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Meeting: 1230 meeting (9-11 June 2015) (DH)

Item reference: Communication from a NGO (The Child Law Clinic of the University of Cork) (22/04/2015) in the case of O'Keeffe against Ireland (Application No. 35810/09)

Information made available under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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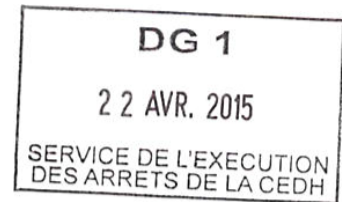
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Réunion : 1230 réunion (9-11 juin 2015) (DH)

Référence du point : Communication d'une ONG (The Child Law Clinic of the University of Cork) (22/04/2015) dans l'affaire O'Keeffe contre Irlande (Requête n° 35810/09)  
**(anglais uniquement)**

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

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The Child Law Clinic  
School of Law  
University College Cork

Submission to the Committee of Ministers of the Council of Europe  
under Rule 9(2) of the Rules of the Committee of Ministers for the  
supervision of the execution of judgments in relation to *O'Keeffe v  
Ireland*, Application No. 35810/09, 28 January 2014 (Grand Chamber)

April 22, 2015

Director: Professor Ursula Kilkelly

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Additional Contributing Members: Ruth Griffin, Lisa Kavanagh,

Maeve McNamara, Carol Casey, Michelle Cullinane



### **UCC Child Law Clinic**

1. University College Cork Child Law Clinic is a non-governmental organisation staffed by academic staff and postgraduate students at the School of Law at University College Cork. It provides research assistance to litigants in child law cases and advocates for rights-based reform of child law. Further details are available at <http://www.ucc.ie/en/childlawclinic/>.
2. The Child Law Clinic provided *pro bono* research assistance to Louise O'Keeffe's legal team throughout the course of her application to the European Court of Human Rights.

### ***O'Keeffe v Ireland***

3. On 28 January 2014, the Grand Chamber of the European Court of Human Rights ruled in *O'Keeffe v Ireland* (Application No. 35810/09) that Ireland had violated Article 3 of the ECHR by failing to implement effective measures to prevent and detect sexual abuse of children in Irish schools, and further, that Ireland had violated Article 13 of the Convention by failing to provide the applicant with an effective remedy in domestic law on foot of the State's violation of her Article 3 rights.
4. The Grand Chamber ruled that "The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals ... the required measures should, at least, provide effective protection in particular of children and other vulnerable persons and should include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge ..." (Para.144)
5. A violation of Article 3 was found on the basis that "it was an inherent positive obligation of government in the 1970s to protect children from ill-treatment. It was, moreover, an obligation of acute importance in a primary education context. That obligation was not fulfilled when the Irish State, which must be considered to have been aware of the sexual abuse of children by adults through, *inter alia*, its prosecution of such crimes at a significant rate, nevertheless continued to entrust the management of the primary education of the vast majority of young Irish children to non-State actors (National Schools), without putting in place any mechanism of effective State control against the risks of such abuse occurring. On the contrary, potential complainants were directed away from the State authorities and towards the non-State denominational Managers (paragraph 163 above). The consequences in the present case were the failure by the non-State Manager to act on prior complaints of sexual abuse by LH, the applicant's later abuse by LH and, more broadly, the prolonged and serious sexual misconduct by LH against numerous other students in that same National School. In such circumstances, the State must be considered to have failed to fulfil its positive obligation to protect the present applicant from the sexual abuse to which she was subjected in 1973 whilst a pupil in Dunderrow National School." (Paras. 168-169)
6. Finally, the Grand Chamber held that "it has not been demonstrated that the applicant had an effective domestic remedy available to her as regards her complaints under the

substantive limb of Article 3 of the Convention. There has, therefore, been a violation of Article 13 of the Convention.”

### **Implementation of the Judgment by Ireland**

7. In an updated action plan filed with the Committee of Ministers on 29 January 2015, the Irish Government stated as follows (para. 16):

“As part of Ireland’s response to this aspect of the Court’s judgment, litigation against the State concerning school child sexual abuse is being examined. The Government’s State Claims Agency, which is handling the relevant litigation, has reviewed its day school abuse cases to identify those that come within the parameters of the judgment. Consequent on that review, in December 2014 the Government approved proposals to offer out of court settlements to those bringing cases of school child sexual abuse against the State where the cases come within the terms of the ECtHR judgment. It is likely that there will be cases that will not come within the terms of the ECtHR judgment. The State Claims Agency will engage with litigant’s solicitors to clarify the position in cases and to make settlement offers where appropriate.”
8. The reference to cases that come “within the parameters of the judgment” in *O’Keeffe v Ireland* is central to the adequacy of the State’s implementation of that judgment. As the case involved violations of both Article 3 and Article 13, it is clear that adequate implementation of the judgment requires that anyone whose Article 3 rights have been violated under the terms of the judgment must be provided with a remedy by the State in order to vindicate their Article 13 rights.
9. Although it is not clearly set out in the updated action plan, it is clear that the State’s interpretation of the Grand Chamber judgment is that a violation of Article 3 only arises in cases where a prior complaint of abuse was made, and not acted upon, before the abuse complained of occurred.<sup>1</sup> This was expressly confirmed to Louise O’Keeffe in a meeting between her, her legal advisor and the Minister for Education in December 2014. Only victims satisfying these criteria will be offered out of court settlements by the State Claims Agency. Victims who suffered abuse in the absence of a prior complaint will not be offered settlements, on the basis that the State interprets the judgment as being inapplicable to such victims.
10. This submission will explain that:
  - a. The existence of a prior complaint and the absence of a reporting mechanism was not the crux of the finding of a violation of Article 3 on the part of the State in *O’Keeffe v Ireland*;
  - b. Constructive knowledge of a prior complaint on the part of the State was not necessary to the finding of a violation; and

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<sup>1</sup> See Joe Humphreys and Barry Roche, “School abuse survivors offered up to €84,000 in cases against State”, *The Irish Times*, December 16, 2014, available at <http://www.irishtimes.com/news/education/school-abuse-survivors-offered-up-to-84-000-in-cases-against-state-1.2039586> and Catherine Shanahan and Juno McEnroe, “Out-of-court payouts a ‘disgrace’, says abuse survivor”, *The Irish Examiner*, December 17, 2014, available at <http://www.irishexaminer.com/ireland/out-of-court-payouts-a-disgrace-says-abuse-survivor-302915.html>.

- c. The judgment requires that an effective child protection framework must include proactive measures designed to prevent child abuse and not merely reactive measures designed to respond to complaints of alleged abuse.
11. Therefore, the terms of the judgment go further than the State is admitting, and liability on the part of the State applies to a broader range of victims than are being offered out of court settlements. Consequently, as victims of violations of Article 3 are being denied an effective remedy for the violation of their rights by the State, the State’s action plan falls short of adequate implementation of the judgment. This results in a continuing violation of the Article 13 rights of victims of child sexual abuse in Irish schools.

**(A) Prior Complaint and Absence of Reporting Mechanism not the Crux of the Violation**

12. The judgment of the Grand Chamber in *O’Keeffe v Ireland* found that Ireland had violated Article 3 not by reason of the failure to respond to a prior complaint made against the applicant’s abuser, but by reason of the failure to implement an effective child protection framework in Irish schools. The judgment makes it clear that an effective child protection framework is not just a reactive one that takes action following complaints being made regarding abuse that has already occurred; it is a proactive one that takes measures to prevent abuse from occurring before it has even occurred. The failure to react to a prior complaint was one feature of the *O’Keeffe* case, but it was not the only (or even the crucial) failure on the part of the State. The much broader failure of the State to implement any mechanisms designed to prevent sexual abuse from occurring in schools (other than the criminal law, which was found not to be sufficient in itself) created an environment in which abusers were allowed to operate with impunity for extended periods of time. This environment existed in the same way for victims who were abused in the absence of a prior complaint as it did for victims who were abused subsequent to a complaint having been made. The failure was systemic in nature and existed across the Irish education system.
13. In interpreting the judgment as hinging on the failure to respond to a prior complaint, the Irish State is most likely relying on the following passages:
- a. “On the contrary, potential complainants were directed away from the State authorities and towards the non-State denominational Managers (paragraph 163 above). The consequences in the present case were the failure by the non-State Manager to act on prior complaints of sexual abuse by LH, the applicant’s later abuse by LH and, more broadly, the prolonged and serious sexual misconduct by LH against numerous other students in that same National School.” (Para. 168)
  - b. “Adequate action taken on the 1971 complaint could reasonably have been expected to avoid the present applicant being abused two years later by the same teacher in the same school.” (Para. 166)
14. The interpretation of the judgment as finding a violation purely on the basis of a direct causal relationship between the omission to respond to a complaint and the abuse complained of ignores the very clear statement by the Grand Chamber that it is not necessary to establish such a direct causal relationship in order to find a violation:
- a. “It is also recalled that it is not necessary to show that “but for” the State omission the ill-treatment would not have happened. A failure to take reasonably available

measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State ...” (Para. 149)

15. The above passage makes it clear that the absence of proactive, preventive measures is as important an issue in the context of the case as any relationship of causation between the failure to investigate the prior complaint and the occurrence of the abuse complained of. This is further reinforced in the key passage of the judgment in which the Grand Chamber identified the mechanisms relied on by the Government as constituting effective protective mechanisms, and held that they “did not provide any effective protective connection between the State authorities and primary school children and/or their parents”:

“The first mechanism on which the Government relied was a reporting process outlined in the 1965 Rules and the Guidance Note of 6 May 1970 (paragraph 62 above). However, none of the material submitted referred to *any obligation on a State authority to monitor a teacher’s treatment of children* and none provided for a procedure prompting a child or parent to complain about ill-treatment directly to a State authority. On the contrary, those with complaints about teachers were expressly channeled to the non-State denominational Manager by the text of the Guidance Note of 6 May 1970 on which the Government relied. If a parent would have been hesitant to by-pass a Manager (generally a local priest as in the present case) to complain to a State authority, the relevant rules discouraged them from doing so. The second mechanism invoked was the system of School Inspectors governed also by the 1965 Rules as well as by Circular 16/59 (paragraph 61 above). However, the Court notes that the principle task of Inspectors was to supervise and report upon the quality of teaching and academic performance. There was no specific reference, in the instruments on which the Government relied, to *an obligation on Inspectors to inquire into or to monitor a teacher’s treatment of children*, to any opportunity for children or parents to complain directly to an Inspector, to a requirement to give notice to parents in advance of an Inspector’s visit or, indeed, to *any direct interaction between an Inspector and pupils and/or their parents*. The rate of visits by Inspectors (paragraph 61 above) *did not attest to any local presence of relevance*. Consistently with this fact, the Government did not submit any information about complaints made to an Inspector about a teacher’s ill-treatment of a child. As pointed out by Hardiman J in the Supreme Court, the Minister (*via* his Inspectors) inspected the schools for their academic performance but it did not go further than that: *the Minister was deprived of the direct control of the schools because the non-State Manager was interposed between the State and the child* (paragraph 35 above). The Court is therefore of the view that the mechanisms on which the Government relied *did not provide any effective protective connection* between the State authorities and primary school children and/or their parents and, indeed, this was consistent with the particular allocation of responsibilities in the National School model.” (Paras. 164-165; emphasis added)

16. While the absence of a mechanism for complaints being channelled to and investigated by the State authorities is one of the flaws identified by the Grand Chamber in this passage, it is not the only one. Other flaws included the absence of “any obligation on a State authority to monitor a teacher’s treatment of children” or any obligation “on Inspectors to inquire into or

to monitor a teacher’s treatment of children”. The Grand Chamber also highlighted the absence of “any direct interaction between an Inspector and pupils and/or their parents”; the fact that “rate of visits by Inspectors ... did not attest to any local presence of relevance”; and the fact that “the Minister was deprived of the direct control of the schools because the non-State Manager was interposed between the State and the child”. None of these flaws have anything to do with the absence of a mechanism for receiving and investigating complaints, and all of them would have been present in a case where abuse had occurred but no prior complaint had been made. These flaws all contribute to the creation of an environment where abusers were allowed to operate with impunity over extended periods.

### **(B) Constructive Knowledge of a Prior Complaint not Necessary to Find a Violation**

17. Apart from causation, the interpretation being relied on by the State also depends heavily on a reading of the judgment as finding a violation on the basis of constructive knowledge – i.e. had appropriate mechanisms been in place for the investigation of complaints, the State would have become aware of the abuse and taken steps to put it to an end before the applicant was abused. The absence of such mechanisms resulted in the State not becoming aware of the complaints and the abuse continuing unchecked.

18. This view misinterprets the discussion of constructive and actual knowledge in the judgment. It was accepted by the Grand Chamber that the State was not aware of the abuse or of the complaints: “Until complaints about LH were brought to the attention of the State authorities in 1995, the State neither knew nor ought to have known that this particular teacher, LH, posed a risk to this particular pupil, the applicant.” (Para. 148) Clearly, therefore, the finding of a violation did not hinge upon a finding that the State ought to have been aware of the specific threat posed by the specific teacher, or that the State ought to have been aware that a complaint had been made against this teacher.

19. In the passages where the Grand Chamber refers to issues of which the State “ought to have known”, it was not referring to the prior complaint made in the *O’Keeffe* case. It was referring to the general risk of sexual abuse that exists in a school setting. This is clear from the following passages:

- a. “Parallel to the maintenance by the State of this unique model of education, the State was also aware of the level of sexual crime against minors through the enforcement of its criminal laws on the subject.” (Para. 159)
- b. “Professor Ferriter’s Report, sponsored by the Ryan Commission and annexed to its Report (paragraph 82 above), analysed the statistical evidence of prosecutions gathered from criminal court archives covering the period after the Carrigan Report and until 1960s. In his report, he concluded, *inter alia*, that those archives demonstrated *a high level of sexual crime directed against young boys and girls*. Lastly, the Ryan Report also evidenced complaints made to State authorities prior to and during the 1970s about the sexual abuse of children by adults (paragraphs 78-81 above). While that Report primarily concerned industrial schools where the programme was different from National Schools and where the resident children were isolated from families and the community (see the description of industrial schools at paragraph 73 above), these earlier complaints *still amounted to notice to*

*the State of sexual abuse by adults of minors in an educational context.* In any event, the complaints to the State prior to and during the 1970s recorded in Volume III of the Ryan Report concerned, *inter alia*, National Schools (paragraph 80 above)."

(Para. 161; emphasis added)

- c. "The State *was therefore aware of the level of sexual crime by adults against minors.* Accordingly, when relinquishing control of the education of the vast majority of young children to non-State actors, *the State should also have been aware, given its inherent obligation to protect children in this context, of potential risks to their safety if there was no appropriate framework of protection.* This risk should have been addressed through *the adoption of commensurate measures and safeguards.* Those should, *at a minimum, have included effective mechanisms for the detection and reporting* of any ill-treatment by and to a State-controlled body, such procedures being fundamental to the enforcement of the criminal laws, to the prevention of such ill-treatment and, more generally therefore, to the fulfilment of the positive protective obligation of the State (paragraph 148 above)." (Para. 162; emphasis added)
- d. "... the application concerns the responsibility of a State. More precisely, it examines whether the respondent State ought to have been aware of the risk of sexual abuse of minors such as the applicant in National Schools at the relevant time and whether it adequately protected children, through its legal system, from such treatment." (Para. 168)

20. The above passages all make it clear that the positive obligation of the State to take measures designed to protect children against sexual abuse in the school system arose from the fact that the State "ought to have known" that children in schools were at risk of being sexually abused. The State ought to have known this as a general matter, and not as a specific matter arising only in certain schools where abuse had previously taken place and been reported. A complete failure to implement a protective framework is as much a failure in the first instance of abuse in a particular school as it is in any subsequent cases; any other interpretation essentially leaves the State free of all responsibility for all cases which were the first in their school. The judgment does not contemplate that the State would be given a free pass for all first cases and would only be obliged to implement protective measures once abuse has already occurred.
21. Para. 162 in particular illustrates the flaws in the interpretation of the judgment being relied on by the State. First, it illustrates that the issue of which the State "ought to have known" was the general risk of sexual abuse that children in schools would be exposed to in the absence of an effective child protection framework – and not the fact that complaints has been made against a particular person in a particular school. Second, it makes it clear that the presence of mechanisms designed to deal with the handling and investigation of complaints are not the only element of the State's obligation. "Reporting" is mentioned, but so too is "detection", and these mechanisms are stated to be the "minimum" that the State should do.



### (C) Effective Child Protection Measures Must be Proactive and not Merely Reactive

22. The interpretation of the judgment relied on by the State ignores the broader context of the judgment as a whole and multiple other references to the need to take proactive measures designed to prevent abuse rather than purely reactive measures designed to investigate allegations of abuse. The judgment does not restrict the scope of the State's obligations to one of reacting to complaints of abuse that has already occurred. The following passages all indicate that the State has an obligation to take proactive measures to prevent abuse from occurring in the first place:

- a. "The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires States *to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment*, including such ill-treatment administered by private individuals. This positive obligation to protect is to be interpreted in such a way as not to impose an excessive burden on the authorities, bearing in mind, in particular, the unpredictability of human conduct and operational choices which must be made in terms of priorities and resources. Accordingly, not every risk of ill-treatment could entail for the authorities a Convention requirement to take measures to prevent that risk from materialising. However, the required measures should, at least, *provide effective protection* in particular of children and other vulnerable persons and should include *reasonable steps to prevent ill-treatment* of which the authorities had or ought to have had knowledge ..." (Para. 144; emphasis added)

→ This paragraph makes the proactive and preventive nature of the State's obligation under Article 3 abundantly clear, referring to ensuring that individuals "are not subjected to torture or inhuman or degrading treatment", and an obligation to "provide effective protection" and to "prevent ill-treatment". Clearly, such an obligation goes much further than an obligation to investigate after the abuse has already occurred.

- b. "The Court's case-law makes it clear that the positive obligation of protection assumes particular importance in the context of the provision of an important public service such as primary education, school authorities being obliged *to protect the health and well-being of pupils* and, in particular, of young children who are especially vulnerable and are under the exclusive control of those authorities". (Para. 145; emphasis added)

→ Again, note the use of the proactive term "protect".

- c. "In sum, having regard to the fundamental nature of the rights guaranteed by Article 3 and the particularly vulnerable nature of children, it is an inherent obligation of government to ensure their *protection from ill-treatment*, especially in a primary education context, through the adoption, as necessary, of special measures and *safeguards*." (Para. 145; emphasis added)

→ Again, note the use of the proactive term "protection", as well as the term "safeguards", which envisages that safeguards will prevent abuse from

- occurring in the first place, and not merely that the State will respond to complaints of abuse that is alleged to have already occurred.
- d. "The series of international instruments adopted prior to this period, summarised at paragraphs 91-95 above, emphasised the necessity for States to take special measures for the protection of children." (Para. 147)  
→ Again, note the use of the proactive term "protection".
- e. "In sum, the question for current purposes is therefore whether the State's framework of laws, and notably its mechanisms of detection and reporting, provided effective protection for children attending a National School against the risk of sexual abuse, of which risk it could be said that the authorities had, or ought to have had, knowledge in 1973." (Para. 152)  
→ Two points of significance arise here. First, it is again clarified that the issue of which the State "ought" to have had knowledge was the general risk of sexual abuse that children in schools would be exposed to in the absence of an effective child protection framework – and not the fact that complaints has been made against a particular person in a particular school. Second, it makes it clear that the presence of mechanisms designed to deal with the handling and investigation of complaints are not the only element of the State's obligation. "Reporting" is mentioned, but so too is "detection". In this regard, the other failures mentioned at paras 164-165 (see p.5 above), such as the absence of monitoring of a teacher's treatment of children, the absence of any direct interaction between an Inspector and pupils and/or their parents", the infrequent rate of visits by Inspectors, and the fact that the Minister was deprived of the direct control of the schools are all factors other than the absence of a reporting mechanism that contributed to the finding that the State had failed to implement an adequate framework for protecting children from sexual abuse.
- f. "That obligation was not fulfilled when the Irish State, which must be considered to have been aware of the sexual abuse of children by adults through, *inter alia*, its prosecution of such crimes at a significant rate, nevertheless continued to entrust the management of the primary education of the vast majority of young Irish children to non-State actors (National Schools), without putting in place any mechanism of *effective State control against the risks of such abuse occurring*." (Para. 168; emphasis added)  
→ The reference to "control against the risks of such abuse occurring" clearly refers to proactive measures taken in advance of the occurrence of abuse, and not merely to reactive measures taken to investigate abuse once it has occurred.
- g. "The Court is therefore of the view that the mechanisms on which the Government relied *did not provide any effective protective connection* between the State authorities and primary school children and/or their parents and, indeed, this was consistent with the particular allocation of responsibilities in the National School model. The facts of the present case illustrate, in the Court's opinion, the *consequences of this lack of protection* and demonstrate that an effective regulatory *framework of protection* in place before 1973 might "*judged reasonably, have been*

*expected to avoid, or at least, minimise the risk or the damage suffered”* by the present applicant (*E and Others v. the United Kingdom*, cited above, § 100).” (Paras. 165-166; emphasis added)

→ The proactive term “protection” (as distinct from investigation) is used on three occasions here, and the final sentence refers to the fact that an effective framework of protection might have been expected to “avoid, or at least minimise the risk or the damage suffered” – which is clearly a proactive duty to prevent abuse and not merely a reactive duty to investigate complaints of abuse.

- h. “In such circumstances, the State must be considered to have failed to fulfil its positive obligation to protect the present applicant from the sexual abuse to which she was subjected in 1973 whilst a pupil in Dunderrow National School. There has therefore been a violation of her rights under Article 3 of the Convention.” (Para. 169)

→ Again, the proactive term “protect” is used, which reinforces the fact that that State’s obligation goes further than an obligation to investigate complaints of alleged abuse.

## Conclusion

23. The updated action plan submitted by the Irish Government proposes to exclude all victims of sexual abuse in Irish schools whose abuse did not take place in the aftermath of a prior complaint that abuse had occurred in that school. This action plan assumes that a violation of Article 3 could only be found in cases where a prior complaint has been made, and that the existence of a prior complaint was the crux of the finding of a violation in *O’Keeffe v Ireland*. This submission has shown that this interpretation of the judgment is not supported by a holistic analysis of the terms of the Grand Chamber’s assessment of the complaint. In fact, a violation was found because of the complete absence of any mechanisms whatsoever designed to protect children against the risk of sexual abuse. The absence of such mechanisms created an environment that was conducive to the widespread incidence of sexual abuse, as documented in the Carrigan Report and Ryan Report. The Grand Chamber held that the Irish State ought to have been aware of the existence of this risk and ought to have put in place a range of measures designed to proactively prevent abuse from occurring as well as to react to complaints that abuse had allegedly occurred.
24. The systemic failure to implement a child protection framework, and not the failure to respond to a specific complaint, was the crux of the finding of a violation in *O’Keeffe*. Accordingly, the terms of the judgment extend to any child who was sexually abused in an Irish school in the absence of an adequate child protection framework, and establish a violation of Article 3 in such cases. In turn, this requires that victims of violations of Article 3 should be afforded an effective remedy in accordance with Article 13. Since the Grand Chamber found that domestic law does not currently provide any such remedy, adequate implementation of the judgment requires that all victims of sexual abuse in Irish schools be offered out of court settlements by the State Agency, regardless of whether a prior complaint of abuse had been made. Anything less would fall short of a full and adequate implementation of the judgment of the Grand Chamber in *O’Keeffe v Ireland*.