



25 November 2015

PRESS SUMMARY

Keyu and others (Appellants) v Secretary of State for Foreign and Commonwealth Affairs and another (Respondents) [2015] UKSC 69
On appeal from [2014] EWCA Civ 312

JUSTICES: Lord Neuberger (President), Lady Hale (Deputy President), Lord Mance, Lord Kerr, Lord Hughes

BACKGROUND TO THE APPEALS

This appeal concerns the decision of the respondent Secretaries of State for Foreign Affairs and Defence to refuse to hold a public inquiry into events which took place while the UK was the colonial power in the former Federation of Malaya (now Malaysia). The UK government sent troops to the Federation in 1948 in response to an insurgency. On 11-12 December 1948, a patrol of Scots Guards killed 23 unarmed civilians in the village of Batang Kali in Selangor, one of the states of the Federation. The Appellants are related to one or more of the victims.

Following the incident, the UK government characterised the events as killings of bandits who had attempted to escape. There were subsequent calls for an investigation and, following statements by participants in the operation that the deceased had been “massacred” on orders and that those killed had not been fleeing, the Metropolitan Police began an investigation in 1969. This investigation was subsequently terminated in 1970. Allegations of unlawful killing resurfaced in 1992 with the broadcast of a BBC documentary. An investigation was started by the Royal Malaysian Police in July 1993 but subsequently closed in 1997.

On 12 December 2008, a campaign group called ‘The Action Committee Condemning the Batang Kali Massacre’ presented a petition seeking a public inquiry from the British government. The Respondents informed the Appellants by letter on 29 November 2010 and 4 November 2011 of their decision to refuse to hold an inquiry into the killings.

The Appellants applied for judicial review of the refusal to hold a public inquiry, arguing that a public inquiry was required on three different grounds: (i) under Article 2 (right to life) of the European Convention on Human Rights (“ECHR”); (ii) under the common law by virtue of its incorporation of principles of customary international law; and (iii) under the common law by judicial review of the Respondents’ exercise of their discretion under section 1 of the Inquiries Act 2005. The Respondents cross-appealed contending that the issues were not within the jurisdiction of the UK courts.

JUDGMENT

The Supreme Court unanimously rejects the Respondents’ jurisdiction argument, but unanimously dismisses the appeal on grounds (i) and (ii) and dismisses the appeal on ground (iii) by a majority of 4-1 (Lady Hale dissenting). Lord Mance gives a judgment, with which the other Justices agree, holding that the Court has jurisdiction; on the three grounds of appeal, Lord Neuberger rejects them in a judgment, with which Lord Mance and Lord Hughes agree, Lord Kerr gives a concurring judgment, and Lady Hale gives a dissenting judgment.

REASONS FOR THE JUDGMENT

Preliminary issue: Jurisdiction

The issue of jurisdiction has two strands: (i) whether the UK can be said to have been responsible for the killings; and (ii) whether the UK can be held responsible for not holding an inquiry now [152].

As to the first strand, the Respondents contended that, as the Scots Guards were operating within the constitutional framework of Selangor and the Federation, their acts were not attributable to the UK government. This argument is rejected. The Scots Guards were in the Federation in the service of His Majesty and in the interests of the United Kingdom. The powers of the British government in the Federation were not solely referable to the domestic arrangements in the Federation [187]. Those who were killed were within the British army's control at the time, whether they were seeking to escape or not [189]. Had the ECHR been in force in 1948, the killings would have occurred within the United Kingdom's jurisdiction for the purposes of article 1 of the ECHR [189-90].

As to the second strand, the Respondents contended that any liabilities or obligations which the UK may have had prior to 1957 passed that year to the newly independent Federation by virtue of article 167(1) of the Federal Constitution [154]. This argument is rejected. It is not at all clear that the actions of the UK government fell within article 167(1) as they are more properly characterised as being carried out in the interests of the UK rather than being rights, liabilities and obligations in respect of the government of the Federation as required by article 167(1) [192]. In any event, the UK government's duty to hold an inquiry, whether under domestic or international law, could not be released on the basis that the independent Federation had been a successor state to the UK as a matter of international law, even if this were the case [197].

Ground (i): Article 2

The ECHR came into force for the UK on 3 September 1953 and was extended to the Federation of Malaya on 23 October 1953. The UK recognised the right of an individual to petition the European Court of Human Rights ("ECtHR") on 14 January 1966. The Respondents argued that the Appellants had no article 2 claim because the killings occurred before the ECHR came into force in the UK.

Article 2 creates a separate and autonomous duty on a state to carry out an effective investigation into any death which occurs in suspicious circumstances [69]. While the general principle is that the ECHR is not retrospective, article 2 could create obligations for a state to investigate a death which occurred before the date of the entry into force of the ECHR ("the critical date") where there exist: (i) relevant acts or omissions after the critical date; and (ii) a genuine connection between the death and the critical date [71-72].

The first criterion was satisfied in the present appeal because there had been no prior full or public investigation of the killings and no publicly available evidence from any member of the patrol to suggest that the killings had been unlawful prior to 1969 and 1970, and the evidence which subsequently came to light in 1969 and 1970 appears to have been compelling and suggests that the killings were unlawful [75].

As to the second criterion, in order for there to be a genuine connection, the lapse of time between the death triggering the investigative duty and the critical date must remain reasonably short, and should not exceed ten years [76]. As to the question of whether the critical date is the date of the coming into force of the ECHR or the date when the right of petition was recognised by the UK, the majority holds that it was the date when the right of petition was recognised that is the relevant critical date [81, 87]. On this basis, as the killings occurred more than ten years before the critical date, there is no genuine connection and the article 2 claim must fail [88-89].

Lord Kerr and Lady Hale come to the same conclusion but for different reasons. Lord Kerr considers that, as there was no clear guidance from the ECtHR as to which of the two dates was the relevant critical date, the Court could not say that the ECtHR would have concluded that the date of the coming into force of the ECHR is the critical date [239]. Lady Hale considers that the critical date is

the date that the ECHR came into force [290-291, 299] but would dismiss the article 2 claim, because (i) the inquiry is sought for the purposes of establishing historical truth rather than legal liability [300]; and (ii) as a matter of principle, there is a difficulty in finding that there could be a “genuine connection” between killings which occurred before the coming into effect of the ECHR and obligations imposed by the ECHR [301].

Ground (ii) Duty to hold an inquiry under the common law by virtue of incorporation of principles of customary international law

It is only within the last 25 years that international law has recognised a duty on states to carry out formal investigations into at least some deaths for which they were responsible and which may have been unlawful. The fact that the killings took place before this requirement became a part of customary international law means that the duty could not be relied upon [115], even where there are strong reasons for believing that a war crime had occurred [112, 268].

Further, even if a duty existed, such a requirement could not be implied into the common law [112]. Parliament has expressly provided for investigations into deaths through the coroners’ courts, the Inquiries Act 2005 and the incorporation of article 2 of the ECHR through the Human Rights Act 1998. In these circumstances, it would be inappropriate for the courts to take it upon themselves to impose a further duty, particularly one with such potentially wide and uncertain ramifications [117, 151].

Ground (iii) Judicial review of the Respondents’ failure to hold an inquiry under section 1 of the Inquiries Act 2005

Applying the ordinary principles of judicial review, the majority considers that the grounds for the decision contained in the Respondents’ letters to the Appellants informing them of the Respondents’ decision not to hold an inquiry were not unreasonable and thus not open to challenge [129]. Had the decision not to hold an inquiry been reviewed on the standard of proportionality, the conclusion would have been the same, namely that the decision was not disproportionate [139, 143, 283].

Lady Hale (dissenting) considers that the decision of the Respondents was one which no reasonable authority could reach [313], because the Respondents did not consider 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 the importance of setting the record straight [312]. In this case, the value of establishing the truth was, in her view, overwhelming [313].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>