

CASE NO.: IC/0115

**RULING DATED 26th FEBRUARY, 2002 ON ISSUES RAISED
AT PROCEDURAL HEARING OF THE INVESTIGATION
COMMITTEE (THE COMMITTEE) ON 19TH FEBRUARY, 2002
HELD IN CAMERA**

First Issue: Supplemental Statement

The issue is whether the Complainant should be allowed to submit a supplemental statement setting out the substance of the evidence of a potential witness proffered by the Complainant in the following circumstances:-

- (a) The Complainant made no mention of the potential witness in his original statement, which was submitted on 8th March, 2001 and in which he alleged that he was abused in a residential institution (the Institution), or in a supplemental statement submitted on 17th May, 2001.
- (b) On the basis of the allegations made in the Complainant's original and supplemental statements, the Religious Order which managed the Institution at the relevant time (the Management Respondent), in response to a request under Section 23(2)(b) of the Commission to Inquire into Child Abuse Act, 2000 (the Act of 2000), submitted a statement dated 9th November, 2001. In that statement, it was disclosed that two individuals named by the Complainant were dead.
- (c) In consequence of a direction under Section 14(5) of the Act of 2000, the evidence of a witness, who at the time of the matters alleged was a member of the Management Respondent in the Institution, but against whom no allegation of abuse was made by the Complainant, was taken on commission, because of the age and state of health of the witness, at a country venue on 30th January, 2002. On that occasion there was no mention of the potential witness.
- (d) The Complainant first told the Solicitor on record for him with the Commission of the existence of the potential witness on 28th January, 2002.

The existence of the potential witness was communicated to the Commission's legal team on 5th February, 2002. On 11th February, 2002 the Complainant submitted a supplemental statement to the Commission, which exhibited a copy of a statement given by the potential witness to the Gardai on 16th August, 1999, giving an account of a specific incident. While the Committee has not had sight of the copy of the Garda statement exhibited, it is aware that it is recited in the Garda statement that the Complainant and the potential witness had discussed the subject matter, from which it is suggested that the Committee should infer that the Complainant was aware of the availability of the potential witness before he made his original and supplemental statement. The Complainant's Counsel has described the evidence of the potential witness as corroborative rather than bringing anything new.

The Management Respondent contends that the Committee should not admit the supplemental statement submitted on 11th February, 2002, or hear the evidence of the potential witness named in it, on the grounds that to do so would be in breach of the Committee's own rules and would be prejudicial to the Management Respondent.

Section 11(4) of the Act of 2000 provides that the Commission shall regulate, by standing orders or otherwise, the procedure and business of its statutory Committees. At the first public sitting of the Commission held on 29th June, 2000, the proposed Rules of Procedure of the Committee were made public. Subsequently, following submissions made by various parties affected by the work of the Committee both prior to and at the second public sitting held on 20th July, 2000, the proposed Rules of Procedure ("the Rules") were adopted for the Committee, but incorporating certain amendments.

The Rules are founded on a number of principles. First, in conducting the inquiry into abuse of children in institutions since 1940, which it is mandated to do by the Act of 2000, the objective of the Committee is to ascertain the full and true facts. Secondly, the inquiry must be conducted in such a way that the constitutionally protected right of every person against whom, and every institution in respect of which, an allegation of abuse is made is vindicated. Thirdly, given the passage of time since most of the matters which the Committee is inquiring into are alleged to

have occurred, basic fairness and justice requires that the Committee concludes its inquiry with all reasonable expedition. Fourthly, the Commission must order its business in an efficient manner, consistent with the foregoing principles.

The provisions of the Rules which come into play on this issue are consistent with the foregoing principles. Paragraph 7 of the Preamble reserves to the Committee a discretion to adopt such procedures as it considers appropriate and, subject to giving reasonable notice to any person or body thereby affected, to depart from the procedure subsequently outlined. Paragraph 2(A) of Part 1 stipulates that if a Complainant wishes that a witness be called by the Committee in support of his allegation, he shall identify the witness and there shall be included in the Complainant's statement the substance of the evidence to be given by the witness. The purpose of this rule is to ensure that a person or body implicated by the Complainant in his allegation of abuse is fully apprised of the case to be made against him or it. A corresponding onus is imposed on a Respondent who wishes that a witness be called in support of his response by paragraph 2(d). However, it is recognised that a supplemental statement may be furnished by a Complainant or a Respondent before a hearing (paragraph 2(h)), but the circumstances in which a supplemental statement may be submitted are not spelled out. Indeed, it is recognised that even at hearing stage evidence not outlined in a statement may be admitted on such terms as the Committee considers necessary to enable any person affected by such evidence to adequately address it (paragraph 3(b)).

The Rules are designed to identify the issues of fact which are in controversy before the hearing. However, they recognise the possibility that the pursuit of the full and true facts may require the Rules to be relaxed, but only in a manner which accords with basic fair procedures. An obvious example of the circumstances in which a supplemental statement may be necessary is where one of a number of Respondents, or a Complainant, takes issue with matters alleged in a Respondent's statement and wishes to "signpost" rebuttal evidence which it is suggested is available to the Committee.

It is the view of the Committee that where, as here, the Complainant proffers evidence which was not adverted to in his original statement and the Respondent against whom

the evidence is directed objects to its admission, the factors to be taken into account in determining where the balance of justice lies are as follows:-

- (1) Whether the new evidence is likely to assist the Committee in ascertaining the full and true facts;
- (2) Whether the Complainant advances a reasonable explanation for failure to comply with Rule 2(a), which would justify waiving compliance with it;
- (3) Whether the Respondent against whom the new evidence is directed is likely to be prejudiced by the admission of the evidence; and
- (4) Whether any potential prejudice to such Respondent can be obviated by the imposition of terms and conditions.

On the issue here, the foregoing factors are finely balanced. There can be no question of prejudice on account of the Complainant having gained an advantage by the Management Respondent, having “shown its hand”, as it were, in its statement, because the evidence which the potential witness would propose to give was recorded in a statement made to the Gardai in 1999. Moreover, the Management Respondent could not be prejudiced by the admission of the statement if it were given an opportunity to submit a supplemental statement in response and to require that the witness who gave evidence on commission be recalled. On the other hand, the Committee is not satisfied that a reasonable explanation has been advanced for not adverting to the evidence of the potential witness in the original statement, or in the supplemental statement of the Complainant, which would justify waiving Rule 2(a) and, crucially, it is not satisfied that the evidence of the potential witness is of a nature that would be likely to carry weight in determining the full and true facts in this case.

In the circumstances, the supplemental statement will not be admitted and should be returned to the Complainant’s solicitor.

Second Issue: Discovery Direction

The issue is whether a direction purported to be made by the Chairperson of the Committee, pursuant to Section 14(1)(e) of the Act of 2000, exceeded the powers conferred by Section 14 and was thereby invalid.

The direction in question directed the representative of the Management Respondent who made a statement on its behalf, in response to a request under Section 23(2)(b) of the Act of 2000, to furnish to the Registrar of the Committee within a month the following information:

- (1) a list of all members of the Religious Order working and/or residing in the Institution and all other members of staff working in the Institution during the period when the Complainant was in the Institution, stating, where known, any “nickname” by which such person was referred to by the children in the Institution;
- (2) photographs of the persons referred to at (1) and
- (3) maps or plans of the Institution at the relevant time, including –
 - (i) a ground plan of the entire property showing the location of the building on the property and
 - (ii) a floor plan of each floor (including the basement) of the main building, identifying the rooms at each level.

Section 14(1) of the Act of 2000 provides that the Chairperson may, for the purposes of the functions of the Committee, make certain directions, namely:

- a) a direction requiring a person to attend before the Committee, to give evidence and to produce any document specified in the direction in the possession or control of the person;
- b) a direction that a person in attendance, pursuant to a direction under paragraph (a), actually produces a document to the Committee;
- c) a direction that a person send to the Committee any document specified in the direction in the possession or control of the person;
- (d) a direction that a person make discovery on oath of any documents that are or have been in his possession or control relating to any matter relevant to the

- functions of the Committee and specify in the affidavit any documents which he objects to produce and the grounds of the objection, the rules of court relating to discovery in proceedings in the High Court to apply in relation to discovery under such a direction *mutatis mutandis*; and
- (e) any other directions that appear to the Committee “to be reasonable, just and necessary”.

Subsection (6) of Section 14 provides that, in relation to the matters specified in subsection (1) the Committee shall have all such powers, rights and privileges as are vested in the High Court or a judge of that Court on the occasion of an action.

While on a superficial comparison the powers conferred on the Investigation Committee by Section 14(1) would appear to be more expansive than the powers conferred on a Tribunal under Section 4 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979, it is accepted that, on the authority of the judgment of the Supreme Court in Lawlor v. Flood [1999] 3 I.R. 107, paragraph (e) of Section 14(1) does not empower the Investigation Committee to require a person to create a document such as a list of names or a plan of a building at a particular time. Accordingly, the purported direction made under Section 14(e) is discharged in full.

The Committee does not, however, accept the submission made on behalf of the Management Respondent that, in circumstances where a Complainant is legally represented and does not seek discovery against a Respondent, the Committee should not direct discovery. The process of the Committee is an inquisitorial process. While the Committee, in practice, has regard to the views of the parties involved in the investigation of particular allegations as to what directions should be made under Section 14 and it has provided a mechanism in its Rules of Procedure for being made aware of such views (paragraph 2(a) and paragraph 2(d)), the exercise of the powers conferred by Section 14(1) is not in any way fettered by the expression or non-expression of views by the parties. It is for the Committee to determine in a particular case what directions will assist it in ascertaining the full and true facts.

The Committee proposes to request its counsel to advise on what, if any, direction in relation to discovery may properly be made, which relates to documents concerning

the personnel in, and the layout of the premises of, the Institution while the Complainant was there, which are relevant to the issues raised in the statements submitted by the Complainant and the Management Respondent. On the issue of relevance, it is the view of the Committee that its legal team should redact any material considered not to be relevant to the issue from documents discovered by a party, or a non-party, before making the copies available to those entitled to them.

Photographs

Finally, the Division wishes to comment on a point raised in connection with the direction for discovery under Section 14(1)(d) made by the Chairperson on 13th December, 2001. Discovery was directed of a photograph of one of the members of the Congregation named in the statement of the Complainant. Apparently, it is averred in the Affidavit of Discovery submitted in response to the direction that no such photograph exists. While, if no such photograph exists, the point is moot in the instant case, nonetheless, the concerns raised on behalf of the Management Respondent in relation to a direction to produce a photograph and, in particular, to produce it at a time when all Complainants' statements in all cases involving allegations against the Management Respondent have not been submitted, are noted. It is considered that the concerns would perhaps best be met by requiring the production of the photograph at the hearing and the Committee proposes, in appropriate cases, to exercise its powers in this regard under paragraphs (a) and (b) of Section 14.