The hooded men judgment

**Friday 27 October 2017**

**COURT DELIVERS “HOODED MEN”” JUDGMENT**

Summary of Judgment

Mr Justice Maguire,, sitting today in the High Court in Belfast,, quashed the PSNI’s decision not to take further steps to investigate the question of identifying and,, if app ropriate,, prosecuting those responsible for criminal acts during the interrogation of the “hhooded men””..

The proceedings were triggered by the PSNI’s decision in 2014 that there is no evidence to warrant an investigation into the allegation that the UK G overnment authorised the use of torture in NI in 1971.. The applicants are Francis McGuigan (oone of the “hhooded men””)) and Mary McKenna,, the daughter of Sean McKenna deceased,, another of the hooded men . As well as seeking a ju dicial review of the PSNI’s decision , the applicants also challenge d decisions of the Chief Constable,, the Department of Justice and the Northern Ireland Office (““tthe respondents””)) as constituting a continuing failure to order and ensure a full,, independent and effective investigatio n into torture at the hands of the UK Government and//oor its agents in compliance with Articles 2 and 3 of the Convention,, common law and customary international law..

**Background**

In August 1971,, the Northern Ireland Government,, following a meeting in Lon don between the NI and UK Governments,, concluded that it was necessary to introduce a policy of detention and internment of persons suspected of serious terrorist activities.. The target of the policy was the IRA and in the period leading up to the introdu ction of internment the RUC,, in consultation with the British Army,, prepared lists of persons to be arrested.. The first internment operation,, “OOperation Demetrius””,, began at 4 am on 9 August 1971 and led to the arrest of some 350 people.. Of these,, 12 men were taken to a British Army facility for “iinterrogation in depth”” which took place between 11 and 17 August 1971.. Arrests continued to be made and in October 1971,, two further men were selected to undergo in - depth interrogation which took place between 11 and 18 October 1971..

The decision to conduct deep interrogation was said to have been made by the NI Government in concurrence with the UK Government.. The deep interrogation process involved five techniques:: prolonged hooding,, subjection to continuou s loud noise,, sleep deprivation,, deprivation of food and water,, and the maintenance of stress positions over long periods of time.. The British Army had been requested in March 1971 to provide advice to the NI authorities about the establishment of an inte rrogation centre and the British M ilitary’s English Intelligence Centre provided training to members of the RUC at a seminar in April 1971.. The techniques had been used in numerous former British colonies.. Military Standing Orders were drawn up to govern the operation of the interrogation centre and the

conduct of the interrogations and specific orders were given to ensure that the interrogations were conducted in accordance with Joint Intelligence Directive JIC 65((115))..

Within a few days of Operation Dem etrius,, there were allegations by and on behalf of those detained of physical brutality and ill - treatment.. On 31 August 1971,, the UK Home Secretary,, Reginald Maudling,, appointed a Committee of Inquiry under the chairmanship of Sir Edmund Compton (““tthe Com pton Inquiry””)) to investigate the allegations of ill - treatment.. It found that the in - depth interrogation by means of a combination of the five techniques constituted physical ill - treatment but not brutality.. The Committee did not examine who authorised t he use of the techniques.. Nor did it explore issues relat ing to the identification or punishment of those responsible for what occurred..

On 16 and 17 November 1971,, the Home Secretary told the House of Commons that there was no evidence of “pphysical brut ality or torture”” and announced the establishment of a further committee,, chaired by Lord Parker (““tthe Parker Inquiry””)) , to explore whether a policy change was required.. During this debate,, the Secretary of State for Defence was asked whether ministers at Westminster knew that in - depth interrogation was taking place.. He said “tthe formal authorisation to remove certain detainees to the interrogation centre was necessarily given by the Northern Ireland Minister for Home Affairs,, with the knowledge and concu rrence of Her Majesty’s Government.. Ministers knew that the interrogation would be conducted within the guidelines laid down in 1965 and 1967 and that the methods would be the same has had been used on numerous occasions in the past””..

The majority Parker I nquiry team concluded that the application of the techniques,, subject to recommended safeguards against excessive use,, need not be ruled out on moral grounds and that they could be used in limited circumstances and with the express authorisation of a Min ister.. The majority also did not make any express findings on whether or not the use of the techniques had been authorised in advance by a UK Minister.. However,, both majority and minority reports acknowledged that some,, if not all,, of the techniques in u se involved unlawfulness and the possible commission of criminal offences..

The Parker report was published and debated in Parliament on 2 March 1972 and on the same day the Prime Minister stated that the techniques would not be used in future as an aid to interrogation.. He further stated that if a Government did decide that additional techniques were required for interrogation,, they would probably have to come to the House of Commons to ask for the requisite powers..

All 14 men who were subjected to the deep interrogation methods brought civil claims for damages directed against Ministers.. These were settled and compensation of between £110,000 to £225,000 was awarded..

On 16 December 1971,, the Irish Government submitted an application to the European C ommission for Human Rights against the UK (““ the Ireland - U K i nter - State case””)) on the grounds that the persons detained were subjected to treatment in breach of Article 3 carried out by the security forces of the UK,, that their treatment constituted an admi nistrative

practice and a continued series of executive acts exposing a section or sections of the population to torture or inhuman and degrading treatment.. Insofar as the case involved the issue of deep interrogation it centred on the question of the su bstantive breach of the requirements of Article 3 ECHR,, including the issue of whether the State was engaging in an administrative practice.. The overall issues were subjected to careful consideration and evidence taking,, albeit on a limited scale.. Ultimate ly,, the UK Government conceded the administrative practice point but contested the issue of the impact of deep interrogation on the mental health of the individual s .

While both the Commission and subsequently the European Court of Human Rights ( “ ECtHR””)) f ound that the UK had substantively breached Article 3 in the context of deep interrogation,, the emphasis was different as between the two with the Commission viewing what had occurred as amounting to inhuman and degrading treatment and torture whereas the ECtHR declined to make any finding of torture.. Notably,, the ECtHR’s conclusion was reached in circums tances in which the UK had not contested the Commission’s finding in respect of torture..

Neither the Commission nor the ECtHR focussed to a substantial degree on the question of the effectiveness of any official investigation on the part of the UK authorities in the context of bringing those responsible for what occurred to justice.. Only a very limited finding was made by the Commission about the psychia tric effects arising from deep interrogation,, though it acknowledged that on this issue there was disagreement between the psychiatrists on either side.. The Commission said it was unable to establish the exact degree of psychiatric after - effects which the use of the techniques had.. However it accepted that some after - effects resulting from the application of the techniques could not be excluded.. This position was adopted later by the ECtHR .

T he ECtHR held that it did not have the power to direct the UK to institute criminal or disciplinary proceedings against those members of the security forces who had committed acts in breach of Article 3 or against those who condoned or tolerated such breaches..

Following the end of the i nter - State proceedings before t he ECtHR in 1978 the issue of what had happened to the “ hooded men ” lay dormant.. While issues arose within the UK Government in the early 2000s as to the disclosure of official public records relating to the use of deep interrogation in 1971 , the discussio n was conducted privately.. In January 2003,, some documents were deposited in the UK National Archives but went un - noticed until identified in 2014 by researchers from the Pat Finucane Centre,, the NUI Galway and RTÉ..

In June 2014,, RTÉ broadcast a docume ntary which referred to materials it said were newly discovered and which had not been before the Commission and ECtHR.. The documentary asserted that torture had been authorised at the time by a UK Government Minister and that the UK Government had withhe ld evidence from the Commission and ECtHR which tended to undermine the UK case that the after - effects of the use of the five techniques were not long lasting or severe.. In particular,, the programme referred to a memorandum written by Merlyn Rees,, the n Ho me Secretary on 31 March 1977 (““tthe Rees memo””)) which gave rise to

a claim that Lord Carrington,, then Defence Secretary,, had in 1971 authorised torture.. The memo to the Prime Minister stated:: “IIt is my view (cconfirmed by Brian Faulkner before his death)) that the decision to use methods of torture in Northern Ireland in 1971//772 was taken by Ministers – in particular Lord Carrington,, then Secretary of State for Defence””.. This memo,, however,, was followed up by a letter from Merlyn Rees dated 18 April 1977 in which he said:: “II would accept that in discussing the situation in 1971//772 I compressed the record too starkly.. It would have been better had I referred to a decision to use interrogation in depth … rather than referring to a decision to use methods o f torture at that time””..

The RT É broadcast led to questions being asked at the Northern Ireland Policing Board i n July 2014 about what steps the PSNI proposed to take,, in particular in relation to the allegation that torture had been authorised by a UK Go vernment Minister.. The Chief Constable in response to a written question said the police would assess any such allegation and,, if there was sufficient evidence,, the question of prosecution could be considered..

**Ministerial Knowledge//AAuthorisation**

The broad official line in 1971 was that the use of the deep interrogation techniques was authorised both by the authorities in the UK and by the authorities in NI.. Authorisation,, it was said,, occurred at a “hhigh level”” or it was said that steps were taken by the N I Government with the concurrence of the U K Gover nment.. The role of i ndividuals was not highlig hted but there was evidence which support ed the view that the then Secretary of State for Defence and the Home Secretary discussed the “iintelligence dividends which would be expected to be obtained through interrogation”” and neither demonstrated any dissat isfaction with the situation.. The evidence also indicated that the NI Minister for Home Affairs had been extensively briefed on the techniques of interrogations and had authorised the removal of each of the persons who was to undergo the process..

**The Iss ue of Possible Prosecutions Arising from the Events**

This issue appears to have been considered at a relatively early stage after the use of the deep interrogation methods came to light.. Documentary evidence was before the C ourt which showed that at some stage in or around the period when the interrogation was planned , or was being used , or in its immediate aftermath,, the RUC received assurance that

1 The RTÉ journalist stated in her affidavit that she had accessed the Rees memo in a Ministry of Defence file in the UK National Archives..

The PSNI deployed a researcher to carry out an investigation at the National Archives to look for documentation which may explain whether or not the use of torture had been authorised.. The researcher was unable to locate the Rees memo and was told “iit had most likely been returned to the original d epartment””

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. He reviewed a range of documents and c oncluded that there would be no useful purpose served by taking the investigation further.. This resulted in two Assistant Chief Constable s stating in October 2014 that the evidence to support an allegatio n that the UK Government had authorised torture had not been found.. These statements generated this litigation..

its officers , provided they acted in line with the JIC Guidelines,, would not face legal sanction.. The detai l of th e assurance from the evidence is unclear .

**Legal Issues before the Court**

The Court identified three main issues::

• “TThe Convention Issue””:: T he applicants allege that the respondents are guilty of failing to ensure that an effective investigation is carried out relating to the performance of the UK of its procedural obligation under Article 3 (oor in the case of the second applicant,, Articles 2 and 3)).. It is further alleged that there is a duty enforceable in domestic law on the State to carry out a n effective official investigation into the treatment of the “hhooded men”” which is capable of leading to the identification and punishment of those responsible for the methods which were used..

• “TThe Common Law Issue””:: The applicants allege that,, even if th e Convention as a matter of domestic law does not require the steps referred to above to be taken,, as a matter of common law such steps are required..

• “TThe Independence Issue””:: Both applicants suggest that if the court finds that an effective official inve stigation must be conducted by the State,, the PSNI should not be permitted to carry it out as it lacks the requisite measure of independence required by the Convention..

Part E of the judgment sets out the legal landscape as it affects these issues . It ci tes authorities showing how the higher courts have addressed the issue of the efflux of time between the key events occurring and the initiation of proceedings,, the discovery of new material and the requirement for an independent investigation..

**The Conv ention Issue**

The first issue addressed by the Court was whether there has been a breach of Articles 2 and 3 of the Convention on the facts of the applicants’’ cases upon which a domestic court can rule.. In doing so,, it considered two questions:: whether i t is likely that the ECtHR would find a breach and whether it is open to the High Court to hold that there is a breach..

The court said it would expect the ECtHR,, in cases of this type where a temporal problem exists,, to consider whether there is a “ggenuin e connection”” between the triggering event (iin this case the early 1970s)) and the entry into force of the Convention in the UK (iie 2 October 2000 - the date when the Human Rights Act 1998 (““HHRA””)) came into force)).. Case law from the ECtHR states that the l apse of time between these dates should be “rreasonably short”” - generally a period not exceeding 10 years though there may be some room for an element of flexibility.. The Court said that the distance in time in these cases is “ssimply too long to establish the existence of a genuine connection::

“TThe gap is upwards of 40 years which exceeds by a wide margin the norm of 10 years,, even if this period was made the subject of a generous extension””..

The Court found that the great bulk of activity in this case oc curred in the period 1971 - 1978 when there were two Inquiries and investigations carried out by the Commission and the ECtHR.. There was then a long period where issues were dormant.. On this basis,, it concluded that the two aspects of the “ggenuine connecti on”” test have not been passed..

The Court then considered the “CConvention v alues t est”” which deals with extraordinary cases which have failed the “ggenuine connection”” test.. Fulfilment of this test is not easily achieved and constitutes an “eextremely high hurdle””.. The Court said there is little in the way of precedents to serve as guidance and for this reason it would tread warily.. It noted that if the events at issue in this case were to be replicated today the outcome would probably be that the ECtHR wo uld accept the description of torture in respect of these events as accurate :

“ In recent times there is universal condemnation of torture and the principle of proscribing it is viewed as a peremptory norm which cannot be deviated from.. These points suppo rt a conclusion that the sort of activity with which this case is concerned has a larger dimension tha n an ordinary criminal offence and would amount to the negation of the very foundations of the Convention.. ”

The Court concluded that the Convention value s test is passed on the facts of this case..

The Court then considered whether the Brecknell test is met.. The Brecknell doctrine states that where there is a plausible or credible allegation,, piece of information or item of relevance to the identification and eventual prosecution or punishment of the perpetrator of an unlawful killing,, the authorities are under an obligation to take further investigative measures.. In this case,, the Court considered whether the material exposed in the RTÉ programme could b e said to come within th is description.. It was satisfied that the material,, which encompassed more than the “RRees memo””,, falls within the broad description referred to in Brecknell and,, accordingly,, is sufficient to cause a revival of the obligation unde r Article 2 to carry out an effective official investigation :

“TThis conclusion,, however,, indicates no more than the existence of an obligation to take further investigative measures.. The obligation engendered is on the authorities to take reasonable step s in the circumstances which have arisen.. It,, therefore,, will plainly be a matter for them to determine how any further inquiries are to be conducted in the light of the lapse of time;; the availability of witnesses;; the ability of witnesses to recall even ts;; and the credibility of the new evidence upon initial investigation.. The prospects of the success of any prosecution in a case of this vintage also seems to the

court to be a factor of no little importance . The C ourt concludes that it is likely the EC tHR would regard these cases as ones in which the Articles 2 and 3 obligations remain to be fulfilled .””

“GGiven the stance of the Court of Appeal in this j urisdiction,, it seems that the above approach applies a fortiori to this Court,, which will therefore adopt the same approach.. On temporal grounds the Court will,, therefore,, hold that for the time being McKerr remains good law and that it should apply to t he matters before this Court,, even if the Strasbourg Court would not take the same view..””

The Court concluded the Convention issue in favour of the respondents and held that,, as a matter of domestic law Articles 2 and 3 are not engaged in this case becaus e of the temporal restriction on the operation of the HRA..

**The Independence Issue**

The Court said that , in light of its conclusion about the Convention issue,, this ground of challenge must also fail and similarly be determined in favour of the responden ts.. The Court decided,, however,, to express a provision al view on the issue independence in case it is wrong in its finding in respect of the Convention issue .

The question which arises is whether th e PSNI i s compromise d in carrying out an investigation a s it has officers within its ranks who served in the RUC,, including the Chief Constable.. The Court said it ha s to view the circumstances in the round and it would be artificial today to seek to draw a rigid distinction for the purpose of an investigation between those who directed the use of deep interrogation both in London and Belfast and those who actually were engaged in the process of implementing what was directed.. The proposal that the s uccessor to the RUC should be the investigator is understandabl y controversial . The Court said it was doubtful that anyone would see an investigation by the

2 In re Geraldine Finucane [22017]] NICA 7

The final qu estion to be considered by the C ourt , however,, was whether there is an obligation to investigate in the context of Articles 2 and 3 as a ma tter of domestic law in this sort of case where the key events took place prior to the commencement of the HRA.. The Court said this is an area where the higher courts have already been extensively involved.. The most recent approaches by the Courts of App eal in E&&WW and NI led it to the conclusion that the decision in McKerr remains the relevant governing authority and therefore no obligation under Articles 2 or 3 can be held to operate under the HRA as a matter of domestic law as the events the court is de aling with long pre - date 2 October 2000 . The Court cited a decision in the NI High Court which indicated that when faced with decisions of the English Court of Appeal the NI court is not strictly bound by them but should afford great respect and will habi tually follow them.. It was noted that the NI Court of Appeal in the case of In re Finucane

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was clearly minded to leave the issue of whether McKerr remains good law for another date in the Supreme Court::

RUC as appropriate and as not infringing the independence criterion,, both on grounds of lack of hierarchical independence and on grounds that public perception of unconscious bias would unacceptably damage public confidence in the outcome..

The Court considers there is a likely breach of t he independence requirement if the PSNI decide itself to investigate this case for the following reasons::

• The PSNI still has a substantial number of officers who in the past have served in the RUC.. T here are officers of the RUC who might even be serving now in the PSNI who could be the subject of investigation or who may in the past have served with officers who may be charged with the investigation..

• Public confidence would best be served by transparent investigation.. I t would be expected that investigati ons into police officers who had served in the RUC and who now served in the PSNI would have their cases considered by the Police Ombudsman..

• If the PSNI is to be the investigative agency in respect of those who authorised the deep interrogation process thi s,, especially in NI , would be detrimental to the goal of securing the requisite public confidence needed to sustain such an investigation.. The position of the PSNI in dealing with legacy cases generally has been the subject of substantial question marks i n recent years.. The present case is one which involves a notorious chapter in the history of the troubles in Northern Ireland and the level of scrutiny required and the identity of the scrutiniser against this background requires heightened care..

• T here ha s been considerable public concern about the quality of investigations into troubles related deaths,, including investigations carried out by the H ET .

• T he preliminary investigation carried out in 2014 “ does not inspire confidence ” .

While the Court’s view is *obiter* in this case,, it considers that if Article 2 (oor Article 3)) applied in this case and an effective official investigation remained to be delivered,, the PSNI should be viewed as lacking the requisite independence to carry out necessary investigatio ns into the issues in these cases..

**The C ommon L aw I ssue**

T he applicants claim that quite apart from any issue of Convention law,, there is an obligation of a broadly parallel nature at common law which requires an effective official

3 In Re McQuillan’s Application [22017]] NIQB 28,, the High Court issued a declaration that the PSNI lacked the necessary element of independence to carry out an investigation into the circumstances surrounding a death in 1972.. The respondents have appealed the decision but the appeal has yet to be heard..

The issue of whether the position of the PSNI can be said to be sufficiently detached from the position of the RUC is the subject of a forthcoming appeal

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. T he C ourt decide d not to delay judgment pending the outcome of the appeal as it has already decided against the app licants on the McKerr point and said it would advance its own provisional view of the independence issue..

investigation into a de ath or an event involving inhuman or degrading treatment or torture.. T he C ourt was not persuaded that there is.. T his issue was considered by the House of Lords in In Re McKerr and the argument that there existed a parallel common law obligation to Articl e 2 of the Convention’s procedural obligation was rejected explicitly in four of the five speeches . The C ourt could see no reason why the reasoning contained in McKerr should not equally apply to Article 3 .

**Has there been a breach of customary internat ional law??**

The second applicant contend s that,, in respect of torture,, an issue arises as to whether customary international law has the effect of requiring,, as a matter of common law,, a parallel effective official investigation.. The court rejected this cl aim,, referring to the decision of the Supreme Court in the case of Keyu which dismissed a similar claim in respect of the investigation of deaths at the hands of the British Army in 1948 in the State of Selangor . The prin cipal reasons for the Supreme Court ’ss decision were that the customary international law obligation emerged only in the last 25 years and that even if international law required such an investigation,, this could not be incorporated into the common law when the ground was occupied expressly by relevant statutory law (iin particular the HRA)) .

**Rationality**

T his head of challenge relates to the way in which the PSNI dealt with the events which occurred in the aftermath of the RT É programme in June 2014 . In response to a written question by Gerry Kelly MLA,, t he Chief Constable re plied that the PSNI would assess any allegation or emerging evidence of criminal behaviour with a view,, *inter alia* , to possible prosecution.. On the same day there was an oral exchange at the Policing Board along the same lines between Catriona Ruane MLA and the Chief Constable.. On this occasion ACC Harris also became involved.. He indicated that an investigation within Crime Operations had begun and that what the police were seeking to do was to actually source the doc ument at the centre of the enquiry (tthe ‘RRees Memo’’)).. The police,, it was said,, would then look for other documentation that would tend to confirm or clarify what was in the document which had been provided to them.. This was an exercise which was said to be ongoing and it was expected that once it had been carried out the police would take advice from the PPS.. A member of the HET staff had been nominated as the researcher for this purpose,, as he had familiar ity with this type of historical exercise..

The res earcher reviewed documents at the National Archives and concluded that the Rees memo when read in context did not substantiate any allegation that Lord Carrington had authorised torture while he was in government and that no useful purpose would be served by taking the matter further.. The researcher’s report was considered by senior officers and in letters from ACC Harris and ACC Kerr dated October 2014 they stated that the research had “nnot identified any evidence to support the allegation that the Britis h Government authorised the use of torture in Northern Ireland””..

The applicant claims that this was a n unreasonable decision which had the effect of bringing the investigation of the matter by the police to an end prematurely.. The PSNI submitted eviden ce to the Court to the effect that further materials had been located by the NIO and that the PSNI “wwill review and examine any additional material to identify whether it provides credible evidence of criminal offences having been committed and,, if so,, by whom,, which may substantiate the allegations that Ministers or other persons were engaged in criminal behaviour””.. The outcome of this review was not provided to the C ourt and it therefore concludes that it has either yet to take place or yet to conclude..

The Court said this describe s a “ sorry state of events ” : “TT he investigation carried out by the researcher appears to have lacked focus . This may have been because the Policing Board members raised an allegation directed only at Lord Carrington as being the authoriser of methods of torture,, or it may have been that the officers responsible for tasking the researcher limited his task more than they needed to ” . The Court said the investigation should have been aimed at identifying evidence of criminal beha viour and it is difficult to see why it would not have examined the more general issue of the official authorisation of unlawful methods of deep interrogation,, which were capable,, in many instances,, of being regarded as criminal assaults :

“ Such an investi gation would,, in the circumstances,, have involved the question of the involvement of Lord Carrington,, but it would also have involved the role of others as well.. An investigation which was much more widely drawn,, in line with known information at the time , would have been the more obvious step for the PSNI to have initiated,, rather tha n such a narrowly based inquiry as that which occurred . Given the narrowness of the inquiry which the researcher carried out,, with the emphasis being placed so significantly on the use of the word ‘ttorture’’ as its guiding light,, it is perhaps not that surprising that a very limited outcome was arrived at.. While the researcher possibly may have regarded himself as obliged to carry out no more of an inquiry than he did,, it is difficult to see why senior officers,, ultimately concerned with whether to end the investigation or to take it to the next stage,, should have chosen the former course,, given that it was plain that the methods used were unlawful and were capable of being vi ewed as criminal and given that no - one heretofore had been identified for potential prosecution in respect of this matter.. ”

The Court consider s that the decision to end the inquiry at the point when it was made was seriously flawed and was inconsistent wi th the broad approach which the Chief Constable had adopted.. It quashed t he decision made by the PSNI in October 2014 not to take further steps to investigate the question of identifying and,, if appropriate,, prosecuting those responsible for criminal act s and held that a completely fresh decision process should begin..

**The issue of whether the European Commission and Court of Human Rights were misled**

This issue h as been raised in the second applicant’s case only.. T he Irish Government has applied to the Strasbourg court to re - open the inter - State case to consider this very issue and t he process of responding to that request is currently before the ECtHR.. In these circumstances the C ourt decline d to deal with this issue and offers no comment on it..

**Concl usions**

The Court quashed the decision made on behalf of the PSNI in October 2014 not to take further steps to investigate the question of identifying and,, if appropriate,, prosecut e those responsible for criminal acts.. The Court said this means that the q uestion should be revisited but did not prescribe how the issue should be taken forward..

The Court dismissed all other grounds of judicial review against the respondents..

**NOTES TO EDITORS**

1.. This summary should be read together with the judgment and shou ld not be read in isolation.. Nothing said in this summary adds to or amends the judgment.. The full judgment will be available on the Court Service website (

www..ccourtsni..ggov..uuk

)..

**ENDS**

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