Neutral Citation Number: [2009] EWCA Civ 1058

Case No: C1/2009/0585

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE

QUEEN’S BENCH DIVISION

ADMINISTRATIVE COURT

MR M. SUPPERSTONE QC

CO/4211/2007

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 14/10/2009

**Before :**

LORD JUSTICE SEDLEY

LORD JUSTICE LLOYD

and

LORD JUSTICE WILSON

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**Between :**

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|  | **THE QUEEN ON THE APPLICATION OF CHILD POVERTY ACTION GROUP** | Appellant |
|  | **- and -** |  |
|  | **SECRETARY OF STATE FOR WORK AND PENSIONS** | Respondent |

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**Mr Richard Drabble** **QC**(instructed by The Child Poverty Action Group) for the **Appellant**

**Mr Andrew Henshaw** (instructed byOffice of the Solicitor, DWP) for the **Respondent**

Hearing date: Thursday 9 July 2009

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Judgment

**Lord Justice Sedley :**

1. From time to time, inevitably, accidental overpayments are made to individuals entitled to social security benefits. The error may have happened because the entitlement has been misunderstood, because of a faulty computation or simply because of a misprint.
2. “Where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact”, s. 71 of the Social Security Administration Act 1992 makes provision for the Secretary of State to recover any consequent overpayment. There is no other express provision in the social security legislation for recovery of these overpayments.
3. The issue which thus arises could not be starker or simpler: where the cause of an overpayment has not been misrepresentation or non-disclosure, can the Secretary of State resort to common law to recover it? For the Child Poverty Action Group, which advances the present strategic challenge, Richard Drabble QC asks what the point was of enacting s.71 if it was possible for such overpayments and many others besides to be collected as debts without legislative help. Absent such provision, he argues, there is no power of recovery. For the Secretary of State, Andrew Henshaw asks what there is in the language or objects of s.71 which suggests that it was intended to be exhaustive of the state’s right to recover overpaid public funds. Its purpose, he submits, is to confer particular powers for the recovery of one class of overpayment, leaving the remainder to the general law.
4. The issue can be drily stated in this way, but its reality is more troubling. Until recently the Department enforced recovery either under s.71 or not at all. For overpayments not covered by that section it would ask claimants for repayment but would take no further steps. What has prompted these proceedings is the adoption of a new practice, illustrated in the documentation, of asserting a right to take legal action outside s.71.
5. A typical letter now reads:

“We are writing to you because too much Income Support has been paid.

This is because of your Child Benefit ending or reducing.

Although this money is not recoverable under social security law we are asking for it back as it was money that should not have been paid.

If you cannot pay this amount in full or would like to discuss the matter further, please contact us ….”

Or:

“We are writing to let you know that a mistake has been made and we have paid you too much Income Support.

This because of your entitlement to the benefit has stopped.

This was our mistake and we are sorry that it has happened. However, you have been paid public money that you were not entitled to and it should be paid back. The law allows us to ask you to pay back money that should not have been paid.

……………..”

Annexed to every such letter is a questionnaire which reads:

Questions you might have about the overpayment

**Q What should I do if I want to know more about the overpayment?**

A Please contact us and we will provide an explanation. Our address and phone number are at the top of this letter.

**Q Why should I have to repay this money if the overpayment was not my fault?**

A Under common law anybody who receives money to which they are not entitled can be asked to pay it back. We are asking for it back because we have a right to recover this money and a duty to protect public funds.

**Q What do I do if I cannot pay this money back?**

A We do not intend to cause any hardship by asking for this money back. If you cannot afford to refund the money in one go we can arrange for payments to be made by instalments.

**Q What if I don’t agree that I should pay this money back?**

A This money is recoverable under common law, as you were not entitled to receive this money. We are allowed to ask for the money back on this basis and could seek recovery through the courts if necessary.

In some circumstances we would not ask for the money back. For example where you thought that you were entitled to the money and all of the money has now been spent.

If you think this is relevant in your case then contact us and explain the situation and we will consider whether to continue to seek a refund of the money. Our address and phone number are at the top of this letter.

1. It is evident that this material is based on legal advice about the law of restitution. The covering letters seek, creditably, not to threaten and not to alarm unduly. But the impact (the examples quoted were seeking repayment of £2,055.55 and £796.00 respectively) can be devastating to a person already living in or close to penury.
2. Moreover (and this too appears to be far from unique) the second example quoted above turned out to relate to a non-existent overpayment. A well-composed letter of complaint from the claimant’s local CAB elicited this in response:

Firstly I would like to explain that Debt Management is responsible for the recovery of overpayments based on referrals made to us by the office that was responsible for the paying of the benefit. On 22 October 2007 we received a referral from the Luton Job Centre Plus Office stating that an overpayment of Income Support had occurred for the period 29 November 2006 to 17 April 2007. This was calculated to be £796.00 and based on the accompanying evidence the Decision Maker decided that the overpayment was not recoverable under Social Security Legislation but could be requested to be repaid under Common Law. As you state there is no requirement to repay the overpayment and there is no right of appeal against the decision. However the text of the letters issued in these cases has been drafted to meet the legal requirements of our solicitors. The debt has since been written off.

1. Although more than 65,000 such letters, with the enclosed Q and A, have been sent out, we are told that no claim has yet been initiated in the courts for recovery of an overpayment falling outside s.71.
2. In this situation, stressful for claimants and problematical for the Department, CPAG’s application for judicial review of the claimed entitlement was an appropriate use of the Administrative Court’s jurisdiction. The claim for declaratory relief failed, however, before Michael Supperstone QC sitting as a deputy judge of the Queen’s Bench Division ([2009] EWHC 341 (Admin)), and the issue now comes before us for redetermination.

*The Social Security Administration Act 1992*

1. Section 71 of the 1992 Act originally read as follows:

*Misrepresentation etc.*

71 Overpayments - general

(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) 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.

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

(4) In relation to cases where payments of benefit to which this section applies have been credited to a bank account or other account under arrangements made with the agreement of the beneficiary or a person acting for him, circumstances may be prescribed in which the Secretary of State is to be entitled to recover any amount paid in excess of entitlement; but any such regulations shall not apply in relation to any payment unless before he agreed to the arrangements such notice of the effect of the regulations as may be prescribed was given in such manner as may be prescribed to the beneficiary or to a person acting for him.

(5) Except where regulations otherwise provide, an amount shall not be recoverable under subsection (1) above or regulations under subsection (4) 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.

(6) Regulations may provide—

(a) that amounts recoverable under subsection (1) above or regulations under subsection (4) above shall be calculated or estimated in such manner and on such basis as may be prescribed;

(b) for treating any amount paid to any person under an award which it is subsequently determined was not payable—

(i) as properly paid; or

(ii) as paid on account of a payment which it is determined should be or should have been made,

and for reducing or withholding any arrears payable by virtue of the subsequent determination;

(c) for treating any amount paid to one person in respect of another as properly paid for any period for which it is not payable in cases where in consequence of a subsequent determination—

(i) the other person is himself entitled to a payment for that period; or

(ii) a third person is entitled in priority to the payee to a payment for that period in respect of the other person,

and for reducing or withholding any arrears payable for that period by virtue of the subsequent determination.

(7) Circumstances may be prescribed in which a payment on account by virtue of section 5(1)(r) above may be recovered to the extent that it exceeds entitlement.

(8) Where any amount paid is recoverable under—

(a) subsection (1) above;

(b) regulations under subsection (4) or (7) above; or

(c) section 74 below,

it may, without prejudice to any other method of recovery, be recovered by deduction from prescribed benefits.

(9) Where any amount paid in respect of a married or unmarried couple is recoverable as mentioned in subsection (8) above, it may, without prejudice to any other method of recovery, be recovered, in such circumstances as may be prescribed, by deduction from prescribed benefits payable to either of them.

(10) Any amount recoverable under the provisions mentioned in subsection (8) above—

(a) if the person from whom it is recoverable resides in England and Wales and the county court so orders, shall be recoverable by execution issued from the county court or otherwise as if it were payable under an order of that court; and

(b) if he resides in Scotland, shall be enforced in like manner as an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland.

(11) This section applies to the following benefits—

(a) benefits as defined in section 122 of the Contributions and Benefits Act;

(b) subject to section 72 below, income support;

(c) family credit;

(d) disability working allowance;

(e) any social fund payments such as are mentioned in section 138(1)(a) or (2) of the Contributions and Benefits Act; and

(f) child benefit.

1. As amended, it now reads as follows:

Overpayments – general

71.—(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) Where any such determination as is referred to in subsection (1) above is made, the person making the determination shall [in the case of the Secretary of State or a tribunal, and may in the case of a Commissioner or a court]–

(a) determine whether any, and if so what, amount is recoverable under that subsection by the Secretary of State, and

(b) specify the period during which that amount was paid to the person concerned.

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

(4) In relation to cases where payments of benefit to which this section applies have been credited to a bank account or other account under arrangements made with the agreement of the beneficiary or a person acting for him, circumstances may be prescribed in which the Secretary of State is to be entitled to recover any amount paid in excess of entitlement; but any such regulations shall not apply in relation to any payment unless before he agreed to the arrangements such notice of the effect of the regulations as may be prescribed was given in such manner as may be prescribed to the beneficiary or to a person acting for him.

(5) Except where regulations otherwise provide, an amount shall not be recoverable under ... regulations under subsection (4) above unless–

(a) the determination in pursuance of which it was paid has been reversed or varied on an appeal or [has been revised under section 9 or superseded under section 10 of the Social Security Act 1998]; and

(b) it has been determined on the appeal or [under that section] that the amount is so recoverable.

(5A) Except where regulations otherwise provide, an amount shall not be recoverable under subsection (1) above unless the determination in pursuance of which it was paid has been reversed or varied on an appeal or [has been revised under section 9 or superseded under section 10 of the Social Security Act 1998].

(6) Regulations may provide–

(a) that amounts recoverable under subsection (1) above or regulations under subsection (4) above shall be calculated or estimated in such manner and on such basis as may be prescribed;

(b) for treating any amount paid to any person under an award which it is subsequently determined was not payable–

(i) as properly paid; or

(ii) as paid on account of a payment which it is determined should be or should have been made,

and for reducing or withholding any arrears payable by virtue of the subsequent determination;

(c) for treating any amount paid to one person in respect of another as properly paid for any period for which it is not payable in cases where in consequence of a subsequent determination–

(i) the other person is himself entitled to a payment for that period; or

(ii) a third person is entitled in priority to the payee to a payment for that period in respect of the other person,

and for reducing or withholding any arrears payable for that period by virtue of the subsequent determination.

(7) Circumstances may be prescribed in which a payment on account by virtue of section 5(1)(r) above may be recovered to the extent that it exceeds entitlement.

(8) Where any amount paid [, other than an amount paid in respect of child benefit or guardian’s allowance,] is recoverable under–

(a) subsection (1) above;

(b) regulations under subsection (4) or (7) above; or

(c) section 74 below,

it may, without prejudice to any other method of recovery, be recovered by deduction from prescribed benefits.

(9) Where any amount paid in respect of a [couple] is recoverable as mentioned in subsection (8) above, it may, without prejudice to any other method of recovery, be recovered, in such circumstances as may be prescribed, by deduction from prescribed benefits payable to either of them.

(10) Any amount recoverable under the provisions mentioned in subsection (8) above–

(a) if the person from whom it is recoverable resides in England and Wales and the county court so orders, shall be recoverable by execution issued from the county court or otherwise as if it were payable under an order of that court; and

(b) if he resides in Scotland, shall be enforced in like manner as an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland.

(10A) Where–

(a) a jobseeker’s allowance is payable to a person from whom any amount is recoverable as mentioned in subsection (8) above; and

(b) that person is subject to a bankruptcy order,

a sum deducted from that benefit under that subsection shall not be treated as income of his for the purposes of the Insolvency Act 1986.

(10B) Where–

(a) a jobseeker’s allowance is payable to a person from whom any amount is recoverable as mentioned in subsection (8) above; and

(b) the estate of that person is sequestrated,

a sum deducted from that benefit under that subsection shall not be treated as income of his for the purposes of the Bankruptcy (Scotland) Act 1985.

(11) This section applies to the following benefits–

(a) benefits as defined in section 122 of the Contributions and Benefits Act;

(aa) subject to section 71A below, a jobseeker’s allowance;

(ab) state pension credit;

(b) ..., income support;

(c), (d) …;

(e) any social fund payments such as are mentioned in section 138(1)(a) or (2) of the Contributions and Benefits Act; and

(f) child benefit.

(12) In this section, “couple” has the meaning given by section 137(1) of the Contributions and benefits Act.

1. These amendments have been made by a succession of statutes, but those most material to this case – the substitution of subsection (2), the removal of words from subsection (5) and the introduction of subsection (5A) – were made by the Social Security (Overpayments) Act 1996. The full amendment history of the section can be found at 40(1) Halsbury *Statutes*, 854-5. Although subsection (5A) appears as a provision introduced by amendment, the substance of it was always in the legislation. The effect of the amendment in 1996 was only to rearrange what used to appear in sub-section (5).

*The arguments*

1. Mr Henshaw’s argument is that this section’s *raison d’ệtre* has throughout been apparent on its face. It is to modify the common law right of recovery of a particular class of overpayment. Thus subsections (5) and (5A) lay down conditions precedent to recovery, and subsection (6)(b) and (c) permit the writing off of recoverable amounts. But subsection (3) permits recovery from individuals who would not be liable at common law; subsection (8) permits recovery by deduction from future benefits; and subsection (9) permits cross-recovery from couples. Moreover the section makes unavailable the defence of change of position which, as the standard departmental letters impliedly recognise, is available against a claim in restitution. If the section restricted the right of recovery, Mr Henshaw accepts that Mr Drabble would have a case; but, he submits, it does the opposite. Were it not so, there would be no means of retrieving a payment made on a cheque erroneously printed with one or more extra 0s.
2. It follows, in Mr Henshaw’s submission, that s.71 carves out of the general law a specific regime for a specific class of overpayment, leaving the department’s common law rights intact for all cases not covered by it.
3. Mr Drabble’s argument is more complex. The section itself, he suggests, covers all possible cases in which an award is revised on account of a mistake. In its absence there would be no power of recovery at all, save – he accepts – for payments made otherwise than in pursuance of an award. The reason is that all other payments - the class that CPAG are concerned about - are made pursuant to an award which, so long as it stands, constitutes both the authority to make the payment and the entitlement to receive it. As s.71 itself repeatedly recognises, it is an essential precondition of recovery that the award pursuant to which the payment was made must first be modified: see in particular subsections (5) and (5A).
4. This, Mr Drabble goes on to submit, dovetails with the history and structure of the social security scheme. Under the Supplementary Benefits Act 1976, and until the reforms of 1998, awards were made by independent officers, making it conceptually almost impossible that a claim for restitution would lie at the instance of the paying department if such an officer made an erroneous award. Moreover, s.119 of the Social Security Act 1975 imposed an obligation to repay benefits when a decision was revised, but subject to an exception for cases of due care and diligence. Common law recovery would have been unarguable. Adjudication and payment were still constitutionally separate functions when the 1992 Act was passed. Thus the legislative context of s.71 was one in which common law powers of recovery were not on the map. This, Mr Drabble argues, is as one would anticipate: since benefits are entirely a creature of legislation, it is in the legislation that one would expect to find all their incidents and the relevant rights and obligations.
5. So far as the benefits to which these proceedings relate are concerned, it is for the Secretary of State to “decide any claim for a relevant benefit”: Social Security Act 1998 section 8(1)(a). A decision so made is final, though subject to the provisions of Chapter II of the Act: see section 17. One of the qualifications to that finality is, of course, the possibility of an appeal. There are two others, of which only one is of major relevance. Section 9 provides for the revision of decisions, which may be done, either on application within a prescribed time, or upon the Secretary of State’s own initiative and in that case not limited in time: section 9(1). Subject to particular provisions, a revision takes effect on the date on which the original decision took (or was to take) effect: section 9(3). This would be appropriate if the revision was on the basis that the decision had been wrong from the start. If the need for the revision arose from a change of circumstances since the original decision, the revision would be back-dated to the date of the change. At all events, one characteristic of a revision is that it may, and commonly will, be retrospective, and will therefore show that payments actually made were of the wrong amount. The power to supersede a decision under section 10 will, generally speaking, operate only prospectively.
6. Under regulation 17 of the Social Security (Claims and Payments) Regulations 1987, subject to specific provisions which we do not need to consider, a claim for benefit is to be treated as made for an indefinite period, “and any award of benefit on that claim shall be made for an indefinite period”. Payment of benefits is governed by the 1987 regulations as well. Regulation 20 imposes on the Secretary of State the duty to pay benefits. It provides that, subject to exceptions not now material, “benefit shall be paid in accordance with an award as soon as is reasonably practicable after the award has been made”.
7. Thus, when an award has been made by virtue of a favourable decision on a claim, it lasts for an indefinite time, it is final in determining the entitlement of the claimant, though subject to appeals and to revision or supersession, and the Secretary of State comes under a duty to make payments in accordance with the award. No payment in accordance with the award could be questioned as not having been properly made. A payment not in accordance with the award (e.g. two cheques or giro payments instead of one, or a payment of twice the amount of the award, or to the wrong person) would not be justified by the award, and the recipient could not claim to be entitled to receive or to keep it. But that is not the concern in these proceedings.
8. None of this directly answers Mr Henshaw’s case, which is that the statutory right to recover overpayments is sui generis, a provision apart. It is not modelled on a common law right of recovery by way of restitution. It is not subject to a defence of change of position. It permits recovery from the person making the misrepresentation even if that was a third party. It permits recovery from a spouse or cohabitant. High authority establishes that it is only where a statute occupies the very terrain in which the state seeks to act that the state is limited to the statutory course (*A-G v De Keyser’s Royal Hotel Ltd* [1920] AC 508), and that, at least in the field of taxation, a common law claim in restitution can coexist with a statutory power of recovery *(Deutsche Morgan Grenfell Group plc v IRC* [2007] 1 AC 558). To limit the power of recovery to the cases covered by s.71 would be to allow many claimants to keep windfalls at the expense of the public purse.

*Conclusions*

1. Parliament can be taken to have recognised that, in the nature of things, mistakes can be and will be made in the administration of a system of benefits of this kind. There may be mistakes which are attributable to the claimant, some of which may be his or her fault and others of which may be innocent. There may also be mistakes which are the fault of those administering the scheme. Some mistakes may be attributable to a third party. Some (though not all) mistakes may lead to what would be seen as an overpayment to the claimant. Legislation can be expected to make provision for correcting such mistakes.
2. Part of the scheme for dealing with such mistakes is the power of revision. Once an award has been revised, retrospectively, it is final in its revised form, and as from the date on which it took effect. Looking back, if the revision was downward, one can see that the claimant was not, in fact, entitled to the whole of the payments which he or she received. It is rational for the legislature to make provision for the consequences, and it is by s.71 alone that it has done so.
3. While regulations are not ordinarily an aid to statutory construction, it is legitimate to look at regulations made by the minister whose department both promotes the primary legislation and, before the court, advances a particular construction of it. The regulations referred to above sort with CPAG’s analysis of the statutory scheme.
4. No amount is recoverable unless the relevant determination (which is presumably the same as the decision and the consequent award) has been successfully appealed, revised under section 9 or superseded under section 10. In other words, as Mr Drabble put it, the real threshold of s.71 is subsection (5A), not subsection (1): it is only where a determination has been reversed, varied, revised or superseded (see subsection (5A)) that the question arises under subsection (1) whether any payment made meanwhile has been procured by misrepresentation or non-disclosure. This, it seems to me, corresponds with the finality of an award while it stands and, in turn, with the substituted finality of a revised award. If, therefore, an award or a determination has been revised, retrospectively, so as to deprive the claimant of an entitlement to part of the sums which have in fact been paid, one would expect there to be provision for recovery of the overpayment, and in section 71 you find that there is. Sub-section (1) sets out the circumstances in which the Secretary of State is entitled to recover an overpayment. They include recovery of the difference between the original and the corrected award where the original award was obtained by misrepresentation or non-disclosure; but they do not include cases of receipt – even knowing receipt - of an overpayment due to a mistaken award.
5. Is the proper conclusion, then, that this is the only right of recovery available to the Secretary of State? Although the arguments are closely balanced, it seems to me that it is. Section 71 was not enacted in a void. It was introduced into an established statutory scheme which had always been understood to be exhaustive of the rights, obligations and remedies of both the individual and the state. It was introduced at a time when adjudication was separate from administration. Both then and since, awards have been conclusive of the obligation to pay and of the right to receive payment. In such a context it is unsurprising that the power of recovery when an award is modified should be prescribed by Parliament and not at large. That is the role of s.71. It does not affect payments made otherwise than pursuant to an award, but it is in my judgment exhaustive of the power to recover payments made pursuant to an award.
6. For the reasons set out in the judgment of Lord Justice Lloyd, which I respectfully adopt, Mr Henshaw’s argument from the tax regime does not assist him.
7. The Secretary of State accepts, in the light of s.17, that it is only on revision or supersession of an award that a right of recovery arises; though a reader of the letters sent out by his department might not have appreciated this. But the effect of Mr Henshaw’s argument is that at that point the Department may elect between statutory and common law recovery, using the expanded powers afforded by s.71 in misrepresentation and non-disclosure cases. This is not an oppressive or fundamentally unjust scheme, since a defence of change of position is not likely to prevail in the face of obtaining payment by one form or another of deception. But it does not answer the thrust of Mr Drabble’s case, which is not that s.71 has excluded any power of recovery that was previously available but that it has created a power of recovery where otherwise there is none. That is a cogent and to my mind conclusive answer.
8. The Secretary of State has suspended the use of these letters pending our decision. For the reasons I have given it should not be resumed. It is for Parliament, if asked, to consider, as it did when it enacted s.71, whether any and what further powers are needed, and with what restrictions or enhancements, to deal with overpayments not caught by s.71.

**Lord Justice Lloyd:**

1. I agree that section 71 of the Social Security Administration Act 1992 is to be seen as part of a comprehensive statutory regime which prescribes all the incidents of the benefits to which it applies, and provides to the Secretary of State the only right to repayment of money paid pursuant to an award.
2. Mr Henshaw’s most powerful argument to the contrary seemed to me to be that based on the cases about recovery of sums paid by way of tax which were not due. Taxation is, in its nature, the subject of a statutory regime which, at any rate as regards liability to tax, is necessarily comprehensive. It contains provisions about the recovery of sums found not to have been due. However, these are not the only circumstances in which sums wrongly paid by way of tax can be recovered, as has been demonstrated by a number of recent cases.
3. These cases were reviewed fully in *Monro v Revenue and Customs Commissioners* [2008] EWCA Civ 306. In that case the Commissioners conceded that, in principle, there could be a common law right to recover sums paid by way of tax under a mistake of law, but argued successfully that such a claim was precluded in that case because it would be inconsistent with the statutory scheme under section 33 of the Taxes Management Act 1970.
4. Previously, the position of the Revenue had been that there was no such common law right. This position was no longer maintained because of two decisions of the House of Lords. The first is *Woolwich Equitable Building Society v. Inland Revenue Commissioners* [1993] AC 70 where it was held that there was a right to recover tax paid under an unlawful demand. That case was unusual in that the Society had established in other proceedings that the legislation under which the tax was exacted was unlawful, being ultra vires and void. The second case was *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49, part of the continuing saga of litigation about advance corporation tax, to which section 33 did not apply because the tax was not paid pursuant to an assessment. There was a special feature in that case, namely that it was as a matter of European Community law that the tax was found not to be due, and the European Community law principle of an effective remedy demanded that the taxpayer should be entitled to recover the tax wrongly paid. But the House of Lords did not limit its recognition of a right to recovery the tax to European principles. It held in terms that there was a common law right to recover tax paid under a mistake (whether of fact or law) in a case in which the revenue is unjustly enriched but which does not fall within section 33: see Lord Hoffmann at paragraph 19, Lord Hope of Craighead at paragraphs 55-6 and Lord Walker of Gestingthorpe at paragraphs 135-6.
5. If, then, the legislation about tax, which includes provision for the repayment of sum paid as tax but not due, does not exclude the recovery of sums so paid in circumstances to which the statutory right to recovery does not apply, why should that not be the case for recovery of wrongly paid social security benefits? It seems to me that there is a highly material distinction between the two kinds of case, at the heart of which is the fact that in the one instance, the sums wrongly paid have been paid by a person (individual or corporate) to the State, whereas in the other they have been paid by the State to a person. As Lord Goff of Chieveley said in *Woolwich Equitable Building Society v IRC* [1993] AC 70, at 172 and 177:

“To that objection, however, there are two answers. The first is that the retention by the state of taxes unlawfully exacted is particularly obnoxious, because it is one of the most fundamental principles of our law - enshrined in a famous constitutional document, the Bill of Rights 1688 - that taxes should not be levied without the authority of Parliament; and full effect can only be given to that principle if the return of taxes exacted under an unlawful demand can be enforced as a matter of right.”

“I would therefore hold that money paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an ultra vires demand by the authority is prima facie recoverable by the citizen as of right. As at present advised, I incline to the opinion that this principle should extend to embrace cases in which the tax or other levy has been wrongly exacted by the public authority not because the demand was ultra vires but for other reasons, for example because the authority has misconstrued a relevant statute or regulation. It is not however necessary to decide the point in the present case, and in any event cases of this kind are generally the subject of statutory regimes which legislate for the circumstances in which money so paid either must or may be repaid.”

1. This principle is now reinforced by article 1 of the First Protocol of the European Convention on Human Rights, and therefore by the Human Rights Act 1998, but it was well established even without that international obligation. Nor is this in any respect undermined by the House of Lords’ later decision in *Revenue and Customs Commissioners v Total Network* [2008] UKHL 19 that the Commissioners could claim damages in tort for fraudulent conspiracy to evade tax. One of the objections was that it was, in substance, a claim to recover tax for which the Defendant was not liable. The House of Lords rejected this and held that it was also not inconsistent with the legislative regime.
2. Self-evidently that principle does not apply to payments by the State to a person which have nothing to do with the tax regime. Accordingly it seems to me that the difference between recovery of a social security benefit wrongly paid to a claimant on the one hand and of tax wrongly paid by a taxpayer on the other is substantial and significant. Recognition of a common law right to recovery of tax wrongly paid, where the statutory provision does not apply, does not lead, by analogy, to an acceptance that sums paid by way of social security benefits pursuant to an award, seen in retrospect to have been overpaid following the revision of the award, are repayable in circumstances other than those for which section 71 provides.
3. For the reasons given by Sedley LJ, therefore, amplified only in one respect by what I have said above, I agree that this appeal should be allowed.

**Lord Justice Wilson:**

1. I agree with both judgments.