



**Coimisiún na hÉireann um Chearta  
an Duine agus Comhionannas**  
Irish Human Rights and Equality Commission

## **O'KEEFFE v IRELAND**

**(Application no. 35810/09)**

**Irish Human Rights and Equality Commission:**

**Communication under Rule 9(2) of the Rules of the Committee of Ministers**

### *Introduction*

1. The Irish Human Rights and Equality Commission ('the Commission') is Ireland's national institution for the promotion and protection of human rights.<sup>1</sup>
2. These submissions relating to the execution of the judgment of the Grand Chamber of the European Court of Human Rights ('the Court') in *O'Keeffe v Ireland*<sup>2</sup> are made to the Committee of Ministers pursuant to Rule 9(2) of the Rules for the supervision of the execution of judgments and of the terms of friendly settlements ('the Rules').<sup>3</sup>
3. The Commission has previously made submissions to the Committee of Ministers ('the Committee') relating to the execution of the judgment of the Grand Chamber.<sup>4</sup> These further submissions are made in light of the most recent actions plans submitted by the State Party.<sup>5</sup>
4. In these submissions, the Commission respectfully requests that the Committee exercise its power to refer the matter of *O'Keeffe* to the Grand Chamber pursuant to Article 46(3) of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention'), which provides –

If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds

<sup>1</sup> The Commission was established under the Irish Human Rights and Equality Commission Act 2014 on 1 November 2014. The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights granted the Commission "A" status in November 2015, indicating full compliance with the Principles Relating to the Status of National Institutions ('the Paris Principles', A/RES/48/134).

<sup>2</sup> *O'Keeffe v Ireland* (Application no.35810/09), (2014) 59 EHRR 15.

<sup>3</sup> Adopted by the Committee of Ministers on 10 May 2006 at the 964<sup>th</sup> meeting of the Ministers' Deputies.

<sup>4</sup> DD(2015)1136, dated 12 October 2015.

<sup>5</sup> DD(2016)123 dated 28 January 2016 and DD(2016)851 dated 28 July 2016.



of the representatives entitled to sit on the committee.<sup>6</sup>

5. The Commission notes that pursuant to Rule 9(2) of the Rules of the Committee of Ministers, the Committee is entitled to consider any communication from a national institution for the promotion and protection of human rights with regard to the execution of judgments under Article 46(2) of the Convention. The Commission submits that the within request for a reference to the Grand Chamber under Article 46(3) of the Convention is a communication which falls within the terms of Rule 9(2), insofar as it relates to the supervision of the execution of the judgment in *O’Keeffe* by the Committee of Ministers under Article 46(2).

### *Background*

6. It is not proposed to outline the factual background to *O’Keeffe* in these submissions save insofar as this is relevant to the interpretive issues arising from the execution of the Court’s judgment, and to the referral of this matter to the Grand Chamber under Article 46(3) of the Convention.
7. It will be recalled that in *O’Keeffe* the applicant’s complaint related to the failure by the State Party to put in place an adequate legal framework to protect children within the national school system from sexual abuse, in violation of its positive obligations under Article 3. The complaint arose in circumstances where the applicant had been sexually abused in 1973 while attending a school owned (through trustees) by a Roman Catholic bishop, and managed by a local priest. The abuse was carried out by the school’s principal teacher (‘LH’), an employee of the school manager.
8. In its decision of 28 January 2014, the Grand Chamber held (by a majority) that there had been a violation of (a) the substantive aspect of Article 3 of the Convention, as regards the State Party’s failure to fulfill its obligation to protect the applicant, and (b) of Article 13 of the Convention (taken together with the substantive aspect of Article 3) on account of the lack of an effective remedy in this regard.
9. The basis on which the Court reached these conclusions may briefly be summarised.

### *Court’s assessment of violations of Article 3 and Article 13*

10. In its consideration of the applicant’s complaint of a violation of Article 3 of the Convention, the Court held that it was an inherent obligation of the State Party to ensure the protection of children from ill-treatment though the adoption of special measures and safeguards, and that this was an obligation that applied at the time of

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<sup>6</sup> As amended by Protocol No.14, Council of Europe Treaty Series No.194. Ireland signed Protocol No.14 on 13 May 2004, and ratified same on 10 November 2004.





the events giving rise to the complaint, namely in 1973.<sup>7</sup>

11. The Court found that at the material time the State Party knew, or ought to have known, of the level of sexual crime by adults against minors within the State. The Court was accordingly of the view that, in relinquishing control of the education of the vast majority of children to non-State actors, the State should have been aware of the potential risk to children if it failed to adopt commensurate measures and safeguards.<sup>8</sup> The Court considered that the mechanisms adopted by the State Party did not afford any effective protection for children within the national school system.<sup>9</sup>
12. As to the applicant's complaint under Article 13, the Court considered that none of the domestic remedies available to the applicant as against the State and/or the relevant non-State actors was effective.<sup>10</sup>

*Individual and general measures adopted*

13. In the action plans submitted to the Committee to date, the State Party has pointed to a range of individual and general measures adopted with a view to executing the judgment of the Court in *O'Keeffe*.<sup>11</sup>
14. The State Party has confirmed that the individual measures ordered by the Court have been discharged, and this has been welcomed by the Commission.<sup>12</sup>
15. The State Party has also pointed to a number of general measures adopted with a view to strengthening the protections available to children, both within the education system and more generally, and again these have been welcomed by the Commission.<sup>13</sup>
16. The Commission considers however that the State Party has adopted an overly restrictive interpretation as to the category of 'victims' who come within the scope of the Grand Chamber's judgment, by limiting its application to those cases where a prior complaint had been made against an abuser which had not been acted upon by school authorities, and where the abuse occurred prior to 1991 – 1992, when child

<sup>7</sup> At paras. 146 – 147 of the judgment.

<sup>8</sup> At para. 162 of the judgment.

<sup>9</sup> At para. 165 of the judgment.

<sup>10</sup> At paras 178 – 187 of the judgment.

<sup>11</sup> DD(2014)895, DD(2015)138, DD(2015)794, DD(2016)123, DD(2016)851.

<sup>12</sup> DD(2014)895, at paras. 5 – 6.

<sup>13</sup> The general measures adopted by the State Party include the issuing of child protection guidelines, the introduction of vetting for new teaching and non-teaching school staff, the enactment of the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012, the National Vetting Bureau (Children and Vulnerable Persons) Act 2012, and the Teaching Council (Amendment) Act 2015, and the Children First Act 2015.



protection guidelines were first introduced by the Department of Education and Skills.

17. In this regard the Commission refers the Committee to section 17 of the State's most recent action plan, dated 28 July 2016, outlining the general measures adopted to date having regard to the Court's findings under Article 13.<sup>14</sup>
18. In its action plan, the State Party outlines that the State Claims Agency<sup>15</sup> has been authorised by the Government to offer out of court settlements to persons taking cases of child sexual abuse as against the State.
19. The action plan provides that an offer of an out of court settlement may be made in cases that in the view of the State Party come within the terms of the judgment of the Court in *O'Keeffe*, and that are not statute barred –

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 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.<sup>16</sup>

*Application of criteria adopted by the State Party*

20. In the view of the State Party, therefore, a case will fall within the scope of the judgment in *O'Keeffe* where the following criteria are satisfied –
  - a. the circumstances of the case involve sexual abuse of a school child by an employee of a primary or post-primary school;
  - b. a prior complaint of sexual abuse had been made as against the employee concerned to the relevant school managerial authority;
  - c. the abuse occurred prior to the issue of child protection guidelines to primary

<sup>14</sup> DD(2016)851.

<sup>15</sup> The functions of the State Claims Agency, established under Part 2 of the National Treasury Management Agency Act 2000, include the management of claims of compensation for personal injuries occasioned by State authorities.

<sup>16</sup> DD(2016)851, section 17, at pp.5 – 8.





and post-primary schools by the Department of Education and Skills, in 1991 and 1992 respectively.

21. It is apparent that that the application of these criteria has operated to deprive individuals who claim they have suffered abuse in circumstances that were, for all material purposes, identical to those of the applicant in *O'Keeffe*, from securing an effective remedy for the purposes of Article 13 of the Convention.
22. In this regard the Committee's attention is drawn to the sections of the State Party's most recent action plan which deal with cases that were (a) in being prior to the delivery of the judgment of the Court in *O'Keeffe*, (b) instituted as against the State in the wake of the judgment of the Court in *O'Keeffe*, and (c) discontinued prior to the delivery of the judgment of the Court in *O'Keeffe*.<sup>17</sup>
23. The Committee will note that the State Party has authorised the State Claims Agency to offer compensation to individuals who satisfy the criteria as outlined above. Where, however, the State Claims Agency is not satisfied that the case satisfies the criteria as outlined, it will be defended in the courts.
24. The restrictive impact of the application of these criteria is illustrated by the fact that just 7 offers of settlement have to date been made by the State Claims Agency in the wake of the decision in *O'Keeffe*.<sup>18</sup>
25. The Committee will also note that the State Party makes reference in its most recent action plan to a number of decisions of the High Court in which applications brought by the State to set aside its joinder as a defendant in proceedings relating to historic claims of child sexual abuse have been successful.<sup>19</sup> The State Party's most recent action plan states that in each of these cases, the High Court found that 'there was no evidence of liability on the part of the State Defendants as there was 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'.<sup>20</sup>
26. It is respectfully submitted that this represents a misunderstanding of the decision of the High Court in these cases. While it was submitted on behalf of the State in each

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<sup>17</sup> DD(2016)851 at pp.6 – 7.

<sup>18</sup> DD(2016)851 at p.7.

<sup>19</sup> *Naughton v Drummond* [2016] IEHC 290, *Kennedy v Murray* [2016] IEHC 291, and *Wallace v Creevey* [2016] IEHC 294 (Unreported, High Court, Noonan J, 1 June 2016). In each of these cases, State parties (the Minister for Education, Ireland, and the Attorney General) had been joined as defendants by the plaintiff in light of the judgment of the Grand Chamber in *O'Keeffe*. The State parties successfully applied for orders setting aside their joinder on the grounds that the plaintiff's claim as against the State were statute barred and/or disclosed no reasonable cause of action against the State.

<sup>20</sup> DD(2016) at p.6.



of these cases that the absence of a prior complaint of abuse to the school authorities was such that they were distinguishable from the facts in *O’Keeffe*,<sup>21</sup> the High Court made no findings in this regard. Rather, the High Court found in each case that the proceedings as against the State Party were statute barred, and that they disclosed no reasonable cause of action against the State.<sup>22</sup> The existence or otherwise of a prior complaint of abuse formed no part of the High Court’s reasoning in this regard.

*Interpretive issues arising*

27. It is submitted by the Commission that the criteria adopted by the State Party, as outlined above, represent a misinterpretation of the scope of application of the judgment of the Court in *O’Keeffe*, in particular as to the requirement that a prior complaint of abuse must have been made to the relevant managerial authority.
28. While the existence of a prior complaint to the school manager, in 1971, as against LH, was an element of the factual matrix of *O’Keeffe*, it is submitted that the existence of such a complaint was irrelevant to the Court’s assessment as to the failure of the State Party to fulfil its obligations to the applicant under Article 3.
29. Indeed it is submitted that the existence of a prior complaint of abuse to the school manager, being a non-State actor, could not have had any relevance to the Court’s assessment of the State’s knowledge of the risk of harm to the applicant.
30. Moreover, the Commission would argue that the existence of such a complaint could not properly have been relevant to the Court’s assessment in circumstances where the allegations of abuse as against LH were only brought to the attention of the State in or around 1995.<sup>23</sup>
31. In this regard it must be emphasised that the Court’s concern was the state of knowledge of the State Party, not the state of knowledge of the school manager. The Court’s reasoning in this regard was explicit –

To conclude, this is not a case which directly concerns the responsibility of LH, of a clerical Manager or Patron, of a parent or, indeed, of any other individual for the sexual abuse of the applicant in 1973. Rather, 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

<sup>21</sup> *Naughton v Drummond* [2016] IEHC 290 at para.9, *Kennedy v Murray* [2016] IEHC 291 at para.10, and *Wallace v Creevey* [2016] IEHC 294 at para.8.

<sup>22</sup> *Naughton v Drummond* [2016] IEHC 290 at para.51, *Kennedy v Murray* [2016] IEHC 291 at para.51, and *Wallace v Creevey* [2016] IEHC 294 at para.50.

<sup>23</sup> See para.19 of the judgment for a summary of the criminal investigation by State authorities as against LH.





whether it adequately protected children, through its legal system, from such treatment.<sup>24</sup>

32. In the Court's view, the State's knowledge flowed *inter alia* from its prosecution of offences relating to the sexual abuse of minors at the material time,<sup>25</sup> the evidence provided to the Carrigan Committee as early as 1931,<sup>26</sup> and from complaints made to State authorities prior to and during the 1970s, as evidenced by the Ryan Report.<sup>27</sup>
33. While the Court did express the view that adequate action taken on foot of the prior complaint made in 1971 as against the teacher concerned, LH, to the school managerial authorities could reasonably have been expected to prevent the risk of the applicant being abused by the same teacher some two years later,<sup>28</sup> the existence of such a prior complaint was not material to its finding that the State had failed in its positive obligations to the applicant under Article 3. Rather, the existence of such a prior complaint merely tended to show that the mechanisms for detection and reporting of sexual abuse put in place by the State Party at the material time were ineffective.
34. In the view of the Commission, the State Party, in restricting offers of out of court settlements to circumstances where a prior complaint of abuse was made to a school authority, has misinterpreted the judgment of the Court in *O'Keefe*, thereby denying an effective remedy to individuals who, like the applicant, were subjected to child sexual abuse as a result of the failure by the State Party to adopt appropriate measures in fulfillment of its positive obligations under Article 3.

*Questions of interpretation to be referred to Grand Chamber*

35. Having regard to the foregoing, the Commission respectfully submits that the execution of *O'Keefe* is being hindered by the State Party's misinterpretation of the judgment of the Grand Chamber, and accordingly that the State Party has failed to adopt appropriate general measures in fulfilment of its obligations under Article 46(1) of the Convention.
36. The Commission submits that it is both appropriate and necessary in the circumstances that the Committee exercise its powers under Article 46(3) by referring a question of interpretation to the Grand Chamber by way of interim resolution, in accordance with Rule 10 of the Rules of the Committee of Ministers, and Rules 91 – 93 of the Rules of Court.

<sup>24</sup> At para. 168 of the judgment.

<sup>25</sup> At para. 160 – 161 of the judgment.

<sup>26</sup> At paras 71 and 161 of the judgment.

<sup>27</sup> In this regard the Court relied on the Report prepared by Professor Diarmaid Ferriter and annexed to the Ryan Report, see paras.78 – 81 and para.161 of the judgment.

<sup>28</sup> At para. 166 of the judgment.



37. The Commission respectfully suggests that the following questions be referred to the Grand Chamber –

Was the finding of the Grand Chamber in *O’Keeffe v Ireland* (Application no. 35810/09) that there had been a violation of –

a) the substantive aspect of Article 3 of the Convention as regards the State’s failure to fulfill its obligation to protect the applicant; and/or

b) Article 13, taken together with the substantive aspect of Article 3 of the Convention, on account of the lack of an effective remedy as against the State’s failure to fulfill its obligation to protect the applicant;

contingent upon the existence of a prior complaint of sexual abuse as against LH to the school manager.

#### *Concluding submissions*

38. The Commission reaffirms the importance of the effective implementation of judgments of the Court by Contracting States for the credibility and integrity of the Convention system.

39. The Commission welcomes the steps taken by the Committee of Ministers to date to strengthen the supervision of the execution of judgments of the Court, in light of the Action Plan adopted at the High Level Conference on the Future of the European Court of Human Rights (‘the Interlaken Declaration’),<sup>29</sup> together with subsequent declarations and action plans adopted at High Level Conferences held at Izmir,<sup>30</sup> Brighton,<sup>31</sup> and Brussels.<sup>32</sup>

40. The Commission notes in particular the recommendation made in the Brussels Declaration that the Committee ‘continue to use, in a graduated manner, all the tools at its disposal, including interim resolutions, and to consider the use, where necessary, of the procedures foreseen under Article 46 of the Convention, when the conditions have been satisfied’.<sup>33</sup>

<sup>29</sup> Declaration and Action Plan adopted by the High Level Conference on the Future of the European Court of Human Rights held at Interlaken on 18 – 19 February 2010.

<sup>30</sup> Declaration adopted by the High Level Conference on the Future of the European Court of Human Rights held at Izmir on 26 – 27 April 2011 (the ‘Izmir Declaration’).

<sup>31</sup> High Level Conference on the Future of the European Court of Human Rights held at Brighton on 19 and 20 April 2012 (the ‘Brighton Declaration’).

<sup>32</sup> High Level Conference on the ‘Implementation of the European Convention on Human Rights, our shared responsibility’ held at Brussels on 26 – 27 March 2015 (the ‘Brussels Declaration’).

<sup>33</sup> Brussels Declaration, para. C(1)(a), at p.7.





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41. The Commission submits it is both appropriate and necessary in the instant case that the Committee exercise its functions under Article 46(3) by referring a question of interpretation to the Grand Chamber, and that the matter of *O'Keeffe* represents a timely opportunity for the Committee to demonstrate its well-established commitment to the effective implementation of judgments of the Court.
42. The Commission notes that pursuant to Rule 9(3) of the Rules of the Committee of Ministers, the Secretariat shall bring any communications made under Rule 9(1) to the attention of the Committee.
43. The Commission looks forward to confirmation from the Secretariat that this communication has been brought to the attention of the Committee, and would respectfully ask that its request for a referral to the Court under Article 46(3) of the Convention be included in the order of business for the next human rights meeting of the Ministers' Deputies for consideration and/or for the bringing of an interim resolution in accordance with Rule 10(3) of the Rules of the Committee of Ministers, as appropriate.
44. The Commission wishes to thank the Committee in advance for its consideration of these submissions, and would welcome the opportunity to make such further submissions as may assist the Committee in its deliberations in this regard.

Signed: Emily Logan  
Emily Logan, Chief Commissioner

*For and on behalf of the Irish  
Human Rights and Equality  
Commission*

Date: 6<sup>th</sup> October 2016