Criminal Justice Notes

In this month's edition of KLS Criminal Justice Notes:

- **A recently published report of the independent Garda Inspectorate has identified significant systemic weaknesses in the management of public order policing in Ireland.**

- **A recent decision of the European Court of Human Rights in *Mihalache v Romania* (application no.54012/10) applies the double jeopardy principle to a prosecutorial decision to discontinue criminal proceedings, but it leaves much uncertainty over when that principle will apply to such decisions.**

Public Order Policing in Ireland

Introduction

From time to time, the public order policing methods of the Garda Síochána (Ireland's police service) have generated concerns about the use of excessive force and/or bias in favour of government and powerful economic interests. Following its review of the Garda's controversial policing of two public protest events, in 2014 and 2018 respectively, the Irish Policing Authority requested the independent Garda Inspectorate to conduct a forward-looking examination of the effectiveness of the Garda's policing of public order. The Inspectorate's report, published a few weeks ago, detected some areas of good practice and professionalism. However, its findings also convey a sense that the Garda is failing to meet international standards and is seriously lagging behind relevant comparators in Scotland and Northern Ireland.

Sensitivities of public order policing

Public order policing spans a broad diversity of situations from actual or threatened breach of the peace involving a few people, to major public gatherings involving thousands of people with the potential for (or reality of) violence. Public protest events present a particular challenge. The freedom to protest in public, even where it causes disruption, is vital to the functional health of a constitutional and peaceful democracy. It provides an essential facility for the organised expression of the strength of public feeling on a subject that has excited widespread anger or opposition. Equally, it is often the only practicable outlet through which vulnerable minority communities can air grievances in the hope of securing some recognition and redress.

Through its guarantee of the rights to freedom of expression, assembly and association, the European Convention of Human Rights underpins the freedom to protest as a fundamental hallmark of a democracy based on respect for human rights and the rule of law. The European Court of Human Rights has made it clear, time and again, that this includes the right to voice opinions and criticisms

disagreeable to government and sectional interests. The State is under an obligation to guarantee and protect the effective and practical exercise of those rights, even in the context of protests targeted against State interests. Moreover, if disorder breaks out, the police must avoid unnecessary and excessive use of force. They must act with restraint and proportionately.

The policing of public protests can be particularly sensitive where they concern government policy or the interests of other powerful economic or sectional groups. Heavy-handed methods aimed at suppressing such protests will project the appearance, and possibly the reality, of political policing in favour of 'the establishment' and against minority communities and interests. Equally, the mere allocation of what appears to be disproportionate policing resources to protect powerful political and/or economic interests from the effects of civil protest against their policies and actions can have a similar effect. It can send out the message that the police are an instrument of the powerful to suppress opposition from economically poor and marginalised communities.

These tensions are especially acute in a jurisdiction, such as Ireland, which is policed by a single, centrally organised and managed police force. In that environment, there will always be a suspicion that the policing of certain public protests is driven by the political and material interests of the national government or of sectional interests that are sufficiently powerful to bring pressure to bear on the government. Controversial examples in Ireland over the past few decades have included: the 'An Cosán' water charges' protest, the North Frederick Street 'Take Back the City' protest (involving gardaí in balaclavas assisting in the removal of housing protestors from private property), the 'Shell to Sea' protest (against the Shell Oil company's construction of a gas pipeline and refinery in a rural part of County Mayo) and a 'Reclaim the Streets' protest (an anti-globalisation protest that was met with excessive force by gardaí). The first two of these were cited as the trigger for the Policing Authority's request to the Garda Inspectorate to conduct the review of public order policing.

Governance and policy

The Garda Inspectorate's review focused on the Garda's organisation and capacity to respond effectively and efficiently to the demands of public order policing, as distinct from the manner in which they handled specific events.

For the most part, the primary weaknesses in the Garda approach, identified by the Inspectorate, can be traced to inconsistent governance and application of Garda policy. This, in turn, can be linked to a tendency to rely too heavily on informal arrangements and understandings, at the expense of compliance with transparent policies and procedures modelled on international best practice. While the Inspectorate did not say so, it is easy to see how such an approach can result in the partisan, heavy-handed and/or inept policing of some events or protests relative to others. The potential to undermine the confidence of disaffected communities or, indeed, the wider public, is clear.

The Inspectorate found significant weaknesses in strategic planning which impacts on the Garda capacity to respond to serious public order breakdown. A major systemic problem is the absence of a public order 'Strategic Threat and Risk Assessment' (STRA) of a type that is

standard across international comparators. A STRA is central to institutional capacity to cope effectively, efficiently, transparently and in a human rights' compliant manner with public order events. Typically, it will encompass an examination of wider issues around police organisational readiness, contingency planning and emerging protestor tactics. It should provide an informed, robust and transparent base for determining the most appropriate operating model for public order policing in terms of, for example, capacity, capability and training. It should also provide a clear strategic link with public procurement of equipment, welfare and legal support in public order policing.

The absence of a public order STRA might help explain repetitive Garda failures in the policing of sensitive public order events. Certainly, it is a major concern that the Garda have been delivering one of their most central, and potentially divisive, functions without a tailored STRA. It is hardly surprising that the Inspectorate commented that, "[t]h absence of a STRA is a significant organisational risk and the Garda Síochána should urgently develop a formalised public order strategic assessment of threat and risk."

Transparency and Accountability

Weaknesses in transparency and accountability are recurring themes in the Inspectorate's findings. That, of course, reflects more widespread, deep-rooted and familiar features of the Garda institutional culture. A major concern in the public order context is the relative lack of published data on the use of force, and the manner in which the limited publicly available data is actually published. In contrast with comparator police forces, the Garda do not publish comprehensive data on the use of force. Nor are they required to do so. The limited data that is available concerns the discharge of firearms and the use of tasers which the Garda is obliged to notify to the Garda Síochána Ombudsman Commission (independent police complaints body). The Commission, in turn, has been publishing this data. It has also been publishing data on the Garda use of pepper spray, but it seems that it is about to stop doing that from 2019 as the data is being supplied to it under a non-statutory obligation.

By contrast, comparator jurisdictions publish comprehensive data on most or all aspects of coercive police actions; from stop and search to the use of lethal force. Such data is vital to facilitate effective scrutiny and accountability in respect of these powers, as the manner and extent of their exercise have major implications for the liberty, privacy, person and life of the individual, the policing of communities and, ultimately, the health of our democracy. The relative lack of such published data in Ireland is a signal mark of the enduring lack of transparency in the policing of the State. The adverse knock-on effects on the operation of the police accountability and democratic scrutiny mechanisms are obvious.

A related concern is that there is no internal Garda governance group monitoring the use of force in public order (or any) situations. Again, this contrasts with other comparator jurisdictions, and can be interpreted as a measure of the lack of Garda management's appreciation of the broader issues posed by the use of force in restoring/maintaining public order. Understandably, the Inspectorate considers the absence of an internal monitoring mechanism as "a significant gap in governance". It also identifies the pressing need for broader and deeper external monitoring of trends in the Garda use of

force. It recommends that this should be delivered as part of the performance monitoring activities of the Policing Authority. Although the Inspectorate does not mention it, this should also be the subject of direct democratic scrutiny through, for example, the Oireachtas Justice Committee.

A general lack of transparency also affects other aspects of the Garda public order remit. Most of the Garda policy documents on public order are treated as confidential. The same applies to the policy documents on the use of the individual weapons. This, of course, is in keeping with a long-standing Garda obsession with secrecy over operational policy documents, even those on the use of police powers and operational procedures. For the most part, there is no compelling reason why they should be treated as confidential. Quite the contrary, maintaining secrecy in such matters would appear to be inconsistent with the values underpinning a democracy based on respect for human rights and the rule of law.

Despite some improvement in recent years, Garda practice in this area is still seriously at odds with international best practice. With respect to public order policing, the Inspectorate suggests that the Garda should take a more transparent approach by publishing its policy documents on its external website; excluding only operationally sensitive material.

Transparency is also lacking in the selection of members for training and service in Garda public order units. The Inspectorate found that there are no processes to quality-assure selection of members for training, and that inconsistent approaches are used for selection across Garda divisions. It recommends the adoption of standardised and transparent selection procedures, complemented with a specific strategy to combat the gross under-representation of females selected for training.

These weaknesses are compounded in the arrangements for deployment of members for public order duties (members do not serve full time in public order units). The Inspectorate found that the arrangements rely too heavily on informal personal contact. While the Inspectorate did not say so, this preference for the informal personal approach, over formal transparent procedures, is (arguably) an inherent feature of the internal Garda working method. It might also be considered a significant contributor to much internal and external dissatisfaction or controversies associated with the Garda.

Lack of transparency usually presents a serious obstacle to the delivery of effective accountability. The dispersal of decision-making powers in the same matter across several persons and/or units can have the same effect. This is a problem for accountability in public order policing. The Inspectorate found that structures and responsibilities for the governance of public order are spread across too many functions with limited strategic coordination, resulting in diffused accountability. It recommends the designation of a single Assistant Commissioner with responsibility for leading on public order governance and compliance. This should be complemented by the designation of a single Chief Superintendent within operational support services with responsibility for overseeing public order standards, training, capacity and capability across the whole country. It is incredible that it should be necessary to make such recommendations in 2019 in respect of a centralised national police

force that was established in 1925 as the sole police force for the State.

Human rights

It is 15 years since the Garda committed itself to putting respect for human rights at the heart of its activities in the wake of the searing and profound criticisms from the Morris Tribunal of Inquiry. Yet, the Garda has been criticised regularly since then for failing to deliver meaningfully on that promise. The Inspectorate, too, has found it necessary to draw attention to significant human rights deficiencies in public order policing.

In particular, the Inspectorate emphasises the need for a greater focus on human rights and the Garda Code of Ethics in the command policy, procedures and guidance. It also recommends a mandatory recertification process for all public order commanders to ensure that they maintain operational competence, professional knowledge and a current understanding of relevant human rights issues. Equally, the selection for service in operational public order units should be contingent on the individuals having completed up-to-date refresher training in the use of force, and their having signed the Garda Code of Ethics.

It is a concern that such basic, and easily remediable, human rights failings should persist. A further concern is that even where policy does reflect best international standards, it may not be implemented in practice. So, for example, decisions by individual gardaí, on matters such as when to use a particular type of force in an operational situation, should be taken in accordance with the 'Garda Decision Making Model' (GDMM). This will have been an integral part of basic Garda training and is of vital importance as, ultimately, each individual member of the Garda is responsible for his or her own decisions in such situations. Yet, the Inspectorate found that knowledge and use of the GDMM is limited!

The Inspectorate's report identifies room for improvement in human rights compliance in public order operations. It found that the national rules for the mobilisation of Garda Public Order units are not applied consistently in time and place. This creates a significant risk of side-lining less aggressive alternatives such as peaceful crowd management or high visibility policing.

Garda planning for the policing of public order events could also benefit from a more structured approach to engagement with the parties involved. In particular, the Inspectorate recommends greater use of community impact assessments to identify community concerns and tensions, and greater use of crisis negotiators to engage with harder-to-reach groups. Garda sergeants and public order commanders should also have ready access to human rights legal advice when planning events.

Clearly, the Garda still have some way to go before they catch up with international best practice in human rights compliant policing of public order.

Organisational Learning

It is reasonable to expect that a national police organisation will have an internal process for investigating and reviewing why a particular police operation generated serious public concern, and what lessons can be learned to improve future police performance. The Garda, for example, conducted an internal review of their handling of the An Cosán and North Frederick Street protests. Disappointingly, however, the results of those reviews were

not published. Even more disappointing is the Inspectorate's finding that only limited progress has been made in the implementation of the recommendations emanating from those reviews on a range of issues, including: Garda policy, training, operational planning, tactical advice, communications and the management and conduct of post incident investigations

More broadly, the Inspectorate found that Garda organisational learning can best be described as ad hoc. Although the Inspectorate did not say so, nothing much has changed since the reports of the Morris Tribunal of Inquiry. Considerable effort seems to be put into conveying the public impression of reform, but the organisation still seems stubbornly resistant to translating that into practice in its operational policing methods.

Conclusion

The Garda's status as the sole, centrally managed, police service in the State places it in a sensitive position in the policing of public protest events. The use of heavy-handed or disproportionate methods against generally peaceful protestors will raise fears of partisan political policing. It is vitally important for the health of our democracy, therefore, that Garda policies, procedures and practices are set up and applied to avert even the appearance of that risk. While the Inspectorate did not say so, its findings suggest that they fall significantly short of that standard.

Finally, it is worth acknowledging the significance of the process which has resulted in the Inspectorate's report on this topic. This is the first occasion on which the Policing Authority, as distinct from the Minister for Justice, has requested the Inspectorate to conduct an examination of an aspect of Garda policing practice. If, as would appear to be the case, this reflects a commitment by the Authority to engage robustly on areas of policing that are giving cause for concern, it is very much to be welcomed. It remains to be seen whether the Policing Authority can use the report to secure meaningful positive change on the ground.

Double Jeopardy and Prosecutorial Decisions

Introduction

The rule against double jeopardy, often referred to as *ne bis in idem*, broadly protects an individual against the risk of being put in jeopardy of being punished twice in respect of the same matter. In practice this usually means that if he has been acquitted or convicted in respect of a criminal charge, he should not be tried again in respect of the same matter in the absence of new evidence. It can be described as a universal legal principle with an ancient ancestry. Today, it finds expression in the common law and in a range of international legal instruments, most notably: Article 14(7) of the International Covenant on Civil and Political Rights, Article 50 of the EU's Charter of Fundamental Rights, Article 54 of the Convention on the Implementation of the Schengen Agreement and Article 4 of Protocol No.7 to the European Convention on Human Rights (ECHR).

Although the principle is deceptively easy to state in the abstract, its application in practice can give rise to difficult and confusing distinctions. One of these is the question of whether, or to what extent, it can apply to prosecutorial (as distinct from court or judicial) decisions to discontinue (or

not to commence) a prosecution. This question was the subject of a judgment of the Grand Chamber of the European Court of Human Rights (ECtHR) a few weeks ago in the case of *Mihalache v Romania* Application No.54012/10.

The Facts

The applicant was a motorist who had been stopped and breathalysed in accordance with Romanian law and procedure. As the breath test proved positive for alcohol, he was taken to a police station and requested to provide a biological sample for determining his blood alcohol level. The applicant refused the request. A refusal is a criminal offence punishable by a maximum sentence of between two and seven years imprisonment. The police file on the investigation was submitted to the public prosecutor's office for consideration of a criminal prosecution.

Having considered the material in the file in accordance with the provisions of the Romanian Code of Criminal Procedure (CCP), the prosecutor decided that the applicant's actions did not present a sufficiently serious danger to society to warrant criminal proceedings. This was an option under the CCP even though the conduct in question was prohibited by the criminal law. Accordingly, the prosecutor discontinued the criminal proceedings and proceeded to deal with the applicant's failure to provide a sample by the imposition of an administrative penalty in accordance with the terms of the CCP. Under the CCP, the applicant had 20 days within which to appeal the discontinuance decision and fine, after which they became enforceable. The applicant did not exercise the right of appeal and paid the fine.

The discontinuance decision and fine were subsequently set aside by a higher-ranking prosecutor who considered that the initial decision had been taken in error. Again, this was an option provided for by the CCP. The criminal proceedings were duly re-instituted and the applicant was convicted of failing to provide a sample. He was sentenced to a suspended sentence of imprisonment for one year (and the fine was ordered to be reimbursed).

The applicant challenged the decision to re-institute the criminal proceedings on the ground that it breached the protection against double jeopardy provided by Article 4 of Protocol 7 to the ECHR. Article 4(1) states:

> "No one shall be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

This is qualified by Article 4(2) which states:

> "The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case."

The importance of this double jeopardy protection is reflected in the fact that Article 4(3) exempts it from the possibility of a State derogation under Article 15 ECHR; a status reserved for very few of the rights guaranteed by the ECHR.

The Romanian courts held that prosecutor's initial discontinuance order did not amount to a final judgment for purposes of the CCP. As such, the re-opening of the case by the prosecutor's office did not breach the double jeopardy principle. The applicant took his case to the ECtHR arguing that the decision was in violation of his rights under Article 4(1) of the Protocol.

Criminal nature of proceedings

The ECtHR proceeded on the basis that for the double jeopardy protection to apply, three components must be satisfied, namely: 1. the two sets of proceedings must be criminal in nature; 2. they must concern the same facts; and 3. there must be duplication of the proceedings. It had no difficulty in finding that the imposition of the administrative fine was criminal in nature. Drawing on its established jurisprudence, it explained that the classification of a prohibition and penalty under national law was not the sole criterion for determining whether proceedings were criminal in nature for the purposes of the ECHR and Protocols. The ECtHR would look also at the substantive nature of the offence and the severity of the penalty that can be imposed for it.

In this case, the failure to give a biological sample was classified as a criminal offence under Romanian law, even though the prosecutor imposed an administrative fine on the basis that the failure was not sufficiently serious to constitute a criminal offence. The ECtHR noted that the substantive nature of the 'offence' reflected core values protected by the criminal law. This was not altered by the fact that the infringement of those values was initially considered as insignificant. The Court also noted that the maximum penalty for the offence was imprisonment for two years to seven years which, by any standard, was a severe penalty. Under the CCP, the prosecutor was required to impose an administrative penalty where the infringement was not considered sufficiently serious to constitute a criminal offence. The fine actually imposed was the maximum available under the CCP. The ECtHR concluded that the purpose of the fine was not to repair damage caused by the applicant, but to punish him and to deter him from committing further criminal acts.

Taking all these factors into account, the Court concluded that the imposition of the administrative fine entailed a criminal proceeding. There was also no doubt that the subsequent criminal proceedings leading to the suspended sentence of imprisonment was criminal in nature.

The same facts

There second component (that the two sets of proceedings must concern the same facts) also presented no difficulty. Each of proceedings leading to the administrative fine and to the suspended sentence concerned the applicant's failure to submit the sample. He was convicted and punished in the second proceedings in respect of the same matter that was dealt with by the administrative penalty in the earlier proceedings. Accordingly, the ECtHR found that the second component was satisfied.

Final determination by a prosecutor

The third component (that there must be duplication of proceedings) was much more difficult and significant. A key issue here was whether the disposal of proceedings by a prosecutor, as distinct from a judge or a court, could be sufficient to bring the double jeopardy protection into play. Could a prosecutor's decision to discontinue criminal proceedings in favour of an administrative penalty be treated as the equivalent of a conviction which would

protect the offender against the risk of being subsequently tried and punished again in the same matter? In its previous case law, the Court had declined to recognise a prosecutor's decision on discontinuance as sufficient to constitute an acquittal or conviction. In *Mihalache*, however, it has accepted that there can be circumstances in which a prosecutor's disposal of criminal proceedings can trigger the double jeopardy protection.

Preferring the English version of Article 4(1) over the equally authentic French version, the ECtHR decided that it was not necessary for the final determination to be made by a judge. It was sufficient that it was made by "an authority participating in the administration of justice in the national legal system concerned, and that the authority is competent under domestic law to establish and, as appropriate, punish the unlawful behaviour of which the person has been accused." Equally, there was no need for that determination to take the form of a judgment. Accordingly, it was at least possible for a prosecutor's decision on discontinuance to amount to a final conviction or acquittal for the purposes of double jeopardy.

Determination on the merits

On the issue of whether the prosecutor's decision amounts to an acquittal or conviction in any given situation, the ECtHR repeated the established position that the decision must involve a determination on the merits of the case. Its explanation of what that entails, however, lacks clarity and precision. Not only must the prosecutor be competent under domestic law to examine the merits of a case, he or she must also "study or evaluate the evidence in the case file and assess the applicant's involvement [in the events in question] for the purposes of determining whether "criminal" responsibility has been established". Interestingly, in explaining when the prosecutor's decision can amount to an acquittal or conviction in this context, the Court did not include a requirement for the prosecutor to have the capacity to impose a penalty or punishment in the matter.

The ECtHR found that the "merits" test had been satisfied on the facts of *Mihalache*. This was not a simple case of a prosecutor's decision to discontinue a prosecution. The prosecutor was competent to investigate the applicant's actions and assess whether they constituted a criminal offence. Having done that, the prosecutor exercised the power to discontinue the prosecution and impose an administrative penalty that had a punitive and deterrent effect. In effect, the prosecutor's decision amounted to a conviction and punishment following on from an assessment of the evidence.

A "final" determination

The more difficult issue, perhaps, was whether the conviction was "final" within the contemplation of the double jeopardy principle. To have that status, "ordinary" remedies under domestic law must have been exhausted or the time limit for their exercise must have expired. On the facts of *Mihalache*, it was clear that the time limit for the applicant to appeal against the penalty had expired. The real question was whether the provision in the CCP permitting a more senior prosecutor to review and overturn the discontinuance decision and penalty qualified as an "ordinary" remedy in this context. If it did qualify, then the initial discontinuance decision was not "final" for the purposes of double jeopardy.

Qualifying its established jurisprudence which seemed to suggest that the

designation of "final" decisions should be determined by reference to domestic law, the ECtHR explained that the matter is not determined exclusively by the domestic classification. It will conduct its own assessment of the "final" nature of a decision by reference to the exhaustion of "ordinary" remedies. Where domestic law requires a particular remedy to be used for a decision to be designated as final, the Court will draw a distinction between "ordinary" and "extraordinary" remedies. In the interests of legal certainty, it will only consider the exhaustion of "ordinary" remedies when determining whether a decision is "final" for the purposes of double jeopardy. In making the distinction between "ordinary" and "extraordinary", having regard to the circumstances of an individual case, the Court will consider such factors as the accessibility of a remedy to the parties, and the discretion afforded by law to authorised officials in the use of the remedy. It will also pay attention to the overall foreseeability of the law.

When establishing the "ordinary" remedies available in a particular case, the Court will take domestic law and procedure as the starting point. That law, however, must satisfy the principle of legal certainty which requires that a remedy must operate in a manner which brings clarity to the point in time when a decision becomes final. Moreover, a law conferring unlimited discretion on one of the parties to make use of a specific remedy, or subjecting such a remedy to conditions disclosing a major imbalance between the parties in their ability to use it, would run counter to the principle of legal certainty.

Applying these principles to the facts in *Mihalache*, the ECtHR found that the "remedy" of review by a more senior prosecutor had a basis in domestic law, and that it was reasonable for senior prosecutors to review the merits of decisions by prosecutors lower down the chain. However, the review facility did not qualify as an "ordinary" remedy for the purposes of double jeopardy, as it did not satisfy the requirements of legal certainty. Its use was not subject to a time limit. This created uncertainty in respect of the applicant's legal situation. By way of contrast, he had to exercise his remedy against the penalty by an appeal lodged within 20 days of notification of that penalty. This discrepancy in the treatment of the two parties resulted in a major imbalance in their ability to make use of the remedies in question.

Double jeopardy satisfied

As it did not qualify as an "ordinary" remedy, the prosecutor's review option could not be taken into account in determining whether the decision on discontinuance and the administrative penalty (the applicant's initial conviction) was a "final" decision for the purposes of double jeopardy. By contrast, the applicant's right of appeal against that initial conviction satisfied the requirements of legal certainty. As such, it qualified as an "ordinary" remedy that could be taken into account in determining whether the initial conviction was "final". Since the applicant allowed the 20 day time limit to expire without exercising the right of appeal, and no other "ordinary" remedy was available, the ECtHR concluded that his initial conviction was "final". It follows that his subsequent trial and punishment, consequent on the senior prosecutor's decision to overturn the initial conviction, were prohibited by the double jeopardy principle contrary to Article 4(1).

The Article 4(1) breach was not avoided by the terms of Article 4(2). There was no issue of new or newly discovered facts

becoming available in *Mihalache*. The argument that the initial prosecutor's decision amounted to a fundamental defect in the proceedings was swiftly dismissed by the ECtHR. A mere reassessment of the facts in the light of the applicable law (which is essentially what had happened in *Mihalache*) cannot amount to a fundamental defect in the proceedings within the contemplation of Article 4(2).

Comment

The ECtHR's decision in *Mihalache* is significant insofar as it extends the application of the double jeopardy principle to prosecutorial decisions discontinuing criminal proceedings in certain circumstances. Unfortunately, however, the Court's reasoning is not as clear and coherent as it might be. So, for example, it leaves considerable uncertainty over the key question of when a decision on discontinuance constitutes an acquittal or conviction sufficient to prohibit a subsequent prosecution in the same matter.

The Court holds that it must be a decision on the merits of the case against the accused. It is by no means clear, however, when a prosecutorial decision to discontinue proceedings can be considered a decision on the merits. The Court said that the presence of certain factors "is likely to lead to a finding that there has been a determination as to the merits of the case". Those factors are: a criminal investigation has been initiated after an accusation has been made against the accused, the victim has been interviewed, the evidence has been gathered and examined by the competent authority (presumably the prosecutor) and a reasoned decision has been given on the basis of that evidence (presumably by the prosecutor).

There are several weaknesses in this approach. Obviously, it is open to subjective interpretation on the facts of an individual case. Apart from the looseness and uncertainty inherent in the individual elements, they are only "likely to lead to a finding that there has been a determination on the merits." This amounts to uncertainty heaped on uncertainty. How can it be possible for an objective observer to predict in advance whether a discontinuance decision will or will not satisfy these criteria sufficiently to constitute a decision on the merits?

Apart from the imposition of the administrative penalty (which the Court did not include as an essential element for a decision on the merits), it can be argued that the prosecutorial decision-making process in many cases in Britain and Ireland can satisfy the *Mihalache* criteria. They entail a thorough police investigation in which the victim is interviewed, evidence is gathered and examined by the prosecutor and the prosecutor makes a reasoned decision on prosecution on the basis of that evidence. In practice, of course, a prosecutorial decision discontinuing criminal proceedings in Britain or Ireland is not considered to be a decision on the merits. It is merely a decision that there is not sufficient admissible evidence to warrant a prosecution (or that it is not in the public interest to take a prosecution). In the light of *Mihalache*, however, it is at least arguable on the facts of an individual case that a decision to discontinue criminal proceedings could be sufficient to trigger the double jeopardy protection against the initiation of subsequent criminal proceeding in the same matter on the basis of the same evidence.

Further confusion is generated by the fact that the ECtHR appears to draw a

distinction between "a simple discontinuance order", which cannot trigger the double jeopardy protection, and the nature of the prosecutorial decision in *Mihalache*. It is by no means clear, however, what is meant by a "simple discontinuance order" in this context. The reality is that decisions not to prosecute, or to discontinue criminal proceedings, can be taken in widely varying circumstances even within a single jurisdiction. A preliminary decision that in the current state of the investigation there is insufficient evidence to warrant a prosecution might reasonably be classified as a simple discontinuance order. What is the position where the matter has been fully investigated and there are no realistic prospects of finding any further admissible evidence sufficient to warrant prosecution? What also about discontinuance decisions taken in the context of the rapidly expanding options to divert the accused from the criminal trial process? Surely these cannot be lumped together as simple discontinuance orders that are incapable of triggering the double jeopardy protection.

Applying the established jurisprudence, the ECtHR made it clear that the conviction/acquittal decision must be "final" in order to trigger the double jeopardy protection under Article 4(1). Here again, however, its approach generates more unnecessary uncertainty. Quite reasonably, it links the issue of finality with the exhaustion of remedies. Unfortunately, it goes on to draw an artificial distinction between "ordinary" and "extraordinary" remedies in this context. The picture is further clouded by the unnecessary introduction of broader concepts of legal certainty and foreseeability to the definition of an "ordinary" remedy. The effect is to convey a sense of subjectivity over what will qualify as an "ordinary" remedy on the facts of an individual case.

The clarity of the analysis is not helped by the peculiar presentation of the facility for review of the initial prosecutorial decision as a remedy. Internal review of a decision within the body making the decision would not normally be interpreted as a remedy available to that body. It would seem more appropriate to classify it as part of the internal administrative process through which an initial decision emanating from the body is finalised. If it had a prejudicial effect on the treatment of the accused in a criminal matter, it could always be challenged under the right to a fair trial as guaranteed by Article 6 ECHR. Introducing it to the analysis of what constitutes an ordinary, as distinct from an "extraordinary", remedy for the purposes of the double jeopardy protection only serves to confuse.

Finally, it is worth noting that while the Grand Chamber of the ECtHR in *Mihalache* was unanimous in its decision, there was considerable disagreement among the judges in their reasoning. The main judgment was agreed by only seven of the seventeen judges. The other ten judges between them appended four separate opinions departing from aspects of the reasoning in the Court's judgment. This, together with the lack of clarity on some key elements in the judgment, as outlined above, suggests that the Court will have to return to the application of the double jeopardy principle to prosecutorial decisions in the future.