



Case No: HQ09X02666

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/07/2011

Before :

The Hon. Mr. Justice McCombe

Between :

Ndiku MUTUA and others

Claimants

- and -

**THE FOREIGN AND COMMONWEALTH
OFFICE**

Defendant

SUMMARY OF JUDGMENT

The Hon. Mr. Justice McCombe :

1. I am providing the following summary of my judgment in this case which I am handing down today. It has been prepared in an endeavour to assist accurate reporting and public understanding of the decision. The summary is not part of the judgment for official purposes.
2. The claimants are five Kenyan nationals who allege that they were seriously mistreated in detention camps in Kenya, when it was a British colony, during the Mau Mau uprising in the 1950s. One claimant has died since the proceedings were begun. I do not understand it to be said that the death was related to the injuries complained of in the proceedings. The claims are for damages for personal injuries brought against the Foreign and Commonwealth Office (“the FCO”) (representing the British government) in respects of the “torts” (actionable wrongs) of assault and battery, and negligence.
3. The FCO has brought applications to strike out the claims and for summary judgment in its favour, in advance of a full trial, on the grounds that the claims disclose no cause of action in law and have no real prospect of success against the UK Government. The FCO’s case (in very broad outline) is that any claim that the claimants might have had could only have been brought against the direct perpetrators of the alleged assaults and/or their employer at the time, the Colonial Government in Kenya, and not against the British government.
4. The applications that I have heard and determined are, therefore, pre-trial applications which were to elicit a decision that, whatever the true facts that might emerge at any trial, the British government could not be liable in law to the claimants.
5. The claimants have argued in contrast that the British government are at least arguably liable to them for their injuries on five different legal bases. First, they say that the liabilities of the old Colonial Government (which ceased to exist in 1963) devolved upon the UK Government on independence, under the common law incorporating general principles of public international law. Secondly and thirdly, it is said that the UK Government was and is directly liable to the claimants for having instigated and procured, through (a) the Army and (b) the Colonial Office, a system of torture and ill-treatment of detainees as part of a common design shared with the Colonial Government in Kenya. Fourthly, the claimants argue that in July 1957 the British government expressly instructed, authorised or approved a policy of mistreatment of detainees, as shown by a series of exchanges between the Governor of the colony and the Colonial Office in London. (Copies of the most important documents on this issue, as presently available, are annexed to the judgment.) Fifthly, it is said that the UK Government, as paramount colonial power, owed a duty of care in law to the claimants to prevent abuses, which it knew were being committed and which it had the power to prevent; it is alleged that the UK Government is liable to the claimants for breach of that duty.
6. The underlying documentary base and the direct witness evidence are voluminous. A large number of documents have been produced already to the court by the parties for the purposes of these applications. However, under our rules of civil procedure, no formal obligation has yet arisen for *any* party (including the FCO) to give to the other or others disclosure of documents in his, her or its possession which are relevant to

the claim. Criticism of late disclosure of papers by the UK Government is and would be misplaced in so far as it is based on a misunderstanding of the court rules and procedures. If criticism is based on the failure to make documents available in the public archive earlier than was achieved, this is not a matter for the court.

7. In the present circumstances, each side has urged upon me in argument rival contentions on the facts, directed to the potential liability or otherwise of the UK Government. In the claimants' case, they have relied on the evidence of three distinguished academic historians. The FCO has produced arguments based upon its own inferences, which they say should govern the factual conclusions of the court, from its own analysis of the constitutional arrangements between the UK and Kenya in the 1950s and the documents produced so far. The rival factual contentions are hotly disputed. I have found that it is impossible at this stage of the proceedings to decide that the FCO must be correct in its factual assessments and arguments. It has been necessary, therefore, to consider the case on the basis that the claimants' version of the facts may prove at trial to be correct and to ask whether, on that basis, they have an arguable claim in law against the UK Government.
8. It will readily be appreciated that this is novel type of claim on which there is no direct precedent to determine the matter in a court of first instance.
9. I have decided that the claimants have arguable cases, fit for trial, on four out of five of the bases summarised above. I have, therefore, dismissed the FCO's applications save in respect of that one formulation of the case, namely the first of those set out in paragraph 5 above. Subject therefore to the decision of any higher court, the case will have to proceed to trial. After the passage of time, there are bound to be further arguments on the question whether the claims are now barred by the provisions of the Limitation Act 1980 and there is already before the court an application for a preliminary issue to decide such questions. The usual limitation period in personal injury cases is 3 years, but there are provisions in the 1980 Act giving the court power, in appropriate cases, to extend that period; the claimants rely on those provisions. It will be necessary in due course to resolve how those issues are to be determined in the context of the proceedings as a whole.
10. I emphasise that I have *not* found that there was systematic torture in the Kenyan camps nor that, if there was, the UK Government is liable to detainees, such as the claimants, for what happened. I have simply decided that these five claimants have arguable cases in law and on the facts as presently known that there was such systematic torture and that the UK Government is so liable. Accordingly, I decided that the FCO have not established that the claims are bound to fail.
11. This summary is no more than that – a summary. For a fuller understanding of the case and the issues arising, readers, and particularly representatives of the news media upon whom the public rely so much for information, are encouraged please to read the full judgment.

The Hon. Mr. Justice McCombe

21st July 2011.