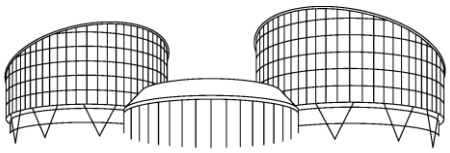

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF DONOHOE v. IRELAND

(Application no. 19165/08)

JUDGMENT

STRASBOURG

12 December 2013

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Donohoe v. Ireland,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Mark Villiger, *President,*
Ann Power-Forde,
Ganna Yudkivska,
André Potocki,
Paul Lemmens,
Helena Jäderblom,
Aleš Pejchal, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 12 November 2013,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 19165/08) against Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Irish national, Mr Kenneth Donohoe ("the applicant"), on 8 April 2008.

2. The applicant was represented by Ms C. Almond, a lawyer practising in Dublin. The Irish Government ("the Government") were represented by their Agent, Mr P. White, of the Department of Foreign Affairs.

3. The applicant complained under Article 6 of the Convention that his trial was unfair because of the non-disclosure of the sources of the evidence of a Chief Superintendent without adequate counterbalancing measures.

4. On 4 January 2012 the application was communicated to the Government.

5. Written submissions were received from the Irish Human Rights Commission, which had been granted leave by the President to intervene as a third party (Article 36 § 2 of the Convention and Rule 44 § 2 of the Rules of Court, as in force at the material time).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1978 and has a permanent address in Dublin.

A. Background facts

7. The criminal proceedings against the applicant to which this application relates arose, *inter alia*, from his association with the following events.

8. On 10 October 2002, an off-duty Garda (police) detective attached to the Special Detective Unit - who lived in a housing estate near Dublin called Corke Abbey - noticed suspicious activity and contacted a local Garda station. From shortly after 11 pm, he watched the movements of three cars (a blue Nissan Almera, a dark Nissan Micra and a yellow Transit van) and he noticed the occupants of the three cars acting in what appeared to be a coordinated manner. At one stage, five men got out of the Nissan Micra and three of them got into the back of the yellow Transit van, where there was already a driver and a man in the passenger seat. The other two got back into the Nissan Micra and it was driven off. A taxi arrived and its sole passenger got out and joined the other group. These six men were gathered together at the side of the Transit van. An unmarked Garda vehicle manned by two Gardaí arrived in response to the off-duty detective's call and approached the van. One of the men walked away from the group while four of them got into the back of the van and one into the driver's seat.

9. The Nissan Almera remained on the estate parked near the Transit van. One Garda spoke to the driver of the Transit van who gave a false name (referred to below as PB). While speaking with him, the Gardaí noted a black balaclava and the handset of a portable radio on the floor of the van. The other Garda opened the back door of the van and saw the other four men, sitting on the floor, as well as a number of items (which the trial court later regarded as " significant pieces of evidence" see § 11 below): a lump/sledge hammer; two pickaxe handles; a torch; eight plastic bags of cable ties; black balaclavas with single or double openings; two identical navy ties resembling those worn by members of An Garda Síochána; woollen gloves; rolls of masking tape; a sky blue shirt marked 'security'; a yellow fluorescent jacket with the word "GARDA" labelled on it; black woollen gloves and plastic industrial gloves; a number of remote controlled radios and election posters in respect of a man named O'Snodaigh. Two of the men in the back of the van were dressed in clothing that gave the appearance of, and made them look like members of An Garda Síochána including, yellow fluorescent jackets on which was printed or marked "GARDA".

10. When the Nissan Almera was later examined by the police they found it contained false registration plates which corresponded to its tax and insurance discs, these, in fact, being those of an identical car that had previously been stolen; the genuine registration plates for the Nisssan Almera; a 'Long Kesh' baseball cap; a quantity of ties and a plastic bag which contained a stun gun and a canister of CS gas; a blue flashing light and beacon which would give the appearance of belonging to an official

police car; and a roll of black binding tape. The owner of the car was later identified as being MB.

11. The five men of the original eight who remained in the estate, and who were in the Ford Transit van, were arrested and charged with being members of an illegal organisation. During police investigations, the Nissan Micra car which had left Corke Abbey after dropping off three of the five men who had been in it, was later traced back to a Ms K., the partner of the applicant (see paragraph 22 below). On 24 October 2002 a lawful search of the applicant's home took place. Papers were found which contained the phone number of the owner of the Nissan Almera (MB) and the phone number of the man in the driver's seat of the Transit van (PB). The trial court later found established that, at the very least, the applicant was acquainted with one of the men arrested on 10 October 2002 and with the owner of the Nissan Almera car (see paragraph 22 below).

12. On 24 October 2002 the applicant was arrested under section 30 of the Offences against the State Act 1939, as amended ("the 1939 Act"). He was brought to the police station where he was questioned about membership, contrary to section 21 of the 1939 Act, of an unlawful organisation (the Irish Republican Army, "IRA"). The applicant did not make a statement and was released from custody.

13. On 30 October 2002 he was arrested on suspicion that, on 10 October 2002, he was a member of the IRA contrary to section 21 of the 1939 Act. He and a co-accused (NB) were interviewed at length by police officers. Numerous questions were put to them concerning the events in Corke Abbey and the evidence gathered by the police. Section 2 of the Offences Against the State (Amendment) Act 1998 ("the 1998 Act") was invoked by the interviewing officers and each accused was informed of the consequences of a failure to answer the questions. Neither answered any question. The trial court later noted that the two accused accepted that they had had full access to legal advice and found that each had availed himself of the opportunity to consult a solicitor before and during several police interviews. Those interviews were also recorded on video.

14. The applicant was brought before the Special Criminal Court ("SCC") and charged with membership on 10 October 2002 of an unlawful organisation, the IRA, contrary to section 21 of the 1939 Act.

B. The SCC

15. In October 2004 the applicant and NB were tried before the SCC. The trial lasted 8 days. 54 prosecution witnesses were heard. The accused did not give any evidence at trial nor was any other evidence tendered on his behalf.

16. On 18 November 2004 the SCC delivered its judgment convicting the applicant and his co-accused. In so doing, it identified four strands of

evidence tendered by the prosecution: (i) the sworn testimony of Chief Superintendent PK that it was his belief that, independently of any matter discovered at the time of the Corke Abbey events or any matters following those events, the applicant was a member of the IRA; (ii) evidence that associated each of the accused with the activities at Corke Abbey which the prosecution contended were of a type usually associated with the IRA and which it claimed supported or corroborated PK's evidence; (iii) evidence that, following a search of their homes, documentation was found which was said to be of a type one might expect to find in the possession of an active member of an organisation like the IRA; and (iv) inferences, it argued, that could properly be drawn, pursuant to statute, arising from the failure of the applicant to answer questions material to the investigation of the offence in question.

17. The trial court considered the first strand, which comprised the evidence of a Chief Superintendent who testified that he believed that, on 10 October 2002, the applicant was a member of the IRA. He stated that his belief was based on confidential information available to him, of an oral and written nature, from police and civilian sources. This information was independent of any matters discovered when five persons were arrested for unlawful activity at Corke Abbey and also independent of any matters discovered following those events. When asked to identify his sources, he claimed privilege stating that disclosure would endanger lives and State security.

18. The applicant made an application for an inquiry into PK's sources arguing that his trial would be unfair if he did not know these sources and the evidence against him (*Rowe and Davis v. the United Kingdom* [GC], no. 28901/95, ECHR 2000-II). The prosecution, which had no access to the confidential source material, opposed the applicant's request on the basis of the principle of informer privilege. Reviewing this Court's case-law (*inter alia*, *Edwards and Lewis v. the United Kingdom* [GC], nos. 39647/98 and 40461/98, ECHR 2004-X), the SCC found that, while it was unthinkable that information that would threaten lives or State security would be disclosed, the admission of PK's evidence without any inquiry into its basis would unfairly balance the trial in favour of the prosecution. The accused, it held, was entitled to some enquiry into the basis of PK's belief in order to reconcile an order for privilege with defence rights. The SCC, therefore, directed the Chief Superintendent to produce all relevant documentation which, he asserted, informed him that the accused were members of the IRA. In compliance with the direction, files relating to both the applicant and his co-accused and covering a lengthy period prior to 10 October 2002 were produced to the trial court, but not disclosed to the prosecution or to the defence. The Court conducted a review of those files considering this to be the most appropriate solution in the interests of justice. Its competence to do so had been considered and confirmed previously by the Supreme Court

and, as such, it was authorised by domestic law (*DPP v Ward* [1999] 1 I.R. 60).

19. Following the review of PK's files, the SCC was satisfied that PK had "adequate and reliable information" on which he could legitimately form the opinion that each accused was a member of the IRA. It found that there was nothing in the files that would assist the defence in proving the innocence of their clients. Later, in weighing PK's evidence, the SCC confirmed that it had excluded any information to which it had become privy during its review of the files he had produced to the court. The SCC also noted that the demeanour of PK was such that the court was persuaded that he was an "honest and reliable" witness. He had 25 years' service as a police officer most of which was devoted to combating subversion and, as the head of the Special Detective Unit (concerned with the State security and monitoring subversive organisations), PK was the person best placed to learn of the activities of the accused. It was difficult to imagine anyone better informed on the subject in the country. The SCC was persuaded beyond any doubt by the belief evidence of PK that the accused were members of the IRA as charged. Moreover, the trial court was satisfied that PK had formed that belief ever before the 'Corke Abbey' events of 10 October 2002 or any matters discovered following the arrest of five persons on that occasion. The SCC totally rejected a suggestion put to the Chief Superintendent PK, in cross-examination that his evidence was a fiction.

20. However, the trial court held that the demands of justice required that it should not convict solely on the basis of PK's evidence so the SCC went on to examine whether there was evidence which supported and corroborated the belief of PK.

21. The second strand of the prosecution case to which the trial court had regard was evidence which, it was satisfied, established that each of the accused was associated with the other and with the activities at Corke Abbey, activities which, according to the prosecution, were of a type associated with the IRA. Police officers gave detailed evidence about the events and the suspicious activities in Corke Abbey on the night of 10 October 2002 and about the items that had been found following a search of the vehicles involved (see paragraphs 7, 8 and 9 above).

22. Packaging from a Rayovac torch and a receipt dated 10 October 2002 were later found in the Nissan Micra when it was searched. The SCC was satisfied beyond any doubt that this packaging and receipt matched the torch found in the Transit van. It was further satisfied that the dark green Nissan Micra observed by the police at Corke Abbey was the property of Ms K, the partner of the applicant, and that he, the applicant, had had control of the motor vehicle on the evening in question. His partner had testified that she had given the keys of her Nissan Micra to the applicant around 8pm on 10 October 2002; that neither he nor the car was back when

she returned home later that night; and that when she awoke the next morning both he and the car were back at the house they shared. The trial court had no doubt that the applicant was either one of the male drivers of the Nissan Micra at Corke Abbey or that he was aware of and acquiesced in the use to which it was being put. It was also satisfied, having heard abundant evidence which included sightings of the applicant and his co-accused together in the middle of the night when the applicant's home was being searched, that they were 'well known' to each other.

23. The SCC considered that the above evidence showed that both accused were aware of, or acquiesced in, unlawful activities in Corke Abbey. However, it was of the view that those activities could equally be ascribed to persons engaged in organised crime as opposed to those engaged in subversive crime.

24. The third strand of the prosecution case concerned documentation found upon a search of the applicant's home on 24 October 2002. On the one hand, there was a piece of paper containing the drawing of a key and a telephone number which the court accepted was that of MB, the owner of the Nissan Almera with the false number plates. They also found a piece of paper with the telephone number of PB whom the Court had no doubt was the person found to be driving the Ford Transit van on the night of the 10 October 2002. During an earlier search of the co-accused's home, police had found documents which contained notes of the actions and movements of a number of elected politicians from different political parties plus documents recording the names and addresses of persons involved in serious crime and documents noting the names of persons linked to the Irish National Liberation Army ("INLA"), another unlawful organisation (paragraph 39 below). A thumb print on black tape found in the Almera was accepted as being that of the co-accused. The trial court accepted that the documentation established that the applicant was, at the very least, acquainted with the driver of the Transit van (PB) and the owner of the Nissan Almera (MB). However, it was not, of itself, supportive of Chief Superintendent PK's evidence that the applicant was a member of the IRA.

25. The fourth strand of the prosecution case against the applicant and his co-accused was that, in the course of a number of interviews by police officers following their arrest during which the provisions of s.2 of the Offences Against the State (Amendment) Act, 1998 were invoked and explained to them, each man failed to answer a variety of questions which, the court maintained, were very material to the investigation of the offences with which each was charged. It was accepted by the defence that each accused was afforded all the rights and privileges to which they were legally entitled during their detention and, in particular, that each of them had full access to legal advice. The court noted that each availed of the opportunity to consult a solicitor before and in the course of several police interviews. The video-recordings of the interviews were shown to the trial court. It

noted that, not only did each remain totally silent during the course of interview, but each appeared to take no ostensible interest whatsoever in what was going on. They sat bolt upright showing remarkable self-control throughout, in that their only movement was an occasional blink of the eyes but they made no effort to engage with the interviewers. It was clear to the court that each was deliberately and offensively ignoring all that was being asked of them. The court was satisfied that not only were the relevant statutory provisions invoked and adequately explained to each accused but each was given an opportunity to protest in the event that he had not understood that explanation, an opportunity which was ignored. Each question material to the charge was met with a stony silence. For example, each accused was asked to affirm or deny that he was a member of the IRA. Each was asked whether he knew the men arrested at Corke Abbey on the night of 10 October 2002, it being clear that each knew one or more of them. Each was asked to explain why they kept the documentation found when their houses were searched and each was asked whether they had any involvement with the aforesaid events. The applicant, in particular, was specifically asked about his use of his partner's car on the night of 10 October 2002 and to explain how it had been seen at Corke Abbey on that night, it being the evidence of his partner that he had been in possession of the car.

26. The trial court had no doubt as to the materiality of a vast number of the questions put to each accused and it was clear that each had made no effort whatsoever to answer them. In those circumstances, the court had 'no doubt' that, as provided for by section 2 of the 1998 Act, it was entitled to and did, in fact, draw the inference from the failure of each accused to answer those questions that each had a guilty conscience insofar as the allegation of membership of an unlawful organisation was concerned. The court was satisfied that their silence amounted to corroboration of the belief evidence given by Chief Superintendent PK. As the court did not doubt the evidence of PK that he believed each was a member of the IRA and as the court was satisfied that the failure of each to answer material questions during police interviews was corroborative of that evidence, it was persuaded beyond all reasonable doubt that each of the accused was guilty of charged.

27. For the sake of completeness, the trial court added, that while it had indicated in delivering its judgment that it was not convinced that, standing alone, either the activities at Corke Abbey with which each of the accused was associated or the documentation found upon a search of their homes necessarily indicated activities or membership of an unlawful organisation, it was the opinion of the court that "when viewed in conjunction with the belief evidence of Chief Superintendent PK and the fact that each accused failed to answer questions while being interviewed by members of the Garda Siochana, those two pieces of evidence, i.e. the activities which took

place at Corke Abbey ... and the documentation which was found on the premises of each accused is supportive to the allegation that each of them is a member of the IRA".

28. The applicant was sentenced to four years' imprisonment.

C. Appeal to the Court of Criminal Appeal ("CCA")

29. The applicant sought leave to appeal against his conviction to the CCA claiming that the trial court had erred in law. In particular, he objected to any review by the trial judges, as adjudicators of guilt or innocence, of material underlying the belief of Chief Superintendent PK on the grounds that to do so was unlawful and contrary to the case-law of this Court.

30. On 28 November 2006 the CCA, having conducted an extensive review of the domestic jurisprudence and the case-law of this Court, gave judgment refusing leave to appeal. It was satisfied that a restriction on the ability to cross-examine the Chief Superintendent, arising from his claim of privilege in respect of the underlying sources of information upon which his belief was based because of a threat to life or to the on-going security of the State, did not *ipso facto* constitute a breach of Article 38 of the Constitution or of Article 6 of the Convention. The Supreme Court in *DPP v. Kelly* ([2006] IESC 20) had found this limitation necessary and properly counterbalanced by matters not dissimilar to those arising in the present case. The belief of Chief Superintendent PK was simply admitted as being evidence, no more and no less, and this was already well established in the prior jurisprudence. Such a witness could be cross-examined but he was entitled to claim privilege in respect of underlying facts or sources which led to his belief that disclosure of same could cause a credible threat to life or to state security. By ruling that it would not convict without evidence that supported or corroborated that belief, the trial court had clearly recognised the disadvantage to the defence which flowed from the claim of privilege and it had correctly sought evidence corroborative of PK's belief. The exercise of the trial court's discretion to review the files furnished by the Chief Superintendent PK did not infringe the right to a fair trial. It found no evidence that would have assisted the accused and the material examined constituted a good basis for the belief of the Chief Superintendent. The trial court had confirmed that, if it had found otherwise, this would have led to a different outcome.

31. The CCA rejected the submission that the SCC, which decided on guilt or innocence, should not have carried out this review having regard to this Court's case-law. It was not at all clear from the Convention case-law that any of the judgments relied upon by counsel in this case dealt with the issue of a claim to privilege based on a threat to life or to the on-going security of the State. In the applicant's case, the CCA held that there was no reason to conclude that anything found in the material examined by the trial

court was influential on that court in making its judgment, let alone inspiring anything determinative of the guilt of either accused. A statement to the contrary was explicitly made by the trial court and was to be found in the judgment itself. Nor could any of this material, had it been disclosed to the defence, have been considered to be in any way of assistance in establishing the innocence of the accused. A statement that no such exculpatory material existed was also found in the trial court's judgment.

32. The CCA also considered that the events at Corke Abbey and an association with those events, the vehicles and the contents of the vehicles, the materials found during searches as well as the meetings between both accused at the time when the applicant's house was being searched, were all matters which came within the ambit of the phrase 'movements, actions, activities, or associations on the part of an accused person' found in section 3(1)(b)(i) of the Offences Against the State (Amendment) Act, 1972, as amended ("the 1972 Act"). The facts upon which the trial court relied were all proven beyond reasonable doubt and, indeed, the trial court had noted that there had been no serious challenge to the prosecution evidence of the facts, connections and associations so found. The trial court was fully entitled to have found that the applicant was associated with the events at Corke Abbey and its conclusion, in the circumstances, was a safe and valid one. Insofar as the appellants had complained about the trial court's comment on the demeanour of each accused during police interviews, the CCA considered that their objection, against a background of a total failure to answer any question at all, was rather surreal. The evidence established a complete and utter failure to answer any question at all and the trial court made a finding on that failure. That court's entitlement to draw inferences arose, precisely, from that failure. In the circumstances, the inferences were correctly and validly drawn. The commentary as to demeanour did not alter that in any way nor did it suggest that the right to silence did not apply.

33. The CCA confirmed the trial court's conclusion that, while the association with events at Corke Abbey or the documents found on searches, for example, might not, in isolation, be indicative of membership of an illegal organisation, these matters, accepted as having been proven, when taken together with the inferences validly drawn, were supportive of the opinion of Chief Superintendent PK. When considered with his evidence, all the matters taken together were sufficient to establish beyond reasonable doubt that both appellants were members of the IRA on the date in question. The trial court was entitled to look at the established facts, when taken together, and also when taken in conjunction with the inferences which it had properly drawn to see whether these supported or corroborated the belief evidence of the Chief Superintendent. The trial court's finding that the foregoing facts and inferences, when taken together with the belief evidence of the Chief Superintendent, established beyond reasonable doubt the charges against the accused was a correct finding and conclusion.

D. Section 29 of the Courts of Justice Act 1924 ("the 1924 Act")

34. The applicant then brought an application to the CCA under section 29 of the 1924 Act, pursuant to which he requested the court to certify that its previous decision involved a point of law of exceptional public importance and that it was desirable in the public interest that an appeal should be taken to the Supreme Court. The question proposed by the applicant for the Supreme Court's consideration was whether the receipt and examination of material concerning the applicant to which neither he nor his advisors had access was consistent with the State's obligation to provide a fair trial pursuant to Article 6 of the Convention and Article 38 of the Constitution. On 26 October 2007 the CCA delivered its (second) judgment and refused the application for a section 29 certificate.

35. The CCA reviewed the case law of this Court upon which the applicant had relied. It summarised this Court's findings in the above-cited case of *Rowe and Davis v. the United Kingdom* (in which it had found a violation of Article 6) to the effect that: (a) the entitlement to disclosure is not an absolute right and that, in any criminal proceedings, there may be competing interests, such as national security or the need to protect witnesses at risk of reprisal, which must be weighed against the rights of the accused; (b) in cases where evidence is withheld from the defence in the above circumstances it is not the role of this Court to decide whether or not such non-disclosure was strictly necessary. Instead this Court's role is to ascertain whether the decision-making procedure or process which was applied did comply, as far as possible, with the requirements of adversarial proceedings; (c) in the *Rowe* cases there was a failure by the prosecution to lay the evidence in question before the trial judge to permit him to rule on the question of disclosure and this deprived the applicant of a fair trial; and (d) the particular facts in that case differentiated it from the case of *Edwards v. the United Kingdom* (16 December 1992, Series A no. 247 B). Referring to *Jasper v. the United Kingdom* ([GC], no. 27052/95, 16 February 2000), in which these principles were repeated, the CCA noted that this Court had recognised that the trial judge held a supervisory role in determining the balance between the competing rights of the defence and of public interest immunity. It found that the fact that the need for disclosure was at all times under assessment by the trial judge provided a further important safeguard.

36. The CCA concluded that the approach taken by the trial court in the applicant's case was clearly within the ambit of the case-law of the Strasbourg Court which required that the withholding of any such documentation had to remain at all times in the supervisory control of judges themselves. The CCA rejected the submission that the trial court's approach involved a review of material which was determinative of guilt. Rather, the judges were considering whether PK's evidence should be admitted without cross-examination as to its source in circumstances where

privilege, based on the safety of the life of others, had been invoked. In weighing up the value of that belief evidence, the trial judges had had no regard at all to the documentary source material. There was no requirement to disclose documents which did not damage the prosecution or assist the defence and it was clear from the SCC's review that there were no such documents: if the SCC had found documents of assistance to the applicant, its answer would have been different. Moreover, the undisclosed documents were demonstrably not determinative as the applicant had suggested and the trial court had explicitly stated this to be so in its judgment. Finally, the CCA noted that the applicant had not sought to have the appeal court examine or consider the Chief Superintendent's documentation in order to ascertain whether the trial judges had misdirected themselves in respect of the documents or the material contained therein.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution

37. Article 38 reads, in so far as relevant, as follows:

> "1. No person shall be tried on any criminal charge save in due course of law. ...
>
> 3(1) Special courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order.
>
> (2) The constitution, powers, jurisdiction and procedure of such special courts shall be prescribed by law. ..."

B. The Offences Against the State Act 1939, as amended ("1939 Act")

38. The Court refers to the description of the matters leading to the adoption of the 1939 Act in its judgment in *Lawless v. Ireland* ((no. 3), 1 July 1961, §§ 1-7, Series A no. 3). The 1939 Act allowed for the establishment of the Special Criminal Court ("SCC", section 38) to try offences not amenable to trial in the ordinary courts. The SCC remains in being as long as the Government proclamation is in force and can be re-established at any time by proclamation. Unlike the ordinary criminal courts, the SCC is a non-jury court comprised of three judges from the ordinary courts.

39. Section 21(1) of the 1939 Act prohibits membership of an unlawful organisation. The Irish Republican Army ("IRA") was declared unlawful by

a suppression order pursuant to section 19 of the 1939 Act. In 1983 a suppression order prohibited the Irish National Liberation Army ("INLA").

40. Section 36 of the 1939 Act allows for certain scheduled offences to be tried before the SCC. The Offences Against the State (Scheduled Offences) Order 1972 defined scheduled offences and includes the offence of membership of an unlawful organisation.

C. The Offences Against the State (Amendment) Act 1972, as amended ("the 1972 Act")

41. Section 3 of the 1972 Act, entitled "Evidence of membership of unlawful organisation", reads as follows:

> "3(1)(a) Any statement made orally, in writing or otherwise, or any conduct, by an accused person implying or leading to a reasonable inference that he was at a material time a member of an unlawful organisation shall, in proceedings under section 21 of the Act of 1939, be evidence that he was then such a member.
>
> (b) In paragraph (a) of this subsection 'conduct' includes-
>
> (i) movements, actions, activities or associations on the part of the accused person, and
>
> (ii) omission by the accused person to deny published reports that he was a member of an unlawful organisation, but the fact of such denial shall not by itself be conclusive.
>
> (2) Where an officer of the Garda Síochána, not below the rank of Chief Superintendent, in giving evidence in proceedings relating to an offence under the said section 21, states that he believes that the accused was at a material time a member of an unlawful organisation, the statement shall be evidence that he was then such a member.."

D. The Offences against the State (Amendment) Act 1998 ("the 1998 Act")

42. Section 2 of the 1998 Act is headed 'Membership of an unlawful organisation: inferences that may be drawn" and provides:

> "2. (1) Where in any proceedings against a person for an offence under section 21 of the Act of 1939 evidence is given that the accused at any time before he or she was charged with the offence, on being questioned by a member of the [police] in relation to the offence, failed to answer any question material to the investigation of the offence, then the court in determining whether to send forward the accused for trial or whether there is a case to answer and the court ... in determining whether the accused is guilty of the offence may draw such inferences from the failure as appear proper; and the failure may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence in relation to the offence, but a person shall not be convicted of the offence solely on an inference drawn from such a failure.
>
> (2) Subsection (1) shall not have effect unless the accused was told in ordinary language when being questioned what the effect of such a failure might be."

E. Relevant judicial dicta

1. O'Leary v. the Attorney General [1993] 1 I.R. 102

43. In this case the High Court rejected a challenge to the constitutionality of section 3(2) of the 1972 Act and, in so doing, it noted:

> "What this section does is to make admissible in evidence in certain trials statements of belief which would otherwise be inadmissible. The statement of belief it proffered at the trial becomes "evidence" by virtue of this section in the prosecution case against the accused. Like other evidence it has to be weighed and considered and the section cannot be construed as meaning that the court of trial must convict the accused in the absence of exculpatory evidence. The accused need not give evidence and he may ask the court to hold that the evidence does not establish beyond reasonable doubt that he is a member of an unlawful organisation. Should the court agree he must be acquitted."

2. DPP v. Ward [1999] 1 I.R. 60

44. The Supreme Court held in this case that informer privilege was of ancient origin and was essential for the prevention and detection of crime. The privilege was subject only to the 'innocence at stake' exception. Members of a trial court, it held, had full discretion to decide how a trial was to be conducted and, in particular, how an issue with regard to the question of privilege was to be decided. Although not mandatory, it was within the discretion of a trial court as to whether or not it should review documentation over which privilege is asserted - the court being required to balance, on the one hand, the public interest in prosecuting serious crime and protecting confidentiality and, on the other, the fair trial rights of an accused.

3. DPP v. Kelly [2006] 3 I.R. 115

45. The appeal in the present applicant's case before the CCA was adjourned pending the delivery of the Supreme Court's judgment in the above-cited case of *DPP v. Kelly*. In that case, the Supreme Court dismissed the appellant's claim that the restrictions on his ability to cross-examine the Chief Superintendent giving belief evidence violated his right to a fair trial.

46. The Supreme Court noted that the 1972 Act had been passed in the context of preserving the security of the State and it allowed for reliable information about membership of an unlawful organisation given by a senior police officer to be admitted into evidence. The Supreme Court noted the difficulty in getting direct evidence from lay witnesses who would not come forward for fear of reprisal. The SCC was itself established to avoid the mischief of juror coercion and intimidation. In relation to all anti-terrorist offences, as a matter of common sense, there would be equal apprehension about the intimidation of witnesses. It held that it was a reasonable inference to draw that section 3(2) of the 1972 Act was enacted

out of bitter experience. A limitation on cross-examination was permitted by the statutory provision. The correct interpretation of section 3(2) was that it allowed cross-examination about the basis of the belief evidence but not to the extent that it interfered with or defeated a legitimate plea of privilege.

47. As to the requested privilege over source material, the Supreme Court recalled the nature of an "unlawful organisation" and considered it obvious both from that definition and from common sense that such organisations are, in their nature, secret and violent. Such organisations threatened, intimidated and endangered the lives of informers. It followed that it would be extremely difficult to produce direct evidence capable of sustaining a prosecution. Intimidation of possible witnesses, and worse, was to be presumed. Where the police had secret intelligence, they would have been unable to produce informants without compromising them. Hence the need for the type of evidence permitted under section 3(2) of the 1972 Act. Parliament had chosen to designate a person holding the rank of Chief Superintendent as a witness whose belief might be accepted as evidence. Whether or not an accused person was a member of an unlawful organisation was a question of fact and the Chief Superintendent gave evidence, not of fact, but of belief. The Chief Superintendent simply stated his belief as an expert in his field.

48. The Supreme Court recognised that, where privilege was claimed, as it inevitably was, the defence did not know the basis of the belief. It reviewed case-law of the Irish, American and British courts as well as of this Court and found that the essential question was whether the undisputed restriction on the right of the accused to cross-examine his accusers and to have access to the materials relied upon by the prosecution, had been unduly restricted to the extent that it rendered his trial unfair.

49. The privilege granted was a clear infringement of the normal right of the accused to have access to the material which underlay the belief expressed and, to that extent, constituted a restriction on the effectiveness of his right to cross-examine his true accusers. However, there were a number of compelling justifications for this course of action. In the first place, resort to belief evidence applied only in the case of organisations which, by their nature, represented a threat, not only to the institutions of the State, but to individuals who were prepared to cooperate with the State in securing the conviction of members of such organisations. Secondly, the legislature allowed such evidence to be given by police officers of particularly high rank who could be presumed to have been chosen for having high standards of integrity. Thirdly, the procedure applied only while there was in force a declaration that "the ordinary courts are inadequate to secure the effective administration of justice...." The offence was a scheduled one: thus the cases would be heard by the SCC, a court composed of judges who had to be presumed to apply only the highest standards of fairness. Any restriction

on the right to cross-examine had been limited to the extent that was strictly necessary to achieve its objective.

50. Mr Kelly's later application to this Court was declared inadmissible (*Kelly v. Ireland*, (dec.) no. 41130/06, 14 December 2010).

4. Redmond v. Ireland [2009] 2 ILRM 419

51. Evidence was given in this case by a detective superintendent to the effect that the IRA was "an oath bound secret organisation divided into cells" which created problems for the police to infiltrate the organisation and gather evidence to prosecute member volunteers. The IRA assiduously sought out police informers: any identification usually resulted in serious ill-treatment or death. The evidence was that, while there were about 69 police officers of the rank of Chief Superintendent or higher who could give belief evidence under section 3(2), only 17 or so were experienced to give such evidence in practice. The Supreme Court also stated that a common feature of investigations into the activities of the IRA was "the presence of fear, intimidation and the threat of reprisals" so that, if section 3(2) had not existed, the police would not have succeeded in counter-acting the threat posed by the IRA.

5. DPP v. Donnelly, McGarrigle and Murphy [2012] IECCA 78

52. The accused argued in this case that Article 6 had been breached as his conviction was based on belief evidence in respect of which a claim of privilege was asserted over disclosure of sources and on a negative inference drawn from his silence under section 2 of the 1998 Act.

53. The Supreme Court underlined the limited scope of section 3(2) of the 1972 Act.

In the first place, belief evidence could only be admitted as regards the offence of membership of an unlawful organisation and it was particularly suited to that charge. Unlawful organisations were cell based, secretive, and violent organisations which invested considerable resources in the enforcement of secrecy about the membership and did so through torture, death and the inevitable fear that those methods engender. "Membership" was normally a continuing state of affairs and more susceptible to belief evidence of a senior police officer, based on a variety of sources over a period of time.

Secondly, the Supreme Court explained the nature of belief evidence:

> "The section makes the belief of a chief superintendent evidence that an accused was at a material time a member of an unlawful organisation. As the cases show, it does not make that evidence conclusive or preclude it from being challenged, tested or contradicted. For present purposes, it is important however, that it is the belief of the Chief Superintendent which is evidence, and not the material upon which that belief is based. Thus, the section does not involve the giving of hearsay evidence where the relevant evidence is that of a person who is not available in court for cross-

> examination. Nor is it akin to the giving of evidence by an anonymous witness. Here, the relevant evidence is the belief of a Chief Superintendent, who is identified and gives his or her evidence in open court. It is to be anticipated that the belief of such a senior officer in the gardaí will be based on a variety of sources: technological, electronic, and human, including information supplied by informants. But even in cases where the evidence of the Chief Superintendent is based upon the direct statements provided to him or her by an informant or informants, the court is not asked to act upon the hearsay statements of such informants: rather it is the belief of the Chief Superintendent based upon such informants which is the evidence. The formation of that belief would normally involve the application of the Chief Superintendent of his or her experience in dealing with informants and in dealing with illegal organisations and where relevant, in assessing the significance and value of diverse pieces of information and intelligence. Accordingly, where evidence is given pursuant to s.3(2) it is not the case that the court is asked to act upon either the evidence of anonymous witnesses or witnesses who are out of court and not available for cross-examination. Accordingly, any analysis based upon *Doorson* and *Al-Khawaja* should take account of this structural distinction."

Thirdly, the category of persons who could give evidence under section 3(2) was limited to officers of the rank of Chief Superintendent and normally only those with experience of illegal organisations.

Finally, belief evidence could only be admitted while Part V of the Act of 1939 was in force so that it was used only when the Government considered that the ordinary courts were inadequate to secure the effective administration of justice and thus normally by the SCC, a non-jury court comprised of experienced judges who could be expected to approach such evidence with the necessary degree of expertise and circumspection.

54. The Supreme Court recognised that the difficulty for the defence was not so much created by the fact that the belief of a Chief Superintendent is made admissible as evidence, but rather by the inevitable claim of privilege when asked questions in relation to the basis of his or her belief. However, it noted that informer privilege cannot be claimed as a right by any Garda witness; it must be established that circumstances give rise to a valid claim in this regard. In addition, the privilege itself is not absolute since it has always been subject to the 'innocence at stake' exception. Furthermore, the Supreme Court noted:

> "Even where such privilege is upheld, it does not follow that the evidence of a chief superintendent cannot be tested. The credibility of any witness is not dependent solely on the material which that witness seeks to adduce in evidence in chief. On the contrary, credibility can be challenged on any issue collateral to the particular testimony. Furthermore, as the Supreme Court expressly held in *Kelly* in rejecting a submission made on behalf of the Director of Public Prosecutions, the evidence of a Chief Superintendent under s.3(2) can be explored and tested in a number of ways, such as whether the belief is based upon one or more sources of information, whether in the case of a human informant the Chief Superintendent is personally aware of the identity of the informant and has dealt personally with him or her, and whether as in this case, the witness has experience in dealing with such informants and rating and analysing their evidence."

The Supreme Court underlined that an accused might choose not to cross-examine a Chief Superintendent in detail, not because extensive cross-examination is impossible but rather because such a strategy would avoid the risk of unwittingly strengthening a prosecution case against him.

55. Finally, the Supreme Court also emphasised the limited scope of section 2 of the 1998 Act. It was restricted to a charge of membership of an unlawful organisation. It was not the failure to answer questions which amounted to corroboration but rather the failure to answer questions which were material to the offence of membership which permitted the court to draw inferences from such failure as appeared proper. It was those inferences which allowed a failure to answer to amount to the type of corroboration contemplated by the section. Accordingly, a trial court had first to consider whether there has been a failure to answer questions material to the investigation of the offence and thereafter what inferences could, properly, be drawn.

THE LAW

56. The applicant complained under Article 6 that the non-disclosure of the Chief Superintendent's source material seriously restricted his defence rights and that it should have been counterbalanced by commensurate safeguards. He further complained that the trial court's review of the materials was inadequate and that no effective safeguards were made available to him.

57. Article 6 of the Convention provides, in so far as relevant, as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Admissibility

58. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Submissions of the parties

(a) The Government

59. It was important to understand that section 3(2) of the 1972 Act was a provision designed to combat the threat posed by the IRA. While the IRA observed a ceasefire, dissident groups continued to recruit, train and arm members. In recent years, members of the IRA had conducted numerous operations, including, murder, attempted murder, the use of explosives and firearms, extortion, intimidation and the execution of its own members who were believed to have cooperated with the authorities. Unlawful organisations continued to pose a threat to the security of the State and to the institutions of Great Britain and Northern Ireland. Belief evidence regularly comprised one of the pillars of evidence in the prosecution of the offence of membership of an unlawful organisation. It remained an essential tool for the prosecution of such offences given that a basic tenet of dissident Republican organisations was non-cooperation with the Gardai and non-recognition of State institutions and given that these organisations carried out attacks on those suspected of having cooperated with An Garda Siochána. Given the nature, secretiveness and violent propensity of these unlawful organisations which continued to pose a threat to the State and to other sovereign nations, investigations into their activities were difficult. A repeal of section 3(2) would seriously diminish the ability of An Garda Siochána to investigate the IRA and would threaten national security.

60. The Government considered that, while it was for the national courts to determine the necessity of non-disclosure, certain interests were regarded as sufficiently important to justify a limitation on disclosure such as national security, witness protection, keeping police investigations confidential and prosecuting serious subversive crime. It had to be determined whether the evidence of the Chief Superintendent was sole or decisive (*Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, ECHR 2011): the nature of the evidence in question as well as the significance of evidence other than the belief evidence, would be important factors. There had to be commensurate countervailing procedural safeguards and factors.

61. Applying those principles to the present case, the Government, in the first place, argued that non-disclosure of PK's sources was strictly necessary to protect lives and State security. The trial court considered that it would have been 'unthinkable' if the Chief Superintendent had been compelled to identify persons or produce documentation which would endanger life or prejudice the security of the state and its assessment in this regard was supported by the CA which expressed similar concerns.

62. Secondly, the belief evidence was neither sole nor decisive. There were four strands of evidence adduced against the applicant. The SCC based

its conclusion on the cumulative effect of that evidence. The trial court was clear and had stated in unequivocal terms that it would not convict on the basis of the belief evidence only. There was extensive evidence other than the belief evidence as in *Kelly v. Ireland* ((dec). no. 41130/06, 14 December 2010). The belief evidence was not an assertion of fact but amounted only to a belief and was evidence with no particular status. The SCC had clearly demonstrated that the belief evidence was not determinative.

63. Thirdly, even assuming that the belief evidence was sole or decisive, there were commensurate procedural safeguards. The SCC was alive to the potential prejudice to the defence and, therefore, the judges had reviewed the documentary sources of the belief evidence. Further, when weighing the Chief Superintendent's evidence in light of the evidence as a whole, the court had expressly excluded consideration of any information to which it had become privy as a result of this review. As to the applicant's suggestion that the trial judges, who decided on guilt or innocence, should not have reviewed this material, the Government underlined that the process and objective of the review and of the trial itself were different. The trial court was experienced in discarding information of which it had become aware but which it should not factor into its deliberations (see the CCA at paragraph 31 above). The case of *Edwards and Lewis v. the United Kingdom* ([GC], nos. 39647/98 and 40461/98, ECHR 2004-X) was distinguishable in a number of respects. The undisclosed evidence was of determinative importance to the defence in that case because, had the defence been able to prove police misconduct and entrapment, the prosecution would have had to have been discontinued. In the present case, the SCC found that there was nothing which would assist the defence and the CCA later noted that the applicant could have sought, but did not seek, to have the CCA re-examine that material in order to ascertain whether the SCC judges had misdirected themselves. Secondly, in *Edwards and Lewis*, the Court could not rule out the possibility that the undisclosed material had been relevant to the judge's conclusion on the entrapment defence raised whereas, in the present case, the SCC expressly stated that, while weighing and considering the belief evidence, it had specifically excluded consideration of any information to which it had become privy as a result of its review of PK's documentary sources. Thirdly, the trial court had added a safeguard: it had expressly stated that it would not convict on the basis of the belief evidence alone. Fourthly, the applicant was able to make submissions in advance of these procedural steps. The thorough and careful judgment of the SCC was accompanied by a rigorous appellate process and by two thoroughly and carefully reasoned judgments of the CCA. The applicant had the opportunity (though he did not avail himself of it) to request the appeal court to review the Chief Superintendent's files in order to determine whether the trial court had misdirected itself as to their content.

64. The Government responded in detail to the IHRC submissions (see below). It noted the wide-ranging nature of its comments which raised issues that, in the context of the present application, went beyond the scope of the supervision of the Court. In the present case, the Court was concerned with the overall fairness of the actual criminal proceedings in issue in the applicant's trial. Likewise, its general comments regarding the operation of section 3(2) of the 1972 Act did not assist with the determination of the question before the Court. The fact that the SCC was a non-jury court was not pertinent to the question identified for determination by the Court since many Contracting Parties do not adopt a jury system. The IHRC discussion of cases of conviction on the basis of uncorroborated belief evidence was also irrelevant because, as the IHRC itself accepted, the SCC exercises a self-imposed restraint and does not convict solely on the basis of belief evidence (as in the present case).

(b) The applicant

65. Founded on the fundamental principle that criminal proceedings must be adversarial and that each side must have knowledge of the evidence adduced by the other party, there was a clear line of authority to the effect that a valid public interest immunity claim could restrict an accused's rights and, notably, his access to material and/or information. However, that must be only to the minimum necessary and, even then, it must be counterbalanced by procedures followed by judicial authorities (*Edwards and Lewis v. the United Kingdom*, *cited above*; *Rowe and Davis v. the United Kingdom* [GC], no. 28901/95, ECHR 2000-II; and *Jasper v. the United Kingdom* [GC], no. 27052/95, 16 February 2000). In *Jasper*, the trial judge reviewed the material but nothing arising from that material was used in the trial and, importantly, the jury, not the trial judge, decided on facts and the guilt/innocence of the accused. In *Edwards and Lewis* the Court underlined that a trial court should not examine documents which could be of determinative importance on the question of guilt or innocence: the undisclosed evidence in that case was about entrapment and thus related to an issue of fact decided by the trial judge himself.

66. It was the trial court's review of the material upon which the belief evidence was based which formed the basis of the applicant's contention that a violation of Article 6 has occurred. The material was received, not merely for the purpose of deciding an issue of disclosure, but as providing evidence of the reliability and adequacy of the opinion evidence. The material was reviewed by the trial court in private and was not opened during the hearing. That same trial court went on to decide on the guilt or innocence of the applicant. The trial court should have provided some system to allow the material to be evaluated in a way which did not prejudice his right to a fair trial.

67. The applicant considered the belief evidence was "determinative" of his guilt. He was charged and convicted of being a member of an illegal organisation contrary to section 21 of the 1939 Act, as amended. While the other evidence may have established a connection between the applicant and criminal activity, without the opinion evidence it would not have been possible to conclude that any such criminal activity was being carried out by an unlawful organisation. The fourth strand of evidence was also indirect evidence namely, an inference drawn from his silence. In contrast, in *Kelly v. Ireland* there was independent evidence founding the conviction other than the belief evidence.

68. The applicant did not consider the *Al-Khawaja and Tahery* case relevant. In that case, the applicants had the statements of the absent witness, they knew the nature of the evidence and the trial court did not have any more evidence than the defence. The unfairness arose in that case from the nature of the evidence itself (hearsay). In the present case, the unfairness attached to the belief evidence was twofold: the very nature of belief evidence was that it was difficult to rebut and, secondly, the applicant could not comment on the contents of the "undisclosed material" or to what it related because he had no idea of its content whereas the trial court had all of this information.

69. In short, the applicant considered it unfair for a trial court to have knowledge of material said to be persuasive of a defendant's guilt but to which a defendant is denied scrutiny of any kind. Since the trial court's review was, therefore, inadequate his trial was unfair within the meaning of Article 6 of the Convention.

2. Submissions of the Irish Human Rights Commission ("IHRC")

70. The IRHC is a statutory body whose functions include reviewing the adequacy and effectiveness of the law and practice in the State with regard to human rights standards deriving from the Constitution and international treaties to which Ireland is a party.

71. The third party intervener set out the background to the SCC and its legislative basis. It noted that the SCC was an exception to the criminal justice system of trial by jury in the State and it outlined the main provisions of the 1939 Act. It submitted that certain aspects of section 3(2) of the 1972 Act may cause concern in relation to the procedural rights of the defence. It submitted that the Chief Superintendent's belief evidence is offered as proof of the offence charged although it noted that the trial judges evaluate the weight to be attached to the evidence in each case. The intervener also provided a review of the domestic jurisprudence on section 3(2). It noted that reports from case law of the 1970s indicated that an accused who contradicted the belief of a Chief Superintendent would most likely not be convicted. While the CCA had in 1975 (People (*DPP) v Ferguson*, unreported CCA 27 October 1975) affirmed the conviction of an accused

based on belief evidence (with the court emphasising that the failure of the accused to deny the belief significantly increased the weight to be attached to it), the practice since then showed that the SCC adopted a self-imposed restraint of not convicting solely on the basis of belief evidence and that this accorded with the judgment of the CCA in the present case.

72. The IRHC submitted that it was an important safeguard to the right to a fair trial that the SCC adopted an approach of requiring corroboration of belief evidence. However, the fact that such corroboration might be based on "reasonable inference" evidence might also call into question whether the criminal standard of proof had been diluted. The IHRC also provided a detailed review of this Court's case law on restrictions on disclosure of evidence, considering that the Court's findings in *A. and Others v. the United Kingdom* [GC], no. 3455/05, ECHR 2009 and in the above-cited *Al-Khawaja and Tahery v United Kingdom* case were relevant.

3. The Court's assessment

(a) General principles

73. The Court's primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings (*Taxquet v. Belgium* [GC], no. 926/05, § 84, ECHR 2010, with further references). The guarantees in paragraph 3(d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision which must be taken into account in any assessment of the fairness of proceedings. In making this assessment the Court will look at the proceedings as a whole having regard to the rights of the defence but also to the interests of the public and the victims that crime is properly prosecuted (see *Gäfgen v. Germany* [GC], no. 22978/05, § 175, ECHR 2010-....) and, where necessary, to the rights of witnesses (see, amongst many authorities, *Doorson v. the Netherlands*, 26 March 1996, § 70, *Reports* 1996-II). Where national legislation is in issue, the Court's task is not to review the relevant legislation in the abstract (*Taxquet v. Belgium*, cited above, § 83). The admissibility of evidence is primarily a matter for regulation by national law and, as a general rule, it is for the national courts to assess the evidence before them (*Ellis and Simms v. the United Kingdom* (dec.), no. 46099/06, § 40, 10 April 2012). It is not within the province of this Court to substitute its assessment of the facts for that of the domestic courts. The Court's task under the Convention is to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see *Elsholz v. Germany* [GC], no. 25735/94, § 66, ECHR 2000-VIII).

74. The principles applicable to the duty to disclose evidence to the defence in criminal proceedings were set out by the Grand Chamber in the above-cited case of *Rowe and Davis v. the United Kingdom*:

"60. It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party ... In addition Article 6 § 1 requires ... that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused...

61. However, ... the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused ... In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1 ... Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities ...

62. In cases where evidence has been withheld from the defence on public interest grounds, it is not the role of this Court to decide whether or not such non-disclosure was strictly necessary since, as a general rule, it is for the national courts to assess the evidence before them ... Instead, the European Court's task is to ascertain whether the decision-making procedure applied in each case complied, as far as possible, with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused."

75. In the later case of *Kelly v. Ireland*, cited above, the applicant made a complaint similar to that of the applicant in the present case. The Court recalled the above principles and found that there was extensive additional evidence against the applicant and concluded that the admission of the impugned belief evidence did not render the proceedings in their entirety unfair.

76. The Grand Chamber later described the principle underlying cases concerning the withholding of evidence from the defence to protect police sources (*Al-Khawaja and Tahery v. the United Kingdom*, cited above, § 145) as follows:

"... the Court has left it to the domestic courts to decide whether the rights of the defence should cede to the public interest and has confined itself to verifying whether the procedures followed by the judicial authorities sufficiently counterbalance the limitations on the defence with appropriate safeguards. The fact that certain evidence was not made available to the defence was not considered automatically to lead to a violation of Article 6 § 1 (see ... *Rowe and Davis v. the United Kingdom* ..."

In that case, the Grand Chamber examined under Article 6 the admission into evidence of statements of absent witnesses which were the "sole or decisive" evidence against the accused. The Court accepted that that would not automatically result in a breach of Article 6 § 1 but it considered that it required the most "searching scrutiny" to be applied to the consideration of

two key points: whether it was necessary to admit the witness statements and whether the untested evidence was the sole or decisive basis for the conviction and, if it was, were there sufficient counterbalancing factors, including strong procedural safeguards, in place to ensure that the trial, judged as a whole, was fair within the meaning of Article 6 of the Convention.

77. Since then, the Court has examined cases concerning the admission of evidence from an anonymous witness which was possibly decisive (*Ellis and Simms v. the United Kingdom*, cited above), from an anonymous witness which was found to be of "considerable weight" (*Pesukic v. Switzerland*, no. 25088/07, 6 December 2012) and from an absent witness which was found to be neither sole nor decisive (*Štefančič v. Slovenia*, no. 18027/05, 25 October 2012). In each case, the Court proceeded to examine whether the safeguards were sufficient to counterbalance the admission of the untested evidence.

(b) Application to the present case

78. The Court notes that the present case does not involve the evidence of an absent or an anonymous witness. Unlike *Al-Khawaja and Tahery*, the non-disclosed material in issue here did not, in itself, form part of the prosecution's case. It was testimony of an identifiable and present witness (Chief Superintendent PK) that constituted the impugned evidence in question. It is true that Chief Superintendent's belief was based on sources which were not disclosed to the applicant, but those sources in themselves did not constitute evidence upon which the prosecution sought to rely. Nevertheless, the Court considers that in view of the potential unfairness caused to the defence by the domestic courts' upholding of the claim of privilege in respect of Chief Superintendent PK's sources, it should be guided by the general principles articulated by the Court in *Al-Khawaja and Tahery* in its consideration of the applicant's complaints.

79. Accordingly, the questions to be addressed by the Court are threefold: (i) whether it was necessary to uphold the claim of privilege asserted by Chief Superintendent PK as regards the source of his belief; (ii) if so, whether Chief Superintendent PK's evidence was the sole or decisive basis for the applicant's conviction; and, (iii) if it was, whether there were sufficient counterbalancing factors, including the existence of strong procedural safeguards, in place to ensure that the proceedings, when judged in their entirety, were fair within the meaning of Article 6 of the Convention.

80. As to the necessity for upholding the claim of privilege asserted by PK, the Court recalls that the public and victims have a strong interest in ensuring that organised and subversive crime is prosecuted. However, the interests of informers courageous enough to provide information must also be taken into account and allowing police informers to provide information

anonymously is a vital tool in prosecuting, in particular, organised and subversive crime (*Saïdi v. France*, 20 September 1993, § 44, Series A no. 261-C; *Doorson v. the Netherlands*, cited above, § 70; *Dzelili v. Germany* (dec.), no. 15065/05, 29 September 2009; and *Ellis and Simms v. the United Kingdom*, cited above).

81. The applicant did not challenge, either before the domestic courts or this Court, PK's view that disclosure of his sources would endanger persons and State security. The Court notes the domestic courts' description of the unlawful organisation in question, the IRA: it was a secretive and violent organisation, one which assiduously sought out and punished police informers through torture and death and one which relied on the inevitable fear of testifying which those methods engendered (paragraphs 46, 47, 49, 50 and 53 above). The admission of belief evidence, combined with the inevitable grant of privilege for the sources of that belief (paragraphs 48 and 54), also provides a crucial tool to overcome the evidential difficulties in prosecuting this particular kind of charge. A charge of "membership" of such an organisation requires evidence drawn from intelligence necessarily gathered from numerous and varied sources (human and documentary) and over some time. The Court considers these justifications for the grant of privilege - effective protection of persons and State security as well as effective prosecution of serious and complex crime - to be compelling and substantiated.

82. As to whether the evidence of Chief Superintendent PK was the sole or decisive basis for the applicant's conviction, the Court notes that the SCC expressly stated that it would not convict the applicant on the basis of his evidence alone. In addition to his evidence, the trial court heard over 50 other prosecution witnesses. It also examined what it regarded as 'significant' other material evidence and it identified therefrom three further strands of corroborative evidence against the applicant.

83. The second and third strands of evidence concerned the applicant's connection to the main factual event namely, the suspicious activities in Corke Abbey on 10 October 2002. The trial court found that there was clear evidence associating each accused with the other and with the activities in Corke Abbey. In particular, it had had "no doubt" that the applicant, if not an actual participant, was well aware of and acquiesced in those activities. He was linked to those events in three ways: his partner's Nissan Micra present in Corke Abbey had been entrusted by her to him just before the Corke Abbey events; that car had been observed by the police at Corke Abbey with five male occupants and, if the applicant was not amongst the five, then the movements of the car were at least within his knowledge or acquiescence; a Rayovac torch was found in the van and the wrapping (matching that usually found on such a torch) as well as a receipt for the purchase of such a torch was found in the Nissan Micra. A piece of paper also found after a search of the applicant's home, the third strand of

evidence, contained the phone number of the owner of the Nissan Almera and of the man in the driver's seat of the van. The applicant did not challenge in any significant way the evidence of the police officers involved in the arrest of the five men in Corke Abbey. However, the SCC was careful to conclude that these two strands of evidence were insufficient, in isolation, to prove the charge of IRA membership but were evidence of suspicious activities of an organised crime nature which were corroborative of PK's evidence.

84. The fourth strand of evidence, which corroborated the Chief Superintendent's evidence and which the trial court took into account in convicting the applicant, was the negative inference which it was entitled by law to draw and which it did draw from the applicant's refusal to answer police questions. It is recalled that silence maintained in response to questions "clearly calling for an explanation" can be taken into account although that negative inference cannot be the "sole or main" basis for a conviction (*John Murray v. the United Kingdom*, 8 February 1996, *Reports* 1996-I; and *Condron v. the United Kingdom*, no. 35718/97, § 56, ECHR 2000-V). The Court again notes that section 2 of the 1998 Act, which allowed the negative inference to be drawn, was also limited to the charge of membership of an unlawful organisation. The SCC did not doubt the materiality to the charge of the police questions, noting that each question had a clear evidential basis which called for a response. The applicant, who was at all times legally represented, had also been warned of the possibility of a negative inference being drawn if he did not answer questions material to the charge and he maintained his silence. The negative inference which the trial court was entitled under statute to draw was so drawn and the court considered it to be corroborative of the Chief Superintendent's evidence.

85. In conclusion, the SCC was careful to point out that none of the four strands of evidence, if taken in isolation, was sufficient to ground the applicant's conviction. However, its assessment was that, when viewed in conjunction with Chief Superintendent PK's belief, the applicant's association with the Corke Abbey activities, the material found during the search of his home and the negative inference to be drawn from his failure to respond to material questions, were supportive of the charge of membership of the IRA.

86. The CCA, on appeal, reviewed the evidential analysis of the SCC in detail. It endorsed its conclusions and, notably, found it clear that the events at, and evidence from, Corke Abbey as well as the applicant's association with those events constituted conduct within the meaning of section 3(1)(b)(i) of the 1972 Act, as amended, and thus evidence of his membership of the IRA. The negative inferences from silence were correctly and validly drawn. The belief evidence was accorded appropriate weight. The appeal court held that the SCC's review of the underlying documentation was clearly within the ambit of the case-law of the Court

which requires that the withholding of any such documentation must at all times remain within the supervisory control of judges themselves. The CCA rejected the applicant's claim that the trial court's review had entailed a review of material that was or could have been 'determinative' of guilt. It found that in view of the SCC's express statement that it had not convicted on the basis only of Chief Superintendent PK's evidence, still less on the basis of anything appearing in the documents examined by the trial judges as part of their monitoring of procedures, the information in the documentation could not be regarded as having been 'determinative'. The CCA approved the SCC's conclusion that, when taken cumulatively, the four strands of evidence established, beyond reasonable doubt, that the applicant was guilty, as charged.

87. In view of the foregoing, the Court considers that Chief Superintendent PK's evidence cannot be considered to have been the sole or decisive evidence grounding the applicant's conviction. However, the Court observes that his evidence clearly carried some weight in the establishment of the applicant's guilt. Accordingly, it considers it necessary to examine, carefully, whether there were adequate counterbalancing factors and safeguards in place (see *Pesukic v Switzerland*, cited above, § 50) in order to ensure that the disadvantage caused to the applicant by upholding PK's claim of privilege did not restrict his defence rights to an extent incompatible with the requirements of Article 6 of the Convention.

88. The Court observes, at the outset, that the trial court was alert to the need to approach the Chief Superintendent's evidence with caution having regard to his claim of privilege and was aware of the necessity to counterbalance the restriction imposed on the defence as a result of its decision upholding that claim. It proceeded to adopt a number of measures having regard to the rights of the defence.

Firstly, the court reviewed the documentary material upon which PK's sources were based in order to assess the adequacy and reliability of his belief. While the Court does not regard such a review, in itself, to be sufficient to safeguard the rights of the defence (*Edwards and Lewis v. the United Kingdom*, cited above, § 46), it nevertheless considers that the exercise of judicial control over the question of disclosure in this case provided an important safeguard in that it enabled the *trial* judges to monitor throughout the trial the fairness or otherwise of upholding the claim of privilege in respect of the non-disclosed material (see *McKeown v. the United Kingdom*, no. 6684/05, § 45, 11 January 2011).

Secondly, the trial court in considering the claim of privilege was alert to the importance of the 'innocence at stake' exception to any grant of privilege. It confirmed, expressly, that there was nothing in what it had reviewed that could or might assist the applicant in his defence and that, if there had been, then its response would have been different. The trial court was thus vigilant in exploring whether the non-disclosed material was

relevant or likely to be relevant to the defence and was attentive to the requirements of fairness when weighing the public interest in concealment against the interest of the accused in disclosure (see, *mutatis mutandi*, *Jasper v. the United Kingdom*, cited above, § 57). The Court considers that if the applicant had any reason to doubt the trial judges' assessment in this regard he could have requested the appeal court to review the material and to check the trial court's conclusions. However, he chose not to do so.

Thirdly, in coming to its judgment the trial court stated, specifically, that it had expressly excluded from its consideration any information it had reviewed when it was weighing the Chief Superintendent's evidence in the light of the proceedings as a whole. It further confirmed that it would not convict the applicant on the basis of PK's evidence alone and that it required his evidence to be corroborated and supported by other evidence.

The Court further notes that, in advance of taking its intended procedural steps, the trial court informed the applicant and his co-accused of its intentions as regards its procedures and it afforded them an opportunity to make detailed submissions *inter partes* which they did (see, *a contrario*, *Edwards and Lewis v. the United Kingdom*).

89. In addition to the above measures taken by the trial court to safeguard the rights of the defence, the Court also considers that there existed other strong counterbalancing factors in the statutory provisions governing belief evidence.

90. In the first place, as noted above, providing belief evidence involves a complex intelligence gathering and analytical exercise. Section 3(2) therefore requires that those doing so must be high-ranking police officers and, moreover, they are generally officers with significant experience of such organisations and in gathering and analysing relevant intelligence (paragraphs 51 and 53 above). 90. In the present case, PK was the Head of the Special Detective Unit concerned with State security and monitoring subversive organisations and had such pertinent professional experience as to lead the SCC to state that it was difficult to envisage any other person in the State more relevantly informed (paragraph 19 above).

91. In addition, the Chief Superintendent's evidence is not admitted as an assertion of fact but as the belief or opinion of an expert. It is not, therefore, conclusive and, indeed, it has no special status it being one piece of admissible evidence to be considered by the trial court having regard to all the other admissible evidence (paragraphs 43, 47 and 53 above).

92. The Court further notes that while the scope of cross-examination was restricted by the trial court's ruling, the possibility to cross-examine the witness on his evidence was not entirely eliminated. The possibility to test the Chief Superintendent's evidence in a range of ways still remained. Consistently, such evidence could be tested by the defence even if privilege had been granted as regards the sources upon which that opinion was based. As pointed out by the Supreme Court in *DPP v. Kelly* (paragraph 49 above),

the principle is that any restriction on the right to cross-examine is limited to the extent 'strictly necessary' to achieve its (protective) objective. As noted by O'Donnell J in *DPP v. Donnelly and Others* (paragraph 54 above), the Chief Superintendent's evidence can, therefore, be challenged on all matters collateral and accessory to the content of the privileged information. He could be cross-examined on the nature of his sources (documentary, civilian, police and amount); on his analytical approach and process; on whether he knew or personally dealt with any of the informants; and on his experience in gathering related intelligence, in dealing with informants as well as in rating and analysing informants and information obtained. His responses would allow the trial court to assess his demeanour and credibility and, in turn, the reliability of his evidence. This possibility of testing the witness distinguishes this case from those where the evidence of absent/anonymous witnesses is admitted (paragraphs 77 and 78 above), and where the cross-examination of these witnesses is hindered or not possible at all. There is, however, no evidence that the present applicant attempted to test the Chief Superintendent's belief evidence in any way other than by asking him to disclose his sources. In this respect, it remains relevant also to note the comment of O'Donnell J in *DPP v. Donnelly and Others* to the effect that an accused may decide not to cross-examine a Chief Superintendent, not because of the constraints imposed by a grant of source privilege, but for other reasons including to avoid the risk of unwittingly strengthening the prosecution's case against him.

93. In such circumstances, and recalling that this Court's task is to ascertain whether the proceedings in their entirety were fair, the Court considers that the weight of the evidence other than the belief evidence, combined with the counterbalancing safeguards and factors, must be considered sufficient to conclude that the grant of privilege as regards the sources of the Chief Superintendent's belief did not render the applicant's trial unfair.

94. It follows that there has been no violation of Article 6 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible; and

2. *Holds* that there has been no violation of Article 6 of the Convention.

Done in English, and notified in writing on 12 December 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Mark Villiger
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Lemmens is annexed to this judgment.

M.V.
C.W.

CONCURRING OPINION OF JUDGE LEMMENS

1. I voted with my colleagues that there has been no violation of Article 6 of the Convention.

To my regret, however, I find it difficult to follow the reasoning adopted by the majority. In the first place, in my opinion the majority fail to address the applicant's core complaint. Secondly, they transpose principles related to statements by anonymous or absent witnesses to a situation of undisclosed material where such principles are in my opinion not applicable.

Notwithstanding the fact that I would apply different principles to a different complaint, I come to the same conclusion.

The complaint: not about the admissibility of belief evidence or the non-disclosure of underlying material, but about the role of the trial court with respect to the privileged material

2. The applicant explicitly stated that he did not object to the admissibility of the belief evidence (written observations of 17 July 2012, § 1). Nor did he object to the non-disclosure as such of the privileged material submitted by the Superintendent to the Special Criminal Court (SCC).

What he objected to was "the unfairness which is inherent in the fact that *the court of trial, which in this case was the trier of fact, reviewed the material upon which the belief was based, formed a view as to its reliability and convicted the (applicant) on the basis of it* while denying the (applicant) any meaningful way of challenging that evidence" (written observations, § 2; emphasis added). He concluded his submissions in the following words: "The applicant does argue that the procedure adopted in his case was unfair because *a trial court which had to determine the question of guilt or innocence had knowledge of material which it concluded was reliable evidence persuasive of guilt* but which the applicant was unable to challenge in any meaningful way" (written observations, § 24; emphasis added).

In sum, the applicant argued that the SCC, as a trial court sitting without a jury, acted in an unfair way by reviewing undisclosed material, not with the purpose of merely deciding whether or not this material had to be disclosed, but with the purpose of assessing its reliability and adequacy as a basis for the Superintendent's belief, which in turn was part of the evidence of the applicant's guilt. In other words, the applicant's complaint was based on the fact that the same trial court reviewed the material underlying the Superintendent's belief *and* decided on the applicant's guilt or innocence.

3. While the majority correctly quote the applicant's complaint, especially in paragraph 66 of the judgment, it seems to me that they do not focus their reasoning on the dual role of the trial court. They examine whether there were reasons for upholding the Superintendent's claim of privilege (paragraphs 80-81), even though the applicant did not challenge

that claim. They go on to examine whether the Superintendent's belief evidence was the sole or decisive basis for the applicant's conviction (paragraphs 82-87). Finally, they examine whether there were adequate "counterbalancing" factors and safeguards in place (paragraphs 88-92), but without discussing the very fact that the trial court examined the material relied on by the Superintendent and subsequently decided on the applicant's guilt.

With all due respect, it seems to me that the majority thus fail to give an answer to the specific complaint made by the applicant.

The relevant case law: not *Al-Khawaja and Tahery*, but *Rowe and Davis* and *Edwards and Lewis*

4. The majority further hold that they must be guided by the general principles articulated by the Court in *Al-Khawaja and Tahery v. the United Kingdom* [GC] (nos. 26766/05 and 22228/06, ECHR 2011) (paragraphs 78-79). That case concerns the impossibility to cross-examine an absent witness. It provides for a three-prong test (as is recalled in paragraph 76 of the present judgment): (i) was it necessary to admit the statement by the absent witness?; (ii) if so, was the evidence given by the witness the sole or decisive evidence for the accused's conviction?; (iii) if so, where there sufficient counterbalancing factors?

It is true that the Superintendent could not be cross-examined about the material underlying his belief that the applicant was a member of the IRA, but this does not turn the present case into a case about an absent (or anonymous) witness. I would like to add that neither is this case about a prosecution witness who refuses to answer questions of the defence (compare *Pichugin v. Russia*, no. 38623/03, 23 October 2012).

5. This case is about the role of the trial court with respect to undisclosed documents.

The relevant principles are, in my opinion, those that can be found in *Rowe and Davis v. the United Kingdom* [GC] (no. 28901/95, ECHR 2000-II) and *Edwards and Lewis v. the United Kingdom* [GC] (nos. 39647/98 and 40461/98, ECHR 2004-X). These cases concern the admissibility of undisclosed material in criminal proceedings and the procedure for dealing with such material. In recent cases concerning the non-disclosure of evidence the Court has continued to refer to those principles, not seeking to replace them with the *Al-Khawaja and Tahery* principles (see, for example, *Leas v. Estonia*, no. 59577/08, 6 March 2012; *O'Farrell and Others v. the United Kingdom* (dec.), no. 31777/05, 5 February 2013; and *Twomey and Others v. the United Kingdom* (dec.), nos. 67318/09 and 22226/12, 28 May 2013). The approach adopted by the majority in the present case is unprecedented.

6. *Rowe and Davis* sets the general principles for cases like the present one. These principles were also stated in two other judgments handed down

on the same day: *Jasper v. the United Kingdom* [GC] (no. 27052/95, § 53, 16 February 2000), and *Fitt v. the United Kingdom* [GC] (no. 29777/96, § 46, ECHR 2000-II). They are quoted in paragraph 74 of the present judgment.

These same principles were reaffirmed in *Edwards and Lewis* (Chamber judgment of 22 July 2003, § 54, quoted in the Grand Chamber judgment, § 46). While *Rowe and Davis*, *Jasper* and *Fitt* all concerned cases in which undisclosed material submitted by the prosecution had been reviewed by the trial judge but not put to the jury which had to decide on the guilt or innocence of the accused, *Edwards and Lewis* concerned two cases in which undisclosed material had been reviewed by the trial court, while that same court also had to decide on all issues of fact and on the guilt or innocence of the accused. The Court found that the material reviewed *ex parte* by the trial judge in order to determine whether there had been entrapment by the police concerned an issue that was "of determinative importance to the (accused's) trials" (Chamber judgment, § 57, quoted in the Grand Chamber judgment, § 46). Moreover, since the trial judge had seen prosecution evidence which could have been relevant to the defence submissions on entrapment, while the defence was not informed of the content of the undisclosed material, the Court did not consider "that the procedure employed to determine the issues of disclosure of evidence and entrapment complied with the requirements to provide adversarial proceedings and equality of arms or incorporated adequate safeguards to protect the interests of the accused" (Chamber judgment, §§ 58-59, quoted in the Grand Chamber judgment, § 46).

On the basis of the *Rowe and Davis* and *Edwards and Lewis* judgments, it seems to me that the Court would have to answer two questions in the present case: (i) did the trial court, in reviewing the material underlying the Superintendent's belief, see material which was, or could have been, "of determinative importance" for the applicant's trial (*Edwards and Lewis*)?; (ii) if so, did the decision-making procedure comply, as far as possible, with the requirement to provide adversarial proceedings[1] and did it incorporate adequate safeguards to protect the interests of the accused (*Rowe and Davis* and *Edwards and Lewis*)?

Application of the *Rowe and Davis* and *Edwards and Lewis* principles to the present case

7. In what follows, I will try to give an answer to the complaint, as I interpret it, on the basis of the principles set forth in *Rowe and Davis*, and further developed in *Edwards and Lewis*.

[1] I would make no reference to the requirement of equality of arms. The material submitted by the Superintendent to the SCC was disclosed neither to the defence nor to the prosecution (see paragraph 18 of the judgment). No issue of equality of arms therefore seems to arise.

8. As to the question whether the undisclosed material was "of determinative importance" for the applicant's trial, I would like to emphasise that "determinative" does not mean "decisive". In my opinion, it is sufficient that the undisclosed material was or could have been "relevant" for the trial court's assessment of the guilt or innocence of the accused.

There cannot be any doubt that this was indeed the case. The material related to the Superintendent's belief that the applicant was a member of the IRA, and this belief formed the first strand of the evidence tendered by the prosecution.

The majority attach importance to the fact that the Superintendent's belief was not the "sole or decisive" evidence relied on by the SCC (paragraphs 82-87). I believe that this assessment is correct, but in my opinion it is not a relevant issue. Even if the Superintendent's belief had been the sole or decisive basis for the applicant's conviction, this fact alone would in my opinion not necessarily have led to the conclusion that the applicant's trial was unfair.

Indeed, it remains to be seen whether the decision-making procedure complied, as far as possible, with the requirement to provide adversarial proceedings and whether it incorporated adequate safeguards to protect the interests of the applicant.

9. It appears to me that the procedure in the applicant's case allowed, as far as possible, for adversarial proceedings.

In the first place, the SCC decided that it would not base a conviction of the applicant solely on the Superintendent's belief, unless it was satisfied that there was evidence which supported or corroborated it. The applicant was able to comment on each of the other strands of evidence presented by the prosecution.

Moreover, "while the scope of cross-examination (of the Superintendent) was restricted by the trial court's ruling, the possibility to cross-examine the witness on his evidence was not entirely eliminated" (see paragraph 92 of the judgment, with further developments).

10. With respect to the protection of the applicant's interests during the proceedings, I note that the Irish Human Rights Commission (IHRC) in its submissions as a third party was very critical of the decision-making procedure before the SCC. Commenting on the role of the SCC, the IHRC stated: "As noted, the SCC sits without a jury, and so the judges charged with determining the guilt or innocence of the accused hear all the evidence irrespective of whether part of it is later ruled inadmissible... This is in stark contrast to a jury trial where the jury, which ultimately decides matters of guilt or innocence, does not hear evidence deemed to be inadmissible, so their deliberations are not tainted by evidence that should never have been before the court in the first place. It is this safeguard in normal procedure that is such a significant lacuna in the safeguards before the SCC" (written comments of 9 May 2012, paragraph 21). Further in its submissions, the

IHRC pointed to the fact that the absence of a jury in the proceedings before the SCC constituted a "structural deficit ..., which should be the overall responsibility of the State" (paragraph 41).

11. I have sympathy for the point of view of the IHRC, but in the end I believe that, notwithstanding the restrictions to the rights of the defence, the procedure in the applicant's case, taken as a whole, incorporated a number of safeguards which sufficiently protected his interests. I would attach particular weight to three aspects of the proceedings. They are also mentioned, albeit with other accents, in paragraph 88 of the judgment.

In the first place, the SCC was well aware of the difficulties the system created for the defence. For that reason, it made two things clear after having reviewed whether the information upon which the Superintendent based his opinion was "adequate and reliable". It stated "that there was nothing in any of the files which, in the view of the court, would assist the defence in proving the innocence of their clients", thus deciding that the "innocence at stake" exception was not applicable. It further stated that in weighing and considering the belief evidence of the Superintendent, it "specifically excluded consideration of any information to which the court had become privy as a result of perusing the files relating to the two accused which had been produced by the ... Superintendent". As the Court of Criminal Appeal (CCA) found in its first judgment, the latter statement indicated that the material examined by the SCC "was (not) influential on that court in making its judgment, let alone inspiring anything determinative of the guilt of (the applicant and his co-accused)".

It is true that it was the trial court itself that made the reassuring statements. The applicant could not meaningfully contest either of them. However, as for the first statement, it would in any event have been for the court deciding on the merits to assess whether or not there was something in the file that could have gone in the direction of an acquittal, and the accused would have had to accept that assessment, subject to appeal of course. As for the second statement, it is understandable that a convicted person may have doubts as to whether a court was able to disregard material it had seen before. However, as the CCA stated in its first judgment, banishing matters from their minds is something experienced judges do "meticulously and without difficulty every day". Our Court also accepts that experienced judges perfectly understand how to deal with undisclosed material that cannot serve as a basis for a conviction (*Twomey*, cited above, § 38).

Finally, it is important to note that the applicant could have invited the CCA, which was not the trial court, "to ascertain whether (in the process of reviewing the material submitted by the Superintendent) the trial judges had misdirected themselves in respect of the documents or the material contained therein" (second judgment of the CCA). The applicant did not seek such an "independent" review. This failure is an element that considerably weakens the strength of his argument.

12. For the reasons set out above, I would conclude that, despite the examination of some undisclosed, potentially damaging material by the SCC, the applicant has not been deprived of a fair trial.