Donohoe v Ireland: Belief Evidence and the European Court of Human Rights
This article shall critically analyses the decision of the European Court of Human Rights ("ECtHR") in Donohoe v Ireland\(^1\) and the effect it may have on Irish law. In doing so, there will also be an examination of informer privilege and belief evidence's standing before and after this case. This article shall examine the case's progress through the courts, the majority and minority decisions of the ECtHR and the overall effect on the rights in Article 6 of the European Convention on Human Rights ("the Convention") and any further challenges. It is important to note from the outset the clash between the rights to a fair trial of the accused are contending with provisions in place to target unlawful organisations who carry out acts of terror. This arose in the context of whether the accused was a member of the Irish Republican Army ("the IRA"). This case looks at the admission of belief evidence and use of informer privilege in light of the Convention and the principles governing its admissibility.

Criminal proceedings arose against Mr Donohoe from his association with events linked with dissident behaviour in 2002. Mr Donohoe was arrested in Corke Abbey, near Dublin for suspicious activity with a group of other men for dissident purposes. He was arrested on suspicion that he was a member of the IRA contrary to section 21 of the 1939 Offence Against the State Act as amended. During questioning numerous questions were put to him concerning the events in Corke Abbey and the evidence gathered by the police. The accused was informed that inferences could be drawn from his failure to answer questioning\(^2\) but remained silent.

**The Irish Courts**

The accused was convicted in the Special Criminal Courts for his membership of an unlawful organization\(^3\). The court heard belief evidence given by the Chief Superintendent PK of the men's membership in the IRA, inferences drawn from the men's failure to respond to questioning and corroborating evidence from the events at Corke Abbey and the searches conducted by the Gardaí. At trial, the court refused the defence permission to review the documents on which the Chief Superintendent based his belief evidence that the accused was a member of the IRA. Instead they balanced the breach to the right to cross-examine by reviewing the documents validity themselves. The trial judges noted the decision was not solely based on the events of Corke Abbey nor the documentation recovered from the

\(^{1}\) Donohoe v Ireland [2013] ECHR 1276 (App No 19165/08)
\(^{2}\) Section 2 of the Offences Against the State (Amendment) Act 1998
\(^{3}\) People (DPP) v Binead and Donohue (18 November 2004, unreported), SCC.
searches but had factored in the belief evidence of the Chief Superintendent PK and the inferences drawn in questioning to find the accused guilty.

The accused sought to appeal this decision to the Court of Criminal Appeal, on the basis that the Special Criminal Court 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. The Court of Criminal Appeal refused grounds for his appeal, holding that the refusal to allow cross examination of the Chief Superintendent did not amount to a breach of his Constitutional rights nor his Conventional rights enshrined in Article 6. The Court found that there was an appropriate justification for the limitation to the right as set out in DPP v Kelly, as the privilege invoked was in the interest of protecting against possible threats to life of the informants. The Court noted that the decision was not solely based on the belief evidence but considered in conjunction with the other strands in determining the guilty verdict. The Court of Criminal Appeal dismissed the application to the Supreme Court questioning the use of belief evidence as breaching his Constitutional and Convention rights. In doing so the Court concluded that the trial court was within its jurisdiction, as drawn from precedence of the Strasbourg Court, in keeping the admissibility of documentation within the supervision of the judges themselves as long as the review was not influential in determining guilt.

**Belief Evidence and Informer Privilege Pre-Donohoe v Ireland**

Before moving on to the substantial judgement, it is interesting to look at the position of belief evidence and informer privilege before the case was decided in Ireland. The provision is set down in The Offences Against the State (Amendment) Act 1972. In

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4. [2013] ECHR 1276
5. Art. 38.1 of the Constitution of Ireland
6. People (DPP) v Kelly [2006] 3 IR 115
8. [2006] 3 IR 115, per Fennelly J
9. 53(2) The Offences Against the State (Amendment) Act 1972- 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."
engaging with this provision, the courts have to balance the accused's right to a fair trial under Article 38.1 of the Constitution with the possibility of witness intimidation and threat to the security of the State.

In the Irish case law, the courts have generally allowed the submission of belief evidence at trial and upheld the validity of Section 3(2)\textsuperscript{10}, with the courts noting that the use of belief evidence and restriction on cross-examination not being a substantial infringement on the fairness of the trial. The Courts have noted that "[f]airness is not an absolute term"\textsuperscript{11} and that limitations placed on fairness may be justified by looking at the social and political considerations. McMahon J in \textit{Redmond v Ireland}\textsuperscript{12}, examined the principles from this area and noted that the right to a fair trial cannot be interfered with to such an extent that it falls below the minimum guarantee to which the citizen is entitled. The Courts have however placed limitations on the extent of belief evidence, generally requiring corroborating evidence as seen in \textit{DPP v Donnelly, McGarrigle and Murphy}\textsuperscript{13} where the evidence was corroborated by inferences drawn from silence in questioning\textsuperscript{14}. It is submitted that the Courts have created principles governing the admissibility of belief evidence requiring some corroborating evidence. Similarly a conviction based solely on belief evidence is likely to be treated less favourably as noted in \textit{People (DPP) v Kelly}\textsuperscript{15} by Fennelly J. However where there is no challenge to the belief, it gains significant weight and could potentially be used as the sole basis for a conviction\textsuperscript{16}.

In terms of the rights of Article 6 of the Convention, the Irish Courts so far has upheld the validity of the use of belief evidence. Although acknowledging this process does infringe the rights of the accused to a fair trial, the courts have traditionally seen the compelling circumstances as sufficient to warrant the infringement. The implication from the judgements is that the Convention standard for a fair trial is adequate if it is "...a trial that is fair overall"\textsuperscript{17}. In \textit{People (DPP) v Binead and Donohue}\textsuperscript{18}, the court did engage in an analysis of

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\textsuperscript{11} \textit{Redmond v Ireland} [2009] 2 IRLM 419 per McMahon J

\textsuperscript{12} [2009] 2 IRLM 419, 435

\textsuperscript{13} [2012] IECCA 78 (30 July 2012)

\textsuperscript{14} S.2 Offences Against The State (Amendment) Act 1998 provides for inferences to be drawn from silence during questioning.

\textsuperscript{15} [2006] 3 IR 115, 147

\textsuperscript{16} \textit{People (DPP) v Ferguson}, Unreported CCA (27th October 1975).

\textsuperscript{17} Heffernan with Ñí Raifeartaigh, \textit{Evidence in Criminal Trials} (Bloomsbury 2014) 775
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the compatibility with the Convention rights in Article 6 and found that there was a potential misbalance of arms which could have breached the fairness of the trial if there had been no examination carried out of the basis of the informer privilege. They found the counter-measures adopted were adequate to remedy the breach and safeguard the right. This point was further examined by the ECtHR of Human Rights.

**The European Court of Human Rights**

In April of 2008, Mr Donohoe brought an application to the ECtHR under Article 6, that his trial had been unfair. He contended that there was a breach in refusing access to the evidence, that the review of the documents was not an appropriate counter-measure to compensate for being unable to cross-examine PK and no other appropriate safeguards had been made available to him. The Court noted their "...primary concern under Article 6(1) is to evaluate the overall fairness of the criminal proceedings"\(^1^9\), not to review the national legislation or substitute in their own view of the facts.

The Court examined the principles for the duty to disclose evidence set out in *Rowe and Davis v United Kingdom*\(^2^0\), recalling how the court in *Kelly*\(^2^1\) had held these principles were not violated by the non-disclosure of the evidence as it did not render the trial wholly unfair. In further examining the decisions relating to the general principles, the Court noted that the non-disclosure of evidence was not automatically a breach of fair procedure as the judicial authority on hand could seek to counterbalance the breach\(^2^2\). It is important to highlight that these cases did not deal with informer privilege directly but instead were focused on absent or anonymous witnesses who did not give testimony at trial. The Court however still opined that they should be used as guiding principles in examining the fairness of the use of belief evidence in this case.

The Court set out a number of questions that needed to be answered in their examination:

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**Footnotes:**

19 [2013] ECHR 1276
20 (2000) 30 EHRR 1
21 [2006] 3 IR 115
22 *Al-Khawaja and Tahery v United Kingdom* (2012) 54 EHRR 23
(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.\(^\text{23}\)

In stating the violent nature of the IRA and the likelihood they would seek retribution against any informers as well as potentially undermining the lengthy process of gathering information required to prosecute members of subversive organisations, the Court found it was necessary to uphold the claim for privilege over the sources of the belief evidence. The Court concluded that the evidence was merely a factor considered on the overall evidence and it was supported by the inferences from questioning, the appellant's acquiescence and participation in the events at Corke Abbey as well as the evidence gathered by the Gardaí in the searches. However the Court did state the belief evidence had carried a measure of weight in the conviction of the appellant and necessitated the use of safeguards to ensure the fairness of proceedings.

From the outset, the Court noted that the trial court was aware of the need to proceed cautiously with PK's claim for privilege and the requirement of counterbalancing measures to ensure the fairness of the trial. The Court proceeded to examine the following measures and considerations that were taken; first the trial court had engaged in an analysis of the Chief Superintendent's evidence and found it was worthy of a claim for privilege. Secondly it noted that the Court considered the issue of "innocence at stake" and found that there would be nothing in the evidence which could strength the defence's case. Thirdly, the Court noted that the trial court's decision had excluded any information it had read in the basis of the belief evidence of PK and stated they would not convict on the basis of the evidence alone. With these measures and the statutory provisions that existed\(^\text{24}\), the Court found there had been no infringement of Article 6 of the Convention. The Court found the applicant had opportunities

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\(^{23}\) [2013] ECHR 1276

\(^{24}\) Section 3(2) Offences Against the State Act 1939 as amended, providing that it must be a Garda ranked highly with relevant experience to compile and submit this evidence.
to cross examine the evidence of PK beyond simply asking him to disclose his sources which had not been used.

In his concurring judgement, Lemmens J argued the other judges had taken the wrong focus, pre-occupying themselves on whether the belief evidence's admissibility was unfair when they should have looked at the applicant's challenge to the dual nature of the Special Criminal Courts in reviewing fact and law. He noted the main issue as a challenge to the Court's examination of evidence with the applicant arguing the examination of the evidence could lend itself to sway their opinion in examining it rather than simply determining its admissibility. He also contested that the appropriate questions were not to be drawn from Al-Khawaja and Tahery v the United Kingdom but from Rowe and Davis v United Kingdom as follows;

(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...?; (ii) if so, did the decision-making procedure comply, as far as possible, with the requirement to provide adversarial proceedings and did it incorporate adequate safeguards to protect the interests of the accused...

In applying these questions he still found there had been no breach in the Article 6 requirements of fair procedure by the trial court as the court had maintained an adversarial nature to the proceedings as well as incorporating safeguards into the process. He notes the applicant's failure to ask the Court of Criminal Appeal to review the basis of the Special Criminal Court's decision and notes how "this failure is an element that considerably weakens the strength of his argument."

**Reliance on Belief Evidence and Informer Privilege Post-Donohoe**

It is submitted that conclusions can be reached from *Donohoe v Ireland* in relation to the effect upon the status of belief evidence in the Irish legal system. First and foremost it appears that the court will not engage in a review of the Irish legislation but instead focus on

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25 [2013] ECHR 1276, Para. [92]
26 (2012) 54 EHRR 23
27 (2000) 30 EHRR 1
28 [2013] ECHR 1276, per Lemmens J
29 [2013] ECHR 1276 Para. [11], per Lemmens J
30 [2013] ECHR 1276
the fairness of the trial in question, suggesting the ECtHR will engage in a more case by case analysis. Interest has existed over whether the Court would raise issue with the use of belief evidence under Section 3(2) as discussed by Colin King. He raised the opinion of members of the Committee to Review the Offences Against the State Acts 1939-1998 as demonstrating that Article 6 of the Convention would be the best avenue to bring a challenge to the use of belief evidence. In spite of this belief, the Court found that the infringement was justifiable by examining the violent nature of the subversive organisations captured within this provision and the overall fairness of the trial.

The second point to be taken is an inference from this judgement that there may be a potential challenge to the use of belief evidence in convicting a party if it is the sole strand of evidence in a case. In examining whether the belief evidence was the sole or decisive factor in the conviction, the court noted there were other strands of evidence which had a corroborative effect upon the evidence of the Chief Superintendent and facilitated the trial judges' decision. It has been previously suggested that there may arise cases where belief evidence may be relied on as the sole, decisive basis for a conviction however in light of Donohoe and previous Strasbourg precedence, it seems likely the Court would hold this sole reliance as a breach of the Article 6 rights of the Convention.

One final point of interest is how proceeding cases will treat the test of Lemmens J in examining whether the national Court acted appropriately. Lemmens J's test looked beyond the issue of whether the evidence was the "sole or decisive" basis, which he viewed as irrelevant, but centred its focus on the fairness of the proceedings and the role of the Special Criminal Court as both finder of fact and law. His test suggests the importance in the Courts guaranteeing that they were not swayed in examining the evidence but merely engaged in a mechanism of review. Liz Heffernan notes cases where the Irish Court did not enter into examinations of the weight of the evidence such as in Kelly, and the potential problematic

31 Section 3(2) Offences Against the State (Amendment) Act 1972
33 King, The Right to Fair Trial v The Claim of Privilege (2007) 17 ICLJ 17, 22
34 John Murray v the United Kingdom (8/2/96) Reports 1996-I 30 and Condon v the United Kingdom, no. 35718/97, § 56, ECHR 2000- Court held that negative inferences drawn from silence could not be the sole basis for conviction.
35 [2006] 3 IR 115
nature of these cases in terms of the Convention. Here there could be merit to applying Lemmens' test in establishing the overall weight the court did attach to the evidence and whether it influenced their decision so it no longer aligned with the adversarial nature of the court. It will therefore be of interest to see how future Courts focus their examination, whether it will be in line with Lemmens J or the majority.

**Conclusion: The Proper Procedure for Courts Post-Donohoe**

It is submitted that Donohoe demonstrates the appropriate counter-balancing measures a court must undertake in these circumstances. The ECtHR stressed the importance of these measures in remedying any incursions into the fairness of the trial. The Court looked favourably upon the trial judges' review of the basis of the Chief Superintendent's assertion of informer privilege. It is submitted that as long as this review is simply used to ascertain the acceptability of the privilege as oppose to forming part of the judges' decision it will be valid.

The Court also approved of the mechanisms counter-balancing the rights of the accused with the use of belief evidence. Primarily the introduction of belief evidence should simply serve to provide the opinion of the Chief Superintendent who is seen as having expert experience on the matter. The evidence although persuasive is not conclusive and it is unlikely a court would frame a decision solely on it where there is a challenge. Further considerations in Donohoe stated that despite there being a restriction on the cross-examination, it was not an absolute restriction created by the Irish system, allowing for some avenues of questioning further upholding the validity of this practice. PK could still have been questioned on the nature of his evidence gathering, analytical approach and other issues, providing the trial court with a further chance to examine his demeanour however this was not pursued by the defence.

This case has provided further perspective in the use of belief evidence, upholding its validity and providing a structured procedure for the Courts to follow in terms of counter-measures, which can all be seen as a welcome addition for the use of this process. However this does not constitute a resounding statement of absolute faith in this practice by the ECtHR as here the evidence was examinable in written form for the courts and the counter measures

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37 [2013] ECHR 1276, para [92]
adopted were previously favoured to be supported by the ECtHR$^{38}$. It is more likely that the Court would have difficulty in a case where the basis of the belief evidence cannot be reduced to writing or where the only corroborative evidence is negative inferences drawn from silence during questioning. In these contexts, it is submitted the Court would be more likely to hold the procedure as in violation of Article 6 of the Convention as suggested by Heffernan$^{39}$, in particular if Lemmens J's test is applied. With this considered, the Court may have supported the use of Section 3(2) in this case but this still may uphold further challenges to the use of belief evidence in different factual scenarios. Donohoe v Ireland$^{40}$ can therefore be seen as a guiding case handed down by the European Court and future prosecutions and judges should consider when structuring their use of belief evidence.

$^{38}$ ibid (n 37) 85  
$^{39}$ Ibid (n 37) 86-87  
$^{40}$ [2013] ECHR 1276