FIFTH SECTION

Application no. 35810/09
by Louise O'KEEFFE
against Ireland
lodged on 16 June 2009

STATEMENT OF FACTS

THE FACTS

1. The applicant, Ms Louise O'Keefe, is an Irish national born in 1964 and she lives in Cork, Ireland. She is represented before the Court by E. J. Cantillon and Co, a firm of solicitors practising in Cork.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicant, may be summarised as follows.

1. Background facts

3. The applicant attended Dunderrow National School from 1968. The school was owned by the Catholic Diocese of Cork and Ross, its Patron was the Bishop of Cork and Ross and its Manager was Archdeacon ("S"). Since the latter was infirm, a priest ("O") was the *de facto* Manager.

4. In 1971 a parent of a child complained to O that the Principal of the school ("LH") had sexually abused her daughter. Sometime in 1973 other complaints of abuse by LH were made. Following a meeting of parents chaired by O, LH went on sick leave and in September 1973 LH resigned from his post in the school. On 14 January 1974 O wrote to the then Department of Education and Science ("the Department") on behalf of S stating that LH had resigned (effective 31 January 1974) and naming his replacement. The Supreme Court later noted that it did not appear that the Department had been informed of these complaints against LH. It also appears that no complaint was made to the police at that point. LH took up a teaching position in another National School where he taught until his retirement in 1995. The applicant and her parents were unaware of these developments.

5. Between January and mid-1973 the applicant was subjected to a number of sexual assaults by LH during music lessons by him in his classroom during breaks or directly after school.

6. The applicant suppressed the sexual abuse. While she had significant psychological difficulties (notably, physical intimacy issues), she did not associate those with the abuse. In 1996 she was contacted by the police who were investigating a criminal complaint made in 1995 by a former pupil of Dunderrow National School against LH. The applicant made a statement to the police in January 1997 and was referred for counselling. During the investigation a number of other pupils made statements about abuse by LH. LH was charged with 386 criminal offences of sexual abuse involving some 21 former pupils of Dunderrow National School. In 1998 he pleaded guilty to 21 sample charges and was sentenced to imprisonment.

7. In or around June 1998, and as a consequence of the evidence of other victims during the criminal trial and subsequent medical treatment, the applicant realised the connection between her psychological problems and the abuse by LH and understood the extent of those problems.

2. Criminal Injuries Compensation Tribunal ("CICT")

8. In October 1998 the applicant applied to the CICT for compensation and was awarded an *ex gratia* sum of approximately IR£ 53,000.

3. Civil action for damages (No. 1998/10555P)

(a) High Court

9. On 29 September 1998 the applicant instituted a civil action against LH, the Minister for Education and Science ("the Minister") as well as against Ireland and the Attorney General, claiming damages for personal injuries suffered as a result of assault and battery including sexual abuse in 1973 by LH whilst attending Dunderrow National School. Her claim against the latter three defendants ("the State Defendants") was threefold: (a) negligence by the State arising out of the failure of the State Defendants to put in place appropriate measures and procedures to protect and cease the systematic abuse by LH since 1962; (b) vicarious liability in relation to the inaction of O and the acts of LH since, *inter alia*, the true relationship between those persons and the State was one of employment; and (c) the constitutional responsibility of the State Defendants in the provision of primary education pursuant to Article 42 of the Constitution. She delivered a detailed statement of claim in March 1999.

10. Since LH did not file a defence, on 8 November 1999 the applicant obtained judgment in default of defence against LH. On 24 October 2006 the High Court assessed and awarded damages payable by LH in the total sum of 305,104 euros ("EUR"): EUR 200,000.00 in general damages; EUR 50,000.00 in aggravated damages; EUR 50,000.00 in exemplary damages; and EUR 5,104.00 in special damages. The applicant was required to take enforcement proceedings in which LH claimed he had insufficient means. The District Court ordered him to pay EUR 400/month in discharge of the award. The first monthly payment was received in November 2007.

11. The State Defendants filed a full defence in June 1999. In March 2004 the applicant filed a reply with the leave of the High Court.

12. The High Court hearing against the State Defendants began on 2 March 2004. Further to their application for a direction nonsuiting the applicant following the presentation of her evidence, by order of 9 March 2004 the High Court dismissed the allegation of direct negligence against the State Defendants given the absence of evidence. The trial continued on the question of the vicarious and constitutional liability of the State Defendants and finished on 12 March 2004.

13. On 20 January 2006 the High Court delivered its judgment. While finding that the action was not statute bared, it found that the State was not vicariously liable for the sexual assaults given the relationship between the State and the church as regards National Schools:

> "The selection and appointment of any person as a teacher was a prerogative of the manager as was such a teacher's appointment as principal. It was the function of the Department of Education (and hence the Minister) to pay the salary of such teachers and to ensure that they had the necessary qualifications. The Department also exercised a supervisory role in the overseeing of teacher's activities in the school. Mr. [...] in his evidence, stated in general terms "the manager was the direct governor of the school" and I accept this as being the situation."

14. The High Court also found that no action lay for a breach of a guaranteed constitutional right where, as in this matter, existing laws (in this case, of tort) protected that right. The costs of the proceedings against the State Defendants were awarded against the applicant.

(b) Supreme Court

15. In 2006 the applicant appealed to the Supreme Court on the point of vicarious liability, although she also raised the State's obligations under Article 42 of the Constitution as a relevant element in identifying the relationship between LH and the State Defendants. The hearing took place on 11-13 June 2008. By a majority judgment (Hardiman and Fennelly JJ, with whom Murray CJ and Denham J concurred and Geoghegan J dissenting) of 19 December 2008, the Supreme Court dismissed the appeal.

16. Hardiman J described in detail the legal status of National Schools.

While the arrangements for national school education might "seem rather odd today", they had to be understood in the context of Irish history in the early 19th century. Following denominational conflict and the later concession of Catholic emancipation in 1829, the dissenting churches and the Roman Catholic Church

wished to ensure that children of their denominations be educated in schools controlled by the denomination and not by the State or the Established (Anglican) Church. Those churches were "remarkably successful" in achieving this aim: from the very beginning of the Irish system of the national education (encapsulated in the "Stanley letter" of 1831), the Government authority paid for the system of national education "but did not manage it or administer it at the point of delivery", the latter function was left to the local Manager who was, in Catholic schools, invariably a cleric appointed by the local bishop who was the Patron of the school.

Hardiman J went on to describe as "remarkable" the fact that, whilst during the 19th century Europe firmer distinctions were being drawn between Church and State and Church influence in the provision of public services (including education) was ebbing, in Ireland the position of the Church became stronger and more entrenched. He adopted the evidence of one expert witness (in the history of education in Ireland) who, in describing the position after the inception of the Irish Free State in 1922, noted that the Catholic Managers in this "managerial" system:

> "were very clearly articulate and very absolutely ... precise in how they interpreted what the situation was for national schools in the new Ireland ... It had to be Catholic Schools under Catholic management, Catholic teachers, Catholic children."

That witness had emphasised the "striking" continuity of tradition following the establishment of the Department of Education in 1924. That expert then described the attitude of the Roman Catholic Church in the 1950s in response to a teachers' trade union wish to establish local committees to control maintenance and repair of school buildings (although not otherwise to interfere with the authority of the Manager). The relevant Cardinal had responded that there could be "no interference whatever with the inherited tradition of managerial rights of schooling". Even if the trade union had spoken only of building maintenance, that proposal would, the Cardinal considered, be the thin edge of the wedge because, in due course, the request might be to interfere with "other aspects of the Manager's authority vis-à-vis the appointment and dismissal of teachers which was of course the key concern that had been fought for and won over the years."

17. Between the 1924 and 1950s referred to above, the Constitution had been enacted, which Hardiman J considered reflected this managerial structure (Article 42 of the Constitution). Article 42.2 disposed of the applicant's contention that she was obliged to attend Dunderrow National School. The reference in Article 42.4 to the obligation of the State to "provide for" free primary education reflected a largely State funded, but entirely clerically administered, system of education. The pleadings in the case suggested that there were approximately 3000 National Schools in Ireland: most were under the control of Roman Catholic Patrons and Managers but others (few) were under the control of religious or religiously appointed Managers of different denominations and some (even fewer) were under the control of non-denominational groups. He noted that, in recent times and after more than a century and a half, the provision of education was belatedly and at least partially placed on a statutory basis (the Education Act 1998) but:

> "At all times prior to that, and in particular at the time to which the [applicant's] complaint relates, the role of the State, and of the Minister, in relation to the educational system (such as it was) was administered by and under the Rules for national schools and a great body of circular letters issued by the Department. In this, the authorities of the modern State were carrying on the traditions established in the 19th century under the Commissioners for National Education."

18. As regards the principles of vicarious liability, Hardiman J concluded that, having regard to the "Salmond test" (from *Salmond and Heuston on Torts*, 20th Edition) for vicarious liability and to the above-described arrangements for the control and management of National Schools, the State Defendants were not liable to the applicant for the actionable wrongs committed against her. He clarified that O was:

> "the nominee of the Patron, that is of a power other than the Minister and he did not inform the Minister of any difficulties with, or complaints about, [LH] or of his resignation and appointment to teach elsewhere until they were *faits accomplis*. He was the agent not of the Minister, but of the Catholic Church, the power in whose interest the Minister was displaced from the management of the school."

19. Although the appeal did not appear to have included the claim of direct negligence, Hardiman J noted

that this was:

> "a claim which could more appropriately be made against the Manager. It was he who had the power to put in place appropriate measures and procedures governing the running of the school. The Minister can hardly be responsible for a failure to "cease" a course of action of whose existence he was quite unaware."

20. Hardiman J concluded that the Minister provided, under that Article, assistance and subvention to private and corporate endeavour, leaving the running of the school to the private or corporate entities. The Minister was "deprived of the control of education by the interposing of the Patron and the Manager between him and the children". Hardiman J affirmed that the Constitution specifically envisaged not even a delegation "but a ceding of the actual running of schools to the interests represented by the Patron and the Manager". He concluded by underlining that nothing in the judgment could be interpreted as suggesting liability on the part of the Church and, in any event, it was quite impossible to do so because those authorities had not been heard by the Court because the applicant had not sued them.

21. Fennelly J also outlined the legal status of National Schools in some detail. The "Stanley letter" was the "foundation document of the national school system" and he outlined the distinctive Church and State roles in national education prior to independence. He accepted the expert's evidence that it was not a state system of schools (other than the few "model" schools) but rather it was a "state-supported system". He referred to the determination of religious denominations "to preserve and guard their independence and their own distinct religious education" so that National Schools developed into a predominantly denominational system in terms of Managers, pupils and teachers. A school was owned by a Patron (in the case of Catholic schools usually the bishop) who appointed the Manager, the latter of whom had day-to-day responsibility. The division of power was very clear: on the one hand, the Board of Commissioners laid down regulations for control of the curriculum and such matters as textbooks and teacher training and, on the other hand, "the appointment and dismissal of teachers was the prerogative of the Manager, who was almost always a clergyman and hence responsible for the "moral probity" of the school." Neither independence nor the Constitution changed the structure so that, in the case of Catholic schools, the Managers, teachers and children were Catholic, a system consistent with the constitutional obligation on the State in Article 42 to "provide for" free primary education

22. In addition, Fennelly J explained in some detail the inspection of schools which he considered as a "crucially important part of the system of State oversight and maintenance of standards" and he referred to the detailed description of this inspection process in Geoghegan J's dissenting judgment (paragraph 25 below).

23. Moreover, the Rules for National Schools reflected the system of allocation of responsibility which has existed since 1831. Even if, in modern times the State played a more intrusive role, responsibility for day-to-day management (in particular, the hiring and firing of teachers) remained with the Manager. While the State controlled the recognition of a teacher's qualifications, the contract of employment was between the Manager and the teacher so that the Manager could employ and dismiss a teacher without the sanction of the Minister.

24. Accordingly, Fennelly J concluded that the State Defendants were not vicariously liable for the acts of LH or, for the same reasons, for the failure of O to report the 1971 complaint to the State. LH was not employed by the State Defendants but he was, in law, the employee of the Manager, S. While LH had to have the qualifications laid down by the Minister and to observe the provisions of the Rules for National Schools and while the State had disciplinary powers in relation to him pursuant to those Rules, he was not engaged by the State and the State did not have the power to dismiss him:

> "The scheme of the Rules and the consistent history of national schools is that the day-to-day running of the schools is in the hands of the manager. The inspection regime does not alter that. The department inspectors do not have power to direct teachers in the carrying out of their duties. ... On normal principles, the State has no vicarious liability for the acts of a teacher appointed by the manager of a national school under the system of management of national schools. I do not, of course, exclude the possibility of liability if it were to be established that, for example, an inspector was on notice of improper behaviour by a teacher and neglected to take action. That would not, however, be

vicarious liability."

25. Geoghegan J dissented. He noted that, for all practical purposes, most of the primary education in Ireland took the form of a joint enterprise of Church and State and he considered that the relationship between the Church and State as regards National Schools (given, notably, the role of School Inspectors) was such that there was sufficient connection between the State and the creation of the risk to render the State liable. He examined in some detail the evidence given by, and concerning the role of, School Inspectors noting, *inter alia*, that if an allegation of sexual assault by a teacher on a National School pupil was considered well-founded by an inquiry set up by the Department, it could lead to withdrawal of recognition or to a police investigation and, if the police found the complaint justified, there would be withdrawal of recognition. There was a major difference between dismissal by the Manager and withdrawal of recognition by the Department: a dismissal by a Manager allowed the teacher to obtain a teaching post elsewhere whereas withdrawal of recognition meant that a teacher's licence was withdrawn so that that person could no longer teach.

26. Finally, Geoghegan J commented specifically on the applicant's failure to take proceedings against the Church. It appeared that the main reason was a practical one of having to sue the personal representatives of the Manager (S), acting Manager (O) or of others such as the Patron (the Bishop), all of whom were deceased. Geoghegan J considered whether, in that context, the applicant was to blame for delaying bringing her proceedings and whether she had "a just and practical remedy" in being forced to sue one or more of those personal representatives. However, the legal representative might be dead so it would require a court application for a special grant *de bonis non* and it was not clear where the assets to meet such a judgment would be. He was not entirely convinced that the fact that the then Patron was not a corporation sole should necessarily preclude an action against the current Bishop and execution against the diocesan assets: there had been many cases in the past where actions had been brought against a diocese concerning events that occurred under a former Bishop and where the current Bishop did not raise the matter either as a matter of honour or because of insurance cover or both. However, none of that arose in the applicant's case.

27. By judgment of 9 May 2009 the Supreme Court vacated the High Court order for costs against the applicant and determined that each party had to bear its own costs of the civil action concerning the State Defendants.

28. The applicant was legally represented throughout the civil proceedings, although did not have legal aid.

B. Relevant domestic law

1. Article 42 of the Constitution 1937

29. This Article reads as follows:

"1. The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

2. Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.

3. 1° The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.

2° The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.

4. The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.

5. In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the

State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child."

2. School Attendance Act 1926

30. Section 4 of the School Attendance Act 1926 requires parents, unless there was a reasonable excuse for not so doing, to cause their children to attend a national or other suitable school, unless that the child is receiving suitable elementary education in some other manner. Section 5 provides that the Minister can certify schools to be suitable and revoke any such certificate and accords to the Minister's relevant powers of inquiries, investigations and inspections. Article 6 provides that, for the purposes of the 1926 Act, a child to whom this Act applies shall be deemed to belong to the school attendance area in which he is ordinarily resident.

COMPLAINTS

31. In the first place, the applicant invokes Article 3 of the Convention.

She complains about the State's failure to put in place a structure to protect children in National Schools which would have avoided her abuse. The provision of primary education is a State power/public function and the State retained responsibility for it despite any delegation of that function to a private actor and she submits that, in adopting the policy to provide for education indirectly, the State should have taken into account the need to effectively protect children but it did not.

Alternatively, the *de facto* Manager was an agent/emanation of the State or a collaborator in the joint national enterprise of providing primary education, who failed to take adequate steps when the abuse was first reported in 1971 and which would have avoided her being abused by LH. Given the functions in the primary education system of the Church and State, any suggestion that the State was not responsible was a construction of an imaginary bureaucratic buffer between the State and LH.

The applicant also invokes the procedural obligations in Article 3 to, independently of any initiative by the victim, investigate and provide an appropriate judicial response to a stateable case of ill-treatment

32. Secondly, she complains under Article 8 that the interference with her right to physical integrity could have been avoided had the State put in place mechanisms to protect children or, alternatively, because the Manager was an agent/emanation of the State and failed to take relevant steps in 1971.

33. Thirdly, she invokes Article 2 of Protocol No. 1 arguing that that Article was prominently in the Court's mind in cases where the Court had held that the liability of the State could be engaged in relation to the conduct of a teacher in a private school. Articles 3 and 8, as well as Article 2 of Protocol No. 1, read together put a duty on the State to organise its educational system so as to ensure it met its obligation to protect children in schools.

34. Fourthly, the applicant invokes Article 14 of the Convention in conjunction with all of the above-invoked Articles. While the State sought to avoid responsibility as regards the vast majority of children in National Schools, it has accepted responsibility to compensate children for the same abuse in residential institutions under the Residential Institutions and Redress Act 2002, even when the distinguishing factor between both groups of children (residence) is wholly irrelevant to the abuse.

35. Fifthly, she complains under Article 6 about the length of the civil proceedings.

36. Finally, she invokes Article 13 in conjunction with Article 6 (that she had no effective remedy about the delay in her proceedings) and in conjunction with Article 3 (contending that the Supreme Court effectively created an immunity for the State in respect of both its own failure to take preventative measures and in respect of the acts of State agents).

QUESTIONS TO THE PARTIES

1. The Government are required to:

- provide the numbers of recognised schools of primary education in Ireland in 1973, including the percentage of National Schools which were under religious patronage/management and the percentage of primary school- going children who received primary education in such schools;
- the primary education options available to parents in 1973 to ensure compliance with the School Attendance Act 1926; and
- provide a copy of the ruling of the High Court of 9 March 2004 and of the Criminal Injuries Compensation Tribunal of October 1998; and

2. The parties are requested to outline:

- the precise role and responsibilities of State Inspectors of National Schools in 1973. What precise matters fell within their responsibility? How and how often did those officials complete school inspections? and
- the structural changes to the management and administration of National Schools introduced by the Education Act 1998.

3. (a) Did the State fail to protect the applicant from being subjected to inhuman or degrading treatment in breach of Article 3 of the Convention (*Van der Mussele v. Belgium*, 23 November 1983, §§ 28-30, Series A no. 70; *Costello-Roberts v. the United Kingdom*, 25 March 1993, § 27, Series A no. 247-C, § 107; *A. v. the United Kingdom*, 23 September 1998, *Reports of Judgments and Decisions* 1998-VI, §§ 19-24; *Z and Others v. the United Kingdom* [GC], no. 29392/95, §§ 69-75, ECHR 2001-V; *E. and Others v. the United Kingdom*, no. 33218/96, §§ 88-101, 26 November 2002)?

In particular, what precise mechanisms, safeguards and procedures were in place to ensure that any complaints about ill-treatment (including sexual abuse) of children in National Schools were reported by Managers to, and acted upon, by the Department of Education and Science?

(b) Did the applicant have at her disposal an effective domestic remedy for the above-noted complaint under Article 3 of the Convention as required by Article 13 of the Convention, including a mechanism for establishing any liability of the State as well as for obtaining compensation in that respect (*Z and Others v. the United Kingdom*, at §§ 108-111 and *E. and Others v. the United Kingdom*, at §§ 111-116, both cited above)?

4. Have the procedural protections guaranteed by Article 3 of the Convention been complied with in the present case?

5. Having regard, *inter alia*, to the case of *Doran v. Ireland*, no. 50389/99, ECHR 2003-X (extracts); and *McFarlane v. Ireland* ([GC], no. 31333/06, ECHR 2010-...):

(a) Was the length of the civil action in breach of the "reasonable time" requirement of Article 6 § 1 of the Convention ?

(b) Did the applicant have an effective domestic remedy in that respect within the meaning of Article 13 of the Convention ?

6. Has there been an unjustified interference with the applicant's right to respect for her private life (the above cited cases of *A. v. the United Kingdom*, *Z and Others v. the United Kingdom and E. and Others v. the United Kingdom*, at §§ 28, 77 and 105, respectively)?

7. Has there been a discriminatory difference in treatment in violation of Article 14 in conjunction with

Article 3 of the Convention?

O'KEEFFE v. IRELAND – STATEMENT OF FACTS AND QUESTIONS