

**Case No : IC/0626**

**Ruling on Application heard in public on 15<sup>th</sup> May 2002 dated 16<sup>th</sup> May, 2002.**

The Background

Among the principal functions of the Investigation Committee (the Committee) conferred on it by section 12 (1) of the Commission to Inquire into Child Abuse Act, 2000 (the Act) are to -

- (i) inquire into the abuse, including physical abuse, of children in institutions during the relevant period, which is defined in the Act as meaning the period from and including the year 1940, or such earlier year as may be determined, to and including the year 1999, and such later period (if any) as may be determined, and
- (ii) determine the causes, nature, circumstances and extent of such abuse.

Section 13 mandates the Committee to prepare a report in writing of the results of the inquiry referred to in section 12 and to specify in it the determinations made by it pursuant to that section. Subsection (2) of section 13 empowers the Committee, if satisfied that the abuse of children, or abuse of children during a particular period, occurred in a particular institution, to make findings to that effect and to identify the institution and the person who committed the abuse in the report.

In the course of its inquiry, the Committee is investigating an allegation made by the Complainant that he was abused while he was a pupil in a residential institution between 1970 and 1973. The Complainant implicates two individuals, one of whom is the Applicant, in an incident which occurred in the institution, during which he alleges he was physically abused by them. In accordance with the requirements of section 23 of the Act, the Complainant's statement was furnished to the following parties :

- (a) The Applicant;
- (b) The Religious Order (the Management Respondent), which managed the institution at the relevant time; and
- (c) The Minister for Education & Science (the Minister), who had statutory regulatory responsibility for the institution at the relevant time.

In response to a statutory request for a statement in writing under section 23(2) (b) of the Act, each of the parties has submitted a statement. In his statement the Applicant averred that he has no recollection whatsoever of the incident described by the Complainant. He did not, however, disclose that the incident had been the subject of a charge of assault occasioning actual bodily harm to the Complainant brought by the Director of Public Prosecutions (DPP) in the Circuit Criminal Court or that he had been successful in a Judicial Review application in obtaining an order prohibiting his trial on that charge and another charge. In the statement submitted on behalf of the Management Respondent it was averred that the passage of time since the specific

events described by the Complainant made it impossible either to respond to them properly or to investigate them adequately and the person making the statement, the Provincial Superior of the Management Respondent, could not conscientiously either contradict or confirm them.

However, it was disclosed that the High Court had prohibited the trial of the Applicant. The position adopted in the statement submitted on behalf of the Minister was that there is nothing in the records of his Department to indicate that his Department had any knowledge of the allegations outlined in the Complainant's statement.

Following receipt of the statements, a direction was made pursuant under section 14 (1) (d) of the Act directing the Applicant to make discovery on oath of all documents and records of whatever nature that are or have been in his possession or under his control in relation to the allegations made by the Complainant, including, without prejudice to the generality of the foregoing, the affidavit sworn by him in the Judicial Review proceedings. The Applicant failed to comply with the direction. After the time for compliance with the direction had expired, the Applicant formally applied to the Committee that the direction be set aside and also that the allegations made by the Complainant against the Applicant be set aside in their entirety.

#### The Hearing of the Application

The Applicant's application was heard at a public hearing of the Committee held on 15<sup>th</sup> May 2002. At the hearing the Applicant, the Complainant, the Management Respondent and the Minister each had legal representation and made submissions, as did counsel to the Committee. The position adopted by the Management Respondent was that it did not oppose the investigation of the Complainant's allegation against the Applicant. The Complainant and the Minister

supported the submission of Counsel for the Committee that the investigation of the allegation should proceed.

#### The Submissions made on behalf of the Applicant

Counsel for the Applicant submitted that the Committee should cease its inquiry into the allegations made by the Complainant in relation to the Applicant on the ground that the Committee is precluded by the doctrine of *res judicata* from continuing with inquiry. The same allegation involving the same parties as was the subject of the criminal charge, the trial of which was prohibited by the High Court, is the subject of the Committee's inquiry, it was alleged. While, by reason of the fact the discovery direction was not complied with, the Committee has not seen the statement made by the Complainant to the Garda Siochana in the criminal proceedings, for the purposes of the present application, the Committee is prepared to assume that, in substance, the two complaints are the same. In granting a perpetual injunction prohibiting the trial in the Circuit Criminal Court, the High Court Judge, Mr. Justice Kelly, made specific findings which determined the issues the subject of the findings and the Committee is estopped from re-opening those issues, it was argued. In particular, reliance was placed on the following findings made by Mr. Justice Kelly namely,:

- (a) that the delay in bringing the complaint to the Gardai was so excessive as to give rise to a presumption of prejudice;
- (b) that on the evidence before the High Court there was actual prejudice; and

- (c) that there was a real and serious risk and danger that an unfair trial would occur if the prosecution was permitted to proceed.

It was further submitted on behalf of the Applicant that the evidence on which the Committee would be making its findings is the same evidence as had formed the basis of Mr. Justice Kelly's findings. Therefore, the Committee would be coming up against the same problems as were considered by the High Court in the Judicial Review proceedings. The evidential difficulties which gave rise to the findings of presumed prejudice, actual prejudice and the real and serious risk of an unfair trial, would face any forum seeking to reach determinations or findings on the basis of that evidence. As the High Court had made specific findings, the matter was *res judicata*. There was a judicial finding in relation to issues of fact giving rise to issue estoppel.

An alternative proposition advanced on behalf of the Applicant was that, if the Committee is not precluded from continuing with the inquiry by reason of the doctrine of *res judicata*, the inquiry should be prevented from going forward on the basis that to do so is an abuse of process.

#### Conclusions of Committee

It is the view of the Committee that the Applicant's reliance on the doctrine of *res judicata* is misconceived. It is predicated on two underlying assumptions, both of which are incorrect. The first is that the issue on which the Committee is empowered by statute to make findings is the same issue as was determined in the High Court in the Judicial Review proceedings. The second is that, in making the findings it is empowered by statute to make on the issue before it, the

Committee will be limited to the evidence which was before the High Court in the Judicial Review proceedings.

The issue which was before the High Court in the Judicial Review proceedings was whether the Applicant had established that he would not be afforded his constitutionally guaranteed entitlement to a trial in due course of law in the Circuit Criminal Court. In determining that issue, Mr. Justice Kelly applied the established jurisprudence of the Superior Courts in relation to criminal prosecutions initiated by the D.P.P. where there has been a delay on the part of the complainant in making a complaint to the Garda Siochana. In doing so, Mr. Justice Kelly made findings on the relevant factors identified in the jurisprudence, namely :

- (1) He held that delay of the magnitude involved between the alleged offences and the complaint to the police was inordinate.
- (2) He held that the delay was so excessive as to give rise to a presumption of prejudice, that is to say, prejudice to the Applicant in conducting his defence.
- (3) He held that there was actual prejudice. This finding must be seen against the Applicant's contention that he was faced with insurmountable difficulties in seeking to adduce evidence in support of the defence case, having regard to the fact that a number of persons to whom he wished to have spoken are dead, to the logistical difficulties of seeking to trace others who have long since moved away from the scene of the alleged incidents, and the inevitable frailty and lack of

clarity in the memory of any such person in relation to such offence of almost 30 years ago.

- (4) He held that the Applicant bore no responsibility for the delay that had occurred between the events alleged and the making of the complaints. In arriving at this conclusion, he found that there was no dominion over the Complainant and there was no convincing physiological evidence to excuse the late complaint.
- (5) He held that there was a real and serious risk and danger that an unfair trial would occur if the prosecution was permitted to proceed.

The issue as to whether the incident described by the Complainant in his statement to the Garda Siochana occurred or not was not an issue in the High Court. The issue there was whether the Applicant could be afforded a trial in due course of law in the Circuit Criminal Court, in other words, whether the Circuit Criminal Court had jurisdiction to try him. Given the presumption of the Applicant's innocence, there could have been, and there was, no finding as to whether the substantive complaint was true or false in the High Court.

The function of the Committee is to conduct an inquiry and its process is an inquisitorial process. In relation to the allegations made by the Complainant against the Applicant, the issue for determination by the Committee at the end of its inquiry is whether the incident alleged to have happened did, in fact, happen. That is an issue of fact to be determined on the evidence before the Committee. It is not an issue which was considered or determined by the High Court.

The evidence which was before the High Court as to the issue with which the Committee is concerned, that is to say, whether the incident referred to by the Complainant in his statement occurred was, by the very nature of the proceedings in the High Court, limited. In relation to the criminal charge pending against the Applicant, he enjoyed the presumption of innocence and he could not be obliged to give evidence at his trial. Presumably, what was before the High Court in relation to the substantive issue with which the Committee is concerned was merely the prosecution case as contained in the Book of Evidence.

The Committee, on the other hand, is conducting a statutory inquiry. It is involved in an inquisitorial process, which involves evidence gathering. It has statutory powers to enable it fulfil its functions, for example, power to direct the attendance of witnesses, production of documents, discovery of documents and such like. Crucially, in this context, by virtue of section 21 of the Act, subject to the usual safeguards in relation to the use of the evidence, a witness before the Committee is not entitled to rely on privilege against self incrimination and to refuse to answer a question. In short, making findings on the issue before it the Committee is not subject to the evidential constraints which apply in a criminal trial and, as a matter of probability, the Committee will have a much broader range of evidence on which to make its finding on the issue before it than was before the High Court.

Accordingly, it is the view of the Committee that it is not precluded from continuing with the its inquiry into the allegation made by the Complainant against the Applicant and the inquiry will

continue. Moreover, it is the view of the Committee that there is no abuse of process involved in continuing the inquiry.

#### Lapse of Time : General Observations

Although Counsel on behalf of the Applicant made it clear at the outset that he was basing his case that the inquiry should not proceed on the narrow ground that the doctrine of *res judicata* applied, inevitably, as delay was central to the issue in the Judicial Review proceedings, the submissions to the Committee strayed into the broader territory of delay and lapse of time.

Under the Act, the Committee has a statutory duty to investigate allegations that abuse occurred as far back as sixty years ago. The Act enjoys the presumption of constitutionality which all Acts of the Oireachtas enjoy. The Committee recognises, of course, that the Oireachtas intended that the Committee would fulfil its statutory remit in accordance with the principles of constitutional justice and that it must do so. Concerns have been voiced repeatedly by parties involved in the work of the Committee in relation to the antiquity of some of the complaints and the problems created by the lapse of time since some of the events which the Committee has been asked to investigate occurred. The Committee has taken a consistent line in relation to such concerns. At the second public sitting of the Commission held on 20<sup>th</sup> July 2000, the Chairperson stated as follows :

“The next item I want to deal with which arises in a lot of submissions is the question of lapse of time. The issue of the duration of the Commission’s inquiry and lapse of time since alleged abuse occurred has been raised in most of the submissions made on behalf of the managers of the schools. The Commission has been referred in some submissions

to judgments delivered in the Supreme Court on 6<sup>th</sup> July this year in Judicial Review (Prohibition) cases. Linked with this issue in the submissions is an institution's inability to deal with an allegation of abuse because of the death, age or infirmity of persons in the institution at the time the abuse is alleged to have occurred. It is the Commission's view that it would not be appropriate to propound a general policy in relation to these matters. Each allegation must be assessed on its merits. As the Commission stated in its statement, page 19, at each hearing where such difficulties arise it will hear submissions of all interested parties."

Discovery Direction:

Finally, it follows from the ruling that the inquiry will continue that the Applicant must comply with the discovery direction made on 1<sup>st</sup> March 2000. The time for complying with the discovery direction is extended to 5 p.m. on 24<sup>th</sup> May 2002.