8 December 2010

PRESS SUMMARY

The Child Poverty Action Group (Respondent) v Secretary of State for Work and Pensions (Appellant) [2010] UKSC 54

On appeal from the Court of Appeal [2009] EWCA Civ 1058

JUSTICES: Lord Phillips (President), Lord Rodger, Lord Brown, Lord Kerr and Sir John Dyson

BACKGROUND TO THE APPEAL

This appeal concerns the question whether, in cases of social security benefit awards mistakenly inflated due to a calculation error, the Secretary of State is entitled to recover sums overpaid under the common law of unjust enrichment or whether section 71 of the Social Security Administration Act 1992 (the "**1992 Act**") provides the only route to recovery.

Section 71 allows the Secretary of State to recover any overpayment resulting from misrepresentation or the non-disclosure of a material fact by the benefits claimant. The background to this appeal is the Secretary of State's practice (adopted in about 2006) of writing to benefit claimants who he considered have been overpaid, but where there had been no misrepresentation or non-disclosure, indicating that his Department had a common law right of action to recover the overpayment. Although no common law claim for repayment was ever in fact brought in the courts, the letters led to the recovery of substantial sums, for example, just over £4m in 2007-8. The Child Poverty Action Group brought this legal test case on behalf of social security claimants to challenge the Secretary of State's practice on the basis that it is based on a false legal premise.

One of the salient features of the history of the social security benefits legislation is the fact that prior to the Social Security Act 1998 (the "**1998 Act**") there was a division between the functions of adjudication which involved the quantification of the award and the payment of the award. Until the 1998 Act, the Secretary of State was responsible for the payment function only and therefore at the time of enactment of section 71 of the 1992 Act there was no possibility of mistake on the part of the Secretary of State in the calculation of the award, since he played no part in the calculation. The only possibility of mistake lay in the payment of the award. Since the 1998 Act the Secretary of State had been responsible both for the calculation and the payment of the awards. Both parties agreed that where the Secretary of State overpays by mistake, for instance by sending a cheque for £120 following an award of £60, the amount of the overpayment can be recovered as money paid by mistake. The overpayments with which this appeal is concerned are those made as a result of a mistake in calculating the award.

JUDGMENT

The Supreme Court unanimously dismissed the appeal. Lord Brown and Sir John Dyson gave lead judgments; Lord Rodger gave a concurring judgment. It held that section 71 of the 1992 Act provides the only route to recovery of social security benefits overpayments to the exclusion of any common law rights.

REASONS FOR THE JUDGMENT

Both Lord Brown and Sir John Dyson agreed with the respondent's argument that, rather than excluding any common law rights to recovery, section 71 and its predecessors created a power of recovery when otherwise, due to the division of adjudication and payment functions up until 1998, there would have been none: **[13]**, **[22]**.

Lord Brown noted that it would seem inconceivable that Parliament would have contemplated leaving the common law restitutionary recovery available to the Secretary of State alongside the carefully prescribed scheme of section 71. He found it striking that Parliament had not made express provisions for recovery of mistaken overpayments alongside provisions for misrepresentation and non-disclosure. Lord Brown thus concluded that section 71 does necessarily exclude any common law restitutionary claim the Secretary of State might otherwise have: **[14]-[15]**.

Sir John Dyson dismissed the Secretary of State's argument that section 71 cannot be taken to have excluded prospectively the possibility of a common law right to recovery arising in the future. In his view, the change in the identity of adjudicator of the social security benefits awards in 1998, which was not accompanied by any change in the statutory criteria for recovery of overpayments, was not intended to open the door to recovery any wider than it previously had been: **[23]-[25]**. Whilst noting that the appeal could be dismissed on that basis alone, Sir John Dyson went on to consider whether, if, contrary to the finding of the Court, the common law right to recovery did exist by the time section 71 and its predecessors were introduced, that right was impliedly displaced by statute. Having discussed the authorities at **[27]-[30]**, Sir John Dyson concluded that the test is not one of "necessary implication" but instead that of statutory interpretation, namely, whether, looked at as a whole, a common law remedy would be incompatible with the statutory scheme and therefore could not have been intended to co-exist with it: **[31], [34]**. Sir John Dyson concluded that, for the reasons given by Lord Brown, he too agreed that section 71 was intended to be an exhaustive route to recovery of wrongly calculated benefits: **[35]**.

Lord Rodger noted that section 9(3) of the 1998 Act, which provides that any revision of the award takes effect from the date of the original award, would have no practical effect in cases of downward revisions resulting from a mistake in favour of the Secretary of State. He concluded that while section 9(3) creates a problem, it does not solve it. Thus the question of whether a remedy should be available in cases of mistaken awards is a matter for Parliament: **[39]**.

References in square brackets are to paragraph numbers in the judgment.

NOTE