Case No: HQ13X02162

Neutral Citation Number: [2018] EWHC 3144 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 November 2018

Before:

THE HON MR JUSTICE STEWART

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Between:

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

- -
- -

Mr Simon Myerson QC, Ms Mary Ruck (instructed by Tandem Law) for the Claimants
Mr Guy Mansfield QC, Mr Neil Block QC, Mr Niazi Fetto, Mr Mathew Gullick, Mr Jack Holborn and Mr Stephen Kosmin (instructed by Government Legal Department) for the Defendant

Hearing dates: 29-30 October 2018; 21 November 2018.

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Judgment

Mr Justice Stewart:

1. This Test Claimant is the second Claimant to be the subject of final submissions. She provided two witness statements, the first dated 22 October 2014 and the second 31 March 2016. She gave oral evidence by videolink on 22 June 2016. As with Test Claimant 34, I will refer to her and subsequent Test Claimants as 'TC' followed by their number. No discourtesy is implied. I handed down judgment in the case of TC 34 on 2 August 2018[1] ("the TC 34 judgment"). Many of the findings and conclusions in the TC 34 judgment apply to the case of TC 20, and will therefore not be repeated in full here. To avoid undue repetition, I cite paragraphs in the TC 34 judgment where appropriate.

Introduction

2. Paragraphs 3 - 4 of the TC 34 judgment apply to TC 20's case. The Glossary has not been reattached to this judgment.

Background

3. Paragraphs 5 – 7 of the TC 34 judgment apply to TC 20's case.

Villagisation

4. The purpose of this section is to give a very brief overview of villagisation so as to give some context to TC 20's case. It is intended to be as uncontroversial as possible. There have been many disputes about villagisation but little of importance remains of these, now that the sole remaining allegations are ones of physical assault.

5. By 1953 villagisation had commenced in various locations throughout the Kikuyu reserve[2]. In 1954 it became a much more widespread policy. In a Report from General Erskine to the Secretary of State for War, it is said[3] that by the end of July 1954: "…well over half of the Kikuyu, Embu and Meru in SOUTH NYERI, FORT HALL, EMBU and MERU had been made to live in villages".

6. There were, broadly speaking, two aims of villagisation: the first was to protect people from Mau Mau incursions; this could be of particular relevance to those perceived as loyal to the Colonial Government. The second was to stop passive assistance to the Mau Mau, predominantly by providing them with food.

7. Villages were administered by a chief and, under him, a headman. These were not hereditary but administrative titles. Under the headman were the Kikuyu Guard. The Kikuyu Guard were replaced by Tribal Police from early 1955 onwards. The chief and headman were paid. The Kikuyu Guard were not paid. Those Kikuyu Guard who became Tribal Police should have been paid. There should have been documents evidencing who were the chief and headman and when they were in charge. The

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[1] 2018 EWHC 2066 (QB).
[2] See for example the Press Office Handout No 28 in Central Province dated 19 March 1953. Caselines 32-4271. See also the Governor's Directive No. 1 of 1954 dated 1 February 1954, Caselines 32-13284, which suggested some regional variations in the creation of villages, depending on the discretion of District Officers.
[3] Caselines 32-33317 paragraph 75

Tribal Police should also have been on staff lists. The Kikuyu Guard may not have been.

8. In oral submissions Mr Myerson referred to the fact that much had been said in the written submissions on whether or not a village was "punitive", but that this did not really much matter for the purposes of the issues in the present judgment, save that it would be more likely that there would have been a harsher regime in a punitive village. He added that, as time went on and the Mau Mau had been overcome militarily from, say, about mid-1955, there were two main reasons for continuing to keep people in villages, namely: (i) the concern that Mau Mau 'supply lines' might otherwise be reinstated, and (ii) the British using the opportunity to make Kenyan society more urban, to create a land consolidation scheme to stop the fragmentation caused by Kenyan inheritance practice[4], and to bring into agricultural use land that had been made available during forest clearance which had been effected to reduce cover for the Mau Mau.

The Mutua Case

9. Paragraphs 15 – 17 of the TC 34 judgment apply to TC 20's case.

Outline Chronology of these proceedings

10. Paragraphs 18 - 19 of the TC 34 judgment apply to TC 20's case, but:

- In addition, the TC 34 judgment was handed down on 2 August 2018.
- TC 20 is the second individual claimant case to be subject to a judgment.

Trial not Inquiry

11. Paragraphs 20 – 22 of the TC 34 judgment apply to TC 20's case.

The approach to the Test Case Submissions

12. Paragraphs 23 – 28 of the TC 34 judgment apply to TC 20's case, save that all the causes of action accrued in the 1950s in respect of her claims and the written submissions provided in her case were:

- TC 20 Closing Submissions: 58 pages
- Test Cases – General Closing Submissions (Claimants): 78 pages
- Defendant's General Closing Submissions to accompany the Test Case Closing Submissions: 108 pages with 94 footnotes and 16 Appendices – a total of 10 lever-arch files
- Defendant's Written Closing Submissions Test Case 20: 289 pages with 114 footnotes and 6 Appendices

[4] Mr. Thompson gave details of this in his memoir.

- Response to the Defendant's General Submissions and submissions regarding TC 20: 109 pages with 36 footnotes

Outline of TC 20's allegations

13. At this stage, and so as to give some context, I will reproduce the summary of the allegations made by TC 20 from paragraph 3 of her written closing submissions as follows:

> "She was villagised and seeks to prove that:
>
> a. She was removed from Majengo and forced to go Gikonda where she lived for about one year…
>
> b. She was assaulted when removed from Gikonda to Thuita… and her family's hut burned behind her.
>
> c. She was detained at Thuita village for two years, assaulted while being interrogated and also beaten while working…
>
> d. She was transported to Githanga where she was detained for two years and was beaten while working…
>
> e. She left Githanga village when she had opportunity and travelled to a different district to visit her brother and find work; she was arrested, interrogated and detained for an alleged pass violation and held in Kamiti prison and then remanded to Thika…
>
> f. She worked on a settler's farm for a year before being allowed to go back to her village where she was reunited with her husband…after approximately five years of being detained."

14. The alleged assaults for which damages are sought will be referred to in this judgment as "the core allegations". They are those mentioned in the above sub-paragraphs: (b) where TC 20 says she was assaulted on removal from Gikonda to Thuita, (c) where she says she was beaten during interrogation and while working at Thuita, and (d) where she says she was beaten while working at Githanga.

15. The written submissions, apart from TC 20's response, were all drafted prior to the handing down of the Fear Judgment and the Section 32 Judgment. Therefore, a major part of them relates to claims based on TC 20's villagisation, as distinct from personal injury claims arising from the core allegations. Many of the documents and arguments are not central to the core allegations which remain to be decided. Their relevance, if any, goes mainly to credit only. Only a few were referred to in oral submissions. I have dealt in the judgment only with those that I have found necessary to consider. It would not have been proportionate for me to have gone through all of them where they do not assist me in the resolution of the core allegations.

Pleadings

16. Paragraphs 31 and 32 of the TC 34 judgment apply to TC 20's case with the substitution of 'TC 20' for 'TC 34'.

Pleadings and evidence: proof

17. Paragraphs 33 – 35 of the TC 34 judgment apply to TC 20.

Pleadings – additional matters

18. Paragraphs 36 – 38 of the TC 34 judgment apply, with the following amendment to paragraph 38:

> 'I do not give any effect to the "international standards" referred to in paragraphs 38 (6), (8), (9) of TC 20's AIPOC.'

Pleadings and evidence: relationship

19. The contents of paragraphs 39 - 44 apply to TC 20's case with the substitution of 'TC 20' for 'TC 34' and other obvious alterations.[5]

Translators

20. Paragraphs 45 – 63 of the TC 34 judgment apply to TC 20's case.

TC 20 translation

21. As far as translation of the key TC 20 documents is concerned:

- TC 20's first and main witness statement is dated 22 October 2014. It is in English. It is thumb printed by TC 20 and contains two declarations by the caseworker.[6] There is a further endorsement "signed in the presence of Lawrence Goldstone, solicitor who was present throughout" – followed by Mr Goldstone's signature 22/10/2014. This accords with how Mr Myerson QC told the court on 10 December 2014 that the first witness statement for each of the Test Claimants had been taken. There was no Kikuyu translation: "because what happened was those claimants were seen, the interpreter was there, the statement was written in English and read back to them being translated by the person who had translated it into English."

- There is an affidavit from Gathoni Waweru dated 22 April 2015. She says she is proficient in the English language and that she read the witness statement attached. It is in Kikuyu. She states that TC 20 appeared to understand the document, and approved its content as accurate and the declaration of truth and the consequences making a false declaration. TC 20 made her mark in the presence of Ms. Waweru.

- On the same day, the Part 18 Responses were signed. The translator into English of the Part 18 Responses is again Ms Waweru.

[5] For example, in paragraph 43, the reference to TC 34's detention in various camps, becomes a reference to TC 20's being in various villages.

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

- There is a supplemental witness statement from TC 20 dated 31 March 2016. This is in English and Kikuyu. The translator is Anne Njeri Kamau.

22. The Defendant prepared a schedule[7] to TC 20's closing submissions. This sets out 9 differences between the translation of the Part 18 Response served by the Claimants and the Wolfestone translation obtained by the Defendant.

23. The Defendant chose to highlight the following:

i) In paragraph 7 of the AIPOC it states: "shortly after the commencement of the State of Emergency, the British military and Kenyan policemen raided the Claimant's neighbourhood in Majengo." The Part 18 question asks: "what identified them as members of the British military?"

Unsurprisingly, the Wolfestone translation is slightly different from that provided by Ms. Waweru. However, the Defendant says it is highly material that the Claimants' translation omits the words: "I knew that they were white soldiers because their skin was white." The Defendant says that this establishes that TC 20's description of the British military was on account of their skin colour alone.

I do not regard this omission as significant since, earlier in the Part 18 translation provided by Ms Waweru, TC 20 records the answer: "the only thing that I can remember is the British soldiers were white and wore uniforms and I cannot give further details."

ii) At paragraph 168b of the Part 18 Response, the Claimants' translation provides the following:

"The Chief used to give the order which he was given by the British soldiers."[8]

In contrast, the Wolfstone translation exhibited to Andrew Robertson's Fifth Witness Statement provides:

"The chief is the one who was giving the orders as directed by the white man".

The Defendant submits that the Claimant's translation unduly seeks to equate an individual's skin colour with their status, not their rank or identity. I will bear this point in mind, though it appears to have limited, if any, relevance at this stage. This part of the translation relates to paragraph 15 AIPOC which does not contain an allegation of personal injury; perhaps more importantly, it is reflected in paragraph 15 of TC 20's witness statement where she says: "…The chief himself would report to British Officers who lived in the Post". In oral evidence she was asked to describe the white people living at the post. Her reply was: "Each camp---they were white men, that is the answer to the first question. They were white men and our camp had four of them". She was

[7] Appendix G

[8] There appears to be an error in Appendix G where the Defendant states that the relevant part from the Part 18 Response is at paragraph 11 at 167g. It is in fact at paragraph 168b of the Part 18 Response, as indicated by the Defendant in its TC 20 submissions at paragraph 80.3.2.

then asked if she knew whether they were policemen or soldiers or other forms of officer. She replied: "No. I cannot tell the rank they were in. I can't tell whether they were policemen or soldiers or other forms of officer".

iii) In the Part 18 Response the Kikuyu word "Njoni" is translated as "British soldier" or "British military". In her oral evidence, TC 20 said: "the Njonis were the white people and those of the black people who were employed to do that type of work". The Defendant is therefore correct in saying that, as regards TC 20, the Part 18 translation of "Njoni" is unduly narrow. I will return to this point later in the judgment.

24. As in TC 34's case (see the TC 34 Judgment, paragraph 68), I do not consider the discrete matter of translation of witness statements and Part 18 Response from the Kikuyu to English to be a remaining matter of real significance.

The evidence gathering process

25. Paragraphs 69 – 76 of the TC 34 judgment apply to TC 20's case with the substitution of 'TC 20 for 'TC 34'.

Test Claimant Cross-Examination

Vulnerability

26. The psychiatric evidence from Professor Mezey was to the effect that there were no clinical features with respect to TC 20's psychiatric presentation which prevented her from giving proper (i.e. complete, coherent and accurate) evidence. In response to questions from the Claimants' solicitors, she said that TC 20 would undoubtedly find the proceedings both physically exhausting and psychologically stressful. However, provided she was well-prepared and properly supported, this should not be a bar to her ability to provide a coherent account or to her capacity to give evidence.

27. TC 20 gave evidence by video link on 22 June 2016 for approximately two and a half hours.[9] As with TC 34, her cross-examination was polite and not insensitive. There was nothing to indicate it was hyper-sensitive. Further, in terms of vulnerability alone, there was nothing in the process of TC 20 giving evidence before the court which affected the court's ability to rely on her evidence, or which would be a reason in itself why the Defendant could not properly cross-examine her on the important issues.

TC 20's cross-examination

[9] The court sat from 10:30 to 13:05 and from 14:05 to 14:25, a total of three hours. To be deducted from this are breaks amounting to 24 minutes (11:20-11:35 and 12:21-12:30) and an unquantifiable time between 14:00 and 14:25. The transcript recommences at 14:00 on page 43 and finishes at 14:25 on page 56. TC 20's evidence finished on page 48 of the transcript.

28. Paragraphs 83 – 94 of the TC 34 judgment apply to TC 20's case with the substitution of 'TC 20' for 'TC 34'.[10]

The approach to evidence

29. Paragraphs 95 – 100 of the TC 34 judgment apply to TC 20's case, with the substitution of 'TC 20' for 'TC 34'. Since the TC 34 judgment was handed down, the Court of Appeal have reversed the exercise of Judge Gosnell's discretion in favour of the Claimant in CD.[11]

Corroborative witnesses

30. The Defendant criticises the lack of any corroborative witness evidence called by TC 20. They say that there is no such evidence of any individual who encountered TC 20 personally during the State of Emergency. Points of importance are that there are no potential witnesses, such as TC 20's family members or fellow former villagers. There is nobody who can directly support in any way TC 20's account of what she says happened to her during the Emergency and, in particular, the alleged assaults or matters which put the alleged assaults into context.

31. The Claimants say it would be astonishing if there were corroborative witnesses to the particular assaults. Even if TC 20 had been beaten every day at Thuita, that would amount to no more than about 750 beatings. Even if each of those was witnessed by 20 people, and each of those 20 people were different every time, only 15,000 people would have witnessed TC 20 being beaten at Thuita. Even if every such person was alive, the odds of finding someone to corroborate a particular incident would be vanishingly small – indeed many people would now be dead.

32. It is correct that the impression given about the beating during interrogation at Thuita is that there were no other detainees present. However, there would have been other witnesses to the alleged beating on removal from Gikonda and the alleged regular beatings at Thuita and Githanga. Nevertheless, I accept that it is likely to be difficult to trace any such person, even if still alive. Whatever the chances, however, (a) no evidence was given by the Claimants of any attempts to trace such witnesses; (b) if TC 20 had been able to call substantial credible evidence which directly corroborated her account of the core allegations, that would have been a factor in her favour in the determination of whether there can still be a fair trial, and, consequentially, whether it is equitable to allow her claims to proceed;[12] and (c) the lack of witnesses is the position now; much nearer the time of the alleged assaults there may well have witnesses who could have been found and available to give material evidence.

33. It is difficult to evaluate, therefore, the merit in the Defendant's argument that there is no evidence from any family member, friend or associate who could corroborate at least part of the case, e.g. as to TC 20's removal to Thuita village, presence in Thuita village, or the happening of some of the core allegations or injuries. I simply do not

[10] Paragraph 7 of TC 34's closing submissions - see TC 34 judgment para 83 - was not specifically repeated in TC 20's closing submissions. However, in various places, similar suggestions are made. See paragraphs 31 and 57.

[11] See paragraph 99 of the TC 34 judgment. The case reference is [2018] EWCA Civ 2342.

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

know whether any such witnesses still exist or could be found. I have no evidence of any attempts made by the Claimants to trace any of them. Whether or not they could now have been found and called as witnesses, the position in relation to at least some core allegations, e.g. all of them, save the alleged beating during interrogation at Thuita, is that they appear to have been witnessed by people not engaged by the Administration. In the absence of any direct evidence, the chances of those witnesses being available to give evidence must have diminished over time. It may also be that, had this trial taken place much nearer the time when TC 20 says she suffered the assaults, she could have identified and obtained evidence from (for example) other villagers who witnessed assaults at Thuita and Githanga. We shall never know. What we do know is that there is, for whatever reason, no evidence now that corroborates TC 20's account of any of the core allegations.

34. The Claimants submitted that the TCs who were villagised all gave an account of abuses in every village and that this therefore was corroborative evidence. The Claimants rely on this evidence on the basis that the TCs were randomly selected, and say that their evidence demonstrates the widespread nature of beatings during forced labour.[13] These TCs were in different villages at different times. They are all part of the GLO cohort. They suffer from the same sort of problems of evidence-testing as TC 20. I have not heard final submissions in their cases and so cannot in any event make findings on their evidence. There is no direct corroboration, nor any live witness to their accounts. Their evidence is therefore of very little, if any, weight in supporting TC 20's allegations.

35. I considered this sort of evidence in the TC 34 judgment, particularly relating to allegations at Manyani and MacKinnon Road camps[14]. I concluded[15] that the alleged corroboration added little to TC 34's case.

36. Mr Myerson submitted that there was a distinction between the TC 20 alleged corroboration and that relied upon by TC 34. This was that in TC 20's case the evidence of the TCs about villagisation is not countered by any documentation, nor by anything that suggests that the witnesses would have been able to say that the abuses never happened. This misses the point. The probative value of the evidence as corroboration of TC 20's allegations is of minimal, if any, value. As I said in the TC 34 judgment[16]: "...it amounts to little, if any, support for (TC 34's) core allegation". The alleged corroboration in TC 34's claims relating to assaults in Manyani and MacKinnon Road was, if anything, stronger than in TC 20's case. At least it was evidence of abuses in those camps, whereas the only evidence of what happened in Thuita and Githanga villages comes from TC 20 herself.

37. As to the submitted distinction, this makes no difference. It was expressly accepted in the TC 34 judgment[17] that abuses occurred and that it was probable that the cohort of Claimants in this GLO include a number of abuse allegations which are true. If, however, it were a relevant distinction that the evidence of the TCs about abuse during villagisation is not countered by any documentation, or by anything to suggest

[13] See: TC 22 (Karirau village, Kangema), TC 29 (Gakui village, Kandara, Fort Hall), TC 1 (Muchungucha village, Fort Hall) and TC 33 (Gitura village, Fort Hall).
[14] See TC 34 judgment paras 314-324; 348-349
[15] TC 34 judgment para 324
[16] TC 34 judgment para 349
[17] Paras 424-425

that witnesses would have been able to say that abuse did not happen, then that would have the following consequence: it would make the prejudice to the Defendant even greater, by virtue of the negative effect of the passage of time on documentary and witness evidence relating to TC 20's core allegations in Thuita and Githanga villages. This is something to which I turn in detail later in this judgment.

38. Further, apart from the case of TC 18[18], the alleged corroborative witnesses are all Claimants in this litigation, a factor which may be of some relevance. On the other hand, they do not, apparently, know each other and there is nothing to suggest that their evidence was cross-contaminated or tainted in any other way.

Section 33 Limitation Act 1980

39. Paragraphs 102 – 132 of the TC 34 judgment apply to TC 20's case.

Length of and reasons for delay – TC 20

40. TC 20 was added to the Group Register on 24 April 2014. That is the date when she became a party to the proceedings[19]. Thus, the length of the delay in TC 20's case is approximately 57 years from the date of the expiry of the limitation period in her first claim.[20]

41. TC 20 gave no evidence whether in her witness statement, or orally, in relation to the reasons for her delay.

42. In TC 20's closing submissions, is the following paragraph:

"TC 20 was at a disadvantage in bringing a claim earlier. She is illiterate, impecunious, uneducated and would have been regarded as a member of a banned organisation regardless of her actual participation until 2003 [Reply 16 - 124 - 125]. Thereafter, her only realistic ability to bring a claim was after Group Litigation was advertised by an order of the court and with the assistance of CFA funding."

43. The relevant section of the Reply referred to is:

"34... As regards the section 33 discretion under the Limitation Act 1980, this particular Claimant relies on the following in addition:

"a. She was an uneducated female at the time of the Emergency;

b. She is illiterate;

c. She is a victim of trauma and is thereby vulnerable;

[18] TC 18 received some corroboration in respect of one incident by a witness Eliaph Mutugi, who was not a TC or part of the GLO cohort because he missed the deadline for being added to the register. See Caselines 30-144 para 11 and 14-124. TC 18 was not cross-examined as he died prior to the TCs giving evidence.

[19] See [2016] EWHC 3005 (QB) paragraph 14.

[20] See below. The pleaded date of accrual of cause of action of the first core allegation of assault is about the end of 1953.

d. She is elderly with restricted mobility and is vulnerable to fatigue;

e. She knew that people had been compensated and that Mrs Kimathi was bringing a claim because not all the people who had suffered had received compensation; she came to Miller & Co Solicitors when she was made aware of the Group Litigation.

f. The Claimant could reasonably only be said to be aware of a possible claim of merit against the Defendant after the claim was advertised by order of the Court and aired on Kenyan radio in November 2013;

g. The Claimant is impecunious and was unable to pay for legal advice in Kenya;

h. She is unsophisticated and from a rural area and would not have the means to approach lawyers in England;

i. She could not reasonably be expected to believe that she could bring a claim against the British Government, or that she would be compensated;

j. It was illegal to be a part of or speak of Mau Mau in Kenya before 2003 and the Claimant would have faced possible legal consequences or retribution had she attempted to raise her complaints;

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

44. I am prepared to draw the inference that TC 20 was uneducated at the time of the Emergency and is illiterate. There was nothing to suggest that she had any education or literacy skills. Unlike TC 34, she had not signed her own identity card. She merely thumb printed it. To that extent her position is somewhat different to that of TC 34 in that he could read and write, though he did not speak English and was relatively unsophisticated.[21]

45. As regards (d) above, for many years after the limitation period expired, TC 20 was not elderly, nor did she have restricted mobility nor was she vulnerable to fatigue.

46. The remaining subparagraphs of paragraph 34 of the Reply repeat, with only the necessary pronoun change from "he" to "she", equivalent averments in TC 34's case[22].

47. For the reasons given in the TC 34 judgment:

    i. What is stated in the Reply is not evidence at this stage of the case.[23]

[21] TC 34 Judgment, paragraph 137.
[22] Subparagraph 34 (e) in TC 20's Reply is not reproduced in TC 34's Reply but adds nothing of substance to subparagraph 34 (f).
[23] TC 34 judgment paragraphs 33 – 35 and 145.

ii. As regards sub-paragraph 34 (c) there is psychiatric evidence in respect of TC 20 (see below), but there is no evidence that this was in any way a reason for the delay in bringing proceedings.

iii. There was no direct evidence to support sub-paragraphs 34 (e) and (f).

iv. As regards sub-paragraphs 34 (g) and (h), I accept that TC 20 was unsophisticated and from a rural area. It may also be that she was impecunious, unable to pay for legal advice in Kenya, and would not have had the means to approach lawyers in England. There was no evidence as to her means, so it may well be the case that she is "impecunious", and "would not have the means to approach lawyers in England." I also accept that legal aid is unavailable to the TCs and probably has been since the mid – 1990's, though it may have been available before then.[24] There is no express evidence that any of these were reasons why the claim was not brought previously by TC 20.

v. As to sub-paragraphs 34 (j) and (k), I repeat with the substitution of 'TC 20' for 'TC 34", paragraphs 138 – 144 of the TC 34 judgment.

As regards matters which I have not expressly accepted and which were not expressly proven, I do not draw any inference in TC 20's individual case. Of course, the pleaded matters which are to be found in the Reply of other Test Claimants with very similar or identical wording may well be true for TC 20 and/or them. However, some or all of them may not. In the absence of express evidence which TC 20 could have given, I consider it impermissible to make these findings of fact by way of inference.

48. There is one matter to which I will have regard. TC 20 did not give evidence that this (or anything) was a reason for her delay. Nevertheless, her case and her evidence were to the effect that she was villagised. There is substantial confusion about the timeline, but on the pleaded case she was free by no later than about 1957. It seems right for this period to infer that there was little or no access to legal advice on the possibility of making a claim. In any event, I will be prepared to take this matter into account as one of "all the circumstances of the case" under s.33 (3).

49. Further, I repeat with the necessary amendments paragraph 157 of the TC 34 judgment. In particular, I am prepared to put into the balance generally in exercising my discretion under s.33 (1) the fact that TC 20 was uneducated, illiterate, and unsophisticated.

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

50. Paragraphs 159 – 162 of the TC 34 judgment apply to TC 20's case.

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

[24] See footnote 88 to the TC 34 judgment.

51. On the evidence, this subsection does not arise, as TC 20 did not suffer from any legally relevant disability after the date of the accrual of the cause of action.

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

52. Paragraphs 165 – 167 of the TC 34 judgment apply to TC 20's case.

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

53. Paragraphs 168 – 169 of the TC 34 judgment apply to TC 20's case, with the substitution of 'TC 20' for 'TC 34'.

Proportionality

54. Paragraphs 170 – 172 of the TC 34 judgment apply to TC 20's case.

Other factors

55. Paragraphs 173 – 175 of the TC 34 judgment apply to TC 20's case.

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

56. Paragraphs 176 – 182 of the TC 34 judgment apply to TC 20's case.

Documents

The evidence of Mr Robert Deane

57. Paragraphs 183 – 188 of the TC 34 judgment apply to TC 20's case.

Documents relating to TC 20

58. Apart from maps and some documents referring to villages named Thuita – see below, there are no documents which relate directly to any of the core allegations, nor to a village at Githanga.

Movement Orders

59. In TC 20's closing submissions it states:

> "Nothing exists to suggest that what happened to TC20 was lawful. Consideration of the Movement Order for Kangema Division of 1 August 1955 [32-36784] shows what would be required. That Order was made for 3 weeks. There should be a trail of such Orders, demonstrating that TC20's movement to Thuita was lawful and confining her there was lawful. None has been found. Mr. Thompson's evidence was that he recalled no paperwork at all regarding villagisation [33-11103]."

60. It is correct that there are no Movement Orders available evidencing TC 20's alleged movement to Thuita or from Thuita to Githanga.[25] Indeed there are no Movement Orders evidencing anybody being moved to/from these places.[26] In respect of villagisation, it is common ground that there should have been a trail of Movement Orders. There is a vast amount of detail as to provisions in the Emergency legislation under which movement of people was potentially lawful.[27]

61. In the disclosed documents are the Emergency (Movement of Kikuyu) Regulations 1953 ("the Regulations"). These were subject to subsequent amendment. The amendments are not material for the purposes of this judgment.

62. The provisions of the Regulations so far as relevant are:

> "2. The Member for Agriculture... may if he considers it to be expedient for securing the public safety or the maintenance of public order so to do, by order (hereinafter referred to as a Movement Order) direct that any person or class of persons, or all persons in any area, specified in such order shall –
>
> (a) Within such period as may be specified in the order, move from the area in which he is residing to such other area as may be specified in the order; or
>
> (b) Remain within the limits of any area specified in the order.
>
> ...
>
> 3. Where a Movement Order applies to any person it should also apply to the family of such person residing with him.
>
> 4. A Movement Order shall be effective for such period as may be specified therein, or if no period is so specified, until the Order is revoked..."

63. There is a witness statement from Joanna Marie Moore. It is dated 27 November 2017. Ms. Moore is a junior barrister instructed by the Defendant to carry out, among other things, legal research relating to Emergency legislation relevant to generic issues in this litigation. From the evidence of Ms Moore and Ms Smith[28] it is apparent that: (i) there are severe limitations in finding official documents from the Emergency period in what exists of the Kenya Gazette online, and (ii) Lincoln's Inn library holds a collection of Kenyan Colonial legislation. In paragraph 20 of Ms Moore's statement she says that there is a great deal of secondary legislation and similar documentation which is not contained within the records she had consulted. An example she gives is Movement Orders. She was able to find records in Lincoln's Inn of only five Movement Orders made during 1953 under the Regulations. They were all in "Kenya

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[25] A similar situation was dealt with, albeit in relation to detention rather than villagisation, in paragraphs 189 – 206 of the TC 34 judgment.

[26] There is a Movement Order (Caselines 32-26519 to 32-26521) evidencing the removal in December 1954 of Nyambura Kariuki to Location 14 Fort Hall. This Location is where TC 20 submits Thuita was situated. This is not accepted by the Defendant: see below.

[27] See the Defendant's closing submissions, paragraphs 98 – 103.

[28] Ms Smith is in the Government Legal Department.

Proclamations, Rules and Regulations 1953." Ms. Moore's understanding is that the book should contain all Orders published in the Kenya Gazette during that year.

64. Ms. Moore found no Movement Orders made under the Regulations during 1954 and the first one she found in 1955 was dated 1 August 1955. She was shown four documents from the trial bundle. These were Movement Orders dated 3 December 1954, 15 July 1955, 16 July 1955, and 23 July 1955. Ms. Moore looked in Lincoln's Inn library for these four Movement Orders and was unable to find them.

65. Of the total of 10 Movement Orders upon which Ms Moore gave evidence[29], some are Orders moving people from an area which is very clearly defined to another area specified in the Order[30] as "the area reserved by law for the use and enjoyment of the Kikuyu tribe"; some are Movement Orders requiring people to remain within the limits of an area in the Order[31]; some specify a period during which the Movement Order is effective and some do not specify a period.[32] Only one specifies individuals, there being 19 names on the schedule.

66. Based on the above, the Defendant submits that the available evidence suggests that the Court has only a limited record of Movement Orders made during the Emergency. The Claimants' response is that, of the four Movement Orders in the bundle not found in the Kenya Gazette, three are from Nyeri and the one naming individuals is from Nairobi. They submit that the probable explanation is that the District Commissioner for Nyeri did not submit his Movement Orders for publication but kept them on file; that the Nairobi Movement Order may have been the only one naming individuals, and that it too, was not sent for official publication. These are inferences I cannot draw.

67. What is clear is that the Kenya Gazette is by no means a full record of Movement Orders made.[33] It is likely, as Mr Myerson accepted, that Lincoln's Inn have not mislaid Movement Orders. More probable is that a full set did not go to that library after Independence.

68. The Claimants submitted that if all Movement Orders had been gazetted, it is unlikely that Lincoln's Inn would have so few. Assuming for the moment that that is correct, where does it take the argument? According to the Claimants, all Movement Orders should have been gazetted. If they had been they would probably have found their way to Lincoln's Inn after Independence. Any failure to gazette is such that the absence of them now is the fault of the Defendant, and therefore a 'self-inflicted wound'.

69. In responding to this submission, the first question to consider is whether it was a legal requirement that Movement Orders be gazetted. There is nothing on the face of the Regulations which requires them to be gazetted. The only basis put forward by the

[29] There are a few others available.
[30] cf Regulation 2 (a).
[31] cf Regulation 2 (b).
[32] cf Regulation 4. This Regulation appears to provide for an indefinite removal period. Therefore there did not need to be a curfew order also.
[33] If Gikonda was in Nyeri (see below) then if I could have drawn the inference that the District Commissioner did not submit his Movement Orders for publication, this would have suggested that any Movement Order authorising TC 20's villagisation was not gazetted.

Claimants is a memo dated 10 August 1955 from the AG [Acting] Provincial Commissioner Central Province. This says:

" 'Subsidiary legislation', for the purposes of the Secretary of State for African Affairs' Circular includes all material of a legal nature which has to be published in the Gazette e.g. forfeiture orders, Curfew order, land confiscation orders, movement orders etc….."

This is some evidence from 1955 in support of the Claimants' proposition. However, by itself - and there is nothing else to which I was taken which supports it – it is insufficient to find that it probably was a legal requirement that Movement Orders be gazetted. Ms. Moore was the person who had done the detailed research on legislation and legislative instruments. I was not, in final submissions, taken in detail through the ten Movement Orders on which she comments in paras 21-25 of Exhibit JMM1 to her witness statement dated 15 November 2017. The five she had found in Lincoln's Inn library[34], which all date from 1953, appear to be in the form of an individually numbered Government Notice and have an individual formal title[35]. The one Movement Order from 1 August 1955[36] also has an individual Government Notice number, but no individual formal title. The four other Movement Orders in the documents, which Ms. Moore could not find in the Kenya Gazette in Lincoln's Inn[37], date from December 1954 to July 1955, are in a different, more informal, form and do not bear any individual Government Notice number or title[38]. It is unclear what I should make of all this, but what I am not prepared to do, particularly against the background of uncertainty which arises from Ms. Moore's researches generally, despite her best efforts at trying to piece together various jigsaws 60 years later, is to find as a probability that gazetting was a formal requirement for Movement Orders in all or any years.

70. Pausing at that point, and if Movement Orders were made in respect of TC 20's removals to Thuita and Githanga, there would therefore have been a vastly increased chance of finding the relevant Movement Orders had this claim been brought in time or even in the early 1960s. As time has passed, so the chance of finding them has diminished. Further, there is insufficient basis on which to find that there was any fault on the part of the Colonial Administration which has led to Movement Orders now not being available.

71. Assuming that, contrary to my last finding, it had been proven that gazetting of Movement Orders was a legal requirement, and had not been done, what would be the position? I refer back to paragraph 210 of the TC 34 judgment and the discussion of the case of Hammond v West Lancashire Health Authority[39]. I was not specifically addressed on this case during the submissions on TC 20's claim. Hammond dealt with the irresponsible loss or destruction of documents and Ward LJ said: "…the learned judge was perfectly entitled to have regard to that prejudice, but to discount it significantly." The circumstances were that the Defendant should have (in effect)

[34] Caselines 35-1134, 35-1147, 36-1151, 36-1152 and 36-1153
[35] E.g. Caselines 35-1134 is Government Notice No 196 and bears the title "The Emergency (Ol Kalou/Kipipiri) Movement Order 1953.
[36] Caselines 35-1512
[37] Caselines 36-1160, 36-1157, 36-1158 and 36-1159
[38] They just bear the title of the 1953 Regulations and the heading: 'Movement Order'.
[39] [1998] Lloyds Rep Med 146.

preserved X-rays but irresponsibly did not do so. In the current case, if Movement Orders should by law have been gazetted, but were not, I would have discounted to some extent the Defendant's prejudice, but not so heavily as the judge in Hammond discounted the prejudice of the Health Authority. The reasons for the distinction are: (a) Lincoln's Inn seemingly does not have a full set of gazetted Movement Orders. If this is correct, all Movement Orders, even if gazetted, would probably not have survived in any event and therefore may have still been now unavailable[40], (b) the X-rays in Hammond were the only copies and had been destroyed after 3 years by the Defendant, pursuant to their destruction policy; here, un-gazetted Movement Orders may well have been available and capable of being found for a number of years after the expiry of the primary limitation period.

72. I have already determined that I cannot find that it was a legal requirement that Movement Orders be gazetted. However, I have hitherto been working on the assumption that if all Movement Orders had been gazetted, it is unlikely that Lincoln's Inn library would have so few of them. However, given the evidence of Ms. Moore as to shortcomings in the Lincoln's Inn records, I would not be prepared to make that finding either.

73. In this paragraph I consider the Defendant's submission in the schedule to the RAID that, apart from the Regulations, there are numerous other provisions under which movement of people was potentially lawful. I accept that it is difficult for the Defendant to say when and in what circumstances each provision might have been relied on by the colonial administration. However, those provided by way of example in paragraph 100.1 of the Defendant's TC 20 submissions seem unlikely to have been a possible justification for TC 20's removal. In brief, this is because the Special Districts (Administration) Ordinance 1948:

(i) By section 16 directed a person to reside in such place as was specified in an Order made by the District Commissioner. However, the section requires a person within the district or area to have conducted themselves in a certain way. This suggestion was not put to TC 20. She was not asked anything about this possibility. Also, an enquiry had to be made satisfying the Provincial District Commissioner of the conduct. Under section 23, such enquiry had to be conducted in the same manner: "as far as may be, as an enquiry under the law relating to criminal procedure." There is nothing upon which to base an inference that TC 20 might possibly have come within section 16. Contravening an Order under section 16 was an offence for which the penalty was a fine – see section 22 (2).

(ii) By section 15A, a power was conferred on a Provincial Commissioner to direct Mau Mau supporters to reside in a specified area. However, there had to be 14 days' notice, the person was required to remove themselves from the area and an Order had to have effect for a term stated therein. Failure to comply with section 15A amounted to an offence which under section 22 (as amended) could

[40] The Defendant took me to what it said was an example of a Movement Order which on its face suggests it was gazetted, but which cannot be found in the Gazette. It is dated 10 August 1955 and states it is "GN. 192 of 1953'. However, this appears to refer to 'Government Notice 192 of 1953' which is the basis upon which the Regulations were promulgated. This also explains why a 1955 Movement Order refers to 1953. It could not have been gazetted in 1953.

give rise to a fine or detention. It is unlikely on the evidence available that this had any application to TC 20.

74. Movement Orders made in relation to TC 20 would therefore, on the information available, probably have been made under the Regulations.

75. As previously stated, no documents are available in relation to TC 20's removal despite extensive searches carried out by the Defendant. The Defendant's case is encapsulated by Mr Murphy[41] who says:

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

76. There is a dispute as to whether any documents which authorised TC 20's alleged removals were ever lawfully made. I do not propose to go into this, since the claim is now limited to the core allegations, and it is not necessary for me to attempt to decide whether the alleged detentions were lawful or not.

77. There are various theoretical possibilities why there are no documents in relation to TC 20 (or any TC) e.g. such documents were not located despite being available and despite the Defendant's extensive searches and/or the documents were lost or destroyed during or after the Emergency, and/or there never was any such document; alternatively that TC 20 was not removed at all[42], or not removed to any of the places to which she says she was removed.

78. There is detailed evidence of the searches which the Defendant has undertaken. These have been on a massive scale, but were still not exhaustive. It would also seem from the number of people said to be villagised, that the documents evidencing their removal and villagisation, and which are in the trial bundle, represent only a very small percentage of the total number.

79. I now turn to the point made by the Claimants that: "Mr Thompson's evidence was that he recalled no paperwork at all regarding villagisation." Mr Thompson was employed in Kenya in various administrative posts between 1952 – 1960. Until 1956, he was in Fort Hall District, which he said was divided into four parts. He was put in charge of Kandara Division in the most southerly part of the District. In April 1956 he was transferred to Nyanza Province and then to Coast Province. He gave some general evidence about villagisation. In cross-examination[43] he was asked about the distinction between punitive and model villages. He said he had a recollection about that "but not completely. We did have two kinds of villages. That is true." A little later his cross-examination continued:

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[41] Government Legal Department lawyer, 7th Witness Statement paragraph 25. Although searches were done 6 months either side of alleged key dates, this does not fully answer the problem the Defendant faces with a shifting timeline; the searches had necessarily to be selective and a change of date, even by 3 months, would potentially lead to different results. Having said that, it seems that the likelihood of the Defendant now finding any document material to TC 20 would be remote, whatever the date.

[42] I will be prepared later in this judgment to find that she probably was removed to two villages.

[43] Caselines [33-11102 to 33-11103].

"Q. So were the model villages for those who, as it were, actively supported the government?

A. Yes, I think I would have to say yes to that.

Q. Do you recall any paperwork in relation to the villagisation process?

A. No. Not at all."

80. The Claimants rely on this last answer. However, his response is as to his personal recall 60 years later and in reply to a very general question. The question is also ambiguous in that it could be asking whether he recalled if any paperwork ever existed in relation to the villagisation process, or whether he had any actual memory of such documents. I find that this is not a matter which can be given significant weight in relation to paperwork evidencing villagisation. Further, Mr Thompson's 1955 Handing Over Report for Kandara, Fort Hall, a contemporaneous document to which I refer below, makes it clear that registers of villagers' names were compiled.

81. Having reviewed all the evidence, I find on the balance of probabilities that the removals of TC 20 would have been subject to Movement Orders. This is because: (a) the law required such orders, (b) some such orders have been located, (c) at this point in time and on the evidence I have elsewhere reviewed, it cannot be inferred that there was any system of removals being effected without Movement Orders.

82. As to Movement Orders authorising the removal of TC 20, if they were available they would probably clearly describe the area from which she was removed, though they may not show the place to where she was sent. They would have been dated. Therefore:

(a) They would have materially assisted in establishing the timeline of events relevant to TC 20's claims.

(b) As regards the core allegation of removal from Gikonda to Thuita, the Movement Order could have corroborated the existence of Gikonda (and perhaps its geographical location); also to which Thuita in which location TC 20 was removed, a contentious matter which I explore later. Potentially this would have led to witnesses who could have dealt with TC 20's allegation of assault whilst being removed, particularly so if the claim had been brought in time or even somewhat later.

(c) A Movement Order transferring TC 20 to Githanga would have evidenced her allegation that she had been in Thuita (being the place from which she would have been removed), and perhaps also identified the geographical location of the Thuita village.

(d) If there were existing Movement Orders in respect of both removals they could have evidenced the fact that, and the dates between which, she was in Thuita, and the date she arrived in Githanga. This potentially would have assisted in leading to relevant witnesses.

83. The absence of such documents means that TC 20's evidence as to her removal from Gikonda and villagisation in Thuita cannot be confirmed, undermined or put into context. The timeline cannot be evidenced. Nor, assuming her evidence is correct as to her villagisation in Githanga, can the start date of her villagisation there begin to be established. Nor can the context of her core allegations in Thuita and Githanga begin to be investigated in any meaningful way.

84. Movement Orders which would have enabled TC 20 to plead the precise dates of her removal to and from Thuita, may well also have assisted in leading to the identification of the individuals responsible for the removals and for TC 20 while she was in Thuita and Githanga. They may also have assisted in leading to the provision of information as to who employed and controlled those individuals and as to other potential witnesses in Gikonda, Thuita and Githanga.

85. Even if the Court had not been able to find that the relevant Movement Orders probably existed, the Defendant would have been prejudiced. This is because, as a result of the passage of time, it would be in the position of not being able to prove whether or not they had existed for TC 20. This prejudice in proving prejudice is something I shall explore later and is dealt with in detail in the TC 34 judgment.

Names of Villagers

86. The African District Councils Ordinance 1950 required:

> "5. It shall be the duty of every headman of a village to maintain a register in regard to all persons resident within that village in accordance with instructions issued by the Authority."[44]
>
> A 1956 version of the same document is in similar terms, but adds that failure by the headman to prepare and maintain the register: "shall be deemed to be an offence against these By-laws."

87. Mr. Thompson, in his 1955 Handing Over Report for Kandara Division, Fort Hall, wrote in relation to the villages:

> "….it will be a priority task to compile registers of population for each village. These registers will be kept by the headman and will be available for inspection by admin officers and police as required. Resist the suggestion that they should be deposited in police stations, where they will quickly become out of date."
>
> In his memoirs which date from 1987, Mr. Thompson wrote (page 64): "Chiefs and Headmen were the very roots of the administration tree. Their duties involved supervision of the poll tax registers, collection of poll tax.…issues of licences….and keeping law and order." On page 65 he wrote: "At least once a month, the DC, or a DO, would visit the location where he would expect a full and comprehensive report and the Chief's company on an extensive walk-around."

88. There is also evidence from 1954 and 1955 documents from Central Province[45] that village nominal rolls were to be maintained.

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[44] Authority is defined as "the District Commissioner, the Medical Officer of Health, the Health Inspector or their nominees".

89. If the above documents had been prepared and are no longer available, then they would probably have assisted in determining if TC 20 was at Thuita and Githanga, and, if so, when.

90. The Claimants question whether registers of names of villagers were prepared. The above evidence suggests that they probably were. In any event, the problem is that the passage of time means that the Defendant cannot begin to investigate evidence as to the actual preparation of such registers and what may have become of them, much less to ascertain what they contained.

Documents evidencing those working in villages

91. I have previously recorded the fact that the chief, headman and, probably, the Tribal Police would have been the subject of payslip documents. There may also have been other documents local to a village which would have given names of those working there at particular periods of time. Nothing is available which assists for Gikonda, Thuita or Githanga, save a little documentary evidence relating to Location 14; this documentary evidence will be considered later. It is of very limited assistance.

92. Mr. Myerson suggested that none of the staff lists of those working in camps were likely to have been reliable. There is nothing which evidences that this was probably the case; in any event, as a result of the delay, we will never know. He also suggested that any staff lists would have been for Fort Hall District rather than for a particular village or area. Again we do not know but, even if that is correct, the lists and payment records would have given names of people to be contacted. That could have substantially narrowed the investigation. If the claim had been brought in time or soon after the expiry of the limitation period, the chances of obtaining names, and locating relevant witnesses from the names, would have been immeasurably better than is the position now.

93. It has been submitted by the Claimants that, even if there were people who remembered a particular Test Claimant, and who could have given evidence about his/her conduct, or even deny the core allegations of which she/he complains took place, nevertheless a court of law 50 years ago would have had to look at the allegations in the context of a number of abuses which happened in Kenya at the time, and the general attitude of the administration which, they say, was averse to any proper enquiry. This requires some analysis:

(i) Of course a court of law would, assuming that the claims were brought in time (or if the section 33 discretion were exercised in TC 20's favour), have had to consider all the available material evidence. That is the court's function.

(ii) The context of other proven, or alleged, abuses would also have been assessed. Such evidence as there now is will be assessed in relation to its materiality to the section 33 discretion, and its probative value in TC 20's case. What must not be lost sight of is the extent to which such other allegations are themselves compromised by the passage of time.

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[45] See Caselines 32-24042 and 32-28773.

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

(iv) The problem which faces the court now, all these years later is, to repeat a well-worn phrase in the litigation: the court "does not know what it does not know." What would any witnesses have been able to say about TC 20? Or about the core allegations? Or about their immediate or other relevant context?

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

Documents not available – documents as to the allegations of assault

95. There are no documents relating to any assault on TC 20. Given the circumstances of the allegations, it is perhaps unlikely that there ever would have been documents directly evidencing the assaults, though there may well have been documents evidencing interrogation at Thuita.[46] However, for example, documents relevant to setting the context of the core allegations, documents leading to potential perpetrators and witnesses etc, so as properly to determine the reliability of the allegations, are a different matter.

A Specific Matter

96. There is a specific matter which does not relate to a core allegation. As set out above, in the "outline of TC 20's allegations", TC 20's final submissions state that after she left Githanga village, "she was arrested, interrogated, and detained for an alleged pass violation and held in Kamiti Prison and then remanded to Thika..." In her witness statement at paragraphs 27 – 30, TC 20 says she was taken to court for travelling without a pass. She denied this, insisted she had a pass, and after a week's remand at Thika, was taken back to the same court. She was released to go back to "Gitambaya's" farm. There probably would have been a number of documents relating to this short period. These may have included some record of the court proceedings, some documents recording her interrogation at Kamiti, and some documents recording her detention in Kamiti Prison, and her remand in Thika. Indeed, in her second witness statement at paragraph 3, TC 20 says: "My name was written down several times, even during arrest when I was taken to Kimati (sic) prison. You cannot go to court without documents or records. The judge read the charges to me so clearly that means there were records".

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[46] Also the possibility of Medical Records relating to TC 20 while in the villages – see below under the section headed 'The Medical Evidence in TC 20's case' - must be borne in mind.

97. If documents relating to these incidents had been available, they probably would have assisted with timeline as well as potentially corroborating, at least in outline, part of TC 20's account. They may well also have led to identifying relevant witnesses.

Prejudice

98. In relation to showing prejudice by reason of lack of documents (or witnesses or otherwise) there is an evidential burden on the Defendant. However, some of the Defendant's prejudice arises at first base in this litigation. Often, in a section 33 case, a Defendant can point to a document lost or destroyed, or to a material witness who has since died. On the core allegations and many other potentially important contextual matters, with only three exceptions, the Claimant has not identified the names of any witness, and the Defendant has no means of beginning a process of identifying, much less tracing, material witnesses. The three named potential witnesses are now either untraceable, and/or dead (see later). The passage of so many years in this case entails that the Defendant cannot even begin any proper investigation of the core allegations. It does not know who allegedly carried out the assaults or when. It knows nothing about TC 20 apart from what she herself has said. To put the matter at its lowest, fifty plus years ago, the Defendant potentially could have found documents, which could potentially have led to information about TC 20 and to potential alleged tortfeasors or witnesses. At the very least, the Defendant probably would have known which documents had been kept and which had been lost/destroyed, and where to locate many if not all of the ones that had been kept. All these are, at a minimum, realistic possibilities; some are probabilities. After all these years, the position is that, apart from much prejudice that the Defendant can prove, there is further prejudice in that it has been deprived in many aspects of proving specific prejudice arising from lack of documentary or witness evidence.

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

100. In paragraph 206 in the TC 34 judgment, in a passage which has equal relevance to TC 20's case, I said this:

> "Further, any submission that there may be no prejudice to the Defendant as to relevant documentary evidence sits ill with the section 32 Judgment at [150], where I recorded the Claimants' submission as follows:
>
> "In paragraphs 15 and 16 of Mr. Myerson's skeleton argument he says that the destroyed documents would have enabled the Claimants to plead the precise dates of their detention and the punishments "for which no authority was given. They would enable the identification of the individuals responsible and provide information as to

who employed and controlled the individuals.[47] Instead the Claimants must rely on memory, inference and general facts". He says that what has happened is that Test Claimants have misremembered dates and then efforts to consider thousands of documents suggested the correct date…"

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

The reason for non-availability of Movement Orders and other potentially important documents

101. The reasoning in paragraphs 208 – 212 of the TC 34 judgment applies, with the necessary amendments, to Movement Orders and other potentially important documents, which are no longer available.

102. Therefore, I have found that on the balance of probabilities there were Movement Orders and other categories of potentially important documents. There may have been other contemporaneous documents potentially relevant to TC 20's removal and villagisation if, as she says, these took place. What has happened to them and when is not clear. What is clear is that the Defendant has been prejudiced, either because it can show that the documents would probably have been available, or, if not, because the lengthy delay in bringing the claims has deprived it of the opportunity of properly investigating whether some or all of such documents could be made available and, if not, from when they became unavailable. The Defendant has therefore shown that the evidence is less cogent as a result.

Documents available – those relied upon by the Claimants

103. The Defendant notes that the documents relied on by TC 20 are documents at a high level of generality.[48] In my judgment, these do not permit the testing of TC 20's core allegations. They are of little probative value in relation to them.

Witnesses

General – Hierarchy, availability and potential relevance

104. Paragraphs 215 - 224 of the TC 34 judgment apply to TC 20. Included in these paragraphs are details of the wide-ranging searches carried out by the Defendant. I repeat that in no TC's case has an alleged perpetrator or direct witness to an alleged tort been found by the Defendant to be identifiable, traceable and contactable.

105. The Defendant's approach was to attempt to trace witnesses following this structure:

(a) Individuals named by TC 20 in her pleadings and evidence;

[47] Not underlined in the judgment, but here for purpose of emphasis.
[48] See for example the Defendant's TC 20 submissions at paragraphs 217.2, 248.1 and 287.2.5.

(b) Individuals whose office and role during the Emergency was such that they might have had knowledge of matters directly relevant to TC 20's claims, or have been able to identify individuals who might have had such knowledge;

(c) Witnesses of a higher rank who may have assisted as to document management/retention and/or allegations about the culture and alleged violence in villages; also why TC 20 was detained, and the regime to which she would have been subject in villages[49].

Colonial Staff

106. Quarterly lists of Colonial Staff in Central Province between 1954 and 1956 are available. Mr. Mansfield took me through an example showing Stations and Officers as at 1st September 1955. In Fort Hall District are listed the names of the District Commissioner (DC), 6 District Officers (DO), one District Revenue Officer (DRO), one Assistant District Officer (ADO), 22 District Officers Kikuyu Guard (KG) and 4 Administrative Assistants (AA).

107. The Defendant produced evidence in relation to those people on the list who had come within the tracing structure referred to above. This covered the DC, 4 DOs, the DRO, the ADO, 17 KGs and 2 AAs. All are deceased or untraceable, apart from Mr Grimmett.[50] These names formed part of a detailed schedule summarising the tracing done on Colonial Staff in Fort Hall/Nairobi between 1953 and 1956. The total number of names on that list is 57. The only person on that more extensive list who was not untraceable or deceased was Mr. Thompson. This shows the lengths to which the Defendant went in trying to obtain witness evidence in relation to TC 20's claim.

108. The Claimants submitted that the involvement of PCs and DCs in villages: "…was very much secondary to the day-to-day involvement of the chiefs and headmen." This appears to be correct. The lower down the colonial staff level one went, the more likely somebody could give direct evidence either of important contextual matters or perhaps of specific allegations. Nevertheless, had the claim been in time or been brought many years ago, a number of the Colonial Staff: (a) may have been able to give useful evidence (e.g. including, but not limited to, the relevant DOKGs), and (b) would have known the names of chiefs and headmen and possibly other relevant witnesses 'on the ground', so that the Defendant could properly investigate TC 20's allegations.

Other potentially relevant witnesses

109. Two documents, one from 1954[51] and one from 1956[52] indicate other types of witnesses who would, on timely investigation, have been able to provide evidence about happenings in villages. They could have spoken generally about conditions. They could also perhaps have given evidence with some particularity about what went on at material times concerning TC 20's allegations of assaults during forced labour, and in other circumstances, in Thuita and Githanga. It is now impossible to know to

[49] cf TC 34 judgment paragraph 223
[50] He made a statement but died before he could give evidence. He is referred to below.
[51] Annual Report of the Department of Community Development and Rehabilitation 1954, section 14 headed 'Villages', Caselines 32-27903.
[52] Report for the Month of May 1956 Community Development Officers (W), Caselines 32-48382b.

where that evidence trail would have led. All that can be said is that the opportunity to obtain important evidence relating to the core allegations in the villages has been irretrievably lost over time.

110. The following extracts from the documents are relevant:

(1954 document):

"In view of the large numbers of women and children to be found in these villages whose husbands are either serving sentences, detained, working in the Home Guard, operating in the forests or living in the towns[53], the accent of rehabilitation must be on women.

Officers have been posted to most of the Districts in the central Province and part-time officers are also being appointed to assist them.

The Red Cross has been provided with Government funds to supplement their own resources and their workers have done magnificent work in health and welfare in conjunction with the department's staff…

All District Commissioners were emphatic regarding the value and importance of the work carried out in some cases by Red Cross Workers and in others by officers of the department with funds provided by the department…"

(the 1956 document);

"**FORT HALL**

The C.D.O. (W) reports that women in the Kangema Repatriation Camp are now having their Maendeleo classes from which they will move on to Clubs within their villages….Two new clubs have been started at Gatiaini Mekemboki and Gathera. A visit was paid to Gathera by the (?) D.C.'s sister Mrs Marsden-Smedley and her entertaining tales of the United Kingdom and the Belgian Congo were much appreciated by the women…."

111. It thus appears that there may well have been relevant evidence from development officers, Red Cross workers and others[54], had the claims been made timeously.

Gitambaya

112. The Defendant tried to trace Gitambaya but without success. Gitambaya was the nickname of the settler to whose farm TC 20 said she went after leaving Githanga, and where she said she returned shortly after her court appearance. Gitamabaya's evidence would have been relevant so as to try to determine when TC 20 may have left Githanga. He may also have had some knowledge as to the court proceedings and, for example, documents evidencing TC 20's employment with him. His evidence

[53] A comment which shows the wide range of women who were in villages

[54] See, for example, 'Kenya Calling' week ending July 17th 1954. This refers to a visit by a Minister to several new villages in the Embu and Byeri districts. There may have been visits by others to villages in Thuita and Githanga by people who may once have been traceable and able to give material evidence. A possible example is health workers, as to which cf the 1954 minutes at Caselines 32-17239.

could therefore have been of relevance in relation to the timeline, which is of importance, and to TC 20's consistency and reliability.

Attempts to trace non-Europeans

113. The Defendant did not find any staff lists for non-Europeans such as those that exist for Europeans. The Defendant did structured searches on the pleadings and focused on the pleaded issues and facts. They therefore searched all pleaded names in relation to the core allegations, namely Ngechu and Ndungu Kahendo (Gikonda) and Peter Njuru (Thuita). People named Ngechu and Peter Njuru died in 2008 and 1999 respectively. Ndungu Kahendo was untraceable.[55] Also, when it was appreciated that the Claimants were relying on a document[56] containing Peter Njuru's name, as Confession Clerk to a team with three elders in October 1954 at Location 14 Fort Hall, the Defendant then attempted to trace the three elders named in the document. These were: Mwangi Thumbi, who appears to have died in 2009, Obadiah Kanguru and Ephantus Waiharo – the latter two are untraceable, probably deceased.

114. The Defendant also tried to trace TC 20's husband, Isaac Waithaka. It appears he died in August 2003. His evidence may also have been of assistance, particularly had he been called many years ago, on timeline and consistency/reliability of TC 20's evidence.

115. Although it was not specifically argued by the Claimants, I asked the Defendant about other possible means to trace non-European witnesses. The response was that it was not considered proportionate to try other methods, for example general advertising in newspapers, to get any remaining people to come forward. All the camps and villages named by all the TCs would have had to be listed, covering a period of more or less the entire Emergency and a geographical area including Nairobi and the locations of the Kikuyu, Embu and Meru tribes. It may be assumed that many people are not literate. It was not suggested to any of the Defendant's corporate witnesses that something of that nature should have been done. Therefore, they had no chance to comment on this possibility. The upshot is that there can be no valid criticism of the Defendant in this regard.

Alleged perpetrators and other proximate witnesses – TC 20

116. Save for three people who are no longer alive/traceable[57], there are no named perpetrators/witnesses in relation to TC 20's core allegations. The Defendant's case is that it does not know who were the alleged perpetrators/witnesses, or how they could possibly be traced, if still alive at this stage[58]. The Claimants have not called anybody directly relevant to TC 20's claims. They have given no evidence as to the reasons for this, or any efforts they may/may not have made to obtain such evidence.

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[55] See further details below relating to these 3 names.

[56] Caselines 32-21872

[57] Ngechu, Ndungu Kahendo and Peter Njuru. In relation to the Gikonda allegation, TC 20 says two neighbours were shot dead (see below); however by definition, if this is correct, any prejudice arising from their non-availability is not because of the expiry of the limitation period.

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

117. It is useful to set out information provided by TC 20 in relation to the alleged perpetrators[59]:

(i) Removal from Gikonda –

- In the AIPOC paragraphs 9 – 12, TC 20 says that a group of Home Guards, Kenyan policemen and British soldiers stormed into her house. She was ordered outside. A number of policemen and Home Guards started simultaneously beating her.

- In the Part 18 Response, in reply to questions asking the name of the Home Guards, Kenyan policemen, and British soldiers, TC 20 said that the only names she knew were Ndungu Kahendo, who was a headman and also a Home Guard, and Ngechu, who was a Home Guard. She added that Ndungu Kahendo (spelled in the Part 18 Response also as Ndung'u Kahindo) and Ngechu are deceased.

- In paragraph 11 AIPOC, TC 20 says she knew of two neighbours who were severely beaten up and shot dead by the police.[60] In the Part 18 Response, she says that the neighbours were called Kubai Wagura and Gacunge Kuria. She says that Ndungu Kahendo gave the order to shoot.

(ii) Interrogation at Thuita village –

- In the AIPOC paragraphs 20 and 21, the Claimant says that she was interrogated by a panel consisting of two British officers and four policemen. She confessed to having taken the Mau Mau oath. She was then physically assaulted by two of the policemen. In her Part 18 Response she said she did not know the names of the two British officers and the policemen. She cannot remember what the policemen wore. They only had clothes that showed they were policemen. She says she cannot give further information about what the British military wore, apart from what she had stated earlier.

(iii) Repeated physical assaults at Thuita

- In the AIPOC paragraph 16, TC 20 says: "detainees were guarded by Home Guards while working. The Claimant avers that the said Home Guards created a hostile and threatening environment by using violence..."

- In the AIPOC paragraph 17, TC 20 says that from time to time detainees would sneak away to gather food. If they were caught, they were beaten on their return.

- In the AIPOC paragraph 18, TC 20 says she was subjected to repeated physical assaults while she was working..."

- In the AIPOC paragraph 19, TC 20 pleads:

  "The village Chief, Peter Njuru, lived in a post situated a few yards away from where the Claimant was staying. He gave orders to the policemen and Home Guards. The Chief reported to British officers who lived in the post. The Claimant will recall that

[59] Even this information is subject to the translation problems about the identification of British military and British officers to which I have referred above under the sub-heading '*TC 20 translation'*.
[60] In the original AIPOC she said she witnessed this. This is explored further below.

around 4 British officers lived there. Sometimes, the British officers wore white shirts and black peak caps. The Claimant will recall that they also wore black capes on occasion. Detainees were randomly called by the Chief to be interrogated."

- In her Part 18 Response to paragraph 18, TC 20 says that the beating was done by the police and Home Guards. She does not provide any names or other identifying features. There is a similar response to the request for the names or identifying features of the policemen, Home Guards or British officers referred to in AIPOC paragraph 19.[61]

(iv) Physical assaults at Githanga village –

- At paragraph 23 AIPOC, in relation to Githanga village, it is pleaded: "the living and working conditions were similar to those at Thuita village including, for the avoidance of doubt, physical assaults while working." The underlined words were added by way of amendment to the original IPOC on 8 September 2017.

- TC 20 gave no evidence identifying any alleged assailants at Githanga village.

118. The Defendant has made attempts to trace individuals in respect of the Gikonda allegations. There is evidence that Ndungu Kahendo is untraceable.[62] Ngechu is deceased, having died in 2008.[63] Whether Ngechu who died in 2008 is the Ngechu to whom TC 20 refers is not known, and could not be known unless he were alive to be asked.

119. The Defendant has also made attempts to trace "the village Chief, Peter Njuru". Somebody known as "Peter Gitau Njuru" died on 25 February 1999.[64] In a document apparently dated September 1954 a Peter Njuru is listed as a clerk on the location 14 Confession Team.[65] It is possible that this is the Peter Njuru to whom TC 20 refers as the "village Chief". If he were, then this would be some evidence that TC 20 was in Thuita village, location 14. Whether TC 20 has proved that she was in Thuita location 14, as opposed to other Thuita villages marked on maps, is controversial and will be dealt with later in this judgment. However, and in any event, the Defendant has been deprived of the opportunity of finding and speaking to Peter Njuru, and, if appropriate, to ask him to give evidence in relation to whether TC 20 was in Thuita village location 14, when she was there and TC 20's core allegation of regular beatings at Thuita and, possibly, in relation to her alleged beating during questioning. TC 20 does not say that Peter Njuru was present during her questioning. However, in her witness statement[66] she says that the chief reported to British Officers who lived in the Post, and that it was the chief who one day sent for her, whereupon she was arrested and interrogated. Even assuming he was not present during the interrogation,

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[61] Save that she says: "I knew they were British soldiers because they were white."

[62] A record of the Defendant's investigations with respect to Ndungu Kahendo is found at [49-10102 – 49-10103]. It shows that investigations found numerous people named 'Kahindo', but the name as given was not found. A Ndunga Kahindo was traced, however, but he died in 2013.

[63] See the trace report at Exhibit MGP3 to Ms Pollock's Witness Statement, Caselines [49-9984] and the table MGP7 exhibited to her Fifth Witness Statement (Caselines [49-11032]).

[64] See the trace report at Exhibit MGP3 Caselines [49-10001] and the table MGP7 exhibited to her Fifth Witness Statement (Caselines [49-11032]).

[65] Caselines [32-21872].

[66] Paras 15-16

the chief could nevertheless potentially have given evidence about questionings and commented on TC 20's account. He could also have given evidence as to those responsible for questionings.

120. The net result is that it is impossible for the Defendant to identify anybody who might have been directly responsible for, or who might have witnessed, the alleged assaults. Nor is there any evidence as to attempts made by TC 20, or on her behalf, to identify or trace any of the alleged perpetrators.

121. The Claimants submitted in relation to TC 34's case that failure by TCs to identify alleged perpetrators is more likely to be evidence of deliberate policy, given that even what was lawful was brutal, and that the Defendant produced no evidence that anyone engaged in law and order wore a name badge or introduced themselves.[67] There is no evidence, nor can it be inferred, that there was a deliberate policy that people could not be identified; nor can it be inferred that people could not in fact be identified.

122. In relation to those whom TC 20 has named, the passage of time has deprived the court of their being able to give evidence.

123. In relation to those who were involved in or could have evidenced the core allegations, but whose names TC 20 has not provided, it may be that she never knew the names of some or all of them, though this cannot be said with any degree of confidence. In any event, except perhaps for the alleged forced removal from Gikonda, she may have heard their names referred to – especially the names of those who allegedly beat her repeatedly – and, had this claim been brought in time, have remembered those names. If so, they, and perhaps other relevant witnesses, could have been traced upon investigation. 50 plus years later this has not been possible. Even if TC 20 had not remembered names, the Defendant would, at that time, have had a proper opportunity to investigate so as to identify and interview relevant potential witnesses.[68] In addition, the passage of time can properly be said to have had these effects:

i. TC 20's memory as to various important features of the allegations would have been better some 50 years ago. Her recollection as to the timeline, description of the perpetrators and the uniforms they wore will have been adversely affected. There is general evidence of different uniforms and insignia worn by different types and ranks of guard/officer.

ii. The Defendant could have investigated who was responsible for any forced removal from Gikonda, potentially with the assistance of documentary records. Not only might this have been entirely possible 50 plus years ago, but also TC 20's recollection as to the probable date of the removal would have been much clearer, thereby narrowing and assisting such enquiries. Thus, considerable light could have been cast upon the allegations relating to the alleged forced removal.

iii. Similar points can be made about the alleged interrogation at Thuita. The reality is that the Defendant has been deprived of any opportunity properly to investigate this allegation.

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[67] See para 228 of the TC 34 judgment

[68] Especially if the time frame had been clearer than it now is.

iv. In relation to the core allegations of repeated assaults at Thuita and Githanga, these are by definition not a single alleged assault. There is no detail as to how often the alleged assaults took place, or any description of any of the persons responsible[69] – something which TC 20 would have been in a better position to recall some 50 years ago; also, this type of allegedly regular abuse could have been addressed by officers/those in charge, and possibly rehabilitation officers and Red Cross workers, in Thuita and Githanga villages. They could have given evidence of the incidence/prevalence of unlawful violence in the period when TC 20 alleges she suffered it. This type of evidence may also have been relevant to the one-off allegations of violence, when TC 20 says she was forcibly removed from Gikonda and during TC 20's questioning at Thuita village. The main importance of the lack of any such evidence is that it seriously undermines the Claimants' submission that there can be a fair trial of the core allegations.

The Defendant's witnesses

124. I have already referred to the evidence from Mr Thompson. I now turn to other aspects of the evidence that the Defendant was able to call. It must be borne in mind throughout that no witness was able to give any direct evidence as to TC 20, or to any of her core allegations, or to the existence of, or conditions in, Thuita or Githanga villages.

125. Mr Myerson referred to the Defendant's witnesses who had been policemen. He said that those witnesses' evidence was that: "villagers weren't anything to do with us"; therefore they were not able to say either that they investigated complaints by villagers, or that they never investigated them because none were made.

126. I shall briefly consider the evidence of the policeman called by the Defendant.

127. Mr Ross was posted to Kiriani Police Station in Fort Hall in about 1957 and he left in around 1958. This was after, or towards the end of, TC 20's villagisation. The whole of the Kiriani area had been settled into villages. He would contact the headman if and when he needed to go to a village. Neither Mr. Ross nor his policemen gave or took any orders from the headmen or Home Guard. The only village name he recalled was Kiriani village. He did not recall villagers working on collective labour projects, though could recall them doing so in adjacent areas. He said[70] that he could not comment directly on the allegations TC 20 made and: "All I can say is that I never witnessed or heard of anything of that nature". He was cross-examined[71] and said that he was not responsible for permitting people in and out of villages, that the chiefs and headmen were under the District Commissioner and they looked after and dealt with villagers. He said he would be very surprised when he was there if there was any control over the movement of coming in and out of the village. He was not aware of what action could be taken against recalcitrant villagers, he was not responsible for it and no paperwork passed his desk suggesting what could and could not be done to control the African population.

[69] Save possibly Peter Njuru – see above.
[70] Witness statement para 17
[71] See in particular Caselines 33-13574 to 33-13575

128. Mr Myerson submitted that, on that last section of Mr Ross' evidence, regular involvement of the police to protect the rights of villagers who might have been maltreated was something that never happened. As far as Mr. Ross was concerned, he was answering a specific question about his involvement in villages with reference to disciplinary measures taken against recalcitrant villagers. The situation he described in the villages he visited was one where it did not appear, at that stage and in that area, that there was much if any restriction on the freedom of movement of villagers, or of forced labour in the villages. What he does describe, though his recollection is now unclear, is visiting a number of villages.

129. Other police witnesses were not subject to detailed submissions, but I shall make short reference to some evidence. This is merely to pick out some sections of evidence. It is not a critical analysis of their evidence, since my concern at this stage is cogency of evidence in relation to TC 20's claim. That said:

- Mr Ridley was an Inspector of police in Embu between 1956 and 1957. At that stage the local population had been moved to protective villages. He said that the police role was to have a presence in the area, to go on patrols, check people's documents and investigate allegations of livestock theft, traffic offences and trivial matters. He described it as ordinary rural police work. He said he visited a village probably about once a week. He would attend a village if he was called in by a District Officer or Tribal Police to investigate, for example, a fight between villagers. He said: "We would sometimes go to a village at night to see that people were behaving themselves and they weren't drunk or taking drugs". He said he saw no evidence of mistreatment and no one made any complaints to him in the villages he saw. As to allegations now made against the Home Guard he said: "I cannot rule out that members of the Home Guard mistreated the villagers at times. I did not see this, but my perception was that Kikuyu did have a violent streak and could be cruel so it's possible there were some excesses…" In cross examination he said that he was not aware of model or punitive villages, but suggested that the villages he saw were very much of the model type.
- Mr Nazer was in police stations in Central Province from 1953 to the end of 1955 when he became an inspector at Kandara, Murang'a. He remembered the names of some of the villages, though he said that when he arrived the villages were breaking up and some people were moving back to their farms. He said[72]: "I used to visit the villages quite regularly….", and "There were about 20 villages in the area and I would have visited them all at one time or another…I used to visit them as part of my general policing duties of investigating crime – for example I might be investigating an allegation of theft and a suspect might live in a village…"
- Mr Griffiths was a policeman from about late 1953. He was first in South Nyeri, Fort Hall in a post named Mombuchi, a forest post. He left this post about November 1954, and from then until about 1957 he was stationed at various posts and police stations in the South Nyeri Reserve. He said that as far as he recalled villages in his area had been constructed before he arrived. In paragraph 19 of his witness statement he said: "I would occasionally visit the villages to speak to the headman or chief to see if they had heard anything

[72] Witness statement paras 15, 28 and 29

about the Mau Mau gangs or had any information but I did not visit regularly. The villages were organised under the Administration rather than the police". In cross-examination he said that a large part of his work at this time was going on police patrols with a view to tracking down Mau Mau. He said that to a great extent policing of the villages was left to the Kikuyu Guard and he, as a policeman, would not involve himself in the supervision of the Kikuyu Guard.

130. The police evidence that I have reviewed is patchy. Recollections were clearly not as good as they would have been many years ago. Regard must be had also to the different dates and places of policing by the witnesses. The impression given from this limited evidence is that: (a) the running of, and discipline in, the villages was a matter for the Administration i.e. chiefs and headmen, and, above them, the District Officers Kikuyu Guard, the District Officers, and so on up the hierarchy; (b) police would not infrequently visit villages, for example to investigate crimes by villagers; (c) no policeman saw abuse by Guards or had it reported to them; (d) there was no evidence to which my attention was brought to the effect that, had criminal assaults by Guards on villagers been alleged, the police would have regarded it as not a matter for them.

131. I now turn to some evidence from administrative officers. Again, I was not taken through this in any detail in submissions. Mr. Grimmett gave a witness statement dated 29 July 2016. He died before he was able to give oral evidence. Therefore I remind myself that I have to take into account the fact that he could not be cross-examined when I consider the weight I give to his evidence. Between 1955 and 1957 Mr. Grimmett was a Divisional District Officer, posted to Kangema in Fort Hall. When he arrived the process of villagisation was complete. In respect of villagisation he said at paragraphs 25-30:

- People worked in the villages supervised by the Home Guard. He never saw any mistreatment and nobody complained to him of any.
- He did not recall Thuita village.
- He did not recognise the picture painted by TC 20 (and TC 22) of systematic assaults by Home Guard. He spent a fair amount of time visiting the villages as a District Officer. Had he witnessed any assaults he would have intervened and the perpetrators would have stopped. Nor did he hear any specific rumours of assaults. From time to time rumours circulated about more serious wrongdoing by the Home Guard: not specific allegations about anything that happened in his area. The police had a CID unit and it was well known that they would investigate any alleged incidents, and would prosecute the individuals concerned if necessary.
- On a day-to-day basis the mood in the villages was generally quite good.

132. Mr. Milbank was a District Officer Kikuyu Guard in Fort Hall District from December 1955. In April 1956 he was posted to Gikui village, Kangema, which had already been built. He never felt any antagonism from villagers and never heard of or saw any mistreatment. He was in Gikui for about six months. He lived in the village in a sort of boma apart from it. As the Government got on top of the Emergency the rules became more lax and the curfew less strict. There was less need to have a DOKG in each village. He was then stationed at Kangema Post where he was

responsible for looking after a few villages in Locations 12 and 13. He could not remember the name of the specific villages. He was there for about 9 months. In addition he said:

- DOKGs were put in charge of protected villages in the Kikuyu Reserve. There were lots of protected villages dotted all over the Reserve.
- Communal labour in Gikui was compulsory 4 days a week, this having been determined by the District Officer, Mr. Grimmett. He (Mr. Milbank) would typically see the work get started some mornings, perhaps go back to the village to check there were no loiterers and then get on with his other work.
- He would have a meeting at least once a month with the District Commissioner and would see the District Officer once a week. The District Officer would occasionally come out to see them on the Reserve (the District Commissioner very rarely did this).
- He did not witness or hear of any mistreatment of Kikuyu during the Emergency period. He suspected that some may have occurred but such incidents would have been isolated.
- He gave instructions to the headmen who effectively policed the village on his instructions.[73]
- The Kenya Police were very much around, but the day-to-day handling of looking after the villages was done by the Tribal Police. The regular police was engaged tracking down the Mau Mau and normal crime.

133. Mr. Gordon was in Kenya between 1951 and 1962. His experience of villagisation was in Ndia on the south-west slopes of Mount Kenya. He was the District Officer of Ndia Division. This was in 1956 – 1957, by which time people had been moved into villages. Among other things, he was asked in cross-examination whether he would have acted on an undated and unsigned curfew order which was in the bundle for Ndia from December 1956. He said he did not recall ever seeing it, he would not have acted upon it and he would have asked his District Commissioner. Later he described aspects of the land consolidation programme. He was asked what land the people in the villages farmed and said it was the land the villagers traditionally used. He added that villagers were allowed to go to their plots whenever they wanted and that they were not escorted out of the village to their plots.

134. This snapshot review of the Defendant's witness evidence makes it crystal clear that the Defendant has been further prejudiced by the delay. Whatever the precise role of the police and administrators in the villages where and at the time when TC 20 says she was villagised, potential witnesses with knowledge of what went on in the villages in which she alleges she was detained are now forever lost, in particular the DOKG, the District Officer, and, as mentioned before, rehabilitation and Red Cross workers. They may or may not have been able to help with direct evidence relevant to TC 20's core allegations. They may well have given important contextual evidence as to

[73] Mr Milbank was questioned about a document he had signed and which was exhibited to his statement as MM 4. This was sent to all headmen in Location 12. It is, as he says, in strong language, and says (for example) that there will be 'severe disciplinary action' and 'heavy punishments' if instructions are not adhered to. Mr Milbank explained the document as being the words of a person who had just left school, was fairly full of himself and was trying to 'establish for a command'. I do not propose to go into it any further as it is not relevant to the main issue about the effect of lack of witnesses on the cogency of evidence in TC 20's case.

Thuita/Githanga villages. Some people could have known and remembered TC 20 herself. Also, witnesses may have been able to help locate the chief of Thuita (if not the Peter Njuru who has died) and the headman of Thuita, together with those responsible for Thuita interrogations, and the chief and headman of Githanga, along with members of the Kikuyu Guard/Tribal Police responsible for the two villages.

135. Instead the position is that, save for TC 20, the court has no real evidence of anything relating to any of TC 20 core allegations, including even the very existence of Thuita village or Githanga village.

Summary of witness shortcomings

136. In brief:

- The Defendant has spent an enormous amount of time and money trying to trace any witness who might be able to give evidence relevant to TC 20's claims. With the exception of some peripheral evidence, it has drawn a blank. There can be no valid criticism of the efforts the Defendant has made and, in fairness, the Claimants did not seriously seek to make any.

- Had TC 20 issued her claim within the limitation period, or even many years ago, the Defendant would have been in a far better position to obtain witness evidence, and any documentation, relevant to the core allegations. This includes important contextual matters, examples of which are the timeline, general evidence as to how the Thuita and Githanga villages in which TC 20 says she was confined were run, and evidence which may have corroborated or undermined TC 20's reliability in respect of the factual 'hinterland' of the core allegations.

- There was no opportunity, until very recently, for the Defendant to investigate TC 20's core allegations because no formal complaint was made. Had TC 20 made such complaints years ago, and the Defendant had investigated [or chosen not to], then that could have been weighed in the balance.

The Defendant's witnesses and documents

137. From the General Submissions of both sides arises a dispute as to the reasons for, and consequences of, the fact that the Defendant did not show documents to its witnesses when they made their witness statements.[74] In TC 20's case, the relevance of lay evidence called by the Defendant as to the core allegations is tangential.[75] Also, the relevance of this point is minimal in TC 20's case. Thus, further exposition of, and comment on, this dispute is not merited. It would not have any impact of substance on my decision.

Documents and Witnesses Interrelationship

[74] Claimant General Submissions, e.g. at [127.3]; Defendant General Submission at [3.27] – [3.60].

[75] Other examples are Mr. Thompson's evidence on some matters not specifically related to TC 20 or the locations of her alleged core allegations – see Claimants' TC 20 submissions at paragraphs 30, 37, 70 and 198.5. As to Mr. Thompson's evidence in his witness statement about Githanga, see below in relation to the core allegation at Githanga.

138. It was submitted by Mr. Myerson that a distinguishing feature of TC 20's case from TC 34's case was the relative absence of documents at the time of TC 20's villagisation. For the reason I have set out, I do not accept this. Further, to the extent that it may be said that it is more difficult to demonstrate that fewer types of relevant documents can now be identified as missing in relation to villages, compared with detention camps as in TC 34's case, the loss of witnesses becomes even more important on two levels:

(1) Nearer the time of the happening of the alleged events, witnesses, such as administrators and people in charge of villages, would have been able to assist in informing the parties as to what types of documents would have been available to evidence: (a) the names and identities of people kept in villages, (b) the names and duties of those charged with looking after them, and (c) the names and/or type and/or rank of those involved in interrogating people in villages. So, if more documents existed, but are not now available, then over time the possibility of locating such documents has become ever more remote.

(2) If it was always the case that there was more and better documentary evidence in detention camps compared to villages, then the importance of a timeous claim is even greater in a village than in a detention camp case. In circumstances where there were fewer documents to assist the investigation, a timeous claim would have been necessary to ensure that the trail of investigating and finding potential witnesses was as hot as possible.

The Medical Evidence in TC 20's case

139. I have medical reports from Ms McGuinness, a Consultant in Emergency Medicine, dated 17 August 2015, and from Professor Mezey, a Consultant forensic psychiatrist, dated 20 August 2015. There were also Part 35 responses by each doctor. They both gave evidence before me.[76]

140. Although much of what I said in paragraphs 236 – 242 of the TC 34 judgment is applicable to TC 20, for clarity I will set it out again so far as relevant to TC 20's case, and with the appropriate changes.

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

(a) Whether a fair trial is now possible and, if so, whether TC 20's account should be accepted in whole or in part is, of course, a matter for the Court. The fact that a witness impresses a doctor does not mean that a fair trial is possible, or that the evidence of that witness should be accepted. It is also likely, in terms of diagnosis and effect of both physical and psychiatric symptoms, that the quality of the medical evidence has been adversely affected by passage of time.[77] Further, inconsistencies which are apparent from the medical evidence must be considered as to what extent they may impair TC 20's claim.

[76] In TC 20's case there is no claim for psychiatric injury.
[77] cf F&S v TH at [61] and [66].

(b) In a number of regards, it is correct, as the Defendant says[78], that the expert is able to do no more than conclude that his or her findings are 'consistent' or 'compatible' with the Claimant's account. The expert in the present case is heavily dependent on the history given. That said, there may be matters in the medical evidence which go beyond mere recording of history and to which the Court should have regard. The Court does not have to accept any such statement, or give to it the weight which the doctor did; but it should not be dismissed as not capable of carrying any weight. That approach is not at odds with the decision in SA (Somalia) v SSHD[79] where the Court of Appeal noted that the medical report relied on as corroboration amounted to no more than a record of (a) the appellant's history as recounted to the doctor, and (b) the appellant's own explanations for the old injuries found on examination. Nor is it at odds with the caution expressed, albeit in the context of other confounding effects in a deportation case, by the IAT in HE (DRC – credibility and psychiatric reports)[80]. This Court is fully alive to drawing the line between the recording of a reliance on subjective recounting of events/symptoms to a doctor, and objective signs which are capable of providing some corroboration.

142. Another matter on which the Defendant relies to allege that there cannot be a fair trial after all these years is the dearth of medical records. I remind myself that, while the ultimate burden is on a Claimant in section 33, "the evidential burden of showing that the evidence adduced by the Defendant is, or is likely to be, less cogent because of the delay is on the defendant".[81] If the section 33 discretion were to be exercised in favour of TC 20, the burden would then be on her to prove her case. The Defendant relies on the absence of contemporaneous medical records in the periods pre and post the core allegations, against which TC 20's account cannot be compared.

143. The first question is as to what medical records were ever available. There is no proper evidence on which I could find that any medical records relevant to the alleged assaults, the subject of TC 20's claims, were probably made; nor that any other medical records relevant to put the claims in context were ever made. The only available evidence on this is that of TC 20. In relation to the alleged assault during questioning at Thuita village, she says:[82] "I did not go to any hospital or seek any medical attention." She may, of course, be wrong about this. Her memory on such a matter cannot be regarded as reliable. It would have been more reliable 50 plus years ago. In relation to the other core allegations of assault she gives no evidence one way or the other.

144. It is therefore a possibility that there were clinical notes in one form or another arising from injuries allegedly occurred by reason of assault. These may have confirmed or cast doubt on TC 20's present account. It is also possible that there were other entries which would have been relevant to assessing the reliability of the core allegations. It cannot be put any higher than that. Nevertheless, it is not possible properly to investigate whether there were any such contemporaneous records or what effect they may have had.

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[78] AICS
[79] [2006] EWCA Civ 1302 at paras 24 – 28; in the tribunal hearing the doctor had not given oral evidence
[80] [2004] UKIT 321 paras 18-19; cited in *S (Ethiopia) v SSHD* [2006] EWCA Civ 1153 at paras 29-30.
[81] The Carroll case at para 42 (5).
[82] Witness Statement para 17.

145. In her Part 18 Response, paragraph 178, TC 20 stated: "I have been going to hospital for general aches and pains since the Emergency ended." Ms. McGuinness was asked about this and said she would have expected, even in Kenya, that there would have been some documentary records. TC 20 had not told Ms. McGuinness that she had been going to the hospital regularly since the Emergency ended.

146. Nevertheless, what I cannot assume is that what happened in the UK from the 1950s onwards vis-à-vis medical records would have been replicated in Kenya generally. Nor do I believe it safe to rely on Ms. McGuiness' assumption about medical records in Kenya, so as to decide that there probably would be medical records in Kenya if TC 20 had been going to the hospital since the Emergency ended. This may be so more recently – there was some evidence of this in TC 34's case, for example – but there was no clear evidence from TC 20 as to the dates when she had so gone to the hospital. In relation specifically to the lack of such medical records relevant to the period pre and post the core allegations, and in the circumstances of my review of those allegations later in this judgment, I cannot find that the delay in bringing the claim has resulted in the evidence adduced being less cogent.

147. What can be said is that the court does not have the assistance of any contemporaneous medical records, whether during the particular periods for which TC 20 makes the core assault allegations, or later. Whatever the position, there are no available medical records against which to test her evidence as to the history of, and reasons for, physical complaints. This is a factor which has been relevant in the authorities in deciding whether there can be a fair trial.

148. I am not at this stage considering a comprehensive assessment of the medical evidence, much less possible quantum. However, I will mention that the Defendant made the point that the AIPOC, paragraphs 6 and 42, refers to continuing pain at various sites of TC 20's body. I will find below that an absolute time bar operates in relation to the claims for assault on removal to Thuita, during the alleged interrogation at Thuita and for part of the period of alleged regular beatings at Thuita. This highlights aspects of the problem caused by the fact that TC 20 has the burden of proving which incident was responsible for any long-term injuries. This could also cause some difficulties if the stage was reached that section 33 discretion was exercised in the Claimant's favour, and either: (a) she proved some core allegations against the Defendant, but not others, and/or (b) if after hearing generic submissions, the Defendant was liable, vicariously or otherwise, for some core allegations of assault, but not others. I do not believe such difficulties would be insuperable, and I do not take them into account in deciding how to exercise the section 33 discretion.

Status/Age

149. TC 20 says she is a Kenyan national and was, at the material time, a British subject by virtue of Section 1 (1) of the British Nationality Act 1948. The Defendant admits that the citizens of the United Kingdom and Colonies were British subjects but, as with other individual Claimants, makes no admission as to TC 20's status.

150. TC 20's evidence in paragraph 3 of her witness statement is: "my ID card says I was born in 1928. I estimated my age to the authorities while we were queuing to get the ID. I worked it out on the basis that I was the first born." Apart from her identity card, there is no corroboration of her identity or age, whether from a document or other

witness evidence. The Defendant submits that TC 20's names appear common in Kenya. On the Register, 452 individuals have her forename, 829 have her middle name, and 143 have her surname. The Defendant further submits that there is insufficient material on which the court may find that TC 20 is the person she purported to be, and that the Defendant has not been in a position to contradict TC 20's identity (or any of her evidence) by way of a positive case. Further, that no evidence has been given as to what research, if any, the Claimants have undertaken to seek corroborative evidence referring to TC 20 at any stage whether before, during, or after the Emergency; nor has any explanation been given by the Claimants as to how they did researches.[83]

151. In relation to the matter of TC 20's identity, as with TC 34, the proper inference appears to be that she had had her identity card for a number of years, that her name and date of birth had remained constant since that date, and her photographs have been renewed. There was no exploration in cross-examination of the background to her identity card. The present identity card was issued in 1996.

152. In those circumstances, on the balance of probabilities, I find that TC 20 was a British subject during the Emergency and that she was born in or about 1928.

Timeline of TC 20's Case

Majengo – Gikonda – arrival at Thuita

153. This period is dealt with in paragraphs 7 – 12 AIPOC. It involves allegations that:

(i) "Shortly after the commencement of the state of Emergency, the British military and Kenyan policemen raided the Claimant's neighbourhood in Majengo." All the men were arrested and taken to be detained elsewhere. The women were left behind.

(ii) Her husband having been taken away, TC 20 decided to go back to her home village in Gikonda and she lived there with her mother-in-law: "for around one year before they were forcibly removed from there." TC 20 and others were beaten and then marched on foot to Thuita village.

154. In her oral evidence TC 20 said:

(i) Her husband was arrested twice. The first time he was arrested at Majengo and taken back to his home village at Githanga. He then went back to Majengo in Nairobi. He went back to Majengo about two months after his first arrest. At that stage TC 20 was not in Majengo but was staying at Githanga. She said that Gikonda and Githanga are in the same area. Gikonda/Githanga are in Murang'a District bordering Nyeri District.

(ii) The second time TC 20's husband was rounded up, he was in Majengo and taken to Manyani.

[83] See the citation in paragraph 245 in the TC 34 judgment in relation to what Mr Myerson said on 23 May 2016 (last bullet point in the TC 34 judgment).

155. In the Liability Amendments judgment a proposed amendment to paragraph 13 IPOC was refused. The proposed amendment was in relation to the date of TC 20's arrival at Thuita. It read:

"The Claimant's arrival was probably in or around 1955. She will rely on the documentation for its full terms and effects. For example, regarding the progress of villagisation in Fort Hall in 1955..."

The basis of the refusal (amongst others) was "on the present pleadings this[84] is said, by clear analysis of paragraphs 7 and 8 of the IPOC, to be around 1953. This is in excess of one year prior to the proposed amendments of 'probably in or after 1955.' The Court also refused the amendments on the basis that there would be prejudice to the Defendant if it were allowed."

156. In paragraph 48 of TC 20's closing submissions it says: "it seems likely that TC 20 arrived in Thuita around the end of 1954 or the beginning of 1955." Reasons are given for this in paragraph 48 and in paragraph 27. These include relying on documentation which was cited in support of the refused amendment. On that basis the Defendant submits that the date relied on for the removal to Thuita advances a case contrary to the pleaded case, and in direct contradiction of the Court's ruling.

157. The Claimants, in paragraph 13 of their submissions in response, state:

"The Court has ruled on what claims TC 20 can bring, based on the case originally pleaded. D's assertion that the Court *ruled* that events in the IPOC fell before June 1954 (para 27) is incorrect. The Court analysed the pleadings: it did not rule on factual submissions. Based upon the Judgment, the parties agree that TC 20 cannot have a remedy if it now appears that the date of an event was post June 1954, but that date is not pleaded in, or derived from, the IPOC, and the date in the IPOC is prior to the absolute time bar."

158. It was clarified in oral submissions that "post June 1954" was an error for "pre June 1954". However, the ruling in respect of the proposed amendment of paragraph 13, was expressly that paragraphs 7 and 8 of the IPOC, properly analysed, pleaded removal to Thuita to be about the end of 1953. Earlier in this judgment I have applied the contents of paragraphs 39 - 44 of TC 34's judgment to TC 20's case. Paragraph 42 of TC 34's judgment requires repeating at this point. It states:

"Therefore, TC 34's claim is defined by his pleadings and not just as to dates. Substantial/material deviation from the pleadings in the closing submissions cannot give rise to a remedy. That said, it is for the court to decide what is substantial/material in the circumstances. The pleadings are not a complete straitjacket. The aim of them is so that each party knows the case it has to meet and is not unduly disadvantaged by any divergence from the pleaded case."[85]

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[84] The date of forcible removal from Gikonda, and hence the date of arrival at Thuita.

[85] See also paragraph 40 of the TC 34 judgment which records Mr Myerson saying in Court on 10 April 2018: "…we accept that once we have pleaded 1953, for the sake of argument, and it turns out, on the face of the documentation, that it appears to be 1955 but everything else is accurate, we can't get a remedy for that. It's too late, we didn't amend it in time, it's not our case."

159. Having regard to those principles and to the Liability Amendment Judgment, TC 20 is disentitled from now claiming that her removal to Thuita was after June 1954. The full reasons for the refusal to allow the amendment to paragraph 13 must be taken into account. This is not a mere pleading point. It is a substantial/material deviation from the pleadings and since I have previously ruled that, on their proper construction, the pleadings allege removal at about the end of 1953, there can be no remedy as a result of the absolute time bar.

160. I will, nevertheless, decide in the alternative whether I would have exercised my discretion under s.33 and, if so, whether the Claimant has proved her case in respect of the events which I determine are pleaded as pre-June 1954.[86]

Alleged beatings at Thuita village – identification of Thuita village

161. It is not known when Thuita was founded as a village.

162. TC 20's submission was that there were two Thuitas in Fort Hall. One was in Location 14, the other was in Location 1. The submission was that TC 20 was villagised in Thuita Location 14. On the Nairobi extra-provincial map, the Claimants marked two Thuitas. It was their case that the more northerly one was the Location 14 Thuita. By reference to an enlarged troop locations map from 1953, a Thuita in an area designated with the number 14 appears close to a place named Gekondi.[87] There is also reference to Gikondi which appears to be a larger area. The submission was that the Thuita on the troop location map corresponded to the more northerly Thuita on the extra-provincial map. In fact, by comparing another enlarged section of the troop locations map, it became apparent, during oral submissions, that the Thuita in what appears to be Location 14 is not one of the two Thuitas on the extra-provincial map. It is not shown on the extra-provincial map, as it is further north than the area which that map covers. This error, which had prevailed on the Claimants' part up to a discussion in court involving the Defendant's submissions, is illustrative of the difficulties faced in now trying to piece evidence together and the possible pitfalls in doing so.[88]

163. TC 20's estimate of the time it took to walk from Gikonda to Thuita village was about three hours. It is not possible on the available cartography and this estimate to draw any inferential conclusion as to which Thuita the Claimant says she was sent.

164. Another piece of evidence upon which TC 20 relies for suggesting she was probably in Thuita Location 14 is the evidence of Agnes Gitau. This was on the basis that in her evidence Mrs. Gitau was clearly describing a different place from TC 20. Mrs. Gitau said that the Thuita she was in was near Githembe and Kiahiti (sic). On the

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[86] cf paragraph 27 of the TC 34 Judgment.

[87] TC 20 says that she was moved to Thuita from Gikonda village. Her evidence was that Gikonda was in Murang'a, not Nyeri. Murang'a is the modern name for Fort Hall District. However, the Gekondi and Gikondi on the troop location map are shown as being in South Tetu, which is in the district of Nyeri and not in Fort Hall/Murang'a. The border between the two districts is not far from Gekondi/Gikondi.

[88] Mr Myerson said that TC 20 could have been asked by the Defendant questions to try to establish which Thuita on the map was the location of the village in which she was kept. However, the Defendant made no admissions and the Claimants could also have asked her such questions. Whether she could have assisted is not known. (She was asked to particularise its location in a Part 18 question. Her response was: "Thuita village is in Kiria-ini, Murang'a. I am unable to mark on the map as I am uneducated."). I have to deal with the evidence I have. I do not accept any criticism of the Defendant for not asking this type of question.

extra-provincial map Githembe and Kiahitie are shown as proximate to the northerly Thuita on that map. Originally, until oral submissions, as stated above, that was the Thuita to which the Claimants submitted TC 20 was sent. If that had been the case, then the evidence of Agnes Gitau would have caused immense problems in trying to infer that TC 20 was in Thuita Location 14. Having regard to the Defendant's clarification, the position appears to be:

(a) That Thuita Location 14 is not on the extra-provincial map;

(b) Mrs. Gitau may well have been in the northerly Thuita shown on the extra-provincial map, as that is close to Githembe and Kahitie. Although not totally clear, that Thuita appears, from comparing the extra-provincial map and enlarged troop locations map, to be Thuita Location 1;[89]

(c) It is common ground that TC 20 and Mrs. Gitau were describing different villages;

(d) The overall evidence has been very confused. It may be that TC 20 was in Thuita Location 14. However, another problem is that in the TC 20 submissions[90] it says "... it seems likely that TC 20 arrived in Thuita around the end of 1954 or the beginning of 1955. That is consistent with her evidence that there were no houses and she had to build the village and the post..." On TC 20's pleaded case she arrived at Thuita village around the end of 1953. Neither the submitted date nor the pleaded date is consistent with a document from October 1955. This document, written by a Mr. Kamau, refers to a claim made by him for "...articles which were burned by Mau Mau on 24th September 1952 in Location No. 14 at Thuita village."

165. There is the point that shown on a document is a Peter Njuru as Clerk to the Location 14 Confession Team. This might be corroboration that TC 20 was in Thuita village in Location 14, since she named Peter Njuru as the Chief of the Thuita village where she was kept. However, there is no evidence as to how common a name Peter Njuru was, and the only document we have shows him as a Clerk, whereas TC 20 said he was the Chief.

166. As to the document showing the Location 14 Confession Team[91], it may be that the covering letter to that document is not the one to which the Claimants referred[92], but a

[89] There is a document dated 9 July 1956 (Caselines [32-48699]) saying that new villages had been built at Location 1 Thuita (below Mukurwe).
[90] Paragraph 48.
[91] Caselines 32-21872.
[92] Caselines 32-62010. If it was this document, or perhaps in any event, the document refers to those people who are to be screened being placed in a declared place of detention and requiring: "A register will be kept showing the name of the person to be screened, the date of admission and the date of release. This book will be signed by all visiting officers…" If TC 20 was subject to this requirement, and assuming it had been complied with, then this would be more documentary evidence now lost. This evidence could also have identified key witnesses to TC 20's interrogation.

memo not on Caselines dated 25th September 1954, headed 'Locational Confession Team'.[93]

167. In any event, the question remains whether the Peter Njuru on that document which is said to link TC 20 with Location 14 is the same Peter Njuru she described as the Chief. The Defendant makes the following additional points:

(i) On TC 20's account, Peter Njuru had no involvement in her interrogation[94]. This may be because it was not the same Peter Njuru. It may, on the other hand, be that he was not at the relevant time Clerk to the Confession team.

(ii) One cannot assume that becoming a Chief after having been a Clerk to the Confessions Team would be a promotion, or that a person could not be both a Chief and Clerk to a Confessions Team at the same time. Therefore I cannot find that the document showing a Peter Njuru as a Clerk in or about September/October 1954 proves that he subsequently became a Chief. In a 1955 document[95], listing members of Confession Teams, one of the members of the Gacargage team is described as "formerly a headman".

168. Therefore: (a) even if Peter Njuru (Clerk) was the Peter Njuru (Chief) to whom TC 20 referred, this does not give any assistance as to timeline, and (b) the fact that the Peter Njuru whose name has been traced died in 1999, and therefore cannot assist, means that it is not possible to clarify matters.[96]

169. Given the vagueness and confusion in the evidence, I am not prepared to make a finding that TC 20 was in Thuita village in Location 14. However, for the purposes of the remainder of this judgment, I shall nevertheless consider TC 20's case that she was in fact in Thuita village, Location 14.

Alleged beatings at Thuita village – timeline

170. In paragraph 22 of the AIPOC, TC 20 says she was detained in Thuita for around 2 years, after which she was transported to Githanga village. This is also evidenced at paragraph 18 of her witness statement.

171. Although on the timeline contended for in TC 20's submissions, she would have arrived in Thuita at the end of 1954 or beginning of 1955, and remained there until about the end of 1956/beginning of 1957, it must follow from my previous comments that the pleaded case is that TC 20 was in Thuita for around two years from about the end of 1953. Thus, about six months of the two years would be caught by the pre 4 June 1954 absolute time bar date.

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[93] This is because of the handwritten number 46 on both documents, which suggests their linkage.
[94] Though there is some ambiguity on this – see paras 15-16 of TC 20's witness statement.
[95] Caselines: 32-33556.
[96] The three other names on the Location 14 Confession Team, namely Mwangi Thumbi, Obadiah Kanguru, and Ephantus Waiharo, have been investigated by the Defendant. The trace reports show that Mwangi Thumbi died in 2009 and the other two names are likely to be deceased but are in any event, untraceable. I have dealt with this earlier in the judgment.

172. The Defendant's submission is that the Claimant has failed to discharge the burden of proving that it is more likely than not that beatings took place on or after 4 June 1954. In support of this it relies on the following:

a. Paragraph 18 AIPOC pleads that TC 20 "was subjected to repeated physical assaults during her time in Thuita village". It is said that this does not affirmatively plead, nor has TC 20 proven, that physical assault took place after the absolute time bar date.

b. In paragraphs 20 - 21 AIPOC, TC 20 alleges that she was subject to interrogation at Thuita, confessed to having taken the oath, and was physically assaulted. Again the Defendant says that this does not plead, nor has TC 20 proven, that the alleged interrogation took place after the absolute time bar. TC 20's witness statement is in similar terms to the pleading as to these dates.

173. As regards the repeated physical assaults, the Defendant is correct that there is no affirmative pleading that any of them took place after the absolute time bar date. I have re-read TC 20's witness statement, paragraphs 16 – 18, and her oral evidence.[97] There is no express evidence that she was physically assaulted at Thuita after the absolute time bar date. This is not an easy decision in the circumstances in which the court has been placed, but if: (a) I exercised the section 33 discretion in TC 20's favour, and (b) I was persuaded on the balance of probabilities that TC 20 had been repeatedly beaten at Thuita, then I would be prepared to draw the inference from her evidence that at least some physical assaults took place after 4 June 1954. I emphasise that this is not a finding that the alleged assaults did take place, only that if they did they were not all subject to the absolute time bar. As to that, the impression from her evidence is that these beatings were repeated and happened during the two-year period, the majority of which fell chronologically after the relevant cut-off date.

174. As to the specific beating during interrogation, this was dealt with in paragraphs 20 – 22 of TC 20's witness statement and briefly in her oral evidence. There is no date, whether expressly or by reference to how long after her arrival at Thuita it took place, which evidences the date of this alleged assault being pre or post 4 June 1954. It is a one-off allegation. It is not possible to draw an inference that, if it did indeed take place, this probably was after the absolute time bar date. The Claimants submitted that Peter Njuru Clerk to the Location 14 Confession Team was subsequently the Peter Njuru Chief of Thuita village, Location 14. Since that Peter Njuru was Clerk in about September/October 1954, then the interrogation of TC 20 probably took place after that date, which is after the absolute time bar cut-off date of 4 June 1954. For the reasons explained above, I cannot so find.

175. I will in any event decide how my discretion should be exercised under s.33 in relation to the allegations of repeated beatings at Thuita, and the beating during interrogation, even though for part of the former allegations and also for the latter allegation, I do not have such discretion since the absolute time bar operates.

Githanga

[97] Caselines [33-1971] – [33-1973].

176. The final core allegation is that TC 20 was transported to Githanga from Thuita. In paragraph 76 of TC 20's closing submissions it is said that this transfer occurred "probably at the beginning of 1957 having been at Thuita", and that TC 20 remained at Githanga for at least 2 years. The 1957 date is therefore clearly based on the submission which I have disallowed, namely that she arrived at Thuita at the end of 1954/beginning of 1955. However, no absolute time bar point arises in any event in respect of the period at Githanga. In this regard, I will look at the Githanga allegations on their merits so as to determine whether: (i) the Defendant is disadvantaged by the divergence in dates on the pleaded case, and (ii) whether in this regard TC 20's evidence has been rendered less cogent by the delay in issuing the claim. The same approach will also apply to those allegations of beating at Thuita, which by inference took place after 4 June 1954; also on the hypothesis that they were not absolutely time-barred, the allegations which have not been proven to post-date June 1954.

177. The upshot is that the timeline of TC 20's allegations is very unclear, as demonstrated by the fact that the closing submissions contended for relevant dates markedly different from those pleaded. In general terms, the delay in issuing the claim has rendered TC 20's evidence less cogent in relation to dates and timeline. This is clear on the evidence and as a matter of common sense. It is for example demonstrated by these facts:[98]

(i) In the Claimant's response it is said that "TC20's evidence was that she did not know any dates" and that TC 20 is unsure about timings.[99]

(ii) The section 32 judgment at [150].

178. Nevertheless I do find that TC 20 was probably villagised in two separate villages for a substantial period of time. I am prepared to find this because: (i) of the evidence she gave by way of general description of village life, (ii) it is unlikely that this part of the general outline of her evidence is wholly unreliable.

Allegations of Assault in TC 20's case

Removal from Gikonda

Pleadings – AIPOC paragraphs 8 – 12

179. The allegations are that, after Majengo, the Claimant opted to go back to her home village in Gikonda and live there with her mother-in-law for around one year before they were forcibly removed. It is said that the forcible removal occurred when a group of Home Guards/Kenya policemen and British soldiers stormed into their house and ordered them to come outside. The Home Guards wore civilian clothes and carried batons and canes. The police carried rifles. A number of policemen and Home Guards: "started simultaneously beating the Claimant and there were so many blows; she could not tell how many people were beating her. Her mother-in-law watched

[98] See also the possible serious effect on the timeline dealt with below under "The Broader Picture" section of this judgment under the sub-heading: "*TC 20's information about her first child*".
[99] Paragraphs 7 and 11.

helplessly. She was crying. The Claimant was caused extreme fear; she thought she was going to be killed."

180. The IPOC prior to amendment continued:

"11. The Claimant was forced outside. Similar assaults also happened to other villagers. Amidst the chaos, the Claimant witnessed two neighbours being severely beaten and shot by the police. The Claimant "was extremely distressed, suffering pain, swelling and discomfort from the beating.

12. The Home Guard made all the villagers form a single line and then marched them to Thuita village on foot. The journey took around three hours. The Claimant was not able to salvage anything from her house before it was set on fire. The Claimant's home and possessions were burnt."

181. The above allegations are evidenced in paragraphs 9 - 10 of TC 20's Witness Statement.

Consistency of TC 20's evidence

182. The first inconsistency relied upon by the Defendant arises from paragraph 11 of the AIPOC[100]. As a result of TC 20's oral evidence, the AIPOC pleads "the Claimant ~~witnessed~~ knew of two neighbours being severely beaten and shot to death by the police." Paragraph 9 of her witness statement says: "I saw two people who were beaten up badly and then shot by the police." In Ms McGuinness' medical report at paragraph 32 it is recorded: "she witnessed her neighbours also being assaulted and two were very severely beaten then shot and they died as a result."[101]

183. In Professor Mezey's report[102], at paragraph 36, it is recorded that TC 20 did not actually witness two men from the village being beaten and then killed. She was told about it.

184. TC 20 was cross-examined on this matter. Professor Mezey's report was put to her and she was then asked why in paragraph 9 of her statement she said she saw them being shot by the police. She replied that she did not say that and that she never saw anybody being shot. She added, for the first time, that the neighbours' eyes were gouged out, though she did not see that.

185. On the basis of the above, the Defendant submits that the TC 20's evidence does not clearly distinguish between those of her own experience and those which third parties reported to her. The Claimants' response is that TC 20 clarified an uncertainty, that this is an example of an effective trial process, and an indication that TC 20 was a careful and truthful witness. They also submit that it is likely that the confusion arose in translation.

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[101] When Ms McGuinness was questioned about this, she said she checked with TC 20 what she said in her statement on this and she "ticked the paragraph where she said that that happened as correct...so I ticked that that was verified. That's what I thought that she meant."

[102] Both Ms McGuinness and Professor Mezey interviewed TC 20 on 7 August 2015 through the same interpreter Anne Kimani.

186. Nothing in this judgment will determine on the balance of probabilities that TC 20 was not a truthful witness. However, it is not possible to find as a fact that this inconsistency probably arose as a result of translation. It is an inconsistency which suggests that TC 20's evidence on this point is unreliable. This is unsurprising given the passage of time.

187. The Defendant also relies on alleged inconsistencies as to the identity of persons who allegedly forcibly removed TC 20 from her husband's house and beat her, the weapons carried by various people, such people, and the clothes they wore. The inconsistencies outlined[103] rely on paragraphs in the AIPOC (paragraphs 9-10), Ms McGuiness' report, paragraph 32, Professor Mezey's report paragraph 34, and TC 20's Part 18 Responses. I do not propose to go into these in detail because: (a) I am not persuaded there are genuine inconsistencies, (b) they were not subject to cross-examination either of TC 20 or the doctors[104], and (c) the specific point made at AIPOC paragraph 9 which states that the Home Guards carried "batons and canes" - whereas the Part 18 Response paragraph 167 says "the Home Guards had clubs" - may also be a matter of translation.

Alleged Identity of Perpetrators

188. A specific issue is as to TC 20's evidence about British soldiers being in attendance when she was forcibly removed. I can deal with this briefly, since its main relevance will be in relation to any future generic issue distinguishing the Defendant's legal responsibility for soldiers on the one hand, and security forces (e.g. Home Guard, police and others comprised of or including white settlers) on the other hand.

189. In the Claimants' closing submissions, reference is made to the Part 18 Response that she could not remember what the British soldiers were wearing apart from uniform, and that she could identify British soldiers because "they were white and came with so much violence". Paragraph 35 of the submissions continues: "she was not asked specifically about soldiers in cross-examination, but said they were white men known as "njoni" wearing khaki who were employed by the British government." Reference is also made to what other TCs meant by the word "njoni", and to evidence which the Claimants say is suggestive of the army assisting the Administration and that soldiers operated in South Tetu in 1954 and 1955.

190. The difficulty with TC 20's identification of British soldiers is to be found in her evidence as to what she meant by "njoni", namely:

> "There were white men we used to call "njoni", or small...that's okay small...the "njonis" were the white people and those of the black people who were employed to do that work."
>
> She went on to say that the white people wore different clothes, mostly khaki. It appears from comparing the Part 18 Response in Kikuyu and English[105] that TC 20's response in Kikuyu of the word "njoni" has been translated into English as "British soldier". In the light of her evidence, should it become relevant, it would be difficult

[103] Para 157 of The Defendant's TC 20's Individual Closing Submissions
[104] cf the previous footnote number 99.
[105] Caselines [16-70] and [16-95].

to find on the balance of probabilities that British soldiers were involved. In addition, khaki clothes do not prove that the wearer was probably a member of the British military.[106]

Observations

191. In the written submissions there is a massive amount of detail relating to whether Gikonda existed and whether it is the same place as other locations with similar but different spellings,[107] whether Gikonda was in Nyeri or Murang'a with consequent reference to a number of documents some of which were introduced in evidence, some of which were not,[108] and to very general evidence relied upon by the Claimants.[109] It is not necessary, and certainly not proportionate, for the court to try to disentangle and rule upon each and every one of these matters. At most, some could provide only the very weakest corroboration at a high level of generality of TC 20's account.[110] At worst, having regard to the consequent detailed disputes as to their significance, they illustrate problems with the cogency of the evidence as a result of the passage of time. Many of the disputes would not have arisen if the claim had been brought much nearer the time, so that the authors of documents[111], or others who could speak with authority about their contents, could have been called to give evidence. They do not assist in relation to the core allegations in coming to a conclusion as to whether it is equitable to allow the action to proceed under s.33 of the Limitation Act. If they were of real relevance, the orthographic problems would be another reason why the quality of the evidence has deteriorated over time. In the 1950s/1960s people would have been available to explain if the various spellings signified the same or different places.

192. Apart from the evidence of TC 20 herself, there is no evidence on any alleged removal from Gikonda village to Thuita. The Defendant has not been able to find or call any such evidence; nor can it call any evidence as to the core allegation of assault, or as to its lead in/aftermath/context.

193. There are now no documents which evidence TC 20's removal from Gikonda or that she was removed to Thuita. I have previously found on the balance of probabilities

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[106] See the evidence of Mr. Thompson in his second witness statement and of Mr. Angove, also in his second witness statement. See also paragraphs 450 – 453 of the Defendant's General Submissions. In addition, although in her oral evidence TC 20 said that: "the white people wore different clothes from what we are wearing, mostly khaki", in her Part 18 Response she said: "I can't remember what the Kenyan policemen and the British soldiers wore. The only thing that I can remember is that British soldiers were white and wore uniforms and I cannot give further details."

[107] The Claimants say that alternative spellings of Gekonde/Gikondi/Gikonda are of no significance. The Defendant says that they deployed very extensive resources in respect of the pleaded spelling and that there is no document which has been located referring to a place named 'Gikonda'. Documents relied on in the Claimants' submissions refer to Gekondi, Gekendi and Gikondi which were in Nyeri. TC 20's evidence was that Gikonda was in Murang'a District, not in Nyeri, but bordering Nyeri (Caselines 33-1960)

[108] This is based on the interpretation of TC 20's evidence and/or whether the borders have changed.

[109] Examples of this arise from evidence of the Defendant's witnesses. Donald Ridley said that the Home Guard had rifles after 1954, Robert Shillinglaw said that tribal police were armed for supervising forced labour by 1956-1957 and Mr. Aspinall recalled hearing that British soldiers operating in Central Province could be "nasty" with people, though he never saw anyone being mistreated or abused, nor ever witnessed nasty conduct.

[110] E.g a document (Caselines 32-17685f) referring to villagisation in Gekondi progressing very slowly as at June 1954 would, apart from the spelling, possibly support TC 20's case that there was villagisation in Gikonda, though there are arguments about this document – see the Defendant's submissions para 169.3.

[111] This is the case with documents from A. I. Cross.

that if TC 20 was removed, then her removal would have been subject to a Movement Order; further, that had she been removed to Thuita village, there may well have been other documents evidencing her presence there.

194. As regards the inconsistency relating to the allegation that two neighbours were severely beaten and shot to death, it may well illustrate confusion and difficulty of recollection.

195. In respect of each of the core allegations, I will set out my preliminary views on whether the evidence is less cogent as a result of the delay in bringing the claim. I shall then deal, under the heading "The Broader Picture", with other evidence which may be of importance in relation to the cogency of TC 20's account. I shall then reach my final conclusions as to whether it is equitable to allow the action to proceed, by carrying out the required balancing act having regard to all the circumstances, but particularly those in section 33(3), to the extent that they are material.

196. As regards the core allegation of the beating on removal from Gikonda, TC 20's own account is not wholly lacking in cogency, even though there are substantial concerns arising from the problems with the timeline and the inconsistency about what happened to the two neighbours.

197. In relation to the questions of cogency of the evidence apart from that of TC 20, in summary:

- The only evidence available is that of TC 20 herself.
- The identity of any of the alleged primary tortfeasors save for Ndungu Kahendo and Ngechu is unknown.
- The Defendant cannot call any witnesses who could give evidence about this core allegation about TC 20. The two witnesses named by TC 20, namely Ndungu Kahendo and Ngechu, are now untraceable and, according to TC 20, are deceased. In relation to the former potential witness, although his date of death is not known, the Defendant is prejudiced by lapse of time because despite extensive enquiries, they can find out nothing about his existence. As regards the latter, assuming that Ngechu is the person who died in 2008 then until that date of death, he could have been a potential witness, though his memory would probably have been very stale. If it is not the same Ngechu, then the position is identical to that of Ngundu Kahendo. If either or both of these witnesses had been traced, at a time when their memories were reasonably fresh, then that could also have led to the Defendant being further assisted in relation to other witnesses, and possibly even to information about documentation.
- It is not possible for the Defendant even to begin to investigate who might have been responsible for the assaults alleged by TC 20.
- There are no documents relevant to the assault alleged and no contextual documents about TC 20 or incidents directly connected with the core allegation.
- Had the allegation been made in time, the Defendant would have been in a much better position. In summary, witnesses would probably have been available, along with probably a copy of the Movement Order and potentially other documentation.

Enquiries and investigations could have been made. The court would, in all probability, not have been faced with anything like the present situation, namely having to rely upon the uncorroborated account of TC 20 devoid of any proper context. TC 20's own recollection would have been far fresher, and therefore more reliable. For obvious reasons in relation to witnesses, and for reasons previously given in relation to documents, the foregoing would also probably have been the case if the claim had been brought in, say, the early-1960s. Further, or alternatively, the passage of time has caused the Defendant to suffer prejudice in not being able to prove some specific aspects of prejudice.

- As time has gone on, so the prejudicial effect of the delay is likely to have increased. Precise dates cannot be given save, if Ngechu is the person who died in 2008, that is a date when a potentially relevant witness became lost to the litigation.

- Therefore, to cite the Carroll case at [42(7)] "…the passage of time has significantly diminished the opportunity to defend the claim on liability."

A preliminary point on village allegations

198. The Claimants submitted that there was something which distinguished village allegations in TC 20's case from the detention camp allegations in TC 34's case. This was that the rights taken away from individuals, for example the restriction of movement and the requirement to do forced labour, rested on a system of coercion and were not balanced in villages by statutory obligations. It was therefore less likely that the administration would have complied with proper safeguards for villagers, and more likely that beatings would take place.

199. During TC 34's case, the Claimants made very forceful submissions about violence in detention camps, despite the statutory provisions there obtaining. In the light of that, this argument does have the air of a rather belated attempt to make a material distinction between the exercise of section 33 discretion in villagisation cases as opposed to detention camp cases. Nevertheless, I will consider it on its merits.

200. The Claimants said that in villages the system of forced labour depended on coercion, there was no system of statutory protection, that the police did not go into villages and District Officers did not regard themselves as being obliged to ensure that the normal rules operated. Therefore, one of the restraints on people hitting others, namely due process of law, did not exist.

201. As to this submission:

(i) There is no sound evidence that those in charge of villages were in some way outwith the criminal law, and in particular the criminal law of assault and battery.

(ii) Indeed, in the Chief's Handbook[112]: (a) at Section XI it specifically states: "A Chief, just like anybody else, commits an offence when he disobeys the law; (b) at section XIII it states: " Chiefs must cooperate as fully as possible with the Kenya Police stationed inside the District and near its borders in preventing offences, in

[112] The Work of an African Chief in Kenya being an edition of a Chief's Guide and Handbook issued by the Government of Kenya: 1956

bringing offenders to justice, and in obtaining and supplying information as to the whereabouts of supervisees and other criminal characters. Every Chief should understand that the Kenya Police in the District have been stationed there **not** for the purpose of usurping his functions in the preservation of peace and good order, but on the contrary to co-operate with him in the fulfilment of those functions and to assist him in the execution of his many duties in connection therewith."

(iii) I have already dealt with such evidence as we have of police and District Officer presence in villages. I refer back to this.

(iv) I therefore do not accept there is any real merit in the submission. Even if there were, it would be no more than a background point. It would not have a material effect on the decision whether it is equitable to allow the action to proceed.

Thuita

Pleadings – AIPOC paragraphs 16 - 21

202. The allegations are that the Claimant worked every day from Monday to Saturday. Whilst working, detainees were guarded by Home Guards, who used violence, or the threat of violence. TC 20 says she was subjected to repeated physical assaults whilst working and that this caused her pain, suffering and distress. It is also pleaded that from time to time detainees would sneak away to gather food and, if caught, they were beaten on their return.

203. On one occasion TC 20 says she was interrogated about the Mau Mau oath. This took place in a room within the Home Guard's Post. There was a panel consisting of two British Officers and four policemen. She confessed to having taken the oath. The pleading continues: "she was physically assaulted by two of the policemen. She was hit on her back, legs, and hands. She was caused bruising. She was in a lot of pain, but managed to go back to the village after the assault. She was not given access to medical treatment. She used hot water to nurse the bruises. They healed after around two months."

Consistency of TC 20's evidence

204. The first inconsistency relied upon by the Defendant is that, at AIPOC paragraph 20, the Claimant pleads a single experience of alleged interrogation and that she confessed to having taken the oath and was beaten. Professor Mezey's report at paragraph 47 states:

"47. Mrs Waithaka said that she was interrogated many times at Thuita about her association with Mau Mau. She never disclosed, or confessed anything, even though she used to get beaten by the Home Guard during these interrogations..."

205. Thus, the Defendant's suggestion is that there are inconsistencies as to:

i. The number of times she was interrogated at Thuita about her association with Mau Mau;

ii. The number of times she was beaten during interrogation;

iii. Whether she disclosed or confessed anything about her association with Mau Mau.

206. After having cross-referenced AIPOC paragraphs 20 - 21, TC 20's witness statement at paragraphs 16 - 17, and paragraph 47 of Professor Mezey's report, there is room for argument as to whether TC 20 has been inconsistent in relation to the number of interrogations and the number of beatings during interrogations.[113] On the face of it, there is however an inconsistency as to whether TC 20 ever disclosed or confessed anything about her association with the Mau Mau. This was not an inconsistency which was put to her in evidence, but it was flagged up in the list of inconsistencies served prior to her giving evidence.

207. The second inconsistency relied upon by the Defendant is based on TC 20 pleading that British officers/British soldiers were involved in matters at Thuita.[114] In cross-examination she said that there were white men in the camp and she couldn't tell whether they were policemen or army. On the state of the evidence, therefore, the Claimant cannot prove that British army/soldiers were involved at Thuita. However, I do not find that this amounts to a material inconsistency in her evidence.

208. The third inconsistency relied upon by the Defendant is in respect of building houses at Thuita village. TC 20's pleaded and evidenced account is that she was involved in building houses at Thuita. The Defendant specifically relies upon her oral evidence where she was asked "and did you build your own house in Thuita?" and she responded, "No, I could not build because I was a prisoner." However, looking at her evidence on this point[115] it is not possible to find that she was inconsistent. She was clearly stating that she did build houses which she and others occupied, but she did not consider she had her own house in circumstances where she was detained. It seems likely that her specific response "I could not build because I was a prisoner", meant that she could not build her "own, new house". None of her evidence suggests that she was not involved in building houses.

209. The fourth alleged inconsistency arises from TC 20's evidence as follows:

"Q. Did you return to your farm or shamba to get your food each day?

A. No, I never used to. If you hid and left the camp and you were found out, you would be punished after that a lot.

Q. You say in your witness statement that you did sneak away to gather food from your farms. Is that right? Paragraph 14.

A. It is possible in that camp, at times we would sneak away, look for food. Whatever you get from your food – or from your shamba, come and divide among the others you are living with, you share out so that you sustain your stay in the camp..."

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[113] Only one such beating is pleaded and can give rise to a core allegation for which a claim can be made. See above also regarding the fact that TC 20 cannot prove that this allegation was after the absolute time bar date of 4 June 1954. Only one interrogation at Thuita about the Mau Mau oath was recorded by Ms. McGuinness. Also, she told Ms McGuinness that she "lost consciousness during the interrogation" - something which is not to be found in her witness statement or elsewhere.

[114] AIPOC paragraph 19, Part 18 Response, paragraph 168.d.

[115] Caselines 33-1969 – 1970.

210. It appears therefore that there was some shift – and therefore inconsistency - in TC 20's evidence, once paragraph 14 of her witness statement was pointed out to her.[116]

Observations

211. I bear in mind fully what I set out in some detail on the question of inconsistencies in TC 20's evidence and also paragraphs 83 – 94 of the TC 34 judgment, which I have incorporated by reference previously in this judgment. The headlines are: First, the Defendant could not put a positive case. Secondly, the Defendant is entitled to point to inconsistencies on the face of the Claimants' own documents/evidence and jointly instructed medical evidence. Thirdly, I have to take care in taking them into account where TC 20 was not given an opportunity to comment on them. It would certainly be wrong for me to draw any conclusion on the balance of probabilities that TC 20 was not being truthful. Indeed the Defendant does not suggest this. What can properly be said in respect of the two inconsistencies I have found, is that they may well illustrate confusion and difficulty of recollection at this remove of time.

212. As regards the core allegations in Thuita village, TC 20's own account is not wholly lacking in cogency, even though there are real concerns arising from the above inconsistencies and the problems with the timeline.

213. The Claimants rely on background material, such as documentary evidence on violence during interrogation to obtain information about the Mau Mau oath, the nature of forced labour etc. In determining whether it is equitable to allow the action to proceed in relation to the core allegations, these documents are of very limited assistance. Neither party has located a single contemporaneous document referring to any of the substantive matters alleged to have been experienced by TC 20 at Thuita village.

214. In relation to the questions of the cogency of the evidence, apart from that of TC 20, in summary:

- The only evidence is that from TC 20.
- The identity of any of the alleged primary tortfeasors is unknown.[117]
- The Defendant cannot call any witnesses who can give evidence about the core allegations at Thuita. As set out previously in this judgment, a Peter Njuru died in 1999. If he was the person to whom TC 20 refers, then until then he could have been a potential witness, though his memory would have probably been very stale. If that person was not the relevant Peter Njuru, the Defendant is prejudiced by lapse of time, because, despite extensive enquiries, it can find nothing about his existence.
- It is not possible for the Defendant even to begin to investigate who might have been responsible for the assaults at Thuita alleged by TC 20. Had the allegations been made in time, the Defendant would have been in a much better position. In summary,

[116] See later in this judgment under the heading "The Broader Picture" and sub-heading "*Involvement with Mau Mau*". Part of that section is relevant to the reliability of TC 20's evidence during the time she says she was at Thuita village.

[117] It is not clear whether Peter Njuru might have been a tortfeasor if he was clerk of the Confessions Team. He is dealt with in the next bullet point, in any event.

witnesses would have probably been available, along, probably, with copies of the Movement Order to and from Thuita (indicating dates), and other documentation referred to in detail earlier in this judgment.

- The Defendant has not been able to investigate, much less call, any witness who may well have been able to put the allegations into context. If: (a) TC 20 was in Thuita for about two years, (b) there had been good evidence as to the relevant dates, and (c) this claim had been brought many years ago, the Defendant would have had proper opportunity to identify, proof and call people who worked in Thuita village, potentially at various different levels of responsibility.

- There are no contextual documents about TC 20 or her interrogation(s). If she was interrogated as to her membership of Mau Mau, then such documents may well have been available (particularly if she had confessed), but no longer are. Such documents would have gone some way to corroborate TC 20's evidence about interrogation and also could have provided a trail of investigation leading to relevant information/witnesses for the Defendant.

- Enquiries and investigations could therefore have been made. The court would, in all probability, not have been faced with anything like the present situation, namely having to rely upon the uncorroborated account of TC 20 devoid of any proper context. TC 20's own recollection would have been far fresher, and therefore more reliable. For obvious reasons in relation to witnesses, and for reasons previously given in relation to documents, the foregoing would also probably have been the case if the claim had been brought in, say, the early 1960s. Further, or alternatively, the passage of time has caused the Defendant to suffer prejudice in not being able to prove some specific aspects of prejudice.

- As time has gone on, the prejudicial effect of the delay is likely to have increased.

- Therefore, to cite the Carroll case at [42(7)] "…the passage of time has significantly diminished the opportunity to defend the claim on liability."

Githanga

Pleadings – AIPOC; witness and medical evidence

215. Paragraph 23 AIPOC states:

> "The Claimant was detained at Githanga village for around two years. The living and working conditions were similar to those experienced at Thuita village including, for the avoidance of doubt, physical assault while working.[118] The work here included constructing houses for the British officers and policemen at the police post, as well as digging a security trench and constructing roads..."

216. In her first witness statement dated 22 October 2014, at paragraph 19, TC 20 states:

[118] The underlined section was added by way of amendment to the IPOC on 8 September 2017. The original pleading was dated 22 October 2014.

"I stayed at Githanga for two years. It was similar to Thuita village. The work here included constructing our houses for the British officers and policemen at the police post, digging a security trench and constructing roads."

217. There is nothing relevant to the alleged core allegations at Githanga in TC 20's second witness statement dated 5 April 2016.

218. In her oral evidence, she said that she ran "away from the chaos that were [sic] happening at Githanga, the beatings...", and that she "was seeking for greener pastures because at Githanga it was becoming chaotic, all the beatings..." [119]

219. Later, there is the following extract of her oral evidence:

"Q. Do you in your statement say that you suffered beatings at Githanga?

A. Yes, I was beaten a lot.

Q. Do you say that in your statement that's been read to you in the last few days?

A. Yes, I did."

220. In relation to this, it would have been expected that TC 20 would have spelled out in her original IPOC, and in her witness statement, that she had been beaten at Githanga. Prior to her oral evidence, she had not specified this in any document save for Professor Mezey's report, which is not evidence or a pleading. On the basis of her oral evidence, she says she was beaten at Githanga and that this had been stated in her witness statement. In relation to her core allegation of physical assault, her original IPOC and witness statements are unsatisfactory. It is not clear whether this was due to the accuracy of her recollection, the process of taking her witness statement, or a combination of both.

Observations

221. I must take some account of the above shortcomings in the evidence and pleadings relating to the alleged beatings at Githanga. Again, the Defendant was not able to put a positive case. Whether due to TC 20's problems of recollection and/or process of proofing her, the shortcomings are relevant in relation to the cogency of her evidence.

222. In addition, there are the concerns arising from the previously mentioned problems with the timeline.[120] These also have an impact on the cogency of her evidence. Further, TC 20 could not now be clear as to whether she was at Githanga for about two years or three years. In her AIPOC paragraph 23 she says she was detained therefore "around two years". In her witness statement, paragraph 19, she said she stayed at Githanga for "two years". In her oral evidence she said she was detained in Githanga for "about another three years". In the Claimants' TC 20 response submissions[121] it states, "Clearly, 60 years on it is difficult for her to estimate precise timings. That is understandable, supports her authenticity, and does not impact on her

[119] cf Professor Mezey's Report, paragraph 49.
[120] Also, the potential timeline matter raised subsequently under the heading "The Broader Picture" and the sub-heading "*TC 20's information about her first child*".
[121] Paragraph 215.f.

credibility." I agree that after this period of time it is difficult for TC 20 to estimate precise timings and that this is understandable. However, it does have some impact on her reliability and the cogency of her evidence, the prospects of properly investigating the case, and, consequently on whether it is equitable to allow this claim to proceed.

223. That said TC 20's account about Githanga cannot be said to be entirely lacking in cogency.

224. In relation to the questions of cogency of the evidence, apart from that of TC 20:

- The only evidence is that of TC 20 herself;
- The identity of any of the alleged primary tortfeasors is unknown;
- The Defendant cannot call any witnesses who can give evidence about the core allegations alleged to have happened at Githanga;
- There are no documents relevant to the assault alleged, and no contextual documents about TC 20 or incidents directly connected with the core allegation;
- It is not possible for the Defendant even to begin to investigate who might have been responsible for the alleged assaults at Githanga. Had the allegation been made in time, the Defendant would have been in a much better position. In summary, witnesses would have probably been available, along with copies of the Movement Order from Thuita (indicating dates) and other documentation referred to in detail earlier in this judgment;[122]
- The Defendant has not been able to investigate, much less call, any witness who may well have been able to put the allegations into context.[123] If: (a) TC 20 was in Githanga for a period of two years or more, (b) there had been good evidence as to the relevant dates, and (c) this claim had been brought many years ago, the Defendant would have had proper opportunity to identify, proof and call people who worked in the village, potentially at different levels of responsibility;
- Enquiries and investigations could have been made. The court would, in all probability, not have been faced with anything like the present situation, namely having to rely upon the uncorroborated account of TC 20 devoid of any proper context. TC 20's own recollection would have been far fresher, and therefore more reliable. For obvious reasons in relation to witnesses, and for reasons previously given in relation to documents, the foregoing would also probably have been the case if the claim had been brought in, say, the early-1960s. Further, or alternatively, the passage of time has caused the Defendant to suffer prejudice in not being able to prove some specific aspects of prejudice;

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[122] There are no documents at all referring to a place by its pleaded spelling of Githanga. There are documents referring to other places with similar spellings, notably Gathanga. These documents have little, if any, relevance to TC 20's core allegations of assault.

[123] The Defendant submitted that its witness, Mr. Thompson, rejected every element of the core of TC 20's account of events at Githanga village. Re-reading my notes and the transcripts of Mr. Thompson's evidence, it is clear that his recollection was very poor and, when shown some documents relating to villagisation more generally, he said that after 65 years the court should rely on documents rather than his recollection. I cannot rely on Mr. Thompson's witness statement rejection of TC 20's evidence about Githanga.

- As time has gone on, the prejudicial effect of the delay is likely to have increased;

- Therefore, to cite the Carroll case at [42(7)] "…the passage of time has significantly diminished the opportunity to defend the claim on liability."

The Broader Picture

225. At this section of the Judgment I will select what seem to me to be the most significant other factors put forward by the parties so as to assist me in deciding whether it is equitable to allow TC 20's claims to proceed, with particular reference to Section 33(3) (b), and whether there can be a fair trial.

Involvement with Mau Mau

226. In AIPOC paragraphs 20 – 21, as mentioned previously in this judgment, it is said that at Thuita "the Claimant confessed to having taken the oath". Later in paragraph 31 relating to alleged subsequent detention and interrogation at Kamiti Prison, TC 20 pleads that she was interrogated, asked if she had taken the oath, and she admitted to having taken it. She was held at Kamiti (she says) for two weeks.

In paragraph 42 IPOC it states:

"The Claimant was arrested, "screened" and tried by an arbitrary system purporting to identify her as assisting Mau Mau..." and, later "By virtue of being associated with "Mau Mau" as a result of her tribal association, the Claimant was regarded as a subversive..."

227. In the Defence, the Defendant responded at paragraph 43 and, at paragraph 63, pleaded:

"e...implicit in the description of the alleged breaches of human rights in paragraph 42 is that the Claimant would have challenged evidence that she was Mau Mau and/or disputes that she was associated with Mau Mau whether 'by virtue of her tribal association' or at all, which assertions contradict paragraph 31, in which the Claimant pleaded that she admitted having taken the Mau Mau oath..."

228. In paragraph 22 of the Reply, signed with a statement of truth, it is said:

"22. As to paragraph 43 and 63e, any admission of taking the oath was in the context of being interrogated by a Panel of British soldiers and African men; it is denied that as a result she was or could properly have been characterised as being Mau Mau (or associated Mau Mau)..."

229. In her witness statement at paragraphs 17 and 28 TC 20 says that under interrogation at Thuita and Kamiti she admitted to having taken the oath. There is no mention of her in any way being associated with or assisting Mau Mau.

230. On the state of the pleadings, supported by statements of truth and her sworn witness statements, there is nothing to suggest that TC 20 had voluntarily taken the Mau Mau oath. There is nothing to suggest that she helped the Mau Mau or was in any way

active in giving support.[124] In paragraph 14 of her witness statement she refers to her and others sneaking out to gather food from their farms, but makes no mention of whether any of that food was supplied to the Mau Mau.

231. In cross-examination TC 20 was asked whether she took the oath and if she had taken it voluntarily. She accepted she had taken the oath on two occasions and said: "I took voluntarily because I wanted to reclaim our land from the white man."

Shortly afterwards was the following exchange:

"Q. Are you still bound by your oath today?

A. Yes, I still feel bound and I also feel very bad because what I was fighting for I have never gotten it. I was fighting for land and I don't have land, and I have a weakness I sustained from that period of Emergency.

Q. Did your husband take the Mau Mau oath?

A. Yes, he did.

Q. Did your brother Stephen take it?

A. Yes, he did.

Q. Did any other family members take it?

A. Yes, all my siblings were active participants of Mau Mau.

Q. What do you mean by 'active'?

A. We would help in feeding those who were in the forest, and if the white man was coming around and we were at home, we would warn those who were in the forest to run away, otherwise they would be caught..."

A little later was the following:

"Mr Skelton: Mrs Waithaka, did the people who arrested you think that you were supporting the Mau Mau?

A. Yes, because they were working for the then government.

Q. Do you think that is why you are arrested, because you were supporting the Mau Mau?

A. Yes, I think so..."

She was then asked about paragraph 14 of her witness statement i.e. sneaking away to gather food from farms. She answered a question on that and then was asked:

"Q. Did you also help to feed the Mau Mau who were hiding nearby?

[124] There is mention in Professor Mezey's report in paragraph 31 that she had voluntarily taken the oath and had given food to Mau Mau fighters hiding in the forest.

A. Yes, we used to. Yes, we used to feed them very well when we had the chance.

Later she was asked about her time in Githanga and was asked:

"Mr Skelton: Were you still helping to feed the Mau Mau fighters at this time?

A: Oh, yes. How could we stop giving them food? Who wouldn't give them?..."

232. It is correct that paragraph 22 of the Reply responded to a specific matter raised in the Defence as to inferences from the fact of taking the oath. That paragraph and the Reply, nevertheless, give a misleading impression to the Defendant and to the Court. The Claimant, to use her own words in cross-examination, knew all along that she was an "active" participant of the Mau Mau.

233. The evidence as to the voluntary nature of taking two oaths came out in cross-examination. It was not explored with TC 20 why this had not been stated before. It would have been more helpful had it been explored. For that reason, I do not place great weight on it. However, paragraph 22 of the Reply and the omissions from the witness statement and pleadings are another cause for concern as to the reliability of the evidence – taking process and/or of TC 20's evidence. I do not know why there are these omissions. It may be that TC 20 was telling the whole truth in oral evidence. But misleading information in witness statements (by omission) and in paragraph 22 of the Reply, both signed with a statement of truth, cannot be totally airbrushed out of consideration. It must have some effect on the Court's overall assessment of TC 20's evidence, though this is limited given that TC 20 did not have the matters specifically put to her for her comments.

TC 20's information about her first child

234. In paragraph 5 IPOC TC 20 pleads "her first child was born later, during the State of Emergency, while she lived at Thuita village."

235. In the Defence at paragraph 7, the Defendant pleads:

"c. The Defendant notes that, contrary to the Claimant's assertion (at paragraph 5) that her first child was born while she allegedly lived at Thuita village, the Claimant has stated by way of a manuscript amendment to paragraph 5 of her witness statement that she "got [her] first child...while at Gtitua Githanga [sic] village". [125]

236. In the Reply it states:

"8. As to paragraph 7c, the Claimant clarifies that her first child was born in Gitua/Githanga and paragraph 5 of her Witness Statement and paragraph 5 of the Individual Particulars of Claim is incorrect in this respect."

237. In Professor Mezey's report at paragraphs 62 and 84 it is recorded that "their first son was born just after independence" (at Githanga) and "she had no children when she was detained and therefore was not faced with the additional stress and burden or [sic] caring for them and protecting them..."

[125] TC 20's witness statement dated 22 October 2014 had deleted the word "Thuita" which had been typed, and inserted in handwriting "Gtitua/Githanga". The IPOC was dated 28 November 2014.

238. A number of questions arise on the issue as to the location and date of birth of TC 20's first child:

i. The IPOC, even as clarified by paragraph 8 of the Reply, continues to assert that TC 20's first child was born during the State of Emergency. This is confirmed by TC 20 in paragraph 5 of her witness statement which says "I got my first child later on, during the State of Emergency while at Gtitua/Githanga Village." This is in conflict with Professor Mezey's report that "the child was born just after independence".

ii. The impression given from paragraph 5 IPOC (as clarified in the Reply), and TC 20's witness statement at paragraph 5, is that her first child was born while she was villagised at Githanga village.[126] If that is the case, then either (a) the periods of villagisation of 2 years at Thuita village and 2 - 3 years at Githanga village have been grossly overestimated by TC 20, perhaps mistakenly, or (b) her evidence that her husband was detained from a period prior to her being taken to Thuita village until after she left Gitambaya's farm, appears to be inaccurate.[127]

239. There is, therefore, on the face of the documents, clear inconsistency.

240. In the Claimants' submissions in response,[128] it is said that: "these matters simply demonstrate the efficacy of the trial process in clarifying matters. She is, after all, the mother of eight children, and given her age, may be forgiven for some confusion – C's wonder if D is seriously contending that such matters impact on the accuracy or veracity of her complaint of beating."

241. TC 20 was not cross-examined about the location or date of birth of her first child. However, both matters were set out in the List of Inconsistencies.

242. Whether the inconsistencies are due to "some confusion" on the part of TC 20, or, possibly the process of proofing her, they have relevance in relation to the reliability/cogency of her evidence in general. It is surprising that there is confusion about where and in what circumstances her first child was born.

Another event at Githanga village

243. In paragraph 21 of her witness statement, TC 20 states:

"Whilst at Githanga village, I was told that my nephew and two other young men were shot and killed in different incidents. They were killed because they were alleged to be Mau Mau fighters. They were shot while in the forest in battle with the

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[126] In her witness statement, after dealing with villagisation at Thuita and Githanga, then being detained at Kamiti and Thika she says she worked on Gitambaya's farm for about a year. She continues at paragraph 30 "before the Emergency ended, things began to get a little better and I was allowed to go back to my village as my husband had been released from detention." It is a possibility, though unclear from the pleadings/witness statement that it was at this stage that TC 20 became pregnant with her first child. That cannot, however, explain the inconsistency between her witness statement, which says that she got her first child during the State of Emergency and Professor Mezey's report that her first son was born just after independence.

[127] cf see also her claims in the AIPOC e.g. paragraph 42 where it is pleaded that "she was separated from her family".

[128] See Claimant's Response at 215 d. If her son was born while she was villagised in Githanga, then she must have seen her husband while she was in Thuita and/or Githanga villages.

British soldiers. The news reached us while at the village. We never saw their bodies and therefore were unable to bury them."

There is a handwritten endorsement on the statement against the word "nephew". That endorsement reads "Ndonya (son of Maingi, the brother to my husband)".

244. Professor Mezey's report records in relation to Githanga:

"49...Whilst she was there she witnessed two men being shot. She said they were killed by Home Guard and by the white men."

245. The Defendant submits that these two accounts call into question TC 20's reliability. However, it is not totally clear whether they are the same or different events; further, TC 20 was not asked about this possible inconsistency. In the circumstances, I give it no weight.[129]

Leaving Githanga

246. In Ms McGuinness' report it states:

"38. One day she left Githanga with a lady, who "loaned" her a baby to carry out of the camp. This apparently was because the guards were not likely to challenge a woman with a young baby to produce a pass."

247. In paragraph 22 of her witness statement, TC 20 said:

"Movement in Githanga and Thuita was restricted unless you had a pass. After some time, however, movement was allowed. I decided to go and visit my brother at Ruiru. I left the village and on my way, I met a woman who had two children and I helped her carry one at a place called Mugeka."

248. TC 20 was cross-examined about this. The relevant extract from her evidence is as follows:

"Mr Skelton: After you left Githanga village, had you walked out without a pass?

A. It was announced on that particular day that we were free to go anywhere without passes...

Q. Why did the woman who you met want you to take her child?

A. She was travelling to Nairobi and because she had two children, and I was not carrying anything, I offered to carry. It's not her who wanted me to carry the child.

....

(The paragraph in Ms McGuinness' report was then put to her.)

Q. Did you say that to Ms McGuinness?

[129] At paragraph 215.g of the Claimants' response, they refer to TC 20's evidence at Caselines [33-1967/8]. However, this was in relation to the round up at Gikonda, not an incident at Githanga. I have dealt with the Gikonda shooting earlier in this judgment.

A. No, I never said that. I didn't say that. That day we were free to leave without passes and that woman was going to Nairobi and I was going to Ruiru. So we were taking the same route, but I didn't even know her."

249. It is correct to say that TC 20's witness statement is consistent with her oral evidence. There are possible explanations for the inconsistent account in Ms McGuinness' report, e.g. error by Ms McGuinness, or serious mistranslation. My conclusion on this point is that whilst the inconsistency cannot be wholly disregarded and causes some concern, nevertheless it is, by itself, not a matter of great significance in evaluating the reliability and cogency of TC 20's evidence.

250. There is a further matter arising from the aftermath of TC 20 leaving Githanga. There was quite a bit of evidence on it, but the important part is to be found in the following section of TC 20's cross-examination:

"Q. Did you then go to a court near a police post in Ruiru?

A. Yes, I did.

Q. Were you charged with travelling without a pass?

A. Yes.

Q. When you saw one of the experts, Professor Mezey, last year, you told her that you said to the court you had the pass but it had been taken away and destroyed by the Home Guard. Do you remember saying that to her?

A. Yes, I did tell them that.

Q. Was that a lie?

A. Since – after I was caught and I stayed in remand for that long period, I wanted some – I told them that so that they could do away with the issue. And since they had detained me for quite some time.

Q Was it a lie? "Yes' or "No'?

A. Yes, because they had taken – instead of taking me to a police station, they had taken me to Kamiti, that's why I'm lying to them. If they had done the right thing and taken me to a police station, I would not have lied. The punishment they had given me in detaining me is what made me lie."

251. This exchange, dealing with the fact that TC 20 had lied to a court, must have some effect on her credibility. However, I place no real reliance on it in making my decision in this judgment.

Death of brother

252. In Professor Mezey's report it states:

"6. She was the oldest of 9 children. Only 3 brothers are still alive. One of her brothers, Stephen, died during the Emergency. He was with the Mau Mau in the forest

and she believes he was shot. She was very close to this brother and said that she was horrified by his death. She still thinks about him and how he died.

7. Mrs Waithaka said that the stress of thinking about his death had given her high blood pressure.

8. She is close to her remaining brothers, who live nearby with their respective families."

253. In oral evidence, TC 20 said this:

"Q. When during this period did Stephen die?

A. I can't remember the exact time but he died during that Emergency.

....

Q. How did he die?

A. He passed away at home, so I can't tell exactly how he passed away.

Q. When you saw Professor Mezey last year... you said one of your brothers, Stephen, died during the Emergency:

"He was with the Mau Mau in the forest, and she believes he was shot. She was very close to this brother and said that she was horrified by his death. She still thinks about him and how he died."

Q. Is that true?

THE INTERPRETER: Here there are two issues. The brother who passed away in the forest was a brother – in – law and her real brother passed away at Githanga. So the brother – in – law was the one who was killed in the forest.

MR SKELTON: What was his name?

A. He was called Ndonya.

.....

MR SKELTON: Who is she talking about in paragraph 6 of Professor Mezey's report?

.....

THE INTERPRETER: So the death of Stephen also horrified her, but the one who was in the forest is Ndonya.

A. By the time Ndonya died, I was at Githanga, I was at home.

MR SKELTON: How did Stephen die?

A. I don't know how he died, but because he had been caught and moved from Ruiru to home area, I can't tell you and I don't want to cheat.

Q. Was the death of Stephen the most distressing thing that happened to you at this time?

A. No. I was also horrified by the brother Ndonya, because he was in the forest, he was also fighting for freedom.

Q. Were their deaths what kept you awake at night after the Emergency when you thought about what had happened?

A. Yes, I am still disturbed even up to today because my property was destroyed during the Emergency, the beatings I received and the death of those who were close to me, like those two brothers and others who were neighbours. And even the beatings I received on my body, I still get a lot of pain..."

254. I do have concerns about this evidence. It is clear from Professor Mezey's report that she was asking TC 20 about her blood brothers. Further than that, TC 20 actually named to her the brother, Stephen, she said she believed had been shot in the forest. In cross-examination she said she did not know how Stephen died. When Professor Mezey's report was put to her she said that the person who died in that way was her brother-in-law Ndonya. It will be recalled that in paragraph 21 of her witness statement, TC 20 said that Ndonya was her nephew, the son of Maingi the brother of her husband.[130] In oral evidence TC 20 said she was horrified at the death of both her brother, Stephen, and Ndonya. This evidence, though not relevant as to a core allegation, casts some doubt on the reliability and cogency of TC 20's evidence generally.

Conclusions

General

255. It is impossible fully to appreciate the situation during a State of Emergency in a former colony subject to what at first was, on the one hand, a serious revolt with many active and passive supporters and, on the other hand, the Administration and a substantial number of loyalists. Presumably, there were also those who wanted nothing more than to get on with their lives, but who were caught up in it all. As time went on, so the colonial government took control, but for a long time problems remained.

256. It is common ground that abuses occurred. The statement of the Rt. Hon. William Hague M.P., set out in the TC 34 judgment, and incorporated by reference previously in this judgment, the former Foreign Secretary, accepted this.

257. It was also accepted by Mr Mansfield QC that it is probable that the cohort of Claimants in this GLO include a number of abuse allegations which are true.

258. The potential for unreliable allegations in a very large group of Claimants may be unavoidable in a GLO. Nevertheless, a GLO is the most effective means of achieving

[130] For further details see above under the sub-heading: "*Another event at Githanga village"*

justice in such a case. In order to proceed in a proportionate way, Test Claimants are selected with a view to being as representative as possible of the cohort as a whole.

259. The evidential scope of many GLOs is much narrower. This is the case for example in a factory explosion which spreads noxious chemicals over a local community, or a medicine which is alleged to have gravely deleterious side-effects.

260. This GLO is different. Such evidence as is available, both witness and documentary, has covered a large number of detention camps, villages' and other venues where abuses are alleged to have taken place. The central time span for what was happening in Kenya is from 1952 to 1963. In addition, there has been detailed evidence, particularly regarding difficulties with witnesses and documentation, from then until the present day. Further, the geographical area of the alleged abuses includes the capital, Nairobi, and vast areas of Kenya which are home to the Kikuyu, Embu and Meru tribes.

261. Against that backdrop, the GLO must, apart from the generic issues, have its first and main focus on the Test Claimants. The Claimants said:[131]

> "……these are *Test Cases*. If D's assertion is simply that *these* TCs cannot fairly have their cases adjudicated then it must be said of all TCs. Otherwise the GLO has failed to achieve its object…. The logical outcome is that many people were abused, but none of the 40,000 people in this action can show *they* were abused……."
>
> This is correct. The corollary is that if it is equitable to allow all the TCs' claims to proceed and they prove their cases, then, subject to the Claimants also succeeding as necessary on the generic issues, those decisions should provide a template for the resolution of the remaining 40,000 plus claims.

262. TC 20 is the second of the TCs to have their cases considered. There have been extensive written and oral submissions as particularised earlier in this judgment.

Absolute Time Bar

263. The first matter which I have determined is that the core allegation of assault on removal from Gikonda, the alleged beating during interrogation at Thuita, and any beatings alleged at Thuita which probably predated 4 June 1954, are subject to the absolute time-bar. For this reason they must fail. However, for purposes of completeness, they will be considered, along with the remaining core allegations, on the assumption that the court had a discretion under section 33 of the Limitation Act 1980.

Exercise of section 33 discretion

264. The next question I have to ask myself is whether to exercise my section 33 discretion. The statutory test is easily stated. I must decide whether: "……it would be equitable to allow (the) action to proceed having regard to the degree to which – (a) the provisions of section 11…prejudice the (claimant)…and (b) any decision of the court….would prejudice the defendant…". In so deciding, I must have regard to all the circumstances of the case and in particular to those in subsections 33(3) (a)-(f). I

[131] Submissions in response in TC 34's case at [131].

must make a decision on each core allegation separately, as it is open to a court to allow one or more claims to proceed, while refusing to exercise the discretion in favour of a Claimant on other claim(s).

265. It is important to recognise in this situation as in numerous others that: "No man is an island entire of itself".[132] TC 20's claim must be seen in context. It is for that reason, and the potential importance of the findings in this first case of a TC who says she was villagised, that both parties have been wide-ranging in their submissions.

266. I have given as careful scrutiny as possible to all points made which are material to TC 20's core allegations. I have sifted them, evaluated them and attributed to them the weight I believe they deserve. This has required delving into matters individually in minute detail. It has then required standing back and looking at the overall picture.

267. On the basis of her evidence, I have accepted that, on the balance of probabilities, TC 20 was required to live in two villages for some periods of time during the Emergency.

268. Each core allegation calls for individual attention. As to the core allegations:

- One is said to have occurred when TC 20 was removed from Gikonda, two at Thuita village and one at Githanga village.
- Two of these core allegations are of regular beatings over undefined periods of time at Thuita and Githanga villages. The other two are pleaded as one - off incidents of assault.

Equitable to allow an action to proceed

269. Paragraphs 435 – 438 of the TC 34 judgment apply to TC 20's case.

Length of and reasons for delay

270. The length of the delay under section 33(3)(a) is delay since the expiry of the limitation period. The dates are, to say the least, somewhat fluid in TC 20's claims. The expiry of the limitation period for the first core allegation claim (i.e. removal from Gikonda) would, according to the pleadings, be not later than the end of 1956, and the expiry of the limitation period for the alleged beatings at Githanga village probably not later than around late 1960.[133] TC 20 was added to the Register in April 2014. Therefore, the delay covering all claims is probably somewhere between 53 and 57 years.

271. The authorities also establish that the Court may have regard to disappearance of evidence and the loss of cogency of evidence, from the time at which section 14(2) was satisfied until the claim was first notified. These factors are not strictly relevant under section 33(3) (a), but rather under section 33(1).

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[132] John Donne: Meditation XVII Devotions upon Emergent Occasions.

[133] This is adding to the end of 1953 date, the pleaded period of about 2 years in Thuita and around 2 years at Githanga.

272. The length of the delay is important, not so much for itself as to the effect it has had.

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

274. Reasons for delay are not self-proving. No express evidence was given by TC 20 about the reason(s) for the delay in her case. It is unsatisfactory to be asked to draw inferences when TC 20 gave written and oral evidence and did not address the matter. Any such reasons were not therefore in evidence so that they were available to be tested in cross-examination.

275. I am prepared, however, to infer that while TC 20 was villagised, she had little or no access to legal advice about the possibility of making a claim. If I am not entitled to take this into account under section 33(3)(a), I do so as part of all the circumstances of the case. I also take into account as part of all the circumstances of the case the fact that TC 20 had no formal education and is unsophisticated. These factors I put into the balance when considering whether it is equitable to allow the action to proceed. However, there is no evidence of a good reason for delay after about the end of 1957, being, on the pleadings, the estimated date when TC 20 left Githanga village. However, as I have said, the dates are unclear.

Conduct of the Defendant

276. The relevant conduct to be considered under section 33 (3) (c) is conduct post-dating the intimation of the claim in 2012. There is no ground for criticising the Defendant's conduct on that basis.

Disability of TC 20

277. Disability under section 33 (3) (d) means lack of capacity within the meaning of the Mental Capacity Act. This is irrelevant in TC 20's case.

The extent to which TC 20 acted promptly and reasonably

278. On the evidence TC 20 cannot be said to have acted promptly and reasonably, once she knew whether the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages.

The steps taken by TC 20 to obtain medical, legal or other expert advice

279. There is no evidence of TC 20 having taken any such steps prior to the involvement of the present solicitors.

Section 33 (3) (b) – Preliminary

280. Under this subsection I have to consider the effect of the delay in issuing the claims on the cogency of TC 20's evidence and of the evidence of the Defendant.

281. The authorities make it clear that it is a well-known fact that memories become less and less reliable the staler an action becomes. This is most relevant to TC 20's evidence.

282. The prejudice to the Defendant of losing a limitation defence is not the relevant prejudice to be addressed. The prejudice to be addressed is that which affects the Defendant's ability to defend. That involves considering what evidence might have been available to the Defendant if a trial had taken place earlier, or if the Defendant had learned of the claim earlier. It is not sufficient for the court simply to hear the evidence of the Claimant, and indeed any other evidence now available, and to decide the issue of limitation on the basis of it, without considering what evidence would or might have been available at an earlier stage. That would be to overlook the possibility that, had the Defendant been in a position to deploy evidence now lost to it, the outcome might have been different.

283. The prospects of a fair trial are important. The Limitation Acts are designed to protect defendants from the injustice of having to fight stale claims, especially when any witnesses the Defendant might have been able to rely on are not available, or have no recollection, and there are no documents to assist the Court in deciding what was done or not done and why. It is, therefore, particularly relevant whether, and to what extent, the Defendant's ability to defend the claim has been prejudiced by the lapse of time because of the absence of relevant witnesses and documents.

284. However, the Defendant only deserves to have the obligation to pay due damages removed if the passage of time has significantly diminished the opportunity to defend the claim.

285. Further, while the ultimate burden is on a Claimant to show that it would be inequitable to disapply the statute, the Defendant has the evidential burden of showing that the evidence adduced, or likely to be adduced, by the Defendant is, or is likely to be, less cogent because of the delay.

286. In their General closing submissions the Claimants said:

> "4. The approach in *Gestmin SGPS Skeleton Argument v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) is, in Cs' submission, the appropriate approach to take. In essence (§§15-22) the Court relied first on the documentation and then on oral recollection, the latter largely to gauge the witness's approach.
>
> ……
>
> 6. Submissions will be made as to how the individual TCs' recollection matches the documentary record. In general Cs submit that the correspondence is remarkable, particularly given the TCs' illiteracy. It is powerful evidence in support of the general submission that the TCs gave their evidence without guile and in an effort to assist, that the documentary record corresponds with their account."

287. At the time when those submissions were filed, the issues were very much wider than is now the case. The documentary record may have been of assistance in determining some of those issues. Later in their General closing submissions the Claimants wrote:

"144. As to cogency and reliability, it must be the case that *Gestmin* and the cases that follow it have a clear effect on the approach to S33. A legal system which relies mainly on oral evidence, either because very little is reduced to writing, or because oral evidence is regarded as being something that a Judge can reliably assess for truth, reliability and accuracy, or both, is bound to look at the effect of the passage of time on memory, and be concerned about delay. Once that legal system recognises both that documentation increasingly became the medium of communication as the 20th century went on, and that memory can be unreliable for many other reasons than the mere passage of time, the approach obviously alters. Memory can be tested, and documentation is likely to be more reliable – both as against memory and as a reliable record of what happened."

288. I have summarised the effect of Gestmin and other authorities in the TC 34 judgment under the heading: "The approach to the evidence".

289. Albeit that I am cautious in applying, to the disadvantage of the Claimants' case, the full rigour of Gestmin and the other authorities, nevertheless, the problems of relying on the uncorroborated, or largely uncorroborated, evidence of TC 20 at this remove of time are clear. TC 20's memory would have been much fresher and therefore more reliable. She may also have been able to give some critical information, e.g. a much better timeframe or names, or at least a description, of the alleged primary tortfeasors. These all affect the cogency of her allegations.

290. TC 20 could not, according to submissions made on her behalf, be right about dates. The problems with the timeline go further than that, as detailed earlier in this judgment. It is highly likely that some 60 years ago, TC 20's recollection as to dates and periods in villages would have been more accurate. In relation to the core allegations, TC 20 has been consistent as to locus and sequence of events, albeit that there are difficulties in identifying the loci. Nevertheless, I must bear in mind the undoubted confusion as to dates and timeline, and the consequences of this when evaluating the cogency of TC 20's evidence. There are few, if any, extraneous objective facts by which properly to measure the reliability of her evidence. The greater accuracy and precision which there would have been if the claim had been brought more than 50 years ago, would have assisted the Defendant's investigations in locating relevant documents and witnesses against which TC 20's evidence could have been tested.

291. In addition, there are examples of lack of cogency as set out in relation to the core allegations and the section subtitled "The Broader Picture". These include a number of inconsistencies. I have been very careful in the weight I have attributed to the latter where they were not put to TC 20 for comment but: (a) some were cross-examined to, for example: (i) the evidence as to whether TC 20 saw two neighbours being shot to death by the police during the removal from Gikonda, (ii) whether TC 20 returned to her farm to get food when in Thuita village, and (iii) the evidence about the death of TC 20's brother, Stephen; (b) other inconsistencies, (e.g. (i) whether TC 20 confessed during interrogation at Thuita that she had association with the Mau Mau, and (ii) the information about the birth of TC 20's first child), cannot in any event be wholly

disregarded when deciding whether TC 20's evidence is cogent at this remove of time.

292. In summary, there is no doubt that TC 20's evidence has been rendered significantly less cogent by the delay in issuing the claim.

293. Having examined the core allegations in detail earlier in this judgment, I now very briefly summarise the loss of cogency on evidence other than the evidence of TC 20. On the core allegations and other important or potentially important contextual matters, the Defendant does not know the names of any witness, or have any means of beginning a process of identifying, much less tracing, them.[134] The passage of so many years in this case entails that the Defendant cannot even begin any proper investigation of the core allegations. It does not know who allegedly carried out the assaults or when. It knows nothing about TC 20 apart from what she herself has said. To put the matter at its lowest, fifty plus years ago, the Defendant potentially could have found documents which could potentially have led to information about TC 20, and to alleged tortfeasors or key witnesses. At the very least, the Defendant probably would have known which documents had been kept and which had been lost/destroyed. All these are, at a minimum, realistic possibilities; some are probabilities. Here, after all these years, the position is that, apart from the clear prejudice that the Defendant can prove, there is further prejudice in that it has been deprived in certain aspects from proving specific prejudice arising from lack of documentary or witness evidence. For example, documents which may have given, or led to potentially material evidence, no longer exist/cannot be found despite serious endeavour to find them; as a result of the passage of time, the Defendant can show that it does not know what happened to them. In the 1950s/1960s, the investigation could have been at least been properly embarked upon, and with a realistic prospect of a positive result. That in itself is prejudice proven by the Defendant.

294. In short, the strong probability is that the Defendant would have been in a very substantially better position to defend the core allegations, certainly had the claim been brought in time and probably into the mid-1960s. As time has passed, so the ability to defend has diminished, such that it is now essentially impossible for the Defendant to have any proper opportunity to find documentary or witness evidence with real relevance to the core allegations.

Witnesses – Authority

295. In relation to witnesses, it is helpful to remind myself of some authority. I have already cited some of this in the general section on the law, incorporated by reference from the TC 34 judgment, but I wish to repeat and amplify some citations.

296. First, it is, according to the House of Lords, a 'false point' to say that, because the law permits a Claimant to disadvantage a Defendant by dilatoriness within the limitation period, the Defendant cannot then complain of prejudice once that period has expired. So, even if the position were that the Defendant would have had difficulty tracing witnesses if the claim had been issued some time after the core allegation(s) but

[134] I have dealt above with three people named by TC 20: i.e in relation to the allegation of removal from Gikonda, Ndungu Kahendo, and Ngechu; in relation to Thuita village, Peter Njuru. All are dead/untraceable.

within 3 years of them, the point as to prejudice could still be made. In Donovan[135] Lord Oliver said:

"A defendant is always likely to be prejudiced by the dilatoriness of a plaintiff in pursuing his claim. Witnesses' memories may fade, records may be lost or destroyed, and opportunities for inspection and report may be lost. The fact that the law permits a plaintiff within prescribed limits to disadvantage a defendant in this way does not mean that the defendant is not prejudiced. It merely means that he is not in a position to complain of whatever prejudice he suffers. Once a plaintiff allows the permitted time to elapse, the defendant is no longer subject to that disability, and in a situation in which the Court is directed to consider all the circumstances of the case and to balance the prejudice to the parties, the fact that the claim has, as a result of the plaintiff's failure to use the time allowed to him, become a thoroughly stale claim, cannot, in my judgment, be irrelevant."

297. In Dale, an accident case, Stuart-Smith LJ, cited Lord Griffiths in Donovan, and said:

"In my judgment where the existence of a claim and sufficient particulars of it are given so late that it is virtually impossible for the defendants to investigate it, either because witnesses cannot be traced, memories will inevitably have faded or vital documents are lost, a defendant is gravely prejudiced if section 11 of the Act is disapplied, because he is almost powerless to defend the case on its merits. In such a case it will require exceptional circumstances to outweigh the prejudice and to bring the scales down in favour of the plaintiff. As Lord Griffiths made clear in the passage I have quoted, the whole purpose of the Limitation Act is to protect defendants from the injustice of having to meet stale claims."

298. The individual circumstances of the case must be taken into account. There is more background information in the claims in the present litigation. Two of the four core allegations are single incidents. Two are alleged repeated beatings. Nevertheless, I must take some note of this citation. In respect of all allegations, it is impossible for the Defendant to investigate for the reasons referred to in Dale. Therefore, to cite Stuart-Smith LJ, the "Defendant is gravely prejudiced if section 11 of the Act is disapplied because he is almost powerless to defend the case on its merits."

299. The passage by Burnett LJ (as he then was) in Bowen is of importance in this context. He also referred to what Lord Brown said in A v Hoare.[136] That passage bears repetition. Lord Brown said in relation to what Burnett LJ described as "the problems of investigating antique events":

"Whether or not it will be possible for defendants to investigate these sufficiently for there to be a reasonable prospect of a fair trial will depend upon a number of factors, not least when the complaint was first made and with what effect. If a complaint has been made and recorded, and more obviously still if the accused has been convicted of the abuse complained of, that would be one thing; if, however, a complaint comes out of the blue with no apparent support for it… that would be quite another thing. By no means everyone who brings a late claim for damages for sexual abuse, however

[135] At 479H-480B.

[136] Both passages are cited in the TC 34 judgment.

genuine his complaint may in fact be, can reasonably expect the court to exercise the section 33 discretion in his favour. On the contrary, a fair trial (which must surely include a fair opportunity for the defendant to investigate the allegations – see section 33(3)(b)) is in many cases likely to be found quite simply impossible after a long delay."

Lord Hoffman at [52] said he agreed with all of Lord Brown's speech and added: "…but I respectfully think that his observations on the exercise of the discretion are particularly valuable…" Lord Walker and Lord Carswell fully endorsed Lord Brown's (and Lord Hoffman's) speech.

300. In TC 20's case there was no complaint at all at or until over 50 years after the core allegations are said to have taken place. It may be said that the complaints did not come 'totally out of the blue', nor that they had "no apparent support" – in that there were a number of complaints of abuse during the Emergency. But those other complaints of abuse, by other people and at other times, do not detract from the prejudice suffered by the Defendant. The Defendant had no notice whatsoever of TC 20's core allegations until more than 50 years had passed, by which time its ability to investigate and defend had undoubtedly been severely prejudiced.[137]

301. Further, in A v Hoare, the underlying assumption was that the individual tortfeasor was named and could give evidence. If a named tortfeasor is dead and has had no opportunity to comment upon the allegations made against him, then it would take very persuasive evidence to exercise the discretion against that person and then to find against him. The unfairness of making a serious finding of abuse against someone who has had no opportunity to defend himself is patent. If that is so with a named tortfeasor now dead, how can a Claimant be in a better position when she cannot even name the tortfeasor but seeks recovery?

302. I have had full regard to the fact that the section 33 discretion can be exercised in favour of a Claimant, notwithstanding the unavailability of the primary tortfeasor and other evidence. In Raggett v The Society of Jesus,[138] Swift J did so in a historic sex abuse case where the alleged tortfeasor, a schoolmaster priest, had died prior to proceedings. The circumstances were:

- The tortfeasor was identified.
- The Judge said, at [123] - [124], that it was difficult to envisage circumstances in which a denial by the tortfeasor would have prevailed over the evidence of the Claimant and his witnesses. She pointed out that there were 11 witnesses who supported the Claimant's allegations "to a remarkable degree".[139] Further, that the tortfeasor "could have had no plausible innocent explanation for the contents of his letter of 28 June 2000.[140]

[137] For a very recent discussion of the prejudice caused in stale claims and the problems of a Defendant not being able properly to investigate, see The Catholic Child Welfare Society v CD in the Court of Appeal (supra) e.g at paras 33, 38 and 44.
[138] [2009] EWHC 909 (QB); upheld by the Court of Appeal: [2010] EWCA Civ 1002
[139] For details of their evidence, as summarised by the Judge, see [23]-[32].
[140] The letter, and other correspondence are detailed at [46]-[47]

- The Judge found on the facts of that case that it was "highly unlikely that the availability of other member of staff of the College would have improved the second defendant's prospects of succeeding on the issue of liability." [124]

303. There was, therefore, a host of very significant factors in Raggett which are not present in TC 20's case.

304. Further, although again I must take into account that all cases differ on the facts, the essence of what the Court of Appeal said in KR v Bryn Alyn at [82] has relevance:

> "It should be remembered that the reason for limitation provisions is to protect defendants from the injustice of having to meet stale claims. And a judge, when considering whether to disapply under section 33, particularly where, as here, there is difficulty in testing old and unsupported complaints, should not form a concluded view on their validity for the purpose of determining the existence and extent of potential prejudice to claimants of being deprived of a remedy. Such allegations are so easy to make and so difficult to refute that the danger of injustice is acute. Here, the Judge had to bear in mind the possibility of them being fabricated or exaggerated for financial gain in the wake of publicity about Bryn Alyn and about other care homes where similar conduct had been alleged. Yet his findings, both on the substantive issues and the effect of delay on cogency were based mostly on the strength of the claimants' evidence alone and without rigorous testing by way of cross-examination derived from instructions or contemporaneous records, or of possible contradictory evidence that might have been available if the claims and the trial had been earlier. It was, as he acknowledged in his opening remarks on the section 33 issue, an inherently difficult task, involving inevitable prejudice to the defendants in attempting to meet uncorroborated claims of this sort so long after the event…"

Exercise of discretion

305. My decision in TC 20's case upon having reviewed the evidence and the submissions, is the same as that in TC 34's case as set out in the TC 34 judgment, paragraphs 475 – 484. However, I feel it necessary to repeat those paragraphs in this judgment. I will also add some further analysis.

306. TC 20 has not proved in respect of any of her core allegations that her prejudice would outweigh that of the Defendant.

307. The prejudice to TC 20 in losing the chance of establishing her claims is of substantial importance. Those claims, though diminished in cogency for the reasons I have given, cannot be demonstrated to be lacking in merit.

308. The length of the delay is very substantial. In Mold v Hayton, Newson[141] at [21] Schiemann LJ, in the context of a clinical negligence claim where the delay had been some 18 years, said:

> "If a judge is minded to give such a huge extension of time under section 33, then he is under a duty to explain his reasons with meticulous care."

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[141] [2000] MLC 207, CA; cited also in B at [12] and Bowen at [23(iv)]

309. On the evidence I have in TC 20's case, it would not be possible for me to explain my reasons to extend time for a period of over 50 years.

310. The effect of the delay in issuing the claims on the cogency of TC 20's evidence and, in particular, on the evidence of the Defendant, is very significant. The Defendant has had no fair opportunity to investigate the core allegations. There was probably some additional effect before the expiry of the limitation period. This can be taken into account. My decision would, however, be the same without this additional effect.

311. The Defendant's ability to defend has been severely compromised by the delay. Had the claim been brought in time, or even at some stage during the early to mid-1960s, the evidence available to the Defendant, both documentary and witness, would have been much greater.

312. It is difficult, given the loss of witnesses and documents over time, to determine up to when there could have been a fair trial of some or all of TC 20's claims. Had the claim been brought in, say, the 1970s or even later, the evidential position then obtaining would have had to be examined in the sort of detail in which it has now been done. What is clear is that there cannot now be a fair trial of any of the core allegations. That is because of the delay.

313. In coming to my decision I have had regard to all the circumstances of the case, but specifically those under section 33(3).

314. I should add that my decision would have been the same even if: (1) I had been able to put into the balance in TC 20's favour all the reasons for delay which had been pleaded in the Reply, and the others which were the subject of the Claimants' submissions,[142] and (2) if there had been no material inconsistency in TC 20's evidence.

315. Dealing first with the reasons for delay, the unfairness to the Defendant in defending TC 20's core allegations would have still outweighed the prejudice to TC 20. Even with all those reasons to qualify or temper the prejudice to the Defendant, it would not have been fair and just in all the circumstances to expect the Defendant to meet the claims on the merits. I have specifically and carefully reconsidered all the reasons pleaded in the Reply. I have reminded myself of the law and in particular paragraph 42 (9) of the Carroll case. However, even on the basis that everything pleaded in paragraph 34 (a) – (l) of the Reply was proven and the delay until the date of issue arose for excusable reason(s), the unfairness to the Defendant due to the delay is in my judgment such that it is still clearly unjust and inequitable to allow the action to proceed. In essence, the Defendant has been deprived of all realistic possibility to defend the case on its merits. In Dale Stuart-Smith LJ said that: "In such a case it will require exceptional circumstances to outweigh the prejudice and to bring the scales down in favour of the plaintiff." Even if the threshold were not so high as requiring "exceptional circumstances", I have no doubt that the scales in this case cannot be brought down in TC 20's favour.

[142] The pleaded reasons, and others if evidenced, may well also have had an effect in TC 20's favour under section 33(3) (e) and (f).

316. Had there also been no material inconsistency in TC 20's evidence, that would not have changed my decision. I have found that, despite the inconsistencies to which I have given some weight, TC 20's evidence as to the core allegations is not lacking in cogency. I do not go so far as to find that TC 20 presented a strong prima facie case. However, even if she had, it would have become all the more critical for the Defendant to be able to mount an explanation by way of defence.[143]

317. Any metaphor must be limited if it attempts to describe the nuances and complexity of properly exercising section 33 discretion in a personal injury case. My judgment and its reasoning stands, irrespective of this metaphor or any shortcomings it may have. That said, it may assist to think of likening the evidence in a case to the components which are required to construct a boat. The aim of the litigation is for each party to attempt to steer the boat across the sea to a different final port, and to use sections of the evidential structure of the boat to influence the direction of travel. When a claim is out of time, the question is whether the boat is seaworthy to launch. If it is, even though it may have defects, then generally it will be proper to allow the voyage to take place. In the case of TC 20 (and TC 34) there is little more than a lop-sided[144] basic structure of a vessel with many essential components missing. The main missing components are evidence from witnesses and documents. The absence of these components, without more, necessitates that the boat must not be put on the water, as it would be doomed to sink immediately. Had TC 20 evidenced all her pleaded reasons for the delay, this would have made no difference. The missing components of witnesses and documents would still be so serious that the boat could not be launched. If the defects caused by their absence had been much less serious, such that the boat, albeit with difficulty, could have safely reached a port, it would have been a different matter. Factors such as inconsistencies in TC 20's evidence further undermine the cogency of TC 20's evidence and, consequentially, the structure of the boat. Had they been the only, or the major, defects, this would have called for a different judgment on sea-worthiness. In this case, however, inconsistencies serve only to increase the failings in that part of the boat constructed from TC 20's evidence. With or without them, the boat is doomed to fail. Rather than putting to sea in a boat which is at least capable of sailing, it would be like putting to sea in a sieve. The inconsistencies increase the size of some of the holes. In short, the boat, i.e. TC 20's claim, cannot be allowed on the water.

318. Consequently, I must refuse to exercise my section 33 discretion in TC 20's favour on all her claims for personal injury arising from the core allegations. The position is encapsulated in the words of Lord Brown in A v Hoare already cited: "By no means everyone who brings a late claim for damages…. however genuine his complaint may in fact be, can reasonably expect the court to exercise the section 33 discretion in his favour". In Davies[145] Tomlinson LJ said at [55] that section 33: "…is a corrective for injustice where the circumstances allow." The circumstances do not so allow in TC 20's claims.

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[143] cf Eady J in TCD v Harrow Council & others [2008] EWHC 3048 (QB) para 26; at para 35 he said: "There is a public interest in certainty and finality and such considerations must not be lightly discounted, especially not on the basis of sympathy for an individual litigant – even when there is, or might be, a strong case on liability."

[144] Lop-sided because there is now available evidence only from the TC 20 on the crucial matters.

[145] Davies v Secretary of State for Energy and Climate Change [2012] EWCA Civ 1380

Summary

319. In summary:

i. The core allegations preceding 4 June 1954, namely those during the removal from Gikonda, the beating during interrogation at Thuita, and the repeated beatings alleged at Thuita which were prior to that date, must fail on the basis that they are absolutely time-barred.

ii. All allegations must fail[146] because it is not equitable to allow them to proceed having regard to the criteria in section 33 Limitation Act 1980.

[146] Including those in i. above, assuming there were a discretion under section 33.