The Collapse of the Kenyan Emergency Group Litigation

Causes and consequences

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The collapse of the Kenyan Emergency Group Litigation: causes and consequences

The ongoing pursuit of historical allegations against UK forces represents a failure on the part of the British state to protect those it asks to serve. Those who object to the unfairness of this trend, whether in relation to veterans who served in Northern Ireland or elsewhere, should welcome last month's decision by the High Court to dismiss the long-running group litigation arising out of the Kenyan Emergency (the Mau Mau insurgency) from 1952 to 1962.

The Foreign and Commonwealth Office had faced claims for damages from over 40,000 people for abuses alleged to have been committed during that period. While some abuses undoubtedly took place, the UK has always denied legal liability for wrongdoing. In view of the scale of the litigation, if the claims had been successful, damages against the Government might have run to hundreds of millions of pounds.

The litigation is amongst the most high-profile and significant challenges to alleged historic wrongdoing on the part of the UK and its forces. Its conclusion is important not only in its own right but also for the light it sheds on how our law handles claims arising out of other conflicts.

This was one of the longest-running civil trials in British legal history. It began in May 2016 and ran for over 230 days, with the judge hearing evidence in relation to 25 test cases. The judge heard oral evidence from more than 40 witnesses for the claimants (including the test claimants) and from about 30 witnesses for the Government, as well as considering more than 3,500 documents of the 40,000 or so that had been disclosed. In a judgment in August, the judge dismissed a first test case. On Wednesday 21 November he ruled on a second, dismissing it along with the other test cases. Under the group litigation arrangements, the remaining claims thereby came to an end.

The Limitation Act 1980 imposes a three-year time limit on personal injury claims. Section 33 of that Act gives the Court a wide discretion to waive this limit if it is equitable to do so. Whatever Parliament may have intended in 1980, this discretion has at times been used to permit claims to proceed despite extensive and problematic delay. However, in his judgment in August and again last Wednesday, Mr Justice Stewart concluded that the long delay in bringing these claims to trial meant that it was impossible for them to be decided fairly. The passage of time seriously compromised the Government's ability to defend itself: notwithstanding spending considerable time and money to retrace events

from half a century ago, there remained very large gaps in the evidential record, which would prejudice a fair trial.

The delay in bringing the claims to trial also meant that the evidence brought forward on behalf of the claimants was less compelling – and less capable of corroboration – than might otherwise have been the case. The judge noted some apparent inconsistencies in evidence, but his main conclusion was that the delay made it virtually impossible for the Government to investigate the claims adequately, to trace relevant witnesses, whose memories will in any case inevitably have faded over time, or to recover vital documents. Allowing such a claim to proceed, he said, "would be like putting to sea in a sieve".

This sensible ruling brings this sprawling litigation to an end. The claimants' lawyers were working on a "no win, no fee" basis, so will not be compensated for their six years of work on this case. Equally, however, there is little hope of the Government recovering any of the vast sums it spent defending the claim, let alone the costs to the taxpayer of court time. Still, one hopes this outcome may deter other attempts to litigate the distant past and, especially, to impose legal liability on the Government, and/or on soldiers or policemen, for actions taken in conflict situations so many years ago.

The Kenyan claims concerned actions from at least half a century ago. Alleged wrongdoing in Northern Ireland is not quite so old and issues such as record preservation and language barriers do not arise in the same way, but 45 years is more than enough time for memories to fade and key witnesses to disappear. The risk of unfair trials is very real. The problem is even worse when allegations are made for the very first time decades after the fact, as for example in the case of General Sir Frank Kitson who, with the Ministry of Defence, now faces a civil claim (negligence) in relation to the murder of Eugene "Paddy" Heenan in Northern Ireland in 1973. In relation to allegations arising out of action in Iraq and Afghanistan, the problem of delay is not yet so pronounced – but the difficulties of gathering evidence in a warzone, and the strategic use of litigation by some enemy combatants, pose major risks to the fairness of trials.

The Kenyan Emergency litigation, as with other legal challenges arising out of UK military action in Malaya and Cyprus, amongst other conflicts, has contributed to the perception that UK forces, as well as the Government itself, remain at legal risk long after they have acted. The seemingly inexorable expansion of litigation against UK forces is likely to undermine recruitment, retention, morale, and operational effectiveness, as General David Petraeus stressed in a cross-party event held at Policy Exchange last month. Wednesday's judgment is a welcome, if rare, reversal of this trend. It may

discourage law firms from mounting other such challenges but it should also prompt us to think further about procedural safeguards in historic allegation cases.

Parliament should consider amending section 33 of the Limitation Act to impose clearer limits on the discretion it confers. The problem is at its most vivid in relation to armed forces and police, who may be pursued by civil claims decades after they served, including in relation to events investigated at the time. Parliament should consider enacting a statute of limitations in relation to criminal actions arising out of deaths and injuries caused by armed forces and police. It should also consider reviving the Crown's immunity from liability in tort in relation to death or injury suffered by a member of the armed forces on active deployment and extending this immunity to lawsuits arising out of death or injury caused by the armed forces in the course of duty. The Human Rights Act 1998 should be amended to prevent similar claims proceeding by a different means. Protecting UK forces from unfair risk of charge and trial may also require legislation to authorise law officers, accountable to the Westminster Parliament, to intervene in proceedings to halt criminal and civil action against former soldiers.

None of this means that UK forces are or should be above the law. They rightly adhere to the law of armed conflict, which is secured in practice by service law and the criminal law. However, like other persons, and indeed like the Government itself, they are also entitled to the protection of the rule of law and should not be tried unfairly or pursued by way of inappropriate legal processes. Civil and criminal trials decades after the fact risk precisely this unfairness.