



Non-disclosure of police sources did not make the trial of a member of the IRA unfair

In today's Chamber judgment in the case of [Donohoe v. Ireland](#) (application no. 19165/08), which is not final¹, the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 6 (right to a fair hearing) of the European Convention on Human Rights.

The case concerned the fairness of Mr Donohoe's trial and conviction before the Special Criminal Court ('SCC') in Ireland for being a member of the IRA. His conviction was based, among other things, on evidence given by a Chief Superintendent of the Irish police, who testified that it was his belief that Mr Donohoe was a member of the IRA. When asked to identify the sources of his belief, the Chief Superintendent claimed privilege stating that disclosure would endanger lives and State security. The SCC directed the Chief Superintendent to produce all relevant documentary sources which formed the basis of his belief and it reviewed those files in order to be satisfied as to the reliability of his belief. Neither the prosecution nor the defence had access to that confidential material. Mr Donohoe complained that the non-disclosure had made his trial unfair as it seriously restricted his defence rights.

The Court found against the applicant because: the trial court had upheld the non-disclosure of sources for the legitimate purpose of protecting human life and State security; the decision to convict had been reached with the support of additional evidence which corroborated PK's belief; and, there had been a number of safeguards in place during the trial to ensure that the non-disclosure of PK's sources would not undermine the fairness of the proceedings.

Principal facts

The applicant, Kenneth Donohoe, is an Irish national who was born in 1978 and has a permanent address in Dublin.

The case concerned Mr Donohoe's trial and conviction for membership of an illegal organisation, the IRA. In the evening of 2 October 2002 police noticed suspicious activity among three parked vehicles (a Nissan Almera, a Nissan Micra and a Transit van) in Corke Abbey housing estate, near Dublin. After investigating, they found two men dressed up as "Garda" (police) in the back of the van and a number of incriminating items both in the van and Nissan Almera, including balaclavas, police costumes, a stun gun and a canister of CS gas. Five men were arrested at the scene in the van and charged with being members of an illegal organisation. Mr Donohoe was not among them. However, the Nissan Micra, which had left the estate, was traced back to his partner, leading to a police search of his home. Papers were found there containing the phone numbers of the owner of the Nissan Almera, and of the man who had been sitting in the driver's seat of the van.

Mr Donohoe was arrested and charged with membership of an illegal organisation. He was tried before Ireland's Special Criminal Court, which found him guilty and imposed a sentence of four

¹ Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

years' imprisonment in November 2004. An aspect of the prosecution's evidence that carried some weight was the sworn testimony of Chief Superintendent P.K. He stated that, independently of any evidence found at the incident in the housing estate or in Mr Donohoe's home, it was his belief that Mr Donohoe was a member of the IRA. P.K. told the Court that his belief was based on confidential information of an oral and written nature that was available to him from police and civilian sources. He refused to identify those sources claiming privilege because disclosure would endanger human life and State security. Mr Donohoe made an application for an inquiry into the sources, arguing that the trial would be unfair if he did not know these sources and the evidence against him. The court conducted an inquiry; it ordered the production of all relevant confidential files and the trial judges reviewed them in order to be satisfied as to the reliability of P.K.'s belief. Mr Donohoe sought leave to appeal against his conviction. Following a hearing and an extensive review of national and Convention case-law, the Court of Criminal Appeal refused leave to appeal. In October 2007, the Court of Criminal Appeal, following another hearing, also refused Mr Donohoe's application for his appeal to be taken to the Supreme Court.

Complaints, procedure and composition of the Court

Relying on Article 6 (right to a fair trial), Mr Donohoe complained that the non-disclosure of the Chief Superintendent's sources had restricted his defence and that the trial court's review of that material was inadequate and that there should have been effective safeguards to ensure that the material could be evaluated in a way which did not prejudice his right to a fair trial. In particular, Mr Donohoe considered it unfair for a trial court to have access to material which he alleged was persuasive of his guilt but to which he, the defendant, had been denied scrutiny of any kind, the SCC review of the material having been held in private.

The application was lodged with the European Court of Human Rights on 8 April 2008. Third-party comments were received from the Irish Human Rights Commission, which was given leave to intervene in the Court's proceedings.

Judgment was given by a Chamber of seven judges, composed as follows:

Mark **Villiger** (Liechtenstein), *President*,
Ann **Power-Forde** (Ireland),
Ganna **Yudkivska** (Ukraine),
André **Potocki** (France),
Paul **Lemmens** (Belgium),
Helena **Jäderblom** (Sweden),
Aleš **Pejchal** (the Czech Republic),

and also Claudia **Westerdiek**, *Section Registrar*.

Decision of the Court

Article 6

The Court noted that, in order to assess the fairness of the non-disclosure of P.K.'s sources, three questions had to be addressed. The first was whether it had been necessary to uphold P.K.'s claim of privilege. The Court found that the justifications given – of protecting human life, namely, persons in danger of reprisals from the IRA and State security as well as the effective prosecution of serious and complex crime – had been compelling and substantiated and that the non-disclosure had therefore been necessary.

The second question was whether the undisclosed evidence had been the sole or decisive basis for Mr Donohoe's conviction. The Court found that this was not the case, noting that the trial court had

heard over 50 other prosecution witnesses and that there was other important evidence provided by the prosecution, namely: Mr Donohoe's link to the suspicious activities at Corke Abbey on 2 October 2002 via the Nissan Micra (whose movements during the Corke Abbey events had to have been carried out, if not with his acquiescence, then at the least with his knowledge) as well as to incriminating objects found in the vehicles; the papers found at Mr Donohoe's home; and, the inference which the trial court was entitled to draw from his complete refusal to answer questions that were of clear relevance to the charges against him.

The third question was whether there had been sufficient safeguards during the trial to counterbalance the disadvantage caused to Mr Donohoe's defence by the upholding of P.K.'s claim of privilege. The Court noted that the trial court had adopted a number of measures having regard to the rights of the defence.

Firstly, there had been judicial control over the question of non-disclosure in that the SCC had reviewed the documentary materials upon which P.K.'s belief was based in order to test the adequacy and reliability of that belief. It found that P.K. had had adequate and reliable information on which he could legitimately form the opinion that Mr Donohoe was a member of the IRA. Furthermore, the SCC confirmed that there had been nothing in the undisclosed files that might have assisted Mr Donohoe's defence. If Mr Donohoe had doubted the trial judges' assessment he could have asked the appeal court to check their conclusions. The SCC also confirmed that it would not convict Mr Donohoe on the basis of P.K.'s evidence alone and that it required this to be corroborated by other evidence. It had kept Mr Donohoe informed of the procedure, allowing him to make detailed submissions about it.

The Court also noted that the laws allowing the admission of 'belief' evidence ensured that it could only be provided by a high ranking police officer and that it would be assessed by the court as a belief rather than a fact. Finally, the defence could still cross-examine the Chief Superintendent in a range of ways – such as by asking about the nature of his sources, whether he knew or personally dealt with any of the informants and about his experience in gathering intelligence – in order to allow the trial court to assess his demeanour and credibility and the reliability of his evidence.

Therefore, considering the weight of the evidence other than P.K.'s belief as well as the numerous counterbalancing safeguards, the Court found that the non-disclosure of P.K.'s sources had not made Mr Donohoe's trial unfair.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.