even the most serious type do not found a claim for damages: see also McLoughlin v O'Brian (1983) AC 4 10. Lord Bridge at p. 431 G-H. Nor in my view, is this an area of law in which the court should infer that there has been an injury where the experts in the field do not." He rejected the suggestion that the law should be developed saying "the bar on recovery in such cases cannot properly be described as unreasonable and, even if it were, removing the bar cannot properly be described as a matter of logical necessity." (Para 21)[20]

24. The Claimants say that fear is not symptomless or hidden. The Claimants felt fear and it was intended that they should do so in order to secure compliance with orders. Fear also provokes physical change albeit transitory and there is an identifiable physiological effect: the release of adrenaline, an increase in blood pressure and an increase in heart rate[21]. Once the threat ceases, physiological markers return to normal, but the changes are felt by the person concerned. Fear, they say, is unpleasant and made the Claimants appreciably worse off and compelled behaviour which would otherwise be different. It also results, or can result, in impairment of normal daily function and is not negligible.

25. None of these submissions, in my judgment, changes the position clearly founded in the authorities that anything short of a recognised psychiatric condition cannot amount to a personal injury.

26. Before turning to the submissions in relation to the Human Rights Act/Convention, I deal with some other matters.

27. The first is that the same definition of "personal injury" used in s.38 of the Limitation Act 1980 is to be found in other statutes[22]. The approach of the courts has been to adopt a consistent construction of "personal injury". So in the Adams case Lord Hoffman said at para 18 "it also seems to me that although strictly speaking the Anderton case decides only that the claim was for personal injury within the meaning of section 33 (2) of the Supreme Court Act 1981, the reasoning is equally applicable to section 11 of the Limitation Act 1980, which by section 38 (1) defines "personal

[20] I shall deal later with the argument about the impact of the HRA and the Convention.
[21] They rely on the evidence of Mr Heyworth, a consultant physician.
[22] See for example the Consumer Rights Act 2015 section 65.

injury" as including any disease and any impairments of a person's physical or mental condition."

28. The second point is that in the closing submissions for TC24[23], the Claimants made the point that fear is "not a symptomless or silent injury. TC24 felt fear because he had a physiological response to external events." That statement is followed by this: "the closest the courts have come thus far is in Hussain v Chief Constable of West Mercia Constabulary [2008] EWCA Civ 1205, where C alleged that discrimination by the police amounted to misfeasance in public office/tort not actionable per se." Reference is then made to paragraph 20 of Maurice Kay LJ's judgment and the Master of the Rolls' comment at paragraph 21. The Claimants in Hussain alleged a claim of racial harassment against him. There was no evidence of a recognised psychiatric illness. The medical report recorded that the Claimant was worried that the police could make up any story about him and get him into serious trouble, and that his children made him irritable and he was less tolerant and got angry all the time. He gave "a good description of stress-related symptoms experienced as irrationality, mood changes and somatised physical symptoms of anxiety such as numbness and discomfort in the left leg." He pleaded that he did not have "a current psychiatric diagnosis" but did "however, experience significant anxiety symptoms at stressful times, which he experiences as is very common, as irritability and physical discomfort, probably deriving from perceived muscular tension in the left arm and leg." All three members of the Court of Appeal agreed that the symptoms were insufficient to satisfy the test of material damage. Maurice Kay LJ said:

> "19 …Like Stanley Burton LJ I have concluded that it is not "material damage". I do so on the basis that, as presented in this case, it is trifling and without the significance required to turn the non-actionable into the actionable. On the other hand, I do not interpret the words of Lord Bingham as requiring "recognised psychiatric illness". He said…that material damage includes recognised psychiatric injury, not that it is limited to it as the only allowable type of non-physical injury.
>
> 20. Misfeasance in public office is an intentional tort of considerable gravity. It is a tort of obloquy…In most of its manifestations, it does not result in physical injury. Whilst it is entirely appropriate to deny actionability where the non-physical consequences are trivial (so avoiding lengthy trials which, at best, result in very modest awards of damages), it is important not to set the bar too high. There is a risk that, in the hands of an average claimant, it will become a toothless tort, availing only commercial claimants who can show pecuniary loss and individual claimants with egg-shell personalities who are tipped over the edge into recognised psychiatric illness. For my part, I would not wish to shut out a claimant who has the robustness to aver recognised psychiatric illness but who nevertheless suffers a grievous non-physical reaction as a consequence of the misfeasance. It seems to me that what Lord Bridge was concerned to discount in McLoughlin v O'Brian…

[23] Paras 37 – 40.

> was "normal human emotions", not significantly abnormal manifestations of non-physical sequelae. If my approach does not live easily with the established approach in cases of negligence resulting in personal injury, I would strive to treat misfeasance in public office exceptionally…"[24]

At paragraph 40 of TC24's closing submissions it is said "Cs rely on those comments, but in the years since Hussain it has become much clearer that what is called "psychological injury" is, in fact, simply a combination of bodily functions manifesting themselves in particular feelings and behaviour. This is no different." Yet there has been no evidence that anything has become clearer about psychological injury relevant to this matter in the years since Hussain. That is an assertion based on no evidence and, if meant to suggest that knowledge of the physiological response if a person suffers fear has materially developed in the last ten years, is, I suspect, erroneous.

29. As to Hussain:

(1) The comment is obiter; also the point was not fully argued.

(2) As is clear from paragraph 12 of Stanley Burnton LJ's judgment, the law divides torts in two kinds, those that are actionable irrespective of any damage to the victim, and those of which an essential ingredient is damage or injury suffered by the victim as a result of the tortfeasor's breach of duty. "…torts of the first kind are described as torts actionable per se; in torts of the second kind, damage is said to be of the gist of the action. Historically, torts of the second kind were litigated by actions on the case." The tort of misfeasance in public office requires material damage as an essential ingredient of the tort. The claims in the present case are based on the torts of (i) trespass (ii) negligence. Trespass is actionable per se[25]. Negligence is not.

(3) Conclusively, I am bound by the raft of higher court authority to which I have referred, which is only a sample of such authority.

30. The third point relates to the submission that TC24 "felt fear because he had a physiological response to external events." I asked Mr Myerson QC to take me to the evidence of this. The relevant evidence is as follows:

(a) TC24's Individual Particulars of Claim:

---

[24] The Master of the Rolls said "As to the precise scope of the "material damage" required to establish the tort of misfeasance in public office which is touched on by Maurice Kay LJ, at [20] above, I entirely see the force of the point he makes. However, I would prefer to defer expressing an opinion upon precisely what amounts to actionable damage until the issue arises on the facts of a particular case. I would only say that, as I see it at present, in a case such as this, it must be injury of some kind, whether psychiatric or physical."

[25] Clerk & Lindsell para 15-139 says "any trespass to the person, however slight, gives a right of action to recover at least nominal damages. The defendant may still be liable in trespass for all the consequences flowing from the tort whether or not those consequences are foreseeable. Even where there has been no physical injury, substantial damages may be awarded for indignity, discomfort or inconvenience. Where liberty has been interfered with, damages are given to vindicate the claimant's rights even though no pecuniary damage has been suffered…"

"12. The Claimant and his neighbours were in fear and could not resist the forced removal for fear of being assaulted. He was forced to walk to the local Post with other men, women and children. He saw others being beaten en route, although he himself was not assaulted on the journey. He felt shock, anxiety and fear…

(Kabare Post)

15. People were beaten and were in fear of being beaten in posts of this nature and it is likely that the Claimant was in such fear.

(Villagisation)

21. The Claimant was not permitted free movement from the village and was forced to undertake work.

Forced labour during villagisation.

…

25. The Claimant saw white soldiers with his own eyes, wearing uniforms and dressed ready for war, near the forest. He was afraid and felt he would be shot at any time. He was aware that the soldiers would shoot and kill people. This was intimidating and he lived in fear…

27. The Claimant lived in fear of arbitrary maltreatment and punishment…"

(b) Part 18 Response

"Detention at Kabare Post":

Paragraph 15 "it is likely that the Claimant was in…fear [of being beaten]"

What is the Claimant's positive case? Was he in such fear or not?

If so:

Of whom was he in fear, and on what basis…

Response…

The Claimant was in fear of being beaten. The Claimant states that this fear was based on their own knowledge and experience of having seen others being whipped and beaten at the Post for not carrying out instructions to the letter given by the Home Guards.

The Claimant states that "you would be beaten or whipped if it was seen that you were not working sufficiently hard enough…"

(c) Witness statement:

"18. I followed instructions because I was determined to get independence and the white man would eventually leave us. I was afraid of the white man because I knew he would shoot me at any one time. The people from the forest come to the village during the night and be shot."

(d) Transcript of evidence:

"Mr Gullick: could the work clearing the bushes have been to stop the Mau Mau from hiding in the bushes?

A. Yes, it was to protect them from coming to the residential areas because we would clear the bushes from where the trenches - the defence trench was coming into the village, coming into where we were staying. That's the bushes we would clear.

Q. Were you guarded by the Home Guards during the work?

A. Yes, they were guarding - they were guarding us to work and they were being paid by the British. And I don't know whether for sure they were being paid -

Q. Was that -

A. - But they were employed by the British…

Mr Gullick…were the Home Guards guarding you to protect you and the other workers from the Mau Mau?

A. I don't know whether they were connected with the other groups during that time, although they were supposed to – they were supposed to attack the Mau Mau but not to beat us…

Mr Justice Stewart… "They" – that's the Home Guard – "were supposed to attack the Mau Mau but not beat us", on what basis does he say that's what they were supposed to do?

A. When they were beating – when they were - they were staying with us and they were telling us to fight the Mau Mau so we didn't know whether they belonged to the government or they were also part of the Mau Mau, because they would tell us "you go and beat the Mau Mau", yet they were with us…"

31. Given that the Claimants' argument was based on the physiological reaction when in fear, I sought to clarify when, on the above evidence, it would be said that TC24 experienced the physiological reaction, especially as the only reference to his having seen somebody being beaten was in the Part 18 Response relating to Kabare Post. Mr Myerson said it was a matter of inference. This is a practical problem which may cause difficulty in psychological cases which fall short of a psychiatric injury. The use of the word fear covers a very wide spectrum. For example, people may describe themselves as living in fear of a particular type of cancer because there is a strong family history of the disease. That sort of fear would not appear to be included in the Claimants' definition. In the case of TC24 and looking at the evidence set out above, there appears to be substantial scope for submissions that either all or the vast majority of the time that TC24 was detained and/or was carrying out labour, his fear was a background fear, rather than one giving rise to physiological change; alternatively, that physiological changes are likely to have been de minimis. In his case, and potentially those of other Test Claimants, even if I drew the line at the point where the Claimants ask me to draw it, success may be very limited.

32. In essence, Mr Myerson's submission was that, just as physical injury e.g. bruising, does not require medical evidence in order to be a recoverable head of damage as "personal injury", so should psychological consequences so long as they are not de minimis or unforeseeable. He said that the bar is set low for actionable physical injury and there was no reason to differentiate psychological symptoms. He accepted that if a passenger in a car which was involved in a substantial accident and suffered neither physical injury nor something which would be diagnosed as a psychiatric condition, nevertheless, subject to the de minimis rule, damages would be recoverable. Thus, upset and nightmares falling short of the psychiatric diagnostic criteria would be recoverable as personal injuries, if not de minimis. Thus, this extension of what does or does not amount to personal injury is not restricted to fear but to any other emotional/psychological reaction (e.g. distress, upset or weeping) which could be said to have a physiological basis. It is therefore apparent that the extension of the traditional definition of "personal injuries" would be extremely wide ranging and have numerous substantial consequences across the law of tort[26].

The effect of the HRA/Convention

33. The Claimants submit that the treatment of them by the Defendant engages their human rights. The way in which they were treated was arguably inhumane and degrading sufficient to engage their rights under Articles 3, 4 and 5 of the Convention. The Court is not being asked to decide whether their human rights were breached. There is no free-standing human rights claim. What the Claimants say in paragraphs 51-52 of their skeleton is:

> "Cs seek the Court's finding that their human rights were engaged in order to frame the exercise of the Court's function as a public body in determining the issue of law before it. If there is any question of whether fear comes within the definition of "any impairment" for the purposes of the Act, an application of principles of human rights should tip the balance… as long as one human right is engaged Cs' human

[26] See further at paragraph 36 (6) below.

rights are engaged for the purposes of the Court's determination of this issue."

34. A number of authorities are cited in support of the submission that the allegations of ill-treatment and incarceration are sufficient conditions for the engagement of a human right or rights to exist, since they "involve a personal interest close to the core of a right."[27] Further, a number of authorities are relied upon in support of the argument that Article 3 was engaged because of the use of physical force and degrading treatment against detained persons, including threats sufficiently real and immediate to cause mental anguish[28]; also the engagement of Articles 4 and 5 because of forced labour and detention."[29]

35. Finally, the Claimants submit that Article 13 ECHR requires a domestic remedy and penalises the lack of it[30]. However, the Claimants say that, to ensure human rights are respected, the common law has developed so as to accommodate an approach compatible with human rights[31].

36. The Claimants' argument that the HRA/Convention authorities make any difference is not sustainable because:

(1) There is no question but that "fear" is not a personal injury. Therefore, there is no balance to tip. The authorities are clear. Nothing has been said in any subsequent case before the House of Lords or the Supreme Court which undermines what Lord Bridge said in Hicks.

(2) The Claimants have a right to action in trespass to the person[32] subject to a limitation bar:

(i) If the trespass causes personal injury then:

(a) There is a 3-year limitation period from the date of the injury, or the date of knowledge, whichever is the later.

(b) This is subject to section 26 Limitation Act 1939 and section 32 (1) (b) of the Limitation Act 1980.

---

[27] (R) v Secretary of State for the Home Department [2006] UKHL 54 (paras 12-13); M v Secretary of State for Work and Pensions [2006] 2 AC 91; R (Steinfeld) v Secretary of State for Education [2017] EWCA Civ 81; Smith v Lancashire Teaching Hospitals NHS Foundation Trust [2017] EWCA Civ 1916.

[28] Ireland v UK [1978] 22 EHRR 25; Campbell and Cosans v UK [1982] 4 EHRR 293.

[29] Siliadin v France [2006] 43 EHRR 16; Rantsev v Cyprus and Russia [2010] 51 EHRR 1.

[30] TP and KM v UK [2002] 34 EHRR 2; RK and AK v United Kingdom [2009] 48 EHRR 29.

[31] The Claimants made reference to D and Others v East Berkshire NHS Trust [2004] QB 558; [2003] EWCA Civ 1151. (Affirmed in the House of Lords [2005] 2 AC 373; [2005] UKHL 23; At para 55 Lord Phillips said that no claim could be brought under the HRA 1998 but continued "it is nonetheless necessary to consider whether the introduction of the Act has developed the common law principles of the law of negligence. As that law develops, all who have outstanding claims are in a position to profit from the development…"

[31] They would also have had a right of action in false imprisonment, had it been pleaded, again subject to the limitation bar.

[32] They would also have had a right of action in false imprisonment, had it been pleaded, again subject to the limitation bar.

(c) Even if the limitation period has expired and the fraud/deliberate concealment provisions do not apply, there is then a section 33 discretion.

(ii) If the trespass does not cause personal injury, then:

(a) There is a 6-year limitation period.

(b) This is subject to section 26 Limitation Act 1939/ section 32 (1) (b) Limitation Act 1980.

(3) This application deals only with the question of into which category the right of action in trespass falls, i.e. (i) or (ii), in order to determine the applicable limitation period. It is not about whether there is a right of action in trespass at all.

(4) The European Court of Human Rights refused to intervene when the House of Lords (erroneously)[33] decided that section 11 Limitation Act did not apply to a case of deliberate indecent assault: see Stubbings v UK[34]. The court dealt with its reasoning in paras 49-54 and concluded:

> "However, since the very essence of the applicants' right of access was not impaired and the restrictions in question pursued a legitimate aim and were proportionate, it is not for the court to substitute its own view for that of the state authorities as to what would be the most appropriate policy in this regard."[35]

(5) There is therefore no lack of a domestic remedy and Article 13 ECHR is irrelevant[36].

(6) After further consideration of the potentially extensive consequences of his central submission on the law of trespass and negligence generally, Mr Myerson said that it might be possible to restrict the effect to the situation where a State was the alleged tortfeasor. It seems to me that this interpretation of sections 11, 33 and 38 of the Limitation Act 1980 cannot possibly be justified.

Summary

37. Despite the comprehensive and innovative submissions of the Claimants, it has been clearly and authoritatively determined that fear alone does not amount to a personal

[33] See A v Hoare [2008] UKHL 6.
[34] [1996] 23 EHRR 213.
[35] See also Al-Adsani v UK [2002] 34 EHRR 11 where it was held that the English court had the right to decide to uphold Kuwait's claim to immunity in respect of civil claims for damages for alleged torture outside the UK as the forum state. Al-Adsani was followed by the House of Lords in Jones v Ministry of Interior of Saudi Arabia [2007] 1 AC 270 – see in particular para 18.
[36] In any event, Article 13 is not incorporated into domestic law. Because it is irrelevant I do not discuss the role of the domestic courts in meeting the requirements of Article 13, nor, since no claim is brought under s.7 HRA 1998, the detailed provisions of paras 42-48 of the Re-Re-Re Amended Defence, or the arguments that no such claim could be brought. Also, it is unnecessary to deal with the Defendant's arguments that any such complaints from the 1950's would be time-barred before the European Court of Human Rights, as there is no jurisdiction to hear complaints relating to events which took place before the state's acceptance of the right to an individual petition – see LCB v United Kingdom [1998] 27 EHRR 212 at para 35.

injury. Claims based on fear are subject to a six-year time limit. The provisions of ss.11, 14 and 33 of the Limitation Act 1980 have no application to them.