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Meeting: 1310th meeting (March 2018) (DH)

Item reference: Action plan (26/01/2018)

Communication from Ireland concerning the case of O'KEEFFE v. Ireland (Application No. 35810/09)

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Réunion : 1310^e réunion (mars 2018) (DH)

Référence du point : Plan d'action

Communication de l'Irlande concernant l'affaire O'KEEFFE c. Irlande (Requête n° 35810/09)
(anglais uniquement)

26 JAN. 2018

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

ACTION PLAN

O'Keeffe v. Ireland

Application no 35810/09

Grand Chamber Judgment 28 January 2014

Information submitted by the Government of Ireland 28th January 2018

Introduction

1. The applicant was sexually abused by her school principal when attending primary school in the early 1970s. She brought proceedings against Ireland before the European Court of Human Rights claiming violations of Articles 3, 8, 13, 14 and Article 2 of Protocol No. 1.
2. In its Judgment, delivered on 28th January 2014, the Grand Chamber determined that there had been a violation of Articles 3 and 13 of the Convention and awarded the applicant €30,000 in respect of pecuniary and non-pecuniary damages and €5,000 in costs and expenses.
3. Ireland is committed to ensuring that the Judgment in this case is implemented expeditiously, while noting that the case relates to events in 1973, over forty years ago.

Publication and dissemination of the Judgment

4. The Judgment was transmitted to the relevant Government Departments and was laid before the Houses of the Oireachtas (the National Parliament). A Press Statement was issued in connection with the Judgment by the Department of Education and Skills. A link to the Judgment was posted on the websites of the Department of Education and Skills, and the Department of Foreign Affairs and Trade. The Judgment was covered extensively in the national media and in the Law Society Gazette, a publication of the Law Society of Ireland which is distributed to its members. All practising solicitors are members of the Society. Ireland does not consider that any further steps are required as regards publication and dissemination.

Individual measures

5. The Court ordered the payment to the applicant of €30,000 in respect of pecuniary and non-pecuniary damages (plus any tax chargeable) and €5,000 in costs and expenses (plus any tax chargeable) within three months. Ireland paid to the Applicant's solicitor the sum of €134,550 (including Value Added Tax of €19,550 on the €5,000 costs and expenses) in February 2014.
6. Ireland considers that no further individual measures are required.

General measures

7. In the period since the early 1970s when the abuse in this case took place, Ireland has been developing and improving its child protection arrangements. Specifically in relation to child protection arrangements in schools, the Department of Education and Skills issued guidelines to schools in three phases: in 1991/1992, 2001/2004 and again in 2011.

1991/1992 Guidelines

8. In 1991 and 1992 the Department of Education and Skills issued guidelines to primary and post-primary schools respectively which communicated to the schools sector the national architecture set by the 1987 Department of Health Child Abuse Guidelines. The guidelines set out reporting procedures which included a requirement for teachers to advise the school principal and, where satisfied that there were reasonable grounds for the suspicion or allegation, the Chair of the School Board of Management. The Chair was advised to report the matter to the local Director of Community Care/Medical Officer of the regional health authority (Health Board) who would investigate and liaise with the police.

2001/2004 Guidelines

9. In 2001, new *Child Protection Guidelines and Procedures* were issued by the Department to all primary schools which clarified the reporting and investigation mechanisms following the publication of national *Children First Guidelines* in 1999 by the Department of Health and Children. The Department's guidelines included a requirement for each school Board to designate a senior member of staff as the Designated Liaison Person (DLP) for the school. The school guidelines also provided for the DLP to act as a liaison person with the health service authorities and other agencies on child protection issues and as a resource person to any staff member who has concerns in this regard. In 2004 the Department of Education and Skills issued similar guidelines for post-primary schools.

2011 Guidelines

10. In September 2011, the Department published updated *Child Protection Procedures for Primary and Post-Primary Schools* which followed the publication in July 2011 of the updated national guidelines *Children First-National Guidance for the Protection and Welfare of Children 2011*. In addition to updating the existing school guidelines having regard to the updated Children First guidelines, these new procedures introduced a new child protection policy template and improved oversight arrangements at school Board of Management level.
11. The 2011 guidelines on *Child Protection Procedures for Primary and Post-Primary Schools* also included a mandatory requirement that all primary schools fully implement the *Stay Safe* programme. The *Stay Safe* programme was reviewed by the Child Abuse Prevention Programme¹ and was revised in 2016 and the revised programme was introduced to schools in that year. The revisions take into account modern day issues for students. All schools were offered a comprehensive Continuous Professional Development (CPD) framework by the Professional Development Service for Teachers to assist in the implementation of the revised programme. The authors of the programme have worked collaboratively with the Special Education Support Service to ensure that the revised programme is inclusive. The revised programme has been quality assured by the Department Inspectorate. New procedures in Whole School Evaluations undertaken by the Inspectorate of the Department included a specific review of school policies in the area of child protection. The Department also provided specific in-service training to assist schools in dealing with child protection issues at primary and post-primary level.

¹ The Child Abuse Prevention Programme is part of the Professional Development Service for Teachers (PDST). The PDST is the country's largest single support service offering professional learning opportunities to teachers and school leaders in a range of pedagogical, curricular and educational areas.

12. Department of Education and Skills ‘*Procedures for Responding to Child Protection Concerns brought to the Attention of Staff employed by the DES*’ were updated in February 2016, having been first issued in 1995 and revised in 2007 and 2010. These updated procedures reflect recent developments such as the establishment of the Child and Family Agency (Tusla) and the role of the Department’s Inspectorate, which has been broadened to include the quality of educational provision across a range of additional environments such as Early Childhood Care and Education settings, Irish-language Colleges, and Colleges of Agriculture and Horticulture. The Inspectorate inspects these venues on behalf of the relevant Department (respectively, the Department of Children and Youth Affairs, the Department of Arts, Heritage and the Gaeltacht or the Department of Agriculture) and reports any child protection concerns that come to its attention to the Department’s Child Protection Unit for forwarding to Tusla and to the relevant Department and, if necessary, the Gardaí (police force).

Garda Vetting

13. Arrangements for Garda vetting of new teaching and non-teaching school staff were introduced in 2006 on a non-statutory basis. The Department updated and clarified the vetting requirements as part of recruitment procedures for all teaching and non-teaching positions in schools as well as for any persons who may have unsupervised access to children in schools. Garda vetting is now on a statutory basis with the commencement of the National Vetting Bureau (Children and Vulnerable Persons) Acts 2012 to 2016² and the application of the new vetting procedures in the education sector has been expressly provided for in the Teaching Council Acts.³

Other Significant Developments

14. As can be seen from the preceding paragraphs, it is current practice in Ireland to review child protection measures regularly and this has been a high priority for Government for many years.

As part of this on-going process of reviewing child protection measures, significant developments include the following:

The creation in 2012 of a criminal offence where a person fails to disclose to the police information in relation to certain serious offences, including sexual offences against children and vulnerable persons.

The introduction of statutory vetting arrangements for people involved in working with children and vulnerable adults, including those working in schools. The National Vetting Bureau (Children and Vulnerable Persons) Acts 2012 to 2016 was commenced on 29th April 2016. Schools were advised by Circular⁴ 0031/2016 (Commencement of Statutory Requirements for Garda Vetting) of the statutory requirements that apply to school authorities from the date of commencement of the Act together with the practical arrangements that will be in place to support statutory

² As amended by Part 3 of the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016;
<http://www.irishstatutebook.ie/eli/2012/act/47/enacted/en/html>;

<http://www.irishstatutebook.ie/eli/2016/act/4/enacted/en/pdf>

³ <http://www.teachingcouncil.ie/en/About-Us/Relevant-Legislation/Teaching-Council-Acts-2001-to-2015-as-consolidated-by-the-Law-Reform-Commission-version-with-annotations.pdf>

⁴ http://www.education.ie/en/Circulars-and-Forms/Active-Circulars/cl0031_2016.pdf

vetting. A Frequently Asked Questions (FAQ)⁵ document to assist schools with queries in relation to the circular was also published in October 2016.

Under the vetting legislation, retrospective vetting of all existing employees and non-employees who undertake relevant work with children and who have never been vetted heretofore must be completed by 31 December 2017. In February 2017 the Department issued circular 0016/2017⁶ which outlines the statutory requirements for the retrospective vetting of school personnel who have not previously been Garda vetted along with the practical arrangements in place to support retrospective vetting. An FAQ⁷ document was also published to assist schools.

Further additional measures to enhance child protection in the education sector were included in the Teaching Council (Amendment) Act 2015⁸ which was enacted in July 2015 and will underpin the Teaching Council's⁹ central role in the vetting arrangements for registered teachers. In April 2016, the Minister for Education and Skills signed a commencement order in respect of those provisions of the Teaching Council Amendment Act 2015 which give statutory underpinning to the role of the Teaching Council in the statutory vetting arrangements for registered teachers.

The Teaching Council Amendment Act 2015 is intended to work in tandem with the National Vetting Bureau (Children and Vulnerable Persons) Acts 2012 to 2016¹⁰ and provides that renewal of a teacher's registration will be linked to compliance with retrospective and re-vetting requirements. The 2015 Act also ensures that there is a robust statutory basis for the Teaching Council to consider, in the case of any teacher who is the subject of an adverse vetting disclosure, whether or not the teacher's registration should be renewed.

Vetting arrangements for all newly employed staff were fully in operation by school authorities for the 2016/2017 school year.

On 2nd November 2016, the remaining sections of the Teaching Council (Amendment) Act 2015 were commenced. The 2015 Act, now fully commenced, puts in place statutory arrangements that make vetting mandatory for teacher registration.

The new arrangements for the renewal of registration, which have now been commenced, provide a straightforward and legally underpinned approach to vetting those teachers who have never been vetted previously. These provide a clear statutory basis for the Teaching Council to:

- (1) require such teachers to undergo vetting, and

⁵ http://www.education.ie/en/Circulars-and-Forms/Active-Circulars/cl0031_2016_faq.pdf

⁶ http://www.education.ie/en/Circulars-and-Forms/Active-Circulars/cl0016_2017.pdf

⁷ http://www.education.ie/en/Circulars-and-Forms/Active-Circulars/cl0016_2017_faq.pdf

⁸ <http://www.irishstatutebook.ie/eli/2015/act/31/enacted/en/html>

⁹ The Teaching Council is the professional standards body for the teaching profession, which promotes and regulates professional standards in teaching. The Teaching Council acts as the gatekeeper to the teaching profession at primary and post-primary level, and within specific areas of the further education sector.

¹⁰ As amended by Part 3 of the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016;

<http://www.irishstatutebook.ie/eli/2012/act/47/enacted/en/html>;

<http://www.irishstatutebook.ie/eli/2016/act/4/enacted/en/pdf>

(2) deal with any adverse vetting disclosure that might be received.

The Teaching Council (Amendment) Act 2015 has provided the statutory basis for the retrospective vetting of all registered teachers to be carried out in the context of their annual renewal of registration. In that regard, in January 2017 the Teaching Council commenced the retrospective vetting of all un-vetted registered teachers. It is intended that all such teachers will undergo retrospective vetting by the end of December 2017.

The number of registered teachers vetted has steadily increased from 75% when reported on in July 2017 to a current total of 99% of the circa 92,000 teachers on the Teaching Council register now vetted.

Children First Act 2015

15. The Children First Act 2015¹¹ was signed into law on 19th November 2015. All remaining provisions of the Children First Act 2015 were commenced on 11th December 2017.

The Act provides for the following key child protection measures:

- A requirement on organisations providing services to children to keep children safe, to undertake a risk assessment and to produce a Child Safeguarding Statement;
- A requirement on “mandated persons” which includes registered teachers, psychologists and other categories of professionals as listed in Schedule 2 of the Act to report child protection concerns over a defined threshold to the Child and Family Agency (Tusla);
- A requirement on those mandated persons to assist Tusla in the assessment of a child protection risk, if requested to do so by Tusla;
- The Children First Interdepartmental Implementation Group has been put on a statutory footing.

The new revised Children First Guidance (2017) has been published and can be accessed on www.dcy.a.ie.¹² It replaces the 2011 edition of the Children First Guidance.

The Child and Family Agency, Tusla have also published an accompanying suite of Children First resource documents for those individuals and organisations who will acquire legal obligations under the Children First Act 2015. Tusla also launched a comprehensive 90 minute basic Children First training programme, to be universally available on line, free of charge. The Tusla suite of Children First resource materials and information on access to the e-learning programme is available at www.tusla.ie.¹³

The Department of Education and Skills concluded its work on reviewing the Department’s Child Protection Procedures for Primary and Post Primary Schools with

¹¹ <http://www.irishstatutebook.ie/eli/2015/act/36/enacted/en/pdf>

¹² <https://www.dcy.a.gov.ie/documents/publications/20171002ChildrenFirst2017.pdf>.

¹³ <http://www.tusla.ie/children-first/support-documents>

the publication of revised procedures on 11th December 2017. Circular 0081/2017¹⁴ issued to school management authorities to advise them that these new Child Protection Procedures¹⁵ have been published. The purpose of these revised procedures is to give direction and guidance to school authorities and to school personnel in relation to meeting their new statutory obligations under the Children First Act, 2015 and in the continued implementation of the best practice (non-statutory) guidance set out in Children First National Guidance 2017.

Article 3

16. As part of Ireland's response to the Judgment of the Court and to inform its Action Plan, the Government initiated a review of current and planned child protection mechanisms in the school system to assess the extent to which issues identified in the Judgment have been addressed in the period since 1973. The review was undertaken by a specially tasked Sub-Committee within the Children First Inter-Departmental Implementation Group and comprises senior officials from the Departments of Education and Skills, Children and Youth Affairs, Justice and Equality, Health and others as appropriate. The work of the Sub-Committee included a review of current child protection measures and systems already in place, and planned developments to safeguard children in schools, including systems to prevent unsuitable people from being employed in schools, the reporting and removal of risk, and proposed responses and mitigations. The report of the Sub-Committee has been circulated to the Children First Inter-Departmental Implementation Group and cross Departmental themes have been identified. These will inform the Children First Inter-Departmental Implementation Group in its ongoing work on child protection across all government sectors.

Article 13

17. As part of Ireland's response to this aspect of the Court's Judgment, litigation against the State concerning school child sexual abuse has been examined. The State Claims Agency (SCA)¹⁶ manages school child sexual abuse litigation being taken against the State. In December 2014, the Government authorised the SCA to offer “out of court” settlements to persons taking cases of school child sexual abuse against the State where their cases come within the terms of the ECHR judgment in the *O’Keefe* case and are not statute barred.¹⁷

In July 2015, the Government agreed that it would respond to those who instituted legal proceedings in relation to school child sexual abuse but had discontinued their

¹⁴ https://www.education.ie/en/Circulars-and-Forms/Active-Circulars/cl0081_2017.pdf

¹⁵ https://www.education.ie/en/Schools-Colleges/Information/Child-Protection/child_protection_guidelines.pdf

¹⁶ The National Treasury Management Agency (NTMA) is a statutory body which operates with a commercial remit to provide asset and liability management services to Government and is designated as the State Claims Agency (SCA) when carrying out its claims and risk management functions.

¹⁷ The Statute of Limitations which applies to personal injury claims in Ireland is the statutory time limit within which an injured party can issue proceedings. A person generally has two years from the date of knowledge of an injury (or the attainment of 18 years of age if earlier) in which to initiate proceedings arising from child sexual abuse. A statutory exception was introduced in 2000 to allow those who are suffering from a psychological injury caused by the sexual abuse suffered, and which is of such significance that the victim’s will or capacity to decide to bring proceedings is substantially impaired, to be considered to be under a disability and, therefore, not subject to the general rule.

cases by offering *ex gratia* payments. It was decided that such payments would be offered to those persons whose cases were not statute barred prior to their proceedings being discontinued and where the person can demonstrate that their circumstances involved sexual abuse of a school child by a primary or post-primary school employee in respect of whom there was a prior complaint of sexual abuse to a school authority (including an authority of a school in which the employee had previously worked) prior to the issue of the Department of Education guidelines to primary and post-primary schools in 1991 and 1992 respectively.

For the purposes of the settlement of litigation and the Government's *ex gratia* scheme, there is no strict interpretation as to what constitutes a "prior complaint." The State must be satisfied on the balance of probabilities that there was a prior complaint but the State does not insist on a strict evidential standard in assessing the material put forward by an applicant. A holistic analysis of the case is undertaken and a flexible approach is adopted

In assessing whether a settlement will be offered or whether an applicant comes within the *ex gratia* scheme, the State will consider instances of abuse which occurred in both primary and post-primary schools.

In assessing a case or application, the State works on the basis that a prior complaint includes not only complaints made to teachers but also complaints made to any person(s) in authority in a school. There are no time limits to the submitting of an application and if new evidence subsequently comes to light, even where an application had been declined, a further application can be submitted at any stage.

In addition to the compensation mechanisms set out in the State's Action Plans filed to date, prior to the Court's judgment in *O'Keeffe v Ireland*, the State had also compensated victims of sexual abuse in day schools by settling cases where, as a matter of domestic law, the State accepted liability.

Following the judgment, the State accepted that a further category of victims of sexual abuse in day schools who were entitled to compensation had been identified by the Court and the steps taken by the State to compensate those victims are detailed in this and previous Action Plans.

Litigation at Time of the Judgment

The SCA made settlement offers in 7 of the 35 extant cases and 6 have now been accepted while in the remaining case, the settlement offer was withdrawn as the Plaintiff died in August 2015. In these cases, the prior complaints were made to a school authority, not a State authority, and the prior complaints arose in relation to abuse in different schools, not the school in which the 6 Plaintiffs were abused.

Payments of €84,000 have been made in each of the 6 cases.

The SCA wrote to the other 28 litigants in March 2015 advising that their circumstances do not appear to come within the parameters of the judgment and inviting them to revert with any contrary evidence.

To date, no evidence has been submitted to the SCA in any of these 28 cases.

Where a litigant does not accept the offer in settlement of his/her case or where the SCA is not satisfied that the case comes within the terms of the judgment, the case will proceed before the domestic Courts.

New Litigation in relation to Historic Abuse Claims

Where other Plaintiffs institute claims against the State in relation to historic school child sexual abuse which are not statute barred and their circumstances come within the terms of the ECtHR Judgment, the SCA is authorised to make settlement offers as in the existing cases.

Where a litigant does not accept the settlement offer or where the SCA is not satisfied that a case comes within the terms of the Judgment or where a case is statute barred, the case will proceed before the domestic Courts.

Since the ECtHR Judgement, the SCA has been notified of many new historic school child abuse claims. These are either (a) claims which are entirely newly instituted or (b) are pre-existing claims against school authorities and in which claimants are now more recently seeking to join the State as a respondent.

The SCA has engaged and will continue to engage with claimants' solicitors to clarify the circumstances of new claimants' claims and to make settlement offers where the claims come within the terms of the ECtHR Judgement and are not statute barred.

In June 2016, the High Court gave Judgments in three related historic day school abuse claims (Wallace v. Creevey and Others [2016] IEHC 294 , Naughton v. Drummond and Others [2016] IEHC 290 and Kennedy v. Murray and Others [2016] IEHC 291) on, inter alia, whether the claims disclosed a cause of action against the State Defendants. The Judge (Mr Justice Seamus Noonan) found that, on the facts of these cases, there was no evidence of liability on the part of the State Defendants as there was, inter alia, no allegation or evidence of a prior complaint in respect of the abuser. Accordingly, the Judge held that the claims were distinguishable from the Louise O'Keeffe case. The Judgements¹⁸ have not been appealed by the Plaintiffs and the State has agreed to no orders as to costs, i.e. the State Defendants will bear their own legal costs and will not seek costs from the unsuccessful Plaintiffs.

Discontinued Litigation in relation to Historic Abuse Claims

The position of historical cases which were discontinued has been reviewed. In July 2015, the Government agreed to respond to those persons who had instituted legal proceedings in relation to school child sexual abuse which were subsequently discontinued, in a similar way to how it is dealing with persons in the previous two categories.

As these cases have been discontinued the proceedings are no longer before the domestic Courts. Accordingly, *ex-gratia* payments will be offered to those persons who come within the terms of the ECtHR judgment and whose claims were not statute barred at the time of their discontinuance.

18

<http://courts.ie/Judgments.nsf/FrmJudgmentsByCourtAll?OpenForm&Start=7.1.61&Count=35&Expand=7.1&Seq=4>

It is not possible to assess at this stage how many cases in this category will satisfy these criteria. Persons who believe that their cases come within the criteria can contact the SCA and provide supporting evidence. 49 applications have been received of which 44 applications have been declined. All of the applications that were declined were advised that they could apply for an independent assessment of their application.

The State Claims Agency (SCA) process

In assessing the original application, the SCA considers the information and/or documentation provided by the Applicant or his/her solicitor to determine (a) if there were relevant legal proceedings in being prior to the ECtHR judgement, involving the State, which were not Statute Barred before being discontinued, and (b) whether or not the applicant was sexually abused by a person in respect of whom there is evidence of a prior complaint of sexual abuse to a school authority prior to 1991/1992.

For the purposes of establishing whether or not the applicant meets the qualifying criteria, the SCA consults its various reviews of closed Day School abuse claims. These reviews contain details of all historic Day School abuse claims received by either the SCA or the Chief State Solicitors' Office and contain data on (1) whether or not legal proceedings involving the State had been instituted, (2) whether or not the claims had been discontinued, (3) where relevant, the dates of discontinuance, (4) the identities of the alleged abusers, and, (5) the linking of claims from different victims of the same abusers.

The SCA double checks the files on all other linked and relevant claims' files.

The SCA requests the Department of Education and Skills to undertake a fresh search of their records for any and all evidence of a prior complaint in respect of the alleged abuser.

The SCA writes to the solicitor representing the relevant Religious Congregation who are managers and/or patrons of the schools and/or employers of the abusers, asking that they provide any and all information and documentation relevant to the abuser and to the possibility of a prior complaint having been made in respect of that abuser. In seeking this information, the SCA advises the Congregation that should a payment be made to an applicant, there are no financial implications for the Congregation as the payment is an *ex-gratia* payment by the State.

Following all of the above steps and consideration of all relevant materials, the SCA makes its decision on the *Ex-Gratia* Scheme application. Successful applicants are informed by letter (either directly or through their solicitor) and arrangements are made for payment. The SCA will write to the individuals or, where legally represented, their solicitors, in cases where their application for an *ex-gratia* payment has been declined and advise of the independent assessment process.

The Independent Assessor

A retired Judge of the High Court, Justice Iarfhlaith O'Neill has been appointed to act as an independent assessor in relation to determinations of the SCA on eligibility of

applicants to the *ex-gratia* scheme.

The independent assessor has access to all records on file with the SCA in relation to an individual application. When applying for an independent assessment, the applicant may also provide the following:

- A statement setting out the grounds on which the assessment is sought and why the applicant considers the determination by the SCA to be incorrect;
- Other relevant documents.

On receipt of the application for assessment, the independent assessor can look for further information and may also convene an oral hearing if he deems it appropriate.

Further information on the independent assessment process, including the applicable timeframes, is published on the Department's website.¹⁹ To-date, 21 applications for an independent assessment have been received. The State will abide by any determination of the independent assessor.

Notices of Discontinuance

In the case of *Mr A v Minister for Education & related cases* [2016] IEHC 268²⁰, five Plaintiffs – who, it is important to point out, are not eligible under the *ex gratia* scheme - sought to set aside Notices of Discontinuance in respect of legal proceedings concerning historical abuse claims. Following established jurisprudence, the High Court (Barrett J.) refused to set aside the Notices of Discontinuance which had been served on the State respondents by the Plaintiffs and which had the effect of discontinuing the proceedings. The Court held that the Notices constituted a contract with the defendants and a settlement of the proceedings. This judgment was appealed to the Court of Appeal. The appeal was heard on 4th July 2017 and the judgement issued on 21st July 2017. The Court of Appeal dismissed the appeal. It held that the High Court has an inherent jurisdiction to set aside a Notice of Discontinuance or to permit a Plaintiff to withdraw a Notice of Discontinuance but that the High Court correctly found that the Notices in these cases should not be set aside.

One of the original 5 plaintiffs, who was previously represented by a solicitor, has personally filed Notice of Appeal papers to the Supreme Court on 23 August 2017 seeking leave to appeal the judgment of the Court of Appeal. Currently this plaintiff is representing himself in the matter. The State is opposing the application for leave to appeal.

This judgment and the on-going litigation does not affect the SCA's approach to persons who discontinued their actions as outlined above. Persons who come within the terms of the ECtHR judgment and whose claims were not statute barred at the time of their discontinuance will be offered *ex gratia* payments.

Domestic Judicial Oversight

As set out previously, in assessing whether to make a settlement offer to a litigant or

¹⁹ <https://www.education.ie/en/Learners/Information/Former-Residents-of-Industrial-Schools/ECHR-OKeeffe-v-Ireland/independent-assessment-process>

²⁰ <http://www.courts.ie/Judgments.nsf/0/98C45787C9856A6380257FC4003A1D67>

whether an applicant comes within the *ex gratia* scheme, the SCA maintains a holistic and flexible approach. It considers the factual background and circumstances involved on a case-by-case basis. An applicant is not required to satisfy the level of proof that a court would require of them.

Where, in specific cases, an applicant does not accept a settlement offer, is not satisfied with the assessment made by the SCA, or where the SCA is not satisfied that the applicant meets the criteria for admission to the scheme, the applicant is entitled to proceed with litigation in the domestic courts.

Such domestic litigation may arise in several ways, depending on the circumstances. An applicant may commence or continue existing litigation seeking damages for personal injury. Such a case will proceed before the domestic courts in the usual way. An unsuccessful applicant to the scheme is, therefore, entitled to litigate and seek compensation in the domestic courts if they wish to do so.

If an individual has a complaint in relation to the operation, procedures or criteria or the *ex gratia* scheme itself or an assessment or decision made pursuant to it, he or she may seek to commence judicial review proceedings in respect of that complaint and challenge the procedures applied to him or her or other aspects of the scheme. Such a judicial review case concerning the operation of the *ex gratia* scheme was instituted by a person before the Irish courts and has now been settled.

Litigation in respect of Current Abuse Claims

Ms O’Keeffe’s abuse occurred in the early 1970s prior to the introduction and enhancement of explicit child protection arrangements in schools in Ireland. If, notwithstanding the robust child protection system which is now in place, a child suffers sexual abuse in the education sector, and in addition to the criminal investigations which would follow, such a child would have recourse to the courts to seek damages.

Section 3(1) of the European Convention on Human Rights Act 2003 requires an organ of State (defined as a body established by law or through which any of the legislative, executive or judicial powers of the State are exercised) to perform its functions in a manner compatible with the State’s obligation under the Convention provisions. Organs of the State include Government Departments such as the Department of Education and Skills, the Health Service Executive, the Child and Family Agency and the police force, An Garda Síochána. Therefore, by way of further protection for such a litigant, Section 3(2) of the 2003 Act provides that a person who has suffered injury, loss or damage as a result of a contravention of *subsection (1)*, may, if no other remedy in damages is available, institute proceedings to recover damages in respect of the contravention. This specific right of action relates to any failure by the State from 31st December 2003 when the Act came into operation. Section 2 of the Act requires courts when interpreting and applying any statutory provision or rule of law, in so far as is possible, subject to the rules of law relating to such interpretation and application, to do so in a manner compatible with the State’s obligations under the Convention provisions.

Next Steps

18. A further Action Plan will be filed by 28th July 2018 to report on the actions identified.