UA-2024-000613-JSA

RULE 14 Order

Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the Appellant ('PQ'), the intended parents or the children concerned in the surrogacy arrangements.

NCN: [2026] UKUT 1 (AAC)
Appeal No. UA-2024-000613-JSA

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

P.Q.

Appellant

- v -

Secretary of State for Work and Pensions

Respondent

Before: **Upper Tribunal Judge Wikeley**
Hearing Date: **24 November 2025**
Mode of hearing: **CVP hearing in private**

Representation:
Appellant: Ms F Curtis, instructed by the Free Representation Unit
Respondent: Ms E MacKenzie, instructed by the Government Legal Department

On appeal from:
Tribunal: First-Tier Tribunal (Social Security and Child Support)
Digital Case No: 1689755803695662
Tribunal Venue: Langstone Civil Justice Centre
Hearing Date: 21 December 2023

SUMMARY OF DECISION

Judicial summary

The Appellant, while in receipt of income-related jobseeker's allowance, entered into two surrogacy arrangements with two sets of intended parents. During her pregnancies she received monthly payments for expenses amounting to £15,000 and £10,500 respectively for each surrogacy agreement. The Secretary of State decided the surrogacy payments amounted to income and that as a result there had been a recoverable overpayment of benefit. The First-tier Tribunal refused the Appellant's appeal. The Upper Tribunal dismissed the Appellant's further appeal, holding that the payments were correctly categorised as income (applying *Morrell v SSWP*) and that there were no applicable disregards (applying *R v Doncaster MBC ex p. Boulton*).

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

KEYWORD NAME (Keyword Number)

4.7 Capital – income as capital
13.7 Earnings and other income – disregards
23.8 Jobseeker's Allowance – other

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

REASONS FOR DECISION

Introduction

1. This appeal is about the proper categorisation, for the purpose of assessing entitlement to a legacy means-tested benefit, of payments received by a claimant acting as a surrogate under a surrogacy arrangement. Are such payments income or capital according to the relevant benefits legislation? Furthermore, if such payments constitute income, are they subject to an applicable disregard?

An outline of the facts

2. The Appellant ('PQ') was in receipt of income-based jobseeker's allowance ('IB-JSA'). Over a period of time she entered into surrogacy arrangements with two sets of commissioning parents ('the intended parents') in pursuance of which she received monthly payments ('the surrogacy payments') during the two respective pregnancies. The Secretary of State's decision-maker decided that the surrogacy payments were income such that the Appellant was not entitled to IB-JSA for the periods in question. This was because the sums exceeded her applicable amount, resulting in a recoverable overpayment. The Appellant lodged an appeal, arguing that the surrogacy payments were no more and no less than the reimbursement of her reasonable pregnancy-related expenses. The First-tier Tribunal ('the FTT') heard the appeal in the Appellant's absence. Its summary Decision Notice recorded that "the appeal is refused because the appellant had undisclosed income by way of payments for surrogacy pregnancies and these payments are treated as income to be taken into account in assessing entitlement."

A summary of the issues raised by the appeal

3. The Appellant's further appeal to the Upper Tribunal essentially raises three issues. First, did the FTT apply the correct legal test in deciding that the surrogacy payments were properly categorised as income rather than as capital? Second, and assuming the surrogacy payments were correctly defined as income, should the FTT have found that they should have been disregarded in the IB-JSA means-test assessment? Third, and in terms of procedural fairness, did the FTT err in

law in deciding to proceed with the hearing of the appeal in the Appellant's absence?

4. In summary, my conclusions on each of those three issues are as follows. First, the FTT applied the correct legal test in deciding that the surrogacy payments were a form of income rather than capital. Second, the FTT correctly found that there were no relevant income disregards to be applied in the means-test. Third, the FTT did not err in law in deciding to proceed with the hearing of the appeal in the Appellant's absence. It follows that the Appellant's appeal to the Upper Tribunal is dismissed and the decision of the FTT stands. My full reasons follow.

The Upper Tribunal oral hearing of this appeal

5. I held an oral hearing of this appeal using the CVP video platform on 24 November 2025. The Appellant attended and was represented by Ms F Curtis of Counsel, instructed by the Free Representation Unit (FRU). The Respondent was represented by Ms E MacKenzie of Counsel, instructed by the Government Legal Department (GLD). I am grateful to both counsel for their helpful written and oral submissions and to all those assisting them in preparation for the oral hearing. I am especially indebted to Ms Curtis and FRU for acting *pro bono* in this matter. The FRU team has worked tirelessly to ensure that the relevant issues were fully and properly ventilated.

6. Unusually, albeit with the agreement of both parties, I directed that the oral video hearing be a private hearing pursuant to rule 37(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698). As a result, the only persons with access to the virtual hearing room were the parties and their representatives. I took the decision to direct a private hearing as there were concerns that several of the documents emanating from the Family Court in the FTT and UT hearing bundles may not have been appropriately and fully redacted. As such, there was the possibility that, absent such a direction, there might have been an inadvertent breach of section 12(1)(a)(iii) of the Administration of Justice Act 1960 (Publication of information relating to proceedings in private) and so a contempt of court. I recognise that directing a private hearing is an unusual step. However, the wider public interest in the principles of open justice and transparency is served by the fact that this lengthy judgment is publicly available. In addition, I can confirm there is no closed annex to this decision.

The Rule 14 Order

7. I also make the Rule 14 Order as set out above. This is to protect the anonymity of the Appellant as well as the parallel interests of the intended parents, with

whom she entered into surrogacy arrangements, and the children concerned. I am satisfied that all those involved have a right to have their privacy interests protected. In that context I am acutely aware that the Appellant has mental health issues which warrant the highest level of safeguarding. As an added layer of protection, in both the case name and the text of this decision, I refer to the Appellant as 'PQ', which are not her true initials. I have also limited my discussion of the facts to the bare minimum being necessary to understand the context for the legal issues which form the prime focus of this decision.

The surrogacy legislation

8. Surrogacy arrangements are governed by the Surrogacy Arrangements Act 1985 ('the 1985 Act'). Section 1(3) provides that "An arrangement is a surrogacy arrangement if, were a woman to whom the arrangement relates to carry a child in pursuance of it, she would be a surrogate mother." A "surrogate mother" in turn is defined by section 1(2) of the 1985 Act (as amended) as:

> a woman who carries a child in pursuance of an arrangement—
>
> (a) made before she began to carry the child, and
>
> (b) made with a view to any child carried in pursuance of it being handed over to, and parental responsibility being met (so far as practicable) by, another person or other persons.

9. Furthermore, in determining whether an arrangement is made with such a view as is mentioned in section 1(2)(b), then according to section 1(4) "regard may be had to the circumstances as a whole (and, in particular, where there is a promise or understanding that any payment will or may be made to the woman or for her benefit in respect of the carrying of any child in pursuance of the arrangement, to that promise or understanding)."

10. However, surrogacy arrangements have a somewhat peculiar legal status, not least as section 1A of the 1985 Act (as inserted by section 36 of the Human Fertilisation and Embryology Act 1990) provides that "No surrogacy arrangement is enforceable by or against any of the persons making it." In addition, section 2(1) of the 1985 Act makes it a criminal offence to engage in certain defined acts relating to surrogacy arrangements on a "commercial basis" – albeit that prospective surrogate mothers enjoy a protected status in this regard (see section 2(2)(a)):

> (1) No person shall on a commercial basis do any of the following acts in the United Kingdom, that is—
>
> > (a) initiate ... any negotiations with a view to the making of a surrogacy arrangement,
> >
> > (aa) take part in any negotiations with a view to the making of a surrogacy arrangement,
> >
> > (b) offer or agree to negotiate the making of a surrogacy arrangement, or
> >
> > (c) compile any information with a view to its use in making, or negotiating the making of, surrogacy arrangements;
>
> and no person shall in the United Kingdom knowingly cause another to do any of those acts on a commercial basis.
>
> (2) A person who contravenes subsection (1) above is guilty of an offence; but it is not a contravention of that subsection—
>
> > (a) for a woman, with a view to becoming a surrogate mother herself, to do any act mentioned in that subsection or to cause such an act to be done, or
> >
> > (b) for any person, with a view to a surrogate mother carrying a child for him, to do such an act or to cause such an act to be done.

11. The 1985 Act makes no provision for the intended parents to assume parental responsibility for a child who has been carried by a surrogate mother. Indeed, section 27(1) of the Human Fertilisation and Embryology Act 1990 ('Meaning of "mother"') categorically states that "The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child." Thus, in order for the *intended* parents to become the child's *legal* parents, they must make an application to the Family Court for a parental order under the Human Fertilisation and Embryology Act 2008 ('the 2008 Act'), section 54 (in cases where there are two applicants) or section 54A (where there is a sole applicant). Successful such applications were made in the present case. The transformative nature of such a parental order was explained by Sir James Munby P in *Re X (A Child) (Surrogacy: Time limit)* [2014] EWHC 3135 (Fam); [2015] Fam 186; [2015] 2 WLR 745 at [54]:

> Section 54 goes to the most fundamental aspects of status and, transcending even status, to the very identity of the child as a human being: who he is and who his parents are. It is central to his being, whether as an

> individual or as a member of his family. … Fundamental as these matters must be to commissioning parents they are, if anything, even more fundamental to the child. A parental order has … a transformative effect, not just in its effect on the child's legal relationships with the surrogate and commissioning parents but also, to adopt the guardian's words in the present case, in relation to the practical and psychological realities of X's identity. A parental order, like an adoption order, has an effect extending far beyond the merely legal. It has the most profound personal, emotional, psychological, social and, it may be in some cases, cultural and religious, consequences. It creates what Thorpe LJ in *Re J (Adoption: Non-Patrial)* [1998] INLR 424, 429, referred to as "the psychological relationship of parent and child with all its far-reaching manifestations and consequences." Moreover, these consequences are lifelong and, for all practical purposes, irreversible: see *G v G (Parental Order: Revocation)* [2012] EWHC 1979 (Fam), [2013] 1 FLR 286 …

12. Section 54 sets out various criteria which must be satisfied before the Family Court may make a parental order. In the present context two such qualifying conditions are of particular note.

13. The first is that the surrogate mother must consent to the making of such an order. So, according to section 54(6):

> (6) The court must be satisfied that both—
>
> (a) the woman who carried the child, and
>
> (b) any other person who is a parent of the child but is not one of the applicants (including any man who is the father by virtue of section 35 or 36 or any woman who is a parent by virtue of section 42 or 43),
>
> have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order.

14. The second, by virtue of section 54(8), is that “no money or other benefit (*other than for expenses reasonably incurred*)” (emphasis added) must have changed hands:

> (8) The court must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by either of the applicants for or in consideration of—
>
> (a) the making of the order,

(b) any agreement required by subsection (6),

(c) the handing over of the child to the applicants, or

(d) the making of arrangements with a view to the making of the order,

unless authorised by the court.

15. The question of what amounts to “expenses reasonably incurred” was considered by Hedley J in *Re X and Y (Parental Order: Foreign Surrogacy)* [2008] EWHC 3030 (Fam); [2009] Fam 71 at [22]:

> In my judgment, the ascertainment of what amounts to 'expenses reasonably incurred' is a question of fact in each case. I make that rather trite observation as I am aware that some organisations which support or facilitate surrogacy have standard guideline figures for such expenses. Such figures may have utility but in my opinion prospective commissioning couples should be cautious about relying on them without satisfying themselves that they are realistic in their case; an obvious example would be whether the surrogate mother was or was not going to sustain an ascertainable loss of earnings by reason of the surrogacy.

16. The notion of “expenses reasonably incurred” was also addressed by Russell J in *A, B and C (UK surrogacy expenses)* [2016] EWFC 33 at [3]:

> The court heard that in this as in other cases, the surrogates were paid sums of money at what was considered to be the "going rate" which is between £8,000 to £15,000 (although I understand that sometimes surrogates receive a larger sum than £15,000). The law provides for no such tariff for expenses for UK surrogacy, or indeed any definition in respect of "expenses reasonably incurred". There is no universally acceptable figure to pay for surrogacy expenses in the UK irrespective of the circumstances in law, whether it is £15,000 or more or less.

17. However, neither the consent of the surrogate mother nor the making of payments for “expenses reasonably incurred” necessarily guarantees that the Family Court will make a parental order. In the final analysis, “the court’s paramount consideration is the welfare of the child involved, which will almost certainly be best served by cementing his home and his family links with the commissioning parents” (*Whittington Hospital NHS Trust v XX* [2020] UKSC 14; [2021] AC 275 at [51] *per* Baroness Hale).

The legislation governing income-based jobseeker's allowance

18. At all material times the Appellant was in receipt of means-tested IB-JSA, payable under the Jobseekers Act 1995 ('the 1995 Act') and the relevant secondary legislation, namely the Jobseeker's Allowance Regulations 1996 (SI 1996/207; 'the JSA Regulations 1996'). IB-JSA is one of the so-called legacy benefits which have since been abolished with the advent of Universal Credit (see section 33(1)(a) of the Welfare Reform Act 2012 and article 4 of the Welfare Reform Act 2012 (Commencement No. 35) (Abolition of Benefits) Order 2025 (SI 2025/1148)). Amongst other qualifying criteria, claimants of IB-JSA had to satisfy both an income test and a capital test. Thus, a person was not entitled to IB-JSA if their income for a given period exceeded the "applicable amount" (section 3(1)(a) of the 1995 Act). Even if their income was less than their applicable amount, there was no entitlement to IB-JSA if the person's capital exceeded the "prescribed amount" (section 13(1) of the 1995 Act). As will be seen, neither the 1995 Act nor the JSA Regulations 1996 actually explain the twin concepts of income and capital. The meaning of the two terms is therefore assumed rather than defined.

19. In the context of the present appeal, the Appellant's primary case (at least before the Upper Tribunal) was that on a proper categorisation the surrogacy payments were payments of capital, with the effect that she would only be disentitled from receiving IB-JSA if at any given time she had capital in excess of £16,000 (that being the prescribed amount by virtue of regulation 107 of the JSA Regulations 1996). The Respondent's case, in contrast, was that the surrogacy payments, properly understood, were at all times payments of income with the consequence that the Appellant was not entitled to IB-JSA for the relevant periods – it not being in dispute that the payments, if they did indeed count as assessable income, exceeded her applicable amount (calculated in accordance with regulation 83 of the JSA Regulations 1996). However, the Appellant also had a fall-back position – in the event that the surrogacy payments constituted payments of income rather than capital, it was argued on her behalf that the payments fell to be disregarded by virtue of Schedule 7 to the JSA Regulations 1996, which deals with disregards applicable to income other than earnings. In particular, it was submitted that either paragraph 2 (expenses incurred by a volunteer) or paragraph 15 (voluntary payments) of Schedule 7 applied to the surrogacy payments.

The key facts

20. The Appellant gave birth to a baby boy in November 2020 and twins (who were delivered early) in July 2022. The Appellant received ten roughly monthly

payments of £1,500, totalling £15,000, between March and November 2020 from the intended parents of the first surrogacy. She also received seven monthly payments of £1,500, totalling £10,500, between November 2021 and May 2022 from the intended parents for the second surrogacy.

21. The Secretary of State's decision-maker concluded that the surrogacy payments were income receipts. As the sums involved exceeded the Appellant's applicable amounts for the periods in question, the decision-maker found that the Appellant was not entitled to IB-JSA for those periods and the overpayment of benefit was recoverable. The Appellant lodged an appeal, asserting that she had only been paid her reasonable expenses for the surrogate pregnancies, as she had repeatedly asserted in her interview under caution. Furthermore, she pointed out that the surrogacy legislation required that the Family Court must be satisfied, before making a parental order, that no money or benefit, other than expenses reasonably incurred, had exchanged hands. As the FTT summarised her case in its Statement of Reasons, "The appellant does not dispute the payments nor does she dispute that she did not disclose the payments to the respondent. Her argument is that these payments do not amount to an income that needed to be taken into account when assessing her benefit entitlement. She says that the payments are classed as expenses for the purposes of the surrogacy agreements and that it is not permitted to be paid anything other than expenses under such arrangements" (paragraph 12).

22. According to its Decision Notice, the FTT refused the appeal "because the appellant had undisclosed income by way of payments for surrogacy pregnancies and these payments are treated as income to be taken into account in assessing entitlement" (paragraph 4). Unpacking that conclusion with the benefit of the FTT's Statement of Reasons, it is fair to say that the FTT made three key findings, namely that:

    a. The series of monthly payments of £1,500 fulfilled the description of 'income' for benefit purposes as being "part of a series of payments (whether or not made regularly) or payments made for a period of time or both of these" (Statement of Reasons at [13]) and that (taking into account the two points below) the surrogacy payments fell within the category of the Appellant's income and so were relevant to the conditions of entitlement for IB-JSA (Statement of Reasons at [14]-[15]);

    b. The Family Court's rulings were not relevant to the question of whether the surrogacy payments should be classified as income for the purposes of IB-JSA (Statement of Reasons at [14]); and

c. There was "nothing in the benefits legislation to suggest that expenses paid for surrogacy arrangements are disregarded for the purposes of calculating entitlement to benefits" (Statement of Reasons at [14]).

The grounds of appeal to the Upper Tribunal

23. The Appellant's original grounds of appeal (drafted before the involvement of FRU) were put in the following somewhat discursive terms:

> *Ground 1*
>
> Reasonable expenses we submit in this incidence amount to costs incurred to the benefit and effectively on behalf of someone else and we submit that the judge had not considered this type of arrangement, when determining the appeal. This was in effect a reimbursement by the ultimate parents of costs that were incurred on their behalf. This situation had not been considered by the Judge which we submit is an error of law.
>
> *Ground 2*
>
> It is accepted that the Judge is not bound by the decision of the Family Court. … The appellant not unnaturally had expected to rely upon the decision of the Family Court in preparation for the First Tier Tribunal … the appellant has mental health problems as noted in the respondent's bundle and declined to attend the hearing but we submit it would have been in the interests of justice either beforehand or at the tribunal to issue directions to the appellant to produce further and better evidence, if the judge intended to consider the issue of expense validity. Moreover, it was clear from the grounds for initial appeal that this was the appellant's whole case. We submit that the judge could not reasonably have drawn the conclusion they did based on their examination of the facts and this issue was compounded by procedural unfairness.
>
> *Ground 3*
>
> In somewhat simplistic terms we need to examine we submit the rationale behind surrogacy arrangements. They are founded we submit in altruism with one person helping out another person. It could be seen therefore that the payments relate merely to a gift and therefore we submit a matter of capital rather than income.

24. A District Tribunal Judge refused leave to appeal on behalf of the FTT but Upper Tribunal Judge Fitzpatrick subsequently granted permission to appeal, observing

that the proposed grounds "primarily relate to the payments in respect of the surrogacy arrangements the appellant entered into being considered income for the purpose of assessing her entitlement to benefit rather than, as the appellant argues, 'expenses' which should be disregarded. This is also an unusual point which may benefit from further submissions and consideration."

25. As helpfully refined with the assistance of FRU, the Appellant's case was that her appeal should be allowed for three reasons. First, the FTT did not apply the correct legal test when it was considering whether the surrogacy payments were income rather than capital. Second, and in the alternative, the FTT did not consider whether, it the payments were income, they should nonetheless be disregarded when assessing the Appellant's income under the IB-JSA means-test. Third, and in any event, the FTT's decision to proceed with hearing the appeal in the Appellant's absence was procedurally unfair and impacted on its ability properly to consider the characteristics of the payments at issue. I approach the grounds of appeal with that typology in mind.

Analysis: did the First-tier Tribunal apply the correct legal test for income?

Introduction

26. The Appellant argues, under this heading, that the FTT erred in law in two respects (which may conveniently be regarded as the opposite sides of the same coin). First, it is said that the FTT failed to address its mind to the correct legal test for determining whether the surrogacy payments were 'income' for the purposes of IB-JSA. Secondly, it is argued that the FTT failed to consider whether the payments made to the Appellant were properly to be regarded as payments of capital rather than income.

So, what is the correct legal test for income?

27. Both counsel were agreed that for the purposes of the legacy means-tested benefit regimes all of a claimant's money resources were categorised in a binary way as either income or capital. As I put it in *Secretary of State for Work and Pensions v MA* [2024] UKUT 131 (AAC) at paragraph 51, "there is nothing in between and so no 'third way'". However, although the JSA Regulations 1996 contain lengthy and detailed statutory provisions as to the treatment of both income and capital (including various deeming rules), nowhere do they expressly define what is meant by either term. We must therefore rely on the case law for elucidation. I was extensively referred, in particular, to two judgments of the Court of Appeal decided in relation to other legacy benefit schemes. These were *Morrell v Secretary of State for Work and Pensions* [2003] EWCA Civ 526 ('*Morrell*')

reported as *R(IS) 6/03*) (which Ms MacKenzie tended to place greater emphasis upon) and *Minter v Kingston upon Hull City Council* ('*Minter*') [2011] EWCA Civ 1155; [2012] HLR 3; [2012] AACR 21 (which Ms Curtis submitted was the more relevant authority).

28. *Morrell* was decided in the context of the income support scheme. There the claimant, following her divorce, had been receiving regular sums of money from her mother, either paid to her to help her pay her rent and other living expenses, or paid directly to her landlord in respect of rent. It was not in dispute that the payments were made to the claimant by way of an informal loan, although the repayment terms were vague, the mother merely expecting reimbursement gradually as her daughter's difficulties diminished. The claimant argued that because the payments made by her mother were a loan, they were not income payments but should have been treated as capital. However, the Court of Appeal rejected this argument. Giving the leading judgment, Richards J (as he then was) observed as follows:

> 31 … "Income" should be given its ordinary and natural meaning. The 1992 Act and the 1987 Regulations do not define it and there is no need to embark upon the elusive quest for a definition. There is nothing in the statutory scheme, including the various deeming provisions whereby certain capital is to be treated as income and *vice versa*, to compel any departure from the ordinary and natural meaning, though the statutory context, with its focus on weekly amounts available to meet outgoings, may help to inform the answer in a doubtful case.

29. Richards J also noted that it was "clear that the sums received by the appellant from her mother, being regular monthly receipts towards her rent and other living expenses, had the character of income" (at [33]). Furthermore, the vagueness of the repayment obligation was not sufficient to deprive the receipts of their character as income" (also at [33]). In addition, Richards J made reference to the wider policy context:

> 34. If there were otherwise any doubt about the matter, then in my view reference to the statutory scheme would strongly favour the conclusion that these receipts were income. Income support is a means−tested benefit designed to meet a person's essential needs on a weekly basis. These moneys were provided to the appellant, and were used by her, for the specific purpose of meeting her recurrent needs throughout the relevant period. It would be contrary to the purpose of the legislative scheme if such payments fell to be excluded from the calculation of income when determining entitlement to benefit.

30. Finally, Richards J left open the question whether an element of regularity or recurrence was essential, although "the fact that these were regular monthly receipts tells in favour of their being income" (at [35]). Sedley LJ and Thorpe LJ both expressed their agreement with the analysis by Richards J. Notably, Thorpe LJ held that "Regular recurring payments designed to meet outgoings might serve as one definition of income" (at [57]). Thorpe LJ concluded as follows:

> 58. … For me the recurrent regularity of the receipts and their disbursement to meet ordinary outgoings including '£200 per month for school fees, £150 for utilities (gas, electricity and telephone) and £400 for food' demands their classification as the provision of income by way of loan. To classify the provision as a loan of capital would be to ignore reality.

31. Other authorities, not cited before me, likewise emphasise that recurrence is a significant feature pointing towards classification of monies as being by way of income rather than capital. Thus, Bridge J in *R v Supplementary Benefits Commission ex p. Singer* [1973] 1 WLR 713 ruled that the "essential feature of receipts by way of income is that they display an element of periodic recurrence. Income cannot include *ad hoc* receipts." As the learned commentary on regulation 23 of the Income Support (General) Regulations 1987 (SI 1987/1967) in *Social Security Legislation 2021/22* Volume V (ed. J. Mesher et al.) observes at p.349, in a passage to which I did not contribute, the statement in *ex p. Singer*:

> links the notion of recurrence (which may only be expected in the future) with the notion of a period to which the income is linked. Similar notions are applied by the Commissioner in *R(SB) 29/85* where the issue was the proper treatment of a £15 loan made to a striking miner by a local authority Social Work Department to meet arrears on hire purchase agreements. That was held to be a capital payment, since it was a "one-off" advance and there was no evidence that it was one of a series of payments.

32. However, payments made on a periodic basis are not automatically regarded as income in every circumstance – thus, capital payments made by way of instalments do not become income simply because they are paid on a recurrent basis, as best illustrated by *Lillystone v Supplementary Benefits Commission* (1982) 3 FLR 52 (capital payments by way of purchase of a house paid in instalments). Conversely, a single lump sum payment may have the character of income, as shown by *Minter*, as discussed below. The parties were accordingly in agreement that it would be an error of law, in a case where there were pointers that a particular payment was properly to be regarded as capital, to treat the manner of the payment of funds as solely determinative of the question of whether a payment is income.

33. Turning to *Minter* then, this case was decided under the housing benefit scheme. The claimant had received a lump sum payment of compensation for breach of various employment rights (e.g. under equal pay legislation), calculated by reference to the difference between past wages actually paid and what should have been paid by way of salary. The Upper Tribunal held that the Equal Pay Act claim against the employer was not for the loss of a capital asset, such as a job or the right to bring proceedings, but for the amount that the claimant would have been paid if her employer had honoured the terms of the equality clause that was part of her contract of employment. Its essential nature as income was not changed by the fact that that amount was paid later and as a lump sum. The claimant's further appeal to the Court of Appeal was unsuccessful. Thomas LJ, giving the leading judgment, set out the relevant principles as follows:

> **The characterisation of the payments**
>
> *(i) The approach*
>
> 18. The issue as to whether the payments are income or capital has to be determined in the context of social security legislation and the particular legislative scheme in issue.
>
> 19. The first task is to determine the true characteristics of the payment in the hands of the recipient, looking at the issue in the context of the two legislative schemes in issue in this appeal: see *R. v National Insurance Commissioner Ex p. Stratton* [1979] ICR 290. This court had to consider in that case whether a redundancy payment was income or capital for the purposes of unemployment benefit. Lord Denning MR made clear that the correct approach was to examine the "true characteristic" of the payment; a redundancy payment was made because a man was regarded as having an accrued right in his job; if he was deprived of his job he should receive a capital payment to compensate him for the loss of it; it was not a payment for loss of future income.
>
> 20. There are many cases which are referred to in the judgments of Judge Howell and Judge Jacobs where *Stratton* has been applied in determining the true characteristic of the payment in the hands of the recipient. One example should suffice — *R(SB) 21/86*, a decision of Commissioner Rice in respect of compensation for unfair dismissal. Applying *Stratton* the commissioner held that the compensation fell within the term "any payment in lieu of notice or remuneration" within the definition of earnings in the then supplementary benefit regulations, as its true characteristic was

compensation for future income or remuneration that would otherwise have been payable had the employment not been terminated.

21. In determining the true characteristic of the payment in the hands of the recipient for the purposes of the legislative scheme, the label that the parties attach to it is irrelevant. That is because the parties to a private agreement cannot determine by the label placed on it by them how it is to be treated for the purpose of social security legislation. For that purpose in the public interest, it is its true characteristic that is alone relevant.

22. If the sum is payable by way of a settlement of a claim or claims, it does not matter in determining its true characteristic whether it is a lump sum or a series of periodic payments. It is only necessary to examine why the compensation is being paid, not whether the manner of payment is by way of a single lump sum or a series of payments, as the method of settlement is again irrelevant.

23. Nor does the size of the payment in contrast to the weekly or monthly wages of an employee matter. The size of the payment in the hands of the recipient cannot alter its true characteristics. If, for example, an employer had through a computer error underpaid an employee the wages due by a substantial amount over a period, the underpayment remains income even if paid in a single lump sum of whatever its size. Nor can the mere fact that the sum may have accumulated over a prolonged period make a difference. Neither of these factors can determine the true characteristics of the payment.

34. On the facts of *Minter*, the Court of Appeal was clear – "what was being settled was nothing more or less than her claim for underpayment of her wages because of a failure to observe equal pay legislation. Its true characteristic was therefore clearly compensation for past lost income" (at [25]). Furthermore, Thomas LJ expressly agreed with *Morrell*:

26. That being the true characteristic of the payment to Miss Minter, the question then arises as to whether it is income or capital within the relevant provisions of the Regulations... I do not think it necessary to refer at any length to the decision in *Morrell v Secretary of State for Work and Pensions* [2003] EWCA Civ 526 where Richards J. (as he then was) gave the leading judgment in this court in an appeal in relation to the question of whether payments received by a claimant were to be treated as income for the purposes of the income support legislation. He observed that, as the legislation did not define income, it should be given its ordinary and natural

meaning [31]. In the present case, once the true characteristic of the payment is identified, both statutory schemes are clear as to the categorisation of the payment as income as opposed to capital.

What did the First-tier Tribunal actually decide in this case?

35. In its Statement of Reasons, the FTT found as follows:

> 13. JSAIB is a means tested benefit so the appellant's financial circumstances need to be assessed for entitlement. Income is not defined by law but is distinguished from capital as being part of a series of payments (whether or not made regularly) or payments made for a period of time or both of these (page E in the appeal bundle). The series of monthly payments of £1,500 in the Schedule of payments fulfil this description of income for benefit purposes.

36. The FTT further reasoned as follows:

> 14. … whether such payments are treated as income for the purposes of benefit claims is not a matter for the Family Court. The classification of expenses for the purposes of the Human Fertilisation and Embryology Act 2008 is not related to the classification of income for the purposes of JSAIB. There is nothing in the benefits legislation to suggest that expenses paid for surrogacy arrangements are disregarded for the purposes of calculating entitlement to benefits. The payments made in this case fall within the category of income into the appellant's household and are therefore relevant to the conditions of entitlement.

37. Finally, the FTT concluded in the following terms:

> 15. The appellant's payments ("expenses") for the two surrogacy arrangements are treated as income for the purposes of benefit entitlement. This income was not disclosed to the respondent and not therefore taken into account in assessing her entitlement to JSAIB. For the periods when she received these payments, she was in receipt of income which exceeded her benefit entitlement and she was not therefore entitled to JSAIB …

Did the First-tier Tribunal apply the correct legal test for income?

38. Ms Curtis, for the Appellant, submitted that paragraph 13 of the Statement of Reasons demonstrated that the FTT's analysis of the character of the surrogacy payments began – and ended – with its consideration of whether the payments

were made on a regular basis. The FTT's definition of income, she argued, did not admit of any exceptions to this principle. Furthermore, the FTT made no reference to the need to identify the 'true characteristic' of the payments in question, as required by *Minter*. Paragraph 14 of the Statement of Reasons was principally concerned with whether surrogacy payments, once categorised as income, fell to be disregarded. The final sentence of paragraph 14 merely reiterated the conclusion arrived at in paragraph 13 and did not include any separate analysis of whether the payments were income or capital.

39. Ms MacKenzie, for the Respondent, submitted that the FTT correctly applied the ordinary and natural meaning of the word 'income' as required by *Morrell*. Thus, she contended, the final sentence of paragraph 13 was not the end of the FTT's reasoning on this point. Rather, the FTT was noting that the surrogacy payments met *this* description (of income as periodic payments), leaving open the possibility that there might be *other* relevant descriptions. In paragraph 14, however, the FTT went on to consider both the nature of the surrogacy payments and the question of possible disregards, before concluding that the payments constituted income in the hands of the Appellant.

40. I would accept that the FTT's reasoning in this case is somewhat compressed, but on a fair reading the FTT did not treat the manner of payment as wholly determinative of the question as to whether the surrogacy payments amounted to income. As noted above, and within the binary framework assumed by the legislation, money resources fall to be classified as either income or capital. Some types of payment will obviously fall on one side of the dividing line or the other, whereas other payments will be closer to the borderline. The task then is to find the categorisation as to placement on which side of the dividing line best fits the payment in question. Given that task, a realistic starting point is that regularity of payments indicates that the funds in question presumptively count as income rather than capital. The question then is whether there is any characteristic or feature of the payments which displaces that starting point.

41. In this context *Morrell* is good authority for the proposition that one applies the ordinary and natural meaning of the word 'income' to the facts of the case. *Minter* is not inconsistent with this approach – its reference to identifying the 'true characteristic' of the payments in question may simply be another way of applying the ordinary and natural meaning of the word 'income'. *Minter* can accordingly be seen as applying a gloss on *Morrell* rather than marking any real departure in meaning. In terms of the ordinary and natural meaning of the words, the essence of capital resources is that they comprise assets (whether a physical asset such as a house or liquid assets such as funds in a savings account) by which a person

accumulates wealth. This can be distinguished from income, which typically involves funds used to meet general disbursements (and which only become capital where circumstances permit savings to be made where there is a surplus on day-to-day expenditure). On that basis the surrogacy payments in the present case were necessarily intended only to meet outgoings and not to build up the Appellant's assets, so they displayed more of the characteristics of income than they did of capital.

Did the FTT fail to consider whether the payments were payments of capital?

42. It follows that I am satisfied that the FTT applied the correct legal test for deciding whether the payments were 'income' for the purposes of an IB-JSA assessment. On the other side of the same coin is the Appellant's submission that the FTT failed to consider whether the payments in question should properly have been regarded as capital. In this respect Ms Curtis identified four factors which she submitted as being indicative that the payments should have been regarded as capital rather than income.

43. The first was that the surrogacy payments were not made to enable the Appellant to meet her essential daily living costs, such as rent and grocery bills, on a regular basis – rather, they were intended to cover the additional expenses associated with her pregnancies. However, it is unclear how the intended purpose of the surrogacy payments should turn what would otherwise be regarded as regular payments of income into periodic instalments of capital.

44. The second (and related) feature relied upon by Ms Curtis was that the Appellant was not able to dispose of the funds freely, but was obligated to use the monies solely for pregnancy-related expenditures. There are at least two difficulties with this line of argument. The Appellant's own evidence to the FTT was that she had a considerable degree of agency in deciding how the surrogacy payments should be expended. In addition, and again as with the first factor, it was difficult to see how this feature was relevant to the income/capital distinction.

45. The third consideration was the 'one-off' nature of the payments, in the sense that the surrogacy payments were tied to specific pregnancies. As such, the payments did not constitute a regular source of income that could be relied upon either before or after the surrogate pregnancies. The summary answer to that point is that sources of income may be of a short, medium or long duration – it simply all depends on the factual circumstances. There are plenty of short-term jobs that provide a source of income for a much shorter period of time than the length of a pregnancy (or indeed two pregnancies).

46. The fourth and final characteristic was that the aggregate sums in question – being £15,000 for the first pregnancy and £10,500 for the second – were indicative of the guideline lump sum figures referred to in the surrogacy case law (see paragraph 16 above). However, the problem with this approach is that it fails to take account of the shorter pregnancy and the correspondingly lower total surrogacy payment in the second case. Those features of the factual matrix point to an analysis based on regular monthly payments of income rather than a capital lump sum paid by instalments.

47. In summary, the four factors identified by Ms Curtis are at best reasons for a finding that the surrogacy payments were not typical forms of income, but they do not go so far as indicating that they were better seen as instalments of capital. Accordingly, I conclude that (i) the FTT applied the correct legal test for determining whether the surrogacy payments constituted income in the Appellant's hands; and (ii) the FTT considered whether, in any event and in the alternative, those payments qualified as capital payments.

Analysis: if the surrogate payments were income, should they be disregarded?

48. The Appellant's alternative argument – on the working assumption that the surrogacy payments were correctly regarded as payments of income rather than capital – was that they fell to be disregarded by virtue of one or other of the two disregards provided for by paragraphs 2 and 15 respectively of Schedule 7 (Sums to be disregarded in the calculation of income other than earnings) to the JSA Regulations 1996.

Paragraph 2 of Schedule 7 to the JSA Regulations 1996

The statutory provision

49. Paragraph 2 of Schedule 7 to the JSA Regulations 1996 (as amended) provides for the following disregard:

> **2.** Any payment in respect of any expenses incurred, or to be incurred, by a claimant who is—
>
> (a) engaged by a charitable or voluntary organisation; or
>
> (b) a volunteer,
>
> if he otherwise derives no remuneration or profit from the employment and is not to be treated as possessing any earnings under regulation 105(13) (notional income).

The Appellant's submissions in summary

50. The Appellant's submission was that in her role as a surrogate mother she was acting as a 'volunteer' within the meaning of paragraph 2(b). In order not to be unlawful, surrogacy was a quintessentially non-commercial activity, as stipulated by the 1985 Act. The Appellant's decision to act in that capacity was entirely voluntary and she derived no remuneration or profit, but only her reasonable expenses (see section 54(8) of the 2008 Act), which accordingly then fell to be disregarded under paragraph 2 of Schedule 7 as a volunteer's expenses. Ms Curtis relied on two further provisions in the JSA Regulations 1996 in support of this submission.

51. The first was regulation 53, which specified certain categories of persons who were to be treated as not engaged in remunerative work. The first such category (as set out in regulation 53(a)) was defined as follows:

> **53.** A person shall be treated as not engaged in remunerative work in so far as—
>
> > (a) he is engaged by a charity or a voluntary organisation or is a volunteer where the only payment received by him or due to be paid to him is a payment which is to be disregarded under regulation 103(2) and paragraph 2 of Schedule 7 (sums to be disregarded in the calculation of income other than earnings) and in this paragraph "volunteer" means a person who is engaged in voluntary work, otherwise than for a relative, where the only payment received, or due to be paid to the person by virtue of being so engaged, is in respect of any expenses reasonably incurred by the person in connection with that work; …

52. Thus, it was argued, the Appellant was a person "engaged in voluntary work, otherwise than for a relative, where the only payment received, or due to be paid to the person by virtue of being so engaged, is in respect of any expenses reasonably incurred by the person in connection with that work". Furthermore, Ms Curtis contended, this definition demonstrated that there was no requirement that the volunteering be undertaken for "a charitable or voluntary organisation" or indeed for any analogous body. Thus, a person can act as a 'volunteer' on an individual-to-individual basis, at least providing the volunteering is not for a 'relative' (in the sense of that term as defined by regulation 1(3)).

53. The second provision relied upon was the definition of "employment" in regulation 3 of the JSA Regulations 1996, which referred to the concept very broadly as

including “any trade, business, profession, office or vocation”. The Appellant’s decision to act as a surrogate mother could, it was said, properly be described as a ‘vocation’ in the sense that it was wholly motivated by altruism and not commercial gain.

The Respondent’s submissions in summary

54. In resisting this argument, Ms MacKenzie made two principal submissions on the construction of paragraph 2 of Schedule 7. First, she argued that the notion of a ‘volunteer’ within the meaning of paragraph 2(b) took its colour from and was informed by the concept of “a charitable or voluntary organisation” in paragraph 2(a). Secondly, she contended that the activity in which a volunteer was engaged must be something akin to employment as that term is generally understood. In that context she drew attention to regulation 12 of the JSA Regulations 1996, which makes provision for special rules applying to volunteers for the purposes of assessing their availability for employment (that being one of the qualifying criteria for IB-JSA which distinguished it from e.g. income support):

> **Volunteers**
>
> **12.**—(1) Paragraph (2) applies if in any week a person is engaged in voluntary work and—
>
> (a) he has restricted the total number of hours for which he is available in accordance with regulation 7(2), 13(3), (3A) or (4), 13A or 17(2); and
>
> (b) the hours in which he is engaged in voluntary work fall in whole or in part within his pattern of availability.
>
> (2) In determining whether a person to whom this paragraph applies is available for employment no matter relating to his voluntary work shall be relevant providing—
>
> (a) on being given one week’s notice, he is willing and able to re-arrange the hours in which he is engaged in voluntary work in order to take up employment at times falling within his pattern of availability; and
>
> (b) on being given 48 hours' notice, he is willing and able to re-arrange the hours in which he is engaged in voluntary work in order to attend for interview at times falling within his pattern of availability in connection with the opportunity of any such employment; and
>
> (c) he complies with the requirements of regulation 6.

(3) In paragraph (2) "week" means any period of seven consecutive days.

55. Thus, Ms MacKenzie submitted, the express terminology of regulation 12 tied in the concept of volunteering to the notion of work, as it contemplated an activity that could be re-arranged (see regulation 12(2)).

Analysis

56. I am not persuaded by Ms MacKenzie's first submission, not least as regulation 53 appears to envisage that volunteering may be undertaken on a one-to-one basis (other than for a relative). So, for example, a person who helps out an elderly neighbour by carrying out their domestic DIY and garden maintenance would arguably be a 'volunteer' within the meaning of regulation 53.

57. However, Ms MacKenzie's second submission is compelling and in my judgement is fatal to any argument that the surrogacy payments are disregarded by virtue of paragraph 2 of Schedule 7. The JSA Regulations 1996 make various provision for volunteers and these stipulations (e.g. in regulations 12, 53 and Schedule 7) must be read consistently across the piece. The common thread of these provisions is that volunteering is seen as effectively akin to unpaid work. However, to describe surrogacy as a form of employment or work (or indeed as a vocation) is to stretch the natural and ordinary meaning of the word beyond breaking point. For example, taking on the role of a surrogate mother is a 24/7 responsibility which cannot be characterised as a form of 'employment' or 'work' – most obviously, it cannot be re-arranged so that there are periods when a claimant is not engaged in surrogacy in order to comply with the availability for employment requirements set by regulation 12. Although I was not referred by counsel to the following passage in my earlier decision in *Secretary of State for Work and Pensions v MA* [2024] UKUT 131 (AAC), this conclusion is consistent with my observations in the course of that appeal (a decision that I should note is currently under appeal to the Court of Appeal):

> 29. Was the claimant 'doing work' for the purposes of regulation 40(1) of the ESA Regulations 2008 (and so to be treated as not being entitled to ESA) when he was buying and selling bikes? Put simply like that - and that is the way the question is posed by regulation 40 - then it admits of only one answer: yes, he was. 'Work' is an ordinary word of the English language and whether a person 'does work' is ultimately a question of fact and degree. So a claimant who sells a single tricycle that their child has outgrown in a one-off garage sale is not engaged in 'work' in any meaningful sense. But a claimant who has a turn-over in the order of £30,000 a year in buying and

selling stolen bikes at markets is doing 'work' just as much as the proprietor of a legitimate second-hand bike shop 'does work', albeit the latter may well generate much less of a profit. Taken together, the various activities involved in sourcing bikes, negotiating prices for purchases and sales, carrying out any necessary repairs and dealing with customers all constitute 'work'. Those activities are essentially the same irrespective of whether the bikes in question are stolen or lawfully acquired. I therefore agree with Mr Castle, subject to one necessary proviso, that 'work' must be given a meaning that includes both legal and illegal activity for the purposes of the ESA scheme. The proviso is that the activity in question must still be capable of being characterised as a form of 'work'. So, for example, a pickpocket is not doing 'work' (although in principle their illicit takings would presumably count for the purposes of the ESA means test as income other than earnings).

58. By the same token, I do not accept that a surrogate mother, by virtue of that status, can be properly regarded as engaged in employment or work for the purposes of this disregard. The role of the surrogate is *sui generis* (unique and in a class by itself). It follows that paragraph 2 of Schedule 7 to the JSA Regulations 1996 was not applicable to the Appellant's surrogacy payments.

Paragraph 15 of Schedule 7 to the JSA Regulations 1996

The statutory provision

59. Paragraph 15 of Schedule 7 to the JSA Regulations 1996 (as amended) provides for the following disregard:

> **15.**— (1) Subject to sub-paragraph (3) and paragraph 41, any relevant payment made or due to be made at regular intervals.
>
> (2) …
>
> (3) Sub-paragraph (1) shall not apply–
>
> (a) to a payment which is made by a person for the maintenance of any member of his family or of his former partner or of his children;
>
> (b) to a payment made–
>
> (i) to a person who is, or would be, prevented from being entitled to a jobseeker's allowance by section 14 (trade disputes); or

(ii) to a member of the family of such a person where the payment is made by virtue of that person's involvement in the trade dispute.

(4) …

(5) …

(5A) In this paragraph, "relevant payment" means—

(a) a charitable payment;

(b) a voluntary payment;

(c) a payment (not falling within sub-paragraph (a) or (b) above) from a trust whose funds are derived from a payment made in consequence of any personal injury to the claimant;

(d) a payment under an annuity purchased—

(i) pursuant to any agreement or court order to make payments to the claimant; or

(ii) from funds derived from a payment made,

in consequence of any personal injury to the claimant; or

(e) a payment (not falling within sub-paragraphs (a) to (d) above) received by virtue of any agreement or court order to make payments to the claimant in consequence of any personal injury to the claimant.

(6) …

60. Thus, by virtue of paragraph 15(1), "any relevant payment made or due to be made at regular intervals" is to be disregarded as a form of income other than earnings. Two matters are self-evident. First, the exceptions in paragraph 15(3) and 41 have no application in the present factual context. Second, the surrogacy payments were plainly "made at regular intervals" within the terms of paragraph 15(1). The critical question, therefore, was whether each of the surrogacy payments qualified as a form of "any relevant payment", namely as "a voluntary payment", within the meaning of paragraph 15(5A)(b) of Schedule 7.

The Appellant's submissions in summary

61. Ms Curtis's alternative and secondary submission (in the event that her primary submission that the payments were capital did not succeed, and aside from her argument based on paragraph 2) was that each surrogacy payment fell to be considered as "a voluntary payment" within the terms of paragraph 15(5A)(b). In

this context she contended that the question as to whether a payment is 'voluntary' for the purposes of means-tested benefit regimes is assessed by reference to the two tests laid down in *R v Doncaster Metropolitan Borough Council ex p Boulton* (1993) 25 HLR 195 ('*ex p. Boulton*'). The first condition is that the payment must be given without anything being obtained in return. As to this, Ms Curtis submitted that the payments were made by the intended parents without the expectation that they would receive anything in return – not least as the surrogacy arrangement was non-binding (see section 1A of the 1985 Act) and the making of a parental order was dependent on a number of other unrelated factors (see section 54 of the 2008 Act). The second requirement is that the payment must be 'benevolent' in nature. As to this, it was said that the payments had a benevolent purpose in that they were provided to support the Appellant with the additional costs that she incurred as a result of the two pregnancies – there was no suggestion that the payments went to meet her basic living expenses.

The Respondent's submissions in summary

62. Ms MacKenzie agreed at a general level with the two principles derived by Ms Curtis from *ex p. Boulton* but disagreed with their application to the circumstances of the instant case. As to the former, she argued that the payments were made by the intended parents in order to make the surrogacy arrangement work, from which they stood to benefit profoundly, and so they did get something in return (not least a reassurance that both parties intended to go through with the arrangement). Accordingly, surrogacy payments were akin to the payments at issue in *ex p. Boulton* – they were motivated by a genuine concern for the interests of both the surrogate mother and the intended child but with the broader purpose of making the surrogacy arrangement work, of which an important element was ensuring that the surrogate mother and the intended child were properly looked after.

Analysis

63. The leading case on the meaning of 'voluntary payment' (an expression left wholly undefined by the legislation) in the context of means-tested benefit schemes is *ex p. Boulton*. The central issue in that case was whether payments in lieu of concessionary fuel made under a scheme set up by British Coal (formerly the National Coal Board) for the benefit of its employees and their widows were "voluntary payments" for the purposes of housing benefit, the statutory scheme for which contained a similar provision entailing that voluntary payments were income that fell to be disregarded in the assessment of

entitlement to benefit. Laws J (as he then was) held that the relevant test was as follows (at p.205):

> the question whether a payment is voluntary is to be judged by looking at the volunteer not the recipient so that the issue is not whether the payee has any legal rights: it is, rather, what is the nature of the payment from the putative volunteer's point of view? Looked at in this way the nature of the legislative policy here becomes entirely clear; it is in fact precisely the same as that relating to the charitable payments. The legislator is looking at a payment which is made, to use Lord Halsbury's words, without anything being obtained in return. There may, I suppose, even be cases where the recipient of the payment could enforce it; certainly there will be cases where the payer has undertaken an obligation, at least in a broad sense of the word, to make the payment.

64. On the facts, Laws J held that the payments in question were not 'voluntary' (again at p.205):

> It seems to me quite plain that the National Agreement, being the result no doubt of careful negotiations with the trades unions, was entered into by British Coal in the interests of good labour relations so as better to secure the willing services of its employees. That is not of course to say that British Coal entertained no more than a selfish motive for making these payments or to suggest that they have no lively and genuine concern for the interests of miners and their widows for their own sake; rather, it is to indicate that the purpose of the National Agreement is to promote the efficient running of the coal industry in which, no doubt as with any large organisation, an important element is to see that employees, ex-employees, and their widows (in other contexts it might be widowers) are properly looked after. This legitimate and proper purpose is, however, far away from the purpose of benevolence behind voluntary payments in the regulations as I have sought to expound it.

65. The principles expounded in *ex p. Boulton* – which was a judicial review – have been followed and applied in the subsequent appellate case law. Thus, in the reported decision *R(H) 5/05* the claimant received large irregular payments from his girlfriend (Ms LB) during a period in which he was seriously unwell. Mr Commissioner Mesher found that "the overall circumstances indicate to me that there was no intention to create legal relations. The transactions were sufficiently within a domestic sphere, without the trappings of clear legal agreements, to produce that conclusion. Thus no legally enforceable rights or obligations were created by the payments to the claimant" (at paragraph 41). The case was

accordingly distinguishable from *ex p. Boulton*, such that the payments in question were voluntary payments:

> 42. That crucially affects the approach to the question whether Ms LB got anything in return for making the payments to the claimant. In the *Boulton* case, Laws J held that the intangible benefits received by the Coal Board in return for making the payments to the claimant in that case were enough to take the payments out of the category of "voluntary payments". But that was in the context of a large organisation operating commercially and with many thousands of employees. The benefits received, although intangible, were real. In the context of an individual in a domestic relationship with the claimant concerned, it seems to me that that sort of intangible benefit does not have the same force. If something like the maintenance of a relationship of affection or of familial duty on the part of the payer or the creation of a merely moral obligation on the part of the payee, dependent on undefined future developments, takes a case out of the category of "voluntary payment" nothing significant would be left. In my judgment, in the ordinary use of language, in such circumstances the payer obtains nothing in return for making the payment. I conclude that in the present case Ms LB obtained nothing in return for the payments she made to the claimant by way of loan and that they were voluntary payments within the meaning of regulation 40(6) of the Housing Benefit Regulations.

66. It followed that the sums transferred by the girlfriend in *R(H) 5/05* were truly benevolent payments – the mere maintenance of family ties or affection did not qualify as getting something by way of return.

67. The requirement that the maker of a voluntary payment should not obtain something in return is neatly illustrated by two decisions involving claimants of income-related employment and support allowance, each of whom received payments from a family trust. In *LG v Secretary of State for Work and Pensions* [2019] UKUT 220 (AAC); [2020] PTSR 550; [2020] AACR 5, Upper Tribunal Judge Poole QC (as she then was) held as follows (at paragraph 29):

> …the payments made regularly by the trust which equate to liferent income were not voluntary, and do not fall within the disregard in paragraph 16 of Schedule 8 (or for that matter regulation 112(7)). The trustees received something in return for the payments, which was a discharge of their legal obligation arising under the trust to pay liferent income to the claimant.

68. By way of contrast, Judge Poole ruled (at paragraph 30) that "payments made to the claimant which represent discretionary advances of capital over and above

the liferent income on the trust funds" qualified as voluntary payments for the purpose of the scheme of disregards.

69. In *SM v Secretary of State for Work and Pensions* [2020] UKUT 265 (AAC), Upper Tribunal Judge Church held that regular payments received under a discretionary family trust fell to be disregarded as voluntary payments:

> 32. While the trustees may discharge their obligations under the trusts by making payments to the Appellant, they may just as well discharge their obligations under the trust without making any payments to the Appellant whatsoever, and there would be nothing that the Appellant could do about that. She is only one of a pool of potential beneficiaries.
>
> 33. The payments made to the Appellant in this case have much more in common with the payment of the discretionary advances of capital in *LG v SSWP* than with the payment of liferent income in that case, or with the payments in lieu of discretionary coal in the *Boulton* case or in *R(IS) 4/94*.
>
> 34. Since the trustees are under absolutely no obligation whatsoever to make payments to the Appellant I cannot see how the payments to her can be characterised as anything but "voluntary". Similarly, it is difficult to see the purpose of the payments as anything but benevolent.

70. In the light of *ex p. Boulton* and the subsequent case law discussed above, it follows that the surrogacy payments could only properly be regarded as 'voluntary payments' if both the relevant tests were satisfied.

71. *First, were the surrogacy payments made without anything being given in return?* Ms Curtis made two principal submissions in this regard. First, she contended that the instant case was much more akin on its facts to *R(H) 5/05* than to the commercial context of *ex p. Boulton*, and drew particular attention to Mr Commissioner Mesher's analysis at paragraph 42 of the former judgment. Secondly, Ms Curtis submitted that the intended parents did not obtain anything in return for the surrogacy payments that they made – the payments were voluntary as there was no means of enforcing them, the surrogacy arrangement itself could not be enforced and the Family Court's decision on whether to grant a parental order was dependent on a range of uncertain future factors (e.g. the surrogate mother's consent and the court's assessment of the best interests of the child or children).

72. As to the former submission, it is obviously true that *ex p. Boulton* was decided against a commercial backdrop and in the context of concessionary

arrangements made in pursuance of good industrial relations. To that extent the present case might indeed appear at first sight to be more akin to the domestic setting of *R(H) 5/05*. However, by focussing unduly on the factual context this approach risks losing sight of the fundamental question, which is whether the person making the payments obtains anything in return for the payments – in *ex p. Boulton* the employers did, whereas in *R(H) 5/05* the girlfriend did not, so the former were not voluntary payments whereas the latter were – which takes us to Ms Curtis's central submission.

73. As for the latter submission, the reality is that the surrogacy payments were put in train in order to make the surrogacy arrangement work. The surrogacy arrangement relies on the parties' mutual co-operation to carry out a legally-unenforceable agreement, as it presupposes both that the intended parents will apply to the Family Court for a parental order and the surrogate mother will in turn consent to the making of that order. The payment of not insubstantial sums of money helps to provide reassurance that both parties are committed to the successful completion of the agreement. The fact that there is no enforceable legal obligation to make the payments is not determinative. As Laws J held in *ex p. Boulton*, "the issue is not whether the payee has any legal rights: it is, rather, what is the nature of the payment from the putative volunteer's point of view?" I agree with Ms MacKenzie's submission that in surrogacy arrangements it is reasonable to assume that the intended parents are under at least a moral obligation to make payments once they have been agreed and the surrogate mother is carrying the intended child, such that they obtain a discharge of that moral obligation in return for the payments made.

74. *Secondly, were the surrogacy payments made for a benevolent purpose?* Ms Curtis relied on a passage in *LG v Secretary of State for Work and Pensions* where additional capital payments were described by Judge Poole as "of a benevolent nature as they are to support the claimant" (paragraph 30). She further submitted that the surrogacy payments were benevolent in that they were intended to meet the extra costs associated with the pregnancies, rather than assisting with basic living expenses. Neither argument is persuasive. The trustees in *LG v Secretary of State for Work and Pensions* did not obtain anything in return for the additional capital payments, so the finding that such payments were an example of unconditional generosity (i.e. that those payments were benevolent) was hardly surprising. Furthermore, while the surrogacy payments in the present case were doubtless motivated by a genuine concern for the interests of both the surrogate mother and the child she was carrying, and so designed to meet the associated expenses, it is unrealistic to view that motivation as wholly divorced from the wider context of the surrogacy transaction itself. Whatever the

surrogate mother's motivations, the intended parents were not acting altruistically – the reality is that they would not be paying the Appellant's expenses were it not for the fact that she was carrying their intended child, showing that the payments were not truly benevolent. If ever there was a case of payments being made for a *quid pro quo*, this was it. They were not voluntary payments as envisaged by *ex p. Boulton*.

75. It follows that paragraph 15 of Schedule 7 to the JSA Regulations 1996 did not operate so as to provide for a disregard for the Appellant's surrogacy payments in the assessment of her income other than earnings for the purposes of her IB-JSA claim.

For completeness: regulation 110(9)

76. If only for completeness, I confirm also that regulation 110(9) of the JSA Regulations 1996 does not assist the Appellant. It was originally pleaded by the Appellant but was later (and rightly) not pursued. Regulation 110 is concerned with 'Income treated as capital' and paragraph (9) provides that "Any charitable or voluntary payment which is not made or not due to be made at regular intervals, other than one to which paragraph (10) applies, shall be treated as capital". Leaving aside the issue as to whether the surrogacy payments were "voluntary payments", on which see the discussion above, such payments were in any event plainly "made at regular intervals" and so necessarily fell outside the ambit of regulation 110(9).

Analysis: did the FTT err by proceeding in the Appellant's absence?

77. The Appellant submitted that the FTT erred procedurally in two respects – first, by not directing the Appellant to produce further evidence as to the nature of the surrogacy payments and, secondly, by going ahead with the hearing of the appeal in her absence.

78. So far as the former is concerned, it was argued that the FTT needed to undertake a more detailed analysis of the nature of the financial agreement between the Appellant and the intended parents, the type of expenses that the surrogacy payments were intended to cover and did cover, and whether the payments were paid on a recurrent basis or as instalments towards a single lump sum. It was further submitted that the FTT should have adjourned the hearing and directed the production of further evidence. However, the decision on whether to adjourn involves the exercise of a judicial discretion. Such a case management decision vests the first instance tribunal with a very broad discretion, such that reasonable tribunals may quite reasonably come to different conclusions. In the present case

the FTT recognised that "it is not here being suggested that these payments flout the rules applicable to surrogacy. That is a matter for the Family Court" (Statement of Reasons, paragraph 14). The decision not to adjourn for further evidence was one that was well within the range of reasonable case management decisions that a tribunal might make in all the circumstances of the case.

79. So far as the latter submission is concerned, the FTT's Decision Notice recorded its decision to proceed in the Appellant's absence in the following terms:

> 5. The appellant did not attend the hearing today. When called by the clerk she asked for the appeal to proceed in her absence.
>
> 6. [The appellant] requested an oral hearing but did not attend today. First Tier Agency representative attended on behalf of the Respondent.
>
> 7. Having considered the appeal bundle to page 104 and the requirements of rules 2 and 31 of The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 the Tribunal is satisfied that reasonable steps were taken to notify [the Appellant] of the hearing and that it is in the interests of justice to proceed today.

80. The FTT gave the following further explanation in its Statement of Reasons:

> 2. The appellant did not attend the hearing but had been notified of the place, time and date of the hearing. When telephoned by the clerk she asked that the appeal proceed in her absence. The tribunal considered whether it was appropriate and proportionate to make a decision in the appellant's absence and concluded that it was. The appellant's case is clearly set out in the appeal bundle and there were no issues raised that would have required an adjournment for further evidence whether written or oral. The respondent was represented at the hearing by [a presenting officer].

81. In this context it is relevant to note rule 2 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685), which states as follows:

> **Overriding objective and parties' obligation to co-operate with the Tribunal**
>
> **2.**—(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.

82. Rule 31 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685) further provides as follows:

Hearings in a party's absence

31. If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal—

(a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and

(b) considers that it is in the interests of justice to proceed with the hearing.

83. In summary, Ms Curtis submitted that the FTT erred in law in deciding that it was in the interests of justice to hear the appeal in the absence of the Appellant. The FTT was under a duty to ensure that the Appellant was able fully to participate in the proceedings (rule 2(2)(c)). Given the Appellant's mental health issues, it was argued the FTT should also have had regard to the Senior President's *Practice Direction (First-tier and Upper Tribunals: Child, Vulnerable Adult and Sensitive*

Witnesses), for example by asking the Appellant whether she wished to have a video-link or telephone hearing instead of a conventional face-to-face hearing. In that context Ms Curtis prayed in aid the decisions in *PM v Secretary of State for Work and Pensions (IB)* [2013] UKUT 301 (AAC) (at paragraphs 5 and 7) and *SW v Secretary of State for Work and Pensions (DLA)* [2015] UKUT 319 (AAC) (at paragraphs 16 and 22).

84. Again, in summary, Ms MacKenzie submitted that there had been no unfairness on the part of the FTT. The Appellant had been called on the day of the hearing and had agreed with the case proceeding in her absence. The FTT's Statement of Reasons, although brief, had indicated that it had given consideration to whether an adjournment for further evidence was needed, but had decided that "The appellant's case is clearly set out in the appeal bundle and there were no issues raised that would have required an adjournment for further evidence whether written or oral." Given this was a case management decision, the Upper Tribunal should only intervene if the decision to proceed in absence was wholly unreasonable.

85. This type of case management decision is necessarily highly fact-sensitive. I agree with Ms MacKenzie, for the reasons that she gives, that the decision not to adjourn but rather to proceed in the Appellant's absence was one that was reasonably open to the FTT in the circumstances of the case. In particular, given the conclusions I have reached on the issue of the proper categorisation of the surrogate payments, I am satisfied there was no resulting unfairness. Had there been an adjournment, the FTT might well have received more detailed information, e.g. about the purposes to which the surrogacy payments were applied, but that does not mean there was any 'silver bullet' which would have resulted in a finding that the monthly payments amounted to capital.

86. It follows that the ground of appeal alleging procedural unfairness is rejected.

Conclusion

87. As none of the grounds of appeal succeeds, I conclude that the decision of the First-tier Tribunal involves no material error of law. I therefore dismiss the Appellant's appeal under section 11 of the Tribunals, Courts and Enforcement Act 2007. The decision of the First-tier Tribunal stands. My decision is also as set out above.

88. I recognise that this judgment will come as a considerable disappointment to the Appellant. In the absence of access to a source of specialist welfare benefits expertise, and reliant on what she could glean from the internet, it is also perhaps

understandable that she assumed that payments of reasonable expenses did not count as income for the purposes of a means-tested benefit such as IB-JSA. However, the Family Court's acceptance in parental order proceedings (albeit notably sometime after the event) that no money has changed hands in pursuance of a surrogacy arrangement, other than "expenses reasonably incurred", cannot be determinative of the status of such funds under social security legislation. That said, potential surrogates are entitled to expect greater clarity about the consequences of accepting surrogacy payments when they are on benefit – although I recognise that, depending on individual circumstances, it may be more advantageous for some claimants to have such payments treated as capital while for others the converse may be true. With that in mind, I recommend that the Secretary of State's officials review the current treatment of surrogacy payments in the benefit system. I emphasise that I am making no suggestion as to whether the present position should be changed, not least as this would raise wider policy issues which are outwith the jurisdiction of the Upper Tribunal (some of the difficulties are highlighted by the Law Commissions in their 2023 report *Building families through surrogacy: a new law Volume II: Full report* (Law Commission No.411, Scottish Law Commission No.262) at paragraphs 12.163-12.166). In that context it must also be remembered that the methodology for assessing income and capital is very different under the universal credit scheme to that under the arrangements for the legacy benefits such as IB-JSA.

Nicholas Wikeley
Judge of the Upper Tribunal
Authorised by the Judge for issue on 9 January 2026