Neutral Citation Number: [2021] EWCA Civ 679

Case No: C6/2019/2863

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
UTJJ Rimington and Jackson
[2019] UKUT 00393 (IAC)

Royal Courts of Justice,
Strand, London, WC2A 2LL

Date: 11/05/2021

Before :

LORD JUSTICE UNDERHILL
Vice-President of the Court of Appeal (Civil Division)
LORD JUSTICE POPPLEWELL
and
LORD JUSTICE NUGEE

- -

Between:

THE QUEEN ON THE APPLICATION OF JIE WANG AND ANOTHER

Appellant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -
- -

Rupert D'Cruz QC and Ramby de Mello (instructed by **Jackson & Lyon LLP**) for the **Appellant**
Zane Malik QC and Julie Anderson (instructed by **the Treasury Solicitor**) for the **Respondent**

Hearing date: 20 April 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.30 a.m. on Tuesday, 11 May 2021.

Lord Justice Popplewell:

Introduction

1. On 20 January 2014 the Appellant, Ms Wang, was granted entry clearance as a Tier 1 (Investor) Migrant and leave to remain until 6 April 2017, together with her son ("G") whose entitlement as a minor was dependent upon her own. On 20 February 2017 Ms Wang and G made an application for further leave to remain as a Tier 1 (Investor) Migrant and dependant respectively. In order to fulfil the applicable conditions under the Immigration Rules, it was necessary for her to have borrowed £1 million from a UK financially regulated institution so as to have that sum under her control; and to have invested at least £750,000 of such sum in UK Government bonds or in share capital or loan capital in a qualifying active and trading UK registered company, as defined. Ms Wang's claim was based on her participation in a scheme sold to her and over 100 other applicants for Investor Migrant visas, whereby £1 million was borrowed from Maxwell Asset Management Limited ("MAM") and invested in Eclectic Capital Limited ("Eclectic") by way of a convertible loan. I shall refer to this as the Maxwell/Eclectic scheme.

2. Following requests from the Respondent ("the SSHD") for further information and two interviews with Ms Wang, the SSHD refused the applications in a decision of 20 December 2017. Ms Wang and G made an application for administrative review, which was concluded on 6 February 2018 with the SSHD's determination that the previous refusal should be maintained.

3. The SSHD refused the application on the twin grounds that the loan from MAM did not result in her having the proceeds under her control, and that the investment in Eclectic was not a qualifying investment. Ms Wang and G brought judicial review proceedings in the Upper Tribunal, which heard their application together with that of another migrant who had participated in the Maxwell/Eclectic scheme, and in respect of whom similar issues arose. The Upper Tribunal dismissed the applications. Ms Wang now appeals to this court.

The Tier 1 (Investor) Migrant rules

4. The conditions governing the grant of entry clearance, leave to remain, and indefinite leave to remain for Tier 1 (Investor) Migrants are set out in the Immigration Rules at Rules 245E to 245EF and paragraphs 54 to 65-SD of Appendix A. The relevant version of the Immigration Rules is that in force at the time of the SSHD's decision in 2017. There are differences from the earlier version applicable between October 2013 and February 2014 when Ms Wang entered into the Maxwell/Eclectic Scheme and when entry clearance and the first leave to remain were granted to her, but they are not material to the issues which arise on the appeal, save in one respect to which I refer below.

5. As is common for many of the grounds for entry and settlement provided for in the Immigration Rules, the parts of the Rules dealing with Investor Migrants envisage the grant of temporary leave to remain in stages, followed ultimately and potentially by the grant of indefinite leave to remain. Rule 245E identifies the purpose of the Investor Migrant provisions, as a ground for entry and route to settlement, in these terms: "This

route is for high net worth individuals making a substantial financial investment to the UK."

6. To qualify for leave to remain prior to indefinite leave to remain ("LTR"), it is both necessary and sufficient for the applicant to meet the conditions set out in Rule 245ED. There are three relevant requirements. The first is that the applicant must have, or have last been granted, entry clearance, leave to enter or LTR as one of a number of categories of migrant, categories which include, but are not limited to, Investor Migrants. Ms Wang fulfilled this criterion, having been granted entry clearance and initial LTR as an Investor Migrant on 20 January 2014. Secondly, the applicant must have a minimum of 75 points under paragraphs 54 to 65-SD of Appendix A. Thirdly, under sub-paragraph (e) of Rule 245ED, "the assets and investment the applicant is claiming points for must be wholly under his control."

7. Paragraph 54 of Appendix A repeats that the applicant must score 75 points for attributes. There are three tables identifying how to score points for the purposes of entry clearance or LTR, namely Tables 7, 8A and 8B. Only one applies to any given applicant, determined in accordance with the provisions of paragraphs 55 and 56 of Appendix A. By reason of paragraph 56(b), the relevant table in Ms Wang's case was Table 8B because she had been granted entry clearance and LTR as an Investor Migrant under the Immigration Rules in place before 6 November 2014.

8. So far as is relevant, Table 8B provides as follows (I have italicised the parts which are key to the present appeal):

Money and Investment	Points
The applicant: (a) has money of his own under his control in the UK amounting to not less than £1 million, or (b) (i) owns personal assets which, taking into account any liabilities to which they are subject, have a value of not less than £2 million, and (ii) *has money under his control* and disposable in the UK amounting to not less than £1 million which has been loaned to him by a UK regulated financial institution.	30
The applicant has invested not less than £750,000 of his capital in the UK by way of UK Government bonds, share capital or loan capital *in active and trading UK registered companies, subject to the restrictions set out in paragraph 65 below* and has invested the remaining balance of £1,000,000 in the UK by the purchase of assets or by maintaining the money on deposit in a UK regulated financial institution.	30
The investment referred to above was made:	15

(1) within 3 months of the applicant's entry to the UK, if he was granted entry clearance as a Tier 1 (Investor) Migrant …	

9. As is apparent, there are only 75 points available under the table, such that in order to qualify the applicant must fulfil the criteria in each of the three rows. It is unlike some other aspects of the Rules involving a points based system in which the total number of points required can be acquired by fulfilling a number of alternative criteria.

10. In Ms Wang's case the relevant part of row 1 is alternative (b), and the dispute relates to whether she fulfils paragraph (b)(ii).

11. Paragraph 61 of Appendix A provides that "money of his own" and "personal assets" include money or assets belonging to the applicant's spouse or partner in certain limited circumstances.

12. Paragraph 61A of Appendix A provides:

> "In Tables 7 to 9B "money of his own under his control" and "money under his control" exclude money that has been secured against where another party would have a claim on the money if the loan repayments were not met" [except in limited circumstances set out in the remainder of the paragraph].

13. Paragraph 65 of Appendix A provides:

> "Investment excludes investment by the applicant by way of:
>
> (a) ….
>
> (b) "Open-ended investment companies, investment trust companies, investment syndicate companies or pooled investment vehicles,
>
> …"

14. Paragraph 65A of Appendix A provides

> "'Active and trading UK registered companies' means companies which:
>
> (a) have a registered office or head office in the UK;
>
> (b) have a UK bank account showing current business transactions; and
>
> (c) are subject to UK taxation."

The Maxwell/Eclectic Scheme

15. The Maxwell/Eclectic Scheme was marketed to potential Investor Migrants, who all participated on the basis of standard documentation comprising three agreements, namely:

(1) a loan agreement between MAM and the migrant, under which MAM lent the migrant £1 million (or in one case £5 million);

(2) a services agreement between the migrant and Maxwell Holding Limited, MAM's parent company ("Maxwell Holding"); and

(3) a loan agreement between the migrant as lender and Eclectic as borrower, under which the migrant invested the £1 million in Eclectic by way of a five-year loan, convertible into equity at Eclectic's option.

16. MAM was incorporated in 2007 in accordance with the laws of England and Wales and is regulated by the Financial Conduct Authority. It qualifies as a "UK regulated financial institution'" for the purposes of paragraph (b)(ii) of Table 8B. Its sole director is Dimitri Petrovich Kirpichenko ("DK"), a Russian national. Documents filed by MAM at Companies House in 2017 indicate that although it had been set up in order to invest in the Russian Stock Exchange, it had not done so, but had made loans to individuals, at that time totalling some £112 million. MAM's annual report and financial statements in 2017 record the company as being a wholly owned subsidiary of Maxwell Holding, and the ultimate controlling party as being its sole director, DK. Its shares had not always been held 100% by Maxwell Holding, having at an earlier stage been held in part directly by DK, and his wife Nika Kirpichenko ("NK"), also a Russian national.

17. Maxwell Holding is a Cypriot company which has at all material times been beneficially owned and controlled by DK and NK.

18. Eclectic is a company incorporated in accordance with the laws of Jersey on 27 June 2013. NK has always been its sole director. Prior to the implementation of the scheme it had 100 shares, all of which were owned by NK. The implementation of the scheme involved an amendment being made to the articles of association on 12 June 2014, which divided the share capital into ordinary shares and preference shares. The ordinary shares remained owned by NK. The preference shares were to form the equity into which the migrants' loans were to be converted. They carried an entitlement to a dividend of 2% per annum on the nominal value of the shares, payment to be deferred until the earlier of redemption of the shares or the sixth anniversary of the date of purchase. Eclectic was entitled to redeem preference shares at any time, but the holders of the preference shares could not do so before the sixth year anniversary date without the consent of the ordinary shareholders i.e. NK; and such redemption would be at nominal value. The preference shares carried no voting rights, and could not be sold, transferred, assigned, pledged, charged or otherwise disposed of without the consent of the owner of the majority of the ordinary shares, i.e. NK. Subsequently a further amendment was made to the articles of association, classifying the existing preference shares as Class A and providing for a further class of preference shares, namely class B preference shares, which were only entitled to a deferred dividend of 0.00001% per annum, payable on the same six year deferred basis as the class A preference shares.

19. Sarmand Global, the chartered accountants for Eclectic, provided a letter with a detailed breakdown of the investments made by Eclectic as of 30 June 2016. These investments totalled £111,127,038, and were all investments in companies in Russia, save for one investment of £6,694,850 in a company in Jersey. The letter stated that at that date, i.e.

30 June 2016, Eclectic's principal business activity was security dealings, although focus had since moved to hospitality (wine bars) and media activity in the UK.

20. The accounts for Eclectic to 30 June 2017 identified that Eclectic had invested in subsidiary companies named Holborn Wine Bar Ltd, Eclectic Gallery Ltd, Portobello Wine Ltd, AAT Lab Ltd and S.A.I.D (UK) Ltd. The documents filed at Companies House in relation to each of these companies show that Holborn Wine Bar Ltd is a dormant company with only £100 of assets; Eclectic Gallery Limited has assets of £7,934 and net liabilities of £2,766; Portobello Wine Ltd is a dormant company with only £100 on its balance sheet; AAT Lab Ltd has net current assets of some £200,000 and net liabilities of some £233,000; and S.A.I.D (UK) Limited has net current assets of some £59,500 and net liabilities of some £466,000. With the sole exception of Holborn Wine Bar, NK is the director and/or a shareholder of all these companies.

21. In summary, therefore, when Ms Wang entered into her loan agreement with Eclectic on 20 January 2014, the evidence shows that its principal business activity was security dealings; and as at 30 June 2016, such investments were almost exclusively in Russian companies, with one exception being an investment in a Jersey company. Despite the reference in the accounts to a subsequent move into hospitality and media activity in the UK it would not appear that this forms any substantial part of its business.

22. Over 100 applicants for Investor Migrant visas participated in the Maxwell/Eclectic scheme. All, without exception, invested the funds loaned by MAM in Eclectic.

Ms Wang's contractual documents

23. Ms Wang entered into a loan agreement with MAM and a services agreement with Maxwell Holding each dated 23 October 2013 ("the MAM loan agreement" and "the services agreement" respectively). She entered into a loan agreement with Eclectic dated 20 January 2014 ("the Eclectic loan agreement"). The proceeds of the MAM loan agreement were never received by Ms Wang herself; instead, and as contemplated by the MAM loan agreement, they were paid directly from MAM to Eclectic pursuant to her written instructions, given on 7 February 2014.

24. The MAM loan agreement, which was governed by English law, contained the following terms:

    (1) Under clause 2.1 MAM agreed to make available a facility of £1 million subject to the terms of the agreement. By clause 2.2 the purpose of the facility was said to be to enable Ms Wang to meet the requirements of the UK Border Authority for a Tier 1 (Investor) visa. Clause 2.2 provided: "the Facility will be used for AID." AID stood for Authorised Investment Destination and was defined by clause 1.1(i) as meaning "investments in share capital or loan capital in active and trading UK registered companies." AID Company was defined by clause 1.1(j) as meaning "company for purposes of AID."

    (2) By clause 6.2.2 the loan term was five years. By clause 5.1 the loan was to carry interest at 3% per annum which was payable quarterly in arrears. The five-year term was, however, subject to clause 4.1 which provided: "Date of the repayment is determined by [MAM] in its sole discretion, considering symmetric repayment from the AID Company to Borrower."

(3) By clause 6.1 there were various obligations on Ms Wang which were required to be fulfilled prior to draw down. One of them, at clause 6.6, was "to sign a loan agreement or share purchase agreement with the AID Company".

(4) Clause 11.1 provided that if the competent UK authorities refused to issue a Tier 1 (Investor) visa to Ms Wang for any reason, "this agreement loses force."

25. The services agreement, also governed by English law, provided that Ms Wang was to pay £200,000 upfront for the services under the agreement. This £200,000 was in substance the fee payable by Ms Wang for participating in the scheme, because one of the obligations undertaken by Maxwell Holding under the terms of the services agreement was that it would be responsible for discharging Ms Wang's interest payment obligations to MAM under the MAM loan agreement. The services to be provided by Maxwell Holding set out at clause 2.2 were to advise Ms Wang on compliance with the requirements of the legislation in relation to Investor Migrant visas and the quantum and nature of the investment activities required to comply with them; and to assist Ms Wang in the process of opening an account with credit institutions and provide her with information about loan products and fees on services at credit organisations. Clause 2.3 of the services agreement provided that Maxwell Holding would conduct negotiations about loan arrangements on behalf of Ms Wang, and on the terms agreed with her, with MAM; would act as guarantor of Ms Wang's loan repayments to MAM; and would ensure timely execution of Ms Wang's interest obligations without seeking additional funds. Clause 3.3 contained a series of obligations imposed on Ms Wang, including opening an investment account at a UK bank under MAM's management should MAM so require.

26. Clause 3.4 provided: "[Ms Wang] hereby agrees to grant [Maxwell Holding] Power of Attorney, or other document which allows [Maxwell Holding] to act on behalf of [Ms Wang] or to represent [her] interests on issues related to the provision of services under this Agreement." We were told that Ms Wang did not, in the event, execute such a power of attorney.

27. Clause 3.7 contains various undertakings by Maxwell Holding, including at clause 3.7.2 an obligation to ensure that MAM invested Ms Wang's borrowed funds in share capital or loan capital in active and trading UK registered companies within the required period of time; and at clause 3.7.4 "to ensure monitoring of [Ms Wang's] investment in such a way that during five years the value of [Ms Wang's] investment into authorised instruments does not become less than 1.0 million pounds. The choice of specific instruments is at the discretion of [MAM]."

28. Under the Eclectic loan agreement, Ms Wang agreed to lend £1 million to Eclectic on the terms of the agreement. By clause 2.2 the term of the loan was said to be five years, but clause 4.1 provided that the date of repayment was to be determined by Eclectic in its sole discretion. Clause 4.4 gave Eclectic the right unilaterally to convert the loan into preference shares with a nominal value equal to the amount of the loan. Clause 5 provided that the loan was to carry interest at 3.05% per annum payable quarterly, on dates which were in each case one day prior to the repayment dates under the MAM loan agreement. Clause 10 gave Eclectic the option to repay the loan and provided that in the event of repayment or in the event of conversion to equity, the agreement would be terminated.

29. Ms Wang's loan was converted to preference shares pursuant to Eclectic's exercise of its option on or about 20 June 2014, with the result that thereafter she held 1 million preference shares at a nominal value of £1 per share. By a further agreement between Ms Wang and Eclectic dated 20 June 2014, it was recorded that Eclectic had decided to convert the loan to preference shares and that accordingly the loan agreement was terminated "without any consequences and responsibilities of the parties."

The SSHD Decision

30. The first basis on which the SSHD refused the application of Ms Wang and G was that Ms Wang was not wholly in control of the proceeds of the MAM loan or the Eclectic investment. Although she referred to control of the Eclectic investment, it was common ground before the Upper Tribunal and before us that the relevant question related to control of the proceeds of the loan, not control of the investment in Eclectic after it had been made. The SSHD concluded that the investment in Eclectic had not been under Ms Wang's control because she had not exercised any choice regarding placement of the investment funds with Eclectic. Three factors suggested to the SSHD that the loan was contingent on the funds being invested in that single, specific company. These were the terms of the MAM loan agreement, in particular the reference to *the* AID Company in clause 6; the links in the beneficial ownership of MAM and Eclectic; and the unattractive terms of the Eclectic investment, which meant that Ms Wang was guaranteed to make a loss. This led the SSHD to conclude that the money which was lent by MAM was not under Ms Wang's control, because Ms Wang was not able to invest the money anywhere other than in Eclectic. Accordingly Ms Wang did not fulfil the requirements in row 1 of table 8B and qualified for no points under that row.

31. The second basis for the SSHD's decision was that the investment in Eclectic was excluded from being a qualifying investment by paragraph 65(b) of Appendix A, by reference to its trading activity to which I have referred. The investment by Ms Wang was made prior to 30 June 2016, when Eclectic's principal business was to use her funds along with those of others to carry out investments in other companies. The SSHD concluded that such activity fell within the type of investments excluded from qualifying investments by paragraph 65(b), without determining that it was specifically one of the four named entities and if so which. Accordingly the SSHD held that it qualified for no points under row 2 of table 8B.

The Upper Tribunal decision

32. The Upper Tribunal dismissed Ms Wang's application for judicial review in a written decision dated 11 October 2019. At paragraph 68 it observed that there was no real dispute as to the correct approach to the interpretation of the Rules, which was that set out by the Supreme Court in *Mahad v Entry Clearance Officer* [2009] UKSC 16 [2010] 1 WLR 48 at [10]. At paragraph 87 of its decision, the UT said that it did not consider it to be helpful or required to set out a definition of "control" beyond what was already in the Rules, and that it was a word which had to be interpreted in the usual way in accordance with its natural and ordinary meaning, namely that a person had the authority to manage and/or direct the use of the money, asset or investment (depending on the context). This was not just a question of legal or beneficial ownership of the same, but included an element of choice and use. It was necessary to look at all of the facts and circumstances of the case and with reference to the overriding requirement in paragraph 245ED(e) of the Immigration Rules that the assets must be "wholly under

his control". The additional requirement imposed by the word "wholly" showed a higher level of control than one might normally expect in some commercial situations. The Upper Tribunal concluded that in the circumstances, and for the reasons set out by the SSHD in the decision letter, the investment could not possibly have been for good commercial reasons, despite Ms Wang's suggestions to the contrary in the course of her interviews. It was motivated solely by her desire to get an Investor Migrant visa. That consideration, combined with the links between Maxwell and Eclectic and the terms of the loan agreements, entitled the SSHD to draw a rational and lawful conclusion that in all the circumstances Ms Wang did not have any free choice to invest in Eclectic but was required to do so. It was therefore a lawful and rational conclusion for the SSHD to conclude that the money was not wholly under her control.

33. The Upper Tribunal went on to hold that there was a further ground on which the SSHD would have been entitled to reach such a conclusion, namely that control was expressly ceded by Ms Wang to MAM by clause 3.7.4 of the services agreement. This was not a ground identified in the SSHD decision, which is not surprising because the services agreement was only disclosed during the course of the hearing before the Upper Tribunal.

34. In relation to the question whether investment in Eclectic was excluded by paragraph 65(b) as a non-qualifying investment, the Upper Tribunal recorded the SSHD's submission that the rationale for the Investor Migrant route was to encourage capital investment in UK companies and generate tax revenue from the same; that the list in paragraph 65(b) of Appendix A was not exhaustive and that the SSHD could not be expected to list each and every possible thing or scheme which would not meet that policy objective; that no specific technical meaning was intended by the language used to describe the four entities listed in paragraph 65(b): and that in accordance with the guidance in *Mahad* these expressions were to be given their plain English meanings.

35. The Upper Tribunal observed that of the four entities expressly listed in paragraph 65(b), not all have statutory definitions, with one described in various ways by different financial dictionaries and publications. Paragraph 65(b) did not adopt phrases with a statutory definition, as was a common technique elsewhere in the Rules, and the ordinary rules of interpretation should be applied to give them their ordinary and natural meaning. The Upper Tribunal concluded that it was not necessary to set out a specific interpretation of each of the four terms listed because there was a common theme to all four, which was that funds were invested by a number of different people and then used not for the benefits directly of the company invested in, but at least to some extent pooled and used as capital for further investments in other companies, the final destination of which was not necessarily easily identifiable or determined; and without any guarantee that such investment was made in other active trading companies within the UK. Such investments defeated the purpose and clarity of the Tier 1 (Investor) Migrant scheme, and accordingly the SSHD was rationally entitled to conclude that the investment in Eclectic by Ms Wang was excluded from being a qualifying investment because it shared the common features of the entities listed in paragraph 65(b).

Submissions on the appeal

36. There are three grounds of appeal. The first is that the Upper Tribunal erred in law in finding that the SSHD was entitled to conclude that the funds were not under Ms Wang's control on the grounds identified by the SSHD in her decision. The second is

that the Upper Tribunal was wrong to conclude that the SSHD would have been entitled to reach the same conclusion based on clause 3.4.7 of the services agreement. The third is that the SSHD was not entitled to conclude that paragraph 65(b) excluded the investment in Eclectic as a qualifying investment on the ground that it shared characteristics with those entities, when it was not suggested that it was one of the four entities.

37. The submissions on behalf of Ms Wang can be summarised as follows:

(1) The Rules should be interpreted in a way which makes them accessible, clear and transparent, such that an applicant should be able to know simply by reading them how to comply. Against that background, the Upper Tribunal was wrong to make any reference to Ms Wang's motives for entering into the Maxwell/Eclectic Scheme and wrong to place any reliance on whether or not the investment was commercially attractive. It was inherent in the Investor Migrant scheme that a visa would be the reward for making the necessary investment, and so the Rules contemplated both that the obtaining of such visa might be the motivation for the investment, and that its value to the migrant might outweigh any disadvantages in the commercial terms of the investment. In any event questions of motive and commercial attractiveness involved subjective judgments lacking any objective criteria, and had no proper place in a points based system where an applicant should be able to determine simply and clearly whether he or she earned the points necessary to qualify.

(2) In relation to row 1 of Table 8B, the question was simply whether the funds were under her control. That was a question to be determined by reference to her legal rights and obligations under the MAM loan agreement, which clearly provided that she had a choice as to what investment to make with the proceeds of the loan, at least within the wide ambit of investment in any AID company.

(3) The Upper Tribunal was wrong to conclude that by clause 3.7.4 of the services agreement Ms Wang had ceded the choice of the investment to MAM. MAM was not a party to the services agreement and therefore the services agreement could not have created any rights or obligations between MAM and Ms Wang. Moreover clause 3.7.4 referred not to the initial investment, but to changes in investments thereafter in order to comply with the requirements in Rule 245EE(c)(ii), and paragraph 65C(b) of Appendix A, to maintain the value of the investment at £1 million or more throughout the period during which it was required to be maintained.

(4) As to whether Eclectic was excluded as a qualifying entity under paragraph 65(b), it was not sufficient simply to hold that it shared some of the characteristics of the four excluded entities there identified. It had to constitute one of those four specific types of investment vehicle. It did not do so, because they were terms which had a defined meaning for statutory, regulatory or fiscal purposes and the Eclectic investment did not fall within such defined meaning of any of the four specified entities.

38. On behalf of the SSHD, it was submitted that the decision of the Upper Tribunal was correct for the reasons given, with emphasis on a submission that the challenge to the SSHD decision could only be made on well-known public law grounds, which in this

case meant surmounting the very high threshold for establishing that the conclusions of fact on which the SSHD made her decision were irrational.

Grounds 1 and 2: control

39. I find it convenient to start with the issue which occupied the bulk of the argument on these grounds, namely whether Ms Wang's choice as to use of the loan proceeds was limited to investment in Eclectic, or more accurately whether the SSHD's conclusion to that effect is open to challenge on public law grounds, although I do not consider that the resolution of that issue is determinative of the outcome of the appeal, for reasons which I explain below.

40. In this context it is important to look at the nature of the Maxwell/Eclectic scheme from the point of view of MAM as lender, and its parent, Maxwell Holding, who can be equated in commercial terms with DK and NK. If the arrangements permitted investment in any AID Company, as Ms Wang contends, DK and NK would be lending over £100 million to individuals of untested creditworthiness, nominally on terms that carried fixed interest of 3% over 5 years, but in practice simply in return for an upfront fee of £200,000 per migrant. The £200,000 would cover the interest nominally being charged, but not repayment of the principal; and might not represent even a commercial rate of return on the money, depending on the movement of interest rates. There was no security taken in respect of repayment of the debt and if the investment was to serve the purposes of the Tier 1 Migrant Scheme it would not be repaid for a number of years. Such loans would make no commercial sense from a commercial point of view unless the migrants were in practice required to invest in a vehicle under the control of DK and NK, namely Eclectic. Were they free to invest in any AID company, DK and NK would be exposed to very large unsecured debt from individuals of untested creditworthiness. The migrants might change their minds about remaining in the UK and disappear with the proceeds of the investment of the loan. Investment of the loans in other AID companies might ultimately prove to be poor investments. MAM might not be able to trace the migrants or find assets against which to enforce any claim for repayment of the loan. To my mind the arrangements make no commercial sense unless the money lent were required in practice to be invested in Eclectic. Not only did DK and NK thereby secure the loan by retaining control of it at all times, but they also thereby dictated the commercial terms which ensured that the money made a commercial rate of return, because of the disparity between the Eclectic repayment obligations and the £200,000 fee charged. The proof of the pudding is that every single one of the over 100 participants in the scheme invested in Eclectic on terms which were commercially unattractive. It is improbable in the extreme that they would have done so in preference to a more attractive investment had they in practice had any choice as to the destination of the funds loaned.

41. I would accept Mr D'Cruz QC's submission that the commercial viability of the investment in Eclectic from Ms Wang's point of view, and the fact that she may have been motivated by the desire to qualify for Investor Migrant status, are not of themselves factors which justify refusal of leave, but that is not how they were treated by the SSHD or the Upper Tribunal. Rather they were factors which informed the conclusion that in practice Ms Wang had no choice but to invest in Eclectic. That is legitimate. The position is analogous to that in *R (Mudiyanselage) v SSHD* [2018] EWCA Civ 65, [2018] 4 WLR 55, in which the relevant Immigration Rule for one of

the applicants required a genuine intention to make an investment in a qualifying business. Underhill LJ said at paragraph [138]:

> "I agree that question-marks over the commercial viability of a proposed investment or the fact that the applicant in making it may be motivated primarily by an intention to move to the UK are not—at least as far as appears from the provisions to which we were taken—*as such* reasons for refusing an application. However, even if they are inadmissible as considerations in their own right, they are plainly material to the central question of whether the applicant is indeed intending to make the qualifying investment at all: that would be obvious anyway, but it is reinforced by the explicit language of paragraph 245DB(g). That was clearly the purpose for which the ECO relied on these factors, and I can see no basis for holding that the conclusion that he reached was perverse."

42. Mr D'Cruz submitted that the SSHD was bound to determine the question of control by reference to the legal rights of Ms Wang under the MAM Loan Agreement. However, this submission assumes that the MAM Loan Agreement and the services agreement represented the whole of the arrangement agreed with Ms Wang and the other participants in the scheme. For the reasons given, the overwhelming inference is that it did not. I do not find this surprising: it is not uncommon for schemes said to achieve a fiscal or regulatory purpose to involve an oral agreement as to the practical and financial requirements, with signature of standard form documentation required as part of the arrangement.

43. It follows that it was not irrational for the SSHD to conclude from the terms of the agreements and the unattractive commercial terms of the investment in Eclectic that the arrangements between Ms Wang and MAM and Maxwell Holding in relation to the loan left her no choice but to have invested in Eclectic. I would have reached the same conclusion myself.

44. That is not, however, the end of the inquiry. It is necessary to examine whether that is sufficient to prevent the proceeds of the loan having been under Ms Wang's "control" within the meaning of that expression in row 1 of Table 8B. That expression is to be interpreted by reference to Rule 245ED (e) as requiring that the money be *wholly* under her control.

45. What is meant by "control" is to be determined in accordance with principles of construction which were not substantially in issue. The Court's task is to discover what the SSHD must be taken to have intended from the words used in the Immigration Rules, construed objectively according to the natural and ordinary meaning of the words, recognising that they are statements of the SSHD's administrative policy, against the background of the Immigration Rules as a whole and the function which they serve in the administration of immigration policy: see per Lord Hoffman in *M(O) Nigeria v Secretary of State for the Home Department* [2009] UKHL 25, [2009] 1 WLR 1230 at [4]; and per Lord Brown in *Mahad v Entry Clearance Officer* at [10]. If the Rules are ambiguous in any respect, it is legitimate to derive assistance from the executive's formally published guidance if it expresses a lenient interpretation more favourable to the applicant, but it is not permissible to rely on extraneous material to construe the Rules more harshly or to resolve ambiguity in the Government's favour:

see *Pokhiryal v SSHD* [2013] EWCA Civ 1568 [2014] INLR 291 per Jackson LJ at [42]-[43].

46. I start with the question as to what can be deduced, within these parameters, as being the SSHD's intended purpose in imposing a requirement of control in row 1 of Table 8B. The expression occurs in both of the alternative ways in which row 1 can be fulfilled, namely by "money of his own under his control in the UK" of at least £1 million (alternative (a)); or "money under his control and disposable in the UK" of at least £1 million which "has been loaned to him by a UK regulated financial institution" (alternative (b)(ii)).

47. At first sight the scheme of Table 8B is perplexing. It was common ground before us that the requirement of control in row 1 applied at the moment immediately prior to making the investment fulfilling the qualifying criteria in row 2, and at a time and for the duration required in row 3. An applicant will only ever be able to gain the necessary 75 points under the table if rows 2 and 3 are fulfilled, both of which require the investment in a qualifying vehicle to have taken place. Row 1, therefore, will always fall to be considered post investment. It might be thought that at this stage it would be irrelevant to show that the money had previously been sufficiently available for investment: the purpose is that a qualifying investment should be made, which is the subject matter of row 2, and one might have thought that if those requirements are fulfilled there is no useful purpose to be served by a historical inquiry into the position prior to investment. Why, one wonders, should it matter whether or not the funds were under the sole control of the applicant prior to the qualifying investment once the applicant has made the investment, an investment which, if rules 2 and 3 are fulfilled, as they must be to score the necessary 75 points, will be an investment which fulfils the purpose expressed in Rule 245E of high net worth individuals making a substantial financial investment to the UK?

48. I can see two possible answers to this question. The first is that the language of Table 8B row 1, when first introduced and when used in the versions of the Rules prior to 6 November 2014, contemplated circumstances in which the investment had not yet been made at the time of the decision of the SSHD (Table 8B is applicable only to those who are applying for entry clearance or leave to remain following an earlier grant under the rules in force prior to 6 November 2014). This is reflected in the use of the present tense in row 1 ("has money" and "owns" personal assets") which it was common ground had to be manipulated into the past tense to reflect the fact that rows 2 and 3 required it to be applied in all cases in the period after investment, as the past tense of their language indicated. In circumstances where the SSHD's decision under the Rules is being made prior to investment, a requirement of control provides a level of comfort that the applicant will be in a position to make the qualifying investment. If the UK assets or loan entitlement are not wholly under his control, it makes it less likely that he will be in a position to make the investment. Entry clearance or leave to remain is not intended to be granted on the basis of future investment without at least this level of comfort. This is reinforced by the requirement that the money must also be "disposable in the UK" which serves the same purpose.

49. The continued application of the row 1 requirement to circumstances in which the SSHD's decision is being made post investment might simply be the product of poor drafting. It might, however, be justified on the basis that it makes clear that the SSHD is able to revisit the question whether the money was at the applicant's free disposition

prior to investment, notwithstanding that she may have so accepted at the earlier stage of granting entry clearance or initial leave to remain as an Investor Migrant. Those are the circumstances of Ms Wang's case, and it was not suggested on her behalf that the SSHD was in any way precluded, on grounds of legitimate expectation or construction of the Rules or otherwise, from applying the test in row 1 again. In either event, the construction of the requirement that the UK assets or loan entitlement must have been wholly under the applicant's control at the moment prior to investment is to be construed against the background of its purpose being to give, prospectively and prior to investment, a level of comfort that the applicant would be in a position to make the investment. The concept of control is aimed at the availability of the money for investment.

50. A second reason why the pre-investment control requirement may have been retained in Table 8B for post-investment decisions is that it ensures the necessary link between the investment and the grant of the leave to remain to the particular applicant in question. The purpose of the Investor Migrant route is to encourage high net worth individuals to come to the UK, with the attendant potential benefits of their presence here; it would not serve such purpose if the applicant were not really the person who was of sufficient net worth to obtain the loan as disposable by him. If, for example, the applicant were merely a nominee for another who had power to direct the use of the proceeds, then even if they were invested in a qualifying investment in his name, it would not justify grant of the Investor Migrant status to the applicant, as opposed to the person who was in reality able to raise such funds for his own benefit. The same applies to alternative (a) ("has money of his own under his control") and paragraph (b)(i) ("owns personal assets"). This rationale is perhaps a more satisfactory explanation for the application of row 1 in cases where the investment has already been made. Suppose that at the time of initial entry clearance and leave to remain the applicant had secured a loan facility, guaranteed by a third party, under which the proceeds would be wholly under his control: but that arrangements were made thereafter and prior to investment by which the chose in action represented by the loan agreement was transferred to the third party, on terms that the applicant became the mere nominee for the third party in return for cash. If the loan were used for a qualifying investment, in the name of the nominee but in reality at the direction of, and for the benefit of, the third party, it would not fulfil the purpose of the rules that *the applicant* should qualify for Investor Migrant status when he had converted the loan to cash, disposable as he wished, and had not in substance made the qualifying investment himself but only in name. Outside the very limited exceptions provided for in paragraph 61 in respect of spouses and partners, the money must be wholly under the applicant's control to avoid this loophole if this purpose of the rules is to be fulfilled.

51. My conclusion as to the purpose of the control requirement in row 1 of Table 8B, taking into account the two considerations I have identified, is that it is intended by the SSHD to ensure the personal availability to the applicant of the UK assets or loan entitlement respectively. I have used the expression loan entitlement, rather than the proceeds of the loan, because paragraph (b)(ii) does not require the proceeds to pass through the hands of the applicant. They may be, as they were under the MAM loan agreement, transferrable directly by the financial institution at the applicant's direction to a third party, and it was not suggested that this prevented their qualification under row 1. The "money" which must be under control of the applicant for the purposes of (b)(ii) can be the chose in action represented by the loan agreement, just as what is colloquially called

money in the bank is in law a chose of action as a creditor against the bank. The words "has been loaned" in paragraph (b)(ii) mean that the money has been the subject of an enforceable loan agreement, rather than drawn down.

52. My conclusion that the purpose of the control requirement is to ensure the personal availability of the money is consistent with the purpose suggested by both counsel in the course of argument. Mr Malik QC for the SSHD said that it was to ensure that the applicant was in a position to make use of his own money. Mr D'Cruz endorsed the part of the Upper Tribunal judgment in which it said that control connoted that the person had the authority to manage and/or direct the use of the money.

Paragraph 61A

53. Mr D'Cruz submitted that paragraph 61A defined the only circumstances in which money was not under the control of an applicant, namely where it was burdened with a security interest in favour of a third party to secure a loan. I am unable to accept this argument for two reasons. First it is not justified by the language of the paragraph. The paragraph provides that money is to be treated as not being money "under his control" in certain circumstances. It does not provide that it is *only* to be treated as not under his control in such circumstances, and there is no process of construction which would justify such an interpretation. Had such been the intention, a different form of drafting would have been adopted, as elsewhere in the rules, which would have identified that this was what control "means". Secondly, such a construction would not fulfil the personal availability purpose I have identified. Paragraph 61A provides one example in which the purpose would not be fulfilled but by no means the only one. Anything which fetters the applicant's sole power to direct the unencumbered use of the money would cut across such purpose, as for example, where a loan facility was granted to the applicant as nominee only, who was obliged to draw it down and use it in accordance with the instructions of a third party.

Restrictions on use

54. The SSHD and Upper Tribunal determined that Ms Wang did not have the proceeds of the loan wholly under her control because of the restrictions in the use to which she could put it. It is not obvious, however, that control is concerned with anything more than the ability of the applicant to exercise the power to order a transfer of the money. The word control in its natural meaning denotes something in the relationship between the applicant and the money in question, not something about the destination of the money if such power exists. This accords with the purpose being that of personal availability.

55. Some restriction on use cannot be fatal to whether the money is under the control of the applicant within the meaning of row 1 of Table 8B. Loan agreements very often contain terms limiting and defining the use to which the proceeds are to be put, and one would expect any such loan provided for the purposes of Investor Migrant status to do so. The SSHD accepted, implicitly in her decision and explicitly before us through Mr Malik, that if in truth the arrangements between Ms Wang and Maxwell were that the loan entitlement could be invested in any AID Company, that would be sufficient to amount to it being wholly within Ms Wang's control, notwithstanding that it would involve some restriction on the use of the money.

56. Once it is accepted that some restriction on use is not sufficient to prevent money being wholly under the control of the applicant, the question arises what, if any, restriction on use prevents the money having that quality? I do not need to examine the case where the restriction precludes investment in a qualifying vehicle. The present case is one in which the restriction in use is to a single investment, which for the purposes of the present argument is to be assumed to be in a qualifying vehicle. If a restriction is permissible which confines the use of the proceeds of the loan to all qualifying investments, why not to 50% of them? Or three of them? Or one of them?

57. Mr Malik had no satisfactory answer to this question, and I confess that I can see none in the language of the Rules or the purpose they are intended to serve. If the applicant has sole and unrestricted power to direct that the proceeds of the loan are used for a qualifying investment, the personal availability purpose which I have identified is fulfilled. It matters not whether there is a choice within that category amongst various alternatives or Hobson's choice of only one: the result will be investment in a qualifying vehicle, which ex hypothesi fulfils the purpose of the Investor Migrant scheme in the Rules.

58. This was not a point initially advanced by Mr D'Cruz, but was adopted by him when identified, and it is open to Ms Wang on the grounds for which permission was granted; Mr Malik did not suggest otherwise. In my view it is determinative of the question of control which gives rise to grounds 1 and 2 of the appeal, which renders it unnecessary to consider other arguments advanced in respect of such grounds. The SSHD and Upper Tribunal erred in the construction of "control" as a matter of law in treating it as directed to restrictions on use, rather than personal availability, and therefore treating the (correct and lawful) conclusion that the MAM loan had to be used for investment in Eclectic as fatal to Ms Wang's application.

Ground 3: qualifying investment

59. The four entities listed as excluded investments in paragraph 65(b) are: (i) open-ended investment companies; (ii) investment trust companies; (iii) investment syndicate companies; and (iv) pooled investment vehicles. Some, but not all, are terms which have a definition to be found in statute or regulatory provisions. An open-ended investment company is defined in s. 236 of the Financial Services and Markets Act 2000 and Regulation 2 of the Open-Ended Investment Companies Regulations 2001, Regulation 3 of which requires authorisation by the Financial Conduct Authority. Investment trust company is defined in s. 1158 of the Corporation Tax Act 2010. Investment syndicate company and pooled investment vehicle are not so defined, so far as was identified by the parties or I am aware, although Mr D'Cruz submitted, on the basis of a website "free.dictionary", that it was to be equated with a "collective investment scheme". The latter is defined under s. 235 of the Financial Services and Markets Act 2000.

60. Although I express no concluded view, I would have been attracted by an argument that the investment in Eclectic was in a pooled investment vehicle within the ordinary meaning of that term. It involved a vehicle, namely the company, being used to pool the assets derived from the loans from all the investors, and the use of the pooled assets to make investments rather than to trade in goods or services. I can see the force of an argument that the four listed entities are not to be interpreted in accordance with any statutory or regulatory definition (although such may inform the interpretation), in

circumstances where there is no such definition for at least one and arguably two of them: see also *R(Sajjad) v Secretary of State for the Home Department* [2019] EWCA Civ 720 per Holroyde LJ at paragraphs 31 and 32.

61. However this was not the SSHD's case in relation to Ms Wang's application. It formed no part of the reasoning of the SSHD when making her decision, nor that of the Upper Tribunal. Mr Malik fairly conceded that the point was not open to him in this court, and expressly conceded that Eclectic was not said to be any of the four entities identified in paragraph 65(b) in the decision made below. Rather he sought to uphold the reasoning of the SSHD and the Upper Tribunal that Eclectic was excluded because it shared the objectionable characteristics which were exemplified by each of the four entities.

62. In my view this is not a permissible construction of the paragraph for two reasons. First, it is not what the paragraph says as a matter of its ordinary language. Paragraph 65 excludes investments "by way of" the four entities listed in paragraph (b). Those are the excluded entities; they are not exemplars of entities with an unidentified common characteristic.

63. Secondly, the construction adopted by the SSHD and the Upper Tribunal is not consistent with the proper approach to the interpretation of rules in a points based system. In *Mudiyanselage*, Underhill LJ referred at paragraph 45 of his judgment to the reasoning of the majority in *EK (Ivory Coast) v Secretary of State for the Home Department* [2014] EWCA Civ 1517 [2015] Imm AR 367 as reiterating the importance to the operation of a points based system of applying hard edged rules. He quoted paragraph 28 of the judgment of Sales LJ in *EK (Ivory Coast)*, which identified the points based system as intended to simplify the procedure for the relevant applications so as to enable the SSHD to process high volumes of applications in a fair and reasonably expeditious manner, according to clear objective criteria, which was also in the interests of all applicants. Underhill LJ went on to refer to Sales LJ's emphasis on the importance of the points based system being clear and predictable (para 31) and straightforward and reasonably automatic (para 32) and intended to minimise the need for making sensitive and difficult evaluative judgments (para 36); and to the judgment of Briggs LJ at para 59 that the thrust of the regime was the simplicity, predictability and relative speed of the process.

64. Those remarks, in both cases, were made in the context of hard edged rules operating in the SSHD's favour. They were concerned with a failure by applicants to comply with the letter of evidential requirements provided for in points based system rules, and the scope of a principle of evidential flexibility which might allow such non-compliance to be ignored. But a hard-edged rules approach operates for the benefit of applicants as well as the SSHD. The desirability of clear objective criteria, predictability and minimising the need for subjective evaluative judgments, is no less important from the applicant's point of view as that of the SSHD. Investor Migrants, like many other points based system migrants, may make decisions of considerable personal significance and consequence based on an entitlement under the rules, not only in making the financial investment, but also in relocating themselves and their families. The complexity of the rules makes this more difficult for them; as Jackson LJ observed in paragraph 4 of his judgment in *Pokhriyal*, the points based system rules have achieved a degree of complexity which even the Byzantine emperors would have envied. Nevertheless applicants are entitled to proceed on the basis of the advice they

would receive from those familiar with the complexities, whether or not such advice is taken.

65. The approach adopted by the SSHD and the Upper Tribunal in Ms Wang's case is that the SSHD should be permitted to apply the spirit rather than the letter of paragraph 65(b). This is the antithesis of the hard edged rules approach identified in *EK (Ivory Coast)* and *Mudiyanselage*. It would be unfair to an applicant to require him to seek to divine the limits of such an imprecise concept, which would involve speculation about a subjective judgment by the SSHD. This is all the more so where a challenge to such a conclusion by way of judicial review would have to show that the SSHD's evaluative judgment was irrational, in the sense that it was outside the range of subjective judgments reasonably open to her. On the contrary, the predictability which is required of a points based system, based on clear objective criteria, and what might be described as its tick box approach, means that the applicant ought to be entitled to proceed on the basis that if the investment was not one of the entities listed in sub-paragraph 65(b) it was not excluded by that sub-paragraph.

66. This is the result of the drafting of the relevant sub-paragraph as excluding investment "by way of" the four listed entities. The following sub-paragraph, sub-paragraph (c) adopts a different drafting technique, in relation to companies involved in property investment, property management or property development. Here the exclusion is by reference to the nature of the business being conducted, and there is added an explanation, in the sub-paragraph, of the underlying principle. The SSHD might have achieved what is now stated to have been her intention in sub-paragraph (b) by such a drafting technique, or one identifying the characteristics regarded as objectionable with the four entities given as exemplars. As it is, the contrast between sub-paragraphs (b) and (c) reinforces the conclusion that (b) is to be interpreted as containing a list confined to the four entities, and that an applicant could legitimately expect it to be applied in that way.

67. Accordingly, in my view the SSHD's concession that Eclectic was not an entity listed in paragraph 65(b) is fatal to her conclusion that it rendered investment in Eclectic ineligible as a qualifying investment for the purposes of row 2 of Table 8B.

68. It follows that I would allow the appeal.

69. I would add by way of postscript that I have not reached these conclusions with any enthusiasm, and can readily understand why the SSHD and Upper Tribunal regarded the Maxwell/Eclectic scheme as objectionable. It allowed DK and NK to circulate funds, which they originally controlled through Maxwell and which they received back through Eclectic, nominally through the migrants but without losing control in practice at any stage, without investment in what might naturally be regarded as a UK trading company, namely one providing goods and services, but rather for the purposes of investments outside the UK. Such a scheme does not fulfil the purpose expressed in Rule 245E of the applicants making a substantial financial investment in the UK as high net worth individuals. This result is, however, a product of the drafting of the Rules and, perhaps, the SSHD's decision not to argue that Eclectic is a pooled investment vehicle, which means that the scheme fulfils the Rules as drafted. Investor Migrants cannot be criticised if they take advantage of a scheme which is permitted by the terms of the Rules as drafted simply on the grounds that the SSHD's intended objective was

that it should not be permitted. The SSHD's intention is to be found in the terms of the Rules.

Lord Justice Nugee:

70. I agree.

Lord Justice Underhill, VP:

71. I also agree that this appeal must be allowed for the reasons given by Popplewell LJ. Like him, I reach that conclusion with reluctance. I can well understand the Secretary of State's position that it was not the intention that an investment of the kind made by the Appellant in this case should satisfy the requirements for further leave to remain as a Tier 1 (Investor) Migrant. It may in fact be that if she had made her decision to refuse leave on a different basis it might have been sustainable in law: I note in particular the observations at para. 60 of Popplewell LJ's judgment, though I do not rule out the possibility that other arguments may have been available to her. But we can only decide this appeal on the basis of her actual decision and how she sought to defend it in the Upper Tribunal.

72. I wish to add this. It is clear from Popplewell LJ's judgment that the drafting of the relevant rules leaves a great deal to be desired: see in particular paras. 47-51 and para. 66. This Court has repeatedly drawn attention to problems with the quality of the drafting of the Immigration Rules generally and of those parts which govern the points-based system in particular. As regards the latter, Popplewell LJ has quoted Jackson LJ's well-known criticisms in *Pokhriyal*. As regards the Rules more generally, the most recent comments are those of all three members of the Court in *Hoque v Secretary of State for the Home Department* [2020] EWCA Civ 1357, [2020] 4 WLR 154, (see paras. 59, 96 and 105). As Dingemans LJ there put it, "poorly drafted rules lead to avoidable litigation"; and the present case illustrates that it may be the Secretary of State herself, who represents the public interest, that suffers just as much as individual migrants. I very much hope that active consideration is being given by the Secretary of State to a comprehensive review of the drafting of the Immigration Rules.