Michaelmas Term
[2015] UKSC 69
On appeal from: [2014] EWCA Civ 312

JUDGMENT

Keyu and others (Appellants) *v* Secretary of State for Foreign and Commonwealth Affairs and another (Respondents)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Mance
Lord Kerr
Lord Hughes

JUDGMENT GIVEN ON

25 November 2015

Heard on 22 and 23 April 2015

Appellants
Michael Fordham QC
Danny Friedman QC
Zachary Douglas QC

(Instructed by Bindmans LLP)

Respondents
Jonathan Crow QC
James Eadie QC
Jason Coppel QC
Marcus Pilgerstorfer
Amy Rogers
(Instructed by Government Legal Department)

Intervener (Attorney General for Northern Ireland Written Submissions Only)

Interveners (The Pat Finucane Centre and Rights Watch UK)
Ben Emmerson QC
Adam Straw
(Instructed by KRW Law LLP)

LORD NEUBERGER: (with whom Lord Hughes agrees)

Introductory

1. The issue raised by this appeal is whether the respondents to this appeal, the Secretary of State for Foreign and Commonwealth Affairs and the Secretary of State for Defence, are required to hold a public inquiry (or other similar investigation). The inquiry which is sought would relate to a controversial series of events which began on 11 and 12 December 1948, when a Scots Guards patrol shot and killed 24 unarmed civilians in the village of Batang Kali, in Selangor. At that time, Selangor was a British Protected State in the Federation of Malaya, but it is now of course a state within the independent federal constitutional monarchy of Malaysia.

2. The decision not to hold a public inquiry was taken by the respondents pursuant to section 1(1) of the Inquiries Act 2005 ("the 2005 Act"). That section provides that "[a] minister may cause an inquiry to be held … in relation to a case where it appears to him that" certain conditions are satisfied including "(a) particular events have caused, or are capable of causing, public concern" and "(b) there is public concern that particular events may have occurred".

3. The appellants, who are closely related to one or more of the victims (and some of whom were children in the village at the time), contend that the killings on 11/12 December 1948 ("the Killings") amounted to unjustified murder, and that the United Kingdom authorities have subsequently wrongly refused to hold a public inquiry, and have sometimes deliberately kept back relevant evidence. The appellants contend that a public inquiry is required on three different grounds. First under article 2 of the European Convention on Human Rights ("the Convention"), which came into force for the United Kingdom on 3 September 1953, and was extended by the United Kingdom under article 56 of the Convention to the Federation of Malaya on 23 October 1953; secondly under the common law by virtue of its incorporation of principles of customary international law; and thirdly under the common law through the medium of judicial review. These three grounds each raise a number of issues, sometimes overlapping. However, there is also a jurisdiction issue, given that the events in question occurred in what was then a different jurisdiction and is now also a wholly independent state.

4. I will first set out the relevant facts, and after mentioning the jurisdiction issue, I will deal with the three grounds raised by the appellants, taking them in the order in which they have been just set out, which is the same order in which they were raised by Mr Fordham QC in the course of his excellent written and oral arguments on behalf of the appellants.

The facts

Background

5. In the first half of the 20th century, the country which is now Malaysia was part of the British Empire. In 1941, during the course of the Second World War, it was invaded and occupied by the Japanese. It was subsequently re-taken by the British in 1945, the year in which the Second World War ended.

6. Shortly thereafter, there was an insurgency, which became known as the "Malayan Emergency", and in which members of what had been the communist Malayan People's Anti-Japanese Army took a leading part. Several British planters and businessmen were killed and there were violent incidents within a number of states, including Selangor. In June 1948, the Colonial Secretary approved the use of emergency powers in Malaya, and the High Commissioner declared a state of emergency on 12 July 1948 for the entire Federation, and three days later he issued Emergency Regulations.

7. United Kingdom ministers agreed to send a brigade of the British army to Malaya by the end of August 1948. The cost was to be borne by the Treasury. Many of the troops sent were national servicemen, with only limited training in relation to operations of this kind. Part of the brigade comprised the Second Battalion of the Scots Guards. They arrived in Singapore in October 1948 and after three weeks training, and they were sent to areas of the Federation where "bandit activity" had been reported. G Company of the Second Battalion was based at Kuala Kubu Bahru where they underwent training for jungle warfare, apparently for the first time.

The events of 11 and 12 December 1948

8. Batang Kali is located approximately 45 miles northwest of Kuala Lumpur in the district of Ulu Selangor. It was then a village consisting of families who inhabited 'kongsi' residential huts, which are wooden longhouses raised from the ground with a veranda entrance. The village was within a rubber plantation owned by a Scotsman, Thomas Menzies, the chairman of the Selangor Estates' Owners Association, and most of the villagers worked on the estate.

9. G Company of the Second Battalion of the Scots Guards was based at Kuala Kubu Bahru. The senior police officer for the district asked Captain Ramsey (the second-in-command of the Company) to send patrols to two separate areas, to ambush a party of insurgents expected to arrive the following day. Captain Ramsey commanded one of the patrols, and Lance Sergeant Charles Douglas led the other because there was no other available commissioned officer. Lance Sergeant Thomas

Hughes was Douglas's second in command, and the patrol included a Lance Corporal and 11 guardsmen (almost all of whom were undertaking National Service). A Malay Special Constable (Jaffar bin Taib) acted as a guide and they were accompanied by two police officers, Detective Sergeant Gopal and Detective Constable Woh.

10. Early in the evening of 11 December 1948, the patrol took control of the village. Fifty adult villagers and some children, including two of the appellants, were detained. The villagers, who were a range of ages, were not wearing uniforms and had no weapons. The men were separated from the women and children by the patrol. They were all detained in custody overnight in the kongsi huts. Interrogation of the villagers then took place, and there were simulated executions to frighten them, which caused trauma to some.

11. A young man was shot dead by the patrol in the village that evening, and he has now been identified as Loh Kit Lin, the uncle of the second appellant.

12. During the interrogations, the police officers secured information from one of the men, Cheung Hung, the first appellant's father, about armed insurgents who occasionally visited the village to obtain food supplies. This information was passed to the patrol.

13. On the morning of 12 December, Lim Tian Sui, who was the 'kepala' (village headman), and the father of the third appellant, arrived in the village by lorry, which was searched and found to contain some rice. Lim Tian Sui was detained. The women and children and one traumatised man were then ordered onto the lorry. It was driven a little way from the kongsi huts. Those aboard were guarded by members of the patrol before being driven away from the plantation.

14. The kongsi hut with 23 men was then unlocked by other members of the patrol. Within minutes all 23 were shot dead by the patrol. The kongsi huts were then burned down. The patrol then returned to its base.

The immediate aftermath

15. The first known document to describe the Killings was a confidential telegram sent by the High Commissioner, to the Colonial Office on 13 December 1948. It stated that "26 bandits have been shot and killed by police and military in the Kuala Kubu area of Selangor" and that one "bandit" had been wounded and captured. Also on 13 December 1948, a journalist working for *The Straits Times*, Harry Miller, drove to the Scots Guards base at Kuala Kubu Bahru. He interviewed Sergeant Douglas who said that all those shot on 11 and 12 December 1948 had been

trying to escape when about to be taken to the company's base for interrogation. He also said that "a large quantity of ammunition had been found under a mattress". This account was published in *The Straits Times* on 13 December 1948 and, four days later, the General Officer Commanding Malaya, Major General Sir Charles Boucher, stated at a press conference that this was an "extremely accurate" description of what had occurred.

16. On 17 December 1948, a Far-Eastern Land Forces British Army Report on relevant incidents was compiled setting out the actions that had been taken to combat the insurgency. In relation to the incident in question it noted that a patrol had "captured 26 male bandits" who had been "detained for a night in kongsi huts" and that, following a successful ambush of a lorry, the "bandits attempted mass escape. 25 killed. One recaptured". The official War Office report of 22 December 1948 repeated this summary, and referred to the event as a "very successful action".

17. This official account was not universally accepted. The families of those killed appealed for help to various organisations and the Chinese Consul-General requested an inquiry, suggesting that the Killings were unjustified given that all the deceased were unarmed. Claims appeared in the Chinese press that there had been a massacre. On 22 December 1948, Mr Menzies stated publicly that all those killed were his employees with records of good conduct, and that there had been no strikes or other problems. On 24 December 1948, *The Straits Times* called for an inquiry.

18. Sir Stafford Foster-Sutton, the Attorney General of the Federation and a Federal counsel, Mr Shields, then conducted an investigation, which seems to have taken a matter of days. Although the file (together with many other files relating to law and order issues during the Malayan Emergency) was destroyed in 1966, Sir Stafford spoke about this inquiry in 1970 to the Metropolitan Police and to a BBC news programme. He said that the inquiry originated as a result of public disquiet and a complaint from the owner of the rubber estate where it occurred. Statements (not on oath) had been taken from each member of the patrol which were given to him by the police. No inquiries were made of inhabitants of the village "for a very good reason, because they were most unlikely to talk and, if they did talk, to tell the truth". He had visited the scene, met the sergeants and the two detectives, examined the burnt down huts and found shell-cases that had exploded during the fire and were illegally there. He had been told by the sergeants that they believed that the men they had arrested were bandits, and that, when those men had been taken for interrogation, they had made a dash for it and the Guards then opened fire. After cross-examining the sergeants and the police officers who had accompanied the patrol, he said that he had been "absolutely satisfied a bona fide mistake had been made". Accordingly, he had been "satisfied of the bona fides of the patrol and there had not been anything that would have justified criminal proceedings" and had reported his findings to the High Commissioner.

19. It seems that there were separate investigations by the police and the army, although scant and contradictory information survives as regards the detail and the extent of these undertakings. For instance, Sir Charles Boucher told the press on 5 January 1949 that he had instigated an investigation immediately after he heard about the incident, but no details have been uncovered.

20. The only contemporaneous statements that have been found are from Detective Sergeant Gopal, Detective Constable Chia Kam Woh, and two statements from Cheung Hung. Officers Gopal and Woh indicated that Cheung Hung had told them about visits by "bandits" in order to obtain food. Cheung Hung told the police that this was common knowledge but the villagers were afraid to inform the authorities. The officers stated that they separated Cheung Hung, and that they were in the area of the store when the 23 men were shot. Cheung Hung, who has given somewhat differing accounts over the years, indicated that he had been in a yam patch at the time of the shooting. He had not seen any attempted escape but instead the men were shot when they were being walked away from the huts.

21. Part of a telegram headed "Incident at Batang Kali" from the High Commissioner, Sir Henry Gurney, to the Colonial Office dated 1 January 1949 has survived. It stated that "the soldiers who had been posted with object of protecting the clearing from external attack did everything that it was possible for them to do to stop the escaping Chinese before resorting to force". It also pointed out that:

> "[W]hen persons are picked up by the security forces under such circumstances until they are screened at headquarters it is impossible for the security forces to know whether they may be members of 'killer squads' or to what extent they are involved. Furthermore although some of the killed were rubber tappers it is our experience that such persons are frequently rubber tappers part time and bandits the rest of the time and that their arms are normally hidden in the neighbourhood and not found with them. Moreover, we feel that it is most damaging to the morale of the security forces to feel that every action of theirs, after the event, is going to be examined with the most meticulous care."

22. A further document from the High Commission headed "Supplementary Statement" was released to the local press on 3 January 1949, and published the following day in *The Straits Times*, and *The Times* in London. After setting out some background information, and explaining how some arms and ammunition had been discovered in the village, it went on to say this:

> "[Some] Chinese men found in the clearing were placed in a room in one of the kongsi houses for the night, under guard.

> The following morning they were brought out of the room by two sentries who were on the verandah of the kongsi house in which the room was situated. The only other soldier in sight was the sergeant in command who was standing on the ground a little beyond the kongsi house, ready to receive the Chinese as they came off the verandah.
>
> When all the Chinese had reached the ground from the verandah, one of them shouted and they thereupon split up into three groups and made a dash for the three entrances to the jungle. There is no doubt that they were under the impression that the only troops that they had to compete with were the two soldiers on the verandah of the kongsi house and the sergeant.
>
> The attempted escape was obviously pre-arranged because there was no hesitation in the formation of the three groups and the shout was no doubt the pre-arranged signal for putting the plan into effect.
>
> The sergeant and the two soldiers on the verandah immediately shouted calling upon them to halt. They could not use their arms because to do so would have endangered the lives of their comrades who were posted out of sight but in the line of fire. The men in the three groups covering the entrances heard shouting but did not know what was happening until they saw the Chinese running through the bush and jungle past where they were posted. They thereupon shouted the Malay word for halt to which no attention was paid by the escaping Chinese. The men of the three groups gave chase, continuing calling upon them to halt and, as they failed to so, the soldiers opened fire."

23. At a press conference on 5 January 1949, Sir Alec Newboult, Chief Secretary of the Federation of Malaya, said, "I have no doubt at all that these men made an attempt to escape from legal custody, and having made that attempt they had to stand the consequences". He went on, "Let us be absolutely fair with the security forces. The point at issue is that, in starting the attempt to escape, the men were warned and continued to make their escape and the patrol opened fire". Sir Charles Boucher added: "I think the public should know that troops and police are trained never to open fire unless it is necessary, but when they have to fire, the fire is always intended to kill. It cannot be anything else".

24. On 26 January 1949, the Colonial Secretary Mr Creech Jones gave a written answer to a Parliamentary Question about the incident. This stated:

> "The Chinese in question were detained for interrogation under powers conferred by the Emergency Regulations. An inquiry into this incident was made by the civil authorities and, after careful consideration of the evidence and a personal visit to the place concerned, the Attorney General was satisfied that, had the Security Forces not opened fire, the suspect Chinese would have made good an attempt at escape which had been obviously pre-arranged. A full statement was issued in Kuala Lumpur on 3 January."

25. Demands were made for a public inquiry conducted by a High Court judge, but they were rejected.

Events in 1969 and 1970

26. In late 1969, some 12 years after Malaysia achieved independence, one of the Scots guardsmen, William Cootes, provided a sworn statement to the newspaper, *The People*, which stated that the victims at Batang Kali had been massacred in cold blood. Sworn affidavits were thereafter taken from three other guardsmen who were part of the patrol that went to Batang Kali: Alan Tuppen, Robert Brownrigg and Victor Remedios. They alleged that the deceased had been massacred on the orders of the two sergeants on the patrol, and it was suggested by some of the deponents that they had been ordered to give the false explanation that the victims had been killed when trying to escape. A further guardsman, George Kydd (who did not provide a written statement) told a reporter on *The People* that the Killings were "sheer bloody murder […]. [T]hese people were shot down in cold blood. They were not running away. There was no reason to shoot them".

27. In the next few days, two of the soldiers, Alan Tuppen and Victor Remedios, gave interviews on British national television and radio confirming an account of unlawful killing. Sir Stafford Foster-Sutton was also interviewed on the BBC News. All of the transcripts are available. Sir Stafford repeatedly described the killings as "a bona fide mistake" and made it clear that "anyone who knew anything about it at the time entirely agreed that it was a bona fide mistake". Alan Tuppen confirmed that in his own mind the killings were tantamount to murder.

28. For their part, Sergeant Douglas (by then a Regimental Sergeant Major) and former Sergeant Hughes reiterated the account given in 1948 by Sergeant Douglas, that all those shot on 11 and 12 December 1948 had been trying to escape when about to be taken to the company's base for interrogation. An official of the Ministry of Defence was present when Sergeant Douglas was interviewed. He commented that the interview was "absolutely fair and correct in all respects".

29. A reporter from *The People* then interviewed Cheung Hung who was still living in Malaysia. He said that the troops had separated the women and children from the men, divided the men – who did not attempt to escape – into groups and shot them. *The Straits Times* interviewed one of the guides, Inche Jaffar bin Taib, who said that, shortly before the Killings took place, a sergeant told him not to look at the male detainees. After he had turned his back he heard a burst of gunfire, and when he turned round he saw dead bodies everywhere. The sergeant told him that he would be jailed if he breathed a word about what had happened.

30. The UK government issued a press statement indicating that it was taking the matter very seriously. Internal memoranda noted that a three-year limitation period prevented prosecutions under the Army Act 1861 but given the view was taken that prosecutions in the civilian courts remained a possibility, a decision on whether to institute criminal proceedings necessarily came before the government could resolve whether to hold an inquiry.

31. The Director of Public Prosecutions, Sir Norman Skelhorn QC, received advice on 27 February 1970 from a prosecution lawyer, with which he and the Attorney General agreed, that the Metropolitan Police should investigate what had occurred. It was proposed that this inquiry into the facts was to include interviewing all the guardsmen, the police officers who accompanied the patrol, the interpreter and the sole survivor. Sergeants Douglas and Hughes were to be interviewed last. On 18 March 1970 the DPP informed the Ministry of Defence that he would extend the inquiry beyond the United Kingdom if he considered this to be a necessary step. On 13 April 1970 the Malaysian Government offered to assist the investigation.

32. Responsibility for the investigation was given to the Metropolitan Police, and the lead officer, Detective Chief Superintendent Williams, contemplated taking two months to interview the guardsmen in the United Kingdom before providing an interim report to the DPP. If authority was given to pursue investigations in the Far East, he envisaged needing six weeks to interview 36 witnesses in Malaysia. He also had in mind the possibility of exhuming the bodies. The sergeants were to be interviewed as the last stage before he submitted his report to the DPP. He expected that the entire process would take approximately six months.

33. Four guardsmen, William Cootes, Alan Tuppen, Robert Brownrigg and George Kydd, were interviewed under caution. They each admitted that Sergeant Hughes had ordered them to shoot the men, who had not attempted to escape, as suspected bandits or sympathisers. None of the guardsmen had taken the option that was offered of not participating. A further guardsman (whose record of interview is not available), Keith Wood, also admitted when interviewed that the men were murdered. Victor Remedios did not answer the officer's questions, but did not withdraw his earlier admission of murder. Additionally, Robert Brownrigg and

George Kydd said that they had been instructed by the army to provide the false explanation that the men had been trying to run away.

34. Two lance corporals, George Porter and Roy Gorton, said that the men had been shot whilst attempting to escape. The sergeants were not interviewed because the inquiry was terminated. DCS Williams spoke to the two reporters and he was critical of their methods, including the fact that William Cootes had been paid £1,500 for his initial statement to *The People*, and the fact that it appeared that the journalists may have given incorrect information concerning the possibility of a prosecution.

35. Meanwhile, in the spring of 1970, the High Commissioner in Kuala Lumpur and the Foreign and Commonwealth Office were expressing concern that the Malaysian Government "may come under pressure to open their own inquiry or press HMG", that the investigation might "revive local feeling", and cause "political difficulties". A letter of 19 May 1970 from the High Commission to the FCO expressed the view that the presence and activities of an investigating team "would be given close and embarrassing attention". It was considered "extremely doubtful if a villager's recollections of an incident which happened 22 years ago could ever be accurate, especially as the terrain has since changed beyond recognition". The letter went on to state that "We quite realise the political importance of allowing justice to be seen to be done over Batang Kali, but it is worth bearing the limitations in mind".

36. On 2 June 1970 Mr P J Sullivan from South West Pacific Department at the FCO wrote to the office of the DPP. Having referred to the likely publicity that the arrival of a British police team in Malaysia would cause, especially if the team wished to take evidence in the area of Batang Kali itself, he expressed doubts about the reliability of any evidence which was given, in the light of the passage of time and also because of the possible incentive of compensation.

37. On 12 June 1970 the DPP was provided by one of his officials with a minute which concluded:

> "I am satisfied that on the evidence we have there is no prospect of criminal proceedings. But there are at least five persons who say this was murder. It seems to me inquiries must be pursued in Malaysia otherwise the inquiry will only be half done. Furthermore there are a number of witnesses out there who claim to have seen what took place, including Cheung Hung. The various statements by this man are inconsistent and we want to pin him down. It appears also that a number of persons who say they saw what happened (women on the lorry) could not have been in a position to do so. I feel that this should be

> cleared up. I am of the opinion that, if we do not go through to the bitter end, we will lay ourselves open to attack by the newspapers and by the anti-military brigade."

38. The DPP's endorsement of that minute was in these terms:

> "I have nothing to add to my minute of 5/6/70. Having embarked on this inquiry, must we now go as far as we can? Perhaps however the Malaysian Government will refuse entry to the investigating team, which will save any further expenditure of time and money on this unrealistic inquiry."

39. Following the General Election on 18 June 1970, the new Attorney General, Sir Peter Rawlinson QC, indicated at a meeting with the DPP on 26 June 1970 that it was unlikely that sufficient evidence would be obtained to support a prosecution and therefore the investigation should go no further. This decision was communicated to the Ministry of Defence by the DPP on 29 June 1970, with a fairly full explanation, which concluded that, in the light of the passage of time and the inconsistent statements which had been made:

> "I am satisfied that the institution of criminal proceedings would not be justified on the evidence so far obtained. Further in my view the prospect of obtaining any sufficient additional evidence by further police investigation in Malaysia are so remote that this would not be warranted. Accordingly, I do not propose to ask the police to pursue the inquiry and the Attorney General agrees with my views."

40. On 30 July 1970, DCS Williams produced a report on his investigation to date. It stated:

> "Cootes, Tuppen (with solicitor), Brownrigg and Kydd admitted in statements, after caution, that murder had been committed. Woods, in the presence of a solicitor, verbally admitted that murder had been committed, after he had been cautioned. Remedios, in the presence of a solicitor, refused to comment on, or add anything to his original sworn statement. Porter and Gorton made statements denying the allegations. …
>
> At the outset this matter was politically flavoured and it is patently clear that the decision to terminate inquiries in the middle of the investigation was due to a political change of

> view when the new Conservative Government came into office after the General Election of 18 June 1970."

41. Meanwhile, the Ministry of Defence decided not to hold an inquiry into the Killings.

Events from 1992 to 1997

42. The deaths at Batang Kali next gained significant public prominence when the BBC broadcast a documentary on 9 September 1992 about the Killings, entitled *In Cold Blood*. This was based on a range of materials, which included interviews with Cheung Hung and a number of other Malaysians who were related to the men who had been killed or who had been present in Batang Kali when these events occurred. This was the first time many of them had been interviewed. One of the officers involved in the 1970 Metropolitan Police investigation, Detective Sergeant Dowling, and three guardsmen who had not been on the patrol were also interviewed and some of the statements made during the 1970 police interviews with the guardsmen were read out. It was said they stood by their accounts but refused to appear. The Ministry of Defence declined an invitation to participate. In correspondence with the BBC, it simply confirmed the account given in 1948 and in 1949.

43. On 15 September 1992, immediately following the broadcast, Ministers were briefed by Richard Suckling, a senior government legal adviser. The briefing described the BBC documentary. It noted that a fact which had not been referred to in the programme was the substantial conflict of evidence between the soldiers who had been present and had given statements. It also referred to the possible differences between what may have been thought to be acceptable in 1948 and in 1992.

44. Following the broadcast, the Crown Prosecution Service reviewed whether any further steps should be taken. In a draft note of the review dated 26 March 1993, Jim England of the Service's War Crimes Unit observed:

> "What the documentary does show is that in 1970 there probably were a number of people with relevant information to give if the police had gone to Malaysia. Even though it now seems almost certain that Chong Fong's account is fictional, I do not consider that it would be fair to say that all the surviving villagers were inherently unreliable. It seems to me that they were never given an official opportunity to tell their side of the story due to fear of what they would say."

45. However, Mr England said that he "was certain in [his] own mind that it would be pointless now to re-open this investigation", partly because "if anyone was charged they would, in view not only of the long and what must be regarded as a consequentially prejudicial delay" but also because "the termination of inquiries in 1970, have an unassailable abuse of process argument so as to avoid conviction". It would appear that no consideration was given to holding an inquiry rather than pursuing a criminal prosecution.

46. Meanwhile, on 8 July 1993, Foo Moi, the wife of one of the men who had been shot, and Cheung Hung, the first appellant's father, presented a Petition to the Queen through the British Embassy in Kuala Lumpur requesting the British government to reopen the investigations, prosecute those responsible for the deaths and to pay compensation. No such action was taken and a telegram from the High Commission to the FCO of 7 February 1994 observed:

> "… we see no case for pushing ahead with an answer to the petition while air services and Bosnia remain such sensitive issues. ... Even if we were [put under pressure by the MCA or the Malaysian Government] we would be able to resist it by taking the line that a suitably thorough examination of the relevant papers in the UK was necessarily taking time."

47. A letter from the High Commission to the FCO of 6 April 1994 commented:

> "It remains in our interests to play this affair long … I therefore recommend that the MCA's petition is submitted to the Queen as soon as possible. … This would buy us a bit more time in which to consider the terms of our reply to the petition (I will telegraph separately with further advice on this)."

48. By April 1994 the Petition had been submitted to the Palace with a draft response which was described as "essentially non-committal", while not closing the door to further action if sufficient new evidence is forthcoming.

49. In December 1994, the High Commissioner responded to the Malaysian Chinese Association who inquired as to the progress of the response to the Petition that he was looking into the matter. However, a response to the 1993 Petition was never forthcoming.

50. Meanwhile, on 14 July 1993, the Royal Malaysian Police began investigating the Killings locally in response to a report of the massacre as a crime made that day by three surviving family members: Foo Moi, and the first appellant's father and

mother, Cheung Hung, and Tham Yong. The Malaysian Police took statements from them and a number of others who were either related to the men who had been killed or who had been in the village at the time, as well as three retired police officers. Contrary to his statement of 14 December 1948, Detective Constable Chia Kam Woh denied being present at Batang Kali on the day.

51. Having been made aware of the petition and Royal Malaysian Police investigation, on 2 February 1994, Mr England sent his report on the 1970 Metropolitan Police Force evidence and the *In Cold Blood* documentary to the FCO. His covering letter stated:

> "As you will appreciate, the role of the CPS is limited to assessing the quality of evidence and making decisions on the question of criminal proceedings. The Petition from the villagers raises other matters of compensation which are not within our remit."

He also stated that no further action was envisaged:

> "although this does not preclude you from asking the CPS to examine any further evidence which may emerge from present investigations in Malaysia so that your Ministers may be advised whether any grounds exist for requesting further investigations."

52. The FCO replied on 15 March 1994 stating:

> "I am very sorry that other events have prevented me from acknowledging before now the very helpful paper enclosed with your letter of 2 February. I copied it at the time to our High Commission in Kuala Lumpur. Their recommendation was that, since we were under no particular pressure from the Malaysians to produce an answer, we should not take further action on the Petition while certain sensitive issues in our relations with Malaysia remained unresolved. Events since then tend to reinforce that case, and I therefore propose to leave the papers on the file for the moment. I will reassess in due course. I will let you know before moving again."

53. An interim Royal Malaysian Police report of 31 May 1995 concluded that further inquiries were necessary, including obtaining the views of the chief pathologist as to examining the bodies and taking statements from the Scots Guards.

54. A request was made through Interpol for British help which was passed to the Metropolitan Police War Crimes Unit. This included a request for the names of the Scots Guards on the patrol. It took until 31 July 1996 to send the names. The addresses were then sought by the Royal Malaysia Police, but nothing further seems to have been supplied.

55. Officers involved in the investigation planned to visit the United Kingdom to pursue their inquiries here. However, this never took place. The Royal Malaysia Police file was closed on 30 December 1997, it would appear due to a lack of evidence to support criminal charges.

More recent events

56. In 2008, a campaign group called the Action Committee Condemning the Batang Kali Massacre was formed. On 25 March that year it sent a second petition to the Queen seeking an apology and compensation. In October, the appellants' solicitors wrote to the Foreign Secretary requesting a response to the petition.

57. On 12 December 2008, a supplementary petition was presented seeking additional relief including a public inquiry. On 21 January 2009, the High Commissioner gave a response that was subsequently withdrawn following pre-action correspondence from the appellants' solicitors:

> "In view of the findings of the two previous investigations that there was insufficient evidence to pursue prosecutions in this case, and in the absence of new evidence, regrettably we see no reason to re-open or start a fresh investigation."

58. A barrister, Dr Brendan McGurk, was then instructed to review the available material on the Killings for the respondents. On 21 August 2009, the appellants' solicitors were sent a provisional decision based on this review refusing to establish an inquiry or to investigate. They were invited to comment. Before doing so, they secured access to view the police files that Dr McGurk had seen and to some of the CPS material. They provided copies of a book that had just been published about the killings, *Slaughter and Deception at Batang Kali* by Ian Ward, the former Daily Telegraph War Correspondent, and Norma Miraflor. With their representations, they forwarded material from the 1993-1997 Malaysian Police file that had been supplied to them by a journalist that had not been seen by Dr McGurk or the British authorities. They also made the respondents aware of the views of archaeologist Professor Sue Black from the Centre of Anatomy and Human Identification at the University of Dundee, as to the prospects of disinterment revealing new evidence and the extent of the process required.

59. On 29 November 2010 the Treasury Solicitor wrote to the appellants' solicitor communicating the respondents' decision to refuse to hold an inquiry into the Killings, and setting out their reasons.

The instant proceedings

60. The instant proceedings were issued on 25 February 2011 by way of an application for judicial review. The Scots guardsmen involved in the patrol who were known to be alive and could be traced were served as interested parties but did not participate. Permission was granted on 31 August 2011 by Silber J.

61. On 4 November 2011 the Treasury Solicitor sent a letter to the appellants' solicitor stating that the respondents had reviewed and confirmed their decision not to hold an inquiry following a submission from officials addressing an argument concerning the adequacy of the previous investigations.

62. Upon the appellants' application for disclosure of documents by the Metropolitan Police, on 1 May 2012, Sir John Thomas P made an order stating: "I cannot be satisfied that these documents are documents that must be disclosed, but the pragmatic solution to the issue is for the documents to be made available to the claimants' solicitors, who can then apply to put those which are relevant (and only those) in due course before the court".

63. The Divisional Court (Sir John Thomas P and Treacy J) dismissed the claim for reasons given in a judgment given on 4 September 2012 - [2012] EWHC 2445 (Admin). The appellants' appeal to the Court of Appeal was dismissed for reasons given in a judgment of the court (Maurice Kay, Rimer and Fulford LJJ) given on 19 March 2014 – [2014] EWCA Civ 312, [2015] QB 57. The appellants now appeal to this court.

The Jurisdiction issue

64. The first issue which it is appropriate to address is whether the present claim is properly brought against the United Kingdom at all. That submission appears to apply to all three of the bases upon which the appellants rest their case, but it was principally developed in argument by reference to the first basis, article 2 of the Convention ("article 2"). In so far as the claim is brought under article 2, this issue is encapsulated in the question whether the appellants' complaint relates to alleged failures by the United Kingdom "to secure to everyone within [its] jurisdiction", within the meaning of article 1 of the Convention, any of the rights and freedoms defined in article 2, so as to make the United Kingdom potentially responsible for

breach of the Convention Rights as incorporated into domestic law by the Human Rights Act 1998 ("the 1998 Act").

65. On this issue, I have read in draft the judgment of Lord Mance. I agree with his conclusion that, in so far as the respondents' case is based on lack of jurisdiction, it should be rejected for the reasons which he gives.

The appellants' case based on article 2 of the Convention

Introductory

66. Article 2.1 provides that "everyone's right to life shall be protected by law" and that "no one shall be deprived of his life intentionally" save pursuant to a court order. According to well-established Strasbourg jurisprudence, this article has given rise to what is now recognised as a "separate and autonomous duty … to carry out an effective investigation" into any death which occurs in suspicious circumstances – see the Grand Chamber judgment in *Šilih v Slovenia* (2009) 49 EHRR 996, para 159. The respondents in this case unsurprisingly do not argue that, at least if one ignores the fact that they occurred in 1948, the Killings would not fall within this principle.

67. However, the respondents contend that the appellants' claim, in so far as it is based on article 2, is barred for what may be characterised as temporal or procedural reasons. The respondents' first argument has two strands and is based on the fact that the Killings occurred (i) before the Convention came into existence, and indeed (ii) before the 1998 Act came into force. Although the Strasbourg court has somewhat finessed the strict rule that the Convention cannot apply retrospectively, the respondents contend that the finessing cannot assist the appellants. The respondents' second argument is that, even if the first argument is wrong, the appellants are too late, as their article 2 right (if any) to seek an inquiry is time-barred. I shall take those arguments in turn.

The contention that there is no right under the Convention

68. The Killings took place in December 1948 and the Convention was only finally agreed in November 1950. In those circumstances, at any rate at first sight, it might be thought that no right, however fundamental or important, could arise under the Convention in relation to facts which occurred before the Convention came into force. Indeed, in accordance with article 28 of the Vienna Convention on the Law of Treaties 1969, that is the normal rule in relation to the application of the Convention – see *Blečić v Croatia* (2006) 43 EHRR 1038, paras 45-72 and *Šilih* at para 140.

69. However, the law on this aspect has been interpreted by the Strasbourg court, specifically in relation to the duty to investigate suspicious deaths, in what may be characterised as a more nuanced way. The law was developed in a number of cases of which *Šilih* was of particular importance. In that case, as already mentioned, the Grand Chamber held in para 159 of its judgment that the duty to investigate suspicious deaths had "evolved into a separate and autonomous duty" on a state, which was "a detachable obligation arising out of article 2 capable of binding the state even when the death took place before the [date when the Convention was binding on the state]". However, the guidance which the court then gave as to how it was to be decided whether that separate and autonomous duty had arisen was subject to substantial criticism (not least in the concurring opinion of Judge Lorenzen and the dissenting opinion of Judges Bratza and Turmen in *Šilih* itself).

70. No doubt it was at least in part for that reason that the law on the point was relatively recently clarified by the Grand Chamber in *Janowiec v Russia* (2013) 58 EHRR 792, from which almost all the applicable principles can be taken for present purposes.

71. In para 128 of *Janowiec*, the Grand Chamber confirmed that "the provisions of the Convention do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention with respect to that Party (the critical date)". The issue in this case which requires consideration of judgments other than *Janowiec* is whether "the critical date" is the date on which the state in question signed up to the Convention or the date on which that state gave its citizens the right to petition the Strasbourg court in relation to any alleged infringement of their Convention rights. Apart from that, however, as the Grand Chamber explained in *Janowiec*, Strasbourg jurisprudence has established that the general principle that the Convention is not retrospective does not necessarily mean that a state has no duty to investigate a suspicious death simply because it occurred before the critical date.

72. As the Grand Chamber put it in para 141 of *Janowiec*, in such a case, there are three relevant applicable requirements:

> "First, where the death occurred before the critical date, the court's temporal jurisdiction will extend only to the procedural acts or omissions in the period subsequent to that date. Secondly, the procedural obligation will come into effect only if there was a 'genuine connection' between the death as the triggering event and the entry into force of the Convention. Thirdly, a connection which is not 'genuine' may nonetheless be sufficient to establish the court's jurisdiction if it is needed to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective way."

In other words, in the case of a death before the critical date, two criteria must be satisfied before the article 2 investigation duty can arise, namely (i) relevant "acts or omissions" after the critical date, and (ii) a "genuine connection" between the death and the critical date. However the second criterion may be finessed where it is necessary to underpin "the underlying values of the Convention".

73. Turning to the first criterion, on the face of it at any rate, the appellants have, at the very least, a powerful case for saying that there have in this case been relevant "acts" and "omissions" since the "critical date". The clearest basis for this contention arises from the information that came to light in the period 1969-1970, which, on any view, was after the "critical date". Until the sworn statement of William Cootes was published in *The People* in late 1969, there was no specific evidence, at any rate in the public domain, from anyone in the patrol that the Killings had been unlawful. In the ensuing months further formal and informal statements to the same effect were made by other members of the patrol.

74. At para 144 of its judgment in *Janowiec*, the Grand Chamber explained that a relevant "omission" would occur if no investigation had occurred and:

> "… a plausible, credible allegation, piece of evidence or item of information comes to light which is relevant to the identification and eventual prosecution or punishment of those responsible. Should new material emerge in the post-entry into force period and should it be sufficiently weighty and compelling to warrant a new round of proceedings, the court will have to satisfy itself that the respondent state has discharged its procedural obligation under article 2 in a manner compatible with the principles enunciated in its case law."

75. In the light of this approach, it appears to me that the appellants have established that the first criterion identified in para 141 of *Janowiec* is satisfied. The crucial components of my reasoning are that (i) prior to 1970, there had been no prior full or public investigation of the Killings, (ii) until 1969, there had been no publicly available evidence from any member of the patrol to suggest that the Killings had been unlawful, (iii) the evidence which first came to light in late 1969 and early 1970 plainly suggested that the Killings were unlawful, and (iv) that evidence appears to have been "weighty and compelling", although by no means conclusive in the light of the other evidence.

76. I turn to the second criterion identified in para 141 of *Janowiec*, the "genuine connection" requirement. In that connection, the Grand Chamber said this at para 146:

> "[T]he lapse of time between the triggering event and the critical date must remain reasonably short if it is to comply with the 'genuine connection' standard. Although there are no apparent legal criteria by which the absolute limit on the duration of that period may be defined, it should not exceed ten years. Even if, in exceptional circumstances, it may be justified to extend the time-limit further into the past, it should be done on condition that the requirements of the 'Convention values' test have been met."

77. It is in relation to this issue that it is necessary to look outside *Janowiec* in order to resolve a centrally important dispute between the parties, namely whether, for this purpose, the "critical date", from which the ten years referred to in para 146 of *Janowiec* runs back, is (i) the date on which the Convention came into force in the relevant territory, or (ii) the date on which the relevant state first recognised the right of every individual citizen to petition the Strasbourg court in relation to alleged infringements of their Convention rights ("the right to petition"). The appellants argue for date (i), whereas the respondents contend that date (ii) is correct (although they did not take this point in the courts below, where they accepted what is now the appellants' case on this issue).

78. The date when the Convention came into force in the United Kingdom was 3 September 1953, although, if the appellants are right, the more relevant date would very probably be that on which the UK extended the application of the Convention to the Federation of Malaya, 23 October 1953. It does not matter which is correct for present purposes, as the Killings took place less than ten years before either date. On the other hand, if the "critical date" is that on which the United Kingdom first recognised the right to petition, it would be 14 January 1966, as that was the date on which the UK accorded the right to its citizens to petition the Strasbourg court "in relation to any act or decision occurring or any facts or events arising subsequently to the 13 January 1966". If that is the correct date, then the appellants must fail as the Killings occurred considerably more than ten years before that date.

79. At first sight, this point may appear to have been disposed of by the Grand Chamber in *Janowiec*, given the definition of "critical date" at para 128 as "the date of the entry into force of the Convention with respect to that Party". However, that statement was made in a case where the "Party", ie the state concerned, Russia, had accorded the right to petition on the same date as it acceded to the Convention. It is therefore plainly not dispositive of the issue. In my view, the position is made clear in two Grand Chamber judgments in 2009.

80. In *Šilih*, para 140, the Grand Chamber said this:

> "The court reiterates that the provisions of the Convention do not bind a contracting party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention with respect to that party *or, as the case may be, prior to the entry into force of Protocol No 11, before the date on which the respondent party recognised the right of individual petition, when this recognition was still optional* (the critical date). This is an established principle in the court's case law based on the general rule of international law embodied in article 28 of the Vienna Convention" (emphasis added).

81. It is very hard to accept the appellants' submission that the reference in that passage to the date of the right to petition was an oversight or mistake. This passage is also said by the appellants to be inconsistent with what the Grand Chamber had said in para 70 of *Blečić*. I do not agree. First, that paragraph was well in the court's mind in *Šilih*, as it was specifically cited to support what was said in para 140. Secondly, para 70 of *Blečić* is expressed in the negative: it merely says that a contracting party cannot be liable in respect of "any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention with respect to that party". That is not the same thing as saying that a contracting party is always liable in respect of any act or fact which took place, or any situation which only ceased to exist, after that date. Further, if the Grand Chamber in the subsequent decision in *Janowiec* had considered that what was said in para 140 of *Šilih* was wrong, it would surely have said so.

82. In addition, there is *Varnava v Turkey* (Application Nos 16064-16066/90 and 16068-16073/90), (unreported) given 18 September 2009, which was concerned with Turkey's alleged failure to investigate the disappearance of individuals in Northern Cyprus in 1974. Turkey had ratified the Convention in 1954, but had only recognised the right of petition in 1987. The Grand Chamber at para 133 said that "the court is not competent to examine any complaints by these applicants against Turkey so far as the alleged violations are based on facts having occurred before … January 1987". Two points can be made, about that decision. First, the claims nonetheless succeeded, as the court held that, unlike killings, disappearances carried with them an ongoing obligation to investigate (see para 148, and the distinction was confirmed in *Janowiec* at para 134). Secondly, there was no argument in *Varnava* based on the contention that there had been any relevant "acts or omissions" on the part of Turkey since 1974. However, it does not appear to me that either of those points detract from the point that the reasoning of the Grand Chamber in *Varnava* is difficult to reconcile with the appellants' case on the "critical date" issue.

83. In addition to these two Grand Chamber judgments, there are the admissibility decisions of the First Section of the Court in *Çakir v Cyprus* (Application No 7864/06), (unreported) given 29 April 2010 and of the Third

Section in *Dorado v Spain* (Application No 30141/09), (unreported) given 27 March 2010, and the judgment of the First Section in *Jelić v Croatia* (Application No 57856/11) (unreported) given 12 June 2014.

84. Like *Varnava*, *Çakir* was concerned with events in Cyprus in 1974, but, unlike *Varnava* and like this case, it involved allegations of failure to investigate allegedly unlawful killings rather than disappearances. At p 5, the court repeated the Grand Chamber's formulation of the relevant law in para 140 of *Šilih* and para130 of *Varnava*, and then pointed out that the killings in question occurred more than 14 years before Cyprus accorded the right to petition – on 1 January 1989. It is fair to say that the decision that the claim in that case was inadmissible was not specifically based on the point that the killings occurred more than ten years before the date on which the right to petition was granted by Cyprus. However, the essential point is that the court relied on more than one occasion on the proposition that the critical date was that date, rather than the date on which Cyprus acceded to the Convention (see at pp 6, 7 and 8).

85. In *Dorado* at para 32, the court stated that "the provisions of the Convention do not bind a contracting party in relation to any act or omission which took place … before the date of the entry into force of the Convention in respect of that party". That is, strictly speaking, neutral, as it is not inconsistent with the respondents' case here. In any event, the application was inadmissible on any view.

86. In *Jelić*, the court discussed *Varnava*, *Šilih* and *Janowiec*, and, at para 55, acknowledged that "in *Šilih*, the proximity in time of the death of the applicant's son to the acceptance by Slovenia of the right of individual petition … established the temporal competence of the court in respect of the procedural obligation under article 2 of the Convention".

87. Quite apart from Strasbourg jurisprudence, I consider that the respondents' contention as to the "critical date" accords better with principle. The "rule" that one cannot, at least normally, go back more than ten years relates to the jurisdiction of the Strasbourg court, as is clear from the way in which the court expressed itself in para 144 in *Janowiec*. One would therefore expect it to be linked to the date on which the court's jurisdiction could be expected to be invoked. Further, the rule is to a substantial extent based on practicalities, and it would therefore be rather odd if its applicability was related to the date on which the Convention first applied rather than the date on which it could first be invoked. Finally, given that time starts to run under article 35 of the Convention against a citizen's right to complain to the Strasbourg court from the date on which the right arose (as to which see the next section but one of this judgment), it would seem consistent if the ten-year rule applied in the same way.

88. In these circumstances, I conclude that, subject to the third criterion identified in para 141 of *Janowiec*, involving "Convention values", the present claim does not meet the "genuine connection" requirement in the second criterion. The third criterion was considered by the Grand Chamber in paras 149-151 of *Janowiec*, and, while it was accepted that it applied where "the triggering event was of a larger dimension than an ordinary criminal offence", the court concluded that "a Contracting Party cannot be held responsible under the Convention for not investigating even the most serious crimes under international law if they predated the Convention". Accordingly, the third criterion cannot assist the appellants.

89. It therefore follows that, in so far as the appellants' claim is based on article 2, it fails because the Strasbourg court would rule it inadmissible as the Killings occurred more than ten years before UK citizens had the right to petition the Strasbourg court.

90. Although Lady Hale and Lord Kerr reach the same conclusion in relation to the appellants' claim based on article 2, they do so for somewhat different reasons. Lady Hale takes a different view of the critical date, as, unlike me, she regards the Strasbourg jurisprudence as unclear and considers that logic favours the date on which the Convention came into force. Lord Kerr considers that the proper approach to this issue is somewhat more nuanced than I do. I readily understand the attraction of his approach, but in my view it is important that parties know where they are in this area of jurisprudence, and it seems to me that his approach would leave the law being in a somewhat unpredictable state. As Lady Hale rightly says, we do not have to follow Strasbourg jurisprudence slavishly, but I would be reluctant to depart from it on this point in this appeal for two reasons. First, the appeal was argued on both sides on the basis that we should follow Strasbourg jurisprudence on this issue. Secondly, this is a topic on which clarity and consistency is highly desirable, and, unless the guidance from Strasbourg seemed unclear, incoherent or unworkable, I would be reluctant not to follow and apply it. Having permitted a degree of retroactivity, I believe that the Strasbourg court has rightly imposed some pretty clear rules with a view to ensuring a degree of clarity and consistency in this area. Particularly in the absence of any invitation to do so, I consider that, at least in this case, this is an area on which we should follow, but go no further than Strasbourg jurisprudence.

91. Although I have concluded that the claim under article 2 should fail for the reason summarised in para 89 above, it is worth examining, albeit not with a detailed exegesis, the other two grounds raised against the appellants' article 2 case by the respondents.

The contention that there is no right under the 1998 Act

92. The respondents contend that, even if (contrary to the conclusion which I have reached) the Strasbourg court would have held that the appellants would have had a valid claim for an inquiry into the Killings under article 2, their claim under that head should be dismissed because a UK court would have no jurisdiction to entertain it. This contention is based on the proposition that the jurisdiction of a UK court to entertain the claim arises not (at least directly) from the Convention, but from the 1998 Act, and, as that Act only took effect on 2 October 2000, it cannot be invoked in order to give the court jurisdiction in respect of an event which occurred before that date.

93. At least on the face of it, that seems a very powerful contention. It is clear from section 22(4) that the 1998 Act was not intended to have retrospective effect. And the contention is supported by opinions given by all five members the House of Lords in *In re McKerr* [2004] UKHL 12, [2004] 1 WLR 807, a case concerned with the duty to hold an inquiry or inquest into a suspicious death: see paras 20-23, 48, 67, 79-81 and 88-89 per Lord Nicholls, Lord Steyn, Lord Hoffmann, Lord Rodger and Lord Brown respectively. This, Lord Hoffmann explained that the House of Lords had "decided on a number of occasions that the [1998] Act was not retrospective", and that accordingly there was, at least domestically, no "ancillary right to an investigation of [a] death [of] a person who died before the Act came into force".

94. However, in the light of the Grand Chamber judgment in *Šilih*, some members of this court adopted a somewhat modified position in the subsequent case of *In re McCaughey (Northern Ireland Human Rights Commission intervening)* [2011] UKSC 20, [2012] 1 AC 725. In that case, by a majority of six to one, the Supreme Court held that, at least where there had been a decision to hold an inquest into a death which had occurred before 2 October 2000, the 1998 Act could be invoked to require the inquest to comply in all procedural aspects with the requirements of the Convention. (And I can see no reason why the same reasoning would not apply where the decision was to hold an inquiry into a death which had occurred before 2 October 2000.)

95. However, Lord Phillips went a little further in *McCaughey* at paras 61-63, where he indicated that, if in a particular case the Strasbourg court would hold that there was, after 1 October 2000 an article 2 obligation to investigate a suspicious death before that date, then, contrary to the conclusion in *McKerr*, he would have been inclined to hold that that obligation would also arise in domestic law under the 1998 Act. While he found the reasoning in *Šilih* difficult to understand (para 46), he seems to have formed the opinion that it would probably justify departing from *McKerr*, although he did not express a concluded view. Lord Kerr (who at paras 216-219 was also critical of the reasoning in *Šilih*) and Lord Dyson both appear to

have concluded that the effect of the Grand Chamber's reasoning in *Šilih* was that the conclusion reached in *McKerr* was no longer sound, and that, if the Strasbourg court would hold that the UK had an article 2 duty after 1 October 2000 to investigate a death before that date, then that duty would also arise domestically under the 1998 Act – see paras 110-114 and 132-137 respectively.

96. Lord Hope (who at para 73 was similarly unhappy about the lack of clarity of the guidance in *Šilih*) took a different view, and at para 75 said that he saw "no reason to disagree" with the views expressed in *McKerr*. He explained in the following paragraphs that it was only because there had been a decision to have an inquest in that case that the requirements of article 2 could be invoked. Lord Rodger of Earlsferry, who dissented, certainly favoured following *McKerr*. Given that the issue did not need to be determined, neither Baroness Hale nor Lord Brown addressed the question whether the reasoning in *McKerr* remained good law, although they proceeded on the assumption that it did.

97. In the light of this rather unsatisfactory state of affairs, there would be much to be said for our deciding the issue of whether *McKerr* remains good law on this point. However, given that it is unnecessary to resolve that issue in order to determine this appeal, we ought not to decide it unless we have reached a clear and unanimous position on it. We have not. On the one hand, the respondents' case is supported by the unanimous decision of a five-judge court in *McKerr*, whose ratio is clear and simple to apply, but it could lead to undesirable conflicts between domestic and Strasbourg jurisprudence. On the other hand, the appellants' case derives significant support from two, and arguably three, of the judgments in the subsequent seven-judge court in *McCaughey*, and, while it involves applying Strasbourg jurisprudence which has been criticised for lack of clarity, it would ensure that domestic and Strasbourg jurisprudence march together.

98. Accordingly, I would leave open the question whether, if the Strasbourg court would have held that the appellants were entitled to seek an investigation into the Killings under article 2, a UK court would have been bound to order an inquiry pursuant to the 1998 Act.

The contention that the appellants' article 2 claim is out of time

99. The respondents' case that the appellants' article 2 claims are in any event brought too late rests on article 35 of the Convention and section 7(5) of the 1998 Act. Under article 35, the Strasbourg court only has jurisdiction in a case where an application is brought after "all domestic remedies have been exhausted … and within a period of six months from the date on which a final decision was taken". Under section 7(5), a complaint of infringement under the 1998 Act must normally be brought within "one year beginning with the date on which the act complained of took place". For present purposes, it does not matter which of these time limits

apply – or whether both of them do. However, I am inclined to think that only section 7(5) applies, as it is solely the jurisdiction of the domestic court which the appellants are seeking to invoke, even though their case inevitably relies heavily on Strasbourg jurisprudence.

100. The appellants contend that time only started to run with the decision of 29 November 2010 to refuse an inquiry, and if that is right, the instant application would plainly have been in time. The respondents primarily contend that time started to run in 1970, when the vital fact that a number of the soldiers in the patrol stated that the Killings were unlawful first became publicly known, and it was decided not to hold an inquiry. Alternatively, the respondents say that time started to run by 1997 when it became clear that, despite the renewed publicity in the television film shown in 1992 and the presentation of a petition for an inquiry in 1993, there would be no inquiry.

101. In *Varnava* at para 162, the Grand Chamber said that, in a case of a suspicious death, "[t]he lack of progress or ineffectiveness of an investigation will generally be more readily apparent", and, [a]ccordingly, the requirements of expedition may require an applicant to bring such a case before Strasbourg within a matter of months, or at most, depending on the circumstances, a very few years after events". At para 158, the Grand Chamber also made the point that "where a death has occurred, applicant relatives are expected to take steps to keep track of the investigation's progress, or lack thereof, and to lodge their applications with due expedition once they are, or should have become, aware of the lack of any effective criminal investigation".

102. However, as the appellants contend, there are observations from the Strasbourg court that the article 2 duty to hold an investigation can arise as a result of fresh evidence. Indeed, that point arose in the Strasbourg court's judgment in *McKerr v United Kingdom* (2002) 34 EHRR 553, which was a precursor to *McKerr*. The reasoning in *McKerr v United Kingdom* was cited in the admissibility decision in *Hackett v United Kingdom* (Application No 34698/04), (unreported) given 10 May 2005, where the Fourth Section said at p 5 that "later events or circumstances may arise which cast doubt on the effectiveness of the original investigation and trial or which raise new or wider issues and an obligation may arise for further investigations to be pursued".

103. To similar effect, in *Brecknell v United Kingdom* (2007) 46 EHRR 957, para 66, the Strasbourg court said that "it may be that sometime later, information purportedly casting new light on the circumstances of the death comes into the public domain" and that "[t]he issue then arises as to whether, and in what form, the procedural obligation to investigate is revived". It then gave examples including "deliberate concealment of evidence" which only subsequently comes to light, or later items of evidence which "cast doubt on the effectiveness of the original

investigation and trial". However in para 70 the court accepted that it was not right to say that "any assertion or allegation can trigger a fresh investigative obligation under article 2", but emphasised that "state authorities must be sensitive to any information or material which has the potential either to undermine the conclusions of an earlier investigation or to allow an earlier inconclusive investigation to be pursued further".

104. Despite their reliance on these cases, and despite the views of Lord Kerr to the contrary, I would reject the appellants' argument that there were events or revelations occurring after 1970, and, even more, after 1997, which justify the argument that, in effect, their article 2 right to an investigation into the Killings revived, and could be pursued in 2009.

105. The respondents realistically accept that the new evidence which came to light in 1969 and 1970 was of such significance that it revived such article 2 right to an investigation into the Killings as the appellants may have had. As already explained, that evidence for the first time involved clear and public statements from soldiers involved with the Killings which cast serious doubt on the correctness of the consistent public position of the UK government that the Killings had been lawful. The new evidence was a classic example of the type of new information which the courts in *Brecknell* and *Hackett* would have had in mind as justifying an investigation if none had been held before, or even, perhaps, if one had been held before.

106. However, the same cannot be said about the evidence or information which came out subsequent to 1970, particularly when one bears in mind that the matter must primarily be assessed by reference to the evidence available to the applicant concerned. The only arguably significant new evidence which was available to the appellants after 1970 was (i) in the contents of the 1992 television programme *In Cold Blood* and (ii) in the 2009 book, *Slaughter and Deception at Batang Kali* and (iii) the contents of some further statements.

107. Both the programme and the book gave the Killings some publicity and no doubt caused many people to undergo feelings of outrage and concern. However, although they each contained some new evidence in the form of, or as a result of, interviews with relatives of the victims of the Killings, neither the television programme nor the book contained much new revelatory evidence over and above that which had been available in 1970. The same thing may be said of any statements which were taken after 1970. In other words, any item of evidence which could be said to have been new after 1970 did not really add anything to the basic point, which had become quite apparent in 1970, namely that there were considerable reasons for doubting whether the official UK government line on the Killings was correct, and that there were strong grounds which suggested that the Killings were unlawful. As for any further investigations carried out in the three or four years following the

broadcasting of the television programme, the same may be said about them: they did not take matters further in terms of revelatory information. Similarly, the investigations in 2008/2009 involved little more than reviewing information which had long been available.

108. In these circumstances, although it may seem somewhat harsh on the facts of this case, I am of the view that, if the appellants' case, in so far as it is properly based on article 2, were held to have been brought within time, it would make the strict time limits in section 7(5) and in article 35 something of a paper tiger in many cases where there is a claim that a death should be investigated.

109. I would therefore hold that even if, contrary to my view, the appellants' case would otherwise be made out under article 2, it would still have to be rejected on the ground that it has been brought too late.

110. It is right to add that a further argument which was touched on in oral submissions, but not developed in much detail, is that, as the purpose of the proposed inquiry is, at least in the main, to establish historical truth, the appellants cannot rely on article 2. In *Janowiec* at para 143, the Grand Chamber observed that the obligation to conduct investigations under articles 2 and 3 is in connection with "criminal, civil, administrative or disciplinary proceedings which are capable of leading to the identification and punishment of those responsible or to an award of compensation to the injured party", not "other types of inquiries that may be carried out for other purposes, such as establishing a historical truth". There is obvious force in the point that an inquiry after 2010 into events in 1948 must at least to a substantial extent be to establish the truth, and it is unlikely that any "criminal, civil, administrative or disciplinary proceedings" would result even if it was concluded that the Killings amounted to a war crime. However, as the point was not debated very much, and as it is unnecessary to rule on it, I shall say no more about it (although a similar point arises in connection with the common law claim – see para 132 below).

The appellants' case based on customary international law

Introductory

111. The second basis for the appellants' claim for an inquiry into the Killings is embodied in the argument that customary international law requires the UK government to investigate the Killings, particularly in the light of the evidence now available to support the notion that they were unlawful and may have amounted to a war crime, and that the common law would recognise, and give effect to, this aspect of international law.

112. I would reject that contention for two reasons. First, the cases and textbooks to which we have been taken do not establish that, by 1948, when the Killings occurred, international law had developed to the extent of requiring a formal public investigation into a suspicious death, even if there were strong reasons for believing that they constituted a war crime. Secondly, and quite apart from that, even if international law required such an investigation, the requirement cannot be implied into the common law.

Customary international law

113. So far as my first reason is concerned, it appears to be common ground that it is only within the past 25 years that international law recognised a duty on states to carry out formal investigations into at least some deaths for which they were responsible and which may well have been unlawful. Thus, the earliest document to which the appellants have made reference in this connection is in UN General Assembly Resolution 60/147 of 16 December 2005 on The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. Article 3(b) provides that "[t]he obligation to ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to … [i]nvestigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law".

114. The first case in which the Strasbourg court suggested that there was such a duty was in 1995 in *McCann v United Kingdom* (1995) 21 EHRR 97. And, as the respondents point out, Lord Steyn in *McKerr* at para 52, suggested that it was probably "unrealistic" to suggest that what he called "the procedural obligation", namely the duty to investigate unlawful deaths "was already part of customary international law" in 1982.

115. However, the appellants argue that, given that it is now part of customary international law that suspected unlawful killings, and in particular war crimes, should be formally investigated, the fact that the Killings took place before this was part of customary international law no longer presents them with a problem. In the absence of any treaty provisions, clear case law or authoritative academic support for this proposition, I would reject that argument.

116. The appellants' argument thus involves a fresh duty being imposed on a state, sometime between 1990 and 2005 by customary international law, to investigate any war crime, indeed any suspicious death, which amounts to a violation of human rights law or of humanitarian law, which may have occurred within its jurisdiction in the past. I regard it as unlikely that such a duty has been imposed by customary

international law, but, even if it has been, it must be subject to a cut-off date. Otherwise, the duty would extend to deaths which occurred literally centuries ago. In the unlikely event that a fresh retrospective duty was imposed sometime after 1995, it seems to me that the furthest that such a duty could go would be ten years back – which would be an unprincipled but arguably practical solution, which has the merit of having been adopted by the Strasbourg court, as already explained. On any view, I regard it as inconceivable that any such duty could be treated as retrospective to events which occurred more than 40 years earlier, or could be revived by reference to events which took place more than 20 years before that.

Incorporation into the common law

117. Even if this conclusion turned out to be wrong, and it is now a principle of customary international law that a state must investigate deaths such as the Killings, even though they occurred as long ago as 1948, it would not be right to incorporate that principle into the common law. Parliament has expressly provided for investigations into deaths (i) through the coroners' courts in the Coroners and Justices Act 2009, and its predecessors, and (ii) through inquiries in the 2005 Act, and its subject-specific predecessor statutes. It has also effectively legislated in relation to investigations into suspicious deaths through the incorporation of article 2 in the 1998 Act. In those circumstances, it appears to be quite inappropriate for the courts to take it onto themselves, through the guise of developing the common law, to impose a further duty to hold an inquiry, particularly when it would be a duty which has such potentially wide and uncertain ramifications, given that it would appear to apply to deaths which had occurred many decades – even possibly centuries – ago.

118. This conclusion receives strong support from four of the five opinions given in *McKerr*, whose authority on this point has in no way been diminished by any of the judgments in *McCaughey*. At para 30, Lord Nicholls, with whom Lord Rodger agreed, said that he had "grave reservations about the appropriateness of the common law now fashioning a free-standing positive obligation of this far-reaching character", namely "a common law obligation to arrange for an effective investigation into [a suspicious] death", simply because it was required by article 2. However, he specifically rejected the notion of such a common law obligation on the ground that it "would create an overriding common law obligation on the state, corresponding to article 2 … in an area of the law for which Parliament has long legislated", namely coroners' inquests.

119. At para 71, Lord Hoffmann, with whom Lord Rodger also agreed, as did Lord Brown, rejected the notion that there was "a broad common law principle equivalent to article 2 against which the whole of the complex set of rules which governed the earlier investigations can be tested and by which they can be found wanting and be ordered to be rerun under different rules". He added that "the very notion of such a

principle, capable of overriding detailed statutory and common law rules, is alien to the traditions of the common law". Lord Brown also rejected the notion that the court should "condemn as contrary to the common law a series of procedures long since properly concluded in accordance with well-established domestic laws and never challenged save by reference to a substantially later European Court decision".

120. Lord Steyn's position was a little different. At para 51, he referred to the fact that it would be necessary to take into account the fact that inquests were dealt with by statute. However, he considered that it was inappropriate for the common law to extend the law on investigating suspicious deaths given that "the right to life is comprehensively protected under article 2 … as incorporated in our law by the 1998 Act". However, he did then suggest that "[t]he impact of evolving customary international law on our domestic legal system is a subject of increasing importance".

121. However, the views of the other four Lords of Appeal were clear, and strongly supportive of the conclusion I have reached on this issue.

122. In these circumstances, I would reject the contention that customary international law, through the medium of the common law, requires the UK government to hold an inquiry into the Killings. I also agree with the more general remarks made by Lord Mance in paras 144-151 of his judgment in connection with the extent to which the common law incorporates principles of customary international law. I should add that it may well be that the appellants' argument on this basis should also be rejected on the ground of delay: the issue was briefly canvassed in the respondents' written case, but it did not feature significantly in oral argument, and it is unnecessary to rule on it.

The appellants' case based on common law

Introductory

123. The appellants' final point is that, given that the respondents had a discretion under section 1 of the 2005 Act as to whether to order an inquiry into the Killings, the court should decide that they should have ordered an inquiry, and they should now be directed to do so.

124. In their first and principal decision letter, that of 29 November 2010, the respondents explained why they had decided not to order an inquiry into the Killings. In summary form, this letter made the following points:

a) Under section 2 of the 2005 Act an inquiry was not permitted to determine criminal or civil liability;

b) Establishing the truth is more likely to be important in relation to recent events;

c) The Killings took place against a different legal backdrop, both domestically and internationally, and any conclusions about the training and command structure of the Scots Guards in 1948 were unlikely to be of practical value today, unlike other recent public inquiries into suspicious deaths;

d) Although the documentary burden would probably be relatively light, collecting evidence in Malaysia was likely to be costly and there would be other running costs;

e) An inquiry would face obvious difficulties as there was a conflict of evidence, those directly involved had mostly died, and the survivors were in their 80s, and witnesses would have difficulty in recalling events over 60 years ago;

f) An inquiry would, as the appellants contended, need to consider the extent to which race was a factor in the Killings and subsequent events, but any conclusion that those events were tainted by race prejudice would be unlikely to assist in eliminating discrimination now;

g) An investigation could be good for race relations but internal Malaysian relations are primarily for the Malaysian Government and any possible benefit to UK-Malaysian race relations was not a sufficient basis for the holding of an inquiry;

h) There was no reliance on the sufficiency of any previous criminal investigations, or the availability of civil remedies.

125. The subsequent letter of 4 November 2011 was written following the respondents' consideration of further arguments from the appellants' solicitor, largely arguing that an inquiry was required to investigate the shortcomings of previous investigations. The respondents considered that the inadequacies of the previous investigations were not themselves sufficient reason to hold an inquiry now. Apart from reiterating many of the points in the earlier letter, the respondents pointed out that inquiring into the earlier investigations would involve yet more

expense, and added that it was doubtful whether much light could be thrown on the earlier investigations, given how long ago they had been undertaken.

126. The appellants argue that, although the respondents had a discretion under section 1 of the 2005 Act as to whether to order an inquiry in 2010/2011 into the Killings (and the subsequent events), the discretion is subject, in principle, to challenge in court, and that, on the facts of this case, the decision in question was wrong in law and should accordingly be quashed.

127. There is no more fundamental aspect of the rule of law than that of judicial review of executive decisions or actions. Where a member of the executive, such as the respondents in this case, is given a statutory discretion to take a particular course or action, such as ordering an inquiry under section 1 of the 2005 Act, the court has jurisdiction to overrule or quash the exercise of that discretion. However, the exercise of that jurisdiction is circumscribed by very well established principles, which are based on the self-evident propositions that the member of the executive is the primary decision-maker, and that he or she will often be more fully informed and advised than a judge. The area covered by judicial review is so great that it is impossible to be exhaustive, but the normal principle is that an executive decision can only be overruled by a court if (i) it was made in excess of jurisdiction, (ii) it was effected for an improper motive, (iii) it was an irrational decision, or, as it is sometimes put, a decision which no rational person in the position of the decision-maker could have taken, or (iv) the decision-maker took into account irrelevant matters or failed to take into account relevant matters. An attack on an executive decision based on such grounds is often known as a *Wednesbury* challenge (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223). If one or more of these grounds (which often overlap to some extent) is or are satisfied, the court may (but need not in every case) quash the decision. If none of these grounds is satisfied, then the decision will almost always stand.

The argument based on rationality

128. In what was an impressive and otherwise full judgment, the Court of Appeal gave this argument of the appellants very short shrift, saying at [2015] QB 57, para 118:

> "The case for the claimants is that the reasoning set out in the two decision letters cannot survive a *Wednesbury* challenge. We totally disagree. We are satisfied that the Secretaries of State considered everything which they were required to consider; did not have regard to any irrelevant considerations; and reached rational decisions which were open to them. Indeed, when considered in the domestic legal context of discretion, we do not think that any other Secretaries of State

> would have been likely to reach a different conclusion at this stage."

129. With the exception of the last sentence of that paragraph (as to which I would prefer to express no opinion), I agree with that analysis. The respondents clearly considered the request for an inquiry seriously and rejected it for reasons which are individually defensible and relevant, and which cumulatively render it impossible to characterise their conclusion as unreasonable, let alone irrational. There is no suggestion that the decision not to hold an inquiry was tainted in any other way, and accordingly, applying classic judicial review principles, I consider that the decision cannot be impugned.

130. The appellants point out that there has been no quantification of the likely cost of an inquiry, but that does not meet the point that it will clearly cost a significant amount of money, especially bearing in mind the likelihood of live evidence and argument, visits to Malaysia, and exhuming and examining the bodies of the victims. Indeed, I strongly suspect that preparing a budget for such an enterprise would be difficult and the result very unreliable. The appellants point out in this connection that some preliminary work has been done through previous investigations, but that appears to us to cut both ways: it may mean that some preliminary investigations have been made, it also means that there will be more material to process, to compare with other evidence, and to put to witnesses. The appellants also suggest that the inquiry would have little difficulty in reaching a conclusion that the Killings were unlawful, but, as the Divisional Court said at para 142, it is "no longer … permissible to conclude … on the evidence available at the present time … that the 24 men were shot when trying to escape". Equally, as the court immediately went on to say, in the light of the evidence which has come to light since 1969, "[n]or can the conclusion now be reached that the 24 men were deliberately executed. There is evidence that supports both accounts".

The argument based on proportionality

131. The appellants raise the argument that the time has come to reconsider the basis on which the courts review decisions of the executive, and in particular that the traditional *Wednesbury* rationality basis for challenging executive decisions should be replaced by a more structured and principled challenge based on proportionality. The possibility of such a change was judicially canvassed for the first time in this jurisdiction by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410E, and it has been mentioned by various judges in a number of subsequent cases – often with some enthusiasm, for instance by Lord Slynn in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, para 51. In other words, the appellants contend that the four-stage test identified by Lord Sumption and Lord Reed in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC

39, [2014] AC 700, paras 20 and 74 should now be applied in place of rationality in all domestic judicial review cases.

132. It would not be appropriate for a five-Justice panel of this court to accept, or indeed to reject, this argument, which potentially has implications which are profound in constitutional terms and very wide in applicable scope. Accordingly, if a proportionality challenge to the refusal to hold an inquiry would succeed, then it would be necessary to have this appeal (or at any rate this aspect of this appeal) re-argued before a panel of nine Justices. However, in my opinion, such a course is unnecessary because I consider that the appellants' third line of appeal would fail even if it was and could be based on proportionality.

133. The move from rationality to proportionality, as urged by the appellants, would appear to have potentially profound and far-reaching consequences, because it would involve the court considering the merits of the decision at issue: in particular, it would require the courts to consider the balance which the decision-maker has struck between competing interests (often a public interest against a private interest) and the weight to be accorded to each such interest – see *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532, para 27, per Lord Steyn. However, it is important to emphasise that it is no part of the appellants' case that the court would thereby displace the relevant member of the executive as the primary decision-maker – as to which see per Lord Sumption and Lord Reed in *Bank Mellat (No 2)* at paras 21 and 71 respectively. Furthermore, as the passages cited by Lord Kerr from *Kennedy v Charity Commission (Secretary of State for Justice intervening)* [2014] UKSC 20, [2015] AC 455, paras 51 and 54, and *Pham v Secretary of State for the Home Department (Open Society Justice Initiative intervening)* [2015] UKSC 19, [2015] 1 WLR 1591, paras 96, 113 and 115 show, the domestic law may already be moving away to some extent from the irrationality test in some cases.

134. As those cases suggest, even if the appellants' attack on rationality as the correct yardstick were to succeed, it may be that the position would be more nuanced than this cursory discussion of the appellants' argument might suggest. The answer to the question whether the court should approach a challenged decision by reference to proportionality rather than rationality may depend on the nature of the issue – see for instance the discussion by Gertrude Lübbe-Wolff in *The Principle of Proportionality in the Case Law of the German Federal Constitutional Court* (2014) 34 HRLJ 12.

135. Turning to this case, the reasons for not holding an inquiry are as set out in the two letters, whose contents are summarised in paras 124 and 125 above. The reasons advanced on behalf of the appellants in favour of having an inquiry are that it is appropriate to explore the evidence publicly "and seek … to identify the truth", and to "grant to the survivors and relatives a form of 'closure' to this matter that

would be enormously valuable". They suggest that an inquiry would be the only way of testing the official version of what happened on 11/12 December 1948, and of "address[ing] this injustice which has endured for decades and will rightly not go away". They further argue that an inquiry could lead to "a correction of the official record, a public apology, a public memorial, and active consideration of some ex gratia compensation".

136. It is impossible not to sympathise with these sentiments. But in my opinion, these understandable reasons for holding an inquiry do not justify a court concluding that the respondents' decision to refuse an inquiry for the reasons summarised in paras 124 and 125 above was disproportionate. The desire to discover "historical truth" is understandable, particularly in a case where it involves investigating whether a serious wrong, indeed a war crime, may have been committed. However, not only is this a case where neither article 2 nor customary international law would require such an investigation. It is also a case where the relevant members of the executive have given coherent and relevant reasons for not holding an inquiry, including expressing a justifiable concern that the truth may not be ascertainable, and a justifiable belief that, even if the appellants' expectations to the contrary were met, there would be little useful that could be learned from an inquiry so far as current actions and policies were concerned.

137. The notion that there is a positive common law duty to investigate the Killings in the present case, even though they took place nearly 70 years ago, simply in order to establish historical truth would, at least without more, open the door to demands that all suspicious deaths, however long ago, would have to be investigated. The notion that the duty is owed to those whose relatives were killed or may remember the incident has more force, but that is not a powerful enough reason, in my view, to enable the court to say that, despite the reasons advanced by the respondents for not holding an inquiry, it was disproportionate to refuse to do so. It is not as if the appellants have got nowhere: in these proceedings, the Divisional Court, the Court of Appeal and now this court have all said in terms that the official UK Government case as to the circumstances of the Killings may well not be correct and that the Killings may well have been unlawful. And the events of 1969-1970, at least to large extent, speak for themselves.

138. As for the argument that an inquiry is justified because of what is said, in effect, to be a "cover-up", I see the force of the argument in relation to the immediate aftermath of the Killings and the decision in 1970 not to proceed with the investigation. However, it seems to me that the appellants' reliance on the events of those two periods suffers from the same sorts of problems as an inquiry into the Killings themselves. There would be obvious difficulty, given the passage of time, at arriving at the truth - or, perhaps more accurately, at any more of the truth than the documents already show. And the value of any further information or analysis of the events of the aftermath or in 1969-1970 in terms of lessons for the present day must be limited at best. In addition, the benefits for the survivors and the relations

of the victims would be limited. So far as the events after 1990 are concerned, I am unconvinced that there is anything to look into. The concerns about the value of an inquiry currently raised by the respondents would have largely applied then.

139. It is the respondents who have the primary role of deciding under section 1 of the 2005 Act whether to have an inquiry into the Killings, and if not why not, and it is not for the court to substitute its view for that of the respondents. What the court, on the instant hypothesis, must do is to decide whether, bearing in mind the reasons for and against holding an inquiry, the respondents' refusal to hold an inquiry was disproportionate. In my view, it was not.

140. The respondents did not specifically raise the argument that the appellants' common law claim was in difficulty for the additional reason of delay. It is nonetheless worth mentioning that, for the reasons discussed in paras 105-107 above, there may well be a powerful case for saying that, if the appellants wished the respondents to hold an inquiry into the Killings, they could and should have requested it in 1970 or 1971. Accordingly, it may be that the fact that the appellants can be said to have delayed for 40 years before seeking an inquiry and have only then judicially reviewed the respondents' refusal to hold one, is a strong factor against now granting them any relief in that connection. However, given that the point was not developed in argument by the respondents, it would be unfair on the appellants to rely on the point, and I say no more about it.

Conclusion

141. For these reasons, I would dismiss this appeal.

LORD MANCE: (with whom Lord Neuberger, Lady Hale, Lord Kerr and Lord Hughes agree on the jurisdiction issue)

142. I have read and agree generally with the reasoning and conclusions in the judgment given by Lord Neuberger. This judgment adds a footnote (in paras 144-151 below) to his observations in paras 112-122 on the incorporation of customary international law into the common law, and, more substantively, addresses (in paras 152-202 below) the issue of jurisdiction, to which Lord Neuberger refers in para 65.

143. As to whether the refusal to direct an inquiry should be reviewed in terms of proportionality, Lord Kerr quotes views which I have already expressed in the context of the issues in *Kennedy v Charity Commission (Secretary of State for Justice intervening)* [2014] UKSC 20; [2015] AC 455 and *Pham v Secretary of State for the Home Department (Open Society Justice Initiative intervening)* [2015]

UKSC 19; [2015] 1 WLR 1591. In the context of, and in order to decide this appeal, all that is necessary to say is that I agree with Lord Neuberger and Lord Kerr that there is no ground for treating the refusal of an inquiry as either *Wednesbury* unreasonable or disproportionate.

Incorporation of customary international law into common law

144. The basis and extent to which customary international law ("CIL") is received into common law was not examined in great detail in the parties' submissions before us. The appellants described obligations on the United Kingdom under CIL as "a source of domestic law". Both the appellants and the respondents referred in their cases to Lord Denning MR's description of the doctrine of incorporation which he went on to endorse in *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529, 553: "the rules of international law are incorporated into English law automatically and considered to be part of English law unless they are in conflict with an Act of Parliament". Lord Denning was clearly only speaking of CIL, not treaty law which raises quite different considerations.

145. However, as the appellants went on to recognise at least this further qualification exists in relation to CIL, beyond that stated by Lord Denning, namely that:

> "The recognition at common law must itself not abrogate a constitutional or common law value, such as the principle that it is Parliament alone who recognises new crimes: *R v Jones (Margaret)* [2006] UKHL 16, [2007] 1 AC 136 at para 29."

Even that principle was only one of the reasons why the House held in *R v Jones (Margaret)* that the international crime of aggression could not form part of English law. The second reason, expressed in the speech of Lord Hoffmann with which all other members of the House agreed, was the constitutional reason that a domestic court could not adjudicate upon the question whether the state of which it formed part had acted unlawfully in the course of exercising the Crown's discretionary powers in the making of war and disposition of the armed forces: paras 63-67.

146. The position is therefore somewhat more nuanced than Lord Denning MR's statement might suggest. Common law judges on any view retain the power and duty to consider how far customary international law on any point fits with domestic constitutional principles and understandings. Thus, in a number of other cases prior to *R v Jones (Margaret)*, courts have rejected suggestions that CIL had expanded the ambit of domestic criminal law: see eg *R v Keyn* (1876) 2 Exch Div 63, 202, et seq and *Chung Chi Cheung v The King* [1939] AC 160. Although both cases involved criminal liability, neither case highlighted this as a critical distinction when

discussing whether CIL should be regarded as part of domestic law. Thus, in the latter case, Lord Atkin said simply at p 168:

> "The courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals."

147. In *Trendtex*, Lord Denning was addressing a distinction between two doctrines, according to which CIL is seen as becoming part of domestic law either by incorporation or by transformation. Lord Denning adopted the former view. He went so far as to say that, unless the doctrine of incorporation applied, "I do not see that our courts could ever recognise a change in the rules of international law": p 554C-D. That seems an unduly, and coming from its speaker perhaps surprisingly, restrictive view of the developmental authority of common law judges. But the background against which Lord Denning uttered it was reasoning of the majority (from which Lord Denning had dissented) in the prior Court of Appeal decision of *Thai-Europe Tapioca Service Ltd v Government of Pakistan, Directorate of Agricultural Supplies* [1975] 1 WLR 1485, suggesting that CIL rules incorporated into domestic law by decisions of a domestic court were subject to the ordinary rules of *stare decisis*. On that basis, once they had been recognised at Court of Appeal level (as the rules of state immunity have been), they would be capable of alteration only by the House of Lords.

148. Several points may be made about Lord Denning's adoption of the doctrine of incorporation. First, it needs qualification as stated in paras 144-145 above. Second, even as regards civil aspects of CIL, Lord Wilberforce in *I Congreso del Partido* [1983] 1 AC 244, 261G-262A expressly avoided "commitment to more of the admired judgment of Lord Denning MR" than was necessary. Similarly, in *R v Jones (Margaret)*, at para 59, Lord Hoffmann, with whom all other members of the House agreed, and I, at para 100, also expressly left open the basis on which CIL is relevant under domestic law. Third, nearly 40 years after *Trendtex* and in an era where precedent is unlikely to be seen as so great an obstacle to reconsideration of domestic law in the light of international developments, the difference in effect of the two doctrines is unlikely to be as significant as it may have seemed in 1977. Even in 1977 Stephenson LJ made a similar point: p 569D - although it is right to add that he was the one member of the court who regarded the prior Court of Appeal authority of *Thai-Europe* as precluding any relaxation of the existing rules of state immunity. A similar observation to Stephenson LJ's is found in *Nulyarimma v Thompson* [1999] FCA 1192 in para 109 of the judgment of Merkel J (whose disagreement as to whether the CIL crime of genocide was to be regarded as a domestic crime does not affect the judgment's general force).

149. When and if it is ever necessary to consider further the precise basis on and extent to which CIL may become part of domestic law, all three judgments on this point in *Nulyarimma v Thompson* will repay study. It is clear that there are different views, even though the differences may prove more apparent than real. As at present advised, and without having heard argument on the point, there seems likely to be wisdom in Wilcox J's statements in para 25 that "it is difficult to make a general statement covering all the diverse rules of international customary law" and in para 26, after distinguishing civil and criminal cases as different classes, that "Perhaps this is only another way of saying that domestic courts face a policy issue in deciding whether to recognise and enforce a rule of international law".

150. Speaking generally, in my opinion, the presumption when considering any such policy issue is that CIL, once established, can and should shape the common law, whenever it can do so consistently with domestic constitutional principles, statutory law and common law rules which the courts can themselves sensibly adapt without it being, for example, necessary to invite Parliamentary intervention or consideration.

151. However, in the present case and for the reasons given by Lord Neuberger in para 112, it would be inappropriate for English courts to import the suggested CIL principle regarding the holding of an inquiry in respect of events in 1948 into domestic law, because Parliament has effectively pre-empted the whole area of investigations into historic deaths. Domestic courts cannot or should not in such circumstances recognise or import a principle which would be wider and would extend to cover events further back in time than would be covered by the inquiries provided by such legislation and/or by the Human Rights Convention.

Jurisdiction

152. The issue of jurisdiction has two strands: the first, whether the United Kingdom can be said to have been responsible for whatever happened in Batang Kali on 11/12 December 1948; the second, whether it can be held responsible for not holding an inquiry now. These strands are relevant under the Convention rights, as incorporated into domestic law, to the question whether there were failures by the United Kingdom "to secure to everyone within [its] jurisdiction", within the meaning of article 1 of the Convention, any of the rights and freedoms defined in article 2 of the Convention, so as to make the United Kingdom potentially responsible for breach of the Convention Rights as incorporated into domestic law by the Human Rights Act 1998. But both strands are also potentially relevant to the claims that an inquiry should now be held by reference to international law and/or under common law principles of judicial review.

153. As to the first strand, the respondents' case is that, while the Scots Guards were on active service in Selangor, they were acting under the aegis of the

constitutional arrangements in force in the Federation of Malaya or, alternatively, in the State of Selangor, and that any acts on their part were always attributable either to His Majesty in right of the Federation or to The Sultan as the Ruler of the State of Selangor, rather than to His Majesty in right of the United Kingdom. In drawing this distinction, the respondents rely on *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57; [2006] 1 AC 529.

154. As to the second strand, the respondents' case is that any liabilities or obligations which the Crown in right of the United Kingdom may have had prior to 1957 passed in that year to the new independent Federation and/or that the Crown cannot now have come under any duty to hold an inquiry in relation to the Killings which had occurred in Selangor in 1948. In support of this second strand of their submissions, the respondents rely on the Federation's independence since 1957 and/or on article 167 of the Federal Constitution of 1957.

Constitutional arrangements of and in relation to Malaya and Selangor

155. To consider these submissions, it is necessary to analyse the constitutional arrangements which existed in Malaya at the relevant times. At the date of the deaths in December 1948, Selangor was a state ruled by its Sultan whose relations with His Majesty King George VI were governed by the Selangor Treaty of 21 January 1948. Also on 21 January 1948, it had become one of nine Malay States which, together with two British colonies (Malacca and Penang) constituting the Straits Settlements, were party to the Federation of Malaya Agreement made between the Sultans of the Malay States and His Majesty.

156. The Selangor Treaty, along with similar treaties with the Sultans of the other eight Malay States, and the Federation of Malaya Agreement were the subject of The Federation of Malaya Order in Council 1948 (SI 1948/108) made on 26 January 1948, laid before the United Kingdom Parliament on 27 January 1948 and coming into force on 1 February 1948. The Order scheduled the Treaties with the Sultans of Selangor and the other Malay States and the Federation Agreement.

157. The Selangor Treaty provided by clause 3(1) that:

> "His Majesty shall have complete control of the defence and of all the external affairs of the State of Selangor and His Majesty undertakes to protect the Government and State of Selangor and all its dependencies from external hostile attacks and for this and other similar purposes His Majesty's Forces and persons authorised by or on behalf of His Majesty's Government shall at all times be allowed free access to the

> State of Selangor and to employ all necessary means of opposing such attacks."

By clause 4, the Sultan undertook

> "to receive … a British Adviser to advise on all matters connected with the government of the state other than matters relating to the Muslim Religion and the Custom of the Malays, and undertakes to accept such advice."

The Treaty also contemplated expressly the entry into force of the Federation of Malaya Agreement.

158. The Federation of Malaya Agreement recited that it had "been represented to His Majesty that fresh arrangements should be made for the peace, order and good government of the Malay States" in the form of the Federation, which was "to take effect on such day as His Majesty may, by Order in Council, appoint …". Clause 3 established the Federation, while clause 4 provided that:

> "His Majesty shall have complete control of the defence and of all the external affairs of the Federation and undertakes to protect the Malay States from external hostile attacks and for this and other similar purposes, His Majesty's Forces and persons authorised by or on behalf of His Majesty's Government shall at all times be allowed free access to the Malay States and to employ all necessary means of opposing such attacks."

159. Clause 7 provided for a High Commissioner in and for the Federation to be appointed "by Commission under His Majesty's Sign Manual and Signet", while clause 8 provided that:

> "Their Highnesses the Rulers undertake to accept the advice of the High Commissioner in all matters connected with the government of the Federation save as excepted in clause 5 of this Agreement [that is, "matters relating to the Muslim Religion or the Custom of the Malays"]: Provided that nothing in this clause shall in any way prejudice the right of any of Their Highnesses to address His Majesty through a Secretary of State, if any of Their Highnesses so desires."

160. Clause 13 provided:

> "His Majesty may from time to time give to the High Commissioner Instructions, either under His Majesty's Sign Manual and Signet, or through a Secretary of State, for the due performance, or the proper exercise of the powers, duties and rights of the High Commissioner under, and in conformity with, this Agreement; but no law made under this Agreement shall be void or inoperative by reason of anything contained in such Instructions."

161. With regard to executive authority, the Agreement provided:

> "*Extent of executive authority.*
>
> 16. Subject to the provisions of this Agreement, and in particular without prejudice to the provisions of clauses 18, 86 and 110 thereof, the executive authority of the Federation shall extend to all matters set out in the first column of the Second Schedule to this Agreement.
>
> *Exercise of executive authority.*
>
> 17. The executive authority of the Federation shall be exercised by the High Commissioner either directly or through officers subordinate to him, but nothing in this clause shall prevent the Legislative Council from conferring functions upon persons or authorities other than the High Commissioner within the powers given to it by this Agreement.
>
> *Delegation of executive authority.*
>
> 18. Notwithstanding anything in this Agreement, the High Commissioner may entrust, either conditionally or unconditionally, to the government of any Malay State with the consent of His Highness the Ruler of that state, or to the government of a Settlement, or to their respective officers, functions in relation to any matter to which the executive authority of the Federation extends.
>
> *Special responsibilities.*

> 19. (1) In the exercise of his executive authority, the High Commissioner shall have the following special responsibilities, that is to say:
>
> > (a) the protection of the rights of any Malay State or any Settlement and of the rights, powers and dignity of Their Highnesses the Rulers;
> >
> > (b) the prevention of any grave menace to the peace or tranquillity of the Federation or any Malay State or Settlement comprised therein;" …

162. Clause 48 further provided:

> "Subject to the provisions of this Agreement, it shall be lawful for the High Commissioner and Their Highnesses the Rulers, with the advice and consent of the Legislative Council, to make laws for the peace, order and good government of the Federation with respect to the matters set out in the Second Schedule to this Agreement and subject to any qualifications therein."

Under clause 52, the High Commissioner could if he considered it expedient "in the interests of public order, public faith or good government" force through any law which the Legislative Council had failed to enact.

163. The matters set out in the first column of the Second Schedule, in respect of which the High Commissioner had executive authority under clauses 16 and 17 of the Federation Agreement and the Federal Legislature had power to make laws under clause 48, included Defence and External Affairs:

> "DEFENCE AND EXTERNAL AFFAIRS
>
> 1(a). All matters relating to defence including (a) naval, military or air forces of His Majesty; local forces, any armed forces which are not forces of His Majesty but are attached to or operating with any of His Majesty's forces within the Federation …
>
> 2. External Affairs …

> CIVIL AND CRIMINAL LAW AND PROCEDURE, EQUITY, EVIDENCE, COURTS, CORPORATIONS, EMERGENCY POWERS
>
> …
>
> 15. Emergency powers, emergency legislation; trading with the enemy; enemy property …"

164. Under the powers contained in clause 48 read with the Schedule 2 paragraph 15, the High Commissioner and the Rulers with the advice and consent of the Legislative Council on 7 July 1948 enacted the Emergency Regulations Ordinance, No 10 of 1948 "to confer on the High Commissioner power to make regulations on occasions of emergency or public danger". The High Commissioner declared a state of emergency on 12 July 1948, and, in pursuit of the powers contained in the Ordinance, issued Emergency Regulations on 15 July 1948. Regulation 21 authorised any police officer of or above the rank of Sub-Inspector without warrant and with or without assistance to enter and search any premises and to stop and search any vessel, vehicle or individual, whether in a public place or not. Regulation 24 authorised a police officer to arrest and detain any person who on being questioned failed to satisfy the officer as to the purposes for which he was where he was found and who the officer suspected had acted or was about to act in any manner prejudicial to the public safety and the maintenance of public order.

165. Regulation 27 provided that:

> "The powers conferred upon police officers by Regulations 21, 22(1)(a) and 23 may be exercised by any member of His Majesty's Naval, Military or Air Forces or of any Local Forces established under any written law of or above the rank of Warrant Officer, and the powers conferred by Regulations 22(1)(b): and 24(1) may be exercised by any member of His Majesty's Naval, Military or Air Forces or of any Local Forces established under any written law."

166. The Order in Council made on 26 January 1948 started with these recitals:

> "Whereas by the Foreign Jurisdiction Act 1890, it was, amongst other things, enacted that it should be lawful for His Majesty to hold, exercise and enjoy any jurisdiction which His Majesty then had or might at any time thereafter have within a foreign country in the same and as ample a manner as if His

> Majesty had acquired that jurisdiction by the cession or conquest of territory: And whereas His Majesty has full power and jurisdiction within the Malay States of Johore, Pahang, Negri Sembilan, Selangor, Perak, Kedah, Perils, Kelantan and Trengganu (hereinafter referred to as 'the Malay States'): …"

167. The Order in Council went on to provide by section 4 that "In pursuance of the Federation Agreement there shall be established a Federation ...", by section 5 that "The provisions of the Federation Agreement shall have the force of law throughout the territories comprised in the Federation" and by section 6 that:

> "The High Commissioner is hereby empowered and commanded to do all things belonging to his Office in accordance with this Order, the Federation Agreement, such Commission as may be issued to him under His Majesty's Sign Manual and Signet and such Instructions as may from time to time be given to him by His Majesty under His Sign Manual and Signet or through a Secretary of State, and in accordance with such laws as may from time to time be in force in the Federation or any part thereof."

Detailed instructions were on 26 January 1948 passed under the Royal Sign Manual and Signet to the High Commissioner relating to matters including the legislative council contemplated by the Federation Agreement.

168. According to Notifications published in the Federation of Malaya Government Gazette dated 28 November 1949, His Majesty had "for the better co-ordination of measures for the maintenance and protection of the interests in South-East Asia of our Government in the United Kingdom" at some point before mid-1948 appointed a Commissioner-General "to advise Our said Government concerning such matters in respect of Burma, Siam, French Indo-China and the Netherlands East Indies (hereinafter referred to as 'the Foreign Territories') …", while from May 1946, Malcolm MacDonald had been Governor-General "in and over the Malayan Union (now the Federation of Malaya), the Colony of Singapore …". By Commission passed under the Royal Sign Manual and Signet on 10 August 1948 His Majesty appointed Malcolm MacDonald as Commissioner-General in South-East Asia "to discharge the functions hitherto discharged by the said Governor-General and to extend the area of his authority to embrace the Federation of Malaya, the Colonies of Singapore, Sarawak, North Borneo, the Protected State of Brunei, and such other territories, being parts of Our dominions or under Our protection, as We may direct …", and to exercise such authority and perform such duties as might be specified in such instructions as he might receive "from Us under our Sign Manual and Signet or through one of Our Principal Secretaries of State or as may be prescribed by law".

169. Prior to the Commission dated 10 August 1948, exchanges between the Commissioner-General for South-East Asia and London dated 26 June and, 8 and 12 July 1948 show the Commissioner-General reporting on "the nature and dimensions of the present internal security problem and the measures necessary to combat it as agreed by the Defence Co-ordination Committee held on 24 June with the Governor of Singapore and the High Commissioner of the Federation attending". These included references to "police action with military support", the military support being at that stage, it appears, two battalions of the Malay Regiment and one squadron of the Royal Air Force Regiment (Malay). The Commissioner's communication dated 12 July 1948 recorded that:

> "There is a very close liaison and co-ordination between the police and military at all levels and in each state and settlement the Chief Police Officer retains final decision of responsibility for law and order. In most affected areas in the Federation troops are taking a very big share in evacuation operations, but we are maintaining the principle that military are acting in aid of civil power. Except in static guard duties troops operate with an element of police presence whenever possible. There is excellent understanding between police and military staffs in both the Federation and Singapore and no difficulties seems to be arising regarding their respective roles."

170. By telegram on 9 August 1948, the Defence Co-ordination Committee recommended the dispatch of a brigade of the British Army to Malaya as reinforcements, saying that:

> "In arriving at this conclusion we have taken into account – (i) the vital need from the point of view of British prestige, civil morale, and the maintenance of the economy of the Federation of bringing the operations in Malaya to a successful conclusion as early as possible. …"

171. At a Cabinet meeting on 13 August 1948 it was resolved to proceed urgently with this. The decision was taken after the Chief of Imperial General Staff, Field-Marshal Viscount Lord Montgomery of Alamein, said that:

> "In Malaya the trouble was not only of local origin, but was instigated by Chinese Communists and kept going by communist reinforcements from across the Siamese border …. Moreover our own nationals were being killed. We could not stand this nor could we afford to lose Malaya to Communism. His conclusion was that we should … send immediate help to the Far East. …"

The brigade, part of which comprised the Second Battalion of the Scots Guards, duly arrived in Singapore in October 1948, and after three weeks training was sent to areas of the Federation where "bandit activity" was reported, including in the case of G Company of the Second Battalion, Kuala Kubu Bahru.

172. The establishment and existence of the British army was authorised by the Army Act, which was brought into force annually by a more specific Act and recited at the relevant times that:

> "Whereas the raising or keeping of a standing army within the United Kingdom in time of peace, unless it be with the consent of Parliament, is against law:
>
> And whereas it is adjudged necessary by His Majesty and this present Parliament that a body of land forces should be continued for the safety of the United Kingdom and the defence of the possessions of His Majesty's Crown …
>
> 71. … His Majesty may … make regulations as to the persons to be invested as officers, or otherwise, with command over His Majesty's forces … and as to the mode in which such command is to be exercised."

173. The King's Regulations 1940 provided inter alia:

> "6. The government of the Army is vested in the Crown. The command of the Army is placed in the bands of the Army Council, who are also responsible for the administration of the regular forces. …
>
> 28. The governor of a colony, protectorate or mandated territory is the single and supreme authority responsible to and representative of His Majesty. He is, by virtue of his commission, and the letters patent, entitled to the obedience and assistance of all military and civil officers, but, although bearing the title of captain-general or commander-in-chief, and although he may be a military officer, senior in rank to the OC the forces, he is not, except on special appointment from His Majesty, invested with the command of His Majesty's forces in the colony, protectorate or mandated territory. He is not, therefore, entitled to take the immediate direction of any military operations, …"

174. The European Convention on Human Rights came into force for the United Kingdom on 3 September 1953, and was under article 56 extended by the United Kingdom to the Federation of Malaya on 23 October 1953.

175. In 1957 the Federation of Malaya became an independent sovereign country within the Commonwealth. The arrangements for this were made by the Federation of Malaya Independence Act 1957 and the Federation of Malaya Independence Order in Council No 1933 of 1957. The Act provided:

> "1. (1) Subject to the provisions of this section, the approval of Parliament is hereby given to the conclusion between Her Majesty and the Rulers of the Malay States of such agreement as appears to Her Majesty to be expedient for the establishment of the Federation of Malaya as an independent sovereign country within the Commonwealth.
>
> (2) Any such agreement as aforesaid may make provision
>
> (a) for the formation of the Malay States and of the Settlements of Penang and Malacca into a new independent Federation of States under a Federal Constitution specified in the agreement, and for the application to those Settlements, as states of the new Federation, of State Constitutions so specified;
>
> (b) for the termination of Her Majesty's sovereignty and jurisdiction in respect of the said Settlements, and of all other Her power and jurisdiction in and in respect of the Malay States or the Federation as a whole, and the revocation or modification of all or any of the provisions of the Federation of Malaya Agreement, 1948, and of any other agreements in force between Her Majesty and the Rulers of the Malay States."

176. The Order in Council gave effect as from 31 August 1957 to a new Federal Constitution contained in the First Schedule, and revoked the Federation of Malaya Orders in Council 1948 to 1956. Article 167(1) of the Constitution provided:

> "Rights, liabilities and obligations.

> 167. (1) Subject to the provisions of this article, all rights, liabilities and obligations of -
>
> (a) Her Majesty in respect of the government of the Federation, and
>
> (b) the government of the Federation or any public officer on behalf of the government of the Federation, shall on and after Merdeka [Independence] Day be the rights, liabilities and obligations of the Federation."

177. On and as from independence, the United Kingdom's notification declaring that the European Convention on Human Rights applied to the Federation of Malaya as a territory for whose international relations it was responsible was withdrawn and no longer applied.

Analysis

178. Against this background, I consider the two strands of the respondents' submissions which I have summarised above. By the first strand, the respondents argue that the British army was not acting in right of the United Kingdom in relation to any of the killings. The respondents acknowledged in their skeleton argument before the Court of Appeal that the Scots Guards were deployed to the Far East in right of the United Kingdom, but they submitted then, and they repeat the submission now, that what matters is the legal regime under which the Scots Guards acted while in Malaya (para 33).

179. This regime is, they contend, to be found in the reservation to the Crown of "complete control" over the defence and external affairs of Selangor as well as of the Federation, pursuant to which the Crown not only undertook to protect Selangor and the Malay States from external hostile attacks, but authority was also given "for this and other similar purposes" for His Majesty's Forces to "be allowed free access to the [Malay States] and to employ all necessary means of opposing such attacks". More specifically, the activities of the Scots Guards were also authorised under Federation law by the Emergency Regulations (paras 151-152 above). Alternatively, they contend that, if the Scots Guards were not deployed in Selangor for such purposes, then they were deployed for internal purposes, necessarily in aid of the Sultan, who was obliged to follow the advice of the British resident adviser on such a matter: see clause 4 of the Selangor Treaty of 1948 (para 157 above).

180. The appellants endorse the respondents' primary contention, that the British Army forces were deployed in Malaya to protect against external hostile attacks or

"for other similar purposes" (written case, para 4.14). It also appears to accord with the reality. The Malayan insurgency was part of an external threat, and British forces were sent to assist in order to protect the Federation and its component parts against that threat or for similar purposes.

181. The parties differ however in their analysis of the constitutional implications of this conclusion. The respondents, invoking reasoning of Lord Bingham, Lord Hoffmann and Lord Hope in *Quark*, submit that there is a distinction between Crown action taken in right of the United Kingdom and in right of, or under the constitutional regime applicable in, Malaya or alternatively Selangor. They argue that the Crown's authority over defence and external affairs was exercised or "mediated" through the High Commissioner, exercising his powers in that regard under the Federation Agreement, and that the Scots Guards were acting under the constitutional authority of the Executive Government of the Federation and exercising the emergency powers provided by the Emergency Regulations of 15 July 1948. The appellants submit that there was no need for any such mediation. The Crown was in right of the United Kingdom simply entitled to deploy its forces in the Federation to protect against external hostile attacks or for "similar purposes".

182. Although this was not fully explored before us, both the distinction which the respondents draw in reliance on reasoning in *Quark*, and its applicability, are open to a number of questions. It can readily be accepted that, in relation to fully self-governing countries where the Queen remains Head of State, the Queen when acting for example on the advice of her local ministers acts in right of her position as Head of State of the relevant country, not as Head of State in the United Kingdom. But (despite the width of the recitals in the Order in Council dated 26 January 1948) the King was not the Head of State of either Selangor or the Malayan Federation. Hence, no doubt, the respondents' argument that the Crown's intervention was mediated through the High Commissioner as executive authority of the Federation or was undertaken on behalf of the Sultan of Selangor. But even in situations where the Crown is the Head of State the distinction drawn in *Quark* calls for further consideration.

183. *Quark* concerned South Georgia and South Sandwich Islands ("SGSSI"), a British Overseas Territory acquired originally by settlement, with a constitution governed by an order in council, which provided for a Commissioner, who was, in similar fashion to the High Commissioner of the Malayan Federation, bound under section 5(1) to act "according to such instructions, if any, as Her Majesty may from time to time see fit to give him through a Secretary of State". By the Fishing (Maritime Zone) Area Order 1993 and the Fisheries (Conservation and Management) Ordinance 1993, the Commissioner declared, and introduced a licensing scheme controlling fishing within, a maritime zone extending 200 nautical miles from SGSSI. He further appointed a Director of Fisheries who was under his direction. The Secretary of State instructed the Commissioner (who was in turn required to direct the Director) to give two fishing licences in a way which precluded

the grant to the claimant of a renewed licence. The claimant relied on article 1 of Protocol 1 ("A1P1") of the European Convention on Human Rights to claim damages. A1P1 had not been extended to SGSSI by any notification under article 56 of the Convention. The claimant failed. Lord Bingham, Lord Hoffmann and Lord Hope endorsed as one reason a submission (advanced as here by counsel for the Secretary of State) that the Queen must be treated as having given the instructions through the Secretary of State in right of SGSSI, rather than in right of the United Kingdom.

184. Lord Nicholls and Baroness Hale did not endorse this reasoning, and they and Lord Hoffmann and Lord Hope all concurred in a second reason, which was that both in Strasbourg and under the Human Rights Act the absence of any notification extending A1P1 to SGSSI under article 56 meant that the claim could not involve any failure by the United Kingdom "to secure to everyone within [its] jurisdiction" any Convention right within the meaning of article 1 of the Convention. The fact that United Kingdom ministers had in reality control over the grant or refusal of fishing licences in SGSSI was, in the absence of any such notification, not capable of bringing the claim within article 1. It was this alternative line of reasoning which, when Quark took their complaint to the European Court of Human Rights, led that court unanimously to declare the application inadmissible: see *Quark Fishing Ltd v United Kingdom* (Application No 15305/06) (unreported) given 19 September 2006.

185. The reasoning of Lord Bingham, Lord Hoffmann and Lord Hope in *Quark* was the subject of a sharp critique by Professor John Finnis in a University of Oxford Faculty of Law Legal Studies Research Paper, *Common Law Constraints: Whose Common Good Counts?*, which was in turn considered by Lord Hoffmann in the House's later decision in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61; [2009] AC 453, paras 37-49. Professor Finnis's thesis was that "The United Kingdom and its dependent territories within Her Majesty's dominions form one realm having one undivided Crown" and that, in contradistinction to the position of self-governing colonies, "in respect of any dependency of the United Kingdom (that is, of any British overseas territory), acts of Her Majesty herself are performed only on the advice of the United Kingdom Government" - both quotations from Halsbury's Laws of England, 4th ed re-issue (2003) vol 6 para 716, specifically approved in *Tito v Waddell (No 2)* [1977] Ch 106, 231, per Megarry V-C and *R v Secretary of State for Foreign and Commonwealth Affairs, Ex p Indian Association of Alberta* [1982] QB 892, 921-922, per Kerr LJ.

186. *Bancoult* concerned the ability of a British court judicially to review an order in council relating to the British Indian Overseas Territory ("BIOT"), notwithstanding the provisions of the Colonial Laws Validity Act 1865. Having read Professor Finnis's paper, Lord Hoffmann said in *Bancoult*, paras 48-49, that he was "inclined to think that the reason which I gave for dismissing the cross-appeal in [*Quark*]" - that is that A1P1 had no application in the absence of any notification

under article 56 – "was rather better than the reason I gave for allowing the Crown's appeal" – that is that the Crown had through the Secretary of State given the instructions "in right of SGSSI, not the United Kingdom" - and that "on this Lord Nicholls was right". Lord Hoffmann also analysed the relevant order in council "not simply as part of the local law of BIOT but, as Professor Finnis says, as imperial legislation made by Her Majesty in Council in the interests of the undivided realm of the United Kingdom and its non-self-governing territories"(para 40). The latter aspect of its "amphibious nature", as he put it, took it outside the scope of the Colonial Laws Validity Act and made it capable of being reviewed judicially in the British courts.

187. Lord Hoffmann's revised views about the Crown's position when exercising powers on the advice of United Kingdom ministers in relation to dependent territories and his views about the potentially "amphibious nature" of an order in council relating to such a nature reinforce my conclusion that there is no reason to attempt to justify the Crown's military involvement in the Federation of Malaya in 1948 solely in terms of the Federation's Constitution. The case for not doing so in the present context is in fact a fortiori to that which, in the light of Professor Finnis's paper and Lord Hoffmann's revised view, existed in relation to SGSSI and BIOT. The Crown was, as I have pointed out, sovereign in SGSSI and BIOT. The Crown was not sovereign in the Federation of Malaya or in any of the nine Malay States including Selangor. It had powers in respect of external affairs, defence and the deployment of the British army which were granted it under Treaty with each Malay State and were reflected in the Federation Agreement. Those powers must have been given to the King wearing the Crown of, and in the interests of, the United Kingdom. There is no reason not to treat them as having simply been exercised in that capacity and for that purpose, on the advice of United Kingdom ministers. All the indications are that this is the basis on which they were exercised.

188. While on active service in Malaya, the Scots Guards remained His Majesty's forces and under the command of the Crown exercised through the Army Council in accordance with the King's Regulations: see para 164 above. There was no question of their secondment to any other authority. Neither the Commissioner-General in South-East Asia nor the High Commissioner for the Federation appears actually to have had any right of command over them. The fact that their members may not have served under any contract of service is irrelevant to the present issue whether the appellants' complaints relating to their alleged activities in Selangor involve alleged failure by the United Kingdom "to secure to everyone within [its] jurisdiction" the rights and freedoms in article 2 of the Convention.

189. By 1953 the Convention was in force and had been extended by notification under article 56 to the Malayan Federation. Once the Convention came into force and was so extended, the second strand of reasoning in *Quark*, based on the absence of any such notification, can no longer directly apply. The fact of notification, coupled with the United Kingdom's control over its armed forces on active service

in Selangor, mean that the deaths in December 1948 occurred in circumstances within the United Kingdom's jurisdiction, within the meaning involved in article 1 of the Convention, if and to the extent that that article applies. Those who died were at the time within the British Army's control, and this would continue to be so, even if they were fired upon as they were seeking to escape.

190. Under the Convention, the question next arising is one of timing: can the United Kingdom be regarded as responsible for failure to hold an inquiry into deaths which occurred in December 1948 before the Convention was in force at all, let alone extended to the Federation? I have concluded that the deaths in December 1948 would have occurred within the United Kingdom's jurisdiction within the meaning of article 1, had the Convention been in force in Malaya in 1948. On that basis, and because the gap in time between the deaths and the extension to the Malayan Federation of the Convention, was less than ten years, a sufficient temporal link exists between the deaths and the critical date to satisfy the test laid down in the Strasbourg case law, particularly *Janowiec v Russia* (2013) 58 EHRR 792. Under international law, there would arise a parallel, though relatively unexplored, issue of timing, which Lord Neuberger mentions in para 117 but which it is unnecessary to resolve on this appeal. As a matter of purely common law judicial review, the length of time since the deaths is a relevant discretionary factor.

191. That brings me to the second strand of the issue of jurisdiction, which arises from the Federation's achievement of full independence in 1957. As at and from that date, it was provided by article 167(1) of the Federal Constitution, given effect by the Federation of Malaya Independence Order in Council No 1933 of 1957 that "all rights, liabilities and obligations of … Her Majesty in respect of the government of the Federation … shall on and after [Independence] Day be the rights, liabilities and obligations of the Federation": see paras 166-167 above. The United Kingdom also ceased to have any right of intervention in the face of external threats or in respect of defence and the notification under article 56 of the Convention extending the Convention to the Federation ceased to apply. The respondents contend on this basis that the United Kingdom cannot after 1957 have come under any duty to hold an inquiry into what occurred in December 1948.

192. Perhaps unsurprisingly, we were shown little material to guide us on the resolution of this strand of the overall issue. But I am not persuaded by the respondents' submission that the grant of full independence in 1957 relieved the United Kingdom of any potential obligation, otherwise arising towards alleged victims of alleged pre-1957 misconduct by the United Kingdom army, to hold an inquiry into such misconduct. A first question is whether any potential liability or obligation to hold an inquiry into the deaths in December 1948 can be said to be "in respect of the government of the Federation" at all. I have considerable doubt whether it can be. Once it is concluded that the British army was in Malaya in the service of His Majesty and in the interests of the United Kingdom, I have difficulty in regarding it as acting "in respect of the government of the Federation", even

though it was there to protect Selangor and the Malay States from external hostile attacks or for similar purposes: see paras 170-171 and 178 above. However, I need not rest my conclusions on this sole basis.

193. Assuming that the conduct of the British army in Malaya was "in respect of the government of the Federation", and any potential duty to hold an inquiry into such conduct likewise, the question is whether and how the constitutional arrangements made between the Federation and the United Kingdom on the Federation's independence can affect any domestic law duty which the United Kingdom would otherwise have towards victims to hold an inquiry into or, in appropriate circumstances, to pay compensation in respect of prior misconduct by the British army.

194. I do not see how they could, even if the deaths can be regarded as occurring during the course of governmental activities which were in 1948 the responsibility of the United Kingdom but were transferred in 1957 to the Malayan Federation. State succession is an area of international law which is neither easy nor well covered by authority. *Brownlie's Principles of Public International Law* 8th ed (2012), p 442 summarises the position as follows:

> "The preponderance of authority is in favour of a rule that responsibility for an international delict is extinguished when the responsible state ceases to exist either by annexation or voluntary cession. Such liability is considered 'personal' to the responsible state and remains with the state if it continues to exist after the succession. This reasoning is, however, less cogent in relation to voluntary merger or dissolution. Nor does it apply when a successor state accepts the existence of succession. In the *Lighthouses Arbitration* [(1956) 23 ILR 81] it was held in connection with one claim that Greece had by conduct adopted an unlawful act by the predecessor state and recognised responsibility."

195. The principle stated in the first sentence is illustrated in domestic law by *West Rand Central Gold Mining Co v The King* [1905] 2 KB 391, in which the King's Bench Divisional Court held that there was no principle of international law by which, after annexation or conquest, a conquering state could become liable, absent express contrary stipulation, to discharge the financial liabilities of the conquered state incurred before the outbreak of war.

196. The principle of acceptance or adoption, referred to in the last two sentences of the passage in *Brownlie*, also appears in *Mwandingi v Ministry of Defence, Namibia* [1991] 1 SA 851 (Nm). The High Court of Namibia there held the Ministry of Defence of Namibia liable for the alleged wrongful shooting of the claimant by

the South African Defence Force prior to Namibian independence. It based its decision on article 140 of the Constitution of Namibia, providing that everything done by the government of South Africa should be deemed to have been done by the government of Namibia.

197. If the conduct of the British army in December 1948 can be regarded as being "in respect of the government of the Federation", it might be said to have been adopted by the Federation by article 167(1) of the 1957 Constitution. But I do not see how or why adoption by the Federation as a successor state should at the same time release the United Kingdom in domestic, or even international, law vis-à-vis the victims of such conduct. Apart from adoption, the general rule which appears is that state liability for a death remains with the state responsible for the deaths, so long as that state exists, and does not pass to a successor state which takes over the relevant territory or activities. Different arrangements made as between the United Kingdom and the Federation should not on any view affect the rights which victims otherwise have against the United Kingdom domestically, whether such domestic rights arise by reference to the Convention rights, international law or pure common law principles.

198. Assuming that the deaths in December 1948 were and remain the United Kingdom's responsibility domestically, responsibility for any inquiry now called for into them must prima facie also remain with the United Kingdom. It is true that the inquiry is claimed by persons who are now clearly not within the United Kingdom's control, in relation to an incident in a place which is now equally clearly outside the United Kingdom's jurisdiction; and, further, that much of the evidence and material which could or would be relevant is and is only in Malaysia, which is outside the jurisdiction. But any inquiry would relate to the deaths of persons who were at the time under United Kingdom control, and to the conduct of the British army which was and is within United Kingdom jurisdiction. More specifically it would relate to the conduct of Scots Guards who were under United Kingdom command and within United Kingdom jurisdiction (and one or two of whom are still alive and understood to be within such jurisdiction). When a death of a person under British military control occurs abroad, any subsequent inquiry will often involve seeking information from sources in different jurisdictions at the date of the inquiry.

199. So far as concerns the Convention, any duty on the part of the United Kingdom under article 2 to hold an inquiry in accordance with the principles in *Janowiec* is an independent duty. This is so although it requires a triggering event, such as a death occurring at a time when the individual complainants could rely on the Convention or within a short period (with a maximum of ten years) prior to whenever that became possible. In either case, the duty to hold an inquiry may arise from or, in the language of *Janowiec*, be "revived" by the discovery of relevant new matter, whereupon a claim to an inquiry may be pursued, within the appropriate time limit for making such a claim after the duty has arisen or revived.

200. For there to be a Convention duty to hold an inquiry, this must be necessary "to secure to [some]one within [the United Kingdom's] jurisdiction" the rights and freedoms defined in article 2. But this cannot and does not mean that the beneficiaries of the inquiry must be within the jurisdiction when the inquiry is sought. The focus must be on whether the inquiry relates to an incident involving someone within the United Kingdom's jurisdiction. In the light of my conclusions on the first strand of the overall issue of jurisdiction, that was and is here the case.

201. As to the problem that the subject-matter of any inquiry would be the conduct of British troops in what is now a fully independent country, that is no new phenomenon, having regard to the United Kingdom's experience in Iraq and Afghanistan. Dividing and tailoring of a Convention obligation to secure Convention rights relevant to an individual was recognised as possible in *Al-Skeini v United Kingdom* (2011) 53 EHRR 589, para 137, when "a state, through its agents, exercises control and authority over an individual, and thus jurisdiction". If other conditions were satisfied, I see no reason why the United Kingdom should not be required to hold an inquiry under article 2 in respect of the events in Selangor in December 1948, on the basis that the inquiry could and would be tailored and limited to what was feasible, having regard inter alia to such co-operation as might be obtained from the Malaysian authorities. Similarly, if an inquiry were required by reference to international law and/or as a matter of purely common law judicial review, the United Kingdom could not be expected to do more than was feasible.

202. For these reasons, I would reject the respondents' case on both strands of the issue of jurisdiction, and hold that, had the other conditions for ordering an inquiry been satisfied, there would be no jurisdictional obstacle to doing so.

LORD KERR:

203. The response that the law ought to make to a claim that an historical wrong should be legally recognised and redressed involves a recurring and multi-faceted challenge. That challenge can arise in a myriad of contexts – the prosecution of sexual offences perpetrated years or even decades before proceedings come to court; the quashing of convictions long after they were first made against a person whose innocence is established by subsequently obtained evidence; and the holding of an inquest into someone's death years after it occurred, when new evidence touching on the death has come to light. These are but a few examples of cases where the law has had to confront the need to revisit disputes which had been considered settled or which were said to have occurred too long ago to countenance their revival.

204. This appeal involves precisely such a challenge. The shocking circumstances in which, according to the overwhelming preponderance of currently available evidence, wholly innocent men were mercilessly murdered and the failure of the authorities of this state to conduct an effective inquiry into their deaths have been

comprehensively reviewed by Lord Neuberger in his judgment and require no further emphasis or repetition. It is necessary to keep those circumstances and that history firmly in mind, however, in deciding how our system of law should react to the demand of the relatives of those killed that the injustice that has been perpetrated should be acknowledged and accepted.

205. Three possible gateways to the vindication of the appellants' claim have been dealt with by Lord Neuberger: via article 2 of the European Convention on Human Rights and Fundamental Freedoms (ECHR); under customary international law, as incorporated into the common law; and by the invocation of the principle of proportionality as a basis for judicial review in the municipal law of this country.

Article 2

206. It would be a mistake, I believe, to view the applicability of article 2 solely in terms of whether it has retrospective effect. This provision carries with it a duty, complementary to the obligation to protect life, of investigating any death occurring in suspicious circumstances. That duty does not arise as a matter of retroactive obligation. If article 2 applies, the obligation to investigate the death is a current imperative.

207. As Lord Neuberger has observed (para 66) the respondents accept that, if article 2 applies to these deaths, there is an existing obligation to carry out an inquiry that meets its requirements. That duty has been variously described as "separate", "autonomous" or "detachable" from the primary obligation under article 2. It has an existence which is distinct from that primary obligation. The assertion that an article 2 inquiry is not required does not rest, therefore, on the claim that no contemporary duty exists but on the essentially pragmatic basis that, for procedural reasons, it is not appropriate that an inquiry be held. This is important. In principle an inquiry into the deaths that is compliant with article 2 should be held. But it is claimed that that *prima facie* position should give way because a bright line rule is required to restrict the backward reach of article 2. The foundation of that claim is, as I have said, pragmatic rather than principled. That consideration should form the background to an examination of the Strasbourg jurisprudence in this area.

208. The detachable nature of the duty to investigate; the fact that this is not inextricably bound up with the primary duty to protect the right to life, underlay the ECtHR's decision in *Šilih v Slovenia* (2009) 49 EHRR 996. This is fundamental to a proper understanding of the correct approach to take to the trilogy of issues which arise: the "critical date" on which a member state will be considered bound by its treaty commitments; the relevant acts and omissions after the critical date; and the genuine connection between the death and the critical date. On one view, these are no more than arbitrarily selected standards which *might* rather than *must* inform consideration of whether a member state should be required to conduct an article 2

compliant inquiry into a death which occurred before the Strasbourg court acquired formal temporal jurisdiction. There is no inescapable point of principle, for instance, which requires the adoption of a ten-year period as the absolute limit on the period between the death and the critical date. The desirability of a rule, whether it be described as a bright line rule or a rule of thumb, is obvious, however. Where feasible, states should have some indication from the ECtHR as to when their article 2 duty is likely to arise. And there has to be some limit on how far back that duty extends. Practicability of inquiry must play a part in the evaluation.

209. Before turning to consider in detail the particular decisions of the ECtHR in this area, a general observation may be made. It is not appropriate, in my opinion, to seek to derive from the Strasbourg jurisprudence rigid rules that might be supposed to provide infallible answers to the questions that arise as to whether deaths occurring before the critical date should be subject to an article 2 inquiry. The evolutionary development of the procedural right under article 2 is alone sufficient to establish the inaptness of such an approach. Convention rights do not generally lend themselves to the application of inflexibly prescriptive rules. This is especially true of article 2 rights.

The critical date

210. Although the respondent adumbrated four possible dates that might qualify as the "critical date" – (i) the date of signing the Treaty establishing ECHR, (1950); (ii) the date of ratification, (1951); (iii) the date of entry into force in the United Kingdom of the Convention, (1953); and (iv) the date on which individual petition was granted, (1966), on the hearing of the appeal, the dispute concerning the critical date issue centred on two possibilities. The first of these was the date on which the Convention came into force in the United Kingdom, 3 September 1953, (or when it was extended to the Confederation of Malaya, 23 October 1953). The second possibility was the date on which the United Kingdom gave its citizens the right of personal petition to the Strasbourg court – 14 January 1966. Lord Neuberger has decided that the case law of the ECtHR favours the latter date and I can understand how that view can be reached in light of some of the statements made by the ECtHR. There are some contrary indications to be found in other statements and, in the light of these, I have concluded that Strasbourg case law does not point indisputably in the direction of the date of personal petition being the critical date. There is reference in the Strasbourg jurisprudence which can be interpreted as supporting the view that the date on which the United Kingdom became bound by the Convention (1953) should be regarded as the critical date.

211. What does the coming into force of treaty obligations such as those contained in ECHR entail? In the case of the United Kingdom it must surely involve this country's acceptance that it is bound by and agrees to abide by the terms of the Convention. The date on which the Convention came into force in the United

Kingdom must be the date when this country formally accepted that it was bound to comply with the rights enshrined in ECHR including those contained in article 2. Now that it is recognised that that duty comprehends a freestanding obligation to conduct an inquiry into suspicious deaths, in 1953, on the coming into force of the Convention, the United Kingdom was, as a matter of international law, bound to conduct an inquiry into the deaths involved in these appeals. Can it be said, in those circumstances, that the critical date did not arrive for another 12 years?

212. In my view, there is no clear and constant line of jurisprudence emerging from the Strasbourg court that would support the notion that, although the United Kingdom had, from 1953, an international obligation to conduct an article 2 inquiry into these deaths, the Strasbourg court's temporal jurisdiction did not come into existence until 1966. Before the Court of Appeal the respondents did not argue that the critical date was 1966. On the contrary, at para 13 of the skeleton argument submitted by the respondents for the Court of Appeal hearing it is stated, "… the critical date … would be in a Strasbourg case … the date on which the United Kingdom ratified the ECHR."

213. That the respondents did not espouse 1966 as the critical date is not surprising in light of the Strasbourg jurisprudence and, incidentally, observations made by this court *In re McCaughey* [2011] UKSC 20; [2012] 1 AC 725 - see paras 62, 78, 101, 112.

214. One may begin the review of ECtHR case law with *Blečić v Croatia* (2006) 43 EHRR 1038. In considering statements made in that case about the temporal jurisdiction of the Strasbourg court it is to be remembered that the decision was given before the detachable duty to investigate suspicious deaths had been recognised. Leaving that aside, however, it is clear that support for either of the contended for critical dates can be discerned from the court's discussion about its temporal jurisdiction. Thus in para 70 the court said:

> "… in accordance with the general rules of international law, the provisions of the Convention do not bind a contracting party in relation to any act or fact which took place or any situation which ceased to exist *before the date of the entry into force of the Convention with respect to that party*." (emphasis added)

215. But in para 71 the court referred to declarations made under former articles 25 and 46 of the Convention by which Croatia "recognised the competence of the Convention organs to deal with individual petitions based on facts occurring after the Convention and its Protocols had come into force in respect of Croatia" which might appear to suggest that the critical date was that on which the right of an

individual to present a personal petition was recognised. (This was, of course, the same date as the ratification of the Convention by Croatia.)

216. Lord Neuberger has relied on the statement in para 140 of the Grand Chamber's judgment in *Šilih* in support of his conclusion that the critical date is the grant of the right of individual petition (paras 80 and 81 above). Two observations may be made about this. Firstly, the Grand Chamber in para 140 canvassed two possible candidates for the critical date – the coming into force of the Convention or the entry into force of Protocol No 11, whereby the right of individual petition was recognised. The Grand Chamber did *not* say that the critical date was necessarily the later of these possibilities. Often, as in the case of Slovenia, these dates coincide. It is, to my mind, therefore, by no means clear that the Grand Chamber in para 140 purported to lay down a general rule that if the grant of the right of individual petition post-dated the coming into force of the Convention, it was the later event that must be regarded as marking the critical date. The Grand Chamber had no need to address that issue since the two events (the coming into force of the Convention and the grant of a right to individual petition) occurred at the same time.

217. Secondly, later statements in *Šilih* are consistent with the view that the critical date is in fact the date of entry into force of the Convention rather than the date of the grant of the right of individual petition. Thus in para 165, the Grand Chamber said, "… the court notes that the death of the applicants' son occurred only a little more than a year before the *entry into force* of the Convention in respect of Slovenia …" and in para 166, "The court notes and the government did not dispute that the applicants' procedural complaint essentially related to … judicial proceedings which were conducted after the *entry into force* of the Convention …" (emphasis added in both instances).

218. I accept that the Grand Chamber's decision in *Varnava v Turkey* (Application Nos 16064-16066/90 and 16068-16073/90) (unreported) given 18 September 2009, represents a rather more forthright endorsement of the grant of the right of individual petition as the critical date. In paras 132-134 the court said:

> "132. Turkey ratified the Convention on 18 May 1954; it accepted the right of individual petition on 28 January 1987 and the jurisdiction of the old court on 22 January 1990. Protocol No 11, which brought the new court into existence, came into force on 11 January 1998.
>
> 133. Turkey was accordingly bound by the provisions of the Convention from 18 May 1954. However, its acceptance of the right of individual petition was limited to facts taking place after the date of the declaration to that effect on 28 January

> 1987. When the old court ceased to function in 1998, this court's jurisdiction became obligatory and ran from the acceptance by a Contracting State of the right of individual petition. It follows that the court is not competent to examine any complaints raised by these applicants against Turkey in so far as the alleged violations are based on facts having occurred before 28 January 1987 (see *Cankocak v Turkey* (Application Nos 25182/94 and 26956/95), para 26, 20 February 2001, and *Demades v Turkey* (just satisfaction) (Application No 16219/90), para 21, 22 April 2008).
>
> 134. On that basis, any complaints by the applicants asserting the responsibility of the Contracting State for factual events in 1974 are outside the court's temporal jurisdiction. In so far as any complaints are raised concerning acts or omissions of the Contracting State after 28 January 1987, the court may take cognisance of them. It notes in this respect that the applicants specified that their claims related only to the situation pertaining after January 1987, namely the continuing failure to account for the fate and whereabouts of the missing men by providing an effective investigation."

219. The Grand Chamber's statement that the court's jurisdiction became obligatory and ran from the acceptance by a Contracting State of the right of individual petition is not supported by any analysis. And, as Lord Neuberger has acknowledged, that statement is incidental to the decision in the case because the court found that the nature of the procedural obligation to investigate disappearances was such that, potentially, it persisted as long as the fate of the person who had disappeared was unaccounted for; the ongoing failure to provide the requisite investigation was therefore regarded as a continuing violation.

220. Interestingly, an argument deployed by the government of Cyprus (an intervener in *Varnava*) which was recorded at para 128 of the judgment does not appear to have been dealt with by the Grand Chamber. It was to the effect that the applications could not be said to concern Turkey's responsibility for acts or omissions at a time when it had not accepted the Convention. The disappearances had occurred in 1974 and from 1954 onwards Turkey could have been subject to proceedings begun by other contracting parties. If this argument is right (and I cannot see any reason that it is not) it illustrates the true nature of the "correct date" concept. It should be seen as a gateway that is concerned principally with the backward reach of article 2, not simply with the enforceability of an individual right under that provision. On one view, it would be anomalous that a country's failure to conduct an article 2 inquiry would come within the Strasbourg court's temporal jurisdiction at the suit of another member state but that it should not be amenable to that jurisdiction on an application by the next-of-kin of the person whose death was

the subject of the application. As against that, however, it might be thought to be incongruous that ECtHR should be able to assume jurisdiction to adjudicate in a dispute between citizen and state before the right of individual petition had even been conferred.

221. An example of the choice of the entry into force alternative can be found, however, in the case of *Dorado v Spain* (Application No 30141/09) (unreported) given 27 March 2012. The Convention entered into force in Spain on 4 October 1979. The right of individual petition became applicable to that country on 1 July 1981. Notwithstanding this, the Third Section of the ECtHR in held that the critical date was the entry into force of the Convention. At para 32 the court said:

> "The court emphasises that the provisions of the Convention do not bind a Contracting Party in relation to any act or omission which took place or any situation which ceased to exist *before the date of the entry into force of the Convention* with respect to that Party ("the critical date" —see *Blečić v Croatia* [GC] (Application No 59532/00), para 70, ECHR 2006-111; *Šilih v Slovenia* [GC], (Application No 71463/01), para 140, 9 April 2009; and *Varnava and Others v Turkey* [GC], (Application Nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90), para 130, ECHR 2009-...)." (emphasis added)

222. Significantly, the court included *Varnava* among the decisions which, it suggested, supported the proposition that the Convention was binding at the date of its entry into force in the relevant member state. And, lest it be thought that the failure to identify the time of the grant of the right to individual petition as the critical date was inadvertent, it should be noted that the two dates (coming into force and right of individual petition) were expressly referred to in paras 34 and 39 of the judgment.

223. In *Janowiec v Russia* (Application Nos 55508/07 and 29520/09) (2013) 58 EHRR 792, the Grand Chamber again considered the question of the temporal jurisdiction of the court. The statement in para 128 of the court's judgment, quoted by Lord Neuberger at para 71 above, that "… the provisions of the Convention do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention with respect to that Party (the critical date)" is expressed in unqualified terms.

224. Lord Neuberger has said that, despite these seemingly clear words, the issue is not disposed of by the judgment in *Janowiec* because Russia had acceded to the Convention on the same date that it gave its citizens the right of personal petition to

Strasbourg. But if the choice between the two possible candidates for the critical date is a stark one (and it has been so portrayed throughout this appeal), then the fact that the two events occurred on the same day cannot explain why the court chose to identify the entry into force of the Convention as the critical date. If it was clear that the grant of the right to individual petition marked the critical date, why has the court in *Janowiec* omitted to say so? Why should it state that the critical date was the time of the entry into force of the Convention, if this was merely an incidental circumstance?

225. The point has been made that if the Grand Chamber in the subsequent decision in *Janowiec* had considered that what was said in para 140 of *Šilih* was wrong, it would surely have said so. This, of course, depends on one's view of the import of that paragraph. For the reasons given at paras 206 and 207 above, I do not accept that the court in *Šilih* decided that the date of the grant of the right to an individual petition was the critical date. There was no need, therefore, for the court in *Janowiec* to make any adverse observation on para 140 of *Šilih*.

226. In *Çakir and others v Cyprus* (Application No 7864/06), (unreported) given 29 April 2010, an admissibility decision, the court referred on a number of occasions to the date on which Cyprus accorded the right of individual petition as the critical date. Lord Neuberger regarded this as highly significant, pointing out in para 84 of his judgment that this was the date that had been chosen by the court rather than the date on which Cyprus had acceded to the Convention. In the section of the judgment entitled "The Law", however, the court said:

> "The court emphasises that the provisions of the Convention do not bind a Contracting Party in relation to any act or omission which took place or any situation which ceased to exist *before the date of the entry into force of the Convention with respect to that Party or, as the case may be, before the date on which the respondent Party recognized the right of individual petition* ("the critical date" – see *Blečić v Croatia* [GC], (Application No 59532/00), para 70, ECHR 2006 III; *Šilih v Slovenia* [GC], (Application No 71463/01), para 140, 9 April 2009; and *Varnava and others v Turkey* [GC], (Application Nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90), para 130, ECHR 2009 ...)." (emphasis added)

227. Again, therefore, the decision in *Çakir* does not unmistakably endorse the time of the grant of personal petition as the only possible critical date. In my view, the least that can be said of the relevant ECtHR case law is that it certainly does not provide unequivocal support for the view that the critical date is in every instance

the date on which the right to present an individual petition to the Strasbourg court has been granted by a member state.

228. What then should this court's conclusion on the critical date be? Two interrelated issues must be addressed in order to answer this question. The first concerns the significance which should attach to the absence of clear guidance from Strasbourg on whether the critical date should be the date of entry into force of the Convention or the date of the grant of the right of individual petition. The second issue is whether the approach to the backward reach of the Convention obligation should be approached in the same way by a national court as it is by the ECtHR, in light of the fact that this court must deal with the question as a matter of domestic law.

229. Part, at least, of the interrelationship between these two issues stems from the fact that national courts in this country give effect to (or refuse to give effect to) Convention rights as a matter of domestic law. The Human Rights Act 1998 introduced to the law of the United Kingdom the European Convention on Human Rights and Fundamental Freedoms. But it did so by making the Convention part of national law so that the rights became domestic rights. Because the rights are domestic, they must be given effect according to the correct interpretation of the domestic statute. As Lord Hoffmann said *In re G (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] AC 173, para 34, "[the courts'] first duty is to give effect to the domestic statute according to what they consider to be its proper meaning, even if its provisions are in the same language as the international instrument which is interpreted in Strasbourg".

230. There are, of course, sound practical and policy reasons that our national courts should follow decisions of the ECtHR. Perhaps the most important of these was touched on by Lord Hoffmann in para 35 of *In re G*:

> "The best reason is the old rule of construction that when legislation is based upon an international treaty, the courts will try to construe the legislation in a way which does not put the United Kingdom in breach of its international obligations. If Strasbourg has decided that the international Convention confers a right, it would be unusual for a United Kingdom court to come to the conclusion that domestic Convention rights did not …"

231. Lord Hoffmann mentioned what Lord Bingham had said in the earlier case of *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323. In para 20 of his speech in that case Lord Bingham had uttered the fateful line that has become the source of much judicial controversy, "The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more but certainly no

less". This gave life to the so-called mirror principle whereby the content and character of rights in the UK national sphere should precisely match Strasbourg pronouncements. The sentence is much quoted as is, what has been described as, "the characteristically stylish twist" that was put on it by Lord Brown in *R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening)* [2007] UKHL 26; [2008] AC 153, para 106 where he said that the sentence "could as well have ended: 'no less, but certainly no more'".

232. In *Ullah* Lord Bingham was careful to refer to the interpretation of the Convention (as opposed to the interpretation of HRA) but his opinion in that case has been used in a number of subsequent judgments to support the proposition that the content of domestic rights under HRA should not, as a matter of principle, differ from those pronounced by Strasbourg. Indeed, his judgment has been construed as indicating that, unless the ECtHR has given clear guidance on the nature and content of a particular Convention right, the national courts of the UK should refrain from recognising the substance of a claimed entitlement under ECHR.

233. So, for instance, in *Al-Skeini* Lord Brown suggested that where the ECtHR had not spoken, our courts should hold back, explaining that, if it proved that Convention rights have been denied by too narrow a construction, the aggrieved individual can have the decision corrected in Strasbourg. And in *R (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission intervening)* [2010] UKSC 29; [2011] 1 AC 1 Lord Phillips followed a similar line. I have expressed my disagreement with that approach in *Ambrose v Harris Procurator Fiscal* [2011] UKSC 43; [2011] 1 WLR 2435 but must immediately acknowledge that mine was the sole dissenting judgment in that case. Since then, however, judgments have been given in which a departure from a rigid application of the mirror principle is discernible.

234. In *Rabone v Pennine Care NHS Foundation Trust (INQUEST intervening)* [2012] UKSC 2, [2012] 2 AC 72 it was held that there was a positive obligation to protect the life of a mentally ill young woman who had been admitted to hospital informally because of serious attempts to take her own life. This decision was reached notwithstanding the fact that there was no authority from the ECtHR to that effect. In *Surrey County Council v P (Equality and Human Rights Commission intervening)* [2014] UKSC 19; [2014] AC 896, para 62 Lord Neuberger said that where there was no Strasbourg authority which dealt precisely with the issues before this court, this court could rely on principles expressed by the ECtHR, even if only indirectly relevant, and apply them to the cases which it had to decide. At para 86 of that case, I reiterated my view (first expressed in *Ambrose*) that this court had a duty to determine whether a claim that a Convention right had been breached should be accepted, even if Strasbourg had not yet pronounced upon it. And in *Moohan v Lord Advocate (Advocate General for Scotland intervening)* [2014] UKSC 67; [2015] AC 901 Lord Wilson suggested that there had been a "retreat" from the *Ullah* principle which had led the court to "substantially" modify it. At para 105 he said:

> "… where there is no directly relevant decision of the ECtHR with which it would be possible (even if appropriate) to keep pace, we can and must do more. We must determine for ourselves the existence or otherwise of an alleged Convention right …"

235. If there is no clear guidance from Strasbourg on which of the alternatives should be chosen as the critical date, in my view, this court should not be deterred from forming its own judgment as to which is appropriate. I acknowledge, however, that where the national court is required, as part of its decision on a Convention issue, to address directly the question of *what Strasbourg would decide* (as opposed to what *the national court itself* should decide), there is a need for caution, where there is no or no clear guidance from the ECtHR on the question. This does not, however, relieve the national court of its duty under section 6 of HRA to resolve the dispute as to whether there has been a breach of a Convention right.

236. The decision in this case as to which date is to be preferred partakes of a two-pronged inquiry. First, what the Strasbourg court would decide on the question of its temporal jurisdiction, if presented with a stark choice between the date on which the right of personal petition was granted by the member state and the date of entry into force of the Convention. Secondly, whether this court should be influenced in its decision as to its jurisdiction under the Human Rights Act by what it considers the Strasbourg court would decide. This is the second issue identified in para 227 above.

237. One can recognise the force of the point made by Lord Neuberger at para 84 that, as a matter of first principle, the critical date, so far as the Strasbourg court is concerned, should be linked to the date on which it is invested with the jurisdiction by a member state to entertain personal petitions from that state's citizens. As against that, it seems to me that, from the date of entry into force of the Convention in a member state, since it then assumed an international duty to abide by the terms of ECHR, that duty was enforceable by another member state. Article 33 of ECHR (previously article 24) provides for inter-state applications. In order to invoke this procedure, it is not necessary for the complainant state to have been a victim. Rights could be violated and inter-state enforcement actions could be taken long before the right of individual petition was recognised in some member states. In light of this, as I have said at para 220 above, it might be regarded as anomalous that the individual actually affected by an alleged violation should not have the right to enforce his or her right while another state could apply to the court for redress. But it may be that this is an anomaly which simply must be accepted.

238. Whichever of the alternatives is chosen (the date of entry into force or the date of the personal petition) it is clear that this is not to be regarded as an immutable point from which no departure can be made. In the first place, as Lord Neuberger

has explained, it is well settled in Strasbourg case law that a connection between the "triggering event" and the critical date can, in certain circumstances, warrant extending the temporal jurisdiction of the Strasbourg court back to that event. As the ECtHR has made clear in, among other cases *Janowiec*, there must be relevant acts or omissions after the critical date and "the period between the triggering event and the critical date must remain reasonably short … [and while there was no] … absolute limit on the duration of that period … it should not exceed ten years" (para 146).

239. If Strasbourg is willing to contemplate a backward reach of up to ten years between the triggering event and the critical date, is it certain that ECtHR would not be prepared to back-date the reach of the Convention to the date of its entry into force in a particular member state? In my view, it is not. But it is by no means certain that the court would be prepared to do so. Because of the need for caution, to which I have adverted (in para 235 above), but not without some hesitation on my part, I am not prepared to say that ECtHR would hold that the critical date was the entry into force of the Convention or that the backward reach of the Convention should be extended to that date. In the event, therefore, although Lord Neuberger and I are not in precise agreement as to what Strasbourg would find, that disagreement does not signify in terms of the present appeal. Either Strasbourg *would* find that the critical date was the date on which the right to individual petition was conferred or it is not clear that it would *not so find*. The consequence is the same in both scenarios.

240. A further matter requires to be considered, however. At para 149 of *Janowiec* the Grand Chamber accepted "that there may be extraordinary situations which do not satisfy the 'genuine connection' standard … but where the need to ensure the real and effective protection of the guarantees and the underlying values of the Convention would constitute a sufficient basis for recognising the existence of a connection". The type of 'extraordinary situation' in contemplation here was explained by the court in para 150:

> "… the Grand Chamber considers the reference to the underlying values of the Convention to mean that the required connection may be found to exist if the triggering event was of a larger dimension than an ordinary criminal offence and amounted to the negation of the very foundations of the Convention. This would be the case with serious crimes under international law, such as war crimes, genocide or crimes against humanity, in accordance with the definitions given to them in the relevant international instruments."

241. At para 151, however, the court said this:

> "The court nonetheless considers that the 'Convention values' clause cannot be applied to events which occurred prior to the adoption of the Convention, on 4 November 1950, for it was only then that the Convention began its existence as an international human-rights treaty. Hence, a Contracting Party cannot be held responsible under the Convention for not investigating even the most serious crimes under international law if they predated the Convention. Although the court is sensitive to the argument that even today some countries have successfully tried those responsible for war crimes committed during the Second World War, it emphasises the fundamental difference between having the possibility to prosecute an individual for a serious crime under international law where circumstances allow it, and being obliged to do so by the Convention."

242. In light of this passage, I agree with Lord Neuberger that, so far as the Strasbourg court is concerned, the "Convention values" argument cannot assist the appellants in their claim that a genuine connection between the triggering event and the critical date should be recognised.

The claim under HRA

243. What then of the claim based on HRA? Is there any reason that a national court should adopt the same approach to the question of critical date as that of the Strasbourg court? If not, what should the backward reach of HRA, if any, be? Three possibilities must be considered. The first is that the date of the coming into force of the Act itself should mark the date on which a right under HRA arises. The second is that the right under HRA should be coterminous with the temporal jurisdiction of the ECtHR. Finally, it is necessary to consider whether the Convention values dimension could exceptionally provide a link to the Killings in 1948, when that dimension is considered under HRA rather than under ECHR.

244. By way of preamble to consideration of these alternatives, and with particular reference to the second of them, it should be emphasised that the temporal jurisdiction of the Strasbourg court derives from provisions that applied or apply exclusively to that court. Article 25 of ECHR provided that the European Commission of Human Rights could receive petitions from any person claiming to be the victim of a violation of his or her Convention rights, provided that the member state against which the complaint was made had declared that it recognised the competence of the Commission to receive such petitions. Article 46 contained a similar provision in relation to the court. Since 1994, it has been compulsory for member states of the Council of Europe to accept the right to petition the Strasbourg court.

245. Not only do these provisions not apply to claims under HRA, they have nothing to say on the issue of the temporal jurisdiction of this court under that Act. The right of individual petition is a specific, procedural question which applies only to the Strasbourg court.

Should the date on which a claim under HRA is possible, be the date of coming into force of that Act?

246. The House of Lords *In re McKerr* [2004] UKHL 12, [2004] 1 WLR 807, unanimously held that HRA did not have retrospective effect. On that account, the argument that there was a duty to conduct an article 2 compliant investigation into a death which had occurred before 2 October 2000 (the date on which HRA came into force) was dismissed. In *McCaughey* some modification (as Lord Neuberger has put it) of that position was inevitable. *McKerr* had been decided before the detachable nature of the procedural requirement to investigate a suspicious death was recognised. But it is important to understand that *McCaughey* did not challenge the conclusion in *McKerr* that HRA did not have retrospective effect. It was because the procedural obligation under article 2 was a continuing one that an article 2 compliant inquest in the latter case was required – see Lord Phillips at paras 51-52 and 61; Lord Hope at para 76; Lady Hale at para 90; Lord Brown at para 100; my own judgment at paras 110-111; and Lord Dyson at para 134.

247. Lord Neuberger has commented (at para 95 above) that Lord Phillips in *McCaughey* was inclined to hold that a departure from *McKerr* was warranted because domestic law should follow the jurisprudence of the Strasbourg court in recognising an article 2 obligation to investigate a suspicious death after the coming into force of HRA. He has also suggested that Lord Dyson (in paras 132-137) and I (in paras 110-114) also favoured this conclusion. It may be that Lord Phillips was of the view that *McKerr* should be departed from solely because Strasbourg had expressed a different view about the retrospective potential of the Convention and that this should be applied as a matter of automatic consequence to the HRA. I do not consider, however, that this was the purport of Lord Dyson's or my judgment.

248. It was because the detachable nature of the procedural duty under article 2 was clearly recognised for the first time in *Šilih* that the decision in *McKerr* could no longer be followed. It was not because it was considered that the pronouncements in that case about the non-retroactive effect of the HRA were wrong. What *Šilih* showed was that the assertion in *McKerr* that all the obligations arising under article 2 were to be treated as parts of a single whole could no longer stand. Of course, it was theoretically open to this court in *McCaughey* to refuse to follow the finding in *Šilih* that the procedural duty under article 2 to investigate suspicious deaths was detachable, but, absent such a decision, the need to revise *McKerr* (without rejecting it in its entirety) was clear.

249. I agree with Lord Neuberger, therefore, that it is not necessary for this court to reach a conclusion on whether *McKerr's* central thesis (that HRA is not retroactive) was wrong. Rather, what this court must do is decide whether, in light of the state's detachable duty to investigate suspicious deaths, there is an existing duty to conduct an article 2 compliant inquiry into the deaths which are the subject of this appeal. On that basis it is impossible to say that, simply because HRA came into force on 2 October 2000, *ipso facto*, there is no such duty. I would therefore dismiss the first of the possibilities outlined in para 243 above.

Should the right under HRA be coterminous with the temporal jurisdiction of the ECtHR?

250. In para 74 of their printed case, the respondents argue that if the appellants do not have a valid claim in Strasbourg under article 2, they cannot have such a claim under the HRA because the Act gives effect to Convention rights within the United Kingdom and does not purport to expand them beyond what Strasbourg has recognised. This argument fails to address the different sources of jurisdiction for Strasbourg and the municipal courts of this country. Constraints on the temporal jurisdiction of the ECtHR, insofar as they derived from articles 25 and 46 of ECHR and, latterly, derive from article 6 of Protocol 11, did not and do not apply to national courts. Moreover, recognition of the jurisdiction of this court to decide whether there is a procedural duty to investigate the deaths does not involve an expansion of the nature and content of that duty as they have been expressed by Strasbourg. The duty remains the same in both instances. The issue is whether, by reason of the different sources of jurisdiction, it should be regarded as arising in domestic law if it does not arise in international law.

251. When a domestic court, applying the HRA, considers the scope of the Convention, the date of the recognition of the right of individual petition to ECtHR is not relevant. One can recognise that it has, at least potentially, some relevance for the Strasbourg court since it marks the beginning of the period when that court has been formally invested with jurisdiction to hear individual complaints. But the domestic courts are in a different position. They must ask first whether the facts constitutive of the alleged violation fall within the temporal scope of the Convention, and they must then ask whether the autonomous article 2 investigative duty lies within the temporal scope of the HRA. The ECtHR asks a different question, namely, whether the matter falls within the temporal jurisdiction of the court, which is regulated by either the date of the entry into force of the Convention in the member state or the recognition of the right of individual petition.

252. My unequivocal answer, therefore to the question, should the temporal jurisdiction of the national court under the HRA be coterminous with that of ECtHR is that it should not be. Just because the Strasbourg court does not have temporal jurisdiction, it should not be regarded as automatic that the national court does not.

253. But the perceived need for legal certainty which prompted ECtHR's decision about the limits on the backward reach of the Convention applies, by parity of reasoning, to the decision as to the national court's jurisdiction. As the Grand Chamber said in *Janowiec* in para 133, "… having regard to the principle of legal certainty, the … temporal jurisdiction as regards compliance with the procedural obligation of article 2 in respect of deaths that occur before the critical date is not open-ended". Likewise, the backward reach of HRA and the recognition of a continuing duty under article 2 to investigate cannot be open-ended. Some limit must be applied.

254. That is not to say that there are no countervailing considerations which militate against the fixing of a rigid limit. The role of national courts is to interpret and apply the Convention and thereby provide effective human rights protection to individuals. Indeed, the requirement that all member states of the Council of Europe must confer the right of individual petition on their citizens reflects the growing consensus that international human rights law is about ensuring justice for individual citizens rather than being a matter of relationships between governments.

255. Notwithstanding these considerations, the need for some temporal connection between the triggering event and the animation in the domestic law sphere of the duty to investigate is undeniable. Otherwise the backward reach of HRA would be potentially limitless or, as it was put in *Janowiec*, open-ended. Should the limit be, as in the ECtHR jurisprudence, a short period and no longer than ten years? There is no reason in principle that the periods should be the same in the national law order as in Strasbourg case law. The need for some limit in both instances is unavoidable, however. The choice of the appropriate period must be, in the final analysis, arbitrary. To fix it at the point of the coming into force of HRA would be antithetical to the concept of a continuing duty to investigate a suspicious death when inquiries into that death were begun or should have been continued after the coming into force of the Act. But to extend the duty backwards without any limit simply because an adequate investigation has not yet been undertaken would be significantly out of step with the Strasbourg approach. It would also be, in many instances, wholly impractical. However unsatisfactory it may be in terms of principle, a limit must be set which is essentially arbitrary but which accords with what is, in most cases, practically possible. It may well be that the ten-year period chosen by Strasbourg is as good as any. However the limit is fixed, I have concluded that it cannot be extended to cover the some 52 years from the date of coming into force of HRA and the Killings in 1948.

The need to avoid erosion of Convention values

256. The triggering event involved in this case, the killing of 24 apparently innocent men, is clearly "of a larger dimension than an ordinary criminal offence" and could well be said to be "the negation of the very foundations of the

Convention". If it is established that the men were not trying to escape when they were killed and that there was no justification for opening fire on them, this would constitute a serious crime under international law. All these elements of the killings, if shown to have existed, would strike at the heart of "the guarantees and the underlying values of the Convention". Should that circumstance operate to provide, for the purposes of HRA, the exceptional form of connection contemplated by ECtHR in para 150 of *Janowiec*?

257. The Strasbourg court considered that the question of erosion of Convention values did not arise in the pan-European context in relation to events which occurred before the Convention was adopted on 4 November 1950. Although it professed to be "sensitive" to the argument that there were contemporary examples of some countries having prosecuted those responsible for war crimes committed during the Second World War, it suggested that there was a fundamental difference between accepting that such prosecutions were possible and their being mandated by the Convention. Should the same considerations obtain in deciding whether the need to protect Convention values ought to prompt a finding that HRA should be applied in a way that would require recognition of a current obligation to investigate killings which occurred almost 67 years ago?

258. For my part, I doubt if the question whether prosecution of historical offences should be a matter of compulsion or discretion bears directly on the issue of what is required to protect Convention values. I consider, however, that the need to preserve those values cannot provide the basis of an exceptional link. I have reached that view for the prosaic reason that those values take their life from the Convention. They are not eroded by events which took place before the Convention itself, and the values and guarantees which it embodies, came into existence. I have concluded, therefore, that the protection of Convention values dimension does not provide a link to an existing duty to conduct an article 2 compliant inquiry into the Killings.

Revival of the duty to investigate

259. Since no link to the triggering event has been established on any of the bases advanced by the appellants, the question of revival of the duty to investigate does not arise. Had that been a live issue in the case, I confess that I would have found it less easy to resolve than does Lord Neuberger.

260. The official account of the Killings given shortly after they occurred in 1948 was affirmed in 1970 (in the House of Commons in a reply by the Attorney General, Sir Peter Rawlinson) and on 21 January 2009 in a letter from the British High Commissioner in which he said, "In view of the findings of two previous investigations that there was insufficient evidence to pursue prosecutions in this case, and in the absence of any new evidence, regrettably we see no reason to reopen or start a fresh investigation". As late as 2009, therefore, the British Government

was maintaining the stance that there was nothing to challenge, much less gainsay the original official version of the Killings. If the appellants had accepted that assertion, could they have been faulted for doing so? Surely not. And, if not, can it be said that nothing new has subsequently emerged that would have warranted a decision to no longer accept the government's claim?

261. In fact, a number of new developments took place after January 2009. In June 2009 the book, '*Slaughter and Deception'* was published. Lord Neuberger has said that this did not contain much new revelatory evidence. That depends on how one views the state of the evidence and the attitude that might reasonably have been taken to it before publication. If a decision to accept the government's steadfast denials of the need for an inquiry could not be condemned, it is difficult to see how the appellants' failure to challenge them can be faulted. The least that '*Slaughter and Deception'* did was to collate material from various sources which supported the appellants' case that the government's claim that no further inquiry was necessary could not be sustained.

262. Significantly, at a meeting held on 3 July 2009 and attended by members of the Batang Kali action committee with their lawyers and representatives of the Ministry of Defence and the Foreign and Commonwealth Office, it was disclosed that the government was reconsidering the January 2009 decision not to hold a further inquiry. This is significant in two aspects. First, it indicates that the government believed that there was new material which called for fresh consideration. Secondly, it sounds on the reasonableness of the stance of the appellants in failing to take action to challenge the decision not to hold a new inquiry.

263. Lord Neuberger has said that in 1970 there were already considerable reasons for doubting whether the official United Kingdom Government line on the killings was correct, and that there were strong grounds which suggested that the killings were unlawful (para 107 above). This assessment is very much a matter of individual judgment and it is not easy to avoid the influence of hindsight in making it. In any event, it must be set against the statement in Parliament by a senior member of the government, the Attorney General, endorsing what he implied was an independent decision of the Director of Public Prosecutions "not to ask the police to pursue the inquiry" into the killings. In fact, as the report of Detective Superintendent Williams revealed, he was of the view that this decision was one secured by "a political change of view". This did not come to the attention of the appellants until 2009. Thereafter, the government was considering the representations made by the appellants as to whether a new inquiry would be held. It has not been suggested (nor could it be) that the appellants should have challenged the failure to hold an inquiry before the outcome of the government's deliberations was known nor that they failed to act with sufficient speed after it was disclosed to them.

264. In the context of what is required to revive a duty to investigate, the question of what new material will be sufficient to give rise to such a revival should be approached broadly. In *Brecknell v United Kingdom* (2007) 46 EHRR 957 the Strasbourg court found that a renewed investigation into a 1975 murder was necessary in order to evaluate the link between a number of previously closed cases involving fresh allegations of state collusion. It emphasised that there could always be situations after the closure of cases where "information purportedly casting new light on the circumstances of the death comes into the public domain" - para 66. And in para 70, while pointing out that the revival of the duty to investigate would not be prompted by any allegation, the court said that "given the fundamental importance of [article 2], the state authorities must be sensitive to any information or material which has the potential either to undermine the conclusions of an earlier investigation or to allow an earlier inconclusive investigation to be pursued further".

265. Clearly, therefore, it is not necessary that the new material take the form of hard evidence. Allegations, provided they are credible and have the potential to undermine earlier findings, will suffice. A reassessment of already existing evidence, if it is plausible and enjoys the same potential, will also be sufficient. While, therefore, it may be true to say that nothing substantial in the way of hard evidence was revealed in *Slaughter and Deception* or by the appellants' lawyers obtaining access to the files of the Metropolitan Police and those of the Malaysian Police, the material that they collectively provided cast an entirely new light on the decision not to hold an inquiry.

266. The impact of that new material was neatly and comprehensively stated in para 82 of the Court of Appeal's judgment:

> "Whilst developments since our critical date have been intermittent, they have yielded material which, to put it at its lowest, may cast doubt on the original account. The confessions which arose in 1969-1970 were of potential significance and remain so, not least because the investigation within which they emerged was brought to an abrupt halt. They have never been tested or discredited. The sum of knowledge has been significantly increased by the work of the Royal Malaysian Police 20 years ago but they were unable to secure meaningful co-operation from the United Kingdom authorities. Importantly, significant material from the Metropolitan Police in the 1970s and a considerable amount of potentially relevant material accumulated during the Royal Malaysian Police investigation in the 1990s has only come to the notice of the claimants in the course of, and as a result of, these proceedings. It includes statements made many years later by some of the children who were at Batang Kali at the time of the shootings. It is not suggested that the material which has emerged since

> the critical date and which, if true, discredits the official version is all inherently incredible. The fact is that it has never been tested independently. Nor has it been brought together for a singular independent assessment. Moreover, there is reason to suppose that, even now, it could be supplemented by significant pathological expert evidence following exhumation. Professor Sue Black of the University of Dundee has so opined."

267. I agree with this summary and, if a link to the triggering event had been established, I would have held that the duty to conduct an article 2 compliant inquiry had been revived.

Customary international law

268. I agree with Lord Neuberger that the appellants cannot succeed by recourse to customary international law because, at the time of the killings, the duty to investigate suspicious deaths had not been recognised as a precept of that system of law. As the Divisional Court in the present case said ([2012] EWHC 2445 (Admin), at para 105), "Any duty under customary international law must be judged at the time of the occurrence of the act about which an inquiry is sought".

269. I would be less sanguine about accepting in its entirety Lord Neuberger's second reason for rejecting the appellants' case on this ground. He relies strongly on four of the five opinions in the House of Lords in *McKerr* to support his conclusion that a rule of customary international law which decreed that deaths occurring as long ago as 1948 should be investigated ought not to be incorporated into the common law. The basis on which those opinions were expressed is that it would be inappropriate to do so where, in the words of Lord Nicholls, this would "create an overriding common law obligation on the state, corresponding to article 2 … in an area of the law for which Parliament has long legislated".

270. One can quite understand how it would be inapt to construct a common law duty to investigate which was, in effect, parallel to the statutory obligation to investigate suspicious deaths occurring within the national court's jurisdiction. But suppose that the deaths had occurred at a time when the United Kingdom had jurisdiction over the territory in which they had occurred but, at that time, there was no article 2 duty to investigate nor, when an inquest was subsequently sought, was there any statutory requirement to investigate the deaths because, for instance, United Kingdom had by then relinquished jurisdiction over the country in which they had occurred. If there was a duty to investigate under customary international law, which was current at the time that the deaths occurred, it seems to me that there would be a strong argument that such a duty should find expression in the common law. But those supposed facts are far removed from the circumstances of the present case and I need say nothing further about the matter.

Proportionality

271. Lord Neuberger has said that it would not be appropriate for a five member panel of this court to reach a final conclusion on the question whether proportionality should supplant rationality as a ground of judicial review challenge at common law. I tend to agree, although I suspect that this question will have to be frankly addressed by this court sooner rather than later. As Lord Neuberger has said, it is possibly a matter of some constitutional importance, although it is perhaps not as great as many commentators believe. Lord Neuberger also suggested that a change from irrationality to proportionality had implications which might be "very wide in applicable scope". This could very well be true but I believe that some of these have been overestimated in the past. Indeed, the very notion that one must choose between proportionality and irrationality may be misplaced.

272. Without rehearsing all the arguments which swirl around this issue and keeping in mind the perils of over simplification, it is important to start any debate on the subject with the clear understanding that a review based on proportionality is not one in which the reviewer substitutes his or her opinion for that of the decision-maker. At its heart, proportionality review requires of the person or agency that seeks to defend a decision that they show that it was proportionate to meet the aim that it professes to achieve. It does not demand that the decision-maker bring the reviewer to the point of conviction that theirs was the right decision in any absolute sense.

273. It should also be understood that the difference between a rationality challenge and one based on proportionality is not, at least at a hypothetical level, as stark as it is sometimes portrayed. This was well expressed by Lord Mance in *Kennedy v Charity Commission (Secretary of State for Justice intervening)* [2014] UKSC 20; [2015] AC 455. At para 51 he said:

> "… The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called *Wednesbury* principle: see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223. The nature of judicial review in every case depends on the context. The change in this respect was heralded by Lord Bridge of Harwich … in *R v Secretary of State for the Home Department, Ex p Bugdaycay* [1987] AC 514, 531 where he indicated that, subject to the weight to be given to a primary decision-maker's findings of fact and exercise of discretion, 'the court must … be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines'."

274. Developing this theme and touching on the subject of the innate superiority of proportionality as a tool of review, Lord Mance continued at para 54:

> "Both reasonableness review and proportionality involve considerations of weight and balance, with the intensity of the scrutiny and the weight to be given to any primary decision maker's view depending on the context. The advantage of the terminology of proportionality is that it introduces an element of structure into the exercise, by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance or benefits and disadvantages."

275. Lord Mance returned to the same theme in *Pham v Secretary of State for the Home Department (Open Society Justice Initiative intervening)* [2015] UKSC 19; [2015] 1 WLR 1591 where he said, at para 96:

> "In short, proportionality is—as Professor Dr Lübbe-Wolff (former judge of the Bundesverfassungsgericht which originated the term's modern use) put it in The Principle of Proportionality in the Case Law of the German Federal Constitutional Court (2014) 34 HRLJ 12, 6-17—'a tool directing attention to different aspects of what is implied in any rational assessment of the reasonableness of a restriction', 'just a rationalising heuristic tool'. She went on, at p 16: 'Whether it is also used as a tool to intensify judicial control of state acts is not determined by the structure of the test but by the degree of judicial restraint practised in applying it.' Whether under EU, Convention or common law, context will determine the appropriate intensity of review: see also *Kennedy v Information Comr* [2015] AC 455, para 54."

276. Lord Sumption in the same case expressed not entirely dissimilar views, saying at para 105 that "although English law has not adopted the principle of proportionality generally, it has for many years stumbled towards a concept which is in significant respects similar, and over the last three decades has been influenced by European jurisprudence even in areas of law lying beyond the domains of EU and international human rights law".

277. Lord Reed, on the other hand, was not disposed to assimilate the tests of proportionality and rationality. At para 115 of *Pham* he said:

> "That is not to say that the *Wednesbury* test, even when applied with 'heightened' or 'anxious' scrutiny, is identical to the

> principle of proportionality as understood in EU law, or as it has been explained in cases decided under the Human Rights Act 1998. In *R (Daly) v Secretary of State for the Home Department* [200l] 2 AC 532, Lord Steyn observed at para 26, with the agreement of the other members of the House of Lords, that there was a material difference between the *Wednesbury* and *Smith* grounds of review and the approach of proportionality in cases where Convention rights were at stake. In *Brind*, the House of Lords declined to accept that proportionality had become a distinct head of review in domestic law, in the absence of any question of EU law. This is not the occasion to review those authorities."

278. As in *Pham* so, probably, in the present appeal, it is not the occasion to review the authorities. Final conclusions on a number of interesting issues that arise in this area must await a case where they can be more fully explored. These include whether irrationality and proportionality are forms of review which are bluntly opposed to each other and mutually exclusive; whether intensity of review operates on a sliding scale, dependent on the nature of the decision under challenge and that, in consequence, the debate about a 'choice' between proportionality and rationality is no longer relevant; whether there is any place in modern administrative law for a 'pure' irrationality ground of review ie one which poses the question, 'could any reasonable decision-maker, acting reasonably, have reached this conclusion'; and whether proportionality provides a more structured and transparent means of review.

279. In the present case, the appellants must present their case for a proportionality review of the decision not to hold an inquiry in a context where they cannot assert that there has been interference with their right to have such an inquiry. Conventionally, of course, interference with a fundamental right has been the setting where proportionality has most frequently been considered recently – see, for instance, *R (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45; [2012] 1 AC 621, para 45; *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700, paras 20 and 74; and *R (Nicklinson) v Ministry of Justice (CNK Alliance intervening)* [2014] UKSC 38, [2015] AC 657, paras 80, 167-168, 310, 337.

280. As Lord Reed pointed out in *Pham* at para 113, it is necessary to distinguish between proportionality as a general ground of review of administrative action, confining the exercise of power to means which are proportionate to the ends pursued, from proportionality as a basis for scrutinising justifications put forward for interferences with legal rights.

281. Lord Neuberger has suggested in para 131 above that the appellants have contended that the four-stage test identified by Lord Sumption and Lord Reed in

Bank Mellat at paras 20 and 74 should now be applied in place of rationality in all domestic judicial review cases. If this is the appellants' position I question its feasibility. In the first instance there is no legislative objective and no interference with a fundamental right; secondly, it is difficult to see how the "least intrusive means" dimension could be worked into a proportionality exercise where the decision did not involve interfering with a right.

282. I envisage a more loosely structured proportionality challenge where a fundamental right is not involved. As Lord Mance said in *Kennedy*, this involves a testing of the decision in terms of its "suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages".

283. In the present case, such a proportionality challenge would require the court to assess whether the government has struck the right balance between two incommensurate values: protecting the public purse from the substantial expenditure that would inevitably be involved, with (from its perspective) little tangible or practical benefit, as opposed to exposing historic crimes by the British forces, with the associated vindication of the appellants' long-fought and undeniably worthy campaign. I have been reluctantly driven to the conclusion that, without an identifiable fundamental right in play, it is difficult to say that the decision not to hold an inquiry is disproportionate.

Jurisdiction

284. I agree with all that Lord Mance has had to say on this subject.

Conclusion

285. With regret, I have concluded that the appeal cannot succeed. This is an instance where the law has proved itself unable to respond positively to the demand that there be redress for the historical wrong that the appellants so passionately believe has been perpetrated on them and their relatives. That may reflect a deficiency in our system of law. It certainly does not represent any discredit on the honourable crusade that the appellants have pursued.

LADY HALE: (dissenting)

286. The claimants want the United Kingdom Government at long last to hold a proper inquiry into how it was that 24 unarmed rubber plantation workers were shot dead by British soldiers on 11 and 12 December 1948 during the emergency in Malaya. They want the decisions taken by the Secretaries of State on 29 November

2010 and 4 November 2011 not to hold such an inquiry or to make any other form of reparation quashed. They make their challenge under both the Human Rights Act 1998 and the common law.

The Human Rights Act challenge

287. The Human Rights Act challenge has always been ambitious. The events in question took place before the European Convention on Human Rights was adopted in 1950; before it was ratified by the United Kingdom in 1951; before it gained sufficient ratifications to come into force in 1953; before the United Kingdom accepted the right of individuals to petition the European Court of Human Rights about alleged violations in 1966; and before the Human Rights Act 1998 turned the Convention rights into rights which are binding, not only in international law, but also in United Kingdom law.

288. The claimants seek to build two bridges. The first is to carry them from the killings which took place in 1948 into the temporal scope of the Convention which came into force in 1953. They say that 1953 is the critical date for this purpose and that the killings took place sufficiently close to that date for there still to have been an obligation to investigate them after it. The second bridge must carry them from that internationally enforceable obligation into a domestically enforceable obligation under the Human Rights Act. They say that such an obligation arises because of new information which has come to light since the Act came into force.

289. It is a tribute to the skill of the claimants' legal team that these arguments have to be taken seriously. They rely crucially on the Grand Chamber decision in *Janowiec v Russia* (2013) 58 EHRR 792, which clarified the court's earlier decision in *Šilih v Slovenia* (2009) 49 EHRR 996. *Janowiec* concerned what is generally known as the "Katyn massacre" in 1940, when more than 21,000 Polish prisoners of war were summarily executed by officers of the Soviet NKVD, the predecessor of the KGB. The court might have disposed of the case on the ground that these deaths all took place long before the ECHR had been dreamt of, let alone adopted. But it did not. It acknowledged that it only had jurisdiction to examine acts or omissions taking place after the entry into force of the Convention. But it posited two circumstances in which that jurisdiction might arise even though the deaths themselves had pre-dated the critical date. The first was where there was a "genuine connection" between the death and the entry into force of the Convention. This had two components, both of which must be satisfied. First, "the period of time between the death as the triggering event and the entry into force of the Convention [was] reasonably short, and [second] a major part of the investigation [had] been carried out, or ought to have been carried out, after the entry into force" (para 148). The court had previously said that the period should be no more than ten years (para 146), although it appears that this was a maximum which might not apply in all cases. The second circumstance was "if the triggering event was of a larger

dimension than an ordinary criminal offence and amounted to the negation of the very foundation of the Convention" (para 150). The examples given were war crimes, genocide or crimes against humanity. But this "Convention values" obligation could not arise where the deaths had taken place before the adoption of the Convention, "for it was only then that the Convention began its existence as an international human rights treaty" (para 151). It would have been much simpler for us all if the Grand Chamber had applied the same logic to the "genuine connection" test. But it did not.

290. As to the first part of the "genuine connection" test, the lapse of a "reasonably short" period of time since the deaths, it seems unrealistic and artificial that so much should depend upon whether the critical date is the entry into force of the Convention in 1953, or the acceptance of the right of individual petition in 1966. As Lord Kerr has demonstrated, the jurisprudence of the Strasbourg court does not point convincingly one way or the other. But logic points strongly in favour of the former. The United Kingdom was bound by treaty to observe the Convention from 3 September 1953 and in relation to Malaya from 23 October 1953. It could thereafter have been taken to the Strasbourg court by any other member state for an alleged violation. There was no requirement that the member state or its citizens be a victim. It is difficult to see why the additional possibility of being taken to the court by an individual victim should make any difference to the obligations of the United Kingdom in international law.

291. Left to myself, therefore, I would not have been prepared to reject this claim on the ground that the critical date was 1966 rather than 1953. We do not have slavishly to follow the Strasbourg jurisprudence. Lord Bingham's famous dictum in *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323, para 20, does not require us to do so. Thus far, it is possible to discern four broad propositions from our own case law. First, if it is clear that the claimant would win in Strasbourg, then he will normally win in the courts of this country. This is because it would negate the purpose of the Human Rights Act for the claimant to have to bring a claim in Strasbourg. But this is subject to the well-known qualifications set out in *Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening)* [2010] UKSC 45, [2011] 2 AC 104, para 48 (and recently reaffirmed in *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, [2014] AC 271, para 26): that the "clear and constant" line of Strasbourg authority is "not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle". Second, if it is clear that the claimant would lose in Strasbourg, then he will normally lose here too: *R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening)* [2007] UKHL 26, [2008] AC 153 is an example where the House of Lords thought that the answer was clear. Strasbourg had drawn a line in the sand – jurisdiction was territorial, with only a very few narrowly defined exceptions, which did not apply to civilians killed in the course of military operations in Iraq. As it happened, the House was wrong about that (see *Al-Skeini v United Kingdom* (2011) 53 EHRR 589), but that does not affect the principle. Third,

there are cases where it is clear that Strasbourg would regard the decision as one within the margin of appreciation accorded to member states. Then it is a question for the national courts by which organ of government the decision should be taken: *R (Nicklinson) v Ministry of Justice (CNK Alliance Ltd intervening)* [2014] UKSC 38, [2015] AC 657 is an example of this, in which this court was divided on where responsibility lay for deciding whether the outright ban on assisting suicide was justified. Fourth, there are cases on which there is as yet no clear and constant line of Strasbourg jurisprudence. We do not have to wait until a case reaches Strasbourg before deciding what the answer should be. We have to do our best to work it out for ourselves as a matter of principle: *Rabone v Pennine Care NHS Foundation Trust (INQUEST intervening)* [2012] UKSC 2, [2012] 2 AC 72 is an example of this (an example which, as it happened, was swiftly followed by a Strasbourg decision which is wholly consistent with it: see *Reynolds v United Kingdom* (2012) 55 EHRR 1040). There may be other situations in which the courts of this country have to try to work out for themselves where the answer lies, taking into account, not only the principles developed in Strasbourg, but also the legal, social and cultural traditions of the United Kingdom.

292. As to the second part of the "genuine connection" test, that a significant part of the investigation did take place, or should have taken place, after the critical date, this depends upon whether there was an omission to act after that date. That depends upon whether "a plausible, credible allegation, piece of evidence or item of information comes to light which is relevant to the identification and eventual prosecution or punishment of those responsible". Such new material must be "sufficiently weighty and compelling to warrant a new round of proceedings" (*Janowiec*, para 144, citing *Dorado v Spain* (Application No 30141/09), (unreported) given 27 March 2012, *Çakir v Cyprus* (Application No 7864/06), (unreported) given 29 April 2010, and *Brecknell v United Kingdom* (2007) 46 EHRR 967, paras 66-72). Quite obviously, new material did come to light in 1970 when five of the soldiers admitted under caution that the villagers had not been running away but had been shot in cold blood and a sixth did not retract the sworn statement he had earlier given to the same effect. The critical question, however, is whether further new material came to light after the Human Rights Act came into force.

293. That question is critical because the second bridge, from the Convention to the Human Rights Act, depends upon it. The claimants might well have been able to complain to the Strasbourg court after the 1970 investigation was abandoned. But it is now far too late for them to do that. The time limit for complaining to Strasbourg is long gone. An individual can only make a claim under the Human Rights Act if he or she could complain to Strasbourg after exhausting the remedies available domestically. It was established in *In re McCaughey* [2011] UKSC 20, [2012] 1 AC 725 that where the death took place before the Human Rights Act came into force but a significant part of the investigation was to take place after that date, then the investigation had to comply with the requirements of the Convention. The claimants argue that the obligation also arises if, after the Act came into force, significant new information comes to light which undermines or casts doubt upon the effectiveness

of the original investigation or investigations (a possibility recognised in *McCaughey*, for example at para 93). The claimants also argue that this point was decided in their favour in the Court of Appeal.

294. The original investigation by the UK authorities in 1948-1949 was seriously defective, not least because none of the surviving villagers were interviewed, and was rightly criticised by the Divisional Court and Court of Appeal. The criminal investigation begun in 1970 as a result of the guardsmen's confessions in 1969-1970 was halted prematurely, before the Metropolitan Police could complete their inquiries by interviewing the Malaysian witnesses. The Malaysian Police conducted their own investigations from 1993 to 1996 but were unable to complete their inquiries by interviewing the British witnesses. Much of the material was first brought together and put into the public domain in the book, *Slaughter and Deception at Batang Kali*, by Ian Ward and Norma Miraflor, published in June 2009. It is unclear just how much the British authorities knew about the Malaysian Police inquiries until then, but it is clear from the précis of the book prepared for the Secretaries of State by Dr Brendan McGurk in 2009, that the authors had seen statements made to the Malaysian Police which had not been seen in either Ministry. As Lord Kerr has shown, in January 2009, the Secretaries of State were still maintaining the stance that there was nothing to gainsay the original official version of the killings, but something caused them to reconsider their decision in the course of 2009. As the Court of Appeal held, "significant material from the Metropolitan Police in the 1970s and a considerable amount of potentially relevant material accumulated during the Royal Malaysian Police investigation in the 1990s has only come to the notice of the claimants in the course of, and as a result of, these proceedings" (para 82). Amongst that material was Detective Chief Superintendent Williams' report, which revealed his view that the decision to halt the inquiry was secured by "a political change of view".

295. Against that, the Secretaries of State argue that the Court of Appeal was not there deciding that there was new information sufficient to revive the investigative obligation. They also argue that the essentials of the villagers' accounts had been reported to the Metropolitan Police in 1970 and included in DCS Williams' report. Thus, although that inquiry had not been completed, the British authorities did know all the essential points of dispute. Further, although the claimants only got access to the files in the course of the proceedings, they too knew about the soldiers' confessions from press reports and from a television documentary *In Cold Blood*, broadcast in 1992. Thus, save for minor details, there was nothing "new" about what each side was saying had taken place.

296. In common with Lord Kerr, I find this a much more difficult issue to resolve than does Lord Neuberger. Clearly, the soldiers' confessions in 1969-1970 were indeed significant new material which cast doubt on the effectiveness of the original inquiry and were sufficient to revive the obligation to investigate. It is also possible that the results of the Malaysian Police inquiries in the 1990s produced sufficient

new material to revive the obligation. It is one thing for survivors to give their accounts to journalists and quite another thing to give them to the police in the course of an official inquiry.

297. But what is meant by "new" material and "coming to light"? It appears from the reference in *Janowiec* to an "allegation, piece of evidence or item of information" that new material must be construed broadly. It is true that the bare bones of the allegations and counter-allegations were known in 1970, but there had then been no proper investigation in Malaya. Effectively there have been two separate investigations, each of one half of the picture only. They were not properly brought together until the publication of *Slaughter and Deception at Batang Kali* in June 2009. In *Harrison v United Kingdom* (2014) 59 EHRR SE1, "coming to light" was equated with coming "into the public domain" (para 51). The findings of the Hillsborough Independent Panel constituted "new evidence and information which cast doubt on the effectiveness of the original inquest and criminal investigations" (para 53). Those findings were based on all the available documentation which now included newly disclosed documents held by government departments. Thus, whatever else "coming to light" may mean, it must encompass the revelation of material which was previously known only to the relevant authorities. Hence I agree with Lord Kerr that the material collectively provided by the publication of the book and the access gained to the Metropolitan and Royal Malaysian Police files "cast an entirely new light on the decision not to hold an inquiry" (para 265).

298. But I cannot agree with him that this is not a live issue in these proceedings. In their written submissions, the claimants clearly state that they cross the second bridge, the bridge into the Human Rights Act, "because the current position is that relevant and weighty material has recently come to light, requiring investigation to discharge the article 2 procedural obligation" (para 2.2). But that question only arises if the first part of the "genuine connection" test is established and that depends upon the critical date.

299. In my view, therefore, principle dictates that the critical date is the date upon which the United Kingdom became bound in international law to observe the guarantees of human rights and fundamental freedoms laid down in the Convention; the triggering events were less than five years earlier; and significant new material has recently come to light which, to say the least, casts doubt on the effectiveness of the original inquiry and later criminal investigations. My reservations about the human rights claim are different.

300. The first is whether what the claimants want falls within the procedural obligation in article 2 at all. In *Janowiec*, the court observed that the "procedural acts" which took place or ought to have taken place after the entry into force of the Convention referred to "acts undertaken in the framework of criminal, civil, administrative or disciplinary proceedings which are capable of leading to the

identification and punishment of those responsible or to an award of compensation to the injured party" (citing *Labita v Italy* (2000) 46 EHRR 50, at para 131 and *McCann v United Kingdom* (1995) 21 EHRR 97, at para 161). The claimants do indeed seek reparation, but this is not by way of an ordinary civil action (which would have been time-barred a very long time ago) and not from the actual perpetrators, and it is now quite unrealistic to expect that anyone could be prosecuted for their part in what took place. What the claimants really and rightly want is a proper, full and fair inquiry, which will establish the truth, so far as it is possible to do so, vindicate their deceased relatives and lead to a retraction of the official account of what took place. Yet in *Janowiec*, the court went on to say that "This definition operates to the exclusion of other types of inquiries that may be carried out for other purposes, such as establishing a historical truth" (para 143).

301. My second reservation is that the logic of refusing to apply the "Convention values" test to deaths which took place before the Convention was adopted could equally well be applied to the "genuine connection" test. How can it be said that there is a genuine connection between the obligations in the Convention and the triggering event, if that event took place before those obligations were given expression in the Convention and adopted by enough states to make it potentially binding in international law? Just like the Convention values, those obligations "take their life from the Convention. They are not eroded by events which took place before the Convention itself, and the values and guarantees which it embodies, came into existence" (to quote Lord Kerr, at para 258). That to my mind is a more logical, sensible and practical solution to the question of whether there is an obligation to investigate such historic events than arid debates about the critical date. It is for that reason that I would dismiss the Human Rights Act claim.

The common law claims

302. There are three bases for the common law claims: customary international law, proportionality, and irrationality or *Wednesbury* unreasonableness. I agree that it has not been shown that, when these killings took place, customary international law had recognised a duty to investigate deaths of this sort. That is sufficient to dispose of this part of the claim and it is unnecessary to express a view on whether, in any event, such an obligation should not be recognised as part of the common law because of the long history of legislative activity governing the investigation of suspicious deaths.

303. Much of the argument before us (but not in the courts below) was devoted to whether the time had now come to recognise proportionality as a further basis for challenging administrative actions, a basis which, if adopted, would be likely to consign the *Wednesbury* principle to the dustbin of history. The claimants' principal argument (relying in particular on the work of Professor Paul Craig) was that proportionality should be adopted as the basis of challenge for all administrative

decisions. An alternative argument was that it should now be openly adopted by this court in a human rights context (relying again on those commentators, including Professor Craig, who suggest that it already applies in the context of fundamental rights).

304. This is indeed a complex issue, but I agree with Lord Kerr (para 283) that it is one thing to apply a proportionality analysis to an interference with, or limitation of, a fundamental right and another thing to apply it to an ordinary administrative decision such as whether or not to hold some sort of inquiry. The recent observations of this court on the relevance of a proportionality analysis, in *Pham v Secretary of State for the Home Department (Open Society Justice Initiative intervening)* [2015] UKSC 19, [2015] 1 WLR 1591, were in the context of stripping the claimant of his British nationality and all that goes with it, which is clearly a grave invasion of a fundamental right. The context here is, of course, the killing of unarmed civilians by British soldiers. The right to life of those civilians was undoubtedly engaged by whatever took place. Two of the four claimants were present at the scene, but the women and children were separated from the men overnight, and loaded onto a lorry to be driven away from the scene the following day. The claim of all four is as relatives of the deceased. The right which they claim is to a proper investigation and a retraction of the official explanation of what took place. But, for the reasons given earlier, that is not a right recognised by the common law or under the Human Rights Act.

305. But that still leaves the *Wednesbury* challenge. I do not think that, by concentrating on the proportionality argument, it was intended to abandon the more conventional challenge. Issue 2 identified in the Statement of Facts and Issues was whether the refusal to hold an inquiry or otherwise investigate can be justified "by the applicable standard". If not proportionality that must be *Wednesbury* unreasonableness or irrationality. The decisions in question were contained in the principal decision letter of 29 November 2010 and confirmed, after these proceedings had begun, on 4 November 2011. The reasons given for deciding not to hold an inquiry are summarised by Lord Neuberger at paras 124 and 125 and it is unnecessary for me to repeat them. I would only add that those reasons were focussed upon a statutory inquiry under the Inquiries Act 2005; but the Secretaries of State also concluded that the reasons against such an inquiry "also militate against the establishment of any other form of inquiry or investigation".

306. The Divisional Court dealt with this issue in some detail: [2012] EWHC 2445 (Admin), paras 124 to 176. The court considered five possible purposes of an inquiry, derived from Lord Howe's evidence to the Select Committee on Government by Inquiry in 2004-2005: (a) establishing the facts, (b) learning from events and preventing a recurrence, (c) catharsis and improving understanding of what happened, (d) providing reassurance and rebuilding public confidence, and (e) accountability. To this they added (vi) promoting good race relations, as required by section 71 of the Race Relations Act 1976. But the court's assessment of how an

inquiry might achieve all of these purposes was heavily influenced by its conclusion that "it would appear to be very difficult at this point in time to establish definitively whether the men were shot trying to escape or whether these were deliberate executions" (para 159). Thus the facts could not definitely be found (paras 160, 161); catharsis could not be achieved (para 165); reassurance could not be given or public confidence rebuilt (para 168); accountability could not be determined (para 169); and it could not be said whether there would be negative or positive consequences in race equality terms (para 172). In addition, times had changed so much that it was very questionable how much could be learnt (para 164); and the costs, even of a "stream-lined" inquiry, which is all the court thought necessary, were a material factor (paras 174-175). Hence the Secretaries of State had taken into account the relevant factors and reached a decision which was plainly open to them to reach (para 176).

307. The Court of Appeal was critical of the approach of the Divisional Court: [2014] EWCA Civ 312, [2015] QB 57. The difficulties of reaching "definitive" conclusions "lay at the heart of its reasoning" but this was to impose too high a threshold (para 109). Recent public inquiries, including the Shipman, Bloody Sunday and Baha Mousa inquiries, had adopted a lower and more flexible standard. Moreover, the Secretaries of State had expressly not assumed that it was unlikely that an inquiry could reach firm conclusions. Nevertheless, they took into account the evidential difficulties; considered that establishing the truth is especially important when it can cast light on systemic or institutional failings, which can then be corrected, and this is more likely where the events are relatively recent; and doubted the contemporary relevance of any findings, given how much had changed since 1948. The costs would be considerable. Overall, the conclusion was that the benefits to be gained would not justify the costs. The Court of Appeal was "satisfied that the Secretaries of State had considered everything which they were required to consider; did not have regard to any irrelevant considerations; and reached rational decisions which were open to them" (para 118).

308. One of the reasons given by the claimants for adopting proportionality instead of *Wednesbury* unreasonableness or irrationality is Professor Craig's view that "cast in its correct terms it could almost never avail claimants" (*Administrative Law*, 7th ed (2012), para 21-027) and that "it is difficult to think of a single real case in which the facts meet this standard" ("The Nature of Reasonableness" (2013) 66 CLP 131, 161). This case is an excellent opportunity to test whether that proposition is correct.

309. Any rational decision-maker would take into account, at the very least, the following salient points about the background history:

(1) The enormity of what is alleged to have taken place. If the guardsmen did indeed kill innocent and unarmed villagers in cold blood, then even

by the different standards of the time, this was a grave atrocity which deserves to be acknowledged and condemned.

(2) The inadequacy of the initial investigation. There were many people present at the scene who could have been asked for their accounts. It was totally unacceptable to assume that the guardsmen and their police escorts were telling the truth but that survivors and civilian eye-witnesses would not do so.

(3) The weight which should be accorded to the confessions made in 1970. Although originally given to a newspaper, four were repeated under caution to the police. They were enough to cast serious doubt on the official account and to prompt a serious police inquiry.

(4) The premature termination of that inquiry, which was obviously being conscientiously conducted by DCS Williams, and his view that this was a political decision, unsurprising given that it happened very shortly after the change of government in 1970.

(5) The evidence obtained from the Royal Malaysian Police inquiry in the 1990s. Although some of the relatives and survivors had previously given their accounts to others, this evidence had only recently come to light.

(6) The petering out of that inquiry, in the face, it would appear, of an unhelpful attitude of the British authorities when the Malaysian Police wished to pursue their inquiries here.

(7) The thorough analysis of all the available evidence in *Slaughter and Deception at Batang Kali*. The authors did have a particular point of view, being determined to undermine the official account, but they collected together a great deal of information and analysed it in great detail.

(8) The evidence from the archaeologist, Professor Black, as to what exhuming and examining the bodies of the deceased could show and how it would help in determining the facts.

(9) The persistence and strength of the injustice felt by the survivors and families of the men who were killed, which has led them twice to petition the Queen and to launch these proceedings.

310. Bearing all that in mind, a rational decision-maker would then consider the advantages of some sort of inquiry, in summary:

(1) The very real possibility that, despite the difficulties, conclusions could be drawn about what is most likely to have happened.

(2) The importance of the British authorities, at long last, seeking to make good the deficiencies of the past inquiries and the very real benefits this could bring in terms of catharsis, accountability and public confidence, whether or not firm conclusions could be reached.

(3) If firm conclusions could be drawn, the huge importance of acknowledging what had gone wrong and setting the record straight.

311. Against those advantages, a rational decision-maker would set the following disadvantages:

(1) The passage of time, the death of so many of the participants and witnesses, and the conflict of evidence, which would make finding the facts more difficult.

(2) The changes which have taken place in the organisation and training of the army, the climate of law and public opinion, such that it is unlikely that practical lessons could be learned about how better to handle such situations today.

(3) The cost of even a "stream-lined" inquiry, which would be not inconsiderable, involving as it would have to do inquiries to be made in Malaysia, which would depend upon the co-operation of the Malaysian authorities.

312. The reasons given by the Secretaries of State focussed on what might now be learned of contemporary relevance, either to the organisation and training of the army or to promoting race relations, from conducting an inquiry. They did not seriously consider the most cost-effective form which such an inquiry might take. They did not seriously consider the "bigger picture": the public interest in properly inquiring into an event of this magnitude; the private interests of the relatives and survivors in knowing the truth and seeing the reputations of their deceased relatives vindicated; the importance of setting the record straight – as counsel put it, balancing the prospect of the truth against the value of the truth. The Strasbourg court expressed this well in *Harrison*, at para 58:

> "Even where no article 2 procedural obligation exists, it is in the interests of governmental transparency and of justice in the wide sense for a government to arrange for a further review in connection with a national tragedy in response to concerns of victims or their families who are not satisfied with the results of the terminated investigations carried out in accordance with national law, notwithstanding that the tragedy has occurred many years earlier."

313. If the Divisional Court had not set the bar to establishing the truth so high, it might well have concluded that the value of establishing the truth, which would serve all the beneficial purposes which it identified, was overwhelming. In my view, the *Wednesbury* test does have some meaning in a case such as this. The Secretaries of State did not take into account all the possible purposes and benefits of such an inquiry and reached a decision which was not one which a reasonable authority could reach. I would have allowed this appeal.