Easter Term
[2018] UKSC 23
On appeal from: [2015] NICA 31

JUDGMENT

R *v* McCool (Appellant) (Northern Ireland)
R *v* Harkin (Appellant) (Northern Ireland)

before

Lord Mance, Deputy President
Lord Kerr
Lord Reed
Lord Hughes
Lady Black

JUDGMENT GIVEN ON

2 May 2018

Heard on 23 November 2017

Appellant (McCool)
Barry Macdonald QC
Dessie Hutton
(Instructed by Madden & Finucane)

Respondent
Liam McCollum QC
Rosemary Walsh
(Instructed by Public Prosecution Service)

Appellant (Harkin)
Fiona Doherty QC
Catherine Devlin
(Instructed by Madden & Finucane)

LORD KERR:

Introduction

1. Part 4 of the Proceeds of Crime Act 2002 deals with the circumstances where benefits obtained by persons in Northern Ireland by their criminal activity can be confiscated. By virtue of article 2 of and the Schedule to the Proceeds of Crime Act 2002 (Commencement No 5, Transitional Provisions, Savings and Amendment) Order 2003, Part 4 of the Act came into force on 24 March 2003.

2. The first and central provision in Part 4 of the Act is section 156. That section is declared in the statute to be concerned with the making of confiscation orders. Subsection (1) of section 156 expressly requires that the Crown Court must proceed in accordance with the terms of the section, where two conditions are satisfied. The context for the way in which confiscation orders are to be applied for and obtained is therefore set. That context, in my view, is defined by the consideration that it is confined to confiscation orders which can be made under the Act.

The relevant statutory provisions

3. Subsections (2) and (3) of section 156 set out the two conditions foreshadowed in subsection 1. The first of these is that the defendant against whom a confiscation order is sought must either have been convicted of an offence or offences before the Crown Court or have been committed to the Crown Court in respect of an offence under section 218. There is an important rider to, or explanation of, the latter of these conditions. It is to the effect that the committal should have been with a view to a confiscation order being considered. This reinforces the nature of the context in which these provisions fall to be considered. The purpose of the committal is to deal with confiscation orders that might be made under the 2002 Act.

4. The terms of section 218(1) again emphasise this essential aspect. Subsection (1)(b) makes clear that committal should take place when the prosecutor asks the court to commit the defendant to the Crown Court *with a view to a confiscation order being considered under section 156*. Thus, under this provision, the court is principally concerned with the making of a confiscation order under the 2002 Act. The magistrates' court must commit the defendant to the Crown Court if requested to do so - section 218(2)(a). But it may also, under section 218(2)(b), commit him in respect of other offences falling within subsection (3). Offences falling within the

latter subsection are those of which the defendant has been convicted by the magistrates' or other court and where the magistrates' court has the power to deal with them.

5. Thus, offences in respect of which it is not proposed to seek a confiscation order may be referred to the Crown Court. It is not difficult to deduce the reason for that. It would not be unusual for a defendant to be charged with a number of offences, only some of which would qualify for applications for a confiscation order. For administrative convenience, and to avoid the possibility of over penalisation, it may be considered prudent to commit the defendant to the Crown Court for a comprehensive sentencing exercise.

6. The section 218(2) distinction between the two categories of case which the magistrates' court may commit to the Crown Court is significant: those offences which are committed so that a confiscation order can be considered and other offences in which the question of a confiscation order does not arise. The important theme, in relation to this case, is that the first category relates to offences in respect of which a confiscation order can be made *under the Act*. This reflects the general, underlying purpose of the legislation, so far as concerns confiscation orders. It is that, in the first and principal instance, the cases which are to be dealt with by the Crown Court are those in respect of which a confiscation order under the 2002 Act can be made. The provision that a second type of case (the other offences category) can also be committed serves to demonstrate that the primary purpose of the Crown Court in dealing with cases emanating from the magistrates' court is to make confiscation orders which can be made under the Act.

7. Returning to section 156, the second condition which forms part of the enjoinder to the Crown Court to act is provided for in subsection (3). That condition is fulfilled where the prosecutor asks the court to proceed under the section or the court considers it is appropriate to do so. Both these alternatives are obviously geared to the making of confiscation orders that can be made under the Act.

8. The theme of facilitating or requiring the making of confiscation orders under the 2002 Act is again apparent from subsection (4) of section 156. The court is required to consider whether the defendant has a criminal lifestyle by subsection (4)(a) and, if it so decides, it must determine whether he has benefited from his general criminal conduct under subsection (4)(b). If the court decides that the defendant does not have a criminal lifestyle, it must consider whether he has benefited from particular criminal conduct - section 156(4)(c). All of these provisions have as their ultimate aim the ascertainment of whether a confiscation order under the Act is appropriate.

9. That basic objective is evident from the succeeding subsections (5) to (8) of section 156. These do not require to be set out, but subsection (9) is material for other reasons. It provides:

> "References in this Part to the offence (or offences) concerned are to the offence (or offences) mentioned in subsection (2)."

10. Drawing on the language used in this subsection and an allied provision, section 236(1), it is argued that the phrase, "the offence (or offences) concerned" is given a fixed and immutable meaning throughout the Act. (Section 236(1) provides that a reference to the offence (or offences) concerned must be construed in accordance with section 156(9)). Guidance as to that meaning is provided, it is suggested, by article 4 of the Commencement Order which provides:

> "**Transitional provisions relating to confiscation orders - Northern Ireland**
>
> 4(1) Section 156 of the Act (making of confiscation order) shall not have effect where the offence, or any of the offences, mentioned in section 156(2) was committed before 24 March 2003."

11. In particular, the use of the words, "any of the offences" in article 4 is said to indicate that, if any of the offences on which a defendant has been committed pre-date 24 March 2003, none of the offences, even those which were committed after that date can be treated as candidates for confiscation orders under the 2002 Act but must be dealt with under legislation which applied on the date when the first offence occurred.

12. To say that this would produce a wholly anomalous result is not an exaggeration. This is particularly so since it is accepted by the appellants that, if the prosecution elects not to have a defendant committed to the Crown Court on a charge which might have warranted a confiscation order in respect of an offence committed before March 2003, and has the defendant committed only on offences committed after that date, it would be open to the Crown Court to make confiscation orders under the 2002 Act in respect of those offences. Likewise, it is accepted that in a case which starts in the Crown Court, if the prosecution chooses not to proceed on a charge relating to an offence committed before March 2003, a confiscation order may be made in relation to offences that occurred after 24 March 2003. In effect, therefore, the appellants accept that the jurisdiction of the court to make confiscation

orders under the 2002 Act could be controlled by tactical decisions by the prosecution.

13. Ironically, the appellants object to what they portray as the election of the prosecution to proceed under the 2002 Act and to ignore offences to which they had pleaded guilty and which occurred before the relevant date, when pre- and post-24 March offences are proceeded with on the same indictment. They suggest that, in those circumstances, the prosecution should not be permitted to choose only the post-March offences on which to seek compensation orders. The respondent's riposte to this argument is, of course, that this is not a matter of election or choice. It submits that only offences which can be dealt with under the Act qualify for consideration as "confiscation offences". It is therefore not a matter of tactical decision by the prosecution but, rather, the consequence of the correct construction of section 156.

14. The appellants counter this argument by pointing to, among other provisions, section 224(3)(b) of the Act. As noted at para 8 above, the court is required to consider whether the defendant has a criminal lifestyle by subsection (4)(a) of section 156. If it decides that the defendant does not have a criminal lifestyle, it must consider whether he has benefited from particular criminal conduct - section 156(4)(c). Section 224 deals with criminal conduct and benefit. Subsection (1) provides:

> "Criminal conduct is conduct which -
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> (a) constitutes an offence in Northern Ireland, or
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> (b) would constitute such an offence if it occurred in Northern Ireland."

15. A distinction is made between general criminal conduct and particular criminal conduct. General criminal conduct is dealt with in subsection (2). Particular criminal conduct is the species of criminality involved in this case and it is provided for in subsection (3):

> "(3) Particular criminal conduct of the defendant is all his criminal conduct which falls within the following paragraphs -
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> (a) conduct which constitutes the offence or offences concerned;

> (b) conduct which constitutes offences of which he was convicted in the same proceedings as those in which he was convicted of the offence or offences concerned;
>
> (c) conduct which constitutes offences which the court will be taking into consideration in deciding his sentence for the offence or offences concerned."

16. The appellants argue that if the rubric, "the offence or offences concerned", is given the interpretation advanced by the respondent, *viz* offences in respect of which confiscation orders could be made, it is clear from the terms of section 224(3)(b) that the court considering the defendant's particular criminal conduct must have regard to offences which lie outside that definition, in other words, offences that were committed before 24 March 2003. This, say the appellants, makes the respondent's interpretation unworkable.

17. Despite its initial attraction, I do not accept the appellants' argument on this point. The overarching consideration is that, plainly, it was Parliament's intention that offences which were committed before 24 March 2003 should not be included in the section 156 consideration. It was also Parliament's intention, in my opinion, that all offences committed after that date which could generate confiscation orders under the Act should be dealt with under section 156. It cannot have been intended that a swathe of post-2003 offences should be removed from the Act's purview simply because the defendant was convicted of an associated offence before the relevant date. If that was found to be the effect of the Act, it seems to me to be beyond question that this was a wholly unintended effect.

18. In these circumstances, the proper approach to interpretation is to determine whether it is possible to give effect to Parliament's intention, notwithstanding the apparent incongruity of section 224(3)(b). I will explain why this is the correct way to interpret the 2002 Act in the next section of this judgment. In the meantime, however, it appears to me that subsection (3)(b) is explicable on the basis that the criminal conduct which the court may take into account under this provision is conduct on which a confiscation order might have been made under the 2002 Act but which has not been put forward by the prosecution as a potentially qualifying offence.

19. That view is supported by a consideration of article 8 of the Commencement Order in its amended form which deals with the approach that the court should take in relation to the ascertainment of whether a defendant has a criminal lifestyle. Although the present case does not involve that question, it is argued that the amendments effected by the Order of 6 March 2003 provide an insight into the issue

whether the 2002 Act can apply to offences committed after 24 March 2003, where the defendant has also been convicted of offences committed before that date. First it is necessary to set out the relevant provisions in section 223 of the Act. So far as material, it provides:

> "**223 Criminal lifestyle**
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> (1) A defendant has a criminal lifestyle if (and only if) the following condition is satisfied.
>
> (2) The condition is that the offence (or any of the offences) concerned satisfies any of these tests -
>
> > (a) it is specified in Schedule 5;
> >
> > (b) it constitutes conduct forming part of a course of criminal activity;
> >
> > (c) it is an offence committed over a period of at least six months and the defendant has benefited from the conduct which constitutes the offence.
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> (3) Conduct forms part of a course of criminal activity if the defendant has benefited from the conduct and -
>
> > (a) in the proceedings in which he was convicted he was convicted of three or more other offences, each of three or more of them constituting conduct from which he has benefited, or
> >
> > (b) in the period of six years ending with the day when those proceedings were started (or, if there is more than one such day, the earliest day) he was convicted on at least two separate occasions of an offence constituting conduct from which he has benefited."

20. In order to set in context the argument in relation to article 8 in its original and amended form, it is necessary to set out both. In its first incarnation, article 8 provided:

> "**Transitional provisions relating to criminal lifestyle - Northern Ireland**
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> 8.(1) This article applies where the court is determining under section 156(4)(a) of the Act whether the defendant has a criminal lifestyle.
>
> (2) The tests in section 223(2)(a) and (c) of the Act shall not be satisfied where the offence (or any of the offences) concerned was committed before 24 March 2003.
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> (3) In applying the rule in section 223(5) of the Act on the calculation of relevant benefit for the purposes of section 223(2)(b) and (4) of the Act, the court must not take into account benefit from conduct constituting an offence which was committed before 24 March 2003.
>
> (4) Conduct shall not form part of a course of criminal activity under section 223(3)(a) of the Act where -
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> (a) the offence (or any of the offences) concerned; or
>
> (b) any one of the three or more offences mentioned in section 223(3)(a), was committed before 24 March 2003.
>
> (5) Conduct shall form part of a course of criminal activity under section 223(3)(b) of the Act, notwithstanding that any of the offences of which the defendant was convicted on at least two separate occasions in the period mentioned in section 223(3)(b) was committed before 24 March 2003."

21. Two weeks after its promulgation on 20 February 2003, the Commencement Order was amended in order to substitute (so far as concerns Northern Ireland) a new article 8. It was in the following terms:

“Transitional provisions relating to criminal lifestyle - Northern Ireland

8.(1) This article applies where the court is determining under section 156(4)(a) of the Act whether the defendant has a criminal lifestyle.

(2) Conduct shall not form part of a course of criminal activity under section 223(3)(a) of the Act where any of the three or more offences mentioned in section 223(3)(a) was committed before 24 March 2003.

(3) Where the court is applying the rule in section 223(5) of the Act on the calculation of relevant benefit for the purposes of determining whether or not the test in section 223(2)(b) of the Act is satisfied by virtue of conduct forming part of a course of criminal activity under section 223(3)(a) of the Act, the court must not take into account benefit from conduct constituting an offence mentioned in section 223(5)(c) of the Act which was committed before 24 March 2003.

(4) Conduct shall form part of a course of criminal activity under section 223(3)(b) of the Act, notwithstanding that any of the offences of which the defendant was convicted on at least two separate occasions in the period mentioned in section 223(3)(b) were committed before 24 March 2003.

(5) Where the court is applying the rule in section 223(5) of the Act on the calculation of relevant benefit for the purposes of determining whether or not the test in section 223(2)(b) of the Act is satisfied by virtue of conduct forming part of a course of criminal activity under section 223(3)(b) of the Act, the court may take into account benefit from conduct constituting an offence committed before 24 March 2003.

(6) Where the court is applying the rule in section 223(6) of the Act on the calculation of relevant benefit for the purposes of determining whether or not the test in section 223(2)(c) of the Act is satisfied, the court must not take into account benefit from conduct constituting an offence mentioned in section

> 223(6)(b) of the Act which was committed before 24 March 2003."

22. If the appellants' argument that any proceedings which involved a pre-March 2003 offence would have to be brought under a statutory regime existing before the 2002 Act was correct, the new article 8(2) (and, for that matter, the original article 8(4)) would not be required. Article 8(3) is also significant. This requires that a court, which is assessing benefit under section 223(5) for the purposes of determining whether or not the test set out in section 223(2)(b) of the Act is satisfied, must leave out of account benefit from an offence committed before 24 March 2003. That stipulation again serves to illustrate the ending of the application of pre-March 2003 legislation for those purposes and the currency of the 2002 Act for offences committed after that date.

The proper approach to interpretation

23. As I have said, it is my opinion that Parliament cannot have intended that a potentially extremely wide range of post-2003 offences would be excluded from the ambit of the 2002 Act. That would produce a result which would be plainly at odds with the entire scheme of the legislation. It is, of course, possible to regard section 156 as an open and simple gateway and that, on a literal interpretation, every offence of which the defendant is convicted, whether or not it preceded March 2003, must be considered. But the absurd outcome which this would produce is a strong indication against treating the section in that way.

24. In *Bennion on Statutory Interpretation* (6th ed) at section 312 of what the author describes as the Code, the following statements are made:

> "(1) The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by Parliament. Here the courts give a very wide meaning to the concept of 'absurdity', using it to include virtually any result which is unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief.
>
> (2) In rare cases, there are overriding reasons for applying a construction that produces an absurd result, for example where it appears that Parliament really intended it or the literal meaning is too strong."

25. Bennion suggests that the courts have been prepared to give the concept of absurdity an expansive reach. In support of that view, he cites Lord Millett in *R (Edison First Power Ltd) v Central Valuation Officer* [2003] UKHL 20, [2003] 4 All ER 209 at paras 116 and 117, where he said:

> "The courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless. But the strength of these presumptions depends on the degree to which a particular construction produces an unreasonable result. The more unreasonable a result, the less likely it is that Parliament intended it ..."

See also Lord Scott of Foscote's approval of this dictum in *Gumbs v Attorney General of Anguilla* [2009] UKPC 27, para 44.

26. The consequence of the 2002 Act being disapplied to a wide array of offences committed after the operative date of 24 March 2003, and requiring these to be dealt with under 1996 (or even, in the case of Ms McCool, 1990) legislation, is self-evidently objectionable and undesirable. It means that contemporary cases would have to be dealt with according to standards and rules which have been replaced by the 2002 Act and secondary legislation made on foot of it. I consider, therefore, that if there is a workable interpretation of the legislation which allows post-2003 offences to be dealt with under the 2002 Act, even when those are associated with pre-2003 offences, that interpretation should be adopted. For the reasons given earlier, I think that such an interpretation is entirely feasible and that the 2002 Act was correctly applied to the appellants' cases. I will discuss the facts of the appellants' offences and the reasons that I consider that they were properly subject to confiscation orders under the 2002 Act later in this judgment.

Ahmed, Martin, Simpson, Aslam and Stapleton

27. The Court of Appeal in this case considered a number of authorities in which transitional provisions in similar terms to those involved in the present appeal were examined. The first of these was *R v Ahmed* (Court of Appeal, Criminal Division, unreported 8 February 2000). In that case, the appellant had pleaded guilty to three offences of conspiracy to defraud by inflating invoices for goods supplied. The first of those offences took place at a time between January 1995 and October 2006; the second between January 1995 and June 2007; and the third between January 1997 and 30 November 2007. Section 16(5) of the Proceeds of Crime Act 1995, which was the statute under which the confiscation orders were sought, provided:

> "Section 1 … shall not apply in the case of any proceedings against any person where that person is convicted in those proceedings of an offence which was committed before the commencement of that section."

The section came into force on 1 November 1995.

28. The Court of Appeal in *Ahmed* accepted that the first two conspiracy offences occurred partly before and partly after the operative date. That circumstance had been overlooked by the parties and the trial judge. If it had been adverted to, it would have been obvious that the judge had a discretion whether to make the confiscation order in the sum that he had decided upon. In the event, the Court of Appeal concluded that this would not have made a difference to his decision. But the appellants in the present case argue that the court in *Ahmed* effectively precluded the application of the 1995 Act because of the earlier offences.

29. This is not what the court held, however. It was decided that the circumstance that two of the three offences had occurred before the operative date meant that the trial judge did indeed have a discretion to make a confiscation order for a lesser sum than that ordered. But the court was not required to, and did not address, the question whether the effect of section 16(5) of the 1995 Act was to preclude a confiscation order under that legislation, if an application had been made solely in relation to the offence which occurred after its coming into force.

30. In contrast, the respondent in the present case relies exclusively on offences occurring after the coming into force of the 2002 Act. As the Court of Appeal in the present case observed (in para 9 of its judgment), it was common case that where the prosecution seeks a confiscation order in respect of an offence committed before the date of coming into force of the relevant statute, the earlier legislation will apply. The prosecution in the present case does not seek to rely on offences committed before 24 March 2003. On the contrary, it bases its claim for a confiscation order on offences committed after that date. *Ahmed* is therefore not in point in relation to the appellants' claim in this appeal.

31. In *R v Martin* [2001] EWCA Crim 2761; [2002] 2 Cr App R (S) 74, the appellant had pleaded guilty to conspiring with others to evade the payment of duty owed to HMRC. The evasion took place over the period between October 1994 and January 1997. It was held that. since the dates of the conspiracy straddled the commencement date of the 1995 Act, that legislation could not be applied to the appellant's case, notwithstanding that overt acts in the perpetration of the conspiracy occurred after that date. The Court of Appeal held that *Ahmed* was directly in point and that it was bound to follow the decision in that case.

32. Again, however, the situation in *Martin* is different from that which obtains in the present appeals. In *Martin*, the prosecution was relying on offences which had occurred before the commencement date for the 1995 Act, in support of its application for a confiscation order under that Act. In the present case, the prosecution places no reliance on offences committed before the coming into force of the 2002 Act. To the contrary, it says that such offences must be left strictly out of account in deciding whether confiscation orders should be made. The Court of Appeal in the present case considered that *Martin* "did not add a great deal on [the issue arising] to *Ahmed*." In my view, it adds nothing to that issue.

33. The next authority considered by the Court of Appeal in this case was *R v Simpson* [2003] EWCA Crim 1499, (2004) QB 118. In that case the appellant had pleaded guilty to offences involving VAT fraud. A confiscation order was made under section 71 of the Criminal Justice Act 1988. The appellant appealed against the confiscation order on the ground that the judge had no jurisdiction to make it because the notice served on the court by the prosecution was not in the form required by section 72(1) of the 1988 Act, and that, by virtue of section 16(5)(c) of the Proceeds of Crime Act 1995, since one of the offences to which he had pleaded guilty had been committed before 1 November 1995, the amendment to section 72, made by section 1 of the 1995 Act, and providing that service of a notice was no longer necessary, did not apply. He submitted that the application of section 16(5) was not limited to offences on which the confiscation order was based. The prosecution had not sought a confiscation order in respect of the sole charge of an offence that had predated the coming into force of the 1995 Act.

34. It was common case that, if the appellant had not been convicted of the offence which had been committed before the commencement date, the 1995 Act would apply. But, because he had been convicted of that offence, it was argued that that single conviction determined that the earlier legislation was the only enactment under which a confiscation order could be sought. Lord Woolf CJ described this as "an obviously … absurd result". Before the Court of Appeal in the present case, Mr Hutton, and before this court, Mr Macdonald QC, on behalf of the appellants, challenged this description. It was, they said, in the nature of transitional provisions that a line had to be drawn somewhere. The choice of that line might in some cases seem arbitrary. That did not mean that the result produced was absurd.

35. While I accept that the imposition of a cut-off point will, in some instances, produce a result which might appear anomalous and that anomaly should not be equated with absurdity, for the reasons given earlier (in paras 23-26), I consider that if a significant number of offences committed after 24 March 2003 were excluded from the 2002 Act's application, solely because of the happenstance that a defendant had also been convicted of an offence committed before that date, this would indeed be an absurd outcome.

36. The Court of Appeal in *Simpson* considered that section 16(5) of the 1995 Act should be applied so that, after the word "offence" in that section, "there appears, the words 'in respect of which a confiscation order is or could be sought'" - para 19. It is not clear whether the court proposed that these words be "read into the section" or merely that they were intended to be clarificatory of the extent of its application. Reading in words to a statute is problematic, of course. In *Inco Europe v First Choice Distribution (a firm)* (2000) 1 WLR 586, 592, 115, Lord Nicholls of Birkenhead said:

> "It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. Some notable instances are given in Professor Sir Rupert Cross' admirable opuscule, *Statutory Interpretation* (3rd ed, 1995) pp 93-105. He comments (p 103):
>
> > 'In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role.'
>
> This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation (see per Lord Diplock in *Jones v Wrotham Park Settled Estates* [1980] AC 74 at 105-106)."

37. For the reasons that I have given earlier, I consider that Parliament's intention in enacting the 2002 Act was that all offences committed after the date of its coming into force should be subject to its regime, irrespective of whether they were associated with offences committed before the commencement date. In light of the experience in this case, it would perhaps have been preferable that the 2002 Act had made it unmistakably clear that this was the intention. I am not sure, however, that the failure to do so amounts to inadvertence on the part of the draftsman. But I am entirely satisfied of "the substance of the provision Parliament would have made" if, indeed, the provision qualifies for the description of drafting inadvertence. The substance of the provision which Parliament intended was, as I have said, that all offences committed after March 2003, whether or not they were associated with offences that occurred before that date, should be dealt with under the 2002 Act.

38. Whatever of that, it appears to me that it is not necessary to read in words such as those suggested in *Simpson.* The Act was intended to permit applications for confiscation orders for offences committed after 24 March 2003 and to exclude from its application offences which had taken place before that date. So understood, the legislation does not require the "reading in" of further words. Provided a clear segregation between pre- and post-March 2003 offences can be identified, the application of the Act does not present a problem.

39. The next case dealt with by the Court of Appeal was *R v Aslam* [2004] EWCA Crim 2801; (2005) 1 Cr App R (S) 116. In that case the appellant pleaded guilty to a number of offences of dishonesty and asked for a number of others to be taken into consideration. One of the offences to which he had pleaded guilty and one of those which he had asked to be taken into consideration had occurred before the coming into force of the 1995 Act. On this account, it was argued on his behalf that the court had no jurisdiction to make a confiscation order under the 1995 legislation. That argument was rejected. At para 11, Bean J said:

> "The legislative purpose of section16(5), as it seems to us, was to prevent the Crown from dividing convictions against a defendant in one set of proceedings into pre- and post-November 1, 1995 matters and then taking confiscation proceedings (concurrently or consecutively) under both statutes. So, if at the time the judge is asked to make a confiscation order under the 1995 Act on a number of counts there remains a pre-commencement count on which the Crown is seeking, or could still seek, a confiscation order under the 1988 Act as amended in 1993, there is no jurisdiction to make an order under the 1995 Act. However, if the pre-commencement count is one which could not be the basis of confiscation proceedings, there is no obstacle to using the 1995 Act regime. Similarly, if (as in this case) the Crown *has*

> *expressly abandoned any reliance on the pre-commencement count for the purposes of a confiscation order*, the fact that it could have sought such an order in respect of that count seems to us entirely immaterial. In such a case also, in our judgment, there is no obstacle to using in the 1995 Act regime in respect of the post-commencement counts. We do not understand *Simpson* to require a contrary conclusion." (Emphasis supplied)

40. In *Aslam,* as in this case, the prosecution did not rely on a pre-commencement offence in support of its application for a confiscation order. The court in that case referred to the approach in *Simpson* of treating section 16(5) as if it read in the manner described in para 36 above. It did not suggest (at least, not expressly) that words should be read into the section. For the reasons that I have given, I do not consider that this is necessary.

41. The "drawing of the line" by the commencement provision is readily explicable for reasons quite different from the rationale suggested by the appellants in the present case. It is, as Bean J said, to avoid the undesirable prospect of having two sets of parallel or even consecutive proceedings under two different items of legislation, with all the undesirable consequences that would entail. It is also to provide a clear demarcation line between the effective application of the 2002 Act and preceding legislation. It is entirely consonant with common sense and good administration that the demarcation should be applied so that only those offences which were committed after it came into force were caught by the 2002 Act. It is also plainly sensible that the line should not be blurred by allowing the Act to apply solely to those cases which happened not to be associated with a pre-March 2003 offence. It may be possible to construe the Act in that way but I am satisfied that this is not how it was intended to apply.

42. The Court of Appeal in the present case also briefly considered the decision in *R v Stapleton* (2009) 1 Cr App R (S) 38. The appellant pleaded guilty to six offences of furnishing false information, contrary to the Theft Act 1968. She was committed to the Crown Court for sentence under the 2002 Act, with a view to a confiscation order being considered. She had made claims for housing benefit in the amount of £15,946 between July 2002 and August 2006. A confiscation order was made under the 2002 Act. On appeal, an argument was made on her behalf in broadly similar terms to those presented by the appellants in this case. Two of the offences had been committed before 24 March 2003.

43. It was argued that the straightforward reading of the transitional provisions meant that there was no power to make an order under the 2002 Act. Reference was made to *R v Clarke* [2008] UKHL 8; [2008] 1 WLR 338, where it was said that

where the statutory provisions were clear in their terms, the court was bound to apply them, even if the consequence was that a defendant is enabled to obtain what might be regarded as an unmerited outcome. In *Clarke* Lord Bingham said (at para 17):

> "Technicality is always distasteful when it appears to contradict the merits of a case. But the duty of the court is to apply the law, which is sometimes technical, and it may be thought that if the state exercises its coercive power to put a citizen on trial for serious crime a certain degree of formality is not out of place."

44. The Court of Appeal in *Stapleton* acknowledged the obvious authority of this statement but nevertheless considered itself bound by *Aslam*. The court also acknowledged that *Aslam* had been criticised by Professor Thomas in his commentary on the case which appeared in 2005 Criminal Law Review 154. But, Latham LJ, who delivered the judgment of the court, observed that it could not be said that *Aslam* was plainly wrong. It had to be followed.

45. It is, I believe, possible to address somewhat more forthrightly than did the court in *Stapleton* the argument that the technical interpretation of the relevant provisions of the 2002 Act compel a result that the decision in *Aslam* was wrong. The correct interpretation of those provisions must be informed by the predominant purpose of the legislation. As I have said, its purpose was to provide a clear dividing line between those offences which were caught by the Act and those which were not. A sensible, workable segregation exists between offences committed before 24 March 2003 and those which occurred after that date. While it is theoretically possible to construe the Act as placing an embargo on its application to post-March 2003 offences where they are associated with offences before that date, in no sense is that the only possible construction. This is not a question of the technical interpretation of the legislation compelling a particular result. Rather it is a matter of construing the legislation in a perfectly legitimate way which keeps faith with its plain and obvious purpose.

46. Professor Thomas's disapproval of *Aslam*, and in a second commentary in 2008 Criminal Law Review 1, of *Stapleton* founds on two principal criticisms. The first was that reading words into the statute was objectionable. For reasons given earlier, I do not believe that it is at all clear that the Court of Appeal in *Simpson* did read words into the provision but merely clarified how its interpretation should be approached by the device of instancing words that would have made its meaning clearer. In any event, if words were read into the statute, that was an unnecessary exercise. Finally, it is not in the least apparent that the Court of Appeal in *Aslam* did read words into the statute.

47. The second major criticism made by Professor Thomas was that the court had no discretion to ignore offences of which the defendant has been convicted. This objection to the approach of the court in *Aslam, Simpson* and *Stapleton* was based on his consideration of section 76(3) of the 2002 Act (the equivalent of section 224(3) in Part 4). He suggested that a defendant's "particular criminal conduct [was] *all of* the defendant's criminal conduct which constitutes the offence or the offences concerned, and conduct which constitutes offences of which he was convicted in the same proceedings as those in which he was convicted of the offence or offences concerned". This is the same argument as was advanced by the appellants in the present case and which, as I observed in para 17, I initially found attractive. For the reasons that I there gave, however, I consider that it is ill-founded.

The facts of the present cases

48. At all material times the appellants, Ms McCool and Mr Harkin were man and wife. Ms McCool was charged with and pleaded guilty to four offences of obtaining benefit by fraud. These were of false accounting on 26 September 1990 for the purpose of obtaining income support as a single person, when in fact she was married; making a false declaration to similar effect on 28 November 2003; making the same false declaration on 20 October 2005 and again on 10 August 2010. One of the offences therefore preceded the coming into force of the 2002 Act. The other three did not. It was asserted that she had received an overpayment of £76,817.72 in the period between 11 November 2003 and 17 May 2011 and it was this sum which formed the basis of the application for the confiscation order. (It was adjusted to £84,966.30 to take account of the increase in the value of money between the time that the benefit was paid and the date of Ms McCool's plea of guilty.)

49. The available amount to meet the confiscation order was deemed to be £38.037, representing half the value of the estimated equity of a property which she owned jointly with her husband, Mr Harkin, the second appellant. The Crown Court judge held that Ms McCool had benefited in the amount of £84,996 and made a confiscation order for a sum exceeding £38,000.

50. In the case of Mr Harkin, he pleaded guilty to making a false declaration on 16 December 1999 in relation to an application for income support, representing that he was single when he was in fact married to Ms McCool. He pleaded guilty to other offences, two of which were similar to the first offence in December 1999 and the remainder were in relation to housing benefit. In all of these cases, the offences were committed after the coming into force of the 2003 Act. The total amount of the benefits received was said to be £53,937.12, after making adjustment for the changes in the value of money. A confiscation order was made in his case in the same sum as Ms McCool's.

51. On appeal to the Court of Appeal, the appellants argued, as they have before this court, that the Crown Court did not have jurisdiction to make the orders which it did. They also argued, however, that the Crown Court should have applied Regulation 13 of the Social Security (Payments on Account, Overpayments and Recovery) Regulations (Northern Ireland) to reduce the amount of recoverable benefit by deducting the amounts to which the appellants would have been entitled, had they made honest and accurate applications for benefit. The Court of Appeal acceded to the latter argument and reduced the sums to be recovered by way of confiscation to £5,531.95 in the case of Ms McCool and £33,624 in the case of Mr Harkin. That order has not been challenged by the respondent on this appeal.

52. An application for leave to appeal to this court was refused by the Court of Appeal but the court certified the following question as giving rise to a point of law of public general importance:

> "Can a confiscation order under section 156 of the Proceeds of Crime Act 2002 be made by a Crown Court in circumstances where a defendant is convicted in proceedings before that Crown Court of an offence or offences which were committed before 24 March 2003, given the stipulations of the commencement, transitional and saving provisions set out in articles 2, 4 and 11 of the Proceeds of Crime Act 2002 (Commencement No 5, Transitional Provisions, Savings and Amendment) Order 2003?"

53. Both appellants were convicted of offences which, in all instances save one in each case, were committed after the coming into force of the 2002 Act. I have concluded that the offences committed after 24 March 2003 had to be dealt with under the 2002 Act by the Crown Court considering whether to make confiscation orders against the appellants. I have also decided that the court was obliged to leave out of account offences which occurred before that date. I would therefore answer the certified question in the affirmative.

Conclusion

54. I would dismiss the appeal.

Postscript

55. I agree with what Lord Hughes has had to say about the power of the Court of Appeal to substitute an order under a different regime - see paras 108 *et seq* of his judgment.

LORD HUGHES: (with whom Lady Black agrees)

Overview

56. Not for the first time, this case concerns a technical issue relating to the construction of confiscation legislation. The two defendants, who have at all material times been married to one another, were both convicted of a series of offences of making dishonest claims for State benefits by pretending that they were single people when they were not and, in the case of Harkin, by claiming housing benefit for a house when he was living with Ms McCool at a different one. There is and was no significant dispute as to the total amounts which they thereby obtained over a period of some years. There is and was no serious dispute that confiscation orders were appropriate, nor that substantial assets were available, from which such orders could be met: the available amount was accepted to be £38,037 each. The only issue of substance in relation to the proper sum to be confiscated arose from the contention that the amount of the order ought to be reduced, in accordance with *R v Waya* [2012] UKSC 51; [2013] 1 AC 294 from the gross payments received (the benefit for the purposes of the legislation) to the amount of overpayment. The Court of Appeal accepted that contention and reduced the confiscation orders accordingly. The Crown accepts the reduction, and there thus remains no dispute as to the sums. But it is said on behalf of both defendants that the orders were made under the wrong set of confiscation legislation and must for that reason be quashed.

57. The reason why this is said relates to the commencement dates of the confiscation legislation and the transitional provisions effecting the change from one set to another. The question here arises in a Northern Ireland case, but the legislation is substantially the same in England and Wales, and indeed very largely in Scotland. For convenience, the equivalent England and Wales provisions, where identical, are noted in brackets.

58. By way of very broad summary, confiscation legislation in the UK began with the Drug Trafficking Offences Act 1986 ("DTOA 1986"). Shortly afterwards, the Criminal Justice Act 1988 ("CJA 1988") introduced similar provisions for non-drug offending. Both statutes responded to international co-operation, and treaty obligations in both fields arose at about the same time. Initially the regime affecting

drug offending was more severe than that applying to other offences. The DTOA 1986 was replaced by the Drug Trafficking Act 1994 ("DTA 1994"). Meanwhile by the Criminal Justice Act 1993 ("CJA 1993") and the Proceeds of Crime Act 1995 ("POCA 1995") a number of amendments were made. Three which affected non-drugs offending may here be relevant: (1) the court's discretion as to the amount of the order was removed and replaced by an obligation (in all but immaterial exceptional situations) to make an order in the sum of the benefit obtained, capped by the available (or realisable) amount; (2) the concept of a minimum benefit disappeared, and (3) provision was introduced for including benefit from past offending where there was a course of criminal conduct. Those alterations brought the non-drug regime closer into line with what the drug regime had always been. There was also in the past separate legislation for confiscation in relation to terrorist offences, which it is not necessary to consider here. Then, in 2002 the legislation was re-worked and consolidated in the Proceeds of Crime Act 2002 ("POCA 2002"), which assimilates drug and other offending. This Act contains separate but similar sections for, respectively, England and Wales, Scotland and Northern Ireland.

59. The Northern Ireland legislation relating to confiscation for both kinds of offence has been:

(i) The Criminal Justice (Confiscation)(Northern Ireland) Order 1990, 1990 No 2588 (NI 17) ("the 1990 Order"); this dealt with both drugs and other offences;

(ii) The Proceeds of Crime (Northern Ireland) Order 1996 (SI 1996/1299) (NI 9) ("the 1996 Order"); this essentially mirrored the changes made in England and Wales in 1993, 1994 and 1995 and came into force on 25 August 1996; and

(iii) The Proceeds of Crime Act 2002; the chiefly relevant provisions of this Act came into force for Northern Ireland (as also for England and Wales) on 24 March 2003.

The issue

60. Ms McCool's indictment, to which she pleaded guilty, charged four counts. The first related to 26 September 1990. The remaining three related to November 2003, October 2005 and August 2010. Those counts reflected a continuing course of repeated false representations made between 1990 and 2010.

61. Harkin's indictment, to which he also pleaded guilty, contained counts relating to offences committed in December 1999, October 2005, April 2006, May 2007 and August 2009. Those counts reflected a course of repeated false claims made between 1997 and 2009 (income support) and between March 2003 and 2011 (housing benefit).

62. When calculating the benefit for the purpose of the confiscation proceedings, the prosecution disclaimed reliance, in both cases, on any offending before the commencement of POCA 2002 in March 2003. In Ms McCool's case, her benefit was calculated from the date of her second count (28 November 2003). The gross sums obtained were £76,817.72; adjusted for inflation this became £84,966.30. The overpayments however, were £5531.95. In Harkin's case, his benefit was similarly calculated. As to income support, benefit was calculated by the prosecution as running from 20 October 2005 to 18 November 2009, and as to housing benefit from 3 April 2006 to 27 March 2011. In each case the start date for the calculation of benefit was the date of the earliest count on the indictment which related to a time after the commencement of POCA 2002. The gross payments received, adjusted for inflation, were £53,937.12. The sum overpaid was (similarly adjusted) £33,624. It follows that these net benefit figures were significantly smaller than the total overpayments dishonestly obtained from 1990 onwards in the case of Ms McCool and from 1999 onwards in the case of Harkin. They were also, but not by nearly so much, somewhat smaller than the total overpayments obtained after the commencement of POCA 2002.

63. The confiscation orders were made under POCA 2002. The appellants contend that there was no power to make orders under that Act. They say that any order could only be made under the relevant predecessor legislation, thus the 1990 Order for Ms McCool and the 1996 Order for Harkin. This contention is founded on the terms of section 156 of POCA 2002 and of the relevant Commencement Order.

64. Section 156 [section 6 for England and Wales] is the foundation of the power to make a confiscation order. So far as relevant, it says:

> "156 Making of order
>
> > (1) The Crown Court must proceed under this section if the following two conditions are satisfied.
> >
> > (2) The first condition is that a defendant falls within either of the following paragraphs -

(a) he is convicted of an offence or offences in proceedings before the Crown Court;

(b) he is committed to the Crown Court in respect of an offence or offences under section 218 below (committal with a view to a confiscation order being considered).

(3) The second condition is that -

(a) the prosecutor asks the court to proceed under this section, or

(b) the court believes it is appropriate for it to do so.

(4) The court must proceed as follows -

(a) it must decide whether the defendant has a criminal lifestyle;

(b) if it decides that he has a criminal lifestyle it must decide whether he has benefited from his general criminal conduct;

(c) if it decides that he does not have a criminal lifestyle it must decide whether he has benefited from his particular criminal conduct.

(5) If the court decides under subsection (4)(b) or (c) that the defendant has benefited from the conduct referred to it must -

(a) decide the recoverable amount, and

(b) make an order (a confiscation order) requiring him to pay that amount.

(6) [exception where victim brings civil proceedings].

(7) The court must decide any question arising under subsection (4) or (5) on a balance of probabilities.

(8) [provision for absconding defendant].

(9) References in this Part to the offence (or offences) concerned are to the offence (or offences) mentioned in subsection (2)."

65. The relevant Commencement Order is the Proceeds of Crime Act 2002 (Commencement No 5, Transitional Provisions, Savings and Amendment) Order 2003 (SI 2003/333) (C20) ("the Commencement Order"). So far as material, it says in article 4(1) [article 3(1) E & W]:

> "4.(1) Section 156 of the Act (making of confiscation order) shall not have effect where the offence, or any of the offences, mentioned in section 156(2) was committed before 24 March 2003."

And by article 11, [article 10 E & W] it preserves the predecessor legislation for cases where article 4 precludes use of POCA 2002:

> "11. Where, under article 4 or 6, a provision of the Act does not have effect, the following provisions shall continue to have effect -
>
> …
>
> (e) Articles 3 to 40 of, and paragraph 18 of Schedule 3 to, the Proceeds of Crime (Northern Ireland) Order 1996."

66. It follows that the issue in this case relates to which offences are contemplated by section 156(2) and thus referred to in article 4(1). Is it, in each case, *any* offence

for which the defendant is before the court, or is it any such offence which is relied upon by the Crown (or the court) as justifying confiscation proceedings?

Previous authority

67. A similar problem arose (in England and Wales) in relation to the transition from the pre-1995 legislation to POCA 1995. Section 16(5) of that latter Act contained a provision very similar to the present article 4(1). It provided:

> "Section 1 … shall not apply in the case of any proceedings against any person where that person is convicted in those proceedings of an offence which was committed before the commencement of that section."

68. As Lord Kerr explains, the Court of Appeal (Criminal Division) confronted this question in *R v Simpson*, *R v Aslam* and *R v Stapleton*. It concluded that the "offence(s)" referred to were ones which were relied upon for the making of a confiscation order, that is to say those which the Crown was seeking, or could still seek, to bring into account for confiscation purposes. It followed that if when it came to confiscation the Crown disclaimed reliance on a pre-commencement count and brought into account only post-commencement offences, the new Act applied. I agree with Lord Kerr that it is not necessary to read words into the new statute to achieve this. Nor, pace the Court of Appeal (Criminal Division) in *R v Simpson*, is it necessary to label the alternative construction absurd. The decisions were that the new statutes applied where the *relevant* offences, that is to say those relied on for confiscation purposes, post-dated the commencement date. There is no doubt that these decisions have consistently been followed as a matter of practice since, as is shown by the considered decision of the Crown in the present case to disclaim reliance on the counts which pre-dated March 2003. The decisions have also consistently been applied in the Court of Appeal (Criminal Division); see for example *R v Aniakor* [2014] EWCA Crim 2171. The present appellants contend that this established line of authority, and the practice based upon it, are wrong. Of course, if this construction of the statutes, despite such general acceptance, is not permissible, then it must follow that however technical the objection raised, the orders made in the present case cannot stand.

The appellants' argument

69. The argument for the appellants rests principally upon the fact that there are some differences between the POCA 2002 regime and the earlier regimes which it replaced. The confiscation legislation is, it is rightly said, penal legislation.

Accordingly, it is said that it ought to be construed strictly in favour of defendants to whom its provisions are applied. It is unjust, it is said, to permit the Crown by a process essentially of election, to choose which regime is to apply to a defendant. And it is contended that the wording of article 4(1) [article 3(1) E & W] of the Commencement Order is clear and can only sensibly mean that where <u>any</u> offence on the indictment dates back before the commencement date of POCA 2002, the old regime applies and not the new.

Differences between the regimes

70. The appellants helpfully assembled a list of differences. By no means all of them could even arguably affect them, but their case is that all of them are relevant to deciding the principle whether POCA 2002 can be applied to those who are before the Crown Court for offences which include pre-commencement offences, even if the Crown disclaims reliance on the earlier offence(s) for the purposes of confiscation. The identified differences are addressed serially below.

71. First, the pre-1995 non-drug regimes provided for confiscation to be available only where the benefit exceeded a minimum amount (set at all material times at £10,000) and moreover made the same sum the minimum amount for which a confiscation order could be made: article 4(1) of the 1990 Order [the unamended section 71(2)(b)(ii) CJA 1988 for E & W]. Allied to this rule, the pre-1995 non-drug regimes required the Crown to serve notice to the effect that an order in at least the minimum amount would be possible: article 4(6) of the 1990 Order [the unamended section 72(1) CJA 1988 for E & W]. This concept of a minimum amount never applied to drugs offending, and disappeared from the legislation after POCA 1995 and the 1996 Order.

72. Second, the pre-1995 non-drug regimes vested in the court a discretion as to the amount of a confiscation order. The court was given the power to make such order as it thought fit, subject to the ceiling of the assets available/realisable: Article 4(1) of the 1990 Order [the unamended section 71(1) CJA 1988 for E & W]. Since 1995/1996 the court has been required in all but immaterial cases to make an order in the amount of the benefit which the defendant has obtained, subject again to the ceiling of available/realisable assets. There was never any discretion in the drug regimes.

73. Third, for the non-drug regimes, there was until the 1995/96 changes no provision for taking into account benefit obtained from offences other than those before the court, either as charges or as offences taken into consideration. Since then, benefit from other offences has been taken into account in prescribed circumstances. The label attached to the prescribed circumstances was, until POCA 2002, "a course

of criminal conduct": article 9 of the 1996 Order [new section 72AA(1) CJA 1988 inserted by POCA 1995 for E & W]. Since POCA 2002 it has been "criminal lifestyle": POCA 2002 section 156(4) and 223 [sections 6(4) and 75 for E & W]. The conditions for attracting these extended provisions have not remained identical, but are very similar. The post 1995/96 conditions were satisfied if the defendant was now, or had been in the preceding six years, convicted of one other offence: article 9(1) of the 1996 Order [new section 72AA(1) CJA 1988 for E & W]. Under POCA 2002 the defendant falls within the lifestyle provisions if there are either three additional convictions (four in all) in the present proceedings, or two previous convictions in the preceding six years: section 223(3) POCA 2002 [section 75(3) for E & W]. Moreover, the course of criminal activity lifestyle rules of POCA 2002 do not apply unless the total benefit is £5,000 or more: section 223(4) [section 75(4) E & W]. In these respects the qualifying conditions are narrower under POCA 2002 than under the previous 1995/96 regime. But under POCA 2002 a defendant is also to be treated as a lifestyle offender if he is convicted of certain specific offences, or (subject to the £5,000 minimum) of an offence committed over a period of at least six months: section 223(2) [section 75(2) for E & W]. The objective seems sensibly to have been to identify more reliably those whose offending spanned a period so as to raise the realistic possibility that their lifestyle was to a significant extent supported by crime.

74. The effect of the course of conduct and lifestyle conditions being satisfied is, in each case, to make available to the court assumptions as to benefit, each applicable unless either the defendant disproves it on the balance of probabilities, or there would be a serious risk of injustice if it were made. The assumptions are the same under both regimes, although the first has been split into two in POCA 2002: compare section 160 POCA 2002 [section 10 E & W] with article 9, 1996 Order [new section 72AA(4) CJA 1988 E & W]. The chief assumptions are that any property held by the defendant over the preceding six years, and any expenditure made by him over the same period, are the product of criminal offences, so that they count towards his benefit. Plainly the objective under both regimes is to cast the onus onto a lifestyle offender to demonstrate, on the balance of probabilities, that his assets have been legitimate. There is one difference between the 1995/96 regime and the POCA 2002 regime, in that the assumptions, which were discretionary under the former, have become mandatory under the latter. In the case of drug offending, the assumptions were always available, and the confiscation order took into account all benefit from drug offending whenever it occurred, before or after the inauguration of the confiscation legislation: see eg DTOA sections 1(3), 2(1)(a) and 2(2).

75. Fourth, the rules as to postponement of confiscation, which were the subject of a considerable amount of litigation until the House of Lords held in *R v Soneji* [2005] UKHL 49; [2006] 1 AC 340 and *R v Knights* [2005] UKHL 50; [2006] 1 AC 368 that failure strictly to comply with them did not usually render an order invalid,

have been modified from time to time. Under the 1990 Order the maximum postponement was six months: article 7. Later that was revised to six months absent exceptional circumstances: article 11 of the 1996 Order [section 72A(3) CJA 1988 inserted by section 28 CJA 1993 E & W]. Under POCA 2002 postponement can be for up to a maximum of two years, and beyond in event of exceptional circumstances: section 164 [section 14 E & W].

76. Fifth, all the regimes have provided for the calculation of the "ceiling" amount of the defendant's available or realisable assets to include gifts which he has made. Under the pre-POCA 2002 non-drug regimes, gifts which were thus to be included were those made by the defendant after the commission of the predicate offence which the court thought it appropriate to take into account: article 3(10) of the 1990 Order and article 7(1)(a) of the 1996 Order [section 74(10) unamended CJA 1988 E & W]. Under POCA 2002 the same rule for what are now termed "tainted gifts" applies by section 225(5) [section 77(5) E & W], but the expression is widened in lifestyle cases, logically enough, to include gifts either made during the six year period or which were of property obtained via criminal conduct: section 225(2)(3) [section 77(2)(3) E & W]. In both cases, if gifts qualify as tainted they are now to be added into available assets, without a further requirement that the court conclude it appropriate to do so.

77. Sixth, from time to time the provisions relating to variation of confiscation orders have been revisited and revised. It is enough to record that the 1995/96 regimes somewhat extended the power to vary an order upwards, when compared with the pre-1995 regime, in the event of fresh evidence becoming available. POCA 2002 provides for additional specific situations in which there may be variation on the basis of fresh evidence; they include cases where the Crown Court made no confiscation order at all, either because it was not invited to do so, or where at that time the evidence did not show any benefit.

78. Seventh, there are differences in the means of enforcement of confiscation orders. It is unnecessary to set them out. Essentially the system of enforcement has remained the same throughout. Confiscation orders are enforced by the magistrates as if they were Crown Court fines: see *R v Guraj* [2016] UKSC 65. Additional mechanisms have however been added from time to time, such as widening the range of officials who may exercise powers of seizure, extending the powers of management receivers appointed under restraint orders, and enlarging the ability to enforce as if civil debts.

79. The appellants identify a particular aspect of enforcement. When making a confiscation order the court has always had power to stipulate the time within which payment must be made. In Northern Ireland the power derived until POCA 2002 from the general provisions for fines, found in section 35(1) of the Criminal Justice

Act (NI) 1954, which permitted extension of the period from time to time. Under POCA 2002, section 161(5) [section 11(5) E & W] time cannot be extended beyond 12 months. The charging of interest depends on the time given to pay, because it runs from default. It follows that in this respect POCA 2002 is, at least theoretically, more severe than the previous regime, under which it was at any rate legally possible for time to be extended beyond 12 months.

80. Eighth, the early legislation placed confiscation jurisdiction in the court of trial, whether the Crown Court or the Magistrates' Court. POCA 2002 restricts it to the Crown Court and therefore includes provision for the defendant who is convicted of a benefit-generating offence before the magistrates to be committed to the Crown Court for confiscation to be considered: section 218 [section 70 E & W]. This power of committal is separate from, and wider than, the ordinary power which magistrates have in England and Wales to commit a defendant for sentence where he is convicted of an offence triable either way. It extends to purely summary offences, and is a power of committal available only where confiscation is a possibility. The terms of the provisions for committal are relevant context on the construction question and are considered more fully below.

81. Ninth, the earlier legislation made no provision for a right of appeal by the Crown. The defendant's right of appeal was secured from the outset because a confiscation order was, although not strictly part of the sentence, an "order … made when dealing with an offender" and thus appealable as if a sentence under section 30 Criminal Appeal Act (Northern Ireland) 1980 [section 50 Criminal Appeal Act 1968 E & W]: see *R v Johnson* [1991] 2 QB 249. This was later reinforced by inserting specific provision in those statutes including a confiscation order in the definition of sentence, such as section 30(3)(a) of the Criminal Appeal Act (Northern Ireland) 1980 [section 50(1)(d) Criminal Appeal Act 1968 E & W]. There is of course no general right of appeal by the Crown against sentence (although there existed the power to refer the case under section 36 of the Criminal Justice Act 1988 as unduly lenient). A general right in the Crown to challenge either a decision not to make a confiscation order, or the amount of it if made, had to be created separately and is found in section 181-182 of POCA 2002 [sections 31-32 E & W].

82. The detail and technicality of the confiscation legislation, sometimes necessary and sometimes not, is such that changes from time to time of the kind set out above are to be expected. The question which matters for present purposes is whether these differences mean that the *Simpson/Aslam* construction of POCA 2002 is thereby rendered impermissible. That in turn involves asking whether that construction would or might result in any unfairness to defendants. If it would, or might, then the principle that penal statutes must be construed strictly in favour of those penalised would carry considerable weight.

83. There would be unfairness, and a breach of article 7 ECHR, if this construction had the effect of applying retrospectively to defendants a regime which was not in force at the time their offences were committed. But there is no question of this retrospective operation of POCA 2002 if it is applied only to confiscation proceedings depending on offences committed after its commencement. If the Crown disclaims reliance, for confiscation purposes, on any pre-commencement offence, then retrospective operation simply does not arise. The principal rationale of the impermissibility of retrospective operation of a penal statute is that a citizen is entitled to know, at the time he decides how to behave, what the legal consequences of what he does may be. If now these appellants, or other defendants like them, were to be visited with consequences by way of confiscation of a kind different from what was available to the Crown when they committed the offence(s) attracting those consequences, there would be impermissible retrospective operation of the criminal law. But these appellants have committed offences since the commencement of POCA 2002. The consequences which have been visited upon them are precisely the same as would have been applied to anyone else who committed such offences after that commencement. It is true that both of them have also committed pre-commencement offences. But the orders made owe nothing to those offences and are precisely the same as would have followed if the earlier offences had never occurred. There is nothing unfair in saying to Ms McCool that she should bear the confiscation consequences of her post-March 2003 offences, as required by POCA 2002, unless those consequences differ in some way from what they would have been if she had not committed her earlier offences. They do not. The same is true of Harkin.

84. There would also be likely to be a real risk of unfairness if a defendant faced the prospect of two different confiscation regimes being applied to him, because so much of the ground covered by each regime is the same. This was the consideration underlined by the Court of Appeal, Criminal Division, in *Aslam* [2005] 1 Cr App R (S) 116. Speaking of the commencement provisions in POCA 1995, the court's judgment contains the following analysis:

> "11. The legislative purpose of section 16(5), as it seems to us, was to prevent the Crown from dividing convictions against a defendant in one set of proceedings into pre- and post-November 1, 1995 matters and then taking confiscation proceedings (concurrently or consecutively) under both statutes. So if at the time the judge is asked to make a confiscation order under the 1995 Act on a number of counts there remains a pre-commencement count on which the Crown is seeking, or could still seek, a confiscation order under the 1988 Act as amended in 1993, there is no jurisdiction to make an order under the 1995 Act. However, if the pre-commencement count is one which could not be the basis of

> confiscation proceedings, there is no obstacle to using the 1995 Act regime. Similarly if (as in this case) the Crown has expressly abandoned any reliance on the pre-commencement count for the purposes of a confiscation order, the fact that it could have sought such an order in respect of that count seems to us entirely immaterial. In such a case also, in our judgment, there is no obstacle to using in [sic] the 1995 Act regime in respect of the post- commencement counts."

However, for the reasons explained in that passage, there is no question of more than a single confiscation regime being applied to these appellants or anyone in a similar position. That is because the offences which are relevant to section 156 [section 6 E & W] are those on which the Crown and thus the court will found any confiscation order. Where, as here, any earlier pre-commencement offences are disclaimed by the Crown, and not relied upon by the court, there can only be the single confiscation regime established by POCA 2002.

85. This position is true despite the various differences between the regimes which are set out above.

86. Ms McCool, had she been dealt with in the early 1990s for her offending up to that point, would have been subject to a confiscation regime under which £10,000 was the minimum sum for which an order could be made - see the 1990 Order and para 71 above. But to say that an order can now be made against her under POCA 2002, where there is no minimum, is to subject her to no injustice if the order is made exclusively on the basis of offences committed since March 2003. It is exactly the same as if she had now been prosecuted only for the post-March 2003 offences. In that event, everyone agrees that POCA 2002 would be the relevant regime and there would be no minimum sum.

87. For the same reasons, there is no injustice to Ms McCool in the fact that the regime applied to her permits of no general discretion as to the amount of the confiscation order. She is in exactly the same position as she would have been in if prosecuted only for the post-March 2003 offences. It might be added that, in any event, no basis is suggested on which any court considering her case at any time under any regime might have made an order in a sum smaller than the £5,531.95 actually made.

88. The lifestyle provisions are of some complexity but the same reasoning applies. If these appellants had been prosecuted only for the post-March 2003 offences, no one suggests that the POCA 2002 provisions would not correctly have been applied to them. The slightly different lifestyle provisions of POCA 2002 are

deliberately applied to anyone convicted of offences committed after the commencement of that statute. They were in force when those post-commencement offences were committed, and no improper retrospectivity is involved in applying them.

89. In considering the lifestyle provisions it is necessary to distinguish between the conditions which must be met before they can be applied, and the consequences if they are. It is certainly true that the conditions for their application may to a strictly limited extent involve looking at past convictions. There are two possible routes to a finding that there has been a course of criminal activity. The first is that the defendant is convicted in the current proceedings of at least three other offences (ie at least four in all) from which he has benefited: section 223(2)(b) with section 223(3)(a) [section 75(2)(b) with section 75(3)(a) E & W]. The second is that he has previous convictions, sustained on two or more different occasions, for benefit-generating offences: section 223(2)(b) with section 223(3)(b) [section 75(2)(b) with section 75(3)(b) E & W].

90. As to the first route, one or more of the three other offences might of course be pre-commencement. But if it is, the Commencement Order requires it to be left out of consideration: Article 8(2) [article 7(2) E & W], and nor can its associated benefit count towards the minimum benefit condition of £5,000 required by section 223(4) and (5) [section 75(4) and (5) E & W]: Article 8(3) as amended [article 7(4) E & W]. The exception of pre-commencement offences for this purpose of counting three others in the present proceedings, and counting a minimum of £5,000 benefit has clearly been stipulated for in the Commencement Order to avoid any risk of retrospectivity, for under the 1995/96 regime only one other offence was sufficient and there was no minimum benefit requirement. It may or may not have been necessary, in order to avoid infringement of article 7 ECHR, to make these stipulations, given that the new conditions are tighter, not looser, for the establishment of a course of criminal activity, but this must have been the aim. Whatever the reason, the outcome is that no pre-commencement offences, even if the conviction occurs in the current proceedings, can count towards the establishment of a course of criminal activity via the three other offences (four in all) rule. It is also to be noted that the fact that it was thought necessary, in order to achieve this, to include articles 8(2) and (3) in the Commencement Order is relevant to the construction of section 156: see below.

91. As to the second route, the past convictions may clearly have been pre-commencement, as was the case under the previous regime. These can and do count, as article 8(5) of the Commencement Order [article 7(5) E & W] makes clear. There is no reason why they should not. There is no offensive retrospectivity so long as the past convictions only go to the calculation of benefit in respect of confiscation based on post-commencement offence(s). It is similar to taking account of previous criminal history for sentencing purposes. The rule that such pre-commencement

benefit might be taken into account when fixing the confiscation order was in force and available to the defendant at the time he committed the post-commencement offence(s) which generate the order.

92. POCA also introduced two new routes to the lifestyle provisions, as additions to the "course of criminal activity" routes. The first is that some offences specified in Schedule 5 [Schedule 2 E & W] (intended to be the kind likely to be committed by professional criminals) now automatically bring the lifestyle provisions into play. The second is that an offence committed over a period of six months or more also does so, since it is likely to involve repetition. Both these new routes are more severe on defendants than the previous regimes. Accordingly, for both of them, the Commencement Order provides by article 8(2) [article 7(2) E & W] that pre-commencement offences are to be left out of consideration. There is thus no risk of objectionable retrospectivity or unfairness.

93. When it comes to the consequences of the lifestyle provisions applying, it is necessary to go back in the statute to section 160 [section 10 E & W]. This sets out the assumptions which must be made. As with the provisions of the previous regimes, they do involve counting as benefit assets obtained before the Act was passed, if but only if the defendant cannot displace the assumptions on the balance of probabilities. But that is the position for anyone convicted of (say) a course of dishonest conduct perpetrated between June and December 2003, if he qualifies under the lifestyle provisions. The counting of past-obtained benefits is not objectionably retrospective, because it applies a regime which was in force when the offences were committed. Nor, for the same reasons, is there any unfairness to a defendant if the Crown disclaims reliance on any pre-commencement offence in the present indictment and proceeds in relation only to the post-commencement offence(s). A defendant whose case is treated in this way by the Crown is in exactly the same position as if he had only been prosecuted for, or indeed had only committed, the post-commencement offence(s).

94. Exactly the same applies to the various other differences between the regimes which are set out at paras 75-81 above. In all cases there is no unfairness to a defendant such as these appellants if the POCA 2002 regime is applied, based only on post-commencement offences, because the rules which are being applied are those which were in force, and publicly known, at the time the offence(s) generating the confiscation order were committed.

95. Even if it were to turn out possible for circumstances to occur in which the result of this, correct, construction of POCA 2002 as applied in the *Aslam* series of cases was to create real risk of unfairness to the defendant, the court retains a simple method of preventing such risk eventuating. On any view, under both the present POCA 2002 regime and its predecessors, the court is given the power to embark

upon the confiscation process of its own motion, even if not asked by the Crown to do so: section 156(3)(b) POCA 2002 or article 8(1)(b) of the 1996 Order [section 6(3)(b) POCA 2002 or section 71(1)(b) CJA 1988 for E & W]. On the assumption that the *Aslam* construction is correct, the offence(s) in respect of which the confiscation inquiry is undertaken are therefore those which either the Crown seeks to rely on or the court determines should be made part of the process. It would therefore be open to a defendant to apply to the court to determine that one or more pre-commencement counts ought to be included in the process, on the grounds that if they are not he would be at demonstrated risk of unfairness. If the court acceded to that application, the earlier count would be part of the confiscation inquiry and, as the Commencement Order ordains, the relevant statutory regime would then be the earlier one.

96. It is clear from the judgment of Lord Reed that the foregoing conclusions as to the absence of risk of unfairness is not in issue; his differing conclusions depend on his construction of the legislation.

The construction of section 156 and the Commencement Order

97. There is no basis for the appellant's assertion that it is improper, or inconsistent with POCA 2002, for there to be an element of election by the Crown in relation to which offences are relied on for the confiscation process. Section 156 [section 6 E & W] does not make a confiscation order available in respect of every person who profits from criminal behaviour. It makes it available in relation to those who are convicted of one or more offences. Certainly confiscation depends on benefit from conduct rather than attaching to particular offences, but the confiscation exercise is, by section 156(2) [section 6(2) E & W] triggered by the offences there referred to. It is axiomatic that the decision to prosecute for an offence is for the Crown. An element of choice as to which offence(s) to charge is inherent in the vast majority of prosecution decisions, and in all where there is serial offending. It is positively unusual for every offence revealed to be charged. It follows that by deciding to charge only those of a series of offences which were committed after the commencement date, the Crown can achieve exactly the same result as contemplated by *Aslam* and similar cases, that is to say the application of the POCA 2002 regime. No one suggests otherwise. There is nothing remotely improper about it.

98. A similar telling indication is provided by the second part of section 156(2), viz section 156(2)(b) [section 6(2)(b) E & W]. As explained at para 80 above, the magistrates' power to make confiscation orders disappeared in POCA 2002. Accordingly it was replaced by a power to commit a defendant to the Crown Court for consideration of confiscation. The power is found in section 218 [section 70 E & W]. This provides:

“218 Committal by magistrates’ court

(1) This section applies if -

(a) a defendant is convicted of an offence by a magistrates’ court, and

(b) the prosecutor asks the court to commit the defendant to the Crown Court with a view to a confiscation order being considered under section 156.

(2) In such a case the magistrates’ court -

(a) must commit the defendant to the Crown Court in respect of the offence, and

(b) may commit him to the Crown Court in respect of any other offence falling within subsection (3).

(3) An offence falls within this subsection if -

(a) the defendant has been convicted of it by the magistrates’ court or any other court, and

(b) the magistrates’ court has power to deal with him in respect of it.

(4) If a committal is made under this section in respect of an offence or offences -

(a) section 156 applies accordingly, and

(b) the committal operates as a committal of the defendant to be dealt with by the Crown Court in accordance with section 219.

(5) [provision for bail].”

99. This power is explicitly to commit with a view to confiscation. It is not the same as the ordinary (English) magistrates’ power to commit for sentence in an either-way offence. This power extends to purely summary offences, where the magistrates could not commit for sentence, and it exists only where consideration of confiscation is the purpose. Once invoked, it does transfer also to the Crown Court the function of sentencing the defendant: see sections 218(4) and 219 [sections 70(4) & 71 E & W]. But the sentencing power to be exercised by the Crown Court is not the same as it would be in the case of committal for sentence in an either-way offence, for it is limited by section 219 to whatever (more limited) power the magistrates would have had by way of sentence [section 71(3)(b) E & W, with the variant that the magistrates may in that jurisdiction indicate under section 70(5) as to an either-way offence that they would in any event have committed for sentence, and then the Crown Court has its own sentencing powers under section 71(2)(b).] In both jurisdictions it is to be noted the magistrates have no power to commit of their own motion with a view to confiscation. They can do so only where the Crown asks them to do so: section 218(1)(b) [section 70(1)(b) E & W]. So the Act recognises explicitly the power of the Crown to make a decision either way about committal. It provides an election to the Crown. If some of the offences before the magistrates’ court are pre-commencement and the Crown opts to request committal with a view to confiscation only those which are later, post-commencement, offences, then only the POCA 2002 regime will apply. There is nothing at all improper in the Crown adopting this course. If it can do so in relation to convictions in the magistrates’ court there is no reason why it should not also do so, via the *Aslam* procedure, if the convictions occur in the Crown Court. It is true that the magistrates can, if asked by the Crown to commit offences A-D with a view to confiscation, also do the same of its own motion in relation to offences E-G. But there is no obligation to do so, and the result is that the Crown’s decision as to which are to be committed is permitted to stand, and in practice in most cases will be determinative.

100. Section 224(3) [section 76(3) E & W] deals with the non-lifestyle offender. Under section 156(4)(c) [section 6(4)(c) E & W] his benefit falls to be assessed from offences constituting his “particular criminal conduct.” Those, by section 224(3) [section 76(3) E & W] are (a) “the offence(s) concerned” and (b) any other offence(s) of which he was convicted in the same proceedings. (A third element, under subsection (3)(c) is offences taken into consideration, but this provision does not assist on the present construction question.) An “offence concerned” is, by section 156(9) [section 6(9) E & W] to be read as an offence mentioned in section 156(2) [section 6(2) E & W]. But section 224(3(b) demonstrates that there may be offences of which the defendant is convicted in the current proceedings which are <u>not</u> the offence(s) mentioned in section 156(2). That is a strong pointer against the appellant’s argument that section 156(2)(a), and thus article 7 of the Commencement Order, means <u>all</u> offences of which the defendant is convicted in the current

proceedings. Rather, it supports the Crown's contention, that "the offence(s) concerned" are throughout those on which the Crown seeks to rely for the purposes of the statute, that is to say, to justify confiscation proceedings.

101. It may just be possible to give section 224(3)(b) [section 76(3)(b) E & W] content without this construction. That might be possible if it could be read as intended only to deal with "left behind offences", that is to say ones of which the defendant was convicted in the magistrates' court (and thus in the present proceedings) but in respect of which he was not committed for confiscation. But if this is all it is for, it might have been expected to refer to magistrates' offences specifically. Next, the suggested eventuality is unlikely, for if the Crown asks for the defendant to be committed with a view to confiscation in respect of offences A-D, and there are also benefit-generating offences E-G, it is highly unlikely that the Crown would not seek committal in respect of all of them, unless of course the complication exists that some of the offences are pre-commencement, and it is necessary to exercise the *Aslam* procedure. Thirdly, it is very significant that the Scottish section of POCA 2002 includes wording identical to section 224(b)(3): see section 143(3)(b). That is because the provisions as to general and particular criminal conduct are identical for each of the three national jurisdictions. But in Scotland there is no question of committal by justices of the peace (or anyone else) for consideration of confiscation. In Scotland, confiscation follows on conviction either in the High Court or before the Sheriff: section 92, and especially section 92(13). Confiscation in Scotland is dealt with by the court of conviction, whether the High Court or the Sheriff Court: section 92(1). Since there is no question of committal there is therefore no equivalent of sections 218 (NI) and 70 (England and Wales). So 224(3)(b) cannot have been intended to refer to "left behind" or un-committed offences because if it were, there would be no occasion for the same words in the Scottish section.

102. I do not think that the operation of the group of provisions found in sections 163-165 [sections 13-15 E&W] is in any way impaired by the construction of the statute here explained. As a matter of general sentencing principle, a court which contemplates fining a defendant for any offence before it is bound to take into account his means to pay. A confiscation order made, triggered by whichever offences, will be relevant to those means, in relation to any offence for which a fine is being considered. Likewise, as a matter of general sentencing principle a court ought in any event to sentence a defendant for all the offences before it at the same time, unless there is a reason to do otherwise.

103. For the reasons explained above at para 84, I do not think that the consequence of this construction of POCA is that it is mandatory for the Crown, in a case where the indictment contains both pre- and post-commencement offences, to exercise the *Aslam* election to nominate only the latter for the purposes of asking the court to proceed to confiscation. There may well be cases where this is

inappropriate, for example where the great majority of offences, or the most serious, are pre-commencement. But in such a situation, where the earlier offences are relied on, the court will, according to the Commencement Order, proceed under the earlier regime.

104. To the extent that the appellants argued that the effect of section 224(3)(b) is, unless their preferred construction is correct, to defeat the aim of confining POCA 2002 to post-commencement offences, this is not so because article 9 of the Commencement Order [applicable also to E & W] specifically provides that conduct which constitutes an offence committed before the commencement date "is not particular criminal conduct under section 76(3) or 224(3)". That provision in the Commencement Order is likewise a good indication of the assumption that there might be offence(s) of which the defendant is convicted in the current proceedings which are <u>not</u> the offence(s) within section 156(2) [section 6(2) E & W].

105. A similar indication is given by article 8(2) [article 7(2) E & W]. This provides that when considering the two new routes to treating the defendant as a lifestyle offender (commission of a specified offence or of an offence committed over a six month period) pre-commencement offences are to be ignored (see para 90 above). But if, as the appellants contend, every case in which there is a pre-commencement offence in the present proceedings must for that reason alone be dealt with under the old 1995/96 regime, this stipulation in the Commencement Order would simply not be necessary. The same applies to the stipulation in article 8(3) [article 7(3) E & W] which excludes pre-commencement offences from the course of criminal conduct (three additional offences and thus four in all) rule. I agree of course that subordinate legislation cannot control the meaning of the primary statute, but where, as here, the primary and subordinate legislation are part of a single scheme to substitute one statutory regime for another, and are plainly intended to operate in tandem, it is not irrelevant to take account of indications of consistency between them.

106. If the appellants' contention were correct, and the earlier confiscation regime has to be applied wherever there is a single pre-commencement offence on the indictment (or before the magistrates) even if it is not relied on for confiscation, it would follow that that rule would have to apply even if the pre-commencement offence could never, even arguably, have generated a benefit, and thus could never, even arguably, have had the slightest relevance to the issue of confiscation. Of course, in order to appear on the same indictment, in the Crown Court in Northern Ireland or in England and Wales at least, the offences have to satisfy the rules of joinder to be found in rule 21 of the Crown Court Rules (Northern Ireland) 1979 [Criminal Procedure Rules 2014, rule 14.2(3) for E & W]. But it is not difficult to imagine circumstances in which the earlier and the later offences would be a "series of offences of the same or similar character" for the purpose of these rules. There simply has to be a sufficient nexus between the counts, which do not at all have to

be for the same form of criminal charge; see for the proper approach see *R v Kray* (1969) 53 Cr App R 569 and *Ludlow v Metropolitan Police Comr* [1971 AC 29. Sometimes acquisitive offences are part of a series of offences of abuse - for example by carers. Count 1 may well charge an assault on the elderly person in January 2003, whilst counts 2-5 charge thefts from her bank account starting in April of the same year. A fire raiser may have committed a series of arsons prior to March 2003, which are all offences from which there is no arguable benefit, but the last in the series might be setting fire to his own house, followed by an insurance claim. But in these and similar cases, if the appellants are right, the offences referred to in section 156 or E & W 6 will include the earlier non-benefit ones, and the confiscation proceedings in relation to the only benefit-generating offences, all committed after March 2003, would have to be conducted under the earlier regimes. Even more oddly, the same would be true of a serial fraudster whose first offence was an unsuccessful attempt, committed before March 2003, followed by a succession of similar frauds which succeeded, all committed after that date. There is no rhyme or reason for this and such an outcome might well be termed absurd.

Conclusion

107. For these reasons, I agree with Lord Kerr that the appellants' arguments fail. The offences referred to in sections 156 and E & W 6 are those on which the Crown relies as relevant to the possibility of confiscation. The context of POCA 2002, considered separately, and also together with its Commencement Order, shows that the construction applied in *Simpson*, *Aslam*, *Stapleton* and *Aniakor* is correct. The important rule that penal statutes must be construed strictly so as to avoid any possible unfairness to those potentially penalised provides no reason to the contrary. The consequence is that these appeals must be dismissed.

Postscript: The powers of the Court of Appeal to substitute

108. Although the question does not, in consequence, arise, this case ought not to be concluded without some reference to it. The argument put to this court by the appellants was that if they were correct, and the order in the present cases was made under the wrong legislation, the Court of Appeal had no power to put the error right by substituting an order, if satisfied that it was in the correct sum, under the correct statutory regime.

109. In the present case the Crown had conceded in the court below that substitution was not available, and having taken that stand did not ask this court to permit it to withdraw the concession. Since the point was in consequence not argued, it is better not to express a concluded view about it. Equally, however, it ought not

to be assumed that the concession made, and the appellants' supportive argument, were correct.

110. The appellants' right of appeal is given by section 8 of the Criminal Appeal Act (Northern Ireland) 1980:

> "8. A person convicted on indictment may appeal to the Court of Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law."

The equivalent provision in England and Wales is section 9 of the Criminal Appeal Act 1968, and in that jurisdiction section 10 makes clear that the same right of appeal exists when a defendant is dealt with by the Crown Court after committal for sentence to that court by the magistrates. Section 30(3)(a) [section 50(1)(d) Criminal Appeal Act 1968 for E & W] expressly includes a confiscation order in the expression "sentence" for this purpose, confirming the earlier decision in *R v Johnson*.

111. On an appeal against sentence, the powers of the Court of Appeal include the power, if quashing the sentence, to impose such alternative sentence as is available in law. Section 10(3) of the Criminal Appeal Act Northern Ireland 1980 provides:

> "(3) On an appeal to the Court against sentence under section 8 or 9 of this Act the Court shall, if it thinks that a different sentence should have been passed, quash the sentence passed by the Crown Court and pass such other sentence authorised by law (whether more or less severe) in substitution therefor as it thinks ought to have been passed; but in no case shall any sentence be increased by reason or in consideration of any evidence that was not given at the Crown Court."

The equivalent provision in England and Wales is section 11(3) Criminal Appeal Act 1968 which is in the same terms except that they are subject to the proviso that the defendant shall not, taking the case as a whole, be dealt with more severely than he was below.

112. In the particular case of confiscation orders, the Criminal Appeal Acts have been amended to enable the Court of Appeal, instead of substituting its own order, to remit the case to the Crown Court. Section 10(3A) [section 11(3A) in E & W] provides:

> “(3A) Where the Court of Appeal exercises its power under subsection (3) to quash a confiscation order, the Court may, instead of passing a sentence in substitution for that order, direct the Crown Court to proceed afresh under the relevant enactment.”

This power is very useful when there may be a need for the Crown Court to take fresh evidence to deal with the import of the judgment of the Court of Appeal.

113. Where a case is thus remitted to the Crown Court, the Criminal Appeal Acts have consequential provisions. They include section 10(3C) [section 11(3D) E & W]. This provides, inter alia, that:

> “‘relevant enactment’ in relation to a confiscation order quashed under subsection (3), means the enactment under which the order was made.”

The effect of this last provision, whether intended or not, is that when remitting a confiscation case the Court of Appeal is bound to direct the Crown Court to apply the same statutory regime that it did before.

114. Section 10(3C) is the foundation of the argument of the appellants in the present case, to the effect that if their confiscation orders had had to be quashed on the grounds that they were made under the wrong statute, it would not be possible for the Court of Appeal to substitute an order under the right legislation. This, however, by no means necessarily follows. On its face, section 10(3C) only applies when the Court of Appeal is remitting the case under the new power to do so. Its longstanding and pre-existing power simply to quash and substitute under section 10(3) is arguably quite unaffected. When dealing with a confiscation order which is found to contain some error justifying its quashing, it is not bound to remit the case to the Crown Court; it simply has power to do so if it wishes. If it chooses not to do so, section 10(3C) is arguably irrelevant.

115. At least where the Court of Appeal can apply the findings of fact and the decisions on the evidence made by the Crown Court, there may be no reason at all why it should not, in a proper case, quash an order if made under the wrong legislation and substitute an order under the right statutory scheme, and it is relevant to note that this is the practice of the Court of Appeal, Criminal Division, in England and Wales - see for example *R v Lazarus* [2004] EWCA Crim 2297; [2005] 1 Cr App R (S) 96 and *R v Bukhari* [2008] EWCA Crim 2915; [2009] 2 Cr App R (S) 18.

LORD REED: (dissenting) (with whom Lord Mance agrees)

116. The first appellant, Ms McCool, pleaded guilty at Derry Crown Court to four counts on an indictment. The first count was of false accounting contrary to section 17(1)(a) of the Theft Act (Northern Ireland) 1969, committed on 26 September 1990. The remaining counts were of making false declarations with a view to obtaining benefits contrary to section 105A(1) of the Social Security Administration (Northern Ireland) Act 1992, committed on dates between 28 November 2003 and 10 August 2010. The second appellant, Mr Harkin, appeared on the same indictment, and pleaded guilty to seven counts of offences under section 105A(1) of the 1992 Act, committed on 16 December 1999 (count 5) and on six other dates between 20 October 2005 and 3 August 2009.

117. At sentencing, the court was asked by the prosecutor to proceed with confiscation proceedings pursuant to section 156(3) of the Proceeds of Crime Act 2002 ("POCA"). Prosecutor's statements were subsequently served on the appellants. In an effort to avoid the problem which has given rise to these appeals, the statement served on the first appellant stated, in relation to the calculation of the benefit obtained:

> "I have decided not to include the first charge on the bill of indictment (this is the first charge in relation to the defendant) for confiscation purposes and as such I have amended the Income Support overpayment period to commence from 28 November 2003."

The statement served on the second appellant contained a similar statement in respect of count 5. The overpayment period was therefore calculated as if it had commenced on 20 October 2005.

118. The explanation for this apparent generosity on the part of the prosecutor lies in the transitional provisions governing POCA's entry into force in Northern Ireland. It was thought that, by leaving out of account the offences committed before POCA came into force, the remaining offences could then be brought within POCA's ambit. The principal issue in the appeal is whether that manoeuvre has succeeded in achieving its purpose, or whether the presence of the earlier offences on the indictment means that all the offences properly fall within the scope of earlier confiscation legislation.

The relevant provisions of POCA

119. POCA contains broadly similar sets of provisions dealing with confiscation in England and Wales (Part 2: sections 6 to 91), Scotland (Part 3: sections 92 to 155) and Northern Ireland (Part 4: sections 156 to 239). Section 156 is the introductory section of Part 4, dealing with Northern Ireland:

> "**156 Making of order**
>
> (1) The Crown Court must proceed under this section if the following two conditions are satisfied.
>
> (2) The first condition is that a defendant falls within either of the following paragraphs -
>
> > (a) he is convicted of an offence or offences in proceedings before the Crown Court;
> >
> > (b) he is committed to the Crown Court in respect of an offence or offences under section 218 below (committal with a view to a confiscation order being considered).
>
> (3) The second condition is that -
>
> > (a) the prosecutor asks the court to proceed under this section, or
> >
> > (b) the court believes it is appropriate for it to do so.
>
> (4) The court must proceed as follows -
>
> > (a) it must decide whether the defendant has a criminal lifestyle;

(b) if it decides that he has a criminal lifestyle it must decide whether he has benefited from his general criminal conduct;

(c) if it decides that he does not have a criminal lifestyle it must decide whether he has benefited from his particular criminal conduct.

(5) If the court decides under subsection (4)(b) or (c) that the defendant has benefited from the conduct referred to it must -

(a) decide the recoverable amount, and

(b) make an order (a confiscation order) requiring him to pay that amount.

(6) But the court must treat the duty in subsection (5) as a power if it believes that any victim of the conduct has at any time started or intends to start proceedings against the defendant in respect of loss, injury or damage sustained in connection with the conduct.

(7) The court must decide any question arising under subsection (4) or (5) on a balance of probabilities.

(8) The first condition is not satisfied if the defendant absconds (but section 177 may apply).

(9) References in this Part to the offence (or offences) concerned are to the offence (or offences) mentioned in subsection (2)."

120. For reasons which will appear, section 156(9) is of particular importance to the issue in this appeal. It provides a definition of the phrase "the offence (or offences) concerned", where it appears in Part 4: a definition which is repeated in section 236(1). The phrase is defined as referring to the offence or offences mentioned in section 156(2). Section 156(2) applies to a defendant who (a) is convicted of an offence or offences in proceedings before the Crown Court, or (b)

is committed to the Crown Court in respect of an offence or offences under section 218. Where the defendant has been convicted of an offence or offences in proceedings before the Crown Court, "the offence (or offences) concerned" is or are therefore the offence or offences of which he has been convicted in those proceedings. Where the defendant has been committed to the Crown Court in respect of an offence or offences under section 218, "the offence or offences concerned" is or are the offence or offences in respect of which he has been committed. There is nothing in section 156(2) or (9) which indicates that the meaning of the words "the offence (or offences) concerned" is limited in any other way.

121. Section 156 sets out the steps which the Crown Court must follow where a defendant falls within either section 156(2)(a), because he has been convicted of an offence or offences in proceedings before that court, or section 156(2)(b), because he has been committed to that court in respect of an offence or offences under section 218, and, in accordance with section 156(3), either the prosecutor asks the court to proceed under section 156, or the court itself considers it appropriate to do so. Under section 156(4), the court has first to decide whether the defendant has a criminal lifestyle, because the answer to that question affects the subsequent steps to be taken. If he has a criminal lifestyle, it must then decide whether he has benefited from what is termed his "general criminal conduct". If he does not have a criminal lifestyle, it must decide whether he has benefited from what is termed his "particular criminal conduct". If the defendant has benefited either from his general criminal conduct or from his particular criminal conduct, as the case may be, the court is then required by section 156(5) to decide what is termed "the recoverable amount" and to make a confiscation order requiring him to pay that amount. It is to be noted that the object of the statutory scheme is to deprive the defendant of the benefit obtained from "conduct": not to deprive him of the benefit obtained from any particular offence or offences of which he has been convicted.

122. The remaining provisions of Part 4 flesh out that general scheme. In particular, section 157(1) defines the recoverable amount, subject to exceptions, as an amount equal to the defendant's benefit from the conduct concerned. Section 157(2) however limits the recoverable amount to "the available amount" (defined by section 159), where that is less than the defendant's benefit from the conduct concerned.

123. Section 158 is concerned with the defendant's benefit from the conduct concerned. The court is required to take account of "conduct" occurring up to the time it makes its decision, and of property obtained up to that time.

124. Section 160 applies where the court decides that the defendant has a criminal lifestyle. It requires the court to make a number of assumptions for the purpose of deciding whether he has benefited from his general criminal conduct, and deciding

the amount of his benefit from the conduct. These include an assumption that any property transferred to him at any time after "the relevant day" was obtained by him as a result of his general criminal conduct: the transfer need not be related to any offence of which he has been convicted. The relevant day is the date six years before proceedings for "the offence concerned" were started against the defendant, or if there are two or more offences and proceedings for them were started on different days, the earliest of those days. In this context, the relevance of "the offence (or offences) concerned", as defined in section 156(2) and (9), is therefore to fix how far back POCA can bite on property obtained by a defendant with a criminal lifestyle. It can go back six years from the date on which proceedings were started for the earliest of those offences.

125. Section 163 explains the effect of a confiscation order on the court's other powers. Under section 163(1), if the court makes a confiscation order it must proceed as mentioned in subsections (2) and (4) in respect of "the offence or offences concerned". In terms of section 163(2), the court must take account of the confiscation order before it imposes a fine on the defendant, or makes any other order involving payment or forfeiture by the defendant, apart from a compensation order. Subject to that provision, the court is required by section 163(4) to leave the confiscation order out of account in deciding the appropriate sentence for the defendant. If the court makes both a confiscation order and a compensation order against the same person in the same proceedings, and it believes that he will not have sufficient means to satisfy both orders in full, section 163(5) provides for the potential shortfall in payment of the compensation order to be paid out of sums recovered under the confiscation order. The intended recipient of the compensation is thus protected against the risk of a shortfall, and the defendant is also protected against the risk of penal consequences of a failure to satisfy the confiscation order. In this context, the relevance of "the offence or offences concerned" is to define the scope of those protections.

126. It is to be noted that these provisions make sense on the footing that "the offences concerned" encompass all the offences of which the defendant has been convicted in the proceedings in the Crown Court, or all the offences in respect of which he has been committed to that court. It makes sense to regulate the relationship between the confiscation order and any other financial orders made by the Crown Court in the same proceedings, since the confiscation order can affect the defendant's ability to meet any other financial order, and vice versa. That is so, whether all of the offences concerned were offences involving financial gain or not.

127. Section 164 allows the court either to proceed with confiscation proceedings before it sentences the defendant for "the offence (or any of the offences) concerned", or to postpone confiscation proceedings for up to two years starting with "the date of conviction", or potentially longer where there is an appeal or if there are exceptional circumstances. The date of conviction is defined as the date on

which the defendant was convicted of the offence concerned, or if there are two or more offences and the convictions were on different dates, the date of the latest. In practice, confiscation proceedings are usually postponed, often for a substantial period. This provision again makes sense on the footing that "the offences concerned" encompass all the offences of which the defendant has been convicted in the proceedings in the Crown Court, or all the offences in respect of which he has been committed to that court. Like section 163, it reflects the potential relationship between the court's function of sentencing the defendant for the offences of which he has been convicted, or in respect of which he has been committed, and the confiscation order which it may also make.

128. Section 165 explains the effect of postponement, and contains analogous provisions to section 163 in respect of the relationship between the confiscation proceedings and any sentence imposed during the postponement period for "the offence (or any of the offences) concerned".

129. This group of provisions (which is replicated elsewhere in Part 4 of POCA in a variety of contexts, and is also replicated in the corresponding provisions for the other parts of the United Kingdom) seems to me to be particularly difficult to reconcile with an interpretation of "the offence (or offences) concerned" which would restrict that phrase to only some of the offences before the court. The language of these provisions is prescriptive. I have difficulty seeing how they might be interpreted as excluding offences which the prosecution had elected to leave out of account for the purpose of assessing the benefit obtained by the defendant. If, however, all the offences before the court fall within the scope of the phrase in this context, then how can it be given a more restricted meaning in the context of section 156(2) and (9), given the definitional status of those provisions?

130. Under section 166, in a case where the court is proceeding under section 156 at the request of the prosecutor, he must give it a statement of information within the period the court orders. Similarly, in a case where the court is proceeding under section 156 of its own motion, it can order the prosecutor to give it a statement of information within the period ordered. The statement must include the matters which are relevant to the making of a confiscation order, including whether the defendant has a criminal lifestyle, whether he has benefited from his general or particular criminal conduct as the case may be, and his benefit from the conduct. The defendant can then respond to the prosecutor's statement in accordance with section 167.

131. Section 218 is concerned with committal by the magistrates' court. It applies if a defendant is convicted of an offence by a magistrates' court, and the prosecutor asks the court to commit the defendant to the Crown Court with a view to a confiscation order being considered under section 156. In such a case, the magistrates' court must commit the defendant to the Crown Court in respect of the

offence, and may commit him to the Crown Court in respect of any other offence of which he has been convicted, and in respect of which the magistrates' court has power to deal with him. The latter provision enables the Crown Court to deal with the defendant in relation to the same offences in respect of which he could be dealt with in the magistrates' court, and thus enables the relationship between sentencing and confiscation proceedings to be regulated in accordance with sections 163 to 165. Section 219 confirms the power of the Crown Court to sentence the defendant for all the offences in respect of which he has been committed.

132. Finally, in relation to the provisions of POCA, it is necessary to note a number of provisions concerned with interpretation. Section 223 defines the term "criminal lifestyle". Under section 223(2), a defendant has a criminal lifestyle if "the offence (or any of the offences) concerned" satisfies any of the following tests:

> "(a) it is specified in Schedule 5;
>
> (b) it constitutes conduct forming part of a course of criminal activity;
>
> (c) it is an offence committed over a period of at least six months and the defendant has benefited from the conduct which constitutes the offence."

These tests are alternatives.

133. In relation to test (a), it is sufficient that any of the offences concerned is specified in Schedule 5. That schedule specifies a number of offences, including the unlawful supply of controlled drugs, and possession of a controlled drug with intent to supply. It is irrelevant to test (a) whether the defendant has made any financial gain from an offence falling within Schedule 5, or whether he has made such a gain from any of the other offences of which he has been convicted in the proceedings in the Crown Court, or in respect of which he has been committed to that court.

134. In relation to test (b), section 223(3) provides that conduct forms part of a course of criminal activity if the defendant has benefited from the conduct and:

> "(a) in the proceedings in which he was convicted he was convicted of three or more other offences, each of three or more of them constituting conduct from which he has benefited, or

> (b) in the period of six years ending with the day when those proceedings were started (or, if there is more than one such day, the earliest day) he was convicted on at least two separate occasions of an offence constituting conduct from which he has benefited."

In a case where the defendant was convicted of an offence or offences in proceedings in the Crown Court, test (b) is therefore satisfied by virtue of section 223(3)(a) if the defendant benefited from conduct constituting any of those offences, and was also the convicted in those proceedings of three or more other offences constituting conduct from which he benefited. The effect of section 223(3)(b) is that he will also have a criminal lifestyle if he benefited from conduct constituting any of the offences of which he was convicted in the proceedings in the Crown Court, and in addition he was convicted on at least two separate occasions, during the six years before those proceedings were started, of another offence constituting conduct from which he benefited. Section 223(3) operates in a similar way where the defendant has been committed to the Crown Court by the magistrates' court in respect of an offence or offences, and benefited from conduct constituting any of those offences. It is therefore unnecessary for the defendant to have made a financial gain from any of the other offences of which he has been convicted in the proceedings in the Crown Court, or in respect of which he has been committed to that court.

135. The same is also true in relation to test (c). It is sufficient that any of the offences concerned was committed over a period of at least six months and the defendant benefited from the conduct which constituted that offence.

136. In relation to both test (b) and test (c), section 223(4) provides that an offence does not satisfy the test unless the defendant obtains "relevant benefit" of not less than £5,000. The expression "relevant benefit" is defined for the purposes of test (b) by section 223(5). It means:

> "(a) benefit from conduct which constitutes the offence;
>
> (b) benefit from any other conduct which forms part of the course of criminal activity and which constitutes an offence of which the defendant has been convicted;
>
> (c) benefit from conduct which constitutes an offence which has been or will be taken into consideration by the court in sentencing the defendant for an offence mentioned in paragraph (a) or (b)."

A broadly similar definition (subject to the omission of paragraph (b)) applies for the purposes of test (c). Accordingly, even if the defendant has benefited from any of the offences concerned, and test (b) or (c) is potentially satisfied, it remains necessary to investigate the amount of the benefit and to ascertain whether it is at least £5,000.

137. Section 224 defines "criminal conduct", "general criminal conduct", "particular criminal conduct" and "benefit". Criminal conduct is conduct which constitutes an offence in Northern Ireland, or would constitute such an offence if it occurred there. General criminal conduct is all the defendant's criminal conduct. It is immaterial whether it occurred before or after the passing of POCA, and whether property constituting a benefit from conduct was obtained before or after the passing of POCA (section 224(2)). Particular criminal conduct is all the defendant's criminal conduct which falls within the following paragraphs of section 224(3):

> "(a) conduct which constitutes the offence or offences concerned;
>
> (b) conduct which constitutes offences of which he was convicted in the same proceedings as those in which he was convicted of the offence or offences concerned;
>
> (c) conduct which constitutes offences which the court will be taking into consideration in deciding his sentence for the offence or offences concerned."

138. So far as paragraph (a) is concerned, it follows from section 156(2) and (9) that the offences concerned are the offences of which the defendant was convicted in the proceedings in the Crown Court, or in respect of which he was committed to the Crown Court for confiscation proceedings. Paragraph (b) envisages a situation where the defendant has been convicted in the same proceedings of offences other than the offence or offences concerned. It must therefore be concerned with offences of which he was convicted in the magistrates' court but in respect of which he was not committed to the Crown Court. Under section 224(4), a person benefits from conduct if he obtains property as a result of or in connection with the conduct.

139. Returning to section 156, it follows from the later provisions that, at the time when the Crown Court is required to proceed under that section, it will not know the answers to all, or possibly any, of the questions which that section requires it to decide. In particular, it may not be in a position to know whether the defendant's conviction in the Crown Court of "the offences concerned", or his committal by the

magistrates' court in respect of those offences, will or may result in the making of a confiscation order, or how the order may relate to any of those offences. Section 156 simply provides for a process to be put in train, which may or may not lead to the making of such an order.

The transitional provisions

140. The relevant transitional provision is article 4 of the Proceeds of Crime Act 2002 (Commencement No 5, Transitional Provisions, Savings and Amendment) Order 2003 (SI 2003/333) ("the Order"). So far as relevant, article 4 provides:

> "4(1) Section 156 of the Act (making of confiscation order) shall not have effect where the offence, or any of the offences, mentioned in section 156(2) was committed before 24 March 2003."

141. The effect of article 4 is clear. Where the offence, or any of the offences, mentioned in section 156(2) was committed before 24 March 2003 (which was the commencement date of the relevant provisions), section 156 does not have effect, and POCA therefore does not apply. Instead, the position is regulated by article 11 of the Order, which provides for earlier legislation to continue to have effect.

142. The offence or offences mentioned in section 156(2), as earlier explained, are the offence or offences of which the defendant has been convicted in the proceedings before the Crown Court, if the case falls within section 156(2)(a), or the offence or offences in respect of which he has been committed to the Crown Court, if the case is one in which the defendant has been committed under section 218. It follows that section 156 does not have effect, and POCA is therefore inapplicable, where that offence, of any of those offences, was committed before 24 March 2003. Instead, the previous law continues to apply.

143. It follows that section 156 has no application to the case of either of the appellants. Article 4 cannot be obviated by the prosecutor's ignoring those of "the offences concerned" which were committed before POCA came into force. The fact remains that the appellants were convicted of those offences in the proceedings before the Crown Court, and they are therefore among "the offences concerned". It follows that the confiscation proceedings against the appellants should have proceeded under the legislation which was in force when the earliest of the offences concerned was committed. The confiscation orders made should therefore be quashed. Since the Crown conceded in the court below that the substitution of orders under the correct legislation was not possible, and it has not sought to withdraw that

concession, it follows that the appeals should be allowed. Like Lord Hughes, I would wish to reserve my opinion as to whether the concession was rightly made.

The reasoning of the majority

144. The only matter which remains to be discussed is the reasoning by which a majority of this court have reached the opposite conclusion. Their judgments must speak for themselves, but so far as I understand them, they contain a number of different strands of reasoning. Their approach appears to be based first on a purposive interpretation of the words of the statute. As I shall explain, I respectfully disagree that the statute has the purpose which they attribute to it, and I do not in any event accept that such a strained interpretation of the statutory language can be justified by a purposive approach. Secondly, they support their interpretation of the statute by reference to the transitional provisions in the Order. That appears to me, with respect, to be an impermissible use of subordinate legislation, made under powers conferred by Parliament in POCA, to interpret the meaning of the provisions enacted by Parliament in POCA itself. Thirdly, the reasoning of the majority is also based in part on previous authorities, which appear to me to be distinguishable because they were concerned with the interpretation of a transitional provision contained in the primary legislation itself. The reasoning of the earlier authorities appears to me to be unsatisfactory in any event, and it has been subjected to cogent criticism (Thomas, (2005) Crim LR 145 and (2008) Crim LR 813).

Purposive interpretation of the statute

145. As I understand their reasoning, the majority of the court consider that it would be absurd if offences committed after the commencement of POCA were subject to an earlier confiscation regime. In their view, Parliament must have intended that all offences committed after the commencement of POCA which could generate confiscation orders should be dealt with under section 156. Having decided that that must have been Parliament's intention, the majority then construe the provisions of POCA so as to fulfil that intention.

146. I see no absurdity. Given their natural meaning, and read with article 4 of the Order, section 156(2) and (9) of POCA achieve a rational purpose, which reflects two considerations identified by Lord Hughes. In the first place, POCA cannot apply to pre-commencement offences, if retrospectivity, and a consequent breach of article 7 of the ECHR, is to be avoided. Otherwise, in Lord Hughes' words, "there would be impermissible retrospective operation of the criminal law" (para 83).

147. In the second place, practical difficulties are liable to arise if a court is required to apply different confiscation regimes in the same proceedings, where some counts relate to offences committed before the commencement date of POCA and some to offences committed after that date. In Lord Hughes' words, "there would also be likely to be a real risk of unfairness if a defendant faced the prospect of two different confiscation regimes being applied to him" (para 84).

148. It follows that pre-commencement offences have to be dealt with under the previous confiscation regime in force at the time when they were committed, and that it is sensible that the same regime should also be applied to post-commencement offences dealt with in the same proceedings. The natural way of achieving those objectives is to provide that in any case in which the defendant has been convicted in Crown Court proceedings of an offence committed before the commencement date, all the offences of which he has been convicted in those proceedings are to be governed by the confiscation regime in force at the time when the earliest offence was committed. Similarly, mutatis mutandis, in any case in which the defendant has been committed under section 218 in respect of an offence committed before the commencement date, and also of later offences. That is the effect of section 156(2) and (9) of POCA, read with article 4 of the Order.

149. The interpretations of section 156 to which the majority are driven by their desire to avoid the supposed absurdity appear to me, with respect, not only to be strained beyond breaking point, but also to create anomalies of their own. As I understand Lord Kerr's judgment, he considers that, as a matter of construction of the statute, section 156(2) cannot apply to any offence committed before the date fixed for the entry into force of the provisions of Part 4 (which, in the event, was 24 March 2003). With respect, I cannot understand how that construction can be derived from the statutory wording. In my view, it requires the insertion of words which are not there, as the Court of Appeal acknowledged when it arrived at the same construction of the predecessor of section 156, as explained below.

150. Furthermore, the logic of Lord Kerr's interpretation appears to be that one and the same court could undertake two or more different confiscation exercises in the same criminal proceedings: one, in respect of offences committed on or after 24 March 2003, under POCA, and others, in respect of earlier offences, under whichever confiscation regime was in force at the relevant time. That situation, it appears to me, might justifiably be described as anomalous.

151. As I understand Lord Hughes' judgment, he takes a different approach. He appears to interpret the phrase "the offence (or offences) concerned" - defined by section 156(9) to mean "the offence (or offences) mentioned in subsection (2)" - as if the definition referred to "any offence (or offences) mentioned in subsection (2) in relation to which the condition mentioned in subsection (3)(a) is also satisfied"

(that condition being "that the prosecutor asks the court to proceed under this section"). Bearing in mind the clarity of section 156(9), and the level of detail and technicality which characterises the drafting of POCA, I find this hard to accept.

152. Furthermore, the logic of Lord Hughes' interpretation appears to be that, if pre-commencement and post-commencement offences are before one and the same court, the Crown must in effect forego any confiscation proceedings in respect of the pre-commencement offences, and proceed only in respect of post-commencement offences for whatever benefit they may yield. That is indeed what happened in the present case. It seems to me to be much more likely that the drafter of the transitional provisions intended to bring all the offences in any set of proceedings into one statutory confiscation scheme or the other. Then, at least, no offences would fall outside all confiscation regimes.

The use of subordinate legislation in the construction of primary legislation

153. The majority of the court also rely on their construction of a number of provisions in the Order, and more particularly the fact that they were substituted by different provisions shortly after the Order was made, as supporting their interpretation of section 156(2) and (9). With respect, this appears to me to be an example of using subordinate legislation to interpret the primary legislation under which it was made: an impermissible, and indeed illogical, method of statutory interpretation. The tail is wagging the dog. Even if I agreed with the majority's construction of the Order, and the intention attributed to it, it follows that I would nevertheless reject this aspect of their reasoning. The Order cannot affect the meaning of section 156(2) and (9). But I am not in any event persuaded by their construction of the Order.

154. The majority rely in particular on articles 8 and 9. In its original form, article 8 provided:

> "8.(1) This article applies where the court is determining under section 156(4)(a) of the Act whether the defendant has a criminal lifestyle.
>
> (2) The tests in section 223(2)(a) and (c) of the Act shall not be satisfied where the offence (or any of the offences) concerned was committed before 24 March 2003.
>
> (3) In applying the rule in section 223(5) of the Act on the calculation of relevant benefit for the purposes of section

223(2)(b) and (4) of the Act, the court must not take into account benefit from conduct constituting an offence which was committed before 24 March 2003.

(4) Conduct shall not form part of a course of criminal activity under section 223(3)(a) of the Act where -

(a) the offence (or any of the offences) concerned; or

(b) any one of the three or more offences mentioned in section 223(3)(a),

was committed before 24 March 2003.

(5) Conduct shall form part of a course of criminal activity under section 223(3)(b) of the Act, notwithstanding that any of the offences of which the defendant was convicted on at least two separate occasions in the period mentioned in section 223(3)(b) was committed before 24 March 2003."

155. A different version of article 8 was substituted by the Proceeds of Crime Act 2002 (Commencement No 5) (Amendment of Transitional Provisions) Order 2003 (SI 2003/531) ("the Amendment Order"). The substituted provisions provide:

"8.(1) This article applies where the court is determining under section 156(4)(a) of the Act whether the defendant has a criminal lifestyle.

(2) Conduct shall not form part of a course of criminal activity under section 223(3)(a) of the Act where any of the three or more offences mentioned in section 223(3)(a) was committed before 24 March 2003.

(3) Where the court is applying the rule in section 223(5) of the Act on the calculation of relevant benefit for the purposes of determining whether or not the test in section 223(2)(b) of the Act is satisfied by virtue of conduct forming part of a course of criminal activity under section 223(3)(a) of the Act, the court must not take into account benefit from conduct constituting an

offence mentioned in section 223(5)(c) of the Act which was committed before 24 March 2003.

(4) Conduct shall form part of a course of criminal activity under section 223(3)(b) of the Act, notwithstanding that any of the offences of which the defendant was convicted on at least two separate occasions in the period mentioned in section 223(3)(b) were committed before 24 March 2003.

(5) Where the court is applying the rule in section 223(5) of the Act on the calculation of relevant benefit for the purposes of determining whether or not the test in section 223(2)(b) of the Act is satisfied by virtue of conduct forming part of a course of criminal activity under section 223(3)(b) of the Act, the court may take into account benefit from conduct constituting an offence committed before 24 March 2003.

(6) Where the court is applying the rule in section 223(6) of the Act on the calculation of relevant benefit for the purposes of determining whether or not the test in section 223(2)(c) of the Act is satisfied, the court must not take into account benefit from conduct constituting an offence mentioned in section 223(6)(b) of the Act which was committed before 24 March 2003."

156. The majority argue that the changes made to article 8 are consistent with their interpretation of section 156. As I have explained, I do not accept the logic of the argument. But I am not in any event persuaded that the inferences which the majority draw from the changes are justified. As it appears to me, the problem with article 8(2) of the Order in its original form was that POCA does not apply, by virtue of article 4(1), where the offence (or any of the offences) concerned was committed before 24 March 2003. There is therefore no question of section 223 of POCA applying in those circumstances, and article 8(2) was therefore otiose. Article 8(4)(a) of the Order was also otiose, for the same reason. Article 8(4)(b), on the other hand, could have applied in cases where the defendant was committed by the magistrates' court.

157. That view is consistent with the changes made. The provisions contained in articles 8(2) and 8(4)(a) of the Order did not appear in the Amendment Order. On the other hand, the terms of article 8(4)(b) of the Order reappeared as article 8(2) of the Amendment Order.

158. I find it much more difficult to be certain of the thinking behind the replacement of articles 8(3) and (5) of the Order by articles 8(3) to (6) of the Amendment Order. Section 223(2)(b), (3), (4) and (5) of POCA form a complex group of provisions. The same is true of article 8(3) and (5) of the Order, and a fortiori of article 8(3) to (6) of the Amendment Order. An in-depth analysis of these provisions would take this court into a minefield of difficulties. It would also take it beyond the scope of the parties' submissions. In the circumstances, I do not express any view.

159. So far as article 9 of the Order is concerned, it provides:

> "Conduct which constitutes an offence which was committed before 24 March 2003 is not particular criminal conduct under section 76(3) or 224(3) of the Act."

The majority suggest that that provision also supports their interpretation of section 156(2) and (9). I am not persuaded. The explanation of article 9, as it appears to me, is that "particular criminal conduct" is defined by sections 76(3) and 224(3) of POCA as including not only "(a) conduct which constitutes the offence or offences concerned", but also "(b) conduct which constitutes offences of which he was convicted in the same proceedings as those in which he was convicted of the offence or offences concerned", and "(c) conduct which constitutes offences which the court will be taking into consideration in deciding his sentence for the offence or offences concerned". Since (b), interpreted as explained in para 138 above, and more plainly (c), could otherwise apply in respect of offences committed prior to the commencement of POCA, article 9 is necessary in order to exclude that possibility, consistently with the objectives explained in paras 146-148 above.

160. Lord Hughes also relies on section 143(3)(b) of POCA, a provision applicable in Scotland which is in similar terms to section 224(3)(b). I have to acknowledge that, although section 224(3)(b) can be interpreted consistently with the approach which I have adopted to section 156(2) and (9), it is at least not obvious that section 143(3)(b) can also be interpreted consistently with that approach. This point has not, however, been the subject of argument, and I am reluctant to express a concluded view. I would not exclude the possibility that, in such a complex and technical piece of legislation, it is possible that the provisions applicable in England and Wales may have been replicated for Scotland, as for Northern Ireland, without noticing a material distinction. I am not, in the absence of fuller argument, inclined to accept that an apparent infelicity in the drafting of one of the Scottish provisions is a sufficient reason for departing from the natural meaning of section 156(2) and (9) and their equivalents for the other parts of the United Kingdom.

Previous authority

161. The majority place some reliance on three decisions of the Court of Appeal of England and Wales concerned with section 16(5) of the Proceeds of Crime Act 1995 ("the 1995 Act"), a transitional provision broadly analogous to article 4 of the Order. The 1995 Act operated by amending the Criminal Justice Act 1988 ("the 1988 Act"). Section 1 of the 1995 Act was analogous to section 156 of POCA. Section 16(5) provided:

> "Section 1 above shall not apply in the case of any proceedings against any person where that person is convicted in those proceedings of an offence which was committed before the commencement of that section."

162. The intended meaning and effect of section 16(5) could hardly have been made clearer. Where a person was convicted in any proceedings of an offence which was committed before the commencement of section 1, that section did not apply, with the result that it was the unamended version of the 1988 Act which generally applied. Where, on the other hand, all the offences of which the person was convicted were committed after the commencement of section 1, it was the 1995 Act (strictly speaking, the 1988 Act as amended by the 1995 Act) which applied.

163. That straightforward interpretation of section 16(5) was however rejected by the Court of Appeal in a series of cases, on the ground that it led to absurd results: as to which, see paras 146-148 above. The first of these cases was *R v Simpson* [2003] EWCA Crim 1499; [2004] QB 118; [2003] 3 All ER 531; [2004] 1 Cr App R (S) 24, where a confiscation order made under the 1995 Act was challenged on the basis that one of the offences of which the appellant had been convicted in the relevant proceedings was committed before the commencement of section 1. The Court of Appeal considered it "obviously an absurd result" that an order could be made under the 1995 Act if a defendant were acquitted of an offence committed prior to the commencement date, but not if he were convicted of that offence. I see no absurdity: transitional provisions limiting the operation of penal provisions to offences committed after their entry into force are necessary in order to protect those who are convicted of earlier offences, not those who are acquitted of them. However, in order to avoid the supposed absurdity, the Court of Appeal read words into section 16(5):

> "In our judgment section 16(5) has to be applied so that after the word 'offence' there appears, the words 'in respect of which a confiscation order is or could be sought'." (para 19)

164. On the facts of the case, a confiscation order *was* not sought in respect of the offence in question; but there was no obvious reason why such an order *could* not be sought. The nature of the offence - a VAT fraud - did not in itself present any problem. More importantly, the Court of Appeal's discussion of the issue was in any event obiter dictum, since it decided that the offence had actually been committed after the commencement of the 1995 Act:

> "So in fact, the offence was committed after 1 November 1995. In any event the argument for the appellant, that the 1995 Act cannot be relied upon, fails on the facts." (para 20)

165. The issue was considered again in *R v Mohammed Aslam* [2004] EWCA Crim 2801; [2005] 1 Cr App R (S) 116. In that case, the appellant had been convicted of numerous offences of dishonesty. At the confiscation hearing, it was pointed out that one of the offences had been committed before the 1995 Act came into force. The prosecution then disclaimed reliance on any benefit obtained as a result of that offence. The question was whether that cured the defect. Relying on *Simpson,* the Court of Appeal held that it did. The court noted that, in *Simpson,* a confiscation order *could* have been sought in respect of the offence in question. It concluded that the fact that the appellant had been convicted in the instant proceedings of a pre-commencement count did not prevent the court from making a confiscation order under the 1995 Act where the pre-commencement count was one which could not be the basis of confiscation proceedings, or if the prosecution had expressly abandoned any reliance on the pre-commencement count for the purposes of a confiscation order.

166. The Court of Appeal followed *Aslam* in *R v Stapleton* [2008] EWCA Crim 1308; (2009) 1 Cr App R (S) 38, stating that it could not properly say that the earlier decision was "plainly wrong" (para 7).

167. The Court of Appeal's approach in these cases raises a number of difficulties. First, and most importantly, it is inconsistent with the plain meaning of section 16(5) of the 1995 Act: a fact which the Court of Appeal acknowledged by effecting a judicial amendment of the provision. As amended by the Court of Appeal, section 16(5) permits the Crown to bring proceedings under the 1995 Act in circumstances where Parliament has directed that the proceedings are to be brought under the preceding legislation. That is not permissible under any canon of statutory construction. Secondly, the Court of Appeal was mistaken, as it respectfully appears to me, in thinking that the result of applying what Parliament had enacted was absurd, as explained earlier. Thirdly, the Court of Appeal was also mistaken, in my view, in thinking that the amount of a confiscation order under the 1995 Act could be restricted by the prosecution. Under the 1988 Act as amended by the 1995 Act, the court had to determine "whether the defendant has benefited from *any* relevant

criminal conduct" (section 71(1A); emphasis supplied), and "relevant criminal conduct" was defined as meaning the offence of which the defendant had been convicted "taken together with any other offences of a relevant description which are either (a) offences of which he is convicted in the same proceedings, or (b) offences which the court will be taking into consideration in determining his sentence for the offence in question" (section 71(1D)). The prosecution could not, therefore, remove an offence of which the defendant had been convicted in the proceedings from the calculation by choosing not to rely on it: the court was under a statutory duty to assess the benefit arising from that offence in any event.

168. There are at least three other difficulties with the approach of the Court of Appeal. First, it did not address the issues which arose, on its approach, from the role which the court itself has in bringing confiscation proceedings. By virtue of section 71(1)(b) of the 1988 Act, as substituted by section 1 of the 1995 Act, the court can initiate confiscation proceedings in respect of all the offences of which the defendant has been convicted in the proceedings if it considers that it is appropriate for it to do so. POCA contains an equivalent provision in section 156(3)(b). One might ask, in the first place, how that power bears on the assumption, implicit in the Court of Appeal's reasoning, that the court should defer to the prosecutor's decision not to proceed in respect of pre-commencement offences. The whole point of the substitution of section 71(1)(b) was to enable the court to act independently of the prosecution. Further, and in any event, if in any case the court decides to exercise its power to initiate confiscation proceedings, can it too ignore certain offences so as to secure the application of the most draconian confiscation regime available? Under what power would it do so? If it cannot, does it not follow that the supposedly absurd outcome must indeed have been intended? These issues appear to me to be equally relevant to the approach adopted by the majority in the present case.

169. Secondly, the Court of Appeal did not address the issue discussed in para 129 above, which also arose in relation to the corresponding provisions of the 1988 Act both as enacted and as amended. This issue is equally relevant to the approach adopted by the majority in the present case.

170. Thirdly, in so far as the Court of Appeal's approach, and that of the majority in the present case, is premised on the assumption that it is always possible to identify particular offences as being offences in respect of which a confiscation order can or cannot be sought ("offences … which would qualify for applications for a confiscation order", "offences which can be dealt with under the Act", "offences in respect of which confiscation orders could be made" or "offences … which could generate confiscation orders", as Lord Kerr describes them in paras 5, 13, 16 and 17), before any inquiry has been made into whether the defendant has in fact obtained property as a result of, or in connection with, the offence, that does not appear to me to be a valid assumption.

171. As explained earlier, a confiscation order is not sought in respect of offences, but in respect of the benefit obtained from criminal conduct, which may or may not have constituted an offence or offences of which the defendant has been convicted in the proceedings in question. Whether a given offence of which the defendant has been convicted may turn out to be one which is relevant to the confiscation order may not be readily apparent at the time when the confiscation proceedings are initiated. For example, a defendant does not usually obtain property as a result of or in connection with an assault; but sometimes he does. A defendant usually obtains property as a result of, or in connection with, the possession of a controlled drug with intent to supply; but not always. In short, the construction of section 156 of POCA, or of its equivalent in the earlier legislation, cannot be predicated on an assumption that whether a conviction of a particular offence will lead to the making of a confiscation order, or will affect the amount specified in the order, can be determined at the time when the confiscation proceedings are initiated. The proof of the pudding is in the eating.

Conclusion

172. For all these reasons, I would have answered the certified question in the negative, and allowed the appeal.