PLEWA

Plewa v. Chief Adjudication Officer

See R(P) 2/95
(CP/11/1992)

HL (Lord Templeman, Lord Bridge of Harwich, Lord Woolf, Lord Lloyd of Berwick and Lord Nolan)

7.7.94

DECISION OF THE HOUSE OF LORDS

Mr. R. Drabble and Miss N. Lieven (instructed on behalf of the Solicitor the Child Poverty Action Group) appeared on behalf of the Appellant.

Mr. M. Beloff QC and Mr. J. R. McManus (instructed by the Office of the Solicitor to the Department of Social Security) appeared on behalf of the Respondent.

LORD TEMPLEMAN:

My Lords.

For the reasons to be given by my noble and learned friend Lord Woolf I would allow this appeal.

LORD BRIDGE OF HARWICH:

My Lords.

I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Woolf, and for the reasons he gives I too would allow this appeal.

LORD WOOLF:

My Lords.

Section 53 of the Social Security Act 1986 enabled the Secretary of State to recover overpayment of both means tested and non means tested benefits. The 6 April 1987 was the appointed date under the Social Security Act 1986 (Commencement No. 4) Order 1986 on which section 53 of the Act of 1986 came into force. It replaced section 119 of the Social Security Act 1975 (which applied to non-means tested benefits) and section 20 of the Supplementary Benefits Act 1976 (which applied to means tested benefits). Those sections were repealed by section 86(2) of the Act of 1986 which was also brought into force on 6 April 1987 by the same Order. Subsequently, section 53 was in turn repealed by the Social Security (Consequential Provisions) Act 1992.

The issue on this appeal is the extent to which section 53 applies to overpayment of benefit made prior to 6 April 1987. Determining this issue involves considering the effect of section 16 of the Interpretation Act 1978 and the correctness of the decision of the Court of Appeal in *Secretary of State for Social Security v. Tunnicliffe* [1991] 2 All ER 712 [R(G) 4/91].

Section 53 so far as relevant provides:

"(1) Where it is determined that whether fraudulently or otherwise any person has misrepresented, or failed to disclose any material fact and in consequence of the misrepresentation or failure-

(a) a payment has been made in respect of a benefit to which this section applies: or

(b) any sum recoverable by or on behalf of the Secretary of State in connection with any such payment has not been recovered.

the Secretary of State shall be entitled to recover the amount of any payment which he would not have made or any sum which he would have received but for the misrepresentation or failure to disclose.

(2) An amount recoverable under subsection (1) above is in all cases recoverable from the person who misrepresented the fact or failed to disclose it.

...

(10) This section applies to the following benefits-

(a) benefits under the Social Security Act 1975:

(b) child benefit:

(c) income support;

(d) family credit:

and any social fund payments such as are mentioned in section 32(2)(a)

above."

It will be noted that a liability to repay, under section 53, depends upon there being:

(a) a determination.

(b) a misrepresentation or failure to disclose, which need not be fraudulent or made by the recipient.

(c) a payment which must be made in consequence of the misrepresentation or failure to disclose.

Subject to those requirements being fulfilled the repayment was then recovered from the person who made the misrepresentation or was responsible for the non-disclosure.

The requirements of section 53 of the Act of 1986 closely followed the language of section 20 of the Act of 1976 except that under section 20 it was unnecessary for there to be a determination before a liability to make a repayment could arise. Both sections required a misrepresentation or a failure to disclose and in the case of both sections it is the person who is responsible for the misrepresentation or the failure to disclose who has to make the repayment. Section 20, so far as relevant, provides:

"(1) If, whether fraudulently or otherwise, any person misrepresents, or fails to disclose any material fact and in consequence of the misrepresentation or failure-

(a) the Secretary of State incurs any expenditure under this Act: or

(b) any sum recoverable under this Act by or on behalf of the Secretary of State is not recovered:

the Secretary of State shall be entitled to recover the amount thereof from

that person.

(2) If, whether in connection with any legal proceedings or otherwise, any question arises whether any amount paid by way of supplementary benefit is recoverable by the Secretary of State under this section, or as to the amount so recoverable, the question shall be referred to the appeal tribunal and the decision of the tribunal shall be conclusive for all purposes."

Both section 53 and section 20 differed substantially from section 119 of the Act of 1975. The differences are apparent from subsections (1) and (2) of section 119 which were in the following terms:

"(1) Where benefit is or has been paid in pursuance of a decision which is reversed or varied on appeal, or is revised on a review then subject to subsection (2) below, the decision given on the appeal or review shall require repayment to the Secretary of State of any benefit which was paid in pursuance of the original decision to the extent to which it-

(a) would not have been payable if the decision on the appeal or review had been given in the first instance; and

(b) is not directed to be treated as paid on account of the benefit awarded by the decision on appeal or review, or as having been properly paid.

(2) A decision given on appeal or review shall not require repayment of benefit paid in pursuance of the original decision in any case where it is shown to the satisfaction of the person or tribunal determining the appeal or review that in the obtaining and receipt of the benefit the beneficiary, and any person acting for him has throughout used due care and diligence to avoid overpayment."

Before section 119 created a liability to repay, the original decision had to be reversed or varied on appeal or revised on a review. There was no requirement for any misrepresentation or non-disclosure and the tribunal determining the appeal or review could not order repayment if it was satisfied that in the obtaining and receipt

of the benefit the beneficiary, and any person acting for him, had throughout used due care and diligence.

Mr. Beloff QC who appeared on behalf of the adjudicating officer and the Secretary of State, accepted that in general the provisions of section 119 were more favourable to a beneficiary than the provisions of section 53. There are, however, a minority of situations where section 53 could be more favourable to a beneficiary. A distinction between section 119 and section 53, which was not appreciated until it was raised by Mr. Drabble (who did not appear in *Tunnicliffe*) in his case on the appeal to this House, is that section 53 could require a third person who has been guilty of misrepresentation or failure to disclose, to make a repayment, while this was not possible in the case of section 119 (although it was possible in the case of section 20).

The issue which arises on this appeal is important to the appellant Mrs. Plewa, because she is the executrix of her late husband, Josef Plewa. Prior to his death a SSAT held that there had been an overpayment of £5,323 retirement pension to Mr. Plewa in the period between 22 January 1981 to 7 October 1987, of which applying section 53 of the Act of 1986 £5,145.05, in respect of the period 7 January 1982 to 7 October 1987, was recoverable from Mr. Plewa.

Mr. Plewa was of Polish extraction. He came to this country in 1945, speaking no English and having served in the Polish army during the war. The reason for the overpayment was that Mr. Plewa's wife was working but her earnings had not been disclosed. During the period between 22 January 1981 and 6 January 1982 the tribunal decided that there had been no failure to disclose since the documents which had been given to Mr. Plewa during this period did not give any indication that the amount of his retirement pension would be affected by the amount of his wife's earnings. The tribunal considered that he could not reasonably be expected to have disclosed that of which he could not reasonably be expected to be aware. However, in relation to the later period, although the tribunal accepted that Mr. Plewa was "quite innocent", it determined he was liable to make repayment, because he had been given a document which set out the effect of his wife's earnings on his entitlement with reasonable clarity. Despite this the tribunal indicated that if the case had been considered under section 119 "the tribunal might well have found that Mr. Plewa had used **due** care and diligence to avoid overpayment". If this was the case

Mr. Plewa would have been under no liability to make a repayment. It follows that if the tribunal were wrong in law in applying section 53 instead of section 119 this could have materially affected their decision.

The tribunal in reaching its decision applied the decision of the Court of Appeal in *Secretary of State for Social Security v. Tunnicliffe* [1991] 2 All ER 7124 [R(G) 4/91]. The facts of that case are indistinguishable from those relating to Mr. Plewa. The Court of Appeal reversed a Commissioner's decision that the liability to refund the overpayment should be considered under section 119 and held that the adjudication officer and the tribunal were right to apply the mechanism of section 53 rather than section 119. This was despite the fact that between the decision of the Commissioner and the decision in the Court of Appeal, there had been a decision of a panel of three Commissioners in CA/126/1989 which had held by a majority (Mr. J. Mitchell and Mr. A. T. Hoolahan, Mr. D.G. Rice dissenting) that section 119 was the appropriate section to apply.

As the decision in *Tunnicliffe* was binding on the Commissioner and the Court of Appeal, neither the Commissioner nor the Court of Appeal gave a reasoned decision on the appeal to them in this case. However, it was agreed between the parties that this was an appropriate case in which to test the correctness of the Court of Appeal's decision in *Tunnicliffe* before their Lordships' House.

The Court of Appeal in *Tunnicliffe* was presided over by Mustill LJ who gave the first judgment. Staughton LJ gave a separate judgment and McCowan LJ agreed with both those judgments. At the heart of Mr. Drabble's argument on behalf of the appellant is his submission that to apply section 53 in accordance with the *Tunnicliffe* decision, involves giving a retrospective effect to section 53 which is contrary to well established principles of statutory interpretation. In order to find a satisfactory expression of these principles I follow in the footsteps of both the judgments in the Court of Appeal in *Tunnicliffe* and the argument of Mr. Drabble by referring to the following passage from the advice of Lord Brightman in the *Privy Council in Yew Bon Tew v. Kenderaan Bas Mara* [1983] 1 AC 553 at p. 558:

> "Apart from the provisions of the interpretation statutes, there is at common law a *prima facie* rule of construction that a statute should not be interpreted

> retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past. There is, however, said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed."

Lord Brightman's language in that passage makes it clear how unfortunate it is that in *Tunnicliffe* the Court of Appeal were not addressed on the possible effect on third parties of the change in machinery being brought into operation for all purposes as from 6 April 1987, the appointed date. In the case of non means tested benefits under the machinery established by section 119 there could be no question of a third party who did not receive the overpayment being under a liability. Under section 53, the new regime, he could be liable if he had made the misrepresentation or failure to disclose even if he did so entirely innocently and had never, in fact, personally received any benefit. All that was then required was that the person concerned should have made the misrepresentation and that the misrepresentation or failure to disclose for which he was responsible caused the overpayment. If the different position of a third party under the new regime, who could, for example, be the manager of an old peoples' home, from that under the previous regime had been brought to the attention of the Court of Appeal. I suspect this would have materially affected their decision. In such a case I would have thought it was obvious that section 53 was creating an entirely new obligation to which Lord Brightman's remarks would apply with full effect. However, when considering Mrs. Tunnicliffe's position, Mustill LJ said at p. 720:

> "Bearing in mind that we are concerned here with a claim to recover money to which Mrs. Tunnicliffe was not entitled and which she wishes to keep, the presumption must be weak and, if one looks at section 53 in isolation from section 119, is in my view clearly rebutted by the opening words of the section."

This was also important on Staughton LJ's approach. At p. 724, he identified the principle as being:

> "That Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree: the greater the unfairness the more it is to be expected that Parliament will make it clear if that is intended."

Adopting that approach, the conclusion to which Staughton LJ came to at p. 725, was that "the retrospective aspect of section 53 is not so unfair to recipients of benefit, or some of them, as to require greater clarity than Parliament has used in the section."

When the possible effect on innocent third parties is taken into account, contrary to those views it is clear that a considerable degree of unfairness could result from the third party being under an obligation which he would not have been under prior to the coming into force of section 53. It is not unreasonable to suggest that the third party might not even have been prepared to act on behalf of a claimant if he had known that he could incur a personal obligation. In considering the position of Mrs. Tunnicliffe, Mustill LJ, at p. 719, emphasised that "the rights of the Secretary of State had their origin in the fact of overpayment and the fact that the overpayment had not been refunded". The Secretary of State had no rights against the third party until the change of regime created by section 53. This distinction of which the Court of Appeal was unaware, undermines the reasoning of Mustill LJ. This was based largely on an assessment of the impact of section 53, assuming that while it was a new mechanism, that mechanism applied to a potential liability which already existed. That it only dispensed with part of the former mechanism under section 119 which involved an investigation of whether the claimant had established that the overpayment was not due to any lack of care on her part.

Although the position of the actual payee is obviously not as clear as that of a third party, even in the case of a claimant, I would have been inclined to attach more importance to section 53's possible retrospective unfair effect than the Court of Appeal did in *Tunnicliffe*. This is because it removed the defence of due care and diligence. If recipients would not have been under a liability in fact to make a repayment under the former machinery then from the practical point of view **they** were being placed under a liability which did not previously exist by the change in

the law. This is a situation where the presumption against retrospectivity should apply. It is desirable that in this situation legislation should make it clear whether the new provision is to be retrospective or not. The way this had been achieved in the past is happily demonstrated by section 9(1) of the Family Allowances and National Insurance Act 1961 of which section 53 is a direct descendant. Section 9(1) states:

> "Where benefit is **(or has before the coming into force of this section been)** paid in pursuance of a decision which is reversed or varied on appeal, or is revised on a review, then, except as provided by this subsection, the decision given on the appeal or review shall require repayment to the Fund of any benefit paid in pursuance of the original decision to the extent to which it, (a) would not have been payable if the decision on the appeal or review had been given in the first instance: and (b) is not directed to be treated as paid on account of the benefit awarded by the decision on appeal or review, or be treated as having been properly paid: but a decision given on appeal or review shall not require repayment of benefit paid in pursuance of the original decision in any case where it is shown to the satisfaction of the person or tribunal determining the appeal or review that in the obtaining and receipt of the benefit the beneficiary, and any person acting for him, has throughout used due care and diligence to avoid overpayment." [emphasis added]

The Act of 1986 contained a provision which enabled the Secretary of State to make regulations dealing with the transitional problems, which it should have been obvious could arise under the new Act. Section 89(1) began:

> "Regulations may make such transitional and consequential provision including provision modifying any enactment contained in this or any other Act) or saving as the Secretary of State considers necessary or expedient ..."

The Secretary of State did not avail himself of this power but instead relied on section 88 of the Act which gave him the power to bring the various provisions of the Act of 1986 into force on the dates he appointed by order. A distinction between the power exercised under section 88 and section 89 is that while regulations under section 89 were required to be laid before Parliament and were subject to a negative resolution, an order made under section 88 was not laid before Parliament.

A point which troubled the Court of Appeal in *Tunnicliffe* and featured in argument before their Lordships is whether, in the absence of any transitional provision, to adopt Mr. Drabble's argument would create a *lacuna*. Would there be overpayments which could neither be recovered under the section 119 mechanism or under the new regime under section 53? The possibility of there being a *lacuna* was underlined by the amendment to section 53 which was made by the Social Security Act 1989, Schedule 3, paragraph 14. The amended provisions were in the following terms:

> " (1A) Where any such determination as is referred to in subsection 1 above is made on an appeal or review, there shall also be determined in the course of the appeal or review the question whether any, and if so what amount is recoverable under that subsection by the Secretary of State.
>
> (4) Except where regulations otherwise provide. an amount shall not be recoverable under subsection (1) above or regulations under subsection (3) above unless [(a)] the determination in pursuance of which it was paid has been reversed or varied on an appeal or revised on a review [and (b) it has been determined on the appeal or review that the amount is so recoverable]."

That amendment emphasised the role of the first determination when operating the new regime under section 53. If section 53 was only to apply where the initial determination was made after 6 April 1987 when section 53 was in force, then there would be no means of recovering any overpayment after 6 April 1987 in respect of an earlier determination, unless section 119 continued in force for that purpose. Whether or not section 119 could fill the gap depends upon the provisions of the Interpretation Act 1978. Section 16(1) of the Interpretation Act provides, so far as relevant, as follows:

> "(1) ... where an Act repeals an enactment the repeal does not unless the contrary intention appears ...
>
> (c) affect any right, privilege, obligation or liability acquired. accrued or incurred under that enactment:
>
> ...

(e) affect any investigation, legal proceeding or remedy in respect of any such right. privilege, obligation, liability ...

and any such investigation, legal proceeding or remedy may be instituted. continued or enforced, ... as if the repealing Act had not been passed."

Inchoate rights, obligations and liabilities are covered by (c). This was established by *Free Lanka Insurance Co. Ltd. v. Ranasinghe* [1964] AC 541. In that case the Privy Council had no difficulty in construing the Ceylon Interpretation Ordnance as including an inchoate or contingent right and the same approach should be adopted to the interpretation of "right", "obligation" or "liability" in section 16 of the Act of 1978. The section clearly contemplates that there will be situations where an investigation legal proceeding or remedy may have to be instituted before the right or liability can be enforced and this supports this approach.

In a situation where prior to the appointed date a claimant could have been held to be under an obligation or liability to make repayment to the Secretary of State under section 119 or section 10, then the effect of section 16 is to make the appropriate remedy available to the Secretary of State unless "the contrary intention appears". This intention would be indicated by the new regime under section 53 coming into effective operation in respect of the sum sought to be recovered. Not to give a retrospective effect to section 53 therefore does not create a *lacuna*. Adopting this approach the position after 6 April 1987 would be as follows:

(1) An overpayment is only recoverable from a **third party** under the new regime (section 53) where the overpayment is made after 6 April 1987 in consequence of a misrepresentation or failure to disclose made by the **third party** after that date. In other cases the overpayment would be recoverable from a **third party** if at all, under section 20.

(2) Similarly, an overpayment is only recoverable from a person to whom it is made under the new regime (section 53) when payment has been made to the claimant after 6 April 1987 in consequence of a misrepresentation or failure to disclose any material fact made by him or with his authority after that date. In determining whether there has been non-disclosure after 6 April 1987, the fact that there may be a continuing obligation to make disclosure

would need to be taken into account.

(3) Where an overpayment is not recoverable under the new regime because section 53 does not apply, then it may be recovered from the claimant in accordance with section 119 or section 20 if the Secretary of State is in a position to comply with the requirements of those sections, which will still be effective after 6 April 1987 in respect of payments to which the new regime does not apply.

Although it is unlikely that any unfairness would occur as a result of not restricting the operation of section 53 to means tested benefits paid prior to 6 April 1987 but recoverable after that date. to which section 20 would otherwise apply, section 53 must be applied in the same way to both means tested and non-means tested benefits. The same approach must therefore be adopted to both section 20 and section 119. However, after 6 April 1987 overpayments of means tested benefits can be recovered from a third party under section 20 if the payment was made in consequence of the misrepresentation or failure to disclose by that person, but section 53 does not apply. In practice, because of the similarity between section 20 and section 53, the result is likely to be the same whether the machinery of section 20 or that of section 53 is used.

No doubt in a case where a sum is recoverable partly under the old regime and partly under the new regime, the tribunal will hear the claim for a repayment as a whole but apply the appropriate machinery to the appropriate payment.

As this is a case in which the overpayment should have been considered under section 119, and it is possible that under section 119 there would be no obligation to make a repayment, this appeal must be allowed and the claim for repayment reconsidered under section 119, or if there was non disclosure after 6 April 1987 both under section 119 and section 53. Bearing in mind the period which has elapsed and the fact that the claimant has died, it may be thought unnecessary to insist on the matter being reconsidered by the tribunal. Subject to this the appeal should be allowed with costs here and below and the appeal remitted to be redetermined at the appropriate level.

LORD LLOYD OF BERWICK:

My Lords,

For the reasons to be given by my noble and learned friend Lord Woolf I too would allow this appeal.

LORD NOLAN:

My Lords,

I too would allow this appeal for the reasons given by my noble and learned friend Lord Woolf.