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| **Judgment**

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| **Title:** | Director of Public Prosecutions -v- Connolly |
| **Neutral Citation:**  | [2015] IESC 40 |
| **Supreme Court Record Number:** | 370/2008 |
| **High Court Record Number:** | 2006 199 |
| **Date of Delivery:** | 26/03/2015 |
| **Court:** | Supreme Court |
| **Composition of Court:**  | Denham C.J., Murray J., O'Donnell Donal J., McKechnie J., MacMenamin J. |
| **Judgment by:** | MacMenamin J. |
| **Status:** | Approved |
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| **Judgments by** | **Link to Judgment** | **Result** | **Concurring** |
| MacMenamin J. | [Link](http://www.bailii.org/ie/cases/IESC/2015/S40.html#judge9) | Appeal dismissed  | Denham C.J., Murray J., O'Donnell Donal J., McKechnie J. |
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| **Outcome:**  | Dismiss |

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| **THE SUPREME COURT****[Appeal No. 370/2008]****Denham C.J.****Murray J.****O’Donnell J.****McKechnie J.****MacMenamin J.****IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 29 OF THE COURTS OF JUSTICE ACT, 1924****BETWEEN:****SEAN CONNOLLY****APPELLANT****V.****DIRECTOR OF PUBLIC PROSECUTIONS****RESPONDENT****JUDGMENT of Mr. Justice John MacMenamin delivered the 26th day of March, 2015** **Introduction**1. Two inter-related issues fall for determination in this appeal. The first relates to a question posed by the Court of Criminal Appeal, pursuant to s.29(1) of the Court of Justice Act, 1924, as amended. The second question, addressed later, is whether the appellant should be permitted to argue an issue which did not arise at the trial, or in the appeal. 2. The first question concerns the status, at trial, of evidence of a Chief Superintendent’s belief of an accused’s membership of an illegal organisation involved in terrorism. 3. Section 3(2) of the Offences Against the State (Amendment) Act, 1972 (OASA) provides that: *“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.”*4. The appellant was tried and convicted by the Special Criminal Court of membership of an illegal organisation in 2006. The evidence before the trial court consisted of the belief evidence of Chief Superintendent Philip Kelly, together with other matters of evidence, which the trial court held, was consistent with the Chief Superintendent’s belief. The appellant appealed to the Court of Criminal Appeal. That court dismissed the appeal, holding that there had been sufficient evidence, lawfully obtained, to justify the conviction. 5. On the 31st October, 2008, on application by counsel for the appellant, the Court of Criminal Appeal issued a certificate, pursuant to s.29 of the Courts of Justice Act, 1924, stating that the appeal involved a point of law of exceptional public importance, and that it was desirable in the public interest that an appeal should be taken to the Supreme Court thereon. The point certified was as follows: *“Is the jurisprudence of the Supreme Court, as enunciated in People (DPP) v. Kelly* [*[2006] 3 I.R. 115*](http://www.bailii.org/ie/cases/IESC/2006/S20.html)*, in relation to belief evidence of a Chief Superintendent, pursuant to s.3(2) of the Offences Against the State (Amendment) Act, 1972, still applicable, having regard to the European Convention on Human Rights Act, 2003.”*6. In *DPP v. Kelly* [[2006] IESC 20](http://www.bailii.org/ie/cases/IESC/2006/S20.html), this court (Murray C.J., Denham, Geoghegan, Fennelly and Kearns J.J.) held that a limitation on cross-examination was inherent in the terms of s.3(2) of the Offences Against the State (Amendment) Act, 1972, which enjoyed the presumption of constitutionality. However, this Court held that, as the normal rights of an accused were being infringed, there must be a constitutional requirement that the limitation of cross-examination be kept to a minimum; and, by a majority (Geoghegan J., Murray C.J., Denham and Kearns J.J.), that s.3(2) authorised the giving of evidence about the basis of a Chief Superintendent’s belief, but not to the extent that it interfered with, or defeated, a legitimate claim of privilege. The same majority of the Court held that the balancing of conflicting rights and interests could only be determined by the court of trial; and that the Chief Superintendent’s belief evidence had no special status, but was merely a piece of admissible evidence. The Court observed that, although the Special Criminal Court was entitled to take into account the fact that the Chief Superintendent refused to identify the basis of his belief, it was also entitled to take into account the fact that the accused made a false statement to the gardai and other corroborating evidence. The majority observed, obiter, that the practice of the Special Criminal Court not to convict on belief evidence alone was commendable, though not absolutely required by statute: there might be exceptional cases where the Special Criminal Court would be entitled to convict on belief evidence alone. While concurring in the order made by the court dismissing the appeal, Fennelly J. expressed the view that the Special Criminal Court should have explained the weight, if any, which it attached to the evidence of the Chief Superintendent, in view of the claim of privilege; however, the restriction on the rights of the accused did not go further than strictly necessary to protect other potential witnesses or informants. He also observed that a trial court was entitled to assume that a Chief Superintendent would only give such belief evidence, only when satisfied beyond a reasonable doubt of its truth; even when that was the only evidence, a trial court was entitled to act on it, in the absence of some challenge or question sufficient to raise a doubt. He took the view that matters might have been quite different in the trial court had the only evidence been that of a Chief Superintendent claiming privilege, and the accused had given evidence denying the charge of membership. 7. A subsequent complaint to the ECtHR, claiming violation of Mr. Kelly’s rights under Article 6 and Article 13 ECHR was dismissed as being manifestly ill-founded, at the admission stage, by the Third Section of the ECHR (*Kelly v. Ireland*, Application No. 41130/06, delivered on the 14th December, 2010).**The Point of Intersection Between the Two Issues**8. The point of intersection between the two issues arising in this appeal occurs in the following way. The determination of the Court of Criminal Appeal to issue a certificate pre-dated three judgments which are relevant to this appeal. First, was the judgment, also of the Court of Criminal Appeal, *DPP v. Donnelly & Ors.* [[2012] IECCA 78](http://www.bailii.org/ie/cases/IECCA/2012/C78.html) on the operation of s.3 OASA 1972; second, the judgment of the European Court of Human Rights (ECtHR) in *Donohoe v. Ireland* (Application No.19165/08) [[2013] ECHR 1363](http://www.bailii.org/eu/cases/ECHR/2013/1363.html) (12th December, 2013); and third, the judgment of this Court in *DPP v. Damache* [[2012] IESC 11](http://www.bailii.org/ie/cases/IESC/2012/S11.html) [2012] 2 I.R. 226, to the effect that at s.29 of the Offences Against the State Act, 1939 (as amended) was invalid, having regard to the provisions of the Constitution. 9. Both *DPP v. Donnelly & Ors.* [[2012] IECCA 78](http://www.bailii.org/ie/cases/IECCA/2012/C78.html) and *Donohoe v. Ireland* (Application No.19165/08) [[2013] ECHR 1363](http://www.bailii.org/eu/cases/ECHR/2013/1363.html) (12th December, 2013) concerned the operation of s.32 OASA in our courts. The judgment in *DPP v. Donnelly & Ors.* [[2012] IECCA 78](http://www.bailii.org/ie/cases/IECCA/2012/C78.html) very fully explained the manner in which a trial court treated such evidence. It set out how a trial court balanced a series of factors to ensure fairness. This was referred to extensively by the ECtHR in *Donohoe v. Ireland* (Application No.19165/08) [[2013] ECHR 1363](http://www.bailii.org/eu/cases/ECHR/2013/1363.html) (12th December, 2013). *Donohoe v Ireland* concerned the circumstances in which, in compliance with Article 6 of the European Convention on Human Rights, a court might convict an accused person of membership of an illegal organisation, where the evidence, *inter alia*, consisted of the belief of a Chief Superintendent of An Garda Siochana. The facts in both *DPP v. Donnelly* and *Donohoe v Ireland* bear a similarity to those at the appellant’s trial, as this judgment explains. The manner in which s.3(2) OASA 1972 operates, as outlined and explained in *DPP v. Donnelly*, and as further described in *Donohoe v Ireland*, was such that the ECtHR held there had been no violation of the applicant’s (Mr. Donohoe’s) rights under Article 6 ECHR. Thus, by the time the point certified by the Court of Criminal Appeal came on for hearing, the certificate was effectively redundant, if viewed in isolation. 10. However, as a result of the *DPP v. Damache* [[2012] IESC 11](http://www.bailii.org/ie/cases/IESC/2012/S11.html) decision, the appellant now seeks to raise a further point in the s.29 appeal, now effectively requesting this Court to discount from its consideration evidence which was adduced at trial, as a result of the search carried out pursuant to s.29 of the Offences Against the State Act. Relying on *DPP v. Damache* [[2012] IESC 11](http://www.bailii.org/ie/cases/IESC/2012/S11.html), counsel submits that this Court should hold that the additional evidence should be treated as having been unconstitutionally obtained, and, therefore, inadmissible. This would then place in a different perspective the actual body of evidence upon which the Special Criminal Court convicted, and the Court of Criminal Appeal acted, in dismissing the appeal. The question, considered later, is whether the appellant should now be permitted to rely on the ‘*Damache* point’ which he now seeks to raise? 11. In order further to understand the context in which these points arise, it is necessary to deal with a series of relevant events in their chronological sequence.**The First Issue: ‘Belief Evidence’ - s.3(A) OASA 1972**12. According to evidence adduced before the Special Criminal Court, the appellant was involved in purchasing eight electronic timers from a shop on the 30th November, 2004. The prosecution evidence disclosed that on the 4th December, 2004 the appellant was observed briefly entering a laneway where, it was said, he met Colum Wiggins, one of the co-accused at the trial (*The People (DPP) v. Kirwan, Wiggins and Connolly*, Special Criminal Court, 2006, Unreported). The subsequent evidence was that on the 5th December, 2004 the timers were found in a search of a car owned by Adrian Kirwan, another co-accused, in which Colum Wiggins was a passenger. 13. On the 14th December, 2004 the appellant’s home was searched, on foot of a search order issued, pursuant to s.29 of the Offences Against the State Act, 1939, as amended, by Detective Superintendent O’Sullivan of the Special Detective Unit. This warrant was issued prior to the determination of this curt in *DPP v. Damache* [[2012] IESC 11](http://www.bailii.org/ie/cases/IESC/2012/S11.html). Detective Superintendent O’Sullivan was a member of An Garda Siochana team involved in the search operation, and in the subsequent prosecution of the accused and his co-accused. The appellant was arrested, pursuant to s.30 of the Offences Against the State Act, 1939, and searched while in custody. During that search a document was found which was described as, and held to be, an IRA “*debriefing document*”. 14. On the same date, the appellant was further detained and interviewed, pursuant to s.30 of the Offences Against the State Act, during which interview, s.2 of the Offences Against the State (Amendment) Act, 1998 was invoked. A number of the accused’s responses were found by the trial court to give rise to an inference that he was a member of the IRA, as charged. 15. In the course of interviews, the appellant denied membership of the IRA. At one point, he had been observed by members of An Garda Siochana entering a laneway in Inchicore in the company of Mr. Wiggins, one of the co-accused. The appellant claimed he was in his mother’s house at the time. The appellant made no reply when the ‘adverse inference provisions’, pursuant to s.2 of the Offences Against the State (Amendment) Act, 1998, were invoked, and he was questioned about the IRA debriefing document found during the search. The accused’s trial was adjourned pending the outcome before this court of the appeal in *DPP v. Kelly* [[2006] IESC 20](http://www.bailii.org/ie/cases/IESC/2006/S20.html). 16. On the 4th April, 2006 this Court delivered judgment in the case of *DPP v. Kelly* [[2006] IESC 20](http://www.bailii.org/ie/cases/IESC/2006/S20.html). Subsequently, at the resumed trial, the appellant was convicted on the 27th July, 2006 by the Special Criminal Court of having been a member of an unlawful organisation on the 14th December, 2004. 17. In summary then, the matters weighed by the Special Criminal Court consisted of (i) the belief evidence given by Chief Superintendent Philip Kelly, the Head of the Special Detective Unit; (ii) the debriefing document found on the appellant during the course of the search; (iii) adverse inferences from the appellant’s silence in garda interviews while in custody; and (iv) the inconsistency, in that the accused had given an account of his movements on a particular date and time, to the effect he had been in his mother’s home when he had been observed in the laneway in Inchicore with Mr. Wiggins, the co-accused. The belief evidence against the appellant, therefore, was not decisive, it was not solely confined to Chief Superintendent Kelly’s opinion, but consisted of a range of other materials, upon which the trial court based its finding of guilt. 18. Later, on the 24th March, 2007 the appellant was convicted of membership of an illegal organisation, on the evidence just described. He was sentenced to a term of 6 years imprisonment, backdated to the 15th June, 2006. **The Court of Criminal Appeal**19. On the 26th June, 2007 the Court of Criminal Appeal (Geoghegan J., de Valera J. and McCarthy J.) delivered an *ex tempore* judgment refusing the appellant leave to appeal against his conviction. Before the Court of Criminal Appeal were both written and oral submissions. The appellant’s oral submissions in the court centred on the question of the opinion evidence of Chief Superintendent Kelly. Counsel submitted that the Special Criminal Court had essentially decided the case on the opinion evidence of the Superintendent alone, and that that opinion evidence was not adequately supported by other independent evidence. Counsel submitted that the Chief Superintendent had refused to give any information as to his sources, or the basis upon which he formed his view. 20. Having considered the case law, and in particular *DPP v. Kelly* [[2006] IESC 20](http://www.bailii.org/ie/cases/IESC/2006/S20.html), the Court of Criminal Appeal came to the conclusion that the Special Criminal Court had approached the question of proofs correctly. 21. It is necessary now to further analyse what were the issues which fell for determination before the Court of Criminal Appeal. The focus of the judgment before that court was on the question of whether or not the trial court had relied on other “*external*” evidence, over and beyond the opinion of the Chief Superintendent. Referring to the members of the Special Criminal Court, Geoghegan J., who presided in the Court of Criminal Appeal stated: *“We are quite satisfied that where they (the members of the Special Criminal Court) found, as they were entitled to find, the evidence of Chief Superintendent Kelly credible, they were entitled in that respect to look at his demeanour and, of course, we take on board the point Mr. Burns (counsel for the appellant) makes. He makes a very valid point that there is a difference between a witness who is giving informer evidence where he himself has received the information from the informer, on the one hand, and a case where the witness is essentially giving what might be described as hearsay information.”*But Geoghegan J. went on to say: *“It does not mean that the court should not pay very careful attention to the way he (the Chief Superintendent) answers the questions. It seems to us that that is what the court did here, but absolutely correctly, they took the view, as has been held in the case law, that there should not be a conviction based solely on opinion evidence of that kind that cannot be properly tested. There must be some reasonable outside evidence. I have deliberately avoided the use of the word “corroboration” because that has a technical meaning in other branches of criminal law … The view was taken by the Special Criminal Court that there was such outside evidence, and we agree with that.”*Clearly, in referring to “*outside evidence*” the court was referring to the evidentiary matters adduced in addition to the opinion evidence. 22. Referring to the judgments of this Court in *DPP v. Kelly* [[2006] IESC 20](http://www.bailii.org/ie/cases/IESC/2006/S20.html), Geoghegan J. went on to draw attention to a number of the factors identified as being of significance in addressing opinion evidence. These included: *“… the exceptional resort to the evidence of the Chief Superintendent applies only in the case of organisations which, in their nature, represent a threat, not only to the institutions of the State, but to individuals who are prepared quite properly to cooperate with the State in securing the conviction of members of such organisations. This makes it possible to justify some restriction on direct access on behalf of the accused to the identity of his accusers. Secondly, the legislature has allowed such evidence to be given by members of the Garda Síochána of particularly high rank, (and that is of considerable importance) who can be presumed to have been chosen for having high standards of integrity. Thirdly, the procedure applies only while there is in force a declaration that "the ordinary courts are inadequate to secure the effective administration of justice…”.*23. The Court of Criminal Appeal concluded, therefore, that the trial court had been entitled to rely on the evidence of the Chief Superintendent, in the light of the supporting outside evidence. That court then went on to analyse, in further detail, the nature and weight of the opinion evidence set out in the judgment of the trial court. This included matters described by Butler J. (the presiding judge of the Special Criminal Court) in the following way: *“Under cross-examination the Detective Chief Superintendent indicated that his information was from informants, and he said that he had no memorandum of interviews or statements from such informants. He refused to identify the informants because to do so would endanger the life of the informants. Further cross-examined by counsel on behalf of Mr. Kirwan (the co-accused) on 19th July, 2006, the witness, inter alia, said that the information upon which he based his belief had come to him in both written and spoken forms. It came from both non-garda and garda sources. He was satisfied that the information in his possession was the truth, and said that he was happy that the information supplied by the informants in this case was truthful and that it could be checked by other sources as well. Asked did he know the name and address of the informant he replied that he would know the sources of information that pertained to the Special Detective Unit.”*24. The Court of Criminal Appeal referred to the appellant’s inconsistent statements, the articles that were found in the search, and the contents of the document found on the appellant’s person which, the appeal court held, was an IRA debriefing document. In summary, therefore, the trial court, and the appeal court, had before it not only the opinion evidence of a very high ranking member of An Garda Siochana, highly experienced in dealing with terrorist offences, but also that additional material just described. At the end of its judgment the Court of Criminal Appeal decided: *“The court cannot find any error of principle in relation to how the Special Criminal Court handled that matter.”***The First Application to Extend the Grounds of Appeal**25. On the 23rd January, 2009, the appellant instructed his legal advisors to seek an order from this Court, pursuant to s.29(5A) of the 1924 Act, seeking leave that argument be heard and a determination made on the following issues: *“(a) Whether the learned Court of Criminal Appeal erred in upholding the conviction of the appellant in circumstances where the decisive factor grounding the said conviction was the evidence of Chief Superintendent Kelly’s belief.* *(b) Whether the learned Court of [Criminal] Appeal erred in failing to hold that the trial court had failed to counter-balance the restriction of the applicant’s right to cross-examine Chief Superintendent Kelly, and had failed to ensure quality of arms.* *(c) Whether the learned Court of [Criminal] Appeal erred in failing to hold that the trial court attached undue weight to the bare belief of Chief Superintendent Kelly in the following circumstances:* *(i) Where privilege was claimed by Chief Superintendent Kelly;* *(ii) The information was based on untested anonymous witness by proxy who is not a member of An Garda Siochana; and* *(iii) May have been a paid informer.”* (emphasis added)26. By inference, the appellant was seeking to broaden his appeal in the light of the fact that the *Donohoe v. Ireland* (Application No.19165/08) [[2013] ECHR 1363](http://www.bailii.org/eu/cases/ECHR/2013/1363.html) (12th December, 2013) case had been referred to the European Court of Human Rights in 2008. The issues he sought to raise broadly reflected those which he raised before the ECtHR in *Donohoe v. Ireland* (Application No.19165/08) [[2013] ECHR 1363](http://www.bailii.org/eu/cases/ECHR/2013/1363.html) (12th December, 2013). With regard to the intended additional grounds, I would wish to point out, explicitly, that the judgment of the trial court did not rely on the “*bare belief*” of the Chief Superintendent, as is suggested at paragraph (c) above.**No *Damache* Issue Raised in the First Application**27. The Notice of Motion, just referred to, was intended to be heard with the appeal. It pre-dated the judgment of this Court in *DPP v. Damache* [[2012] IESC 11](http://www.bailii.org/ie/cases/IESC/2012/S11.html). Insofar as the appellant now seeks to argue such a point, counsel for the Director submits that this first Notice of Motion, in fact, constitutes a waiver against raising any point in relation to the alleged *DPP v. Damache* [[2012] IESC 11](http://www.bailii.org/ie/cases/IESC/2012/S11.html) invalidity of the warrant, and, as such, the appellant is dis-entitled from seeking further to amend, or add to his grounds of appeal, by adding a *‘Damache* point’. In the interests of justice, however, the court permitted counsel for the applicant to make submissions on the point. 28. On the 14th December, 2010, taking into account remission and backdating, the appellant completed serving the 6 year sentence which had been imposed on him by the Special Criminal Court. At this point the constitutional point raised in *DPP v. Damache* [[2012] IESC 11](http://www.bailii.org/ie/cases/IESC/2012/S11.html) comes into play.**The High Court Judgment in Damache**29. On the 11th June, 2011, the High Court (Kearns P.) delivered judgment dismissing the applicant’s claim *in Damache v. The DPP* [[2011] IEHC 197](http://www.bailii.org/ie/cases/IEHC/2011/H197.html), and held that s.29 of the Offences Against the State Act, 1939 was not repugnant to the Constitution. **The Supreme Court Damache Judgment**30. On 23rd February, 2012 this court delivered judgment in the appeal in *DPP v. Damache* [[2012] IESC 11](http://www.bailii.org/ie/cases/IESC/2012/S11.html). The Court held that s.29 of the Offences Against the State Act was repugnant to the Constitution. 31. On the 11th November, 2013 this court gave notice that the appellant’s s.29 appeal would be listed in the backlog list on the 22nd November, 2013. By then, six years had elapsed since the trial and conviction. With these events recorded, it is now necessary to set out other developments on the evidential status of ‘belief evidence’ under s.3(2) OASA 1972.***DPP v. Donnelly***32. On the 30th July, 2012 the Court of Criminal Appeal delivered its judgment in *DPP v. Donnelly & Ors.* [[2012] IECCA 78](http://www.bailii.org/ie/cases/IECCA/2012/C78.html). This judgment was referred to earlier. In *DPP v. Donnelly & Ors.* [[2012] IECCA 78](http://www.bailii.org/ie/cases/IECCA/2012/C78.html), O’Donnell J., speaking for the Court of Criminal Appeal, explained very fully the manner in which s.3(2) OASA may be analysed. He did so in the following terms: *“26 First, it is noteworthy that the evidence pursuant to s.3(2) can only be given in relation to one category of offence, that is membership of an unlawful organisation. For the reasons set out in Kelly and Redmond , those organisations determined to be unlawful organisations pursuant to the Act of 1939 are cell based, secretive, and violent organisations which invest considerable resources in the enforcement of secrecy about the membership of such organisations, and do so by torture, death, and by the inevitable fear that those methods engender. Membership is normally a continuing state of affairs, rather than a single activity, and is accordingly more susceptible to belief evidence of a senior garda officer, based on a variety of sources over a period of time, than if such evidence was admissible in respect of a single criminal activity. Whatever the justification, it is certainly the case that such belief evidence is only admissible in respect of membership of an unlawful organisation.”*O’Donnell J. continued: *“27 The section makes the belief of a Chief Superintendent evidence that an accused was at a material time a member of an unlawful organisation. As the cases show, it does not make that evidence conclusive or preclude it from being challenged, tested or contradicted. For present purposes, it is important however, that it is the belief of the Chief Superintendent which is evidence, and not the material upon which that belief is based. Thus, the section does not involve the giving of hearsay evidence where the relevant evidence is that of a person who is not available in court for cross-examination. Nor is it akin to the giving of evidence by an anonymous witness. Here, the relevant evidence is the belief of a Chief Superintendent, who is identified and gives his or her evidence in open court. It is to be anticipated that the belief of such a senior officer in the gardaí will be based on a variety of sources: technological, electronic, and human, including information supplied by informants. But even in cases where the evidence of the Chief Superintendent is based upon the direct statements provided to him or her by an informant or informants, the court is not asked to act upon the hearsay statements of such informants: rather it is the belief of the Chief Superintendent based upon such informants which is the evidence. The formation of that belief would normally involve the application of the Chief Superintendent of his or her experience in dealing with informants and in dealing with illegal organisations and where relevant, in assessing the significance and value of diverse pieces of information and intelligence. Accordingly, where evidence is given pursuant to s.3(2) it is not the case that the court is asked to act upon either the evidence of anonymous witnesses or witnesses who are out of court and not available for cross-examination. Accordingly, any analysis based upon Doorson and Al-Khawaja should take account of this structural distinction.”*33. In the last sentence of the passage just cited, O’Donnell J. was referring to other judgments of the ECtHR which addressed hearsay evidence as being the sole and decisive evidence against a defendant. There the ECtHR observed that such procedures would require sufficient counter-balancing factors, including the existence of strong procedural safeguards, and held that in the absence of such safeguards, there had been violations of Article 6.1, in conjunction with Article 6.3 of the Convention. The reference to *Doorson v. The Netherlands* (Case 20524.92) [(1996) 22 EHRR 330](http://www.bailii.org/cgi-bin/redirect.cgi?path=/eu/cases/ECHR/1996/14.html), and *Al-Khawaja and Tahery v. The United Kingdom* (Case 26766/05) (2011) 54 EHRR 23, therefore, relate to circumstances in which evidence was admitted from witnesses who were not present in court, not available for cross-examination, and in some circumstances whose testimony was accepted under provisions of anonymity. The European Court of Human Rights considered that in such a situation Article 6 was breached if such evidence is the sole or decisive evidence in a sense as is likely to be determinative of the outcome of the case. **The ECtHR Judgment in *Donohoe***34. I turn now to *Donohoe v. Ireland* (Application No.19165/08) [[2013] ECHR 1363](http://www.bailii.org/eu/cases/ECHR/2013/1363.html) (12th December, 2013) judgment of the ECtHR, where extensive references to the judgment of the Court of Criminal Appeal in *DPP v. Donnelly & Ors.* [[2012] IECCA 78](http://www.bailii.org/ie/cases/IECCA/2012/C78.html) can be found. 35. The ECtHR delivered judgment in *Donohoe v. Ireland* (Application No.19165/08) [[2013] ECHR 1363](http://www.bailii.org/eu/cases/ECHR/2013/1363.html) (12th December, 2013) on the 12th December, 2013. Having outlined the circumstances in which the Chief Superintendent Philip Kelly, (also referred to as ‘PK’ in the passage cited below) had given evidence to the Special Criminal Court, and adverting to the additional counter-balances which had been taken into account by the trial court, the ECtHR observed: *“88. … at the outset, that the trial court was alert to the need to approach the Chief Superintendent’s evidence with caution having regard to his claim of privilege and was aware of the necessity to counterbalance the restriction imposed on the defence as a result of its decision upholding that claim. It proceeded to adopt a number of measures having regard to the rights of the defence.* *Firstly, the court reviewed the documentary material upon which (Chief Superintendent) sources were based in order to assess the adequacy and reliability of his belief. While the Court does not regard such a review, in itself, to be sufficient to safeguard the rights of the defence (Edwards and Lewis v. the United Kingdom, cited above, § 46), it nevertheless considers that the exercise of judicial control over the question of disclosure in this case provided an important safeguard in that it enabled the trial judges to monitor throughout the trial the fairness or otherwise of upholding the claim of privilege in respect of the non-disclosed material (see McKeown v. the United Kingdom, no. 6684/05, § 45, 11 January 2011).* *Secondly, the trial court in considering the claim of privilege was alert to the importance of the ‘innocence at stake’ exception to any grant of privilege. It confirmed, expressly, that there was nothing in what it had reviewed that could or might assist the applicant in his defence and that, if there had been, then its response would have been different. The trial court was thus vigilant in exploring whether the non-disclosed material was relevant or likely to be relevant to the defence and was attentive to the requirements of fairness when weighing the public interest in concealment against the interest of the accused in disclosure (see, mutatis mutandi, Jasper v. the United Kingdom, cited above, § 57). The Court considers that if the applicant had any reason to doubt the trial judges’ assessment in this regard he could have requested the appeal court to review the material and to check the trial court’s conclusions. However, he chose not to do so.* *Thirdly, in coming to its judgment the trial court stated, specifically, that it had expressly excluded from its consideration any information it had reviewed when it was weighing the Chief Superintendent’s evidence in the light of the proceedings as a whole. It further confirmed that it would not convict the applicant on the basis of PK’s evidence alone and that it required his evidence to be corroborated and supported by other evidence.* *The Court further notes that, in advance of taking its intended procedural steps, the trial court informed the applicant and his co-accused of its intentions as regards its procedures and it afforded them an opportunity to make detailed submissions inter partes which they did (see, a contrario, Edwards and Lewis v. the United Kingdom).* *89. In addition to the above measures taken by the trial court to safeguard the rights of the defence, the Court also considers that there existed other strong counterbalancing factors in the statutory provisions governing belief evidence.* *90. In the first place, as noted above, providing belief evidence involves a complex intelligence gathering and analytical exercise. Section 3(2) (of the Offences Against the State Act, 1939) therefore requires that those doing so must be high-ranking police officers and, moreover, they are generally officers with significant experience of such organisations and in gathering and analysing relevant intelligence (paragraphs 51 and 53 above). In the present case, PK was the Head of the Special Detective Unit concerned with State security and monitoring subversive organisations and had such pertinent professional experience as to lead the SCC to state that it was difficult to envisage any other person in the State more relevantly informed …* *91. In addition, the Chief Superintendent’s evidence is not admitted as an assertion of fact but as the belief or opinion of an expert. It is not, therefore, conclusive and, indeed, it has no special status it being one piece of admissible evidence to be considered by the trial court having regard to all the other admissible evidence …* *92. The Court further notes that while the scope of cross-examination was restricted by the trial court’s ruling, the possibility to cross-examine the witness on his evidence was not entirely eliminated. The possibility to test the Chief Superintendent’s evidence in a range of ways still remained. Consequently, such evidence could be tested by the defence even if privilege had been granted as regards the sources upon which that opinion was based. As pointed out by the Supreme Court in DPP v. Kelly …, the principle is that any restriction on the right to cross-examine is limited to the extent ‘strictly necessary’ to achieve its (protective) objective. As noted by O’Donnell J in DPP v. Donnelly and Others …, the Chief Superintendent’s evidence can, therefore, be challenged on all matters collateral and accessory to the content of the privileged information. He could be cross-examined on the nature of his sources (documentary, civilian, police and amount); on his analytical approach and process; on whether he knew or personally dealt with any of the informants; and on his experience in gathering related intelligence, in dealing with informants as well as in rating and analysing informants and information obtained. His responses would allow the trial court to assess his demeanour and credibility and, in turn, the reliability of his evidence. This possibility of testing the witness distinguishes this case from those where the evidence of absent/anonymous witnesses is admitted …, and where the cross-examination of these witnesses is hindered or not possible at all.”* 36. In light of the findings, the Court of Human Rights considered that the proceedings in their entirety were fair. The weight of the evidence, other than the belief evidence alone, combined with the counter-balancing safeguards and factors, was sufficient to conclude that the grant of privilege as to the sources of the Chief Superintendent’s belief did not render the applicant’s trial unfair. It followed, therefore, that there had been no violation under Article 6 of the Convention. 37. Thus, insofar as ECHR jurisprudence was engaged, the ECtHR judgment addressed the original question posed by the Court of Criminal Appeal. The jurisprudence of the Supreme Court, as enunciated in *DPP v. Kelly* [[2006] IESC 20](http://www.bailii.org/ie/cases/IESC/2006/S20.html), in relation to the belief evidence of a Chief Superintendent, was, therefore, “*still applicable*” (see the certificate of the Court of Criminal Appeal referred to earlier). I would point out that the question of ECHR compatibility, in this context, must be seen in the light of Murray C.J.’s observations in *McD v. PL* [2009] IESC 81, to the effect that: *“… the role of the Convention as an interpretative tool in the interpretation of our law stems from a statute, not the Convention itself, and can only be used within the ambit of the Act of 2003.”*(See also the observations of O’Donnell J. in *DPP v. Donnelly & Ors.* [[2012] IECCA 78](http://www.bailii.org/ie/cases/IECCA/2012/C78.html) to the same effect). On this basis, it can be safely concluded that the question sought to be raised in the expanded grounds of 23rd January, 2009 were fully answered both by the judgment in *DPP v. Donnelly & Ors.* [[2012] IECCA 78](http://www.bailii.org/ie/cases/IECCA/2012/C78.html), and in the ECtHR judgment in *Donohoe v. Ireland* (Application No.19165/08) [[2013] ECHR 1363](http://www.bailii.org/eu/cases/ECHR/2013/1363.html) (12th December, 2013).**The *Damache* Issue in Context**38. With this background in mind, it is now necessary to address the second ‘*Damache* issue’, mentioned at the outset of this judgment. The Court of Criminal Appeal herein stated, at the conclusion of its judgment here: *“There are one or two other matters that were mentioned in the Notice of Appeal, such as, for instance, a search warrant issue that was never really pursued and on the matters that have been pursued, the court can find no relevant error and does not consider that some new principle of law that needs to be developed in a further reserve judgment …”*39. The Court of Criminal Appeal was referring here to the Notice of Appeal which included a challenge to the search warrant, but in the following terms: *“The Learned Trial Court erred in law, and in fact, in holding that the warrant issued for the search of the Applicant’s house at 12 Ring Terrace, was valid and in admitting the evidence arising from said search”.*40. At the trial in the Special Criminal Court counsel for the appellant challenged the validity of the search warrant, issued pursuant to s.29 of the Offences Against the State Act, 1939 (as amended), in respect of the applicant’s home at 12 Ring Terrace, Inchicore. But, the grounds of challenge were confined to submitting that the warrant was bad on its face, as there had been no reasonable grounds to issue it. Counsel argued that, in issuing the warrant, Superintendent O’Sullivan should have had reasonable grounds for so proceeding, and that no evidence as to reasonable grounds had been adduced. No question of the constitutionality of the warrant procedure was raised. No reference was made to the inviolability of the home guaranteed by Article 40.5 of the Constitution, which was the basis for the decision in *Damache*. If, hypothetically, such a point had been raised at the trial, or on the appeal, then the nature of the prosecution case against the appellant might have been very different. But this is a hypothesis. This did not occur at the trial. Instead, both the Special Criminal Court, and the Court of Criminal Appeal, acted on evidence which had been adduced by the State in the *bona fide* belief that it was lawfully admissible. Should this Court entertain an appeal based on a point of law which was not argued before the trial court (the Special Criminal Court), or by the Court of Criminal Appeal? 41. Section 29(5A) of the Courts of Justice Act, 1924, as inserted by s.59 of the Criminal Justice Act, 2007, and as amended by s.31(a) of the Criminal Procedure Act, 2010 provides as follows: *“(5A) The Supreme Court, in an appeal under subsection (2), (2A), (2B) or (3) of this section, may, if it considers it appropriate to do so, hear argument and make a determination in relation to any part (not only the point of law of exceptional public importance which is the subject of the certificate concerned issued under whichever of those subsections is appropriate) of the decision of the Court of Criminal Appeal concerned.”*Did the point form part of the “decision of the Court of Criminal Appeal”? 42. Were the appellant to persuade this Court of the validity of his submission, it would effectively remove from consideration the “*outside evidence*” obtained on foot of the s.29 warrant. But, this makes the assumption that the circumstances of the trial would have been quite different. The evidence would have hinged very largely on the Chief Superintendent’s belief evidence. In effect, therefore, this Court is invited to act upon a hypothesis, an abstract proposition. This Court does not act in such a way, in s.29 applications, or otherwise. 43. Faced with this situation, counsel for the appellant in this appeal sought to distinguish his case from *DPP v. Donnelly & Ors.* [[2012] IECCA 78](http://www.bailii.org/ie/cases/IECCA/2012/C78.html) and *Donohoe v. Ireland* (Application No.19165/08) [[2013] ECHR 1363](http://www.bailii.org/eu/cases/ECHR/2013/1363.html) (12th December, 2013), by submitting that were the Chief Superintendent’s opinion evidence the ‘*sole or decisive’* evidence in the prosecution, different considerations would apply, thus, giving rise to the scenario outlined in the ECtHR *Doorson v. The Netherlands* (Case 20524.92) [(1996) 22 EHRR 330](http://www.bailii.org/cgi-bin/redirect.cgi?path=/eu/cases/ECHR/1996/14.html), and *Al-Khawaja and Tahery v. The United Kingdom* (Case 26766/05) (2011) 54 EHRR 23 jurisprudence. Counsel suggested that were he to succeed in excluding the fruits of the warrant and arrest the significant, “*decisive*”, evidence would then be the belief evidence. But in *Donohoe v. Ireland* (Application No.19165/08) [[2013] ECHR 1363](http://www.bailii.org/eu/cases/ECHR/2013/1363.html) (12th December, 2013), the ECtHR attached great significance to the fact that the opinion evidence had not been the sole determinative factor, and, on that basis, analysed whether there were other adequate safeguards. Thus, counsel states that the Court should now disregard the extensive evidence. Thus, the appellant herein, faced with a situation where, the *Donnelly* judgment, and at least theoretically the *Donohoe v. Ireland* ECtHR judgment, might have had a bearing on the outcome of the s.29 appeal has, in effect, sought to ‘reconfigure’ the facts of the appeal at hand. 44. Section 29(1) of the 1924 Act provides that no appeal shall lie against an order of the Court of Criminal Appeal, except where certified. That court certified a s.29 question on a matter unrelated to the search, in circumstances where the focus in the appeal to the Court of Criminal Appeal was on a quite different issue. It is important to again recall the words of the Court of Criminal Appeal that the search warrant issue, there quite different in its characterisation, was “*never really pursued*”. Even accepting that a challenge to the warrant did constitute one of the grounds of appeal, the question nonetheless arises as to whether this challenge, or any determination thereon, in the words of s.29(5A), formed “*part … of the decision of the Court of Criminal Appeal concerned*”. 45. As s.29 reference arises only in the circumstances where what is in issue is a matter arising from a “*decision*” of the Court of Criminal Appeal. In briefly alluding in its judgment to the challenge to the validity of the search warrant, the Court of Criminal Appeal was not referring to a *Damache* point, which is now sought to be litigated. Rather, in the Special Criminal Court, counsel sought to challenge the validity of the warrant on the grounds that it had been issued for insufficient reason. Can it then be said that a *Damache* point was ‘part’ of the ‘*decision’* of the Court of Criminal Appeal, such as would confer jurisdiction on this Court, pursuant to s.29(5A) of the 1924 Act, as amended? Because the point now canvassed was not argued, the point did not form part of the ‘decision’ of either the Special Criminal Court, or of the Court of Criminal Appeal. No application to argue such a point was made to the trial court or the appeal court. The application to argue the point comes only now, some eight years after the trial. It is made in circumstances where an earlier application to amend the s.29 certificate was made five years ago on different grounds. Those earlier grounds are now otiose. At no stage up to the present appeal hearing, did the appellant challenge the constitutionality of the warrant procedure. At the trial, and the appeal, the prosecution relied, in fact, on the statute then in force permitting the procedure (see *A v. Governor of Arbour Hill Prison* [2004] I.R. 88). The appellant has served his sentence and was released five years ago. The effect of allowing the point to be argued now would be to create an abstract, hypothetical and false scenario, involving the fiction of deeming a point as having been argued and decided, which was not argued, still less decided, by the trial court, or the appeal court. It is true that s.29(5)(a) of the Court of Justice Act, 1924, as amended, makes clear that this Court may hear arguments, and may make a determination *on any part of the decision of the Court of Appeal.* That may include a point arising in the judgment which is not certified. But the point at issue here did not arise *at all* in the appeal judgment. The reference to the validity of the search warrant in the judgment of the Court of Criminal Appeal did not, even implicitly, include the *Damache* issue. In *The People (A.G.) v. Patrick Higgins* (Supreme Court, Unreported, 22nd November, 1985) (Finlay C.J., Walsh, Henchy, Griffin, McCarthy JJ.), Finlay C.J., speaking for the unanimous court, and having referred to *The People v. Shaw* [1982] 1 I.R. 1, pointed out that while the court is not confined to the point certified, nonetheless: *“… it is inherent in the section that a point of law certified … must be a point arising before the Court of Criminal Appeal, and thus involved in its decision. A point of law certified in the abstract, or in terms wider than those involved in the decision of the Court of Criminal Appeal, cannot be entertained for it would be outside the jurisdiction given to this Court by the section, which is not consultative, but essentially appellate, and for the purpose of doing justice in the particular case”.* (emphasis added)In *The People v. Giles* [1974]1 I.R. 422, Henchy J. commented that there would be jurisdiction to add to the grounds of appeal if: *“… if application on that behalf had been duly made in the Court of Criminal Appeal.”*The judgment of this Court in *The People (AG) v. Patrick Higgins* (Supreme Court, Unreported, 22nd November, 1985) makes clear the scope of s.29 of the Act, as amended. Insofar as this Court may entertain a point not certified, the point sought to be argued must be a point which arose in the Court of Criminal Appeal to the extent that the point was, necessarily, the subject of that court’s “*decision*”. 46. In summary, therefore, the point certified by the Court of Criminal Appeal has again been considered by that Court in *Donnelly*. The law in relation to ‘*belief evidence’*, as enunciated in *DPP v. Kelly* [[2006] IESC 20](http://www.bailii.org/ie/cases/IESC/2006/S20.html), is ‘*still applicable’*. The issue has again been considered by the ECtHR in *Donohoe v. Ireland* (Application No.19165/08) [[2013] ECHR 1363](http://www.bailii.org/eu/cases/ECHR/2013/1363.html) (12th December, 2013). Insofar as an issue concerning Article 6 ECHR arises, that question, and the procedure engaged, has been found compliant with Article 6 ECHR. The appellant’s appeal to the Court of Criminal Appeal on the search warrant was confined to an alleged error on its face, that is, an absence of reasonable grounds. Even that distinct issue was never really pursued in the Court of Criminal Appeal. As a consequence, a *Damache* point cannot be properly before this Court, in accordance with s.29(5A), as it was never before the Court of Criminal Appeal. There is no other unaddressed and subsisting point. The appellant cannot seek, in this appeal, to rely on the judgment delivered by this Court in *Damache*, pronounced 6 years after his trial. In effect, the appellant is seeking to raise a point based on an abstract hypothesis, which this Court cannot entertain. On this basis, the appeal must, therefore, be dismissed.  |

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