Judgment Approved by the court for handing down.

Neutral Citation Number: [2020] EWCA Crim 552

Case No: 201903156 B3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM SOUTHWARK CROWN COURT
HER HONOUR JUDGE KORNER CMG, QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23rd April 2020

Before :

LORD JUSTICE DAVIS
MR JUSTICE FRASER
and
SIR NICHOLAS BLAKE

- -

Between :

(1) ANDREW DINES	**Appellants**
(2) ANDREW NEAVE	
(3) PAUL O'CONNOR	
- and -	
DIRECTOR of PUBLIC PROSECUTIONS	**Respondent**

- -
- -

Mr Hugo Keith QC and Mr Nicholas Yeo (instructed by **Keystone Law**) for the **Appellants**
Mr Michael Newbold (instructed by **the Crown Prosecution Service**) for the **Respondent**

Hearing date: Thursday 19 March 2020

- -

Approved Judgment

LORD JUSTICE DAVIS:

Introduction

1. If a foreign confiscation order is to be registered in this jurisdiction, one of the conditions set by Part 2 of the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 ("the 2005 Order") is that such an order has been made consequent on the conviction of the person named in the order. But what does the word "conviction" connote for this purpose? That is the interesting question raised on this appeal.

2. The question arises in the particular context of Italian confiscation orders made after each of the appellants had, pursuant to the provisions of the Italian Code of Criminal Procedure ("ICCP"), entered into what is commonly known in Italian law as a *patteggiamento*. The case of the appellants is that a *patteggiamento* does not give rise to a conviction within the ambit of the 2005 Order, properly interpreted under English law. The case of the respondent, on the other hand, is that it does give rise to a conviction within the ambit of the 2005 Order, properly so interpreted.

3. There was a hearing in the Southwark Crown Court before Her Honour Judge Joanna Korner CMG, QC. The judge, by a reserved decision, rejected the appellants' arguments. By Orders of 14 November 2019, she ordered that the confiscation orders in question be registered; and she dismissed the appellants' applications to cancel that registration. She directed that the Director of Public Prosecutions (via the Crown Prosecution Service Proceeds of Crime Unit) should be appointed the enforcement authority in respect of the realisable property of each appellant as specified in the Orders which she made.

4. The appellants have applied for permission to appeal against the judge's refusal to cancel the registration of these external confiscation orders. The court granted permission to appeal at the hearing, the applications having been referred by the Registrar. Before us, the appellants were represented by Mr Hugo Keith QC and Mr Nicholas Yeo. The respondent was represented by Mr Michael Newbold. We would like to place on record that the respective arguments presented to us, both written and oral, were excellent. We have sought to bear in mind all points made, although we do not propose in this judgment to cover the nuances of every argument presented to us.

The Legislative Context

5. A degree of international cooperation with regard to confiscation orders in the context of serious crime was and is to be expected.

6. Thus relevant shared objectives are set out in the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime made in Strasbourg on 8 November 1990 ("the Strasbourg Convention"), to which member states of the Council of Europe and certain other states subscribed. The preamble to that Convention recites that the fight against serious crime, which has become an increasingly international problem, calls for the use of modern and effective methods on an international scale.

7. By Article 7 of the Strasbourg Convention, various general principles for international cooperation are set out. By Article 13, there are set out provisions relating to enforcement of a confiscation order made by the requesting party in relation to the proceeds of crime. Article 14 then stipulates, among other things, that procedures for obtaining and enforcing such a confiscation order are governed by the law of the requested party. However, the requested party is bound by the findings of fact stated in "a conviction or judicial decision of the requesting party or in so far as such conviction or judicial decision is implicitly based on them."

8. Article 18 of the Strasbourg Convention then sets out potential grounds for refusal of cooperation. Amongst other things, cooperation may be refused where "the request does not relate to a previous conviction or a decision of a judicial nature or a statement in such a decision that an offence or several offences have been committed, on the basis of which the confiscation has been ordered or is sought"; Article 18.4 (d) (which is also the subject of discussion in paragraph 73 of the accompanying Explanatory Report).

9. Section 444 (1) of the Proceeds of Crime Act 2002 ("the 2002 Act") provides that Her Majesty may by Order in Council (a) make provision for a prohibition on dealing with property which is the subject of an external request and (b) make provision for the realisation of property for the purpose of giving effect to an external order. "External order" is defined in s.447 (2) of the 2002 Act as follows:

> "(2) An external order is an order which–
>
> (a) is made by an overseas court where property is found or believed to have been obtained as a result of or in connection with criminal conduct, and
>
> (b) is for the recovery of specified property or a specified sum of money."

10. That was duly done by the 2005 Order. By Article 18 of the 2005 Order (included in the Part corresponding to Part 2 of the 2002 Act) an external order "arising from a criminal conviction in the country from which the order was sent" and concerning relevant property in England and Wales may be referred to the Director of Public Prosecutions for processing. By Article 19, where there is authenticated involvement of an overseas court in any judgment, order or any other document concerned with such a judgment or order or related proceedings any statement therein is admissible in evidence. Article 20 then gives the Direction of Public Prosecutions power to apply to the Crown Court to give effect to an external order.

11. Article 21, and in particular Article 21 (2), is the critical provision for present purposes. Article 21 provides in the relevant respects as follows:

> "(1) The Crown Court must decide to give effect to an external order by registering it where all of the following conditions are satisfied.
>
> (2) The first condition is that the external order was made consequent on the conviction of the person named in the order and no appeal is outstanding in respect of that conviction.

> (3) The second condition is that the external order is in force and no appeal is outstanding in respect of it.
>
> (4) The third condition is that giving effect to the external order would not be incompatible with any of the Convention rights (within the meaning of the Human Rights Act 1998) of a person affected by it.
>
> (5) The fourth condition applies only in respect of an external order which authorises the confiscation of property other than money that is specified in the order.
>
> …
>
> (7) In determining whether the order is an external order within the meaning of the Act, the Court must have regard to the definitions in subsections (2), (4), (5), (6), (8) and (10) of section 447 of the Act.
>
> (8) In paragraph (3) "*appeal*" includes–
>
> (a) any proceedings by way of discharging or setting aside the order, and
>
> (b) an application for a new trial or stay of execution"

The word "conviction" is not defined in the 2005 Order.

12. Article 22 then, in the relevant respects, provides as follows:

> "(1) Where the Crown Court decides to give effect to an external order, it must–
>
> (a) register the order in that court;
>
> (b) provide for notice of the registration to be given to any person affected by it; and
>
> (c) appoint the relevant Director as the enforcement authority for the order.
>
> (2) Only an external order registered by the Crown Court may be implemented under this Chapter.
>
> (3) The Crown Court may cancel the registration of the external order, or vary the property to which it applies, on an application by the relevant Director or any person affected by it if, or to the extent that, the court is of the opinion that any of the conditions in article 21 is not satisfied."

13. It can be noted that, whilst these particular provisions would doubtless have been drafted with the provisions of the Strasbourg Convention in mind, that Convention had contemplated a significant degree of latitude as to how subscribing states might

seek to give effect to it. Further, it was common ground before us that there was, for instance, no relevant Council Framework Decision to which the 2005 Order was designed in these respects to give effect. Thus purposive principles of interpretation of the kind ordinarily to be expected in such a situation have no direct application in this context: contrast the position arising, for example, in the case of *Moss* [2019] EWCA Crim 501, [2019] 1 WLR 6033 (which related to enforcement of confiscation orders pursuant to the Criminal Justice and Data Protection (Protocol No. 36) Regulations 2014, which have not featured in this case).

Patteggiamento

14. In order, then, to explain what is at issue here it is next necessary to give an outline explanation of the *patteggiamento* procedure in Italy.

15. This was the subject of detailed written reports on Italian law adduced before the judge at the hearing. Various reports from Professor Vigano and, latterly, Professor Gatta in this respect were put in on behalf of the respondent. Other reports from Mr Sangiorgio were put in on behalf of the appellants. Oral evidence was given at the hearing by Professor Gatta (Professor Vigano having in the interim become a judge) and Mr Sangiorgio. The qualifications and expertise of the witnesses were not in dispute. To a very great extent their evidence did not really conflict: even if their ultimate conclusions to an extent did.

16. The phrase "*sentenza di patteggiamento*" is, as is to be gathered, widely used in the Italian criminal courts. However, as Professor Vigano and Professor Gatta explained and as was not disputed, the word "sentenza" does not correspond to the word "sentence" as used in the English criminal courts. Rather, it corresponds to the notion of a judgment. As to "*patteggiamento*", that connotes a negotiated agreement: an agreement whereby the defendant in criminal proceedings proposes, in exchange for an agreed penalty, to renounce any defence or challenge to the charges which he faces in those criminal proceedings. If that is accepted, and a *sentenza di patteggiamento* pronounced, that is final. Significant advantages can accrue to the accused. The most obvious is that the penalty (including any custodial penalty) is required to be reduced by one-third. But in addition there are other prospective advantages: for example, a defendant obviously is spared the delay and uncertainty of continued proceedings; he is spared the cost of funding those proceedings; and, in certain such cases, he also will not be required to pay any prosecution costs. Further, under the ICCP, if the sentence is less than two years a *patteggiamento* can be regarded as extinguished after a specified lapse of time; and certain other advantages are potentially available, such as the non-application of various ancillary orders which otherwise normally would follow a conviction and sentence of imprisonment.

17. Italy, of course, has a codified legal system. In criminal proceedings, as we were told and as was explained in the oral evidence given before Judge Korner, there is no procedure directly corresponding to a plea of guilty in the way known to the courts of England and Wales under the common law. In this jurisdiction, if a defendant of sound capacity chooses unequivocally to plead guilty in court to a charge, then that ordinarily will be accepted by the court without any further judicial enquiry or determination being undertaken. But that is not the position in Italy (nor, we apprehend, in many other codified systems). If a defendant openly admits his responsibility that will be treated as admissible evidence: but the judge of the Italian

court still is required to go on to appraise the case on the evidence and the court will give its judicial determination, in the form of a pronouncement of conviction (*pronuncia di condanna*) and the appropriate sentence. In such circumstances, the defendant then will not have an entitlement to the prospective benefits (such as the mandatory one-third discount and so on) which can flow if the *patteggiamento* procedure is successfully adopted.

18. Although the *patteggiamento* procedure is the subject of the ICCP, the ICCP does not use that actual word. Article 444 of the ICCP is, as translated, headed: 'Application of punishment upon request'. It currently provides in the relevant respects as follows in the translation provided to us:

> "Article 444 (*Application of punishment upon request*)
>
> 1. The accused and the Public Prosecutor may agree to request [*recte*: may request] the judge to impose a penalty, specifying its type and length or amount. Such penalty may be either a substitute or a financial penalty reduced by a maximum of a third, or a sentence of imprisonment when, considered the circumstances and after its reduction by a maximum of a third, it does not exceed five years of imprisonment or five years or imprisonment combined with a financial penalty
>
> 1-*bis*. [*omitted*]
>
> 2. If the party who has not submitted the request agrees with the request and delivery of the judgment of dismissal is not required in line with Article 129, the judge shall order the application of the punishment by issuing a judgment, stating, in its operative part, that the parties have submitted the request. The judgment on the application of the punishment shall be delivered only if, on the basis of the available elements of evidence, the judge believes the legal definition of the criminal act, the application and comparison of the circumstances adduced by the parties are correct and the requested punishment is adequate […]
>
> 3. Upon submission of the request, the party may subordinate the effectiveness of the request to the granting of a suspended sentence. In this case, the judge may reject the request if he believes the suspended sentence cannot be granted."

19. Article 129 there referred to provides as follows:

> "1. In any state and phase of the proceeding, the judge who recognizes that the fact does not exist or that the defendant did not commit it or that the fact does not represent a crime or is not qualified as a crime by law or if the crime is extinguished

> or a requirement to proceed is lacking, declares it ex officio in a judgment.
>
> 2. If a reason for the extinction of the crime exists but, from the documents, it is evident that the fact does not exist or that the defendant did not commit it or that the fact dies [sic] not represent or is not qualified as a crime by law, the judge issues an acquittal decision or a decision not to prosecute with the appropriate formula."

20. It is, now, expressly provided in the ICCP (it previously having been, apparently, the subject of debate) that a confiscation order may be made not only in cases of pronouncement of conviction but also where a *patteggiamento* is accepted in certain specified kinds of case.

21. As is to be gathered from the evidence, there had been (certainly until 2003) a debate amongst Italian lawyers and judges as to whether a *patteggiamento* constituted a conviction. On one view, the procedure involved only an agreement between prosecution and defence, with no confession of criminal responsibility and no determination of criminal responsibility. It was also pointed out, in support of that view, that a conviction, in Italian law, was generally to be regarded as conclusive evidence of the matters the subject of the charge in subsequent civil or administrative proceedings; but a *patteggiamento* does not have that status: it is at most admissible evidence in that respect. At all events, that overall viewpoint was one seemingly shared by Professor JR Spencer (writing in 2002) in his book on European Criminal Procedures. At page 596 of that work, he stated (comparing and contrasting the position with pleas of guilt under the English common law):

> "… the Italian defendant whose case ends with a patteggiamento does not formally admit his guilt, although he accepts that he will be punished. He therefore does not formally count as someone who has been convicted."

22. The other view was that it was to be regarded as a conviction, in circumstances where the accused had elected not to pursue any defence or to contest the prosecution evidence and where the court (pursuant to Articles 129 and 444) had accepted, even if summarily, the joint request for punishment and thereby the criminal responsibility of the accused.

23. Against the background of that debate, further provision had been made in 2003 in the ICCP by amendment to Articles 444 and 445. First, Article 444 was amended so as to extend the availability of the procedure to cases where the proposed sentence might be up to five years imprisonment (whereas previously it had been up to two years). This was potentially significant, because under Italian law sentences in excess of two years cannot be suspended. Secondly, there was now included in Article 445.1 this further express provision with regard to a *patteggiamento*:

> "Unless otherwise provided by law, the judgment shall be considered equal to a judgment of conviction".

(In the papers before us, other translations use the words "equivalent to": the Italian is "è equiparata a una pronuncia di condanna".)

24. Finally, for present purposes, reference can be made to a judgment delivered on 26 February 2015 by the Joint Sections of the Court of Cassation (agreed by the experts to be a court of the highest authority in this regard). That judgment directly related to the *patteggiamento* procedure. We were not shown a translation of the full text of the judgment. But the extracts cited in the reports included the following passages (as translated):

> "It is evident the difference between the determination made by a conviction decision after the trial and a decision imposing the penalty requested by the parties [i.e. *patteggiamento*], because what is different is the rule of justice to apply and different is the determination of the facts made by the judge. The case-law has pointed out that in the "*patteggiamento*" a positive determination of the criminal liability is not required …." (page 6).

At a later stage in the judgment, this was said, as translated:

> "According to the well settled case law of this Court, by requesting the imposition of the penalty the accused renounces to avail himself of the possibility to challenge the accusation. In other terms, he does not deny his responsibility and exempts the prosecution from the burden to prove it. Therefore, the judgment which grants his application contains a finding and an implicit assessment of his responsibility, without being necessary for the court to give reasons of it (see the judgment by the Joint Sections of the Court of Cassation Nr. 5777 of the 27.3.1992, Di Benedetto, Rv. 19 1134). Besides, the judgment which imposes a penalty upon the parties request cannot be impugned before the Court of Cassation by the defendant on account of an inadequate statement of reasons about the facts upon which his criminal liability is based, since their actual existence is implicitly, but unequivocally, admitted by him in the very moment he requests the 'patteggiamento', or agrees to the prosecutor's request thereof …." (page 18).

Article 21 (2) of the 2005 Order

25. Whilst it is necessary to assess the effect of a *patteggiamento* in Italy, the ultimate question for this court is by reference to the provisions of Article 21 (2) of the 2005 Order: which is, of course, to be interpreted under English law.

26. We were taken to a number of authorities as illustrating what a "conviction" connotes in English law. It is not necessary to refer to all of them. It has not infrequently been said that the word is ambiguous; certainly much will depend on context. It is, however, generally taken as extending to a finding of guilt, although sometimes (depending on context) it may extend further so as to include the final disposal of a

case in the form of sentence. But it also can extend to an admission of guilt as reflected in a plea of guilty tendered to the court and formally recorded.

27. The position is reflected in the case of *McGregor* (1992) 95 Cr. App. R 240. In that case, the defendant faced trial in England for a drugs offence. She attacked the character of the co-accused; whereupon counsel for the co-accused (without prior notification to the prosecution or judge) in due course put to her in cross-examination that she had a previous conviction for a drugs offence in Florida, USA. She, after initial prevarication, admitted that she had been fined for such an offence: and it was left to the jury that that bore on her credibility. She was convicted.

28. On appeal against conviction, it was identified that in fact she had been the subject in Florida of what was called a *nolo contendere* procedure in respect of an alleged offence of possessing cannabis. The relevant Florida court document was headed "Order withholding adjudication." It stated in the body of the order that an adjudication of guilt was "stayed and withheld": the sentence imposed was a fine of $1,000 (it apparently being the case that the *nolo contendere* procedure in Florida did not even permit any custodial penalty). Expert evidence adduced before the Court of Appeal described the procedure as being available where the accused, although unwilling to confess guilt, did not wish to go trial, whereby much expense and delay otherwise might be incurred. Lord Lane LCJ in this regard (in giving judgment) summarised at p. 243 the expert evidence relating to "what prima facie seems to be a somewhat self-contradictory proceeding."

29. The appeal was allowed. The court in Florida had withheld an adjudication of guilt and thus there was no conviction. What had happened was that there was a bargain struck between both sides to which the Florida court judge had given his or her blessing: "There was no plea of guilty and there was no verdict of guilty. There had been a bargain struck between the two sides sanctified by the court": per Lord Lane LCJ, at p. 244.

30. To anticipate, it is the submission of the appellants that, although the features of the *nolo contendere* procedure in Florida undoubtedly have a number of distinctions from the *patteggiamento* procedure, the general approach taken by the Court of Appeal in *McGregor* is highly informative in the present case.

The Italian Criminal Proceedings Relating to the Appellants

31. It is convenient next to outline the position of these appellants and the *patteggiamento* process as applied to their cases in the Italian criminal proceedings. The background can be summarised as follows.

32. The three appellants are British citizens, resident in England and variously owning properties or interests in properties in England.

33. Each was alleged to be involved in a major international tax fraud, seemingly of a carousel nature, in connection**,** in particular**,** with telecommunications companies based in Italy. A number of different companies were involved: these included various companies registered in England and elsewhere and with which the appellants variously were connected as directors and/or shareholders. Over €300 million were said to be involved in the overall tax fraud.

34. Following investigations started in 2006, criminal proceedings were commenced in Italy, in the Criminal Court in Rome, against a large number of persons, including the appellants. Restraint orders were also made in 2010 in this jurisdiction, on the request of the Italian authorities. Consequent on a decision of the Divisional Court, the appellants were in 2012 extradited to Italy under the European Arrest Warrant procedure: they were then held, so it appears, under house arrest in Rome. Each instructed Italian lawyers to represent them in defence of the proceedings.

35. In his witness statement in the proceedings in Southwark Crown Court dated 24 September 2017, the appellant Andrew Dines amongst other things describes the circumstances relating to his house arrest in Rome, the limited contact he could have with his family in England and other pressures. Having been advised by his Italian lawyers of the prospective advantages of a *patteggiamento* and having been advised, as he says, that a *patteggiamento* involved no admission of guilt and no finding of guilt, he elected to enter into that procedure. He, amongst other things, said in his witness statement: "I have always maintained my innocence". The appellants Andrew Neave and Paul O'Connor put in short witness statements adopting the same position. Letters from their Italian lawyers were also provided.

36. At all events, a *patteggiamento* was proposed and agreed with the prosecuting authorities. This was then put forward to the Criminal Court in Rome pursuant to Articles 444 and following of the ICCP. But in addition there was also placed at the same time before the court for its determination a matter which most decidedly had *not* been agreed: that is, whether confiscation orders should be made against each of the appellants, as the prosecution was seeking and the appellants were resisting.

37. This application resulted in a "Judgment Imposing the Penalty Requested by the Parties" dated 13 June 2013 and issued by Judge Antonella Capri, the judge for the preliminary investigation. The judgment is a detailed document, extending (in translation) over ten pages.

38. The judgment set out in full the Charges and the Grounds of the *patteggiamento* application. The penalty agreed between prosecution and defence was recorded as follows (put shortly). In the case of Mr Neave, the penalty (allowing for the stipulated one-third reduction) was 3 years 11 months imprisonment and a fine of €12,000. In the case of Mr O'Connor, the penalty likewise was 3 years 11 months imprisonment and a fine of €12,000. Finally, in the case of Mr Dines, the penalty was 3 years 6 months imprisonment and a fine of €12,000.

39. Judge Capri recorded (giving the details) that each of the defendants was accused of the offence of criminal association, aggravated by its transnational nature and the multiplicity of persons involved, relating to tax evasion; the offence of aggravated money laundering, of a transnational nature and involving the receipt of money deriving from "issuing invoices for non-existent transactions"; and the offence of money-laundering on a like basis.

40. The judge went on to state, having set out the alleged and unchallenged facts, that there was "no basis for an acquittal" pursuant to Article 129 of the ICCP. To the contrary, she recorded, at great length, the product of the criminal investigations as giving rise to the following accusations, among others, against the defendants (1) a structured and complex transnational criminal organisation, carried out over time,

involving many companies and involving "missing traders" both in Italy and abroad (2) a "fraudulent scheme" which was fuelled by fictitious contracts and by the issue of invoices for non-existent transactions (3) a fictitious transaction called "Phonecard" (4) invoices issued for non-existent transactions (5) the laundering of money coming from non-existent transactions (6) a fictitious transaction called "Telephone Traffic"; and so on. The appellants, and companies connected with them, featured prominently in the judge's detailed recital of the evidence. In the course of that detailed recital, the judge at one stage recorded the accusation as being that: "the fictitiousness of the transaction is fully proved by the technical investigations and interceptions of conversations" and that "the defendants have basically laundered the money coming from the billing of non-existent transactions…".

41. The judge went on to set out her own consideration of the results of the investigation and her own consideration of the aggravating circumstances and extenuating circumstances.

42. Having done that, the judge proceeded to consider the (contested) issue of confiscation. It seems that the argument being advanced on behalf of the appellants was not at all by way of dispute of any of the primary facts as asserted by the prosecution. Rather, the argument was that no confiscation orders should be made essentially because the tax liability had now been settled by two of the other protagonist companies involved. The judge rejected that; she considered that the defendants had, on the evidence presented by the prosecution, benefitted in the amounts which they (or their companies) had withheld as their "profit" on the laundered monies passing through their (or their companies') hands.

43. The judgment concluded by stating that, for the reasons recited, having regard to Articles 444 and following, the judge applied the penalties requested (which she set out). She also made an Order of Confiscation against each appellant, in respect of the assets specified in a schedule to the Order.

44. By reason of the amount of time spent on house arrest, it seems that the balance of the sentence of imprisonment to be served was in each case by now to be treated as less than 2 years. Those terms of imprisonment could, under Italian law, be regarded as suspended; and the appellants were thus able to return to the UK on that basis (as no doubt had been calculated in advance of the hearing).

45. However, the appellants sought to appeal against the making of the confiscation orders. Their appeals were roundly rejected by the Cassation Court on 6 December 2013, after a full recitation of the evidence which had been advanced in the investigation. The appeals were said to be "unfounded". It was said that the judgment of Judge Capri "demonstrated that all the evidence shows" that the appellants withheld a portion "from each money laundering operation carried out" and that there had been "personal enrichment" in relation to what was styled "the entire complex and illegal operation." Mr Newbold noted, in fact, that at one stage the Cassation Court described the appellants as "convicted of, among other things the offence of money laundering"; and had also referred to the assets held by them at "the time of conviction".

46. Be that as it may, by virtue of this judgment the criminal and confiscation proceedings in Italy were concluded in all respects so far as the appellants were concerned.

The Letter of Request and Proceedings in the Crown Court

47. Following the decision of the Cassation Court, a letter of request with a view to the registration and enforcement in England of the confiscation orders was sent on 29 July 2014. The request was signed by Judge Capri.

48. That letter referred at the outset to the Strasbourg Convention. It outlined in some detail the offences with which the appellants had been charged and the sentences imposed; and also gave details of the confiscation orders made in respect of the specified properties and the failure of the appeals to the Cassation Court. A certified copy of the Judgment Imposing the Penalty Requested by the Parties of 13 June 2013 was also enclosed. Mr Newbold noted that in this letter of request Judge Capri variously referred to "the charges for which they have been convicted" and, on two occasions, to the "convicted offenders".

49. There then followed a lamentable delay. We were given some limited explanations for some periods of the delay. But an overall delay of nearly five years before the matter eventually came on for hearing in Southwark Crown Court on 8 July 2019 is not acceptable. Such a delay is not to be repeated in other such cases of this kind.

50. Sensibly, the hearing in the Crown Court was conducted on an inter partes basis and on the footing that it extended both to the application to register and to the application to cancel any registration that otherwise might ensue. The detailed arguments presented in the Crown Court to a considerable extent tracked the arguments presented on the appeal before us. The only real issue was as to whether Article 21 (2) of the 2005 Order had been satisfied.

51. By her reserved ruling, provided in writing, dated 24 July 2019 Judge Korner ordered registration of the confiscation orders. She considered that all the requirements of Article 21 of the 2005 Order had been satisfied.

52. The judge summarised the background, the requirements of the 2005 Order, the views of the experts on Italian law and the competing arguments of counsel. She attached considerable weight to certain observations of Lord Lloyd-Jones in the case of *Konecny* v *District Court in Brno-Venkov* [2019] UKSC 8, [2019] 1 WLR 1586. That was a case on extradition pursuant to a European Arrest Warrant – the issue being whether it was a conviction warrant or an arrest warrant – and was a case which she herself had drawn to counsel's attention. These observations of Lord Lloyd-Jones were to the effect that there were inevitable differences in criminal procedure among member states; and that a national court will usually attach considerable weight to the description by the requesting judicial authority in a European Arrest Warrant of the position in its own national law. Judge Korner stated that the observations of Lord Lloyd-Jones had "strong persuasive force" in the present case.

53. The central reasoning of the judge is that contained in paragraphs 29 to 34 of her ruling. She there said:

> "29. Whilst no procedure equivalent to that of the *patteggiamento* exists in UK law the judgements entered against these defendants in Italy and the Letters of Request from the Italian to the UK authorities, make it clear – beyond a

> peradventure – that the Italian authorities regard the procedure as one which equates to a conviction under their law and therefore allows them to order confiscation of assets.
>
> 30. Whilst, superficially the *patteggiamento* procedure may seem to be identical to that of the US *nolo contendere*, (as described in *R. v. McGregor*), it is apparent on closer analysis of the law and effects of the former procedure (see paragraphs 18-20 *supra*), that it is very different in major respects; in particular that the judge who is presented with an agreement is obliged to carry out an analysis of whether evidence exists inconsistent with guilt, before passing sentence and the fact that should the defendant who has accepted sentence under this procedure being convicted of a further offence the earlier sentence will be seen as an aggravating feature and if suspended, may be brought into effect.
>
> 31. Moreover the ECHR Article 5, (incorporated in to both UK and Italian law), makes it clear that "*no-one shall be deprived of his liberty save in the following cases…the lawful detention of a person after conviction by a competent court"*. In my judgment this is such a fundamental right that no country which is a signatory to the Convention would be able to impose a sentence of imprisonment without there having been a "conviction" however described.
>
> 32. I do not find that the fact that these defendants were advised by their Italian lawyers that by entering into this procedure no finding of guilt was being made, can have any bearing on the decision which I have to make as a matter of law.
>
> 33. The UK courts are obliged to give effect to their international treaty obligations, whether they arise as a result of EU Framework Decisions or under other international agreements. The dicta of Lord Lloyd-Jones in *Konecny v Disrict Court in Brno-Venkov*, as already stated, have strong persuasive force when applied to the facts of this case.
>
> 34. In my judgment a UK judge is entitled to assume, absent evidence to the contrary, that the Italian authorities are acting in good faith when they describe the defendants as having been "convicted" of the offences which led to the making of the Confiscation orders and requests that the UK courts assist in the enforcement of a lawfully issued judgment."

The judge did not, in the event, in terms evaluate the evidence of the experts on Italian law or make findings, as such, on that evidence (which, under English procedure, is to be treated as evidence of fact). However, overall her ruling indicates, by implication, that she had preferred the evidence of Professor Vigano and Professor Gatta where it differed from that of Mr Sangiorgio.

Submissions

54. Mr Keith, on behalf of the appellants, submitted that such a decision cannot be sustained. The *patteggiamento* procedure involved no unequivocal admission or confession of guilt, as such, at all; nor was it the product of a judicial determination as to guilt. Rather, it was a negotiated settlement. Thus it could not be regarded as a "conviction" for the purposes of the 2005 Order. That was the nub of the argument. He developed his arguments fully and skilfully. But his principal supporting points, in summary, were these:

    (1) The words of Article 21 (2) of the 2005 Order should be given their clear and ordinary meaning, under usual principles of interpretation of English law.

    (2) The 2005 Order was not made so as to give effect to the Strasbourg Convention and in any event that Convention had, in the relevant respects, contemplated a wide degree of discretion available to subscribing states: as connoted, for example, by Article 18 (4) of that Convention.

    (3) There was no applicable European Framework Decision or the like requiring a broad purposive approach to interpretation; and the judge's reliance on the case of *Konecny* (cited above) was misplaced, since that case related to European Arrest Warrants, whereby the relevant provisions had to be read so as to give effect to the relevant Framework Decision.

    (4) The *patteggiamento* in Italy did not involve any confession of guilt and the appellants have never accepted guilt. Further, in so far as Article 445 of the ICCP states that (unless otherwise provided by law) a *patteggiamento* judgment was *equivalent to* a conviction (in Italian law) that did not mean that it *was* a conviction.

    (5) Such a conclusion pays full and proper regard to fundamental principles relating not only to the protection of liberty but also to the protection of property: which Article 21 of the 2005 Order can be taken to respect.

    (6) Examples taken from the *nolo contendere* case of *McGregor* (cited above) and from Deferred Prosecution Agreements made pursuant to the provisions of the Crime and Courts Act 2013 are illustrative of other situations where, even though there is an agreed penalty, there is no conviction: and the *patteggiamento* procedure is, in substance, comparable.

    (7) Such a conclusion does not leave a requesting state altogether without remedy: it may, for example, in an appropriate case apply under Part 5 of the 2005 Order.

55. On behalf of the respondent Mr Newbold, in likewise full and skilful submissions, accepted that for there to be a "conviction" for the purposes of Article 21 (2) of the 2005 Order there needed to be either an acceptance of guilt or a finding of guilt in criminal proceedings. The nub of his argument was that the *patteggiamento* satisfied that requirement. His essential points were these:

(1) Such a conclusion accorded with the general objectives of the Strasbourg Convention (albeit he readily agreed that that Convention did not mandate such a conclusion).

(2) In circumstances where Article 445 of the ICCP states that a *patteggiamento* judgment is "equal", or "equivalent to", a judgment of conviction (save where otherwise prescribed by law) and in circumstances where the Joint Sections of the Cassation Court in 2015 have decided that a *patteggiamento* involves an implicit and unequivocal admission of criminal responsibility, the outcome can indeed properly be said to be a conviction. The other features of a *patteggiamento*, taken overall, are also entirely consistent with that conclusion.

(3) The judgment of the Cassation Court in 2013 on the confiscation appeals and (in particular) the letter of request signed by Judge Capri had referred to the appellants as "convicted": that, even if not determinative, was informative and a strong pointer to there having been convictions.

(4) The position in *McGregor* and the position for Deferred Prosecution Agreements was not only distinguishable but revealingly so.

(5) Evidence that the appellants had been advised that to agree a *patteggiamento* did not involve an admission of guilt and evidence that they have always considered themselves to be innocent was not relevant: the matter was to be appraised objectively.

Disposal

56. It is, as we see it, crucial to identify that two separate issues need to be addressed. The first issue (which is a matter of Italian law) is whether a *sentenza di patteggiamento* counts as a conviction under Italian law. For if it does not, then at the outset it cannot be conceived that there was here an external order which could properly be the subject of registration under Article 21 of the 2005 Order. If, however, it does, then the second issue (which is a matter of English law) is whether it counts as a conviction for the purposes of Article 21 (2) of the 2005 Order. It is plain that although there are undoubtedly common elements to considering both issues – in particular the elements of what actually is involved in a *patteggiamento* – they are legally distinct. We thus agree with Mr Keith that even if a *patteggiamento* does constitute a conviction as a matter of Italian law (a point he disputed) it does not follow that it necessarily must constitute a conviction for the purposes of Article 21 (2) of the 2005 Order as a matter of English law.

57. In this regard, it is also clear that the matter must be assessed by reference to the substance of things: not by reference to labels. Mr Keith and Mr Newbold were agreed on that, and rightly so. Adapting phrases used by the House of Lords in the (extradition) case of *R v Governor of Pentonville Prison, ex p. Zezza* [1983] AC 46, one looks at the "nature and characteristics", or "nature and substance", of the postulated conviction in order to see whether it constitutes what would be recognised as a conviction under English law.

(1) Was this a conviction under Italian law?

58. As we have said, the judge made no express findings as to the aspects of Italian law debated before her; albeit her ultimate conclusion connotes at least an implied preference for the opinions of Professor Vigano and Professor Gatta. We have in such circumstances considered the reports on Italian law for ourselves. In truth, the areas of disagreement between the experts were limited. It was, however, perhaps somewhat unfortunate that Mr Sangiorgio was asked, among other things, to consider whether the *patteggiamento* approved by Judge Capri on 13 June 2013 could be considered a "conviction", interpreted, as he had been instructed, as a finding of guilt or an admission of guilt, for the purposes of the 2005 Order. He valiantly, as instructed, sought to answer that question. But, with respect, the only proper province for the experts on Italian law was to explain the elements of the law and procedures relating to the *sentenza di patteggiamento* and whether it was a conviction for the purposes of Italian law. Whether it amounts to a conviction for the purposes of the 2005 Order is then solely a matter of English law.

59. We conclude, in agreement with the judge, that it was a conviction under Italian law.

60. The position, in our view, is made explicit by the provisions introduced into the ICCP in 2003 (which, we observe, post-dated Professor Spencer's book). Thus Article 444 now permits a custodial sentence of up to five years, in circumstances where a sentence of more than two years is not permitted to be suspended. But in particular Article 445 stipulates that a judgment of *patteggiamento* is equal (or equivalent to) a judgment of conviction, unless otherwise provided by law. Those latter words can be taken to cover the position in which the consequences of a *patteggiamento* are elsewhere expressed under the ICCP to differ from the consequences of a *pronuncia di condanna* (as summarised above). But that there are, in some limited respects, such differences (most of them, as Professor Vigano observed, relating to a *patteggiamento* with a custodial term of less than two years), does not mean that both cannot be regarded as convictions.

61. Moreover, the expert evidence drew attention to the provisions of Article 629 of the ICCP, as amended. That amendment extended the ICCP provisions relating to *revisione* (in effect, the quashing of a conviction in the light of fresh evidence of the accused's innocence) to a *sentenza di patteggiamento*: a matter which, prior to 2003, had not, by virtue of a Cassation Court decision of 1996, been considered possible. That is wholly consistent with a *patteggiamento* being equated with a conviction.

62. There are other features of Italian law which also align a *sentenza di patteggiamento* with a conviction. For example, it is ordinarily registered in the national criminal record system; it is taken into account if there is further subsequent offending in assessing the appropriate sentence on that subsequent occasion; it also operates to revoke a previous suspended sentence order if it is pronounced in the period of suspension; and there are other related provisions to like effect.

63. Mr Sangiorgio emphasised (and Professors Vigano and Gatta agreed) that a *patteggiamento* is, under the provisions of the ICCP, not conclusive evidence of the matters comprising the charge for the purposes of subsequent civil proceedings: whereas a conviction is. But that difference is not one which goes to the heart of what is a conviction and what is not: it is simply an evidential consequence. Indeed, the point would not be in the slightest bit troubling to English lawyers, given the common law rule of *Hollington v Hewthorn* (and even when that rule was itself then modified

by s. 11 of the Civil Evidence Act 1968). More generally, as Mr Newbold pointed out, the fact that convictions may have different consequences in different situations is one which can also arise in English law: for example, a conviction giving rise to an absolute or conditional discharge.

64. The overall opinions of Professor Vigano and Professor Gatta to the effect that a *patteggiamento* involves an acceptance of guilt and is a conviction in Italian law is, in our judgment, strongly supported by two other matters.

65. The first point is that such a conclusion is wholly consistent with the reasoning of the Joint Sections of the Cassation Court in 2015 at page 18 of the judgment (set out above). As Professor Gatta points out, the court there found, as part of its reasoning for its conclusion, that, by agreeing to a *patteggiamento*, an accused "implicitly but unequivocally" admits the facts upon which his criminal responsibility is based: and that a *sentenza di patteggiamento* is a "finding and implicit assessment" of his criminal responsibility. Mr Sangiorgio drew attention – as did Mr Keith – to the earlier passage at page 6 of that judgment (also set out above). But, as Professor Gatta pointed out in his report, that statement, to the effect that in a *sentenza di patteggiamento* a positive determination of criminal liability is not required, is entirely consistent with the subsequent passage: for it is precisely because the accused implicitly admits his guilt that the court is dispensed from the task of "positively determining" (with full reasons) the issue of guilt. As Professor Gatta put it, the *sentenza di patteggiamento* is a "simplified" or "streamlined" assessment of the facts which support the charge and therefore of the guilt of the accused to whom the requested penalty is applied. Nevertheless, as the provisions of Article 444.2 and of Article 129 make clear, the judge still has an important role to perform in the respects there set out: including, among other things, an assessment of whether the facts alleged (albeit not disputed) substantiate the crime alleged and whether the requested penalty is adequate. Indeed, it is to be noted in this case that Judge Capri also based her (contested) decision on confiscation on those self-same undisputed facts.

66. The second point is this. If a *sentenza di patteggiamento* is not a conviction, how can an Italian criminal court lawfully impose an (immediate) custodial sentence of up to five years? That would seem to go flatly against the terms of Article 5.1 of the European Convention on Human Rights, to the effect that no one shall be deprived of his liberty other than in the cases there specified: which, by Article 5.1 (a), include the lawful detention of a person after "conviction by a competent court." It would also seem to go against the presumption of innocence enshrined in Article 6 of the European Convention on Human Rights.

67. Mr Keith was dismissive of the relevance of this point. But in our view it is highly relevant and the judge was justified in placing emphasis on it as she did. Some reliance had in fact been placed below, without dissent at that time from Mr Newbold, on the case of *Storck v Germany* 61603/00, [2005] ECHR 406 as rebutting the relevance of Article 5.1 (a) by reason of consent given. But Mr Keith conceded, when the point was queried by this court in argument, that that decision was not material, since it had not involved detention pursuant to a conviction at all: rather it involved detention of a person said to be of unsound mind, for the purposes of Article 5.1 (c) of the European Convention on Human Rights. That being so, the argument on behalf of the appellants to the effect that a *sentenza di patteggiamento* is not a conviction connotes, if correct, that Italian criminal law does not in this respect comply with the

European Convention on Human Rights: at all events where the requested penalty exceeds two years imprisonment. But it is not realistic for the English courts to entertain so extravagant a notion: the more so when it is a general principle of European law that fellow members states are to be trusted to comply, and are (albeit rebuttably) presumed to comply, with their obligations under EU law and the European Convention on Human Rights. The clear inference, indeed, is that Article 445.1 was introduced into the ICCP precisely in order to ensure compliance with the European Convention on Human Rights: a point stressed by Professor Vigano and Professor Gatta and not really answered by Mr Sangiorgio in his reports.

68. Finally, the fact that the appellants say that they were advised by their Italian lawyers that to enter into a *patteggiamento* did not convey an admission of guilt is, we consider and in agreement with the judge, not relevant. The provisions of Article 444 and 445 of the ICCP are clear and the appellants and their advisers are to be taken as knowing the law. It is true that the judgment of the Joint Sections of the Cassation Court in 2015 post-dated the *sentenza di patteggiamento* in 2013. But we did not understand that judgment to be considered to have changed the general understanding of the law after 2003 rather, it was declaratory of the law. Besides, it is not acceptable that the effect of a *patteggiamento* can vary depending on the subjective beliefs and understanding of the individual accused or their lawyers. The matter has to be assessed objectively.

69. It is also to an extent revealing that the Cassation Court in its judgment on the appeal in 2013 and Judge Capri in formulating the letter of request variously refer to the appellants as "convicted": that conveying, in admittedly short-hand form, their own understanding of the position – moreover, the statement to that effect in the letter of request is potentially admissible by reason of Article 19 of the 2005 Order. But we in any event reach our conclusion even without regard to that. The *patteggiamento* entered into by each of the appellants in this case amounted to a conviction under Italian law.

(2) Was this a conviction for the purposes of Article 21 (2) of the 2005 Order?

70. As we have said, accepting Mr Keith's submission, such a conclusion on Italian law does not of itself determine the outcome of this appeal by reference to the 2005 Order. Thus we cannot, with all respect to the judge, regard it as determinative that the Italian authorities regard the *patteggiamento* as a conviction under their law and acted in good faith in so describing it. The position still has to be assessed under English law. This involves assessing the nature and substance of the *sentenza di patteggiamento* pronounced in 2013.

71. In our judgment, the features of a *patteggiamento*, as discussed above, do show that it is to be regarded as a conviction for the purposes of Article 21 (2) of the 2005 Order.

72. Mr Keith maintained his point that just because Article 445 of the ICCP provides that a *patteggiamento* is "equal to" a conviction that does not mean that is a conviction for these purposes. If it was desired to extend Article 21 (2) to such cases then, he said, it could have been so drafted as to add words such as "or judicial decision equivalent to a conviction": but that had not been done. He frankly accepted, when the point was put to him, that his arguments on this would have been the same irrespective of the provisions of Article 445 of the ICCP. His position was that if a *patteggiamento* did

not constitute a conviction before 2003, as he said it did not, it could not, as a matter of substance, become a conviction after 2003 simply by reason of a deeming provision of Italian law. He went on to submit that the acceptance of Mr Newbold that, for there to be a conviction, there must be either a finding of guilt or an admission of guilt in effect concluded the case in the appellants favour. For here, he reiterated, there was neither a finding of guilt nor an admission of guilt.

73. With respect, in our view this argument goes wrong at its outset because it fails sufficiently to acknowledge the context in which the word "conviction" is used in Article 21 (2) of the 2005 Order. Self-evidently the Article is designed to operate in the context of a conviction in the courts of the requesting state. But equally self-evidently it is to be taken as known to those drafting the 2005 Order that the procedures of such states, which do not have the common law, would differ, and perhaps significantly so, from those applicable in England and Wales. One illustration is that such states (which include Italy) simply may not have the notion of pleas of guilt, on which the court will act ordinarily without further enquiry in the way our (common law) jurisdiction does. The use of the word "conviction" in Article 21 (2) has to be read with all that in mind.

74. In this context, Mr Keith nevertheless roundly submitted that it is "neither here nor there" that the Italian criminal justice system has no plea of guilty procedure precisely corresponding to our domestic law. We do not agree. It is very much "here and there". Overall, therefore, as we see it, the interpretative approach to Article 21 (2) is to be taken as intending to promote international cooperation in the effective enforcing of confiscation orders. For this purpose, what may be called an "internationalist approach" is called for.

75. The substance of the matter in the present case is that the appellants did not in any way contest the evidence advanced by the prosecution as giving rise to the criminal offences alleged. Those undisputed facts constitute the offences alleged. Further, the appellants submitted to what would be a significant custodial sentence. Thus they proposed, and thereafter agreed to, the *patteggiamento* in this case. They did not have to do so: that was their choice. Mr Dines graphically outlined in his witness statement the pressures they were under. But many defendants in criminal proceedings are under various pressures; and it cannot be said that the appellants acted in any way other than of their own free will and having legal advice: and did so when they are to be taken to have known that acceptance of a *patteggiamento* was, in the material respects, to be regarded as equal to a conviction under Italian law. Thus – in accordance, indeed, with what the Joint Sections of the Cassation Court decided in the 2015 case – they impliedly (and unequivocally) admitted their guilt.

76. Mr Keith, however, objected that such a notion is alien to principles of English law: there can be no such thing as an "implied" plea of guilt; rather, for it to be accepted, it must be both express and unequivocal. But that is simply our way of doing things. There is, in our judgment, no reason why, for the purposes of Article 21 (2), a conviction cannot be based on an implied admission such as occurred here. This cannot be controverted, for these purposes, by defendants blowing hot and cold: by not contesting at all any of the prosecution evidence and by agreeing to a custodial sentence in excess of three years, but by also thereafter maintaining their innocence. Indeed, as Mr Newbold pointed out, it is by no means unknown for defendants in this

jurisdiction, whether convicted after trial or on a plea, thereafter to maintain their innocence.

77. Moreover, matters do not rest there. As set out above, in Italy – and unlike in England and Wales where a plea of guilt is entered – a criminal judge still has, under the ICCP, a substantive role to perform in a *patteggiamento* case: as illustrated by the detailed judgment of Judge Capri in the present case. The agreement of the parties alone is not conclusive. Not only does the judge have to rule out the possibility that the alleged facts do not establish the alleged crime (see Article 129 of the ICCP); but in addition the judge has the various positive obligations set out in Article 444.2 of the ICCP. The court thus is not a mere rubber-stamp; rather, it is obliged to make a proper judicial appraisal of whether or not it **is** appropriate to make a *sentenza di patteggiamento*. That is a matter of substance: not form. It is true that such appraisal is not precisely the same as that requiring a positive determination after trial, resulting in a *pronuncia di condanna*; but in our opinion it remains a substantive form of judicial determination as to guilt all the same, albeit simplified or streamlined so as to adapt to the *patteggiamento* procedure.

78. In our judgment, the combination of these matters – the implied admission of guilt and the subsequent assessment under Article 129 and Article 444.2 by the judge in Italy – amply suffices to make the *sentenza di patteggiamento* a conviction for the purposes of Article 21 (2) of the 2005 Order.

79. Furthermore, the situation arising under the *nolo contendere* procedure discussed in the case of *McGregor* and the situation arising under the Deferred Prosecution Agreement procedure under the Crime and Courts Act 2013 so far from supporting the appellants' propositions in fact, as we consider, if anything tell**s** against them.

80. Thus in *McGregor*, the *nolo contendere* procedure applicable in Florida did not permit, as it would appear, the possibility of a custodial penalty at all; second, it involved no judicial appraisal at all by the court; third, and not least, the resulting order *explicitly* records that there is a withholding of an adjudication of guilt; fourth, it appears that the Florida Courts do have available a procedure for guilty pleas. These are not merely points of distinction from the *patteggiamento* procedure: they also go to illustrate just how the latter procedure can indeed correspond to a conviction.

81. The same can be said of Deferred Prosecution Agreements, relied upon by the appellants. The title of itself gives the game away. Such an agreement can be made when the prosecutor is "considering" prosecuting for a specified offence. A penalty agreed by a company in such circumstances does not purport, impliedly or explicitly, to be an admission of a criminal offence. No custodial term can be imposed under a Deferred Prosecution Agreement (which, indeed, relates only to companies); nor does such agreement, as approved by the court, necessarily purport to be final: thus if the agreement is breached, a prosecution may then ensue. The Deferred Prosecution Agreement procedure accordingly provides no true analogy with the *patteggiamento* procedure at all. Here too, in fact, its very differences seem to us to go to illustrate just why the *patteggiamento* procedure can indeed constitute a conviction for the purposes of Article 21 (2) of the 2005 Order.

82. We do not propose to say more. Even if we do not adopt all the judge's reasoning, we consider that in substance she got it right; and she reached the right conclusion in

registering the confiscation orders and in refusing the applications to cancel the registration. Thus we confirm the decision to register.

Conclusion

83. In the result, therefore, the registration of these three confiscation orders will stand. The appeal of each of the appellants is dismissed.