IHRC

AN COIMISIÚN UM CHEARTA AN DUINE
IRISH HUMAN RIGHTS COMMISSION

AMICUS CURIAE SUBMISSION

European Court of Human Rights

DONOHOE

Applicant

V

IRELAND

Respondent

Application No. 19165/08

WRITTEN COMMENTS BY THE IRISH HUMAN RIGHTS COMMISSION PURSUANT TO ARTICLE 36 § 2 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND RULE 44 § 3 OF THE RULES OF THE EUROPEAN COURT OF HUMAN RIGHTS

9 May 2012

INDEX TO SUBMISSION

Introduction

1. The Irish Human Rights Commission ("IHRC") is Ireland's National Human Rights Institution ("NHRI"), established pursuant to the Human Rights Commission Acts 2000 and 2001. The IHRC has a statutory remit to promote and protect the human rights of all persons in the State. Its functions include keeping under review the adequacy and effectiveness of the law and practice in the State with regard to human rights standards deriving from the Irish Constitution and the international treaties to which Ireland is a party, which include the European Convention on Human Rights and Fundamental Freedoms ("ECHR").[1] The IHRC is mandated to appear as *Amicus Curiae* in proceedings before the national Courts and has done so on fourteen occasions to date.[2]

2. The IHRC is fully compliant with the United Nations "Paris Principles".[3] These principles govern independent NHRIs[4] and broadly set out the competences and responsibilities of NHRIs and the criteria under which they should function, namely:

- Independence guaranteed by Statute or Constitution;
- Pluralism, including in membership;
- A broad mandate covering all human rights and based on universal human rights standards.

Background to the Application

3. By letter dated 19 April 2012, the Court granted liberty to the IHRC to intervene in *Donohoe v. Ireland* in the form of a written submission in accordance with Article 36 § 2 of the ECHR and Rule 44 § 3 of the Rules of the Court. As set out in the Statement of Facts the Applicant was convicted in the Special Criminal Court ("the SCC") of membership of an illegal organisation in 2004 and sentenced to four years imprisonment.[5] This conviction was upheld on appeal. There were four categories of evidence presented against the Applicant at trial, three of which are considered in this submission: that is the belief evidence; inferences drawn from the conduct of the accused and finally; inferences that may be drawn from the silence of the accused under questioning, as is permitted by statute.[6]

4. The Applicant claims that his trial before the SCC breached Article 6 ECHR. He alleges that the judges who determined his guilt also reviewed material submitted by the prosecution which would tend to establish that guilt as it supported the belief evidence presented by the prosecution. However, the material was not available to the defence as informer privilege was invoked. In essence, the Applicant alleges that the SCC was exposed to material prejudicial to his defence and, as it sat without a jury, the trial was tainted by inadmissible evidence. The Applicant accepts that there may be circumstances where access to material may be restricted in the public interest, but he claims there should have been a counter-balancing measure taken by the Court to avoid undue interference with his fair trial rights.

5. While the Applicant's complaint may be considered to relate to a narrow procedural point, it is submitted that an understanding of the legal context in which the application arises is helpful in determining whether the conduct of the trial in its entirety was fair. Accordingly, the intervener will set out the background to the SCC and the exceptional legislative basis on which it is based. A number of observations will also be made in relation to the unique evidential rules that apply before that court, insofar as this contrasts with the practice and procedure in the other criminal courts of similar jurisdiction in the State.

6. It is important to make the preliminary observation that Article 38 of the Constitution, provides a robust protection in Irish law for the right to a fair trial, and in most respects equates with the guarantees of Article 6, and indeed may even go further in some aspects, such as in relation to pre-trial detention. However, it is unclear that those robust fair trial protections have transferred with equal force to the operation of the SCC.

7. In relation to the exceptional evidential rules that apply before the SCC, as the present application has at its heart matters pertaining to belief evidence and informer privilege (which are inextricably bound together), the intervener will consider in detail how these two rules of law interact, and what impact this may have on the overall fairness of a trial before the SCC.

The Special Criminal Court

8. The basis for the establishment of special courts in domestic law is Article 38.3˚ of the Constitution.[7] This allows for the use of special courts where the ordinary courts are considered inadequate to effectively secure the administration of justice and preserve public peace and order.[8] Article 38 expressly excludes these special courts from Articles 34 and 35 of the Constitution which, *inter alia*, enshrine the independence of the judiciary in the discharge of its duties under the Constitution. In addition, Article 38 of the Constitution prescribes that all criminal charges, other than minor offences, must be tried before a jury, with an exception for special courts.[9] As such, special courts are inherently an exception to the constitutional criminal justice system of the State. This exceptionality is reinforced by the limitation on the ability to legally challenge the legislation underpinning the Court and the proclamation bringing it into operation, as will be seen below.

9. The Offences Against the State Act, 1939 ("the OASA"), provides for the establishment of special criminal courts.[10] This remains the principle statutory basis for the present day SCC, although the Act has been amended and extended on several occasions since.[11] The SCC is essentially a creation of statute rather than the Constitution. The SCC must consist of an uneven number of members, usually three, and as noted already, sits without a jury.[12] In practice, all the members of the SCC are members of the judiciary and discharge their office independently, although this is not an express constitutional requirement.[13] It has control over the time and place of its sittings and over its own procedure, although this is subject to constitutional fair trial norms.[14] The SCC has the power to make rules regulating its practice and procedure, with the agreement of the Minister for Justice, including, *inter alia*, providing for the admission or exclusion of the public from its sittings, issuing of summonses and the production of documents.[15] There are limited rights of appeal from the SCC.[16]

10. The OASA, allows the State to proscribe certain organisations by means of a "suppression order", and in turn makes it an offence to be a member of such an organisations.[17] Two organisations have been so proscribed to date, namely the Irish Republican Army ("IRA") and the Irish National Liberation Army ("INLA").[18] Part V of the OASA provides for the establishment of Special Criminal Courts which can be brought into force at any time and continue indefinitely where the government issues a proclamation to that effect.[19] This power to make proclamations under the OASA effectively bypasses the legislative process and avoids parliamentary scrutiny.[20] It is also a matter for government which offences (known as scheduled offences) will be tried before the SCC, and this may be done by ministerial order, rather than requiring primary legislation, again side stepping parliament.[21]

11. As stated, where such a proclamation is made, Part V of the OASA automatically comes into force[22] and will only cease when the Government is satisfied that the ordinary courts are adequate to secure the effective administration of justice and the preservation of public peace and order or where Dáil Éireann (the legislature) passes a resolution annulling the proclamation.[23] Such proclamations have been made on a number of occasions and the current proclamation in force was made in 1972, and has not been annulled since.[24]

Evidence before the Special Criminal Court

12. Irish law contains a mix of common law, constitutional and statutory rules in relation to the admission of evidence before the Courts. The SCC broadly applies the same rules of evidence as apply in the ordinary criminal courts, however, it has been noted that there are a number of "*pro-prosecution evidentiary shortcuts sprinkled across the panoply of the Offences Against the State Acts*".[25] It is the combination of these so called evidentiary

shortcuts and the absence of a jury that makes the SCC so anomalous within the domestic criminal justice system.[26] The principal exceptions of relevance to the present application are the admissibility of belief evidence; evidential inferences that may be drawn from the conduct of the accused, including the failure to deny published reports of membership of an illegal organisation;[27] inferences that may be drawn from the silence of the accused when questioned in detention[28] and the evidential weight to be attached to incriminating documentation found in the possession of the accused.[29]

Belief Evidence and Informer Privilege

13. The provision in relation to belief evidence is contained in section 3(2) of the Offences Against the State (Amendment) Act 1972 ("the 1972 Act") and states: "*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.*"[30]

14. The proposal to make belief evidence admissible on a statutory basis, like the SCC itself, was controversial and was the subject of strong criticisms not only from commentators but also in parliamentary debates.[31] Allowing belief evidence to be offered in criminal trials was a marked departure from the rules of evidence that prevailed at the time and was viewed as a significant curtailment of the rights of the defence. The core concern was that section 3(2) elevated what was essentially a person's opinion based on anonymous sources, which are open to human error and inconsistencies, to the status of evidence.[32] The criticism was not accepted and the legislation was passed.

15. There are a number of aspects of section 3(2) that may cause concern in relation to the procedural rights of the defence. Commentators have observed that the impact of this provision is in effect to transfer some of the powers of the Court into the hands of the prosecution, in the form of the Chief Superintendent, who evaluates in evidence whether he or she believes the accused to be guilty of membership of an unlawful organisation.[33] This in turn means that the belief of the Chief Superintendent is offered as proof of the offence charged and ultimately has the potential to determine the outcome of the trial, although of course the trial judges will evaluate the weight to be attached to the evidence in each case.

16. It is also noted that there is no objective element in section 3(2) such that the Chief Superintendent's belief should be 'reasonable' or 'objective'.[34] The unconditional nature of the belief that may be adduced as evidence must also be considered in light of the fact that where belief evidence is proffered, informer privilege will often be invoked to protect the sources on which the belief is based.

17. Privilege from disclosure is not a matter that arises exclusively before the SCC, and indeed the law in relation to privilege from disclosure has developed in the ordinary courts.[35] However, it does take on a specific significance in the SCC, where belief evidence may be adduced and where the court sits without a jury. Although the mere fact that information has been given to the police in confidence will not suffice to ground a claim of informer privilege, it appears that at common law, once it has been established that there is a public interest in ensuring that the identity of an informer or indeed the existence of an informer is kept secret, this will probably justify the granting of informer privilege, subject to the "*innocence at stake*" exception.[36] One author has observed that although privilege is often regarded as an example of public interest immunity it is more correctly categorised in the Irish context as a "*distinct category of privilege*".[37] This is because informer privilege, as distinct from public interest immunity, "does not involve any case by case balancing exercise" other than considering whether the innocence at stake exception applies.[38] In addition, where the charge relates to membership of a subversive organisation, it may be assumed that a claim of informer privilege would not be difficult to justify.

18. A grant of informer privilege will significantly limit the defence in evaluating the strength of the information on which belief evidence is based, and indeed challenge the evidence in cross examination.[39] In the case of *DPP v Special Criminal Court*[40], an Order of the SCC that would have permitted the lawyers for the defence, but not the accused, view the relevant documents, in relation to which informer privilege was claimed, was overturned on appeal. It was found by the Supreme Court that the Order made by the SCC would represent an "*unprecedented and wholly undesirable breach in duty which counsel would owe to their client and in the proper trust which should exist between a client and his/her lawyer.*"[41] The accused had made submissions in relation to the difficulty he and his legal team would experience in assessing the relevance of the documents to the defence if they could not have access to same. In addition it was submitted that even if the SCC reviewed the documents, this would not be adequate as they would be doing so without the instructions of the accused. The Supreme Court on appeal, did not address this submission directly, but suggested that the remedy to the problem lay in the duty on prosecuting counsel to ensure the overall fairness of the trial and the ability of the SCC to review the documents if necessary to determine if they assisted the defence, disparaged the prosecution case or gave a lead to other evidence.[42]

19. In considering the present complaint, the stated approach of the SCC to the claim of informer privilege and its decision to review the documents itself is useful to recall:

> *"On a perusal of those files, the court (is) satisfied that the Chief Superintendant had adequate and reliable information upon which he could legitimately form the opinion that each of the accused was a member of the IRA. Moreover, 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."*[43]

20. This approach is very much in line with the precedent set in *DPP v the Special Criminal Court*, but again eschews consideration of the importance of the accused's instructions when considering the material, and of course the broader criticism made by the present applicant that the trial judges should not review material which then underpins the belief evidence as to guilt provided by the Chief Superintendant.[44] It is notable that the SCC did take into account the case law of this Court in determining its approach to disclosure. In turn, the Court of Criminal Appeal also considered the said case law, but came to the conclusion that it was of no particular assistance as it did not deal with claims of informer privilege based on a threat to life and the security of the State, nor did it deal with situations where the power to investigate does not reside in a judge (which is in distinction to many civil law jurisdictions).[45]

21. 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.[46] 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 criminal procedure that is such a significant lacuna in the safeguards before the SCC.

22. Section 3(2) has been the subject of constitutional challenge. This is significant insofar as the applicant in the present case was probably foreclosed from challenging the legislation in the domestic courts. In *O'Leary v Attorney General*[47] it was argued that the use of inference drawing and belief evidence violated the presumption of innocence and that section 3(2) transferred the burden of proof from the prosecution to the defence.[48] In finding that the subsection was constitutional, the High Court accepted that the presumption of innocence was a crucial element of the right to a fair trial. However, the High Court considered that the exercise of the right could be abridged in certain circumstances, and took the view that section 3(2) merely imposed an evidential as distinct from the legal burden of proof on the accused. The legal burden to prove guilt beyond reasonable doubt always remained with the prosecution,[49] and did not impose an obligation on the accused to call evidence in order to be acquitted.[50]

23. In *DPP v Kelly*[51] the accused argued that he had been deprived of his right to a fair trial due to the restrictions placed on cross-examination of the Chief Superintendent who claimed informer privilege. In considering the correct interpretation of section 3(2) Geoghegan J. found that it allowed for cross examination as to the basis of the belief but only insofar as this did not interfere with a legitimate plea of privilege.[52] In a Judgment that has strong echoes of the present Applicant's trial before the SCC, Fennelly J. emphasised that it was of crucial importance in the particular case that there was other evidence, aside from the belief evidence which had resulted in the accused's conviction for membership of the IRA.[53]

24. Section 3(2) does not indicate the evidential weight to be accorded to belief evidence, this question has been addressed on a case-by-case basis by the SCC.[54] One leading commentator documented newspaper reports of cases before the SCC during the early 1970's and found that an accused who contradicted the belief of the Chief Superintendent would most likely not be convicted.[55] This appears to indicate an early judicial skepticism regarding basing convictions on belief evidence.[56] However, in (*People) DPP v Ferguson*[57], the Court of Criminal Appeal affirmed the conviction of the accused on the basis of uncorroborated belief evidence, emphasising how the failure of the accused to deny the belief evidence significantly increased the weight and bearing to be attached to it.[58] However, following *Ferguson,* in practice the SCC adopted a self imposed restraint of not convicting solely on the basis of belief evidence and this accords with the Judgment of the Court of Criminal Appeal in the present case where, at least implicitly, it was indicated that belief evidence alone would not be a sound basis for a conviction. The outcome of such a decision, however is that an accused has a difficult choice to make to either give evidence and seek to rebut the belief evidence, thus leaving oneself open to cross-examination, or remain silent and run the risk of inadvertently adding weight to the belief evidence adduced.[59]

25. Following *DPP v Kelly* it seems clear that the Irish judiciary continues to accept the need for belief evidence in dealing with subversive crime. Although the Supreme Court made clear that belief evidence could not be construed as conclusive evidence, the fact remains that such evidence is a direct comment on the guilt of the accused, and in this sense directly relates to the ultimate determination of the trial. In the acceptance of belief evidence, significant trust is placed in the hands of a person who would, in normal circumstances, perhaps be excluded by the rule against hearsay from giving any evidence at all. In addition belief evidence, coupled with a claim of informer privilege, places considerable fetters on the ability of the defence to cross-examine and to robustly seek to undermine such evidence.

Inference Drawing and the Right to Silence

26. It is an important safeguard in relation to the right to a fair trial that the SCC has adopted an approach of requiring corroboration of belief evidence. However, the fact that such corroboration may be based on further indirect evidence, such as 'reasonable inference' evidence may call into question whether in fact the standard of proof which the prosecution must discharge has not been considerably diluted.

27. In the present application before the Court it is noted that evidence was also adduced pursuant to section 3(1) of the 1972 Act (as amended) which allows inferences to be drawn from the conduct of the accused. [60] While conduct under the 1972 Act originally related to the omission to deny published reports, this was significantly expanded by the Offences Against the State (Amendment) Act 1998 ("the 1998 Act"), and, it is submitted, that conduct can now relate to any activity or indeed omission on the part of the accused.

28. What constitutes 'conduct' sufficient to lead to an inference being drawn appears to be a nebulous test to apply. In *DPP v McGurk,*[61] the Court of Criminal Appeal considered the meaning of the word 'conduct' after the accused had been convicted before the SCC on the basis of belief evidence corroborated by inferences drawn on the basis of the accused's conduct. The conviction was set aside and it was found that the conduct of the accused did not 'with a degree of precision' indicate membership of an unlawful organisation. It should be

noted that the decision in *McGurk* was delivered before the definition of conduct was significantly extended by section 4 of the 1998 Act and so the matter may now be even less certain.

29. As mentioned above, inferences may also be drawn from the silence of the accused under questioning, which naturally raises the question how this relates to the right to silence, a right recognised at common law and which also enjoys the protection of the Constitution.[62] The right is not absolute but any curtailment of the right must pass a proportionality test.[63] A number of cases involving challenges against the constitutionality of statutory provisions providing for an abridgment of the right to silence[64] have not been successful and in one instance the Courts upheld the constitutionality of such a provision on the premise that "*the innocent person has nothing to fear from giving an account of his of her movements*".[65]

30. Domestic law contains a number of provisions which allow for inferences to be drawn from silence in proceedings relating to an arrestable offence.[66] Of immediate relevance is section 2 of the 1998 Act,[67] which allows adverse inferences to be drawn in relation to the failure of an accused to answer questions material to the offence during Garda questioning. Such inferences may not ground a conviction, but may corroborate other evidence. While this provision, taken alone, may not appear to raise a particular concern, as it allows the person questioned the choice whether to respond or not, ancillary issues regarding access to a lawyer are relevant. It is significant to observe in this regard that the Applicant was convicted in 2004, and it was not until 2007 that section 2 was amended to require that a person be warned in ordinary language of the consequences of the failure to answer questions and, further, to that a person be afforded reasonable access to a lawyer before being so questioned.[68]

31. Reasonable access to a lawyer has been recognised as a constitutional right by the Irish Courts.[69] The term 'reasonable' indicates that it is not an absolute right and, in the present case, it is unclear whether the applicant had access to a solicitor before or during Garda questioning. In *Lavery v Member in Charge, Carrickmacross Garda Station,* the Supreme Court decided that the right of access to a solicitor did not extend to having the solicitor present at questioning.[70] It has been observed that this leaves the accused in a state of uncertainty as to whether he is at risk of adverse inferences being drawn when his/ her lawyer is not even entitled to be informed of the details of the questioning.[71] This intervener has previously highlighted its concerns in relation to a similar inference drawing provision, in circumstances where there is no stringent right of access to a lawyer before Garda questioning.[72]

The Hederman Committee - Belief Evidence and the Right to Silence

32. In 2002 an expert committee was established by the State to examine the future of the SCC and to suggest possible amendments to the OASA 1939-1998.[73] This was done following the formal cessation of violence in Northern Ireland when the whole apparatus of the State to counter domestic terrorism came under scrutiny.[74] In considering section 3(2), the majority of the Committee came to the view that the danger inherent in the section was that "*the Oireachtas has given evidential status to an expression of opinion which may not merit that status. There is no requirement, for example, that the Chief Superintendent should have personal knowledge of the accused or that the opinion is based on material facts (such as conduct, movements or status) which tend to prove membership of the illegal organisation.*"[75]

33. The committee report goes on to identify a number of other objectionable aspects to the subsection as follows:

> *"....the opinion evidence rule appears to violate three established rules of evidence. First, while acknowledged experts are permitted to give evidence of opinion, their expertise must be established and their opinion is generally confined to scientific, medical, engineering and cognate matters, and the application of such knowledge to factual data, in accordance with established professional norms. Secondly, even experts, strictly speaking, are not allowed to give evidence on the ultimate issue, in this case whether or not the accused is a member of an*

illegal organisation, although this rule is often in practice ignored. Finally, the Chief Superintendent's opinion may be based on a mixture of hearsay and other inadmissible evidence which would not, in themselves, be admissible as evidence."[76]

34. The Hederman Committee recommended in light of their analysis that section 3(2), if retained, should provide that no person could be convicted purely on the basis of opinion evidence and such evidence should only be treated as corroborative, otherwise the majority felt that the subsection should be retained.

35. Finally, it is noted that the Hederman Committee also considered the right to silence and any implication for same under section 2 of the 1998 Act. The majority recommended its retention as it contained sufficient safeguards in the form of a requirement of a warning as to the possible consequences of remaining silent and that a court could not draw an adverse inference where its prejudicial effect outweighed its probative value. The minority considered that the inference drawing powers under the section added nothing to the law in relation to circumstantial evidence.[77] The Committee was also mindful of the constitutional right of reasonable access to a lawyer and further indicated that no adverse inference should be drawn from failure to answer questions, before the person has had an opportunity to consult with a lawyer.

36. There appears to have been no further substantive or public inquiry into the need for the SCC since the Hederman Committee or a review of the legislation underpinning it.

Article 6 and Disclosure

37. In the jurisprudence in relation to the right to a fair trial under Article 6 of the Convention, a number of principles of relevance to the application herein have been established. It is clear from the case law that this Court will not review individual determinations as to the admissibility of evidence by the national courts, but rather will consider whether the procedure adopted, taken as a whole, met the requirements of a fair trial.[78]

38. One aspects of a fair trial identified by this Court is an adversarial procedure and equality of arms.[79] However, the rights of the accused are not absolute. In *V v Finland* it was found that it may be necessary to withhold certain evidence from the defence, where an important public interest must be protected or the rights of others.[80] In *Van Mechelen and Others v Netherlands,*[81] this Court found that where the disclosure of evidence to the accused is restricted, the State party must prove to the Court's satisfaction that the resort to exceptional limitations is justified and thus compatible with the guarantees of the right to a fair trial. In this regard, there is a requirement to demonstrate that any restriction on the disclosure of evidence is strictly necessary in the public interest.[82] In turn, it must be shown that the domestic Courts have taken the necessary procedural steps to counterbalance the difficulties created for the defence.[83] Even where such counterbalancing procedures compensate for such restrictions, convictions secured through these measures cannot be used "solely or to a decisive extent" to secure the conviction.[84]

39. There are a number of cases, primarily involving anonymous witness evidence, which are instructive in relation to the issue of belief evidence. In *Kostovski v Netherlands* it was observed that the use of pre-trial witness statements is not in itself inconsistent with Article 6 provided the rights of the defence are respected. This involved, as a general rule, the opportunity to question and challenge the witness either at the time the statement was made or at a later time in the proceedings.[85]

40. *In Van Mechelen v Netherlands* where the accused and counsel were excluded, except for an audio link, from a room where anonymous police witnesses were questioned by an investigating judge, the Court found that this was not a satisfactory substitute for direct questioning.[86] In contrast in *Doorson v Netherlands* the difficulties encountered by the

accused by reason of the use of anonymous witnesses were considered to be counter balanced by a procedure at the appeals stage conducted by an investigating judge where Counsel was present.[87] Therefore the use of anonymous evidence is permitted in certain exceptional cases, but this must be done with the appropriate safeguards in place to offset any detriment to the rights of the accused. [88]

41. In both *Jasper v United Kingdom*[89] and *Fitt v United Kingdom,*[90] this Court, found that material withheld on the basis of the public interest immunity had not infringed the rights of the accused, as it had not formed part of the prosecution case and was not put to the jury. In contrast, in *Edwards and Lewis v United Kingdom*[91] it was found that restricting the access of the applicants to relevant material violated Article 6 as it related to an issue of fact at trial, which the trial judge, rather than a jury, was determining, and which had the potential to determine the outcome of the trial. It should be noted that the present case pertains to a non jury trial where the judges examining undisclosed material relating to an issue of fact (i.e., membership of an unlawful organisation), were also making the final determination as to guilt in the trial. It is again submitted by the intervener that the absence of a jury removes a very significant counterbalancing safeguard in a criminal trial, insofar as the possibility of definitively excluding certain evidence from being considered in the final determination of the trial is lost where a judge decides to view evidence that is, or should be, regarded as inadmissible. While it may well be the case that in an individual case an experienced judge can indeed exclude from his or her deliberations undisclosed material to which he or she has had access during the course of the trial this, however, does not address the structural deficit caused by the absence of a jury, which should be the overall responsibility of the State.

42. In *A and Others v The United Kingdom,* the Grand Chamber addressed whether administrative detention (as apposed to post conviction detention) could be based on belief and the safeguard that should apply in testing that belief.[92] The case concerned, *inter alia*, the ability of a number of applicants to challenge their detention under exceptional powers, based on the Secretary of State's belief that they presented a risk to the State and were international terrorists. Each of the applicants had been detained pending deportation. The Court indicated that the legal proceedings under Article 5(4) had to be "*adversarial and must always ensure equality of arms between the parties*".[93] The Court accepted that based on its previous case law, restrictions on a full adversarial procedure could be permitted if there was "*a strong countervailing public interest, such as national security, the need to keep secret certain police methods of investigation, or the protection of the fundamental rights of another person.*"[94] The Court then went on to consider whether the proceedings before the Special Immigration Appeal Commission (SIAC), to determine the reasonableness of the Secretary of State's belief that the applicants were a risk to national security and that they were international terrorists, were fair. It was noted that the judges sitting as SIAC were able to consider both "open "and "closed" material, but that neither the applicants nor their legal advisors had access to the closed material. However, Special Advocates were appointed to act on behalf of each applicant, and they could make submissions on behalf of each applicant both in relation to procedural matters including disclosure and as to the substance of the case. Notably, once the closed material procedure commenced the special advocate could only communicate with the relevant applicant with the permission of SIAC. In considering the overall fairness of the proceedings, the Court accepted that during the period of the applicants' detention that there was a "*public emergency threatening the life of the nation*".[95]

43. The Court considered that the appointment of special advocates was an important safeguard in the proceedings.[96] However, the Court found that the special advocates could not perform their functions in a meaningful way, unless the detainee was given sufficient information regarding the allegations against them such that they could give adequate instructions to the special advocate. In addition, the Court indicated that it would have to be assessed on a case by case basis whether the belief of the Secretary of State was wholly or substantially based on closed material or open material. Insofar as it was substantially based on closed material to such a degree that the applicant, even with the assistance of a special advocate, could not challenge the allegations against him, this would undermine the overall

fairness of the proceedings. It is submitted that similar reasoning can be applied in the present case and it must be asked whether the applicant's conviction was based, to a decisive extent, on belief evidence, and if so whether he had a real possibility of challenging that belief.

44. The judgment of the Grand Chamber in *Al-Khawaja and Tahery v The United Kingdom*[97] is also instructive in relation to the admissibility of evidence of absent witnesses in a criminal trial. The Court indicated that the necessity for admitting the evidence of an absent witness is a preliminary question which must be examined before consideration is given as to whether that evidence was sole or decisive. In relation to that preliminary question, if the absence of the witness was based on fear, either attributable to the accused or agents of the accused, or a more general fear, then *"[t]he trial court must conduct appropriate enquiries to determine first, whether or not there are objective grounds for that fear, and, second, whether those objective grounds are supported by the evidence."*[98] In addition the Court went on to state that *"[b]efore a witness can be excused from testifying on grounds of fear, the trial court must be satisfied that all available alternatives, such as witness anonymity and special measures, would be inappropriate or impracticable."*[99] The Court then went on to consider objections of the United Kingdom government to the application of the sole and decisive rule to the case. The objections primarily centred on the unsuitability of the test in a common law context, it being noted that the particular case concerned a jury trial. The Court rejected all grounds of objection, and came to the following conclusion regarding the rule:

> *"The Court therefore concludes that, where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6(1). At the same time where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny…The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case."*[100]

45. In the present case, the alleged breach of Article 6 arises from the procedure adopted by the domestic court to assess whether belief evidence should be admitted at the trial and whether that being so, any disclosure should be made to the defence, on the basis of the 'innocence at risk' principle. The approach of the SCC implicitly accepts that the defence could have a legitimate objection to the admission of belief evidence as such evidence is an exception to the normal rule against hearsay. In reality, belief evidence is extremely difficult to challenge in the course of cross examination where the defence is cut off from questioning in relation to the sources upon which the belief is based and may be regarded as presumptively unfair unless a counterbalancing procedure is adopted to ensure that the rights of the defence are not so impaired so as to imperil the fairness of the trial. Therefore, the overall fairness of the trial must be considered by reference to the admission of the belief evidence, without disclosure of the prosecution material on which the belief is based, and, finally, the decision of the SCC to consider that material itself, in circumstances where the belief expressed and the material underlying it was directly related to the question of fact the judges would ultimately have to determine (i.e. the guilt of the accused).

Article 6 and Access to a Lawyer

46. While this Court has recognised the right not to incriminate oneself or its corollary, the right to silence, as being an internationally recognised right which lies at the hear of the guarantees enshrined in Article 6, it has also found that this right is not breached per se by inference drawing provisions.[101] However, the Court found in *Murray v UK*, that although the right to silence under Article 6 was not absolute and that inferences could admissibly be drawn from silence under questioning, a breach of the Article arose from the fact that the applicant did not have access to a lawyer during the first 48 hours of his detention, and the domestic court allowed adverse inferences to be drawn from his silence during that period.[102]

47. The right of "reasonable" access to a lawyer in Irish law may well fall short of what is required under Article 6, insofar as it does not place a sufficiently rigorous obligation on the

State to ensure that a person has access to a lawyer during questioning from which adverse inferences may be drawn (subject to any necessary and proportionate limitation).[103] It is unclear in the present case whether the applicant may have been questioned before having access to a lawyer. It may also arise that a person might respond to certain questions, but be reluctant to respond to others as questioning proceeds and it is unclear whether a person is permitted access to a lawyer during the course of questioning or whether an initial consultation is deemed to suffice for constitutional and statutory purposes, although it is submitted that this would not be sufficient in light of the purpose and safeguards required by Article 6.

48. In *Salduz v Turkey*, which concerned the questioning of a minor in relation to alleged terrorist offences, the Grand Chamber was of the view that the right of access to a lawyer under Article 6(3)(c) may extend to pre-trial proceedings.[104] The Court pointed out that this was not only to prevent coercion on the part of the authorities, but also to ensure equality of arms between the investigating or prosecuting authorities and the accused.[105] The Court went on to state that:

> *"in order for the right to a fair trial to remain "practical and effective" Article 6(1) requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right…..The right of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction."*.[106]

Conclusion

49. The present application raises fundamental questions regarding the extraordinary nature of the SCC, and the exceptional forms of evidence that may be adduced before that Court. While it was accepted in *A and Others v The United Kingdom*, that an emergency existed threatening the security of the State, which supported the view that there was a strong public interest in maintaining the secrecy of the sources of information regarding terrorism, it is unclear in the present case whether the State may claim a similar circumstance of emergency pertained at the time of the applicant's trial. This is of course not the complaint that this Court has been asked to address, but it is an important contextual observation when considering whether the applicant received a fair trial. When the matter of a trial before the SCC was considered by the UN Human Rights Committee in *Kavanagh v Ireland*, it was implicit in the determination of the Committee, that not only was the applicant treated differently than other persons charged with a criminal offence by reason of being tried before the SCC, but that such difference of treatment put him at a significant disadvantage compared to others appearing before the ordinary criminal courts.[107]

50. In this regard, the approach of the Grand Chamber in *Al-Khawaja and Tahery v The United Kingdom* commends itself where the Court asked itself three questions; "*first, whether it was necessary to admit the witness statements of [the absent witnesses]; second, whether their untested evidence was the sole or decisive basis for each applicant's conviction; and third, whether there were sufficient counterbalancing factors including strong procedural safeguards to ensure that each trial, judged as a whole, was fair within the meaning of Article 6 §§ 1 and 3(d)."* In addressing the final question, it is respectfully submitted, this Court should bear in mind the exceptional nature of the SCC, and its departure from a number of the fair trial norms that apply to the regular criminal courts in Ireland. It is certainly questionable whether the State has sought to specifically address the procedural safeguards that might be required to deal with the admission of belief evidence when coupled with non-disclosure of relevant material by the prosecution. The case law to date may be considered to have addressed the matter on a case by case basis, and in that regard may be imposing far too much responsibility on the trial judges to ensure the fairness of the proceedings, by asking them to act as both judge and jury at the same time.

[1] Section 8(a) of the Human Rights Commission Act 2000.
[2] Section 8(h) of the Human Rights Commission Act 2000. The IHRC has previously submitted 2 amicus briefs to the Court on behalf of the European Group of National Human Rights Institutions – in the cases *DD v Lithuania* (Application No. 13469/06), Judgment of 14 February 2012, and *Gauer v France* (Application No. 61521/08) and in addition the IHRC has submitted a further two amicus briefs on its own behalf, in the case of *O'Keefe v Ireland* (Application No. 35810/09) and *Magee v Ireland* (Application No. 53743/09).
[3] *National institutions for the promotion and protection of human rights,* UN General Assembly Resolution 48/134, 1993.
[4] A NHRI is a State-sponsored and State-funded organisation with a constitutional or legal basis, with authority to promote and protect human rights at the national level as an independent agency.
[5] The illegal organisation in question is the Irish Republican Army ("IRA"). This offence is created by section 21, Offences Against the State Act 1939, as amended by section 2, Criminal Law Act 1976
[6] The other strand of evidence adduced at the trial of the Applicant was in relation to documentation found at his home and which were alleged to be of a type one might expect to find in the possession of a member of the IRA. See *DPP v Nial Binead and Kenneth Donohue*, [2006] IECCA 147.
[7] In 1934 a Constitutional Review Group was set up to consider possible future reforms of the 1922 Constitution of Ireland and particular interest was shown in making provision for emergency legislation. From an early stage it seems that there was an acceptance that any new constitutional arrangement would need to include provision for a special court. For a detailed account of the historical background to the establishment of the Special Criminal Court see Davis F. *The History and Development of the Special Criminal Court* (Four Courts Press, 2007) at p 56-57.
[8] Article 38.3 states the following: *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.*
[9] Walsh, D. *Criminal Procedure* (Thomson Roundhall, 2002) at p 963.
[10] Prior to the enactment of Offences Against the State Act in 1939 emergency legislation had comprised of the Public Safety Act 1927, which sanctioned severe penalties and provided for a special court which could impose death or life imprisonment for the unlawful possession of fire arms. However, in 1928 the Public Safety Act 1927 was repealed and the robust special courts provided for within the legislation were never in fact established- see Davis p39-41. The subsequent Constitution (Amendment No.17) Act 1931, namely Article 2A of the then 1922 Constitution which, *inter alia*, provided for the establishment of a five-member military tribunal with extensive powers including the death penalty. Following the election of Eamonn De Valera in March 1932 the controversial Article 2A was suspended effectively dismantling the military tribunal- see Davis p 44-51.
[11] For instance section 8 of the Criminal Justice (Amendment) Act 2009 added to the list of scheduled offences under Part V of the Offences of the State Act 1939, to extend the automatic jurisdiction of the Special Criminal Court to organised crime.
[12] Section 41(2) of the Offences Against the State Act 1939.
[13] The European Commission found a complaint in relation to the power of the government to appoint the members of the Special Criminal Court to be inadmissible in *Eccles & Others v Ireland,* Application no. 12839/87, Decision, 9 December 1988. The Commission found that the SCC was independent and impartial within the meaning of Article 6 (1).
[14] In *The State (Coveney) v Members of the Special Criminal Court* [1982] ILRM 284, it was found that the Special Criminal Court is subject to the supervisory jurisdiction of the High Court, in the event that it acts unlawfully or *ultra vires.*.
[15] Section 41(1) of the Offences Against the State Act 1939.
[16] Section 44 of the Offences Against the State Act 1939 provides for an appeal to the Court of Criminal Appeal if certified by the Special Criminal Court to be a case fit for appeal, or where this is refused, the Court of Criminal Appeal may grant leave to appeal. Pursuant to section 29, Courts of Justice Act, 1924, a further appeal may lie to the Supreme Court on a limited basis in relation to a point of law of exceptional public importance and in the public interest.
[17] Sections 18 and 21, Part III respectively of the Offences Against the State Act 1939.
[18] Davis, F. *The History and Development of the Special Criminal Court* (Four Courts Press, 2007) at p 63.
[19] The decision to invoke Part V of the 1939 Act is at the absolute discretion of the Government and no reference is made to the Oireachtas (Parliament) in this context. Also of considerable significance is that the Government is not required to provide any official explanation for its decision to make a proclamation stating that it considers the ordinary courts inadequate. While Part V is in force the Government has the authority to declare offences of any class or kind to be scheduled offences or if any person attempts, conspires, incites to commit, aids or abets the commission of any such scheduled offences, this shall also be regarded as a scheduled offence. See Robinson, Mary, *The Special Criminal Court* (Dublin University Press, 1974) at pp 8-9.
[20] Section 35(2), Part V of the Offences Against the State Act 1939. Section 35 (2) of the Act is in similar terms to Article 38.3° of the Constitution in setting down the specific circumstances in which the Government can make such a proclamation; where it is "…satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order...".
[21] Section 36, Offences Against the State Act 1939. In fact there are a number of ways in which an alleged offence may come to be tried before the SCC, which will be referred to in more detail later.

[22] Section 35(3), Part V of the Section 35 (2) of the Act echoing Article 38 3° of the Constitution sets down the specific circumstances in which the Government can make such a proclamation; where it is "…satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order...".
[23] Section 35 (4)-(6) of the Offences Against the State Act 1939.
[24] Such proclamations have been made on a number of occasions resulting in the establishment of a special criminal court from 1939 to 1946, briefly in 1961 and 1962 and in 1972. See further Walsh, D. *Criminal Procedure* (Thomson Roundhall, 2002) at p 964.
[25] Heffernan Liz., *Evidence and National Security: 'Belief Evidence' in the Irish Special Criminal Court*, European Public Law 15, no 1. (2009); pp 65-88.
[26] See further, Walsh Dermot, *Criminal Procedure*, Roundhall, 2002, at para 20.41-20.52, where the author sets out in detail a number of the exceptional legal aspects of a hearing before the SCC.
[27] Section 3(1) of the Offences Against the State (Amendment) Act 1972.
[28] Section 2 Offences Against the State Act 1998.
[29] See further below.
[30] Section 3(3) of the Offences Against the State (Amendment) Act 1972. This provision, as noted earlier, was most recently was brought into force in 1972.
[31] Robinson, Mary, *The Special Criminal Court* (Dublin University Press, 1974) at p 30. See also Davis, F. *The History and Development of the Special Criminal Court* (Four Courts Press, 2007 at p 135-136 who notes in this respect that a letter of protest was lodged with the office of the Taoiseach by eight academics of Trinity College Dublin objecting to the introduction of Section 3.
[32] *Ibid.,* at p 31.
[33] Farrell, Michael. "*The Challenge of the ECHR*", Judicial Studies Institute Journal no. 2 (2007): 84. See also Heffernan, Liz "*Evidence and National Security: 'Belief Evidence' in the Irish Special Criminal Court*", *European Public Law* 15, no. 1 (2009): 68, Robinson, Mary, *The Special Criminal Court* (Dublin University Press, 1974) at pp 28-34.
[34] Heffernan, Liz *Evidence and National Security: 'Belief Evidence' in the Irish Special Criminal Court*, European Public Law 15, no. 1 (2009): 68.
[35] See for instance Walsh, Dermot, *Criminal Procedure*, Roundhall, 2002, at paras 14.53-1457.
[36] In the Case of *DPP v The Special Criminal Court*, [1999] 1 I.R.60, O'Flaherty J stated: "It will be clear that there are two conflicting interests involved here. I hold that the informer's privilege is of ancient origin and that it is essential for the prevention and detection of crime and, therefore, the preservation of law and order that that privilege should remain intact; subject only to the innocence at stake exception." (at p.87)
[37] McGrath, Declan, *Evidence* (Thomson: Roundhall, 2005) at p 607.
[38] *Ibid.,* at 607.
[39] In the present case, the belief evidence of the Chief Superintendent regarding membership of an unlawful organisation, was based upon material in relation to which informer privilege was granted, *DPP v Donohue* [2007] IECCA 97.
[40] *Supra* fn 36.
[41] *DPP v The Special Criminal Court*, [1999] 1 I.R.60, at p.85.
[42] *Ibid.*
[43] *People (DPP) v Binead and Donohue*, Unreported, Special Criminal Court, 18 November 2004.
[44] It might also be questioned whether in fact the SCC did not take an overly restrictive approach based on the Irish authorities, that would have also required the Court to consider whether the material undermined the prosecution evidence or indeed might have lead to other evidence. In relation to the question of whether the trial was tainted by inadmissible evidence the SCC indicated in its judgment that in considering the weight to be attached to the belief evidence of the Chief Superintendant it excluded consideration of the privileged material which it had reviewed.
[45] *People (DPP) v Binead and Donohue,* Court of Criminal Appeal, 28 November 2006.
[46] Walsh, D. *Criminal Procedure* (Thomson Roundhall, 2002) at p 1008.
[47] *O' Leary v Attorney General* [1993] 1 I.R. 102 (HC).
[48] *Ibid.,* at 102.
[49] *Ibid.,* at 103.
[50] *Ibid.,* at 109.
[51] *DPP v Kelly* [2006] IESC 20.
[52] *Ibid.*, at 24.
[53] *Ibid.,* at 49.
[54] Heffernan, Liz, *Evidence and National Security: 'Belief Evidence' in the Irish Special Criminal Court*, European Public Law 15, no. 1 (2009): 72.
[55] Robinson, Mary *The Special Criminal Court* (Dublin University Press, 1974) at p 32.
[56] *Ibid.,* at p 33. In this instance, Robinson refers to the cases of *Anthony Ballantine* and *Noel Hanrahan* where the Court was unable to convict the accused men after they contradicted the belief evidence presented by the respective Chief Superintendents.
[57] *(People) DPP v Ferguson*, unreported, Court of Criminal Appeal, 27 Oct 1975.
[58] See further Heffernan, Liz *Evidence and National Security: 'Belief Evidence' in the Irish Special Criminal Court*, European Public Law 15, no. 1 (2009): 73.

[59] Heffernan, Liz "*Evidence and National Security: 'Belief Evidence' in the Irish Special Criminal Court*", European Public Law 15, no. 1 (2009): 73.

[60] Section 4, Offences Against the State Act 1998, amended section 3 of the Offences Against the State Act 1972, which now states as follows:

> *(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 organization, but the fact of such denial shall not by itself be conclusive.*

[61] *The People (DPP v McGurk*) [1994] 2 IR 579.

[62] *Heaney v Ireland*, [1996] 2 I.R. 580. In that case the Supreme Court did not derive the right to silence from Article 38 of the Constitution, but rather saw it as an aspect of the right to freedom of expression. In this regard the Court did not consider that there was an absolute right to silence under police questioning, but rather the Court considered the right as one not to be compelled to say anything that is self –incriminating

[63] *Re National Irish Banks Ltd* [1999] 3 IR 145.

[64] Section 52, Offences Against the State Act 1939 requires a detained person to give a full account of their movements and actions and all information in relation to commission of another person of any offence relevant to the Act. Failure or refusal to do so is punishable by six month's imprisonment.

[65] *Heaney v Ireland* [1996] 1 IR 580 at 590. See also *Rock v Ireland* [1997] 3 IR 484 where the Court applied *Heaney* in finding that provisions which provided for inferences to be drawn from an accused's failure to account for, objects, marks or substances on their person did not infringe the presumption of innocence. In this instance the Court considered such inferences could only amount to corroboration and even then only those that appeared properly drawn.

[66] This includes, inter alia, four provisions under the Offences Against the State Acts 1939-1998 and Sections 18, 19 and 19A of the Criminal Justice Act 1984 as inserted by sections 28-30 Criminal Justice Act 2007.

[67] Section 5 of the Offences Against the State Act 1998 provides for a similar situation whereby the accused fails to mention any fact which is later relied upon in their defence, which is considered material and which they could have reasonably been expected to mention. Inference can also be drawn from such failure as amounting to corroboration of evidence of the offence in question.

[68] Section 31, Criminal Justice Act 2007. It is noted that in the Applicant's complaint to the Court he indicated that he had been given a warning as to the consequences of failure to answer questions when he was arrested for the second time on 30 October 2002, although it is unclear if he was so warned on the occasion of his first arrest and questioning on 24 October 2002.

[69] *The People (DPP) v Healy* [1990] 2 IR 53.

[70] *Lavery v Member in Charge, Carrickmacross Garda Station* [1999] 2 IR 159. This is in notable contrast to practice in the United Kingdom where persons being interviewed whilst in custody are entitled to have a lawyer present. See Farrell, Michael, *The Challenge of the ECHR,* Judicial Studies Institute Journal no. 2 (2007): at p. 92.

[71] Kelly, J.M *The Irish Constitution,* 4th ed. Butterworths, (2003) at p1115.

[72] IHRC, *Observations on the Criminal Justice (Amendment) Bill 2009*, June 2009, at pp 7-11. At present the Smith Committee established by the government is considering this and other matters relating to interrogation in Garda custody.

[73] *Report of the Committee to Review the Offences Against the State Acts 1939-1998 and Related Matters* (2002). It appears there has been no such substantive review of the SCC and the Offences Against the State Acts since then. The terms of reference of the Committee included reviewing the court and legislation by reference to the State's international obligations including pursuant to the ECHR.

[74] *Ibid,* Chapter 1.

[75] *Ibid.,* at para 6.90. A minority of the Committee expressly disagreed with this view.

[76] *Ibid.,* at para 6.91.

[77] S*upra*, at para 8.63.

[78] In the case of *Doorsen v Netherlands* [1996] 22 EHRR 330, this approach was expressed in the following way: "*The Court reiterates that 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. The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, was fair."*

[79] In *V v Finland* [2007] ECHR 321, the Court stated; "*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.*"

[80] At para 75.

[81] *Van Mechelen and Others v Netherlands* 25 EHRR 647 at para. 60.
[82] *Ibid* and *W v Finland* [2007] ECHR 702.
[83] *Doorson v Netherlands* [1996] 22 EHRR 330; *Van Mechelen and Others v Netherlands* 25 EHRR 647; *V v Finland*, [2007] ECHR 321 and *W v Finland* [2007] ECHR 702.
[84] *Doorson v Netherlands* [1996] 22 EHRR 330 at para 76. See also *Taal v Estonia* [2005] ECHR 749 at para 33 where the applicant's conviction was found to be incompatible with the accused's right to a fair trial under Article 6 as the conviction was based to "a decisive extent" on statements of witnesses which he had been unable to question. In *Luca v Italy,* Judgment, 27 February 2001, the Court was considering the reliance placed on depositions by the prosecution, where the witnesses refused to give evidence at trial. The Court emphasized that where the conviction was based "solely or to a decisive degree" on depositions that had been made by a person who could not be cross examined, whether during investigation or at trial the rights of the defence would be restricted to an extent incompatible with the guarantees provided by Article 6.
[85] *Kostovski v Netherlands* [1990] 12 EHRR 434 at para 41.
[86] In *Ellis and Simms and Martin v the United Kingdom,* Application No.s 46099/06 & 46699/06, 25 April 2012, which was a decision on admissibility, the Court assessed the fairness of a trial involving anonymous witness evidence, finding that there were sufficient counterbalancing factors in place to ensure that the rights of the defence under Article 6 were not violated. This involved the use of anonymous witness evidence where the judge, jury and counsel for both the prosecution and the defence could all see and hear the key anonymous witness give evidence in Court. The trial judge also reviewed the status and credibility of the witness on several occasions, gave careful directions to the jury as to how they ought to approach the evidence of the key anonymous witness and adequate material was disclosed so that the defence could challenge and examine the witness.
[87] *Doorson v Netherlands* [1996] 22 EHRR 330 at para 73. However Heffernan in her analysis of the use of belief evidence in the Irish Special Criminal Court notes that the other evidence upon which the domestic court of appeal had relied upon in convicting the applicant was relatively scant.
[88] In *Dowsett v United Kingdom* [2004] 38 EHRR 41 this Court has described its task in cases of restricted disclosure on the basis of public interest immunity as being to determine *"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"* (at para 43).
[89] *Jasper v United Kingdom* [2000] 30 EHRR 441 at para 55.
[90] *Fitt v United Kingdom* [2000] 30 EHRR 480 at para 48.
[91] *Edwards and Lewis v United Kingdom* [2005] 40 EHRR 24 at para 46.
[92] *A and Others v The United Kingdom*, Grand Chamber Judgment, 19 February 2009.
[93] *Ibid*., at para. 204. In fact the Court found that in light of the apparently indefinite detention of the applicants, Article 5(4) should import substantially the same fair trial guarantees as Article 6(1) (at para. 217).
[94] *Ibid*., at para. 205.
[95] *Ibid*., at para. 216.
[96] The Court stated: "*In this connection, the special advocate could provide an important, additional safeguard through questioning the State's witnesses on the need for secrecy and through making submissions to the judge regarding the case for additional disclosure. On the material before it, the Court has no basis to find that excessive and unjustified secrecy was employed in respect of any of the applicants' appeals or that there were not compelling reasons for the lack of disclosure in each case.*
The Court further considers that the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings".(at paras 219-220).
[97] *Al Khawaja and Tahery v the United Kingdom*, Grand Chamber Judgment, 15 December 2011.
[98] *Ibid*., at para. 124.
[99] *Ibid*., at para. 125.
[100] *Ibid*., at para 147.
[101] See for instance *Saunders v United Kingdom* (1997) 23 EHRR 313 at para 68.
[102] *Murray v UK*, (1996) 22 EHRR 29. In that case the Court stated: "*Although not specifically mentioned in Article 6 of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aim of Article 6*." (at para 60).
[103] See *supra.* It is noted that section 2 of the 1998 Act has now been further amended by section 10 of the Criminal Justice Act, 2011 by the inclusion of the following requirement: *" the accused was informed before such failure occurred that he or she had the right to consult a solicitor and, other than where he or she waived that right, the accused was afforded an opportunity to so consult before such failure occurred*." This amendment has not as yet been commenced by Ministerial Order unlike other sections of the Act which were commenced in August 2011 (S.I. 411/2011). It is unclear why this section has not been given legal force as yet.
[104] *Salduz v Turkey*, Grand Chamber Judgment, 27 November 2008, at para.50.
[105] *Ibid*., at para 53.
[106] *Ibid.* at para, 55.
[107] *Kavanagh v Ireland*, Human Rights Committee, 4 April 2001, CCPR/C/71/D/819/1998. In its consideration the Committee found that a trial before the SCC did not, per se, constitute an unfair trial for the purposes of

Article 14 of the International Convention on Civil and Political Rights, however the Committee had considerable unease in relation to the ease with which the jurisdiction of the SCC could be invoked: *"The Committee regards it as problematic that, even assuming that a truncated criminal system for certain serious offences is acceptable so long as it is fair, Parliament, through legislation set out specific serious offences that were to come within the Special Criminal Court's jurisdiction in the DPP's unfettered discretion ("thinks proper"), and goes on to allow, as in the author's case, any other offences also to be so tried if the DPP considers the ordinary courts "inadequate", and no reasons for the decision in the particular case have been provided to the Committee. Moreover, judicial review of the DPP's decisions is effectively restricted to the most exceptional and virtually undemonstrable circumstances*." (at para 10.2)