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Meeting: 1273 meeting (6-8 December 2016) (DH)

Communication from a NGO (The Child Law Clinic - School of Law - University College Cork) (04/11/2016) 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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Réunion : 1273 réunion (6-8 décembre 2016) (DH)

Communication d'une ONG (The Child Law Clinic - School of Law - University College Cork) (04/11/2016) 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.

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)

4 November 2016

Director: Professor Ursula Kilkelly

Deputy Director: Dr Conor O'Mahony

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. At its meeting of 7-9 June 2016, the Committee of Ministers considered Ireland's action plan for the implementation of the decision of the Grand Chamber in *O'Keeffe*. Under General Measures taken on foot of the finding of a violation of Article 13 in conjunction with Article 3 (substantive), the Committee noted the redress scheme being operated by the State Claims agency to offer out-of-court settlements to applicants who suffered abuse in the school system and who could demonstrate the following:
    a. that he or she was sexually abused as a school child by a teacher or other school employee;
    b. that a prior complaint of sexual abuse had been made to any person in authority in a school about the alleged abuser;
    c. the complaint could have been made on an informal basis and by anyone (the claimant, another school child, or any other person;
    d. that the complaint was not acted upon at the time.
8. Notwithstanding submissions from the Irish Human Rights and Equality Commission and from the Child Law Clinic highlighting the fact that the *O'Keeffe* decision had not turned on the question of prior complaint, but was in fact also based on the absence of proactive child protection measures such as an adequate inspection regime, the Committee found that the terms of the scheme were legitimate and reasonable.[1]
9. The rationale of the Committee for this finding was expressed as follows:

    "In sum, the limits imposed on the settlement scheme appear acceptable as long as the authorities ensure that the flexible and holistic approach of the State Claims Agency is maintained. In addition, the Irish authorities have confirmed that, should an individual be dissatisfied with the assessment by the State Claims Agency, he or she is free to lodge a complaint before the domestic courts. This domestic judicial supervision of the settlement scheme should therefore provide an effective, domestic safeguard and avoid repetitive cases being brought before the Court."
10. This submission aims to highlight the fact that the above assessment is **inaccurate as a matter of law**.
11. First, approximately 210 potential applicants to the scheme who had previously instituted legal proceedings against the State discontinued them under threat of costs following the Supreme Court ruling in *O'Keeffe v Hickey* [2009] 2 I.R. 302 (the domestic proceedings in *O'Keeffe v Ireland*).[2] Contrary to what the Government submitted and what the Committee accepted, these applicants are unable to reinstitute proceedings before the domestic courts. One applicant who attempted to do so was refused permission by the High Court in *Mr A v Minister for Education* [2016] IEHC 268 on the basis that the arrangement under which

[1] 1259 Meeting, 7-9 June 2016, https://search.coe.int/cm/pages/result_details.aspx?objectid=090000168064e699.
[2] 1259 Meeting, 7-9 June 2016, https://search.coe.int/cm/pages/result_details.aspx?objectid=090000168064e699.

applicants who discontinued proceedings were not pursued for costs constituted a binding legal settlement that could not be re-opened.

12. Second, although other victims have litigation pending before the domestic courts, all relevant case law makes it clear that this litigation has no prospect of success. Domestic Irish law does not provide any mechanism through which State liability can be established for a failure to implement an effective child protection framework in the period prior to the commencement of the European Convention on Human Rights Act 2003. In *O'Keeffe v Hickey* [2009] 2 I.R. 302, the Supreme Court ruled against the plaintiff on grounds of vicarious liability and stated at p.344 that the claim for direct liability would have failed if pursued on appeal. In *O'Keeffe v Ireland*, the Grand Chamber held (at paras.183-187) that it was "not persuaded that any of the remedies against the State has been shown by the Government to be effective" and that the Government had "not demonstrated, with relevant case-law, how the State could be held responsible". Since the Grand Chamber decision in *O'Keeffe*, all efforts to persuade the Irish courts to revisit this issue have been summarily dismissed. In *Mr A v Minister for Education* [2016] IEHC 268, the High Court held at para.1 that "the decision of the European Court of Human Rights does not have the result that the law on negligence or vicarious liability ... was incorrectly pronounced upon by the courts in the past, or that it has changed". In *Naughton v Dummond* [2016] IEHC 290, *Kennedy v Murray* [2016] IEHC 291 and *Wallace v Creevey* [2016] IEHC 294, the High Court held that in light of the Supreme Court decision in *O'Keeffe*, along with separate precedents on the status of the ECHR in Irish domestic law, the claim against the State for either vicarious or direct liability was "bound to fail". The claims in all three cases were struck out as disclosing no reasonable cause of action.
13. As such, there is no prospect whatsoever of "domestic judicial supervision of the settlement scheme … [providing] an effective domestic safeguard and [avoiding] repetitive cases being brought before the Court". Indeed, the Child Law Clinic is working to support a significant number of litigants who are currently being pressured into dropping their cases against the State under threat of costs. Many of these litigants are currently considering making fresh applications to the European Court of Human Rights.
14. Aside from the unavailability of litigation in the domestic courts, it should also be noted that the Committee's finding that the redress scheme was reasonable applied only "as long as the authorities ensure … [a] flexible and holistic approach". To date, just seven offers of settlements have been made under the scheme, even though at least 360 cases arise for consideration.[3] A settlement rate of just 2% is not indicative of a flexible and holistic approach.
15. A significant reason for this relates to the fact that it is virtually impossible for most applicants to prove the existence of a prior complaint against their abuser that was not acted upon. In *O'Keeffe v Ireland*, it was accepted that no State authorities were aware that a complaint had been made against the applicant's abuser (para.15). Since the Guidance Note of 6 May 1970 directed complaints to school managers and away from the State authorities (para.163), it is fair to assume that the same situation would apply to most complaints. If State authorities are not aware of a particular complaint due to the failure of a

[3] 1259 Meeting, 7-9 June 2016, https://search.coe.int/cm/pages/result_details.aspx?objectid=090000168064e699.

school manager to act upon it, it must be questioned how anyone else – and particularly a child – could be aware of that same complaint, or be in a position to provide proof as to its occurrence.

16. The requirement to demonstrate prior complaint is a key reason why so few applications have thus far been made to the redress scheme. As of last June's meeting of the Committee of Ministers, just 15 applications had been made out of a potential 360 cases.[4] Potential applicants who cannot prove prior complaint have simply not been applying, because they know that their application will fail. They have no remedy available to them via the either redress scheme or (as demonstrated earlier) via the courts. Their only remaining course of action is an application to the European Court of Human Rights.
17. In this regard, it should be noted that the Convention does not require applicants to exhaust domestic remedies which have no prospect of success (see, inter alia, *A, B and C v Ireland*, Application No. 25579/05, Judgment of 16 December 2010 (Grand Chamber) at para.149).
18. With all of the above in mind, it is essential that clarity be provided on the question of whether the redress scheme is sufficient to discharge the State obligations on foot of the Grand Chamber decision in *O'Keeffe*. This clarity can only be provided by the Court. Rather than await repetitive applications from future litigants, the Committee can provide a resolution to the matter at this point by exercising its discretion under Rule 10(1) to refer the matter to the Court for an interpretive ruling clarifying whether it is necessary to demonstrate the existence of a prior complaint which was not acted upon in order for a case to come within the terms of the *O'Keeffe* decision. The Child Law Clinic respectfully urges the Committee to pursue this option at the earliest opportunity.

[4] 1259 Meeting, 7-9 June 2016, https://search.coe.int/cm/pages/result_details.aspx?objectid=090000168064e699.