Neutral Citation Number: [2009] IEHC 201

THE HIGH COURT

2006 5362 P

BETWEEN

THOMAS REDMOND

PLAINTIFF

AND

IRELAND AND THE ATTORNEY GENERAL

DEFENDANT

JUDGMENT of Mr. Justice McMahon delivered on the 30th day of April, 2009

Introduction
In a plenary summons issued by the plaintiff in 2006, the plaintiff seeks declarations that s. 3(2) of the Offences Against the State (Amendment) Act 1972, ("the Act of 1972") is unconstitutional and incompatible with the State's obligations under the European Convention on Human Rights ("the Convention") and also seeks such further or ancillary declaratory or other relief that the court deems appropriate as well as damages. It was agreed that the claim for damages and other ancillary orders would be postponed pending the court's decision on the substantive issue.

Facts and Background
On the 22nd April, 2002, the plaintiff, Thomas Redmond, was convicted by the Special Criminal Court of the offence of membership of an unlawful organisation contrary to s. 21 of the Offences Against the State Act 1939 as amended by s. 2 of the Criminal Law Act 1976. On the 24th February, 2004, the Court of Criminal Appeal refused the plaintiff leave to appeal against his conviction. On the 8th July, 2004, the Court of Criminal Appeal refused the plaintiff's application for a certificate for leave to appeal to the Supreme Court pursuant to s. 29 of the Courts of Justice Act 1924. The plaintiff was sentenced to 4 years imprisonment.

At the plaintiff's trial, in accordance with the procedures provided for by s. 3(2) of the Act of 1972, Chief Superintendent Murphy stated that he believed that the plaintiff was a member of an unlawful organisation contrary to s. 21 of the Offences Against the State Act 1939, as amended. The Chief Superintendent refused to disclose the factual basis for this bare assertion on the grounds that all of the facts and material underlying the belief were confidential and privileged.

The Legislation
Section 21 of the Offences against the State Act 1939, as amended ("the Act of 1939") provides as follows:-

> "(1) It shall not be lawful for any person to be a member of an unlawful organisation.
>
> (2) Every person who is a member of an unlawful organisation in contravention of this section shall be guilty of an offence under this section...
>
> (3) It shall be a good defence for a person charged with the offence under this section of being a member of an unlawful organisation, to show –
>
> > (a) that he did not know that such organisation was an unlawful organisation, or
> >
> > (b) that, as soon as reasonably possible after he became aware of the real nature of such organisation or after the making of a suppression order in relation to such organisation, he ceased to be a member thereof and dissociated himself therefrom…."

Section 3(2) of the Offences Against the State (Amendment) Act 1972 ("The Act of 1972") provides as follows:-

> "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."

The plaintiff claims that s. 3(2) of the Act of 1972 is contrary to the provisions of the Constitution of Ireland and in particular Articles 38 and 40 thereof and article 6 of the European Convention on Human Rights ("the Convention") as given effect in Ireland by the European Convention on Human Rights Act 2003. The plaintiff also argues that his conviction under s. 21 on the basis of the belief evidence of the Chief Superintendent is unsafe and unsatisfactory and should be set aside.

Summary of the Plaintiff's Legal Arguments
In summary, the plaintiff argues that s. 3(2) of the Act of 1972 and the procedures provided for by s. 3(2) of the Act of 1972 violate the constitutional and convention rights of the accused, in particular, the following:-

> (i) the right to be informed of the substance of the allegations of membership and evidence against him;

(ii) the right to test the evidence against him and cross-examine his accusers;

(iii) right to give effective rebutting evidence; and

(iv) the right to a fair trial by according a presumptive status to the Chief Superintendent's evidence.

Moreover, insofar as the defence relies on "informer privilege" as a ground for its refusal to disclose material, the plaintiff contends that the rules of disclosure and privilege enunciated by the Supreme Court in *D.P.P. v Special Criminal Court* [1999] 1 I.R. 60, do not apply to a situation where the Chief Superintendent relies on information in coming to a belief and then refuses to disclose to the defence the very material on which he relied.

Finally, the plaintiff contends that proportionality has no place in due process issues and that if s. 3(2) of the Offences Against the State (Amendment) Act 1972 breaches the constitutional guarantee of a fair criminal trial, that is the end of the inquiry. Without prejudice to that line of argument, the plaintiff further submits that if the principle of proportionality does apply, the burden and onus of proof is on the party who asserts that the curtailment of the right is proportionate. When considering whether a law "impairs the right as little as possible", administrative convenience is not a legitimate consideration, according to the plaintiff.

Summary of the Defendants' Submissions
The defendants submit that s. 3(2) of the Offences Against the State (Amendment) Act 1972 is consistent with the constitution and has been so held in a number of significant decisions of both the High Court and the Supreme Court (it relies in particular on *O'Leary v. the Attorney General* [1993] 1 I.R. 102; *The People (D.P.P.) v. Kelly* [2006] 3 I.R. 115 and a significant number of decisions of the Court of Criminal Appeal in particular The *People (D.P.P.) v. Binéad* [2007] 1 I.R. 374). Furthermore, like all Acts of the Oireachtas, s. 3(2) of the Act of 1972 enjoys the benefit of the presumption of constitutionality.

With regard to the European Convention on Human Rights, the State does not accept that the plaintiff has standing to invoke the provisions of the European Convention on Human Rights Act 2003 in order to seek a declaration of incompatibility in relation to s. 3(2) of the Act of 1972. In any event, and without prejudice to the standing of the plaintiff, s. 3(2) does not conflict with article 6 of the European Convention on Human Rights and is not incompatible with it, as had been held in The *People (D.P.P.) v. Kelly* [2006] 3 I.R. 115 and *The People (D.P.P.) v. Binéad* [2007] 1 I.R. 374.

Finally, the defendants submit that the court has no jurisdiction to entertain a claim to set aside the plaintiff's conviction and that in accordance with s. 29 of the Courts of Justice Act 1924, as amended, the plaintiff's conviction is final, subject only to the provisions of the Criminal Justice Act 1993. Even if the plaintiff's claim to substantive relief were successful, that would not result in the setting aside of his conviction. Likewise, the State contends that there is no basis in law or in fact for any award of damages to the plaintiff.

The Proceedings Before the Special Criminal Court and the Court of Criminal Appeal

The hearing before the Special Criminal Court
The hearing before the Special Criminal Court took place over thirteen hearing days, commencing on the 5th March, 2002. The court heard a considerable volume of evidence, as well as much legal argument, before hearing the evidence of Chief Superintendent Murphy pursuant to s. 3(2) that he believed that the plaintiff was a member of an illegal organisation. His evidence in chief was brief, but he was subjected to cross-examination at some length. Most of that cross-examination related to issues unconnected with any issue of privilege. In fact, privilege is referred to only in the most passing manner. No challenge to the privilege asserted by Chief Superintendent Murphy was made by the plaintiff, less still an assertion made that such a claim would cause an injustice to the plaintiff. The Chief Superintendent's belief was challenged on other grounds unrelated to issues of privilege, none of which, individually or collectively could persuade the Special Criminal Court or the Court of Criminal Appeal at the end of the day.

The plaintiff did not give evidence at the trial nor was any other evidence called on his behalf. In addition to the Chief Superintendent's bare and unsubstantiated belief, the prosecution also led forensic evidence arising from the alleged fruits of searches of premises.

Since the Chief Superintendent did not disclose the facts and material underlying his bare belief to either the plaintiff or the Special Criminal Court, the Special Criminal Court held that its function under the procedures provided for by s. 3(2) of the Act of 1972 was to assess the truthfulness and honesty of the Chief Superintendent and to satisfy itself that the Chief Superintendent was a "credible person and worthy of belief." The Court of Criminal Appeal endorsed the Special Criminal Court's approach to the Chief Superintendent's evidence as a proper discharge of the trial court's function under the procedures provided for by s. 3(2) of the Act of 1972.

In his closing submission, counsel for the plaintiff complained that he had not the opportunity "to test by examination" the evidence of Chief Superintendent Murphy. This complaint was strongly put in the following language:-

> "In the present case I cannot cross-examine, because he [i.e. the Chief Superintendent] says that the information is from a privileged source. If it is privileged, it is privileged and I cannot cross-examine, so your Lordships cannot examine the basis for his opinion and I cannot. Your Lordships are thereby disadvantaged. But I have been deprived of my constitutional right to test by examination the evidence offered by or on behalf of my accuser."

The Court of Criminal Appeal
The Court of Criminal Appeal refused to grant the accused leave to appeal. First, it considered that the accused's argument that the Chief Superintendent's evidence should have been ruled inadmissible was directly in conflict with the wording of s. 3(2) itself. Second, as the Chief Superintendent said his belief was based on privileged information, the recent High and Supreme Court jurisprudence had decided that it is a matter for the trial court to call for evidence and determine the issue of privilege if it deems it necessary to do so.

In refusing to grant leave to appeal to the Supreme Court on a point of law of exceptional public importance, (s. 29 of the Courts of Justice Act 1924) the court held (*ex tempore*) that the meaning of s. 3(2) was clear and unambiguous and the

subsection had been declared constitutional by the High Court in *O'Leary v. The Attorney General* [1993] 1 I.R. 102.

Relevant Facts in the Plaintiff's Case
A challenge to the constitutionality of any legislative provision must be grounded on the facts of the plaintiff's own case. The courts will not entertain a challenge based on a *ius tertii* or on a hypothetical set of facts. For this reason some features of the proceedings before the Special Criminal Court and the Court of Criminal Appeal must be highlighted. In particular, the court must bear the following in mind:-

(i) The Chief Superintendent was cross-examined in this case.

(ii) The accused did not give evidence or have evidence called on his behalf.

(iii) There was other evidence against the plaintiff which was apparently relied on by the Special Criminal Court, although both the Special Criminal Court and the Court of Criminal Appeal accepted that "belief knowledge" on its own was sufficient for conviction.

(iv) The Special Criminal Court assessed the credibility of the Chief Superintendent while he was giving evidence and concluded beyond reasonable doubt that he was truthful in his evidence.

(v) The accused in cross-examination scarcely referred to the question of privilege and did not appear to challenge the Chief Superintendent's claim to privilege.

(vi) The accused at the trial did not seek disclosure of the material on which the Chief Superintendent based his belief.

(vii) The accused did not invite the Special Criminal Court to review the material on which the Chief Superintendent based his belief.

(viii) The plaintiff did not intimate to the Special Criminal Court or the Court of Criminal Appeal that s. 3(2) was unconstitutional.

(ix) The plaintiff did not suggest to either the Special Criminal Court or the Court of Criminal Appeal that the special advocate mechanism should have been used to review the material on which the Chief Superintendent relied.

(x) The plaintiff was convicted before the European Convention on Human Rights came into effect in Ireland.

The Irish Case Law
The constitutionality of s. 3(2) has been addressed in the Superior Courts on several occasions and it is now necessary to consider this case law.

O'Leary v. The Attorney General [1993] 1 I.R. 102
In *O'Leary v. The Attorney General* [1993] 1 I.R. 102 the plaintiff was convicted by the Special Criminal Court on two counts of membership of an unlawful organisation contrary to s. 21 of the Offences Against the State Act 1939 and on one count of possession of incriminating documents which convictions were affirmed in the Court of Criminal Appeal. The evidence of the Chief Superintendent was tested in cross-examination in this case and the plaintiff gave evidence denying membership. Thirty seven posters with the words "I.R.A. calls the shots" were also found in the accused's possession which the plaintiff said were in his possession as a member of Sinn Fein only. The plaintiff by way of plenary summons sought declarations that both s. 24 and s. 3(2) of the Act of 1972, were unconstitutional because the plaintiff claimed it placed on him the burden of disproving his guilt.

Costello J. in the High Court holding that the presumption of innocence was a constitutional right dismissed the plaintiff's claim that s. 3(2) deprived him of that right. Referring to s. 3(2) he said at p. 112:-

> "I fail to see how this section affects in any way the plaintiff's right to enjoy the presumption of innocence. What this section does is to make admissible in evidence in certain trials statements of belief which would otherwise be inadmissible. The statement of belief if proffered at the trial becomes 'evidence' by virtue of this section in the prosecution case against the accused. Like other evidence it has to be weighed and considered and the section cannot be construed as meaning that the court of trial must convict the accused in the absence of exculpatory evidence. The accused need not give evidence, and he may ask the court to hold that the evidence does not establish beyond a reasonable doubt that he is a member of an unlawful organisation. Should the court agree he must be acquitted." (At 112)

No appeal was brought against Costello J's holding on s. 3(2). (The learned judge's holding on s. 24 of the 1972 Act, was also upheld in the Supreme Court: [1995] 1 I.R. 254)

In the course of his analysis Costello J. drew attention to the two different meanings that can be attributed to the phrase "shifting the burden of proof". In the first sense it can mean the substantive obligation on the prosecution in a criminal trial to establish the case against the accused beyond reasonable doubt. In this sense the burden always remains on the prosecution. Any shift in this burden onto the accused would be an interference with his presumption of innocence and his constitutional right to a fair trial. In the second sense, the phrase is used to describe the onus on the prosecution to adduce evidence to establish the case against the accused, which is now usually referred to as "the evidential burden of proof". If the prosecution has advanced sufficient evidence against the accused, a *prima facie* case may be established, which has then the effect of casting an evidential burden on the accused. This shift, however, does not discharge the burden of proof which at all times remains with the prosecution to prove its case beyond reasonable doubt. Even if the accused decides not to give evidence in such a case, he may still be entitled to an acquittal, if the evidence of the prosecution, does not establish guilt beyond reasonable doubt. Section 3(2) according to *O'Leary v. The Attorney General* [1993] 1 I.R. 102, only affects the evidential burden on the accused and does not deprive him of the presumption of

innocence.

The *D.P.P. v. Martin Kelly* [2006] 3 I.R. 115
The accused was convicted in the Special Criminal Court on a charge of membership of an unlawful organisation. The Court of Criminal Appeal refused leave to appeal against his conviction but certified as a point of law of exceptional public importance (under s. 29 of the Court of Justice Act 1924) the following question:-

> "Are the requirements of Article 38 of the Constitution satisfied where an accused is precluded from enquiring into the basis of the evidence of belief given against him at his trial pursuant to the provisions of the Offences Against the State Act, 1939, as amended, on a charge of membership of an unlawful organisation before the Special Criminal Court?"

The Supreme Court held against the accused. There were two judgments delivered, one by Geoghegan J. (with whom Murray C.J., Denham J. and Kearns J. agreed) and the other by Fennelly J. who also held against the applicant.

Geoghegan J. emphasised that it was important to note that the court "is not concerned with any matter other than the question of whether the appellant was deprived of a fair trial by reason of [the] limitation on cross-examination" of the Chief Superintendent who gave belief evidence under s. 3(2) of the 1972 Act. The Chief Superintendent was cross-examined as to the source of his belief but pleaded privilege on the grounds that to disclose his sources would endanger life. The Special Criminal Court upheld the plea of privilege.

In examining the purpose of s. 3(2) of the 1972 Act, Geoghegan J. remarked that:-

> "…it is perfectly clear that the legislation has been passed in the context of preserving the security of the State and the legitimate concern that it will not in practice be possible in many, if not most cases, to adduce direct evidence from lay witnesses establishing the illegal membership. Such witnesses will not come forward under fear of reprisal. The Special Court itself was established to avoid the mischief of juror coercion and intimidation. In relation to all anti terrorist offences, as a matter of common sense, there would be equal apprehension about intimidation of witnesses. It is a reasonable inference to draw that the subsection was enacted out of bitter experience. It is carefully crafted ensuring that the belief evidence must come from an officer of An Garda Síochána not below the rank of chief superintendent. This is with a view to establishing trust and credibility as far as possible".

Later in acknowledging that counsel for the accused was limited in his cross-examination, Geoghegan J. notes that this limitation was inherent in the subsection itself, which enjoys the presumption of constitutionality. Section 3(2), according to Geoghegan J., means no more than that "subsection at least authorises the giving of evidence about the basis for the Chief Superintendent's belief but not to the extent that it interferes with or defeats a legitimate plea of privilege". Anything more would be disproportionate.

The learned judge also draws attention to the practice not only of the D.P.P. but also of the Special Criminal Court in cases involving s. 3(2) only:-

> "It has been the practice apparently of the Special Criminal Court not to convict on the belief evidence alone. In my view, that practice is commendable though not absolutely required by statute. There may be exceptional cases where the Special Criminal Court in its wisdom would be entitled to convict on the belief evidence alone. Equally commendable is the practice of the Director of Public Prosecutions of which the court has been informed, not to initiate a prosecution based solely on the belief evidence. These self imposed restrictions by the Special Criminal Court and by the Director of Public Prosecutions are with a view to ensuring a fair trial. In this case, there was plenty of outside evidence and it was well within the discretion of the Special Criminal Court to convict the appellant for the reasons given by the Court of Criminal Appeal. It is not necessary to cover that ground again."

Geoghegan J. also notes that both the Court of Criminal Appeal and the Special Criminal Court had, at any rate, substantial evidence implicating the appellant in the offence independently of the evidence of belief of the Chief Superintendent.

At the end of day according to Geoghegan J. the Chief Superintendent's belief has no special status but is merely a piece of admissible evidence. Like the Court of Criminal Appeal, Geoghegan J. agrees that "the balancing of the conflicting rights and interests can only be determined by the court of trial".

It is significant to note that the appellant was tried with a co-accused, William Clare, who pleaded guilty to a charge of membership, although the appellant himself gave evidence denying that he was a member of an unlawful organisation.

Geoghegan J. notes that in the Court of Criminal Appeal, counsel for the appellant did not argue that a claim for privilege should not be entertained, but rather that a fair trial requires that there be some investigation as to whether it is reasonable to protect a claim of privilege in any particular case. As already indicated the Court of Criminal Appeal held that the proper place to conduct such balancing exercise was before the court of trial.

When coming to his conclusions in *D.P.P. v. Martin Kelly* [2006] 3 I.R. 115, Fennelly J. summarised the question that was to be answered by the court:

> "The essential question to be answered in this case is whether the undisputed restriction on the right of the accused to cross-examine his accusers and to have access to the materials relied upon by the prosecution has been unduly restricted so as to render his trial unfair and his conviction unsafe. I believe that all of the authorities cited from all relevant jurisdictions demonstrate that there is an inescapable obligation on the courts to guarantee the overall fairness of a trial. I also believe that, in our legal system, the right to cross-examine one's accusers is an essential element in a fair trial. This is not to say that restrictions may not be imposed in the interests of overall balance and the efficiency of the criminal justice system. While there may be derogations for overriding reasons of

public interests from normal procedural rights of the defence, these must not go beyond what is strictly necessary and must, in no circumstances, to use the language of Lord Bingham, 'imperil the overall fairness of the trial'.

I believe that the claim of privilege made by the Chief Superintendent constituted an undoubted infringement of the normal right of the accused to have access to the material which underlay the belief expressed. To that extent, it constituted a restriction on the effectiveness of the right of the appellant to cross-examine his true accusers and it had, for that reason, the potential for unfairness."

In the same case, the circumstances which might justify such a restriction were advanced by counsel for the Director of Public Prosecutions. First, the s. 3(2) restriction, only applies to organisations which represent a threat not only to the institutions of the State but to those wishing to give evidence regarding membership of such organisations. Second, s. 3(2) is confined to the belief evidence of high ranking members of the Garda Síochána who it can be assumed operate on high standards of integrity. Third, the belief evidence under s. 3(2) only applies in exceptional circumstances where there is in force in the State a declaration that "the ordinary courts are inadequate to secure the effective administration of justice . . ." and to particular scheduled offences, the trial of which is reserved to the Special Criminal Court (i.e. a non jury court comprised of three members of the judiciary who must also be presumed to apply high standards of fairness). Finally, the section must be entitled to the presumption of constitutionality.

On the facts of the case, Fennelly J. said it was of crucial importance that there was quite extensive evidence other than the evidence of the Chief Superintendent before the Special Criminal Court as to the appellant's membership of the I.R.A. Although the Chief Superintendent claimed privilege, the court did not elaborate on this aspect of the case as it might have done according to Fennelly J. Emphasising the particular circumstances of the trial before him, Fennelly J. formed a view that there was not any overall unfairness and that the restriction on cross-examination was strictly necessary. His closing remarks, at p. 147, however, indicate a certain caution in the matter:-

"The matter might be quite different in a case where the evidence of the Chief Superintendent was the sole plank in the prosecution case, where privilege had been successfully claimed and the accused had given evidence denying the charge. In such a case, there would be a powerful argument based on denial of *'in re Haughey'* rights."

Bearing that last remark in mind it is significant to state that in the case before this Court the Chief Superintendent's evidence was not the sole plank in the prosecution case; there was other evidence which was adverted to by the relevant courts. Secondly, the defendant did not give evidence denying the charge nor was any evidence given on his behalf. Thirdly, the Chief Superintendent did not have to elaborate on his privilege claim as he was not challenged on it. It would seem to me, absent these features, even on Fennelly J's view, this Court is bound by the decision of the Supreme Court in *D.P.P. v. Martin Kelly* [2006] 3 I.R. 115

The plaintiff states it did not challenge the Chief Superintendent because it anticipated the plea of privilege.

The People (D.P.P.) v. Binéad and Donohue [2007] 1 I.R. 374
The most recent consideration of many of the arguments advanced by the plaintiff in this case is to be found in *The People (D.P.P.) v. Binéad and Donohue* [2007] 1 I.R. 374. In that case, the defendants were prosecuted for membership of an illegal organisation contrary to s. 21 of the Offences against the State Act 1939, as amended by s. 2 of the Criminal Law Act 1976. The prosecutor relied, *inter alia*, on the belief evidence of a Chief Superintendent pursuant to s. 3(2) of the Act of 1972. This belief was based on confidential information available to the Chief Superintendent and he claimed privilege in respect of the sources which provided this information on the grounds that to disclose them would endanger the lives of people and hamper ongoing security measures in relation to the security of the State. The Special Criminal Court required the Chief Superintendent to produce all relevant documentation upon which he relied. Following a review, the court ruled that it was satisfied that the belief evidence was based on adequate and reliable information and that nothing in the documentation would assist the defence in proving the innocence of the accused. The court, however, indicated that it was not disposed to convict on the basis of the belief evidence alone, and indicated that nothing in the documentation influenced its ability to determine the question of innocence or guilt. The prosecutor also urged the court that it should make appropriate inferences from the refusal by the accused to answer questions put to them in the course of detention, as was allowed under s. 2 of the Offences against the State (Amendment) Act 1998. The court held that it was willing to make such inferences, and combined with the belief evidence offered to the court, convictions were warranted.

Referring to the earlier jurisprudence, the court summarised, at p. 395-396, the *D.P.P. v. Martin Kelly* [2006] 3 I.R. 115 and *O'Leary v. The Attorney General* [1993] 1 I.R. 102 case law in the following terms:

"The correct interpretation of the judgments in *The People (Director of Public Prosecutions) v. Kelly* [2006] IESC 20, [2006] 3 I.R. 115, in this court's view, is that the belief of the Chief Superintendent is simply admitted as being evidence, no more and no less, and that this was already well established in the prior jurisprudence. It is that evidence, that is to say, his belief evidence, which is the subject of cross-examination. Such a witness can be examined and cross-examined on his belief in accordance with the provisions of article 6 of the European Convention of Human Rights. Such a witness is entitled, in the course of his evidence, to claim privilege in respect of underlying facts or materials or sources which led to his belief, *inter alia*, on the basis that disclosure of the same could cause a credible threat to the life of persons or to the ongoing security of the State, as claimed here. By ruling that it would not convict without supportive or corroborative evidence of that belief, the trial court clearly recognised the disadvantage which flows from and accrues to the defence in a trial, from the admission of such belief evidence with an accompanying claim to privilege which may limit, in a particular case, the ability to test fully by cross-examination the underlying material or facts leading to that belief. On the basis of the judgments in the Supreme Court in *The People (Director of Public Prosecutions) v. Kelly* [2006] IESC 20 and *O'Leary v. The Attorney General* [1993] 1 I.R. 102, this court is satisfied that the trial court did not, in the present case, conduct an unfair trial. This court is also satisfied that the trial court was not obliged to appoint a special advocate to consider and report on the material underlying the belief evidence of the Chief Superintendent. The role and jurisdiction of the Special Criminal Court is indeed limited by the fact that it is a creature of statute and cannot operate outside the scope of its statutory mandate, or beyond what can be implied as being reasonably necessary to carry out that

> mandate. The appointment of a special advocate, in the view of this court, is not established by the first accused as being within its mandate, or implied from its statutory jurisdiction. Nor is there otherwise an entitlement enabling him to procure such an appointment."

On the issue of whether it is appropriate that if sensitive material for which privilege is claimed is to be examined that it should be done by the trial court itself, the Court of Criminal Appeal was not willing to accept the argument that by doing so the trial court would be tainted and would not be able to deliver a fair trial at the end of the day. It did not lack confidence in the judiciary's ability to isolate and keep separate its determination on the "privilege documentation" from its ultimate decision on the guilt or innocence of the accused. It pointed out that even in "ordinary" criminal trials judges are used to dealing with this problem whenever a trial court has to deal with a *voir dire*, a trial within a trial. In that regard, it says at p. 397:-

> "There is the prospect that matters involved in the *voir dire*, even vexatious or potentially damaging matters may have to be banished from the judge's mind as the case progresses, and judges do so meticulously and without difficulty every day. If they fail to do so, an appeal mechanism exists to remedy this."

I am of course bound by the decision of the Supreme Court in *The People (D.P.P.) v. Kelly* [2006] 3 I.R. 115. Moreover, I do not disagree with anything which Costello J., said in O'Leary or with the Court of Criminal Appeal in *The People (D.P.P.) v. Binéad* [2007] 1 I.R. 374. In this context it is worth repeating the following. The Chief Superintendent's "belief" may be undermined by the accused's own evidence if he chooses to give it. But it does not follow that failure by the defendant to give such evidence, inevitably means that the Chief Superintendent's "belief" will be determinative. Even in the absence of such a denial (or other contradictory evidence) by the accused, the court still has to assess "the belief" of the Chief Superintendent. Neither is any unfavourable inference to be drawn from the accused's decision not to give evidence, nor will the failure to give evidence "enhance" the Chief Superintendent's evidence as was suggested in *D.P.P. v. Ferguson* (Unreported, Court of Criminal Appeal, 27th October, 1975). Finally, such reluctance does not deprive the accused of the presumption of innocence. (See *D.P.P. v. Martin Kelly* [2006] 3 I.R. 115 and *O'Leary v. The Attorney General* [1993] 1 I.R. 102 supra) That the court may, and sometimes will, convict on such unchallenged "belief" evidence, does not "in any way infringe the principles of natural justice or the constitutional rights of the accused" (*D.P.P. v. Gannon,* Court of Criminal Appeal, 2nd April, 2003 pp. 7-8). The courts have noted the restraint of the Director of Public Prosecutions to prosecute, and the reluctance on some occasions at least, of the Special Criminal Court to convict, on such bare "belief" evidence. The question remains, however, whether s. 3(2) would survive a challenge in the circumstances contemplated by Fennelly J. in *D.P.P. v. Martin Kelly* [2006] 3 I.R. 115. I agree with Fennelly J. insofar as he suggests that in such circumstances the courts would have to give serious consideration to the encroachment on the accused's rights in these circumstances. That fact pattern is not before this Court, however.

The Plaintiff's Convention based Claim

At the outset, it is quite clear to me that the plaintiff cannot rely in these proceedings on the Convention of Human Rights as direct support for his case. His trial and the refusal in the Court of Criminal Appeal predated the coming into force in this jurisdiction of the Human Rights Act 2003 and on principle he cannot rely on in this case. That this is the law has been clearly established by the Supreme Court in *Dublin City Council v. Fennell* [2005] 1 I.R. 604.

In support of an argument to the contrary, the plaintiff relies in his written submission on *Grace v. Ireland* [2007] IEHC 90, but in oral argument, the plaintiff's counsel graciously acknowledged that *Dublin City Council v. Fennell* [2005] 1 I.R. 604 represents a difficulty for him. In any event, Grace v. Ireland can easily be distinguished from *Dublin City Council v. Fennel*l. In *Grace v. Ireland*, the plaintiff challenged certain provisions of the Bankruptcy Act 1988 relating to the discharge of a bankrupt from bankruptcy. Although he had been adjudicated bankrupt prior to the 2003 Act coming into force, that status had a continuing adverse impact on him after that date. It is understandable that he should in these circumstances be entitled to invoke the 2003 Act. This case, in no way modifies the general principle to be found in Dublin City Council v. Fennell and it is clear to me that the plaintiff here cannot rely on events occurring prior to the coming into force of the 2003 Act to seek a declaration that s. 3(2) is incompatible with the Convention.

This does not mean, however, that the case law from the Court of Human Rights is irrelevant to these deliberations. The right to a fair trial is guaranteed in both the Irish Constitution and the Convention on Human Rights. This commonality means, at the very least, that the relevant jurisprudence of the European Court of Human Rights is persuasive authority which should not be ignored.

In *D.P.P. v. Martin Kelly* [2006] 3 I.R. 115, Fennelly J reviewed the relevant case law on Article 6(3) of the European Convention on Human Rights and Fundamental Freedoms. I do not propose to rehearse again these cases in any detail. Suffice to say that although earlier jurisprudence of the Court of Human Rights favours to some extent the plaintiff's argument in this case, later case law saw the court modify its position on the issue. In *Doorson v. Netherlands* (1996) 22 E.H.R.R. 330 the Court, at paragraph 70 of its judgement, said:

> "It is true that Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 ... of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify."

Fennelly J., at p. 144, concludes his survey of the case-law with the following:

> "In subsequent years the European Court has adhered to the principle that the fair administration of justice holds an important position in a democratic society and that measures restricting the rights of the defence should be restricted to what is strictly necessary (see, for example, *Van Mechelen and Others v. Netherlands* (1998) 25 E.H.R.R. 647, and *Rowe and Davis v. United Kingdom* (2000) 30 E.H.R.R. 1). Recognition of the legitimate public interest in protecting police sources of information or the safety of informers or witnesses has led to the acceptance of the possible justification of the withholding of relevant information from disclosure to the defence."

In *The People (D.P.P.) v. Binéad* [2007] 1 I.R. 374, Macken J, in delivering the judgement of the Court of Criminal Appeal gave the Court's conclusion on the effect of *D.P.P. v. Martin Kelly* [2006] 3 I.R. 115, at pp. 388-389, in the following language:

> "This court is satisfied that a restriction on the ability to cross-examine the garda witness in question arising from his claim of privilege in respect of the underlying sources of information upon which his belief was based arising from a threat to life or to ongoing security of the state, does not, ipso facto, on the basis of Irish case law, or that of the European Court of Human Rights, constitute a failure to comply with the Constitution, or with article 6 of the European Convention on Human Rights. Having regard to the majority judgement in *The People (Director of Public Prosecutions) v. Kelly* [2006] IESC 20, [2006] 3 IR at 115, in the context of Article 38 of the Constitution, as well as to the above analysis in the judgement of Fennelly J. on to the jurisprudence of the European Court of Human Rights on article 6 of the Convention, this court is satisfied that a restriction on cross-examination may be permitted. The majority decision of the court in *The People (Director of Public Prosecutions) v. Kelly* [2006] IESC 20 clearly found that the limitation on the right to cross-examination was necessary, and that it was properly counterbalanced in that case by matters not dissimilar to those which also arise in these proceedings, being the measures which contribute to the court ensuring a fair trial."

I accept the analysis and the conclusion of Fennelly J in *D.P.P. v. Martin Kelly* [2006] 3 I.R. 115, on the case law of the Court of Human Rights, and agree with the endorsement of the Court of Criminal Appeal. Although I have already held that the plaintiff is not entitled to rely on the Convention to advance his case in these proceedings, it appears to me, in any event, that nothing in the Convention suggests that section 3(2) as it applies in the present case is in breach of the Convention.

Fair Trial
There can be little doubt that the right to a fair trial is a fundamental right in our Constitution. In *D. v. Director of Public Prosecutions* [1994] 2 I.R. 465, Denham J. stated at p. 474:-

> "The applicant's right to a fair trial is one of the most fundamental constitutional rights afforded to persons. On a hierarchy of constitutional rights it is a superior right.
>
> A court must give some consideration to the community's right to have this alleged crime prosecuted in the usual way. However, on the hierarchy of constitutional rights there is no doubt that the applicant's right to fair procedures is superior to the community's right to prosecute.
>
> If there was a real risk that the accused would not receive a fair trial then there would be no question of the accused's right to a fair trial being balanced detrimentally against the community's right to have alleged crimes prosecuted."

But the concept of a fair trial must be seen in the wider context of the administration of justice where other interests must also be accommodated. There is the public interest, for example, in the security of the State. The right to life is another. Many States in recent years have had to introduce anti terrorist measures which inevitably modified to some degree the traditional indicia of the ordinary criminal trial. Our legislation, reflecting our own political history of social disturbance, predates these recent enactments in other jurisdictions and has been challenged and considered by our courts on many occasions. The arguments advanced by the plaintiff here are not unfamiliar and have surfaced in the case law in one guise or another over the years.

Fairness is not an absolute term. It is limited by the social and political circumstances in which it is being considered. Accepting that there are minimum standards below which the courts will not go in defending the citizen's right to a fair trial, it must be acknowledged that in times of crisis, where the security of the State is threatened, for example, the State may have to take measures which it would not wish to take in normal peaceful social conditions. It may have to depart, for example, from the norm of a jury trial. This is what has been done in this State by the establishment of the Special Criminal Court, a legal development which has been challenge-proofed by our Supreme Court on more than one occasion.

It must be clear, however, that such erosion of the citizen's right to a fair trial does not, in difficult social circumstances, fall below the minimum guarantee to which the citizen is entitled. There are basic protections, core principles, which the individual is entitled to insist on even in times of crisis and social upheaval; a floor level below which any civilised State must not descend. It is for the courts in this State to ensure that this does not happen.

The plaintiff in this case argues that s. 3(2) of the 1972 Act is a step too far.

In this context, it is also appropriate to draw attention to the distinction between the right to a fair trial on the one hand, and the right to a fair legal system on the other. In *Kemmy v. Ireland and the Attorney General* (Unreported, High Court, 24th February, 2009), I have noted that the presence of an appeal system, if successfully availed of by the person convicted, may be sufficient to cure what was a judicial error at the trial, so that one could not say in those circumstances that at the end of the day, the accused did not get a fair trial. The State cannot guarantee, because of human fallibility, that an unfair trial will never occur. What is important, however, is that the system provides a corrective mechanism to minimise the damage that may ensue from such an error. The availability of an appeal is for this reason an essential mechanism to guarantee a fair system. In the case before this Court the accused was not deprived of an appeal, indeed he availed of it but was not successful. In the present case, the plaintiff is not complaining of judicial error. He complains of "unconstitutional" legislation, that is, a frailty which, if true, precedes any judicial consideration.

The argument which the plaintiff advances, suggesting that s. 3(2) in effect places the burden on him to disprove his guilt or deprive him of his presumption of innocence is unsustainable for the reasons set out by the Supreme Court in *O'Leary v. The Attorney General* [1993] 1 I.R. 102. Similarly, the argument put forward that his ability to cross-examine the Chief Superintendent was restricted in an unwarranted way, was considered and rejected by the Supreme Court in *D.P.P. v. Martin Kelly* [2006] 3 I.R. 115. The question of privilege was not raised squarely by the plaintiff either in the Special Criminal Court or in the Court of Criminal Appeal. In *D.P.P. v. Martin Kelly* where privilege was claimed by the Chief

Superintendent, Fennelly J. although noting that the issue was not considered at length by either the Special Criminal Court or the Court of Criminal Appeal, nevertheless, held that there was no overall unfairness and that the restriction on cross-examination in the circumstances of that case was justified.

The main argument advanced by the plaintiff now appears to be focused on the issue of disclosure. This is to be detected from the lengthy legal submissions made by the plaintiff and the oral submissions offered over the five days of hearing. Significantly, this argument does not appear in the plaintiff's statement of claim and appears for the first time in the document delivered by the plaintiff in July 2008, entitled: *Further Particulars of Invalidity of s. 3(2) of the Offences against the State (Amendment) Act 1972*. The issue that proper disclosure was not made was not raised at the trial or before the Court of Criminal Appeal. In these circumstances the defendant submits that the plaintiff has no standing to make these arguments at this late juncture. The State suggests that this change of tack was forced on the plaintiff because of the Supreme Court's decision in *D.P.P. v. Martin Kelly* [2006] 3 I.R. 115 and that it represents the plaintiff's attempt to restrict the *ratio* of *D.P.P. v. Martin Kelly* to the question of cross-examination only. According to the plaintiff, *D.P.P. v. Martin Kelly* does not determine his right to be informed of the substance of the allegations of membership and the evidence against him. I will examine the plaintiff's substantive argument before I consider the objection to the plaintiff's standing to make such an argument at this late stage of the proceedings.

I am not sure I fully understand the distinction the plaintiff wishes to make now between his right to cross-examine the Chief Superintendent and his inability to have access to the material underlying the Chief Superintendent's belief in the present context. There is no doubt that the plaintiff can cross-examine the Chief Superintendent as to his belief. When he seeks the information on which the belief is based he is met with the wall of privilege which, if it applies, denies him access to the material underpinning the Chief Superintendent's belief. In the absence of this knowledge, counsel for the plaintiff is afraid to exercise his right to cross-examine further. This inhibition is according to the plaintiff, a *de facto* denial of his right to cross-examine the Chief Superintendent.

In my view, the distinction advanced by the plaintiff, in an effort to confine the holding in *D.P.P. v. Martin Kelly* [2006] 3 I.R. 115 is wholly artificial. *D.P.P. v. Martin Kelly* upheld the restriction which s. 3(2) effectively put on both accuseds in relation to their ability to cross-examine the Chief Superintendent because they did not have access to the material on which the belief was based. The restriction on the right to cross-examine in that case must be seen in the context of s. 3(2) which was the issue in *D.P.P. v. Martin Kelly*. To suggest that *D.P.P. v. Martin Kelly* does not also concern the right to disclose is unconvincing. That disclosure was also relevant to the Court's decision is abundantly clear from Fennelly J's judgment in *D.P.P. v. Martin Kelly*. At p. 146 of that judgment, he identifies the issue:-

> "The essential question to be answered in this case is whether the undisputed restriction on the right of the accused to cross-examine his accusers *and to have access to the materials relied upon* by the prosecution has been unduly restricted so as to render his trial unfair and his conviction unsafe."(Emphasis added).

Later on, at p. 146, he elaborates:-

> "I believe that the claim of privilege made by the Chief Superintendent constituted an undoubted infringement of the normal right of the accused to have access *to the material which underlay the belief expressed.* To that extent, it constituted a restriction on the effectiveness of the right of the accused to cross-examine his true accusers and it had, for that reason, the potential for unfairness." (Emphasis added).

For the reasons he later identifies, however, he concludes that in the circumstances of that appeal, there was no unfairness in the trial of the accused.

In the ordinary criminal trial, the defendant is entitled to full disclosure by the prosecution of any matter that may assist the defendant in his defence or which may weaken the prosecutor's case. Some information may, for a variety of reasons, be considered to be so sensitive that an exception is made to the general rule of disclosure. Our courts have recognised, for example, that if the disclosure would reveal police methodology, undermine the security of the State or represent a real threat to the life of others, a claim to privilege may be made and disclosure may be withheld. If it wishes to rely on this exception, however, the prosecution must claim it. The question then arises as to how this claim is verified as being genuine and real and how it is to be checked and supervised independently. In the *Director of Public Prosecutions v. the Special Criminal Court* [1999] 1 I.R. 60, the Supreme Court determined that the competing interests should be balanced in the following way:-

> "The solution, in the view of the Supreme Court, begins with counsel for the prosecution. His task in a criminal trial is not just to secure a conviction. He must also function as a minister for justice. In this role he must bear a responsibility to disclose all relevant material to the defence and to accommodate both informal privilege and the innocence at stake exception. In cases of doubt it is a matter for the trial court to make a ruling on the matter. For this purpose it can inspect the documents in question, although there is no absolute need for it do so in every case. This applies as much in respect of the Special Criminal Court as for a court sitting with a jury. Judges are well experienced in ignoring inadmissible matters when reaching a verdict on the evidence." (Walsh D., *Criminal Procedure*, Thompson Round Hall, Dublin 2002, p. 729)

The Irish courts have in several cases held that to ensure fairness in the withholding, the court should consider the basis of the claim of privilege and if there are documents being withheld the court itself may decide to read and consider these documents and make a decision as to the fairness of the claim to privilege and determine whether the defendant can receive a fair trial if the privilege is successfully invoked.

The plaintiff claims that such normal procedural safeguards are insufficient when the belief evidence of the Chief Superintendent is involved and where s. 3(2) applies.

In the present case, the plaintiff did not challenge directly the claim to privilege which the Chief Superintendent relied on in refusing to disclose the basis for his belief. In a sense, therefore, this Court might be entitled to refrain from entertaining an argument challenging the privilege in such circumstances. Without ruling out the plaintiff's argument on that procedural point, however, it is clear from the judgments of both Geoghegan J. and Fennelly J. in *D.P.P. v. Martin*

Kelly [2006] 3 I.R. 115 that the claim for privilege has been recognised by the Supreme Court in these circumstances. I have already quoted the relevant parts of these judgments and it is appropriate to say that while the claim for privilege will be recognised in appropriate circumstances and will inevitably in such cases restrict the right of cross-examination, both judges were of the opinion that the extent to which privilege will be allowed to limit the right to cross-examine must itself be curtailed to such an extent that it does not become disproportionate. It is for the trial court to strike the balance between these two competing interests in the circumstances of each case. One recalls Fennelly J's reservation on this issue (*supra* p.16) which does not apply in the case before this Court, since the accused did not give any evidence to the trial court, and did not challenge the privilege before the Special Criminal Court.

On the authority of *D.P.P. v. Martin Kelly* [2006] 3 I.R. 115, therefore, it seems to me that any failure of disclosure claimed by the plaintiff in this case can be justified.

The Evidence in this Case
In the present case, Detective Superintendent D. O'Sullivan gave evidence as to the background which Geoghegan J. and Fennelly J. envisaged in *D.P.P. v. Martin Kelly* [2006] 3 I.R. 115 when considering the purpose of s. 3(2) of the Act of 1972. Detective Superintendent O'Sullivan testified that he has served in An Garda Síochána for thirty two years and had spent over twenty years involved in the investigation of subversive crime. His responsibilities are State security, the gathering and analysis of intelligence and the investigation of subversive crime within the jurisdiction. Referring to the increased activities and attacks of the I.R.A. in the 1930s he explained the necessity for the introduction of the Offences Against the State Act in 1939. The I.R.A. was declared to be an unlawful organisation and that suppression order still continues in this jurisdiction. In detailed evidence to the court he gave a brief history of the I.R.A. and the emergence of a breakaway faction in around 1969, now known as the Provisional I.R.A. Having outlined the objectives of the I.R.A., he gave a description of the treatment meted out to people who are suspected of assisting police investigations, which included interrogation and torture sometimes resulting in execution. The fact that it is an oath bound secret organisation divided into cells creates problems for the gardaí making it very difficult to infiltrate the organisation and gather evidence to prosecute member volunteers. The organisation is very energetic in trying to identify members of the public who provide information to the police and are very assiduous in collecting evidence including closely examining books of evidence to identify any such persons. If anyone is identified in this manner it usually results in serious torture or death. This represents a serious problem for the gardaí who bring prosecutions before the ordinary courts where witness and jury intimidation was not unknown. In 1972 the Government introduced an amendment to the Offences Against the State Act, 1939. Section 3(2) of this Act seeks to address the difficulties which confronted the law enforcement agencies in these situations. The witness also gave evidence that there are only about 69 members in the force of Chief Superintendent status or higher who can give evidence under s. 3(2). In fact, he testified that only 17 or so have the relevant experience to give such evidence in practice.

The threat continues today. In 1994, the leadership of the Provisional I.R.A. adopted a policy of cessation of military operations. This caused unrest with some hardliners and after the October Convention in 1997, where these policy matters were discussed within the republican movement, a breakaway group styling itself "32 County Sovereignty Committee" (subsequently the "32 County Sovereignty Movement") was established. It was from this grouping that the "Real I.R.A." was born. This group is committed to securing its objectives by physical force and was strongly opposed to the political process favoured by the Provisional I.R.A. Subsequently, a campaign of violence throughout Ireland and the United Kingdom was carried out by this group. Detective Superintendent O'Sullivan, gave details of the threat which this group represented for the State and the institutions of the State. He gave direct evidence of the many investigations into the activities of the I.R.A. in which he was involved and declared that a common feature in all of these investigations is the presence of fear, intimidation and the threat of reprisals. As a result witnesses have refused to give evidence in court, even when they have initially made statements to the gardaí. When asked by counsel for the State, "Has it (i.e. s. 3(2)) been an important tool in terms of prosecuting and obtaining convictions in respect of alleged offences of membership of subversive organisations, such as the Provisional I.R.A. and the other variants of the I.R.A?" the witness replied "Yes, Judge. In the last number of years it has also been of enormous help to An Garda Síochána in endeavouring to combat the threat posed by the I.R.A., and I believe if it was not there we would not have succeeded in counteracting that threat". He went on to say that the threat is an ongoing one and that without s. 3(2) the hands of the police would be tied in their efforts to combat terrorism and the threat posed by the I.R.A.

In cross-examination, Mr. O'Higgins in forensic detail, and by specific reference to informer evidence given in the *McKevitt* trial [*The People (D.P.P.) v. McKevitt* [2008] I.E.S.C. 51], as well as by way of hypothetical examples, established to the satisfaction of the court that the more information the defendant has disclosed to him by the defence the greater opportunity he has to successfully challenge the witnesses for the prosecution.

The court has no difficulty in accepting this as a general proposition, but the whole point of privilege is that in some extreme cases, where the safety or the lives of witnesses are at risk, the courts in such cases are willing to accept a restriction of the defendant's normal entitlements. That is the inevitable consequence of the privilege concept.

The real question in such circumstances is whether the curtailment is warranted and justified in the circumstances.

Counsel for the accused has cited case law from other jurisdictions where similar problems on "opinion" or "belief" evidence have arisen. It was emphasised to the court that it was not being urged on the court that the solutions adopted by these jurisdictions should be followed by this Court, but they were opened to show that the anomalous nature of such evidence within the common law tradition is extensively recognised and acknowledged. Particular emphasis was placed on some Canadian authorities as well as the special advocate system that operates in England and Northern Ireland. Reading these authorities one is impressed by the eloquent articulation of the difficulty which such evidence represents for the accused and the dilemma which confronts his advisors when trying to advise him on the proper course to pursue when confronted with a witness whose opinion is admissible in court. If one pursues such a witness, one is quite likely to be met with the claim of privilege. If one seeks to inquire as to what is the basis of the privilege, one is likely to offend against the most basic rule of cross-examination: one must never ask a question, to which one does not know the answer. No responsible defence counsel dares open that Pandora's box.

In referring to the jurisprudence from other jurisdictions, the defendant emphasised that it is not asserting that the Irish Courts are obliged to ameliorate the accused's position by adopting the special advocate solution or any particular solution favoured in these other countries. This comparative case law (with the exception of the Convention on Human Rights case law perhaps) according to the counsel for the plaintiff, was opened to the court to illustrate that in other comparable common law jurisdictions, where the issue has been addressed, the courts have recognised the injustice of a

system which prevents the defence from having access to, or having the opportunity to challenge in a meaningful way, the material on which the opinion or belief evidence is based. By making this comparison, counsel for the plaintiff urges the court to recognise that the mechanisms adopted in this jurisdiction fall short of what would be required for a fair trial in other comparable democracies.

Counsel for the defence made much of this difficulty. In fact, he called an experienced defence solicitor to give evidence on the practical problems that this presents for him in everyday practice. I have no difficulty in accepting this evidence. But it does not address the problem confronting this Court. The court is aware that s. 3(2) makes life more difficult for the accused. But, in circumstances prevailing in this jurisdiction at present, does it make it so difficult as to deprive the accused of the right to a fair trial?

Moreover, the plaintiff objects to the ability of the Chief Superintendent to rely on privilege when he is questioned about the basis of his belief. It should be pointed out, however, that the feature of privilege is not peculiar to s. 3(2) evidence before the Special Criminal Court. The notion of privilege is recognised both in civil and criminal law and can apply in "ordinary" criminal trials in a variety of situations where other competing interests are prioritised. Examples occur where there may be a threat to life or to the security of the State. In recognising such privilege, our courts acknowledge that there are some cases where other interests must prevail over the accused's right to know all the details of the material used in his prosecution. Of course, such instances should be limited and should be recognised only when a superior interest is acknowledged. Moreover, once established such instances should be closely scrutinised to ensure that they encroach as little as possible on the accused's rights to a fair trial. It is always a balancing task.

The fundamental question in all of these cases, and in this case too, is whether the intrusion, the restriction, the departure from the norm, is justified in the context of the legislation and in the circumstances of the case, and is not such as to deprive the accused of his right to a fair trial in that context. The question is not whether life is made more difficult for the accused, more difficult than if he was facing a normal criminal charge, but whether it is made so difficult that he cannot now in a meaningful sense, get a fair trial. The task of the court is to ensure that, given the evidence before the Court, the accused's right does not fall below the essential minimum at the core of the fair trial ideal.

Conclusion
At the end of the day, what is significant about s. 3(2) is that it merely makes admissible, evidence of what is the Chief Superintendent's belief. The court does not have to accept it, much less convict on it. Its abnormality in that regard is recognised in the system by the reluctance of the D.P.P. to proceed on such evidence only, as well as the reluctance of the Special Criminal Court to convict on it only. Its frailty is well highlighted by the defence in this case: the material on which the Chief Superintendent bases his belief is hidden from the accused and his legal advisors. Insofar as informers are involved, there is no opportunity offered to the accused to test their motives, their history, their integrity or what private agendas they may have. They are shadows, or "ghosts", as counsel for the defence describes them, with whom the accused cannot engage. To that extent, the accused is certainly placed at a disadvantage and has to engage in the normal adversarial process, labouring under a handicap. Nevertheless, when such evidence is admitted, the weight given to this evidence, alone or combined with other evidence is a matter for the trial court. In assessing the weight, in deciding how this piece of untested evidence feeds into the trial court's decision, the court will, no doubt, bear in mind the unusual nature of this evidence and all the weaknesses it has, as evidence being unavailable to, and untested and unchallenged by, the defence. Many judges, for these reasons, might well deem such "bare" opinion evidence insufficient to convict and may, if that is the only evidence before the court, say that the State has failed to prove its case beyond reasonable doubt. That is what happened in *The People (D.P.P.) v. Binéad* [2007] 1 I.R. 374.

> "By ruling that it would not convict without supportive or corroborative evidence of that belief, the trial court clearly recognised the disadvantage which flows from and accrues to the defence in a trial, from the admission of such belief evidence with an accompanying claim to privilege which may limit, in a particular case, the ability to test fully by cross-examination the underlying material facts leading to that belief."

I am not willing to say, however, that it could never be sufficient. The circumstances of each case will differ and that is why so much responsibility is, at the end of the day, placed on the trial court.

It is also important to note that the Chief Superintendent gives his evidence in open court. The court has the obligation and the opportunity to assess the honesty of that belief. This belief evidence can be subjected to cross-examination. The court can examine, if it considers it necessary, the material on which the belief is based admittedly, out of sight of the accused, and make its own assessment as to whether it is sufficient to support the belief. (*Director of Public Prosecutions v. Special Criminal Court* [1999] 1 I.R. 60; *The People (Director of Public Prosecutions) v. Binéad* [2007] 1 I.R. 374, at 396).

Contrary to the argument advanced by the plaintiff, I do not accept that there is a presumption that the Chief Superintendent is telling the truth. The accused can challenge the privilege. He can cross-examine the Chief Superintendent (perhaps a risky tactic in many cases) and he can give evidence himself. Fennelly J. speculates that if the accused gives evidence to that effect that he is not a member of the relevant organisation, it would be very difficult to convict him on the Chief Superintendent's "bare" evidence, and I agree. Finally, an appeal lies from the Special Criminal Court's decision to the Court of Criminal Appeal and, in some limited circumstances, on an exceptional point of law to the Supreme Court.

For all these reasons, and given the ongoing threat that the named organisations still present to the security of the State, I am not satisfied that s. 3(2) is unconstitutional or, indeed, contrary to the Convention on Human Rights.

Because of this finding the question of setting aside the plaintiff's conviction does not arise. Similarly, the question of damages need not concern the court.