

## SECRETARIAT GENERAL

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Meeting: 1243 meeting (8-10 December 2015) (DH)

Item reference: Communication from a National Human Rights Institution  
(Irish Human Rights and Equality Commission)  
(19/10/2015) 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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Réunion : 1243 réunion (8-10 décembre 2015) (DH)

Référence du point : Communication d'une Institution nationale des droits de  
l'homme (Irish Human Rights and Equality Commission)  
(19/10/2015) 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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**Response of Ireland's National Human Rights Institution to the State's Action**

**Plans pursuant to Rule 9,  
Rules of the Committee of Ministers**

***O'Keeffe v. Ireland* (Application No. 35810/09)**



**12 October 2015**

**I. Introduction**

On 28<sup>th</sup> January 2014, the European Court of Human Rights (Grand Chamber), after considering submissions from the parties, delivered its judgment in the case of *O'Keeffe v. Ireland* (Application No. 35810/09). In its judgment, the Court held that there had been a violation of Article 3 of the European Convention on Human Rights ('the Convention') as regards the State's failure to fulfil its obligation to protect the applicant and further that there had been a violation of Article 13 of the Convention, taken with the substantive aspect of Article 3 of the Convention, on account of the lack of an effective remedy. Ireland has now submitted a number of action plans in relation to the implementation of the judgment, including action plans dated 24<sup>th</sup> July 2014, 28<sup>th</sup> January 2015 and 28 July 2015 respectively.<sup>1</sup> Rule 9 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements permits national institutions for the promotion and protection of human rights to submit communications under Article 46, paragraph 2, of the Convention.<sup>2</sup> This affords national human rights institutions the opportunity to contribute to the execution of a judgment, highlighting once again the pivotal role of subsidiarity in the Convention system. In accordance with Rule 9, the Irish Human Rights and Equality Commission has the honour of submitting its comments on the State's action plans in this case.

<sup>1</sup> The Commission notes that a further action plan is to be filed by 28 January 2016.

<sup>2</sup> Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements (Adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers' Deputies).

The Irish Human Rights and Equality Commission ('the Commission') was established pursuant to the Irish Human Rights and Equality Commission Act 2014. The Commission, which replaced the Irish Human Rights Commission and the Equality Authority, is Ireland's National Human Rights Institution ('NHRI'). The Commission performs its functions in conformity with the United Nations Paris Principles of 1993 which set out the role of independent national institutions charged with protecting and promoting human rights.

NHRIs are fundamentally different from States and non-governmental organisations and, as such, represent a "third dimension". NHRIs work to prevent violations at the domestic level, encouraging domestic remedies and monitoring implementation of European Court judgments. The areas of work of NHRIs range from legislative and policy review, follow-up of international obligations, monitoring, research, education and awareness-raising, to investigation and litigation functions. In this way, NHRIs play a key role in identifying and seeking to address structural and systemic deficiencies in their own countries and in the European system as a whole, thus contributing to the effective national implementation of the Convention.<sup>3</sup> In the course of the proceedings in this case, the Irish Human Rights Commission was granted leave and submitted written comments pursuant to Article 36(2) of the European Convention on Human Rights and Rule 44(3) of the Rules of the European Convention on Human Rights.

## **II. Implementation of the Judgment to Date**

The Commission welcomes the State's compliance with the individual measures ordered by the Court in respect of the applicant, Ms O'Keeffe.<sup>4</sup> The Commission also welcomes the recent legislative proposals which aim to strengthen the system of child protection within schools in Ireland, including, in particular, the proposal to place key elements of the Children First guidelines on a statutory footing in the form of the

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<sup>3</sup> The role of NHRIs in relation to the implementation of the Convention system at a national level is affirmed in both the Brighton and Brussels Declarations.

<sup>4</sup> Action Plan, 28<sup>th</sup> January 2015, paragraph 5.

Children First Bill 2014.<sup>5</sup> The Commission calls for the full implementation of existing measures and the timely enactment of the Children First Bill 2014.

However, the Commission is of the view that, in order to implement fully the findings of the Court in its judgment and to ensure compliance with the Convention at the national level, the State must consider the adoption of further general measures. In particular, the Commission is concerned that the State, in its implementation of the judgment, has adopted an overly restrictive interpretation of the principles laid down in the judgment concerning the violation of the substantive aspect of Article 3 of the Convention and the right to an effective remedy under Article 13 of the Convention.

### **III. The Violation of the Substantive Aspect of Article 3 of the Convention**

The Commission notes that the State Claims Agency has undertaken a review of “its day school abuse cases to identify those that come within the parameters of the judgment”, consequent upon which the Government has approved proposals to offer out-of-court settlements to the relevant plaintiffs.<sup>6</sup> It also notes that the State Claims Agency is undertaking a review of certain historical cases. While it is of course possible that these cases might include cases which do not come within the parameters of the judgment, the Commission is concerned that, in undertaking these reviews, the State has adopted an unduly narrow approach to the category of “victim” who would be entitled to compensation from the State by reason of its violation of the substantive aspect of Article 3 of the Convention. In particular, it appears that the State has interpreted the Court’s judgment as meaning that there would only be a violation of the substantive aspect of Article 3 if the abuse occurred in schools in circumstances where the school authorities had failed to take action in response to a prior complaint of abuse and where the abuse occurred prior to 1991/1992 when the Department of Education first introduced child protection guidelines for schools.<sup>7</sup> If this is indeed the case, it is the Commission’s view that the State is not giving full effect to the principles laid down in the judgment of the Court.

<sup>5</sup> Action Plan, 28<sup>th</sup> January 2015, paragraph 14.

<sup>6</sup> Action Plan, 28<sup>th</sup> January 2015, paragraph 16.

<sup>7</sup> See e.g. Humphreys and Roche, “School abuse survivors offered up to €84,000 in cases against the State”, *Irish Times*, 16 December 2014.



In its assessment of the violation of Article 3 of the Convention, the Court observed that, having regard to the fundamental nature of the rights guaranteed by that article 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” and that this obligation applied at the time of the events relevant to Ms O’Keeffe’s case.<sup>8</sup> The Court went on to comment that “...the nature of child sexual abuse is such, particularly when the abuser is in a position of authority over the child, that the existence of useful detection and reporting mechanisms are fundamental to the effective implementation of the relevant criminal laws”.<sup>9</sup> In this regard, the Court clarified that “[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”.<sup>10</sup> Summarising the issue before it, the Court stated that the question for its purposes was “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”.<sup>11</sup>

In considering this question, the Court noted the distinctive model of primary education in Ireland, the State’s awareness of the issue of sexual crime against minors, and the mechanism relied upon by the State for the detection and reporting of ill-treatment of primary school pupils. Having done so, the Court concluded 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” and noted how the facts of Ms O’Keeffe’s case illustrated the consequences of this lack of protection.<sup>12</sup> In the Court’s view, the inherent obligation of government to protect children from ill-treatment – described as “of acute importance in a primary education context” – “was

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<sup>8</sup> Judgment, paragraphs 146-147.

<sup>9</sup> Judgment, paragraph 148.

<sup>10</sup> Judgment, paragraph 149.

<sup>11</sup> Judgment, paragraph 152.

<sup>12</sup> Judgment, paragraphs 166-167.

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".<sup>13</sup> Instead, as the Court noted, potential complainants were directed away from the State authorities and towards the non-State denominational managers.<sup>14</sup> Applying that analysis to the facts of the specific case before it, the Court concluded that the consequences in Ms O'Keeffe's 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".<sup>15</sup> On this basis, the Court concluded that the State had failed to fulfill its positive obligation to protect the applicant from sexual abuse while a primary school pupil under Article 3 of the Convention.<sup>16</sup>

While it is clear that, in Ms O'Keeffe's specific case, there had been prior complaints made to the school authorities about the abuser before Ms O'Keeffe herself was abused, in the Commission's view, it is equally clear that the Court's finding that there was a violation of the substantive aspect of Article 3 of the Convention was not specifically based on, and did not depend on, this fact. As is clear from paragraphs 165 and 168 of the judgment read as a whole, the Court's finding was based on the more general failure to put in place mechanisms to provide protection against abuse for primary school pupils such as the applicant. In the absence of any such mechanisms, the question of whether or not there had been a prior complaint of abuse against the abuser is largely irrelevant. Indeed, it is quite clear that, at the level of the relationship between the applicant and the State which is the relevant consideration for the purposes of the Convention, the existence of prior complaints against the abuser made no difference to the applicant's position and it was not until 1995 that the State authorities learnt about any complaints against the abuser. This was precisely because of the lack of any effective mechanisms of child protection, including

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<sup>13</sup> Judgment, paragraph 168.

<sup>14</sup> Judgment, paragraph 168.

<sup>15</sup> Judgment, paragraph 168.

<sup>16</sup> Judgment, paragraph 169.



mechanisms for the communication and processing of any complaints of abuse. Against this backdrop, even if there had been no prior complaint of abuse (for example, in the case of a first-time abuser), the lack of any effective mechanism of protection would nonetheless have violated the substantive aspect of Article 3 of the Convention.

In the circumstances, the Commission is of the view that it would be an unduly narrow interpretation of the Court's judgment to interpret its finding of a violation of the substantive aspect of Article 3 as being confined solely and specifically to cases where the school authorities had failed to take action in response to a prior complaint of abuse.

Furthermore, while it is the case that certain limited child protection guidelines were introduced by the Department of Education in 1991/1992, the fact that such measures were introduced does not necessarily mean that the mechanisms of protection were effective to protect against violations of the subsequent aspect of Article 3 of the Convention, at least in the initial period after their introduction. For this reason, the Commission considers that an interpretation of the judgment strictly limiting its scope and application to events prior to 1991/1992 would not be compatible with the principles laid down in that judgment.

#### **IV. The Right to an Effective Remedy under Article 13 of the Convention**

Related to its concern that the State has adopted an unduly narrow approach to the category of "victim" to whom the principles set out in the judgment apply, the Commission is also concerned that the general measures adopted by the State under its action plans do not provide for an effective remedy at the domestic level for other victims of child sexual abuse in the primary education system. Thus, if an individual in a similar position to Ms O'Keeffe wished to take legal action against the State by reason of its failure to fulfill its positive obligations under Article 3 of the Convention, that individual would face similar challenges to those faced by Ms O'Keeffe which ultimately necessitated her application to the European Court.

In this regard, the Commission accepts that the context of child protection in the primary education system has changed significantly in the over forty years since the facts giving rise to the application in *O'Keeffe*. In particular, as detailed in the State's actions plans, the State has adopted a range of measures which provide guidance and direction on child protection.<sup>17</sup> Nevertheless, the fundamental structure of primary education, and the allocation of responsibilities between the State and non-State actors, have not materially changed in that time.

If an individual suffered child sexual abuse in an Irish primary school – whether in 1970, 1980, 1990, 2000 or 2010 – and wished to seek a remedy against the State before the Irish courts on the basis that there had been a violation under Article 3 of the Convention of the positive duty to protect him/her from ill-treatment while at school, it is not clear that that individual would have any, or any effective, remedy against the State. While the adoption and enhancement of child protection measures in the course of the 1990s and 2000s might render it more difficult for an individual in the primary education system during that period to succeed in such a claim, it cannot be excluded that there might be cases in which, notwithstanding the existence of such child protection measures, there is a violation of an individual rights under Article 3 of the Convention. In addition, it is possible that further victims of child sexual abuse who attended primary school in Ireland prior to 1991/1992 will emerge over time and may wish to seek a remedy against the State. The category of victims is thus not necessarily limited to those who have already taken proceedings against the State, which has been the subject of the reviews undertaken by the State Claims Agency referred to in the State's action plans.

The Court's findings on the lack of effective remedies against the State in the judgment thus remain valid. First, it is clear from the Supreme Court's judgment in *O'Keeffe v. Hickey & Others*<sup>18</sup> that an action alleging vicarious liability on the part of the State for the actions of a primary school teacher would not be an effective remedy.<sup>19</sup> Secondly, it also appears to be the case that a claim against the State in direct negligence – which would require the recognition of a duty of care on the part

<sup>17</sup> Action Plan, 28<sup>th</sup> January 2015, paragraphs 8-14.

<sup>18</sup> *O'Keeffe v. Hickey & Others* [2009] 2 IR 302.

<sup>19</sup> Judgment, paragraph 184.



of the State to primary school pupils in this context – would not be an effective remedy.<sup>20</sup> Thirdly, an individual faces similar challenges in advancing a so-called constitutional tort claim, such as a claim for breach of his or her constitutional right to bodily integrity.<sup>21</sup> In the absence of a significant shift in the Irish courts' jurisprudence in these areas, it is thus very unlikely that these remedies at the domestic level would be effective for an individual in a similar position to Ms O'Keeffe.

The only other possible remedy available to an individual in this context would be an action for damages under Section 3(2) of the European Convention on Human Rights Act 2003 ('the Act of 2003'), the legislation which gives further effect to the Convention in Irish law. Under section 3(1) of the Act of 2003, subject to any statutory provision (other than the Act itself) or rule of law, every organ of the State "shall perform its functions in a manner compatible with the State's obligations under the Convention provisions". The Minister for Education and Skills is an "organ of the State" for the purpose of the Act of 2003. Under section 3(2), 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 in the High Court (or, subject to subsection (3), in the Circuit Court) and the Court may award to the person such damages (if any) as it considers appropriate". Section 3(2) of the Act of 2003 thus appears to provide a remedy to individuals where organs of the State have failed to perform their functions in a Convention-compatible manner. Yet an action for damages under section 3(2) by an individual in a similar position to Ms O'Keeffe would face a number of significant (and, in some cases, insuperable) obstacles. First, the duty on the organs of the State under section 3(1) is specifically "subject to any statutory provision ...or rule of law", which raises the possibility that the exclusion of liability of the State under the common law or the Constitution (as discussed in the preceding paragraph) might be raised to defeat a claim under section 3(2). Related to this, an individual would have to demonstrate that no other remedy in damages is available; while this Court has recognised the ineffectiveness of the civil remedies in negligence, vicarious liability and constitutional tort, it is by no means certain that a domestic court would be

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<sup>20</sup> Judgment, paragraph 185.

<sup>21</sup> Judgment, paragraph 186.

willing to do so without the individual having first exhausted those remedies. Secondly, under section 3(5)(a) of the Act of 2003, proceedings under section 3 “shall not be brought in respect of any contravention of subsection (1) which arose more than 1 year before the commencement of the proceedings”. While section 3(5)(b) of the Act of 2003 allows this period to be extended “by order made by the Court if it considers it appropriate to do so in the interests of justice”, section 3(5) nonetheless places a significant temporal limitation on any action for damages under section 3(2). Thirdly, and most significantly, the Supreme Court has made it clear that the Act of 2003 does not have retrospective effect.<sup>22</sup> Thus, claims relating to contraventions predating the coming into operation of the Act of 2003 on 31<sup>st</sup> December 2003 could not be the subject of an action for damages under section 3(2) of the Act. For these reasons, the Commission is of the view that an action under section 3(2) of the Act of 2003 is unlikely to be an effective remedy for persons who, in a similar way to Ms O’Keeffe, have suffered a violation of their rights under Article 3 of the Convention.

In the circumstances, the Commission is concerned that the general measures relating to Article 13 of the Convention, set out at paragraph 16 of the Action Plan of 28<sup>th</sup> January 2015, do not fully implement the judgment and ensure compliance with Articles 3 and 13 of the Convention at the domestic level.

## **V. Conclusion**

In conclusion, the Commission welcomes the steps taken by the State to date to implement the judgment in *O’Keeffe v. Ireland*. However, the Commission is concerned that the general measures adopted to implement the judgment do not fully and meaningfully address the implications of the judgment, specifically in the following respects. First, the Commission is concerned that the State has adopted an overly restrictive interpretation of the category of “victims” which come within the scope of the Court’s judgment by apparently limiting its application to those cases where a prior complaint had been made against an abuser which had not been acted upon and where the abuse occurred prior to 1991/1992 when child protection

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<sup>22</sup> *Dublin City Council v. Fennell* [2005] 1 IR 604.

guidelines were first introduced. Secondly, the Commission is concerned that the State has not put in place an effective remedy at the domestic level for individuals who, in a similar way to Ms O'Keeffe, have suffered a violation of their rights under the substantive aspect of Article 3 of the Convention. The Commission awaits the State's updated action plan and may provide further views to the Department for the Execution of Judgments on the implementation of the judgment in due course.