THE COURT OF APPEAL
CRIMINAL

Record Nos. 278/2019 279/2019
Bill No. SCDP0012/2017A

IN THE MATTER OF SECTION 23 OF THE CRIMINAL PROCEDURE ACT, 2010

Between:

THE DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

AND

RK AND LM

Respondents

AND

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Amicus Curiae

SUBMISSIONS OF THE *AMICUS CURIAE*

Introduction

1. An issue arises in this case, as to whether there are circumstances in which belief evidence, given pursuant to s.3(2) of the Offences Against the State (Amendment) Act 1972, can be ruled inadmissible where a broad claim of privilege has been upheld in respect of the grounds for such belief.

2. A key aspect of this legal issue is whether the availability of a review of the Chief Superintendent's file by a trial court is a sufficient safeguard to ensure admissibility of such evidence; or, whether there is a separate requirement for the Director of Public Prosecution and Prosecuting Counsel to review the material grounding the belief evidence.

3. The central submission of the Irish Human Rights and Equality Commission ("the Commission") is that significant safeguards are indeed required, to ensure that belief evidence remains a proportionate measure, and to maintain the balance envisaged by the Supreme Court in the cases of *Kelly*[1] and *Redmond*[2].

[1] DPP v Kelly [2006] 3 I.R. 122 at para 12
[2] Redmond v Ireland [2015] 4 IR 84

4. Where belief evidence is to be given, there must in the first instance be a process of prosecutorial review of the material grounding the belief. If required, there should also be review by a court. Ideally, this should not be by the trial court.

5. It is submitted that the steps taken by the Special Criminal Court in this case go no further than implementing the principles set out in the caselaw, including *DPP v Ward & Special Criminal Court*[3].

The key principles from the case law on belief evidence

6. While the Supreme Court was prepared to uphold the constitutionality of s.3(2) in *Redmond*, it seems clear that this provision is at the outer limits of compatibility with Article 38.1 of the Constitution. Hardiman J, in comments endorsed by the majority of the Court, said as follows:

> *'5. I have no doubt that the provisions of s.3(2) represent a very serious diminution in the protections ordinarily afforded to an accused person by the law of evidence. On the face of it, it merely makes the opinion of the Chief Superintendent admissible in evidence. In reality, however, its effect is far greater. That effect cannot be better stated than it was by Fennelly J. in DPP v. Kelly [2006] 3IR 115. Fennelly J. said, at p.135: "The real problem is that, where privilege is claimed, as it inevitably is, the defendant does not know the basis of that belief. He does not know the names of the informants or the substance of the allegations of membership. Without any knowledge of these matters, the accused is necessarily powerless to challenge them. Informants may be mistaken, misinformed, inaccurate or, in the worst case, malicious. None of this can be tested."*
> *6. I wish specifically to endorse this statement of the position brought about at a criminal trial before the Special Criminal Court where s.3(2) applies. I believe it epitomises the view of every practitioner with actual experience of defending persons charged with the offence of membership. It is obvious that this puts a person accused of this offence in a much less protected position than a person charged with any other offence and exposes to a very real risk of conviction, though innocent.'*

7. Despite these stark findings, the Court secured the constitutionality of s.3(2) by elevating the requirement of independent supporting evidence to a rule of law.

8. Hardiman J referred to the possibility that there may sometimes be a lack of *'examinable reality'* to the evidence of a Chief Superintendent, because very broad privilege has been claimed. The effect of this, he found, was to:

> *'undermine any potential avenue to effectively challenge the opinion evidence… wholly to subvert the prospects of useful cross-examination… exclude even the theoretical possibility of undermining the opinion by cross-examination."*[4]

[3] DPP v Special Criminal Court & Ward [1999] 1 IR 60, pp. 87-88
[4] *Redmond, paragraph 24*

9. The Supreme Court did not state, however, that belief evidence lacking in examinable reality was inadmissible *per se*. Instead, credible independent evidence is required, as a safeguard.

10. But, it is submitted that the admissibility of such evidence is also subject to the *caveat* identified by O'Donnell J in *Donnelly*[5]*:* in any individual case, frailties in the belief evidence may result in an unfair trial.

11. More generally, admissibility of such evidence is subject to the *caveat* of Geoghegan J in *Kelly*, in respect of the encroachment on cross-examination in respect of belief evidence, that since the *'normal rights of an accused are being infringed, it would seem to me that there must be a constitutional requirement that such limitation be kept to a minimum'*[6].

12. This appeal raises an issue about the review of the grounds for the belief, that is not expressly addressed in *Redmond* or *Kelly,* but which may have been implicit in the Supreme Court's analysis: if a blanket claim of privilege over belief evidence is to be upheld and the evidence acted upon, is this only permissible where the prosecution has complied with a duty to review the privileged material?

13. It is submitted that the constitutionality of s.3(2) is dependent on safeguards being read-in to the process, to ensure that the interference with the normal rights of an accused are limited to the greatest extent possible. The appropriate means of safeguarding the fairness of the process is for there to be prosecutorial and, where necessary, judicial involvement in review of the file. If, after such involvement, a blanket claim of privilege is upheld, then the resulting lack of examinable reality does not render the belief evidence inadmissible. In such circumstances, the solution as provided for in *Redmond* is to require additional, credible independent evidence.

14. Without the involvement of the prosecution in the assessment of privilege claims, much trust must be placed on the witness to properly frame their claim within the confines of constitutional principles. While it will is not possible to say objectively whether a blanket claim of privilege has properly been invoked by a witness in a given case, it can be noted that on occasion in the past, more information has been given by such witnesses. And in other jurisdictions in comparable[7] contexts, there is a requirement to go significantly further in elaborating on the grounds for belief. This raises the prospect that potentially more can be disclosed than is being disclosed.

15. Even applying the solution identified in *Redmond*, problems remain. Where blanket privilege is upheld, it is impossible to assess what weight, if any, should properly attach to the Chief Superintendent's belief. In both *Kelly* and *Redmond*, the exercise of weighing the evidence was expressly left to the trial court. But it is hard to see how a trial court can test, and therefore weigh, belief evidence where blanket privilege has been claimed**.** In such circumstances, the weighing of the witness's evidence may amount to no more than a reference to the particular level of experience of the Chief

[5] People (DPP) v Donnelly, McGarrigle & Murphy [2012] IECCA 78
[6] At p.121
[7] See page 13 and 14 below

Superintendent and their demeanour while giving evidence. These are not sufficient substitutes for analysis of the content of evidence.

16. Where, however, the prosecution have already fulfilled their duties as 'ministers for justice', there can be more confidence that the rights of the accused have been protected.

17. The main cases on belief evidence, including more recent judgments such as *Redmond, Kelly* and *Donnelly,* appear to have proceeded on the assumption that there would ordinarily be scope for some cross-examination. In reality though, where elaboration on the grounds of the belief has been given, it rarely yields real insight into the basis of the belief or provides potential for challenge. Where additional information is given, it may reflect a desire to demonstrate that the belief is grounded on multiple sources and on multiple incidents.

18. On occasion, when the veil has been drawn back on the grounds for the belief, it has transpired that there has been some error in respect of the grounding material. But it remains difficult, even then, for a trial court to assess to what extent errors or omissions in the belief-forming process should reduce the weight they can attach to the evidence. Absent a review of the Garda evidence, the trial court will have no sense of the overall strength of the material grounding the belief.

19. Where a blanket claim of privilege is asserted the result, in practice, is that no information leaks out to shed light on the grounds for the belief and there is no opportunity to undermine the belief evidence. The Commission submits that an accused should not have to rely on the remote possibility that a chink of light will illuminate frailties in belief evidence. The responsibility to bring such matters to light properly rests with the prosecution.

Review by an officer of the DPP at the beginning of a prosecution

20. The Commission submits that it is incumbent on the DPP to ensure that the grounds for the belief of the Chief Superintendent are considered and queried at the outset of the process, and on a continuing basis as required.

21. A related submission was previously considered by this Court in the case of *DPP v Palmer*[8]. In that case, a submission was made by an appellant that:

> *'…there is an overriding obligation on the prosecutor to consider that material so that that claim can be stood over. There must be an assessment of the reliability of the sources, or the quality of the intelligence which have been supplied. The appellant cited the 'Guidelines for Prosecutors (November 2010)' in support of this contention.*
> *It was argued that the involvement of the Office of the Director of Public Prosecutions is a valuable safeguard which ensures real organisational independence in the assessment of such evidence, and not merely personal or divisional independence which is provided by the opinion of a Chief Superintendent.'*

[8] People (DPP) v Palmer [2015] IECA 153

22. In response, the DPP submitted that:

> *'The section permits in evidence the evidence of a Chief Superintendent as to his belief regarding the conduct or activities of a person when charged with a membership offence. There is no requirement in the statute that there would be any add-on that the opinion should be verified, checked or analysed by the Director of Public Prosecutions or anyone else. It was submitted that, in fact, it would be quite improper if the Director of Public Prosecutions took it upon herself to analyse evidence that is to be given by a witness. The Director of Public Prosecutions' function and role is not to analyse, review and inform evidence to be given in relation to any witness, and it was submitted that that applies to the belief evidence of a Chief Superintendent pursuant to s. 3(2) of the Offence Against the State Act 1972 as amended. That would be usurping the function of the trial court. The statute requires that it is the Chief Superintendent who forms the belief and gives that evidence to a trial Court.*
>
> *...*
>
> *The section does not refer to a Chief Superintendent's opinion being reviewed by the Director of Public Prosecutions. Any review by The Director of Public Prosecutions of the Chief Superintendent's belief would not be admissible as it is his belief that is provided for by the legislation. The information that is available to the Chief Superintendent may not be such as would be intelligible on its own, per se, and any examination of such material by the Director of Public Prosecutions could, in any event, be a pointless exercise.*

23. On this issue, the Court, *per* Ryan P, held as follows:

> *'There is no provision in the sub-section for consideration of the material on which the Officer's belief is based by the Director of Public Prosecutions or another agency. It is not the belief of the Director of Public Prosecutions. Neither is it the Chief Superintendent's belief as approved or authorised or evaluated by the Director. The Director's functions in regard to prosecutions do not include consideration of the confidential material on which the Chief Superintendent's belief is based.*
> *This ground of appeal and the submissions supporting it suffer from the misunderstanding that the evidence before the Court is of the Officer passing on hearsay information. The distinction may at first sight appear to be a fine one between a belief based on confidential information from a variety of sources, on one hand, and reporting information provided by others, on the other hand. However, as the case of Donnelly & Ors makes clear, the distinction is an important one for a proper understanding of the section and how it operates. The Court in that case also highlighted the evaluative role of the officer giving the evidence and the fact that it is a person of very senior rank in the Garda Síochána who has particular and relevant experience.*

24. The submissions made by the DPP in *Palmer* were firstly, that the individual items grounding the belief evidence might not be intelligible to the DPP and so a review could be a pointless exercise; and secondly, that the DPP has no function in checking the evidence to be given by a particular witness. The first proposition appears questionable.

It is hard to see how the various strands of information grounding a belief would individually or cumulatively be beyond the understanding of an experienced directing officer. The role of the DPP, and/or directing officers, encompasses a qualitative assessment of strands of evidence to determine whether they are cumulatively capable of supporting a finding of guilt beyond reasonable doubt.

25. In respect of the second proposition, a directing officer would not be getting involved with a checking or verification of the witness' evidence but rather, performing the DPP's core function of assessing whether the evidence presented is sufficiently robust that charges should be brought, or maintained.

26. Under the current system, the DPP/a directing officer can only consider the independent supporting evidence when deciding whether a charge should be brought or maintained. There is no means to assess whether the belief is based on solid grounds; no opportunity to identify errors or infirmities in respect of the belief and how it interacts with the other evidence; and no way of assessing whether exculpatory material can be disclosed.

27. The reason for requiring such scrutiny by the Office of the DPP is amply demonstrated, it is submitted, by the facts of *DPP v Connolly*.

28. In *Connolly*[9], a request from the defence for prosecution counsel to review the documentation had been rejected. Consequently, the defence took the step of asking the trial court to review the documentation in order to determine a claim of privilege. The Special Criminal Court had declined to do so, being of the view that an *'inexpert and out of context analysis of intelligence material'* would not be of assistance in assessing the belief evidence and that there was no necessity in any event, given the constitutional requirement for supporting evidence. The Court of Appeal allowed an appeal against conviction on the basis of the trial court's refusal to view the file grounding belief evidence.

29. In a subsequent retrial in *Connolly*[10], the trial court was again asked to review the file, in order to determine whether there was any material on it that supported innocence. Following a review of the file, the Court ordered the disclosure of two documents relating to the accused's movements on a certain date. This material overlapped with the independent supporting evidence, which had been relied on in the first trial and the retrial. The defence therefore submitted that the supporting evidence was not in fact independent and offended the rule against 'double counting'. Since the Assistant Commissioner giving the belief evidence had not addressed the issue of doublecounting or taken precautions to ensure that it did not occur, the Court could not be surethat the documents were not taken into account in forming his belief. In the circumstances, the Court could not be satisfied beyond reasonable doubt of the guilt ofthe accused. His acquittal was therefore a direct result of the inspection of the file by the trial court.

30. This outcome undoubtedly demonstrates that review by a trial court, in the rare cases in which it occurs, can be a valuable safeguard. But, it is submitted that this safeguard

[9] People (DPP) v Connolly [2018] IECA 201

[10] People (DPP) v Connolly (Bill No 0009/2014, 24 June 2019) SCC

was never intended to stand alone, or in substitution to the role of the prosecution. The specific issue that arose in *Connolly* demonstrates why it is vital that there would be transparency and meaningful engagement between the Chief Superintendent and the prosecuting authorities throughout the process.

31. Recently, the accused in *Connolly* brought an application before the Special Criminal Court to have his conviction declared a miscarriage of justice. Coffey J, giving the judgment of that Court, held that the failures in respect of the belief evidence amounted to *'a grave defect in the administration of justice in the trial'* which constituted a miscarriage of justice. When analysing the nature of that defect, Coffey J pointed out that:

> *'Prior to commencing the prosecution, the Director of Public Prosecutions could have had no knowledge of what was contained in the intelligence file or of any possible overlap between the contents of that file and the proposed independent supporting evidence contained in the Book of Evidence relating to the movements and activities of the accused on the 16 December 2014 or as to what, if any, overlapping alleged facts had been consciously disregarded by the senior garda officer when forming his belief. This is not, therefore, a prosecution that should never have been brought in the sense that there was never any credible evidence implicating the applicant.'*[11]

32. While Coffey J in *Connolly* was not addressing the issue of whether there had been a culpable failure on the part of the DPP to review the file, his comments illustrate that in certain cases, a prosecutorial review of the material grounding belief evidence could contribute to a decision not to try a suspect at all, on the basis that the evidence is not sufficiently robust to prove guilt beyond reasonable doubt.

33. The need for engagement between the DPP and the Chief Superintendent was presupposed by Hardiman J in the Court of Criminal Appeal case of *Farrell*[12]. There, a conviction was overturned due to a Chief Superintendent *'deploying'* prejudicial comments about a *'litany of incidents'*, which had not been notified to the defence in advance of trial. Hardiman J said that where a Chief Superintendent wishes to allude to incidents grounding his belief, the prosecution should have regard to its own disclosure obligations and consider whether details relating to these incidents should be disclosed to the defence.

34. Such a review could in fact strengthen a prosecution case by ensuring the trial court has a proper understanding about the scope of the belief evidence and the nature of the material underlying it.

35. Therefore, it is submitted that the DPP should know on what basis a Chief Superintendent believes that a particular individual is a member of the IRA. The DPP is not unused to receiving sensitive and highly confidential information. For example, to certify that a non-scheduled offence is not suitable for trial in the ordinary courts, the DPP must inevitably base her decision on confidential information. As held by the

[11] Connolly v DPP (12 April 2021, SCDP 09/2014) Coffey J

[12] DPP v Farrell [2014] IECCA 37, para 33 onwards

Supreme Court in *Thomas Murphy v Ireland & DPP*[13], *per* O'Donnell J, an accused can then be denied even the gist of the reasons for the DPP's decision, where this is necessary.

36. Directing officers within the Office of the DPP are not readily identifiable to members of the public or to accused persons. Further measures could be taken, if necessary, to ensure their anonymity in the context of a prosecution for membership of an unlawful organisation. Unlike a court when assessing privilege, they are in a position to communicate freely with members of the Gardaí, to ask questions, to request further details and to properly test whether disclosing information grounding the belief would jeopardise the relevant privilege. In circumstances where the belief of the Chief Superintendent is predominantly based on a review of an intelligence file, the information will be readily available for review.

37. In such a process, a directing officer might learn, for example, that there are a number of reliable informants who gave information about the activities of a suspect which are highly consistent with membership of the IRA. There may be covert surveillance of this activity, or audio recordings of the suspect speaking of matters highly consistent with IRA membership, which cannot be relied on as evidence for operational reasons.

38. The provision of such information, and its review by an institutionally-independent person, would add much legitimacy to what is a controversial procedure at the outer limits of constitutional acceptability.

39. Alternatively, it may transpire that the belief that a suspect is a membership of the IRA is based on less compelling or comprehensive information. The DPP would then properly assess whether it is appropriate to proceed with a charge, in light of the strength of the other independent supporting evidence.

Review of the Chief Superintendent's file by Prosecuting Counsel

40. The Appellant has emphasised that giving any details of the grounds for a belief may simply not be possible. The Commission would agree that there are certainly clear reasons, based on public interest and informer privilege, which may justify a broad claim of privilege in certain circumstances. But in this regard, the prosecution do not get to see the Chief Superintendent's file and are not in a position to say whether a blanket claim of privilege is justified in a particular case.

41. Moreover, it does seem clear from Charleton J's judgment in *Redmond* and O'Flaherty J's judgment in *DPP v Ward and Special Criminal Court*, that Prosecuting Counsel are expected to review sensitive privileged material where controversy arises. These authorities do not appear to sit easily with the analysis of the Court in *Palmer* and they are not referred to that judgment (*Redmond* being subsequent to it, in any event)

42. The Commission would also accept that there may be some distinction to be drawn in terms of sensitivity and safety concerns, between the type of material reviewed by Counsel in the *Ward case*, and the material or information which underlies belief

[13] [2014] 1 I.R. 198

evidence. But it is notable that Charleton J drew no such distinction in his judgment in *Redmond*.

43. While Charleton J's judgment was not endorsed by the other members of the Court, Hardiman J adopted much of what was said by Charleton J and highlighted the specific findings that he disagreed with. There is no reason to conclude that Charleton J's comments on the role of prosecuting Counsel was implicitly rejected. Hardiman J's own judgment differs mainly by being more emphatic in respect of the need for safeguards.

44. The Commission is mindful that the proposed safeguards referred to in these submissions may have security and safety implications at various levels, including in respect of the lawyers engaged in the process. In the context of the trial of the Respondents, no evidence was called on this issue by the Appellant; but that should not be treated as conclusive. Nonetheless, on this matter, there does not appear to be any major distinction between Judges reviewing sensitive material, and senior lawyers reviewing such material.

Review of the Chief Superintendent's file by the Court

45. A trial court's discretion to review the Chief Superintendent's file upon requestamounts to a safeguard in respect of belief evidence. Examples from the case-law showthat a trial court can have a valuable role to play. But, it is a role which is likely to be exercised in exceptional circumstances only.

46. It is understandable that in a non-jury trial, an accused person would not wish for the trial court to review the Chief Superintendent's file. Such reluctance does not necessarily flow from an acknowledgment of guilt on the part of an accused. The file may still contain prejudicial content even where the accused is innocent.

47. While receipt of belief evidence has been firmly distinguished, in the case-law, from processes where a court's decision is directly based on a review of 'secret evidence', the distinction is a fine one. It is far from desirable that the trier of fact would be put through a process of examining the privileged information; pronounce findings in respect of that information; and later, determine the central issue of fact to which that information, cumulatively, is referrable.

48. In summary therefore, given the understandable reluctance of accused persons to avail of this safeguard, a trial court exercising its discretion may decide not to engage in the process even as a last resort. It is submitted that an issue of fairness arises where the prosecution refuses to consider the material itself, but then suggests that the failure of the accused to ask a trial court to review the file prevents them from raising a complaint about the adequacy of the process.

49. Accused persons have been reluctant to avail of this remedy, and so it is of limited efficacy as a safeguard. But instead of a trial court reviewing the file, there does appear to be an alternative solution which would be at least partially effective. In advance of the trial, a differently constituted panel of the Special Criminal Court could deal with

issues of privilege and disclosure. While this option has not yet been utilised, it is more viable since the introduction of the second Special Criminal Court.

50. Pre-trial hearings of this nature have the added advantage of focusing the minds of the parties on the strengths or weaknesses of their respective cases and may tend to hasten the resolution of cases. In *People (DPP) v Fitzpatrick and McConnell*[14], in an appeal against conviction relating to IRA activities, O'Donnell J stated that if matters of disclosure and privilege are agitated well in advance of the trial, *'it also might allow a differently constituted court to address the issue if that was thought necessary or desirable'*.[15]

51. In this regard, the Criminal Procedure Act 2021 (signed into law on the 24th May 2021, but not yet commenced) contains provision for the hearing of such matters[16] by the Special Criminal Court in advance of trial[17], including by a differently constituted division of the Court[18]. It must be acknowledged however that such a process is not without drawbacks. Even where disclosure and privilege issues are addressed in advance of a trial, further issues frequently arise upon receipt of evidence during the trial proper. Often, potential defences are first ventilated in the context of cross-examination. Without such reference points, it is difficult for a court to review the file from an informed position. Clearly, the defence could make submissions in advance of the review, but they would be precluded thereafter from having further input in the process.

52. Having regard to these limitations, it is submitted that review by the trial court or by a differently constituted court is not a sufficient safeguard to address privilege claims in the context of belief evidence.

Solutions must be found to ensure belief evidence is a proportionate measure

53. Having regard to Geoghegan J's comments in *Kelly,* that reliance on belief evidence *'should only impair rights to the minimum extent necessary to achieve the legitimate public end',* it is useful to consider a recent Supreme Court, *A.P. v Minister for Justice*[19], wherein the Court considered the lawfulness of an administrative decision based on secret evidence. The Supreme Court held that, even without legislative intervention, *ad hoc* procedures such as an independent review of privileged material could be adopted and would be an appropriate safeguard.

54. In the case of *A.P. v Minister for Justice,* the applicant was refused citizenship by the Minister for Justice based on the 'good character' criterion. This decision was taken based on information received from foreign intelligence services. Privilege was claimed over this information, on national security grounds, to the extent that the applicant was refused even the 'gist' of the information. Clarke C.J. and O'Donnell J analysed the various ways in which such privilege claims have been dealt with in the civil and criminal context. Clarke C.J. said as follows:

[14] People (DPP) v Fitzpatrick and McConnell [2013] 3 IR 656
[15] Ibid. 663
[16] S.6.8(e)
[17] S.6(3)
[18] S.6(11)
[19] A.P. v Minister for Justice & Equality [2019] 3 IR 317

[50] 'It must, of course, be recognised that, in many cases, the position of the State and its agencies may be impaired if they are unable, for reasons such as those which lie at the heart of the refusal in this case, to make information available. If the State is, as it were, the moving party, whether in criminal or civil proceedings, then the onus rests on the State to present before the court sufficient evidence to allow the court to reach whatever conclusions are required in order that the claim advanced by the State can be made out. In a criminal prosecution, evidence to establish the guilt of an accused beyond reasonable doubt needs to be put forward. In civil proceedings, evidence sufficient to establish the facts on the balance of probabilities needs to be led. If the State is not in a position to present evidence in its possession, then that may well lead to the State being unable to establish its case. Indeed, in certain circumstances the case may never be brought because the State would be unable to bring the proceedings with any chance of success due to lack of evidence which it is prepared to disclose.

[51] One illustration of this impairment can be seen in the context of the criminal offence of membership of an illegal organisation. Section 3(2) of the Offences against the State (Amendment) Act 1972 renders admissible in evidence the belief of a Chief Superintendent of An Garda Síochána that a person accused of the criminal offence of membership of an illegal organisation is in fact a member of that organisation. As referred to in oral submissions, in Redmond v. Ireland [2015] IESC 98, [2015] 4 I.R. 84, this court held that s. 3(2) of the 1972 Act would not be consistent with the Constitution if it permitted the conviction of a person solely on the basis of opinion evidence, in circumstances where privilege is asserted over all of the material which led to the formation of that opinion. The opinion evidence in such cases can, of course, like any other evidence, be challenged as a matter of principle. However, a practical problem will necessarily arise if the entire basis for the opinion is stated by the witness concerned to derive from intelligence which cannot be disclosed. A constitutional construction of this provision, therefore, requires that the belief evidence of a Chief Superintendent be supported by some other evidence implicating the accused in the offence charged, which evidence has to be independent of the witness giving the belief evidence. Therefore, in such criminal proceedings, where opinion evidence is admitted in circumstances where no justification for the opinion is put forward other than material which is not disclosed on the grounds of confidentiality, an acquittal will almost certainly follow.

[52] Thus, it may well be seen that, in many circumstances, the consequence for the State or its agencies in being unable, for reasons of security or international relations and confidentiality, to place certain evidence before a court or an administrative body in a manner where that evidence will be disclosed to a relevant party, may simply be that the State will be unable to achieve the legal ends which it wishes.

[53] But this case is different. Here, the person who potentially suffers by the unavailability of the evidence is Mr. P., who is unable to know in any detail the national security reasons which apparently justify both the refusal of

naturalisation and the refusal of detailed reasons. Mr. P. is, therefore, unable in any practical way to contest the issue. The real question is as to the proper approach, as a matter of principle, in a case such as this.

55. Clarke C.J. then went on to consider the issue of proportionality, and the test set out by Costello J in *Heaney v Ireland*[20]. He continued:

> *[59] One key element of the test is that the measure adopted should only impair rights to the minimum extent necessary to achieve the legitimate public end. It seems to me that there is a legitimate basis for applying a similar consideration to a situation where, as here, more detailed reasons could, as a matter of practicality, be given but where it is said that there are legitimate interests involved which justify not going further. In such circumstances, it seems to me to follow that a failure to give more detailed reasons can only be regarded as justified if that failure impairs the entitlement to reasons to the minimum extent necessary to protect the legitimate countervailing interests engaged.*
>
> *60] In those circumstances, it seems to me that it is incumbent on the Minister to put in place measures which only impair the entitlement of Mr. P. to be informed of the reasons for any adverse decision to the minimum extent necessary to protect legitimate State interests.*
> *...*
>
> *[62] ... there is no reason, in principle, why an independent person, with appropriate security clearance, could not be given the task of assessing the documentation for the purposes of advising on whether, in that person'sopinion, there was any further information which could properly be given.*

56. O'Donnell J, in a concurring opinion, said as follows:

> *[132] 'I agree with Hogan J. in the Court of Appeal, and with Clarke C.J. in this court, that it does not appear possible for the court to devise a complete procedure, cut from whole cloth, which is capable of being applicable in all of the many different and difficult situations where the issue of disclosure of information arises, and where it is resisted on the grounds of public interest. I do not rule out the possibility that, in certain circumstances, ad hoc solutions might be sought. This, after all, is what has occurred in the field of discovery and disclosure, and the somewhat different techniques adopted to permit disclosure of some information while maintaining confidentiality, which are discussed in the judgment of Clarke C.J. Indeed, to some extent, that approach is what is urged in this case.*
> *...*
>
> *For this reason, I agree with the approach set out at para. 65 of the judgment of Clarke C.J. that, in principle, it would at least be possible to put in place an enhanced process by which an independent assessment could be made as to whether any version of the information could be provided in a way which would*

[20] Heaney v Ireland [1994] 3 IR 593

not affect State interests to the extent that disclosure should not be required at all. Such a process of advice from an independent person with access to the information, which in this case has, after all, been seen already by a judge of the High Court, would itself also enhance confidence in any decision made.'

57. One of the lessons to be taken from the case of *A.P.* is that solutions must be found to secure the proportionality of measures taken by Organs of the State, when they are relying on intelligence material. It is incumbent on the relevant Organs to seek out solutions. Unlike the process for acquisition of citizenship, where discrete rights are engaged, the consequences of reliance on belief evidence are profound. A correspondingly robust approach to safeguards is required.

58. The Commission is not suggesting that a special advocate or independent review system must be put in place, in respect of belief evidence. In the citizenship context, there was no institutionally-independent review of the privilege claim and so the Court suggested that such a position must effectively be created. But in the context of reviewing belief evidence, the DPP is an existing, institutionally-independent body, with a capacity and a responsibility to provide the requisite safeguards.

Safeguards in respect use of intelligence materials, in other jurisdictions

59. It is worth considering, briefly, how other jurisdictions have applied proportionality considerations of the type averted to in *Kelly*, where intelligence material is being utilised in a terrorism prosecution. The Global Counter Terrorism Forum, which seeks to implement UN recommendations on counter terrorism, published the following comparative summary[21] of measures taken in various jurisdictions. It can be seen that these include many of the safeguards discussed in this submission:

'To achieve the balance between the accused's right to a fair trial and the protection of national security and witnesses, States have created various legal regimes, including: (1) using intelligence information solely for lead purposes for law enforcement, which must then develop evidence through law enforcement techniques; (2) using an independent commission to review the relevant intelligence and decide if it should be declassified and turned over; (3) using a national-level terrorism prosecutor – who is not involved in the case – to review all relevant intelligence and decide what should be turned over; (4) appointing a "special advocate" for the defense who will have the ability to review the intelligence information, to assist the defense; (5) having a separate judicial process to review the information, conduct the necessary assessment, determine whether the information should be disclosed and in what form; and (6) having the trial court determine how best to handle the disclosure of intelligence information in criminal proceedings.'

60. Outside of the terrorism context, in the case of *Myers v R*[22], the Privy Councilconsidered the use of expert evidence by police officers in respect of gang membership.

[21] GCTF's Criminal Justice Sector and Rule of Law Working Group, 'Recommendations for Using and Protecting Intelligence Information In Rule of Law-Based, Criminal Justice Sector-Led Investigations and Prosecutions'
https://www.thegctf.org/documents/10162/159887/14sept19_gctf+rabat+gp+6+recommendations.pdf
[22] Myers v R [2016] AC 314

The reasoning of the Court in *Myers* has been adopted as *'helpful guidance'* by the English Court of Appeal in *R v Awoyemi and Others*.[23] In *Myers*, the Court held that a police officer could give such evidence as an expert witness and, as such, was subject to the same duties on independence and hearsay evidence.[24] On the specific duties that an officer has in giving evidence on gang membership, the Court held the following:

> *'68. .... As part of the duty of an expert witness to the court, a police officer tendering the kind of evidence called in these cases must make full disclosure of the nature of his material. His duty involves at least the following. (a) He must set out his qualifications to give expert evidence, by training and experience. (b) He must state not only his conclusions but also how he has arrived at them; if they are based on his own observations or contacts with particular persons, he must say so; if they are based on information provided by other officers he must show how it is collected and exchanged and, if recorded, how; if they are based on informers, he must at least acknowledge that such is one source, although of course he need not name them. (c) In relation to primary conclusions in relation to the defendant or other key persons, he must go beyond a mere general statement that he has sources of kinds A, B and C, but must say whence the particular information heis advancing has come; an example would be observations of a defendant in the company of others known to be members of a gang.*
> *69. If a witness statement tendered for a trial does not meet these standards, the judge can be asked to direct that it be expanded in whatever particulars he judges necessary. Such an application should not be left until the beginning of the trial but should be made well beforehand. If directions given are not complied with, that will be relevant both to whether the witness has established a proper basis for giving expert evidence and to whether his evidence ought to be excluded under section 93.'*

61. *Myers* has been held to be of persuasive authority in the Canadian Courts also, in respect of expert evidence given by intelligence officers on gang membership.[25] In criminal cases in Canada, where disclosable information bears upon national security, the Attorney General of Canada must be notified.[26] This information will then not be disclosed to the defendant unless an application is made to a Federal Court, or an arrangement is made with the AG.[27]

62. The Federal Court may order disclosure where it would not be injurious to *"international relations or national defence or national security".*[28] Alternatively, where the disclosure would be injurious, the Federal Judge may order conditional disclosure or a summary of the relevant facts.[29] Notably, the trial court itself does not have the power to review the undisclosed material.[30]

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[23] [2016] EWCA Crim 668, [2016] 4 WLR 114 at [22].
[24] [57]-[67]
[25] R. v. Sheriffe [2015] ONCA 880 at [114]-[115].
[26] Canada Evidence Act, Section 38.01.
[27] Ibid, sections 38.031-38.04.
[28] Ibid.
[29] Ibid, s38.06.
[30] Canada Evidence Act, Section 38.

63. By contrast with the very broad claims of privilege made in cases of IRA membership such as this, the *Myers* approach goes much further in requiring proper elaboration on the grounds of the belief. Even if such elaboration is not possible in a given case, it is submitted that it remains an appropriate standard of disclosure that the prosecution should aim to secure when relying on belief evidence, in respect of a charge of membership of an unlawful organisation.

Conclusion

64. The prospect of review by a trial court is not a sufficient safeguard to secure the fairness and proportionality of belief evidence, where broad privilege is being claimed.

65. Section 2(5) of the Prosecution of Offences Act 1974 provides that the Director of Public Prosecutions shall be independent in the performance of the Director's functions. The Commission submits that the DPP must have sight of the material grounding belief evidence in order to properly exercise its' statutory functions, with due regard for the Constitutional rights of the accused.

66. The potential consequences of these failures are grave and, in an assessment of proportionality, unjustifiable. Such concerns as may exist in respect of safety and security cannot outweigh the pressing need for effective safeguards.

67. In so far as it is suggested that Prosecuting Counsel has no function in reviewing privileged material grounding belief evidence, that view is contradicted by the caselaw of the Supreme Court.

68. Where the consequence for an accused of reliance on belief evidence is, as noted in Redmond, *'the very real risk of conviction, though innocent'*, what is required is institutionally-independent oversight of the use of belief evidence.

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