



R (on the application of JW and Others) v Secretary of State for the Home Department (Tier 1 Investor; control; investments) [2019] UKUT 00393 (IAC)

**Upper Tribunal
Immigration and Asylum Chamber**

Judicial Review Decision Notice

The Queen on the application of JW & GW and Jiaqi Wu

Applicants

v

Secretary of State for the Home Department

Respondent

Before Upper Tribunal Judge Rimington and Upper Tribunal Judge Jackson

- 1. The meaning of 'control' in paragraph 245ED(e) and in Appendix A (specifically in Table 8B and 9B) of the Immigration Rules is to be interpreted in accordance with its natural and ordinary meaning, namely that a person has the authority to manage and/or direct the use of the money, asset or investment (depending on the context). It includes not just a question of legal or beneficial ownership but includes an element of choice of use. The money must be under a person's control at the point of investment.*
- 2. To determine whether a person has the requisite control, it is 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 (at least for the purposes of an application for further leave to remain as a Tier 1 (Investor) Migrant) that the "assets and investment he is claiming points for must be **wholly** under his control".*
- 3. The terms listed in paragraph 65(b) of Appendix A to the Immigration Rules are not to be interpreted by reference to statutory definitions outside of the Immigration Rules but in accordance with the ordinary rules of interpretation applicable to the Immigration Rules, the terms bearing their ordinary and natural meaning.*

Application for judicial review: substantive decision

Having considered all documents lodged and having heard the parties' respective representatives, Ms A Weston QC, Mr R Toal and Mr R D'Cruz of Counsel, instructed by Lu Oliphant Solicitors, on behalf of the Applicants and Ms J Anderson and Mr Z Malik of Counsel, instructed by the Government Legal Department on behalf of the Respondent, at a hearing at Field House, London on 17 and 20 May 2019.

Anonymity Direction

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Applicants in JR/2469/2018. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Decision: the application for judicial review is refused

1. This is the decision of Tribunal, to which both members have contributed.
2. The first application for Judicial Review is brought by JW & GW, who are mother and dependent child; both of whom are subject to an Anonymity Order. In this decision they are identified as A1 and A2. A2's claim is entirely dependent on the outcome of the substantive challenge in A1's claim and there is no distinct or substantive challenge to his refusal of leave to remain as a dependent of A1. The second application for Judicial Review is brought by Jiaqi Wu, referred to as Ms Wu in this decision. The two claims have been linked due to similarity of the facts and issues raised.
3. A1 challenges the Respondent's decision of 20 December 2017 to refuse her application for further leave to remain as a Tier 1 (Investor) Migrant, upheld on Administrative Review on 6 February 2018; and A2 challenges the consequent decision of the Respondent to refuse his application for leave to remain as a dependent of A1. Ms Wu challenges the Respondent's decision of 22 December 2017 to refuse her application for indefinite leave to remain as a Tier 1 (Investor) Migrant, upheld on Administrative Review on 6 February 2018. Both A1 and Ms Wu had previously been granted limited leave to remain as Tier 1 (Investor) Migrants, respectively seeking an extension of leave to remain and indefinite leave to remain in the same category.

Background facts

4. A1 and Ms Wu were both sold a product, by Maxwell Holding Limited ("Maxwell Holding"), by which both

- 5.
6. the investment and immigration elements of the Tier 1 (Investor) Migrant route were to be satisfied. In both cases, the applicants obtained unsecured loans, in A1's case of £1 million and in Ms Wu's case of £5 million, from Maxwell Asset Management Ltd ("Maxwell") which they both invested in Eclectic Capital Limited ("Eclectic"). These two applicants were amongst over 100 individuals who similarly obtained loans of £1 million or over from Maxwell, the funds from which were also invested in Eclectic.
7. To understand the nature of the applications for leave to remain, reasons for refusal and grounds of challenge in these applications for Judicial Review, it is necessary to set out in some detail information about the companies involved, as well as the structure and agreements between them and the applicants. Save for the existence of and detail of the original Services Agreements between each applicant and Maxwell Holding (which were only disclosed to the Respondent and the Upper Tribunal during the course of the oral hearing before us), all of the information which follows was before the Respondent at the time of the decisions under challenge, either from the applications made or from information in the public domain.

Maxwell Holding Limited

8. Maxwell Holding is a company registered and incorporated in Jersey, whose director is Mr Dmitry Petrovich Kirpichenko ("DPK").
9. On 23 October 2013, A1 entered into what is described as a "Services Agreement" with Maxwell Holding (referred to in the agreement as the "Company") in which the latter was to provide A1 with services pertaining to her intention to obtain a UK visa as a Tier 1 (Investor) for a service fee of £200,000. The specific nature of the services provided are set out in clause 2 of the Services Agreement¹, which so far as relevant are as follows:

- "2.2 Considering set out in Section 2.1 point of this Agreement, the Company*
- will advise the Client on compliance with the requirements of legislation of the United Kingdom to persons applying for the UK Visa Tier 1 (Investor), as well as the quantum nature of the investment activities of Clients required to obtain a Visa type Tier 1 (Investor) of the United Kingdom.*
 - will inform the Client of the requirements of United Kingdom legislation regarding the credit obligations of the Client and their enforcement under law.*
 - will assist the Client in the process of opening an account with credit institutions, and will also provide the Client with information about loan products and fees on services at credit organizations.*

¹ The quotes from the Services Agreement and financial documents relating to the various companies set out here and below contain typographical and grammatical errors which all appear in the original documents.

2.3 *The Company also*

- *will conduct negotiations about loan arrangements on behalf of the Client and on the terms agreed with the Client, with the Manager, as well as helping in to prepare and deliver the required documents to the Manager.*
- *will act as guarantor of the Client's loan repayments to the Manager.*
- *will ensure timely execution of the Client's loan interest payment schedule by Client, without the involvement of extra cash.*
- *will provide other services within its competence in accordance with the intentions of the Client as set out in Section 2.1 point of this Agreement."*

10. The 'Manager' is defined in section 1 of the agreement as meaning *"Maxwell Asset Management Ltd., the company authorized by the Financial Conduct Authority UK, duly registered in the United Kingdom"*.

11. Section 3 of the Services Agreement sets out a schedule of activity with obligations on both parties. So far as is relevant to the issues in the current proceedings, this included the following provisions and obligations on the part of the Client:

"3.3.3 Open (with the Company's and the Manager's assistance) an investment account at the UK Bank under the Manager's management, in case if it is necessary in a Manager's opinion.

3.3.4 Attend a face-to-face meeting with the Manager, in order to sign the original this Agreement and Loan Agreement, as well as to provide the Manager with the originals of all the documents legalized in accordance with the law of UK as required by Section 3.1.1 point of this Agreement, if the documents were not provided before.

3.4 The Client hereby agrees to grant the Company Power of Attorney, or other document which allows the Company to act on behalf of the Client or to represent its interests on issues related to the provision of services under this Agreement.

...

3.7 After executing the Client its obligations according to Sections 3.3.1 – 3.3.4 of this Agreement, the Company shall:

3.7.1 Ensure the provision of Loan facility to the Client by the Manager in amount of 1.0 million GBP

- a. Loan term is 5 (five) years.*
- b. Loan will be granted on the investment account of the Client, opened at the UK bank and managed by the Manager or otherwise provided by Loan agreement and defined by the Manager.*
- c. Loan will be granted in accordance to the requirements for Tier 1 Investor Visa no later than three months from the date of entry of the Client in UK.*

- 3.7.2 *Ensure that the Manager invests the Clients borrowed funds in the Authorised instruments within the required period of time (three months from the date of entry of the Client in UK).*
- 3.7.3 *Ensure the payment of interest on the loan in such a way that the Client does not incur any additional costs to pay for such expenses.*
- 3.7.4 *To ensure monitoring of the Clients investment in such a way that during 5 years the value of the Clients investment into authorised instruments does not become less than £1.0 million. The choice of specific instruments is at the discretion of the Manager.”*
12. A materially identical Services Agreement was entered into by Ms Wu with Maxwell Holding on 27 January 2014, save the loan amount was £5 million.
13. The existence of the Services Agreement between A1 and Maxwell Holding, and between Ms Wu and Maxwell Holding was not expressly disclosed to the Respondent with either of their initial or subsequent applications for leave to remain in the United Kingdom as a Tier 1 (Investor). Its existence and a copy of the agreements were only disclosed during the course of the substantive oral hearing of these applications for Judicial Review further to specific questions being raised by the Tribunal.
14. There was however an undated letter to A1 from Maxwell Holding confirming receipt of payment of £200,000 on 19 November 2013 in accordance with the Services Agreement; an addendum to the Services Agreement between A1 and Maxwell Holding dated 20 June 2014 and a materially identical addendum to the Services Agreement between Ms Wu and Maxwell Holding also dated 20 June 2014. The addendum amended section 3.7.3 of the original agreement to include an agreement by the Company (Maxwell Holding) to pay interest on the Loan Agreement (that concluded between A1 and Maxwell dated 27 January 2014) on behalf of the Client (A1). It is unclear at what point or for what purpose these documents were provided to the Respondent, whether it was within the original application, provided with the application for Administrative Review or only as part of Judicial Review proceedings. We do not have a copy of any similar documents in relation to Ms Wu or her Services Agreement with Maxwell Holding.

Maxwell Asset Management Ltd

15. Maxwell is a company which was incorporated on 21 May 2007, whose sole director since incorporation has been DPK. Between 17 July 2008 and 18 June 2013, Maxwell changed its name to Menostar Asset Management Limited, before reverting to being called Maxwell Asset Management Limited.
16. As at 21 May 2008, Maxwell was a wholly-owned subsidiary of Menostar

Holdings Ltd (“Menostar”), a company incorporated in Cyprus whose sole director and owner is DPK. According to the annual return dated 23 April 2013, Maxwell’s shares were owned by Menostar (9,700), DPK (740,000) and Ms Nika Kirpinchenko (“NK”) (1,200,000). NK is the wife of DPK. Maxwell’s Annual Report and Financial Statement in 2017 records the company as being a wholly owned subsidiary of Menostar and the ultimate controlling party is its sole director, DPK.

17. In its Annual Report and Financial Statement in 2017, Maxwell states that:

“During the years ended 30 September 2014 to 30 September 2016 Maxwell Asset Management Ltd (“Maxwell”) engaged in the provision of loans to high net worth individuals looking to invest in the UK. ... Maxwell was originally established to manage overseas investment funds primarily investing in the Russian stock market, but the company never commenced to earn any trading income from this activity.”

18. With regards to the loans made by Maxwell, the Annual Report and Financial Statement for the year ended 30 September 2017 states:

“During the year ended 30 September 2016, the company made a loan of £1,000,000 to an unconnected third party, which was invested by them in a company under the control of the wife of the director. No loans were made in the year ended 30 September 2017. At 30 September 2017, the total amount of the loans to unconnected third parties, which were invested by them in a company under the control of the wife of the director was £112,000,000 (2016: £112,000,000). The parent has provided an irrevocable undertaking to the company that it would bear the risk and full cost in the event that any of the third parties were to default on part or all of their indebtedness to the company”.

19. A1 entered into a loan agreement with Maxwell on 23 October 2013. Under this agreement, Maxwell would lend £1 million to A1, the express purpose of which was to enable A1 to meet the requirements of the Immigration Rules as a Tier 1 (Investor). The loan amount was to be used for ‘AID’, defined in the agreement as “investments in share capital or loan capital in active and trading UK registered companies”. The loan term was for a period of five years, to be granted, in accordance with the requirements of A1’s Tier 1 Investor visa, no later than three months from the date of entry of A1 into the United Kingdom and the interest rate on the loan was 3% per annum.

20. Ms Wu entered into a loan agreement with Maxwell on 27 January 2014, which was materially identical to the one entered into by A1 with Maxwell, save that the loan amount was £5 million.

Eclectic Capital Limited

21. Eclectic is a company which was incorporated on 27 June 2013, from which point NK has been its sole director and NK has consistently held all 100

ordinary shares issued by the company.

22. On 12 June 2014, an amendment was made to the articles of association of Eclectic, which included the division of share capital of the company into ordinary shares and preference shares. Only holders of ordinary shares have the right to vote in general meetings of the company; holders of preference shares did not. Preference shareholders involvement in Eclectic was limited to a deferred entitlement of a dividend of 2% per annum on the nominal value of the shares, to be paid on the earlier of the redemption of the shares or on the sixth anniversary of the date on which the share was issued. Eclectic was entitled to redeem preference shares at any time in its discretion (for their nominal value or at a premium), but the holders of preference shares were entitled only to request redemption six years after the date of their issue and only at nominal value. Preference shares could not be sold, transferred, assigned, pledged, charged or otherwise disposed of without the consent of the owner of the majority of ordinary shares, namely NK.
23. As at 27 June 2014, as shown in the annual return for Eclectic, there were 23 preference shareholders, comprised of 22 holders each of 1 million preference shares at a value of £1 per share (which included A1) and one holder of 5 million preference shares at a value of £1 per share, which was Ms Wu.
24. On 19 May 2015, a further amendment was made to the articles of association of Eclectic, to divide the share capital into ordinary shares and two classes of preference shares, class A and class B, with the same terms for ordinary shares and class A preference shares (as the per the existing preference shares). The new class B preference shares were only entitled to a deferred dividend of 0.00001% per annum on the nominal value of shares, to be paid after six years if the same person had held the shares for a continuous six-year period. As with class A preference shares, Eclectic were entitled to redeem them at any time in their discretion, at the nominal value or at a premium; but the holders of class B preference shares were only entitled to request redemption after holding the shares for a continuous six-year period at nominal value.
25. As at 27 June 2015, the annual return of Eclectic shows that it had 104 preference shareholders, 103 of whom held 1 million preference shares for which they paid £1 per share and one shareholder with 5 million preference shares for which they paid £1 per share (Ms Wu).
26. On 22 February 2018, a further amendment was made to the articles of association of Eclectic to create a further class C of preference shares with equivalent limited rights to the class B preference shares. At each stage of amendment to the articles of association set out above, there were increases in the amount of share capital which could be issued.
27. Sarmand Global, the Chartered Accountants for Eclectic provided a detailed

breakdown of the investments made by Eclectic as of 30 June 2016. These investments totalled £111,127,038 and save for one investment of £6,694,850 to a company in Jersey; all other investments were in companies in Russia. The letter went on to state that although at this date Eclectic's principal business activity was security dealings, its focus had since moved to hospitality (wine bars) and media activity in the UK.

28. The accounts for Eclectic to 30 June 2017 stated that Eclectic has invested in subsidiary companies named Holborn Wine Bar Ltd, Eclectic Gallery Limited, Portobello Wine Ltd, AAT Lab Ltd and S.A.I.D (UK) Limited. The Respondent has provided documents filed at Companies House (which are publicly available and relate to the same or similar time period as the Eclectic accounts) in relation to each of these companies, showing that Holborn Wine Bar Ltd is a dormant company with only £100 of assets; Eclectic Gallery Limited has assets of £7934 and net liabilities of £2766; Portobello Wine Ltd is a dormant company with only £100 assets 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 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.
29. A1 entered into a loan agreement with Eclectic on 20 January 2014, pursuant to which she would lend £1 million to Eclectic for a term of five years at an interest rate of 3.05% per annum. Ms Wu entered into a materially identical loan agreement with Eclectic on 19 February 2014, save that the amount to be lent in her case was £5 million. Those sums were, on the written instructions of A1 and Ms Wu, paid directly from Maxwell to Eclectic and were not paid out to the applicants to make the loan directly themselves.
30. On 20 June 2014, there was an additional agreement to the loan agreement between A1 and Eclectic and to the loan agreement between Ms Wu and Eclectic, pursuant to which Eclectic converted the loans given by each of them into 1 million and 5 million preference shares respectively, with a nominal value of £1 each. The additional agreement terminated the original loan agreement and specified that no interest at all had been accrued on the loan for the entire period from the date of the loan agreement until its termination on 20 June 2014.

Legal Framework

31. Paragraph 245ED of the Immigration Rules sets out the requirements for leave to remain as a Tier 1 (Investor) Migrant, which so far as relevant to A1, provide as follows:

"Requirements

- (a) *The applicant must not fall for refusal under the general grounds for refusal, and must not be an illegal entrant.*
- (b) *The applicant must have a minimum of 75 points under paragraphs 54 to 65-SD of Appendix A.*
- (c) *The applicant must have, or have last been granted, entry clearance, leave to enter or remain:*
 - (i) *as a Highly Skilled Migrant,*
 - (ii) *as a Tier 1 (General) Migrant,*
 - (iii) *as a Tier 1 (Entrepreneur) Migrant,*
 - (iv) *as a Tier 1 (Investor) Migrant,*
- ...
- (e) *The applicant must be at least 18 years old and the assets and investment he is claiming points for must be wholly under his control.*
- (f) *The applicant must not be in the UK in breach of immigration laws except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded.*
- (g) *The Secretary of State must not have reasonable grounds to believe that:*
 - (i) *notwithstanding that the applicant has provided the relevant specified documents required under Appendix A, the applicant is not in control of or at liberty to freely invest the money specified in their application for the purposes of meeting the requirements of Table 7 of Appendix A to these Rules (where relevant); or*
 - (ii) *any of the money specified in the application for the purposes of meeting the requirements of Table 7 of Appendix A to these Rules held by:*
 - (1) *the applicant; or*
 - (2) *where any of the specified money has been made available to the applicant by another party, that party, has been acquired by means of conduct which is unlawful in the UK, or would constitute unlawful conduct if it occurred in the UK; or*
 - (iii) *where any of the money specified in the application for the purposes of meeting the requirements of Table 7 of Appendix A to these Rules has been made available by another party, the character, conduct or associations of that party are such that approval of the application would not be conducive to the public good, and where the Secretary of State does have reasonable grounds to believe one or more of the above applies, no points from Table 7 (where relevant) will be awarded. ..."*

32. Paragraph 245EF of the Immigration Rules sets out the requirements for indefinite leave to remain as a Tier 1 (Investor) Migrant, which so far as relevant to Ms Wu, provide as follows:

"Requirements

- (a) ...
- (b) *The applicant must not fall for refusal under the general grounds for refusal, and must not be an illegal entrant ...*
- (c) *The applicant must have a minimum of 75 points under paragraphs 54 to 65-SD of Appendix A. ..."*

33. Paragraphs 55 to 58 of Appendix A refer to the Tables contained in the Appendix setting out the points requirements for different categories of application according to whether the initial application for leave to remain as a Tier 1 (Investor) Migrant was made before or after 6 November 2014. So far as relevant to A1 and Ms Wu; who both had previous grants of leave to remain as a Tier 1 (Investor) Migrant prior to 6 November 2014, these paragraphs provide that the available points for further leave to remain for A1 are those in Table 8B and for indefinite leave to remain for Ms Wu are those in Table 9B. It should be noted that in Table 9B the size of the investment required decreases as the length of investment holding extends.

34. Table 8B, so far as relevant, provides as follows:

<i>Row</i>	<i>Money and Investment</i>	<i>Points</i>
1	<p><i>The applicant:</i></p> <p>(a) <i>has money of his own under his control in the UK amounting to not less than £1 million, or</i></p> <p>(b) (i) <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</i></p> <p>(ii) <i>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.</i></p>	30
2	<p><i>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.</i></p>	30
3	<p><i>The investment referred to above was made:</i></p> <p>(1) <i>within 3 months of the applicant's entry to the UK, if he was granted entry clearance as a Tier 1 (Investor) Migrant and there is evidence to establish his date of entry to the UK, unless there are exceptionally compelling reasons for the delay in investing, or</i></p> <p>(2) <i>where there is no evidence to establish the date of his entry in the UK or where the applicant was granted entry clearance in a category other than Tier 1 (Investor) Migrant, within 3 months of the date of the grant of entry clearance or leave to remain as a Tier 1 (Investor) Migrant, unless there are exceptionally compelling reasons for the delay in investing, or</i></p> <p>(3) <i>where the investment was made prior to the application which led to the first grant of leave as a Tier 1 (Investor) Migrant, no earlier than 12 months before the date of such application, and in each case the investment has been at least maintained for the whole of the remaining period of that leave:</i></p>	15

	<i>"Compelling reasons for the delay in investing" ...</i>	
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35. Table 9B, so far as relevant, provides as follows:

<i>Row</i>	<i>Money and Investment</i>	<i>Points</i>
1	<p><i>The applicant:</i></p> <p>(a) (i) <i>has money of his own under his control in the UK amounting to not less than £10 million, or</i> (ii) (1) <i>owns personal assets which, taking into account any liabilities to which they are subject, have a value of not less than £20 million, and</i> (2) <i>has money under his control and disposable in the UK amounting to not less than £10 million which has been loaned to him by a UK regulated financial institution;</i> <i>or</i></p> <p>(b) (i) <i>has money of his own under his control in the UK amounting to not less than £5 million; or</i> (ii) (1) <i>owns personal assets which, taking into account any liabilities to which they are subject, have a value of not less than £10 million; and</i> (2) <i>has money under his control and disposable in the UK amounting to not less than £5 million which has been loaned to him by a UK regulated financial institution;</i> <i>or</i></p> <p>(c) (i) <i>has money of his own under his control in the UK amounting to not less than £1 million; or</i> (ii) (1) <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</i> (2) <i>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.</i></p>	20
2	<p><i>The applicant has invested not less than 75% of the specified invested amount 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 the specified invested amount in the UK by the purchase of assets or by maintaining the money on deposit in a UK regulated financial institution.</i></p> <p><i>The specified invested amount is:</i> (a) <i>£10,000,000 if the applicant scores points from row 1(a) above,</i> (b) <i>£5,000,000 if the applicant scores points from row 1(b) above, or</i> (c) <i>£1,000,000 if the applicant scores points from row 1(c) above.</i></p>	20
3	<i>The applicant has spent the specified continuous period lawfully in the</i>	20

	<p>UK, with absences from the UK of no more than 180 days in any 12 calendar months during that period. The specified continuous period must have been spent with leave as a Tier 1 (Investor) Migrant.</p> <p>The specified continuous period is:</p> <p>(a) 2 years if the applicant scores points from row 1(a) above, (b) 3 years if the applicant scores points from row 1(b) above, or (c) 5 years if the applicant scores points from row 1(c) above, ...</p>	
4	<p>The investment referred to above was made no earlier than 12 months before the date of the application which led to the first grant of leave as a Tier 1 (Investor) Migrant.</p> <p>The level of investment has been at least maintained throughout the time spent with leave as a Tier 1 (Investor) Migrant in the UK in the relevant specified continuous period referred to in row 3, other than in the first 3 months of that period.</p> <p>In relation to time spent with leave as a Tier 1 (Investor) Migrant in the UK, the applicant has provided specified documents to show that this requirement has been met.</p> <p>When calculating the specified continuous period ...</p>	15

36. Paragraph 61 of Appendix A provides that: *“Money of his own”, “personal assets” and ‘his capital’ include money or assets belonging to the applicant’s spouse, civil partner or unmarried or same-sex partner, ...”* subject to further requirements in relation to the spouse or partner.
37. Paragraph 61A of Appendix A deals with the control of money, providing that:

“In Tables 7 to 9B, “money of his own under his control” and “money under his control” exclude money that a loan has been secured against, where another party would have a claim on the money if loan repayments were not met, ...” subject to exceptions, including at (iii) that *“the money is under the applicant’s control, except for the fact that the loan referred to in paragraph (b) in Table 8B or row 1 of Table 9B has been secured against it”*.
38. Paragraph 61-SD sets out the specified documents required for the purposes of paragraph 61 of Appendix A.
39. Paragraph 65 of Appendix A provides notes for qualifying investments in Table 8A to Table 9B, which excludes investments by way of *“(b) Open-ended investment companies, investment trust companies, investment syndicate companies or pooled investment vehicles”*.
40. Paragraph 65A defines *“Active and trading UK registered companies”* as ones

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.

41. Paragraph 65-SD of Appendix A sets out the specified documents required as evidence of investment, including at (a) a series of investment portfolio reports, certified as correct by a UK regulated financial institution, which must, *inter alia*, (vii) *“for investments made as loan funds to companies, be accompanied by audited accounts or unaudited accounts with an accounts compilation report for the investments made, giving the full details of the applicant’s investment. The accountant must have a valid licence to practise or practising certificate and must be a member of the Institute of Chartered Accountants in England and Wales ...”*.

A1’s application for further leave to remain

42. A1’s application was for further leave to remain as a Tier 1 (Investor) under paragraph 245ED of the Immigration Rules was dated 20 February 2017 (under cover of a letter dated 23 February 2017), and which included an application for A2 as her dependent. The claimed attributes were that (a) she has money of her own under her 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 her control and disposable in the UK amounting to not less than £1 million which has been loaned to her by a UK regulated financial institution.
43. Specifically, the Applicant stated that she made a loan of £1 million to a UK registered company (Eclectic) which was converted to preference shares in the nominal value of £1 million and such shareholding has since been maintained at that level, with the value of shares at 31 December 2016 being £1,003,270. Eclectic was said to have maintained active trading throughout the previous three years and an investment portfolio and unaudited accounts were provided. It was said therefore that the applicant earned 30 points by meeting this requirement.
44. A1 was interviewed in relation to her application on 7 August 2017 and further documents/representations were provided in support of it by her representatives on 18 and 25 August 2017. Extracts from the record of interview with A1 appear at Annex A.

A1’s Reasons for Refusal dated 22 December 2017

45. The Respondent set out in three boxes the points claimed and points awarded under Appendix A: Attributes in respect of A1’s application. The first box deals with the requirement that the applicant has not less than £1 million in the UK, which has been loaned by a UK regulated financial institution, as required in paragraph b(ii) of Row 1 of Table 8B of Appendix A of the Immigration Rules. The evidence relied upon by A1 is set out followed by the conclusion

that the funds loaned to A1 by Maxwell were not under her control in the UK. The reasons were set out as follows:

"We are aware of a link between Maxwell and Eclectic.

Dmitry Petrovich Kirpichenko is named as a Director and a person with significant influence or control over Maxwell in the company's entry on the Companies House website.

Nika Kirpichenko is named as the Director of Eclectic in the Report and Unaudited Accounts provided for Eclectic Capital Limited, and in the company's entry on the Companies House website.

Dmitry Petrovich Kirpichenko and Nika Kirpichenko are husband and wife. This raises concerns about the loan and investment arrangements you have entered into.

You have provided a loan agreement between you (as the Borrower) and Maxwell (as the Lender).

The terms of this agreement call into question the level of control you have over the funds loaned to you by Maxwell.

Paragraph 2 of the agreement states that the loan will be used for AID, that is, the Authorised Investment Destination. Paragraph 2 further defines "AID Company" as "company for the purposes of AID". Paragraph 6 states that you are obliged to, "To sign a loan agreement or share purchase agreement with the AID Company."

Furthermore, Paragraph 2 of the agreement states that the purpose of the loan "is to enable the Borrower to meet the requirements of the UKBA Visa Tier 1 (Investor)." Paragraph 11 of the agreement advises that the loan agreement will lose force if you are refused such a visa or if you do not sign the loan agreement or share purchase agreement with "the AID Company" referred to in paragraph 6.

The inclusion of these conditions in the loan agreement raises concerns regarding your arrangement with Maxwell. The reference to "the AID Company" leads us to conclude that the loan appears to be contingent on the funds being invested in a single specific company, namely Eclectic. This, coupled with the links between Maxwell and Eclectic referred to above, leads us to conclude that, on the balance of probabilities, the money that was lent to you is not under your control because it is evident that you are not able to invest the money anywhere other than in Eclectic.

You have provided a 5-year loan agreement dated 20th January 2014 between you (as the Lender) and Eclectic (as Borrower), paragraph 5 of which states that the interest rate that you will receive on the loan is 3.05%.

Paragraph 4 of the loan agreement states that "the Borrower has the right to unilaterally decide about the conversion of the loan into the preferred shares of the Borrower".

You have provided a letter from Maxwell Holdings Ltd showing that although your investment in Eclectic was initially in the form of a loan, it was subsequently converted to Preference shares.

The Articles of Association adopted by Eclectic on 12 June 2014 and later on 2 June 2015 are available in the Companies House website. These articles show that the rate of return available to holders of Preference Shares in Eclectic are poor and are unlikely to attract investors.

“Share Capital and Rights” are set out in Paragraph 15 of these articles.

The articles state that fixed dividends of 2% may be paid to Preference A shareholders/0.0001% may be paid to Preference B shareholders. The net returns would be even poorer if inflation is taken into account and the 3% annual interest payable on your 5 year loan from Maxwell are taken into account. This rate of interest is set out in Paragraph 5 of the loan agreement mentioned above.

Moreover your funds were converted from a loan which attracted interest of 3.05% into preference shares which attracted a lower rate of returns, meaning you were guaranteed to lose money on the investment. The fact that the loan agreement enabled Eclectic to make such a change unilaterally without your agreement suggests this is not a genuine investment under your control.

Furthermore, the articles state that your Preference Shares need to be held for at least 6 years in order for any dividend to be paid.

Any dividends awarded are payable:

- to Preference A shareholders either on redemption of the shares on the sixth anniversary of the share being issued*
- to Preference B shareholders once the shares have been held for a minimum of six years, no dividend being payable if the shares are redeemed beforehand*

This means that as a holder of preference shares you must keep your funds in an uncompetitive investment for an extended period in order to obtain any return whatsoever.

In addition to the low rate of return, your loan agreement with Maxwell is for a term of five years, meaning you will be required to repay the loan you have used to invest in Eclectic before you are able to receive any return whatsoever from your investment.

Moreover Paragraph 17 of the articles prohibits holders of preference shares from disposing of their shares without the consent of the majority of the Ordinary shareholders meaning that investors who wish to redeem their shares may not be allowed to release their funds.

In contrast to the restrictive arrangements in place for preference shareholders, the company is free to redeem its preference shares at any time, at their nominal value, a

premium only being payable at the discretion of the company's directors.

The inflexibility and lack of returns outlined above are advantageous to the company at the expense of preference shareholders and do not afford any financial incentive to invest. They call into question whether you are genuinely investing funds under your own control in an arrangement that fixes those funds in place for 5 years with no return.

We also note that the loan agreements you have signed with both Maxwell and Eclectic offer no ability for you to terminate either agreement without the other party's consent.

Both the loan agreements prohibit you alone from transferring your rights and obligations under the respective agreement without prior written consent of the other party (i.e. paragraph 8 of the Maxwell agreement and paragraph 7 of the Eclectic agreement). This coupled with the above restrictions on your shareholding in Eclectic, clearly shows that you have no control over the funds either as a borrower or as a lender/equity investor. All of the above leads us to conclude that this investment has not been under your control and that you are unable to exercise a choice regarding the placement of your investment funds with Eclectic and what was done with the funds once the company had possession of them."

46. The Respondent then quoted parts of the interview with A1 on 7 August 2017 (extracts of which are at Annex A) and concluded that in light of all of the above, A1 did not satisfy the criteria at paragraph b(ii) of Row 1 of Table 8B for the award of points claimed.
47. The second box in the decision letter deals with the specific investment of £750,000 for the purposes of Row 2 of Table 8B of Appendix A of the Immigration Rules. The Respondent awarded no points for this part of the application on the basis that it was not accepted that the funds invested in Eclectic met the requirements of a qualifying investment set out in paragraph 65 of Appendix A of the Immigration Rules, specifically being excluded by paragraph 65(b) of the same. This is because the investment was made prior to 30 June 2016 when Eclectic's principal business was to use funds to trade investments in companies, which is of a type that is excluded for the purposes of investment under Paragraph 65.
48. The third and final box deals with the criteria in Row 3 of Table 8B of Appendix A of the Immigration Rules, for which no points were awarded on the basis that the investment made, for the reasons already given, was not a qualifying investment.
49. A2's application for leave to remain as a child dependent of a Tier 1 Migrant was also refused on 22 December 2017 under paragraph 319C of the Immigration Rules on the basis of the refusal of A1's application.

A1's grounds for Administrative Review

50. A1 sought Administrative Review of the refusal of her application on the following grounds:
- (i) The Respondent mis-applied paragraph 245ED(g) of the Immigration Rules which is only applicable to cases under Table 7 of Appendix A of the Immigration Rules, whereas the present application was under Table 8B. The Respondent therefore had no power to refuse the application on "reasonable grounds" to believe that the loan funds and the investment in Eclectic were not under A1's control.
 - (ii) The loan agreement relied upon by A1 was the same one relied upon when leave to remain was first granted, and accepted by the Respondent at that time.
 - (iii) The Respondent's reasons for deciding that the loan funds were not under the control of A1 are irrational and manifestly speculative, given in particular that there is no condition in the loan agreement for a specific authorised investment destination; the requirement for A1 to give notice to where funds were to be paid and that A1 had selected Eclectic by choice.
 - (iv) The Respondent has misinterpreted the requirement for a person to have money under his control by equating it with a wholly unencumbered choice of action in relation to the investment loan funds rather than simply having ultimate control over the money and about where and how it is invested; further by applying the phrase after the investment of funds rather than control at the point of investment; and in failing to take into account the Respondent's own policy as to the meaning of control.
 - (v) The Respondent's remaining reasoning as to why the loan funds were not in A1's control were perverse and speculative, including the marriage between directors which is irrelevant to the operation of corporate entities; the definition of authorised investment destination and use of the term in the loan agreement, and that A1 voluntarily signed a loan agreement with Eclectic which included the right to convert the loan to share capital. Various other matters relied upon by the Respondent reflected normal commercial practice and would not be relevant to the issue of control.
 - (vi) The Respondent misdirected himself in law as to the meaning of paragraph 65(b) of Appendix A to the Immigration Rules and failed to give reasons as to which particular type of investment the Respondent considered this to be to fall within one of the express exceptions to a qualifying investment.
 - (vii) The Respondent had accepted in a number of other cases, investments into Eclectic as satisfying the investment requirement in Table 8B of Appendix A to the Immigration Rules, such as to constitute a practice of doing the same.
 - (viii) The Respondent failed to apply her own published policy guidance in relation to the application made by A1.

A1's Administrative Review decision dated 6 February 2018

51. The Respondent accepted in the course of the Administrative Review that paragraph 245ED(g) of the Immigration Rules was not applicable to A1's application as it related only to Table 7 and not Table 8B of Appendix A to the Immigration Rules. However, in any event A1 was still required under Table 8B to have money of her own under her own control and disposable in the UK. The Respondent decided that the balance of all the evidence available led to the conclusion that A1 was not in control of the funds, on the basis that A1 did not in fact have freedom to choose where to invest the loan funds, or to withdraw the investment once made. The Respondent maintained that relevant considerations in determining whether a person had control of the funds included the fact that money was transferred between two companies whose directors were married; the poor terms of the agreement and poor financial returns of the investment.
52. In relation to the refusal under paragraph 65(b) of Appendix A, the Respondent stated that Eclectic has attributes akin to investment vehicles expressly excluded by paragraph 65(b) and for the reasons already given in the refusal letter, it was not accepted that the investment met the requirements of the Immigration Rules.
53. Overall, the Respondent considered that the original caseworker had applied the Immigration Rules, policy and guidance correctly and reached a conclusion on the evidence that the funds loaned to A1 were not in her control in the UK; such that the decision to refuse the application with reference to paragraph 245ED(b) of the Immigration Rules was maintained. On this basis, the refusal of A2's application was also refused as he was not at the time the child of a parent who has been granted leave to remain as a Points Based System Migrant.

Ms Wu's application for leave to remain

54. Ms Wu applied for indefinite leave to remain as a Tier 1 (Investor) under the accelerated three year route under cover of a letter dated 10 January 2017, pursuant to paragraph 245EF of the Immigration Rules. The application was made on the basis that Ms Wu (i) owns personal assets which, taking into account any liabilities to which they are subject, have a value of not less than £10 million; and (ii) has money of her own under her control in the UK amounting to not less than £5 million which has been loaned to her by a UK regulated financial institution. Specifically, Ms Wu loaned Eclectic £5 million on 12 March 2014, which was converted to Preference Shares of the same nominal value on 20 June 2014 with the value maintained continuously to the date of application. The value of the shares as at 31 December 2016 was £5,016,350. Eclectic has maintained active trading over a three year period and

their unaudited company accounts and investment portfolio report was submitted.

55. Ms Wu was interviewed in relation to her application on 16 August 2017 and further documents/representations were made in support of it by her representatives in essentially the same terms as were made for A1's application. Extracts from the record of interview with Ms Wu appear at Annex B.

Ms Wu's Reasons for Refusal dated 22 December 2017

56. The Respondent set out Ms Wu's immigration history and requirements for a grant of indefinite leave to remain as a Tier 1 (Investor) under paragraph 245EF of the Immigration Rules and by reference to Appendix A of the same, specifically paragraphs 54 to 65-SD and Table 9B of Appendix A.
57. In respect of paragraph b(ii) of Row 1 of Table 9B, the Respondent did not award Ms Wu any points as she was not satisfied that the funds loaned to her by Maxwell were under her control in the UK. The following reasons were given:

"We are aware of a link between Maxwell and Eclectic.

Dmitry Petrovich Kirpichenko is named as a Director and a person with significant influence or control in Maxwell in the company's entry on the Companies House website.

Nika Kirpichenko is named as the Director of Eclectic in the Report and Unaudited Accounts provided for Eclectic Capital Limited and in the company's entry on the Companies House website.

Dmitry Petrovich Kirpichenko and Nika Kirpinchenko are husband and wife. This raises concerns about the loan and investment arrangements that you have entered into.

You have provided a loan agreement between you (as the Borrower) and Maxwell (as the Lender).

The terms of this agreement call into question the level of control you have over the funds loaned to you by Maxwell.

Paragraph 2 of the agreement states that the loan will be used for AID, that is, the Authorised Investment Destination. Paragraph 2 further defines "AID Company" as "company for the purposes of AID". Paragraph 6 states that you are obliged to, "To sign a loan agreement or share purchase agreement with the AID Company."

Furthermore, Paragraph 2 of the agreement states that the purpose of the loan "is to

enable the Borrower to meet the requirements of the UKBA Visa Tier 1 (Investor).” Paragraph 11 of the agreement advises that the loan agreement will lose force if you are refused such a visa or if you do not sign the loan agreement or share purchase agreement with “the AID Company” referred to in paragraph 6.

The inclusion of these conditions in the loan agreement raises concerns regarding your arrangement with Maxwell. The reference to “the AID Company” leads us to conclude that the loan appears to be contingent on the funds being invested in a single specific company, namely Eclectic. This, coupled with the links between Maxwell and Eclectic referred to above, leads us to conclude that, on the balance of probabilities, the money that was lent to you is not under your control because it is evident that you are not able to invest the money anywhere other than in Eclectic.

You have provided a letter from Maxwell Asset Management showing that although your investment in Eclectic was initially in the form of loan it was subsequently converted to Preference shares.

The Articles of Association adopted by Eclectic on 12 June 2014 and later on 2 June 2015 are available on the Companies House website. These articles show that the rates of return available to holders of Preference Shares in Eclectic are poor and are unlikely to attract investors.

The articles state that fixed dividends of 2% may be paid to Preference A shareholders/0.0001% may be paid to Preference B shareholders. The net returns would be even poorer if inflation is taken into account and the 3% annual interest payable on your 5 year loan from Maxwell are taken into account. This rate of interest is set out in Paragraph 5 of the loan agreement mentioned above.

In addition to the low rate of return, your loan agreement with Maxwell is for a term of three years, meaning you will be required to pay repay the loan you have used to invest in Eclectic before you are able to receive any return whatsoever from your investment.

Moreover Paragraph 17 of the articles prohibits holders of preference shares from disposing of their shares without the consent of the majority of the Ordinary shareholders meaning that investors who wish to redeem the shares may not be allowed to release the funds.

In contrast to the restrictive arrangements in place for preference shareholders, the company is free to redeem its preference shares at any time, at their nominal value, a premium only being payable at the discretion of the company’s directors.

The inflexibility and lack of returns outlined above are advantageous to the company at the expense of preference shareholders and do not afford any financial incentive to invest. They call into question whether you are genuinely investing funds under your own control in an arrangement that fixes those funds in place for 3 years with no return.

We also note that the loan agreement you have signed with Maxwell offers no ability for you to terminate the agreement without the other party's consent."

58. The Respondent then quoted parts of the interview with Ms Wu on 7 and 16 August 2017 and concluded that taking everything together, there were reasonable grounds to believe that the loan funds and investment in Eclectic were not under Ms Wu's control.
59. In addition, the Respondent had not been provided with sufficient evidence from Ms Wu that she owned personal assets with a value of not less than £10 million. Her interview record stated that she had paid £3.5 million for her property and in addition that she had shown Maxwell Asset Management a bank statement showing a balance of £10 million, but the latter was not provided to the Respondent with the application. For this reason, the Respondent did not accept that the Appellant met the criteria in paragraph b(ii) of Row 1 of Table 9B.
60. In relation to Row 2, the Respondent did not award any points as she was not satisfied that the funds invested in Eclectic met the requirement of a qualifying investment in paragraph 65 of Appendix A of the Immigration Rules because the report and unaudited accounts for Eclectic dated 30 June 2016 and 30 June 2015 did not give full details of the applicant's investment as required in paragraph 65-SD(vii) of Appendix A and further, that the investment was excluded from being a qualifying investment under paragraph 65(b) of the same.
61. In relation to Rows 3 and 4, the Respondent did not award points, essentially for the reasons already given above.

Ms Wu's grounds for Administrative Review

62. Ms Wu sought Administrative Review of the refusal of her application on the following grounds:
 - (i) The Respondent mis-applied paragraph 245ED(g) of the Immigration Rules which is only applicable to cases under Table 7 of Appendix A of the Immigration Rules, whereas the present application was under Table 9B. The Respondent therefore had no power to refuse the application on "reasonable grounds" to believe that the loan funds and the investment in Eclectic were not under Ms Wu's control.
 - (ii) The loan agreement relied upon by Ms Wu was the same one relied upon when leave to remain was first granted, and accepted by the Respondent at that time.
 - (iii) The Respondent's reasons for deciding that the loan funds were not under the control of Ms Wu were irrational and manifestly speculative, given in particular that there is no condition in the loan agreement for a specific authorised investment destination, the requirement for Ms Wu to give

notice to where funds were to be paid and that Ms Wu had expressly compared investments available and selected Eclectic by choice.

- (iv) The Respondent has misinterpreted the requirement for a person to have money under his control by equating it with a wholly unencumbered choice of action in relation to the investment loan funds rather than simply having ultimate control over the money and about where and how it is invested; further by applying the phrase after the investment of funds rather than control at the point of investment; and in failing to take into account the Respondent's own policy as to the meaning of control.
- (v) The Respondent's remaining reasoning as to why the loan funds were not in Ms Wu's control were perverse and speculative, including the marriage between directors which is irrelevant to the operation of corporate entities; the definition of authorised investment destination and use of the term in the loan agreement, and that Ms Wu voluntarily signed a loan agreement with Eclectic which included the right to convert the loan to share capital. Various other matters relied upon by the Respondent reflected normal commercial practice and would not be relevant to the issue of control.
- (vi) Ms Wu had provided all of the specified evidence to show personal assets of not less than £10 million and if the Respondent was not satisfied with the same, further evidence should have been requested pursuant to paragraph 245AA of the Immigration Rules.
- (vii) The Respondent misdirected himself in law as to the meaning of paragraph 65(b) of Appendix A to the Immigration Rules and failed to give reasons as to which particular type of investment the Respondent considered this to be to fall within one of the express exceptions to a qualifying investment.
- (viii) In relation to paragraph 65-SD(a)(vii) of Appendix A to the Immigration Rules, there is a detailed list of investments in the report from the accountants dated 22 December 2016 and in any event this paragraph should not have been applied at all because the loan had been converted into shares in the company and this paragraph applies only to loan funds' investments.
- (ix) The Respondent had accepted in a number of other cases, investments into Eclectic Limited as satisfying the investment requirement in Table 8B of Appendix A to the Immigration Rules, such as to constitute a practice of doing the same.
- (x) The Respondent failed to apply her own published policy guidance in relation to the application made by Ms Wu.

Ms Wu's Administrative review decision dated 6 February 2018

63. The Respondent maintained the original refusal of Ms Wu's application in her administrative review decision dated 6 February 2018. Although it was accepted that the application fell under Table 9B of Appendix A to the Immigration Rules and not Table 7, the requirement is the same for an

applicant to have money of their own under their own control and disposable in the UK, such that the Respondent must still be satisfied that this is the case and can refuse an application if there are reasonable grounds to consider that the requirement has not been met.

64. The Respondent did not accept that she was under any obligation to compound any decisions which may have been incorrect in the past by making further incorrect decisions on future applications, in particular in relation to the loan agreement submitted with the previous application for leave to remain which was successful. The Respondent considered that on the information now available, the initial application should not have been granted. A similar statement was made about any other applications which relied on investment into Eclectic.
65. The reasons originally given as to why Ms Wu was not considered to be in control of money were maintained and it was emphasised that she did not appear to have freedom to choose where to invest the money or to withdraw her investment once made. The published policy guidance relied upon by Ms Wu gave illustrative but not exhaustive examples.
66. In relation to the exclusions to qualifying investments in paragraph 65(b) of Appendix A to the Immigration Rules, the Respondent stated as follows:

“You claim that the original caseworker unlawfully concluded that the investment made in Eclectic is one excluded by paragraph 65(b) but fails to state, which type of investment prohibited by paragraph 65(b) is being referred to. The Secretary of State groups the investments listed in paragraph 65(b) together in a common exclusion, for the reason that all these types of company could be used as a vehicle to channel the funds into other investments, which may not be active and trading UK companies, and may therefore not meet the requirements of the Tier 1 (Investor) category. The purpose of Tier 1 (Investor) is to benefit the UK economy, not just through tax paid on investments but also through the investments themselves. That is why we require investments to be made in UK government bonds or active and trading UK companies.

Namecos are referred to in the Policy Guidance (Annex A, paragraph A14). It is clear that these are only given as one example of an investment syndicate company. They are not the only type of company which would fall within this group. It is noted that the submissions around pooled investment vehicles are incorrect, as it appears you have assumed the only reason for excluding this type of vehicle is to ensure maximum UK tax revenue and this is incorrect.

Although you maintain that Eclectic is not an investment excluded by paragraph 65(b) it does have some attributes akin to these, this, alongside reasons highlighted in your refusal letter does not satisfy the Secretary of State that on the balance of probabilities, Eclectic and your investment meet the Immigration Rules.”

Grounds for Judicial Review

67. The first four grounds of challenge are common to both A1 and Ms Wu's applications for Judicial Review and are set out in materially identical terms. The fifth and sixth grounds of challenge are specific to Ms Wu's application only.
68. The grounds of challenge are as follows:
 - (1) the Respondent applied the wrong test under paragraph 245ED(g) of the Immigration Rules;
 - (2) the Respondent misinterpreted the requirement for an applicant to have money under his or her control;
 - (3) the Respondent's decision was irrational and took into account irrelevant factors;
 - (4) the Respondent erred in relation to her interpretation and application of paragraph 65(b) of Appendix A;
 - (5) the Respondent erred in failing to accept the evidence provided by Ms Wu of personal assets, or in the alternative, further documents should have been requested pursuant to paragraph 245AA of the Immigration Rules or a limited period of leave granted rather than indefinite leave to remain; and
 - (6) the Respondent erred in failing to take into account evidence relating to paragraph 65-SD(a)(vii) of Appendix A, and/or erred in finding that this paragraph applied at all.

Preliminary matters

69. The skeleton argument submitted on behalf of the applicants, supported by opening oral submissions from Ms Weston, went into some considerable detail about basic principles of interpretation of the Immigration Rules and the suggestion that the relevant Immigration Rules for Tier 1 (Investors) were inherently defective, lacking in clarity and contradictory both internally and with banking practice. However, it was expressly confirmed that there was no challenge to the legality of the Immigration Rules for this route and in applications such as these, it was solely a matter for the Upper Tribunal to properly interpret them. The global submission on behalf of the applicants that the rules and the Respondent's practice in the assessment of such applications is inherently unclear is therefore only considered to the extent that the interpretation of specific parts of the relevant Immigration Rules have been expressly challenged within the pleaded grounds.
70. There is no real dispute as to the correct approach to the interpretation of the Immigration Rules, which has been clearly set out by the Supreme Court in Mahad v Entry Clearance Officer [2009] UKSC 16, with reference to Odelola v Secretary of State for the Home Department [2009] UKHL 25. Lord Brown stated:

“[10] There is really no dispute about the proper approach to the construction of the Rules. As Lord Hoffman said in Odelola v Secretary of State for the Home Department [2009] 1 WLR 1230, 1233 (paragraph 4)

“Like any other question of construction, this [whether a rule change applies to all undetermined applications or only to subsequent applications] depends on the language of the rule, construed against the relevant background. That involves a consideration of the immigration rules as a whole and the function which they serve in the administration of immigration policy.”

... Essentially it comes to this. The Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State’s administrative policy. The respondent’s counsel readily accepted that what she meant in her written case by the proposition ‘the question of interpretation is ... what the Secretary of State intended his policy to be’ was that the court’s task is to discover from the words used in the Rules what the Secretary of State must be taken to have intended. After all, under section 3(2) of the Immigration Act 1971, the Secretary of State has to lay the Rules before Parliament which then has the opportunity to disapprove them. True, as I observed in Odelola (para 33): ‘The question is what the Secretary of State intended. The rules are her rules.’ But that intention is to be discerned objectively from the language used, not divined by reference to supposed policy considerations. Still less is the Secretary of State’s intention to be discovered from [IDIs] issued intermittently to guide immigration officers in their application of the rules.”

71. In relation to interpretation of the Immigration Rules specific to the Points Based System, we also bear in mind the dicta of Holroyde LJ in R (on application of Sajjad) [2019] EWCA Civ 720.

‘31. ... It would be inconsistent with the nature and objective of the PBS to interpret the phrase [director’s loan] as carrying some specialist meaning which would or might in particular circumstances require a detailed analysis of finer points of contract law or company law....

32...In order to operate the PBS fairly and efficiently, the respondent must be able to ascertain quickly, from the information provided by an applicant, the precise nature and legal status of the investment made in order to confirm that it attracts an award of points under the terms of the scheme’

72. Separately, on 28 May 2019, after the substantive oral hearing, an application was made on behalf of both applicants to make written post hearing submissions in respect of matters identified by the Tribunal during the course of the oral hearing, upon which Counsel for the applicants considered that she did not have an adequate opportunity to respond during the course of the hearing. The application was opposed by the Respondent.

73. We refuse the application to put in further written submissions on behalf of the applicants on the basis that there is no sufficient justification for further written submissions to be made and the content of those proposed take the applicants' claims no further. Much of the text reiterates submissions already made during the course of the oral hearing by both parties and ultimately the majority of the submissions are not relevant to the issues raised in the grounds of challenge to be determined in these applications for Judicial Review. We have not therefore taken the post hearing submissions into account.

Ground 1 – application of the wrong test under paragraph 245ED(g) of the Immigration Rules.

74. The applicants assert that the reference in the Respondent's decision letters referring to the Secretary of State having "*reasonable grounds to believe that the loan funds and the investment in Eclectic are not under your control*" show that the decision was erroneously taken under paragraph 245ED(g) of the Immigration Rules which is expressly only relevant to cases where points are to be awarded under Table 7 of Appendix A, which is not the applicable provision for either A1 or Ms Wu.
75. Although it is accepted by the applicants that the Administrative Review decision in respect of each of them expressly states that paragraph 245ED(g) of the Immigration Rules was not applicable to either application, the Respondent said within those decisions that in any event the requirements in Table 8B and Table 9B of Appendix A mean that a person has to show money under their control and is therefore of the same effect. The applicants submit that this is erroneous and the only requirements to show that a person has money under their control are the evidential requirements set out in paragraphs 60, 61A and 61-SD of Appendix A; with no subjective judgement permitted.
76. However, the submission that the mere provision of documents in accordance with those specified in the relevant part of the Appendix is of itself sufficient, ignores the structure of the Immigration Rules governing applications under the Points Based System. The provision of specified documents is the required means by which an applicant can establish that the substantive requirements of the Immigration Rules are met for a grant of leave to remain, however the content of those documents must be examined to ensure the satisfaction of the relevant requirements of the rules.
77. In relation to A1, this included the requirement in paragraph 245ED(e) of the Immigration Rules that the "*assets and investment he is claiming points for must be wholly under his control*" and in Row 1 of Table 8B of Appendix A that the applicant "*(a) has money of his own under his control ...*" or "*(b)(ii) has money under his control ...*". In relation to Ms Wu, this included the requirement in Row 1(b) of Table 9B to (i) have "*money of his own under his control ...*" or "*(ii)(2) has money under his control ...*".

78. The specified documents in paragraphs 60 to 61-SD of Appendix A on their face only deal with two particular matters, namely the exclusion of money that a loan has been secured against, and, that money of his own includes that of a spouse or partner subject to specific evidential requirements. These are self-evidently distinct from the requirement for an applicant to be able to establish satisfaction of the underlying relevant Immigration Rules such as the award of points under the relevant Table as they only deal with evidential requirements for a specific element of control and could not of themselves establish it.
79. The burden is on an applicant to satisfy the Respondent that the money was under their control to meet the requirements of the rules and in the Administrative Review letter, it was stated that the decision that the funds were not under the applicants' control was taken on the "*balance of all of the evidence*", after considering "*all factors and evidence*" and "*on consideration of this evidence as a whole ... on a balance of probabilities*".
80. In these circumstances, we do not find that the Respondent erred in applying the wrong test or standard in refusing either application by the mere reference to "*reasonable grounds to believe*" in the original refusal letters. As expressly confirmed in the Administrative Review decisions, the standard which was applied was the balance of probabilities and this is borne out by the detailed assessment of the evidence before the Respondent at the date of decision and considered further below in relation to the second ground of challenge.

Ground 2 – requirement for an application to have “money under his control” & Ground 3 – whether the Respondent properly concluded that the applicants did not have control at the required time

81. The first issue raised in the second ground of challenge turns on the interpretation of 'control' and the point in time at which a person has to have money under his control (either at the point when money is invested or afterwards, being control over the investment itself at the date of decision, or both). The second issue is then, as set out in the third ground of challenge, whether the Respondent properly concluded that neither A1 nor Ms Wu had the requisite control at the required time. We consider these grounds together.
82. Neither party suggested a specific definition of what 'control' means or how this is to be interpreted in the relevant parts of the Immigration Rules for Tier 1 (Investor) Migrants, the submissions instead focusing on elements of what it could include and what it could not include. In relation to when 'control' is required, submissions were made both ways by the parties but with an apparent common position that it is control at the point of investment, to be determined at the date of decision.
83. In relation to the meaning of control (the relevant requirements in relation to

which being set out above in paragraph 74 for each of the applicants), the applicants' case is that something less than complete and unfettered control is required. In any commercial situation, some degree of control has to be relinquished by an investor, even if simply a deposit in a savings account which can be subject to specific terms and conditions for withdrawal and that control cannot possibly rationally be interpreted as meaning entirely unrestricted access to and use of the money or investments in question. Numerous examples were given of the different meanings ascribed to the concept of control in commercial contexts and the different forms of control which exist, in contrast to the lack of definition or specific type of control being specified within the Immigration Rules.

84. Ms Weston submitted that one can look to paragraph 61A of Appendix A to give an indication of the 'mischief' behind the requirement to have control over the money invested, specifically that money which is used as security for a loan cannot be under a person's control. It was submitted that this is an obvious instance of a situation where a person does not have control of the money or investment because it would have been ceded to a third party – a creditor of the investor – and therefore could not be used by the investor to invest in the United Kingdom and would be vulnerable to forfeiture in the event of default under a loan agreement. This, however, is contrasted with the usual commercial situations in which some degree of control has to be ceded to be able to benefit the destination of an investment.
85. It was submitted on behalf of the applicants that they plainly had effective and ultimate control over the Maxwell loans to them and had effective and ultimate control over the investments in Eclectic, in that (i) neither are (or were) subject to any security; (ii) the applicants had the legal right under their respective agreements to require Maxwell to pay the loans directly to an AID company of their choosing; and (iii) the applicants have a legal right to redeem their shares in Eclectic after six years.
86. The applicants' case is that none of the reasons given by the Respondent for finding that investments were not under the applicants' control, namely the links between the companies involved; the view that the applicants were required to invest in Eclectic; the poor commercial returns and lack of rights to dispose of shares or terminate agreements; were relevant or valid reasons, individually or cumulatively, for concluding that the applicants did not have control within the meaning of the Immigration Rules because (i) none involved ceding any control of the loans or investments to third parties, whether as security or otherwise; and (ii) each benefited (or would have benefited) Eclectic.
87. The above is premised on control being required after the investment, even though Ms Weston submitted that this of itself would be irrational under the rules. If in the alternative the money needed to be under an applicant's control at the point of investment, the applicants state that on the facts they have

demonstrated this. The applicants both rely on the terms of their respective loan agreements with Maxwell, which do not expressly define or require investment to be made in any particular company, only that it has to be made in an AID. The definition of AID in section 1.1(i) is "*investments in share capital or loan capital in active trading UK registered companies*" and section 1.1(j) of the loan agreement defines AID Company as "*company for the purposes of AID*". The agreement does not refer to any specific company and within the agreement references to the singular include the plural and vice versa, such that it cannot be interpreted either as a single AID company. Further, the agreement does not mention Eclectic at all and it cannot be read into the agreement that the references to AID Company are to Eclectic and Eclectic alone.

88. The Respondent's primary position is not that the applicants lost control of their investments once made, but that they had no control of the money before it was invested. In any event, it was submitted that the provisions of the Immigration Rules had to be interpreted in accordance with the normal rules set out in Mahad and not by reference to commercial or banking practice and there was no clear or express intention within the rules to restrict the meaning of control to a single criterion as is suggested by the reference to paragraph 61A of Appendix A.
89. Returning to the first issue raised, as to what is meant by 'control' in the relevant Immigration Rules, we do not consider it to be helpful nor required to set out, beyond what is already in the Immigration Rules, a definition of 'control'. This word has to be interpreted, in the usual way, in accordance with its natural and ordinary meaning, namely that a person has the authority to manage and/or direct the use of the money, asset or investment (depending on the context). This is not just a question of legal or beneficial ownership of the same, but includes an element of choice and use. To determine whether a person has the requisite control, it is 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 (at least for the purposes of an application for further leave to remain as a Tier 1 (Investor) Migrant) that the "*assets and investment he is claiming points for must be wholly under his control*". The addition of the requirement of 'wholly' shows a higher level of control than one may normally expect in some commercial situations, but that is to be expected given that not every investment will satisfy the requirements for a grant of leave to remain under this route (for example, see the restrictions on qualifying investments in paragraph 65A of Appendix A).
90. We agree with the parties who appeared to be largely in agreement that for the purposes of Row 1 (b)(ii) of Table 8B and Row 1 (a)(ii)(2), (b)(ii)(2), and (c)(ii)(2) of Table 9B of the Immigration Rules, an applicant must establish control of the money at the point of investment, rather than after investment, to be satisfied at the date of decision.

91. In the circumstances of an application for extension of leave to remain or indefinite leave to remain as a Tier 1 (Investor) Migrant under either Table 8B or 9B, the money referred to in in Row 1 must have already been invested in the UK, as necessitated by the requirements which follow in Rows 2 and 3 that a person 'has invested' and done so within a specified timescale absent compelling reasons for delay. We find this supports the view that the date at which an applicant must show that they had money under their control (either their own money or money loaned to them) must refer to the time period before investment as it is that same money which is then used for investment to satisfy the other requirements. That view is supported by the construction of the Immigration Rules which refers to a sliding scale of investment according to the length of time an investor has spent in the UK identifying that a 'specified continuous period *must have been spent* with leave as a Tier 1 (Investor) Migrant'
92. Ms Anderson submitted that in all of the circumstances, it was plainly rational for the Respondent to find, on the evidence as a whole, that neither applicant made a genuine investment of money under their control; taking into account in particular that they were required to invest the funds in Eclectic (for the reasons set out in the decision letter by reference to the terms of the Loan Agreements, the links between the companies and the terms of investment), the limitation on what they could do with their investments compared to the unilateral power of Eclectic to control the investments and the poor returns on them. These reasons were all expressly set out in the respective decision letters.
93. The applicants challenged the Respondent's reference to the investments not being genuine, as not being founded in any of the requirements in the Immigration Rules for a grant of leave to remain as a Tier 1 (Investor) Migrant. The Rules do not require any assessment of the commercial value and rationale of an investment and it is not necessary for any investment to be a good one. The applicants' case is that the only requirement under Table 8B or 9B is that the investment is in an active and trading UK registered company, as defined in paragraph 65A of the Immigration Rules.
94. We pause here to note that on the evidence before us, the applicants had not submitted documents to the Respondent to show that the requirement in paragraph 65A(b) of Appendix A had been met, that Eclectic was an active and trading UK registered company, there being no bank statements or similar document demonstrating a UK bank account showing current business transactions.
95. At the oral hearing, Ms Weston repeatedly submitted that it was a rational choice for both A1 and Ms Wu to deal with everything in one package as part of a scheme to meet the requirements of the Immigration Rules and the administrative convenience of doing so would be a legitimate benefit to both of them, who wished to relocate to the United Kingdom without the difficulty of

withdrawing money from investments made in China. It was suggested that the primary motive for investment did not have to be good commercial returns (or in fact any commercial return), nor was that required by the Immigration Rules for a grant of leave to remain as a Tier 1 (Investor) Migrant.

96. The difficulty with this submission is that it was not founded in any evidence from the applicants themselves, nor was that their position when interviewed by the Respondent. For example, in her interview, A1 expressly stated that she invested in Eclectic, having become aware of them from a recommendation from Maxwell which she trusted (questions 29 and 31) and sought to invest in Eclectic because their projects were attractive and potentially lucrative on a long-term basis (question 30). When asked how the investment in Eclectic compared with other investments she considered, A1 answered that *"this project is more retainable and can be lucrative on the long term"* (question 38). A1 was asked why she chose to invest in this way in Eclectic, to which she stated, *"Its just I have confidence in the business projects they are engaged in with a wine or media industry have great confidence in these projects. I am very experienced investor so I do evaluate and seek profit for myself"* (question 53).
97. There is nothing within the interview with A1 or elsewhere in the documents submitted to the Respondent which makes any suggestion that her motive for taking out a loan from Maxwell to invest in Eclectic was anything other than commercial and profit driven, with specific reference being made to A1's experience as an investor. There is no hint of any consideration of administrative or other convenience, nor of any recognition of the very poor commercial terms upon which she invested in Eclectic.
98. In her interview, Ms Wu did state that she made her investment using loan funds rather than her own money because it was a convenient way to invest without needing to transfer money from China and so that she could leave assets in China with high returns. In response to the investment in Eclectic, Ms Wu stated that this was one of the suggestions made by Maxwell and that she compared these investments and made her choice, with the Eclectic projects compared to all the options bringing her a more lucrative return with less risk, ensuring the investment retained its value (question 29 and 30) and that she thought *"the investment projects will give better return than other products in other companies"* (question 32).
99. As with A1, there is nothing in the interview with Ms Wu or elsewhere in the documents submitted to the Respondent which makes any suggestion that her motive for taking out a loan from Maxwell to invest in Eclectic was anything other than a commercial and profit driven and no suggestion that even part of the reason for this was administrative or other convenience. In answers given in interview, it was clear that Ms Wu was not aware of and did not understand the detail or nature of the agreements signed, nor did she recognise or address the poor commercial return on her investment in Eclectic.

100. In the circumstances and for the reasons set out by the Respondent in the decision letter, the nature of the investment made cannot possibly have been for good commercial reasons (there were none, the applicants having both made payments of interest upfront at the outset of the loan which were greater than the dividend payment to be made to them after six years of shareholding), as claimed by both applicants, which itself raises the question of whether it was a freely made investment of each applicant's own choosing. We find that this, combined with the links between Maxwell and Eclectic and the terms of the loan agreements, entitled the Respondent to draw a rational and lawful conclusion that in all the circumstances of the investment, the applicants did not have a free choice to invest in Eclectic, but that they were required to do so. As such, the applicants were lawfully and rationally found not to have had money under their control for the purposes of the award of points under Row 1(b)(ii) of Table 8B for A1 or under Row 1(b)(ii)(2) of Table 9B for Ms Wu. Further, for the same reasons as identified by the Respondent, neither had sufficient control of their investments once made either.
101. In any event, once the further documents disclosed to the Respondent and the Tribunal during the course of the hearing, namely the Services Agreements concluded between each applicant and Maxwell Holdings, are taken into account, there can be no doubt at all that neither applicant had control over the funds loaned to them or the destination of their investment. That control was expressly ceded under the Services Agreement to Maxwell, as set out in section 3.7.4 where the choice of investment in specific instruments is at the discretion of Maxwell. In addition, the Services Agreement required the applicants to grant Maxwell Holdings a Power of Attorney or other document to allow Maxwell Holdings to act on the applicant's behalf or to represent its interests on issues related to the provision of services (section 3.4); for the Manager to manage the investment account in a UK bank (section 3.3.3); ensured that the Manager invested the Client's borrowed funds in an authorised instrument (section 3.7.2); all of which show that control was ceded to a third party.
102. We were not at all persuaded by Ms Weston's submissions in relation to section 3.7.4 of the Services Agreement that 'choice of specific instruments' was unhappily drafted but meant only a function of monitoring the nature of the vehicle invested in to ensure the maintenance of the value of investment so as not to put an applicant at risk of an investment falling below the required level for the purposes of the Immigration Rules. The submission was contrary to the plain wording of the section, where in the Manager's choice of specific instruments for investment was the means by which the requirements of the rules and monitoring of satisfaction of those requirements was achieved.
103. Further, Ms Weston submitted that section 3.7.4 did not specify where the money was to be invested, provided it was within an authorised investment. This takes the applicants' case no further given the express wording within the

Services Agreement that the choice of destination of investments was at the discretion of Maxwell. It was the fact that Maxwell chose where to invest, managed the bank account and actually invested the funds that is relevant for the purposes of the applicants' lack of control rather than any specification of which company Maxwell chose for the investment to be made into.

104. In any event, it was submitted that the existence of the terms of the Services Agreement was not fatal to either of the applicant's applications and that these documents would simply be part of the evidence to be addressed in any further reconsideration decision (on the assumption that the applicants were successful on the grounds and evidence as it was before the Respondent). However, as we have already concluded, it is beyond doubt that the overarching Services Agreement entered into between each applicant and Maxwell Holdings ceded control of the loans and investments from the applicants to Maxwell Holdings and/or Maxwell and as such the applicants could not establish that they had the requisite control of funds loaned to them to satisfy the requirements of Table 8B or 9B of Appendix A. Section 31 (2A) of the Senior Courts Act 1981 dictates that permission should be refused in claims where it is highly likely that the outcome for the applicant would not be significantly different if the conduct complained of had not taken place. This is such a case where the applications were bound to fail on the basis of the documents belatedly disclosed to the Respondent and the Upper Tribunal.
105. The application for Judicial Review must therefore be dismissed on grounds two and three. Where there is an independent substantive reason for refusal of both applicants' applications for leave to remain as a Tier 1 (Investor) Migrant which has been upheld in these proceedings, the applications as a whole must fail as the relief sought to quash the decisions under challenge cannot be granted. It is clear that the applications would have failed and the Administrative Review decision correctly upheld the initial refusal is in both cases. In these circumstances we deal with the remaining grounds of challenge relatively briefly.

Ground 4 – refusal under paragraph 65(b) of Appendix A

106. The Respondent refused both applications on the basis that the funds invested in Eclectic were not a qualifying investment under paragraph 65(b) of the Immigration Rules, primarily because the investment was made prior to 30 June 2016 when Eclectic's principal business was to use funds to trade investments in other companies, which is said to be of a type which falls within the exclusion. This part of the decision was reiterated and confirmed within both of the Administrative Review decisions, with the additional explanation that Eclectic has attributes akin to investment vehicles expressly excluded by paragraph 65(b) of Appendix A.
107. The applicants' case is that paragraph 65(b) of Appendix A to the Immigration

Rules provides an exhaustive list of investments which are excluded, some of which are defined in other legislation, the definitions for which are not satisfied in the case of Eclectic and it is not sufficient for the Respondent to merely say that Eclectic has attributes akin to these types of investment vehicle.

108. Specifically, an 'open-ended investment company' is defined in section 236 of the Financial Services and Markets Act 2000 and by Regulation 2 of The Open-Ended Investment Companies Regulations 2001, which, inter alia, means a body incorporated by virtue of regulation 3(1) of the latter, authorised as such by the Financial Conduct Authority. Eclectic has not been authorised under this provision.
109. A pooled investment vehicle, otherwise known as a collective investment scheme is defined in section 235 of the Financial Services and Markets Act 2000 and said not to apply to Eclectic because the original investment was made by way of a simple loan which was subsequently converted into shares.
110. An investment trust company is defined in section 1558 of the Corporation Tax Act 2010, which includes the requirement that shares are publicly traded on a regulated market.
111. The applicants have not identified any statutory definition of an investment syndicate company but referred to explanations of this from other sources. It is said that Eclectic is not an investment trust company because it is not publicly traded on the stock market and that it is not an investment syndicate company because resources are not pooled for the purpose of investing in a specific business venture.
112. The Respondent points to the rationale for the Tier 1 (Investor) route to obtain leave to remain in the United Kingdom, which is to encourage capital investment in UK companies as well as generate tax revenue from the same. For these reasons, certain investments are excluded, including those in investment vehicles which essentially reinvest the money elsewhere but with no guarantee that the ultimate destination of the further investment is in a UK trading company. This is the policy objective behind paragraph 65(b) of Appendix A consistent with the guidance given for such applications as a Tier 1 (Investor) Migrant.
113. Ms Anderson submitted that the list in paragraph 65(b) of Appendix A was not exhaustive and that the Respondent could not be expected to list each and every possible thing or scheme which would not meet the policy objective of ensuring a controlled investment, the ultimate destination of which is within the United Kingdom. It was submitted that there is no limitation intended by specific or implicit incorporation of a technical meaning of the phrases listed in paragraph 65(b) of Appendix A from any other definition used for non-immigration purposes. Given the purpose of the Immigration Rules and their

self-contained nature aimed at a 'standalone' status enabling applicants to know the position by reading the Rules, they would have contained any specific definitions to those terms if applicable. In the absence of any prescribed definitions in the Immigration Rules, it was submitted that in line with the guidance in Mahad, the normal presumption must be that these expressions are intended to have their plain English meanings.

114. The Respondent highlights general meanings attributed to each of the expressions outside of the legislation referred to and relied upon by the applicants. On the basis that all of the types of investments are grouped together within one paragraph, the Respondent says that on the ordinary principles of statutory interpretation, it is not necessary to determine which of the four types or similar type of vehicle covers Eclectic. It is sufficient that all of these types of investments have in common the feature that they involve funds from many different investors being aggregated into a single fund which is then invested in diverse investments, for which there is no guarantee of the ultimate destination being within the UK.
115. The Respondent submits that the accounts for Eclectic show some 98% of its value consisted of investments (104 different people having each loaned at least £1 million to Eclectic who then subsequently converted the loans into share capital) and that such investments were not in Eclectic itself as a company, but were in practice used to make further investment in separate companies, some of which were subsidiaries of Eclectic with common ownership by NK, including dormant companies. However, as at June 2016, all except one of the investments were in Russian companies, the remaining one being in a company incorporated in Jersey. There is a lack of evidence of any substantial investment by Eclectic in active trading UK companies.
116. Of the four vehicles expressly listed in paragraph 65(b) of Appendix A, not all have statutory definitions, with one described in various ways by different financial dictionaries and publications. We cannot at least for this one identify a consistent or agreed definition.
117. In the context of the Immigration Rules, there are numerous examples of specific terms being identified by reference to statutory definitions or provisions, either in the common interpretation section or generally throughout the rules. The terms listed in paragraph 65(b) of the Immigration Rules are not so defined, either within that section or elsewhere within the Immigration Rules and there is no provision of interpretation applicable generally across the rules that the meanings given to terms in other legislation outside of the immigration context are to be applied within the Immigration Rules. In these circumstances, the ordinary rules of interpretation of the Immigration Rules apply, that is that the terms bear their ordinary and natural meaning.
118. We do not find it necessary to set out a specific interpretation of each of the

four terms listed because, having considered the various descriptions and definitions put forward by both parties, we accept that there is a common theme to all four that funds are invested by a number of different people and used not for the benefit directly of the company invested in, but are at least to some extent pooled and used as capital for further investments in other companies, the final destination of which is not necessarily easily identifiable or determined and there is no guarantee that such investment is made in other active trading companies within the UK. Such investments defeat the purpose and clarity of the Tier 1 (Investor) scheme and we find the Respondent was therefore rationally entitled to conclude that the investment in Eclectic by both applicants was excluded from being a qualifying investment because it shared the common features of the vehicles listed in paragraph 65(b) of Appendix A.

Ground 5 – Ms Wu’s evidence of personal assets

119. This ground of challenge was not pursued orally at the substantive hearing, with reliance placed by Ms Weston only on the initial written grounds of challenge.
120. Ms Wu asserts that in relation to evidence of personal assets with a value of no less than £10 million as required in Row 1(b)(ii)(1) of Table 9B in Appendix A, all of the specified evidence required by the rules had been met. This included a letter from Maxwell dated 7 February 2014 confirming Ms Wu’s net worth and the same being confirmed within the application form. There was no further specified evidence required within the Immigration Rules over and above the initial confirmation provided by an FCA regulated body in her first application for leave to remain as a Tier 1 (Investor).
121. For similar reasons to those set out in relation to ground one above, the burden is on an applicant to show that he or she meets the requirements of the Immigration Rules. In the Points Based System, these are substantive requirements set out in the main body of the rules, with additional specific requirements for the award of points set out, in this case in Appendix A, specifically Table 9B and finally the specification of the relevant evidential requirements.
122. It is not the case that because there is not a listed specified document for each and every requirement, that it is not necessary for an applicant to provide any evidence at all to show satisfaction of a particular requirement. Ms Wu’s suggestion in this ground that the fact that a third party had, in early 2014 as part of her initial application for leave to remain as a Tier 1 (Investor) Migrant confirmed her net worth, was sufficient to show that as at the date of application for indefinite leave to remain as a Tier 1 (Investor) or the date of decision thereon, that she had assets of not less than £10 million is wholly unsustainable. On any rational view, an outdated third-party assertion of assets is woefully insufficient to meet the express requirements for the award

points set out in Row 1 of Table 9B in Appendix A.

123. In the alternative, Ms Wu claims that the Respondent ought to have used the discretion available in paragraph 245AA of the Immigration Rules to request further evidence of her assets. However, no such discretion is available to the Respondent in the circumstances of this application in accordance with the provisions in paragraph 245AA, which expressly only deal with required specified documents where specified evidence is missing from the documents; the document is in the wrong format; or document does not contain all of the specified information. That is not the situation here. First, because the missing evidence to establish satisfaction of part of Table 9B was not specified evidence; and secondly, what was missing could not on any view fall within the categories outlined in paragraph 245AA(b)(i), (ii) or (iv) of the Immigration Rules. In any event, in accordance with paragraph 245AA(c), no request for documents would be made when an application is to be refused for other reasons, as it was in this case under other parts of the relevant Immigration Rules. In any event, as accepted by Ms Weston in submissions, this point falls away if Ms Wu has not succeeded on her earlier grounds of challenge, which she has not.
124. Also in the alternative, Ms Wu claims that if the Respondent was not satisfied of the full value of her assets for a grant of indefinite leave to remain as a Tier 1 (Investor), she should have considered the application as one for further leave to remain under Paragraph 245ED and Table 8B of Appendix A to the Immigration Rules. For the reasons given above in relation to the other grounds of challenge, it is clear that in any event Ms Wu could not satisfy these requirements either, such that any alternative consideration by the Respondent of the application for leave to remain was bound to fail.

Ground 6 – application of paragraph 65-SD(a)(vii) of Appendix A to Ms Wu’s application

125. Ms Wu’s final ground of challenge is that the Respondent was wrong to say that the report and unaudited accounts of Eclectic did not give full details of her investments sufficient to satisfy paragraph 65-SD(a)(vii) of Appendix A to the Immigration Rules in circumstances where there was a compilation report from Sarmand Accountants dated 22 December 2016 which gave full details of such investment.
126. In any event, Ms Wu claims that paragraph 65-SD(a)(vii) of Appendix A does not apply to her at all because as at her date of application and the date of decision, all loaned funds to Eclectic had been converted to preference shares and this provision only applies to loan funds’ investments.
127. This ground of challenge was not developed orally at the substantive hearing. The Respondent does not accept this interpretation of the Immigration Rules, but in any event submitted even if this provision did not apply, this part of the

decision could not materially affect the outcome of Ms Wu's application which was bound to fail for other substantive reasons.

128. For the reasons already set out above, this final ground of challenge is wholly immaterial to the outcome of these applications for Judicial Review and we therefore make no detailed findings on the application of paragraph 65-SD(a)(vii) of Appendix A of the Immigration Rules and whether or not it applies only to investments which were made and continue as loans to companies, or whether the requirement is restricted only to existing loan funds.

Order

We order, therefore, that the judicial review application be dismissed.

Costs

The Applicants shall pay the Respondent's reasonable costs of these applications, to be subject to detailed assessment if not agreed.

Permission to appeal to the Court of Appeal

The Applicants sought permission to appeal on the generic basis that the Upper Tribunal made unreasonable findings of fact, misinterpreted the immigration rules and failed to apply them lawfully. The Applicants have not particularised the grounds of appeal at all and have not identified the specific findings or immigration rules said to be unreasonable or misinterpreted. In any event, we refuse permission to appeal to the Court of Appeal because there is no arguable error of law in the decision above.



Signed:

Upper Tribunal Judge Jackson

Dated:

11th October 2019

Annex A – Extracts of interview with A1, 7 August 2017

<p>12. Did you seek independent and qualified financial advice before placing your investments in the UK? If so, please provide the details. If not, please specify the reasons for not seeking a financial expert's advice</p>	<p>Yes that's why I was referred to this particular investment company. It's a friend of mine – she works in the country, Jia Guo</p>
<p>13. Why did you apply for Tier 1 (Investor) using loaned funds? ...</p>	<p>Because I can maximise the value of my loan on my capital it's the principal of the investment ...</p>
<p>16. How did you originally become aware of Maxwell Asset Management Limited?</p>	<p>My friend Jia Guo referred me to them</p>
<p>18. Why did you seek to take a loan from Maxwell Asset Management rather than any other company or third party?</p>	<p>As I said my friend referred me to them</p>
<p>21. Which bank account was this £1 million from Maxwell Asset Management received in?</p>	<p>Not received in to the bank account. This loan has been invested directly into the investment project</p>
<p>22. Has Maxwell asked for a charge on your assets as security for lending you funds? If so, please provide details</p>	<p>No they didn't require anything as sort of deposit they noticed I had the creditworthiness from bank accounts and my certificate for investments in China</p>
<p>24. Are you paying interest on the loan? If yes, (a) How much is this? (b) Is the interest being paid back to Maxwell Asset Management?</p>	<p>Yes £200,000 for 5 years Yes</p>
<p>25. How much interest have you paid back to Maxwell over the past 2/3 years on the loaned funds?</p>	<p>I've already paid the interest off with them which is £200,000</p>
<p>27. What due diligence/checks did you do on Maxwell Asset Management (the company which loaned you the funds) before deciding to take a loan from them?</p>	<p>Well its basically word of mouth and I have a brief search on the internet.</p>
<p>28. What is the name of the company that your funds have been invested in?</p>	<p>Eclectic Capital</p>
<p>29. How did you originally become aware of Eclectic Capital?</p>	<p>Maxwell recommended them to me</p>
<p>30. Why did you seek to invest in Eclectic Capital rather than any other company?</p>	<p>I find there projects attractive and potentially lucrative on a long term basis</p>
<p>31. What due diligence/checks did you do on Eclectic Capital before deciding to</p>	<p>Well I just trust the consultancies companies recommendation I mean</p>

invest on them?	Maxwell's recommendation
32. What made you choose this company	Recommendation as previously stated
33. What relationship does Maxwell have with Eclectic?	Probably just companies working together or doing business I don't really know
34. How have you invested into Eclectic?	The loan was transferred to Eclectic capital directly from Maxwell
38. How does this compare with other investments you have considered? (If haven't considered any investment, why not?)	I think this ermm project is more retainable and can be lucrative on the long term
39. How much interest or dividends have you receive from Eclectic in the past 2/3 years? Are you getting a fixed return?	I haven't received anything yet as I've said I could only get the return after 6 years
41. Are you able to sell the shares to third parties and invest elsewhere? Or do you need the consent of Eclectic or Maxwell?	I'm not sure if I can sell them but I am pretty sure I can redeem them and I probably need consent from Eclectic. The relationship with me and Maxwell is of debtor and creditor so I don't think I need their consent.
42. Have you seen an investment strategy for Eclectic? (Notes: if yes) what attracted you to Eclectic's investment strategy? (Note: if no) why did you invest?	I think some of their projects are highly regarded by myself especially the ageing apartments investment - especially the fact that china is ageing and has older members in society so the apartments is an attraction to the investment idea
43. Documentation provided to us by Eclectic suggests they changed strategy from trading in securities to investing in wine bars and media in the UK. Were you consulted on this change?	They are trading professional resources - with the focus on moving from the trading of securities to wine bars and media industry it is easier to manage. I was engage in investment myself in China and I know that sometimes I have to shift away from securities as it's better for investors Were you consulted on the change? I'm not sure I'm not involved in them directly I am only the shareholder - but happy to accept the change of strategy and investment
46. Can you ask Eclectic to invest into UK Companies of your choice?	Not at the moment - as I'm only a share holder
47. What are the names of the companies that Eclectic has invested in?	I do have a list but I do not recall them at the moment
50. the evidence we have suggests that	Yes I am aware of that

<p>the majority of Eclectic's assets are in shareholdings in Russian Companies, and the UK companies Eclectic has invested in were not incorporated until June 2016.</p> <p>Are you aware of this? If not, why not?</p>	
<p>52. Are you an investor who has virtually no prospect of benefitting from the success of the company but stand losing capital if the company is not successful?</p>	<p>Of course I have considered that. I do have prospect with the company's development I am only a shareholder at this stage, after 5 years I will reassess my position whether to redeem or carry on. At this stage it is beyond my consideration regarding what the company does.</p>
<p>53. Why did you choose to invest in this way?</p>	<p>Its just I have confidence in the business projects they are engaged in whether wine or media industry I have great confidence in these projects I am very experienced investor so I do evaluate and seek for profit myself</p>
<p>60. What address did you visit when making arrangements to invest in Eclectic?</p>	<p>I think it's the same address where I signed the agreement with Maxwell.</p>

ANNEX B – Extracts of interview with Ms Wu, 16 August 2017

<p>3. Why did you apply for Tier 1 (Investor) using loaned funds? Did you not have £1 million of your own funds? If not, why not?</p>	<p>It's convenient way to invest in UK because of China protocol with transferring money and also I have money in China which I want to keep these assets in China. The investment in China brings me good returns and the interest for the loan is not that high.</p>
<p>16. How did you originally become aware of Maxwell Asset Management?</p>	<p>Our family friend recommended this too us as she has made same application through this company. What is your friend's name? Jing Fang Peng</p>
<p>18. Why did you seek to take a loan from Maxwell Asset Management rather than any other company or third party?</p>	<p>I compared several offers including HSBC and bank of China And then Maxwell management he has the lowest interest</p>
<p>19. What information or documents did you have to show Maxwell Asset Management to prove your credit-worthiness?</p>	<p>I showed them my bank statements and my documents from both of my parents companies</p>
<p>22. Has Maxwell asked for a charge on your assets as security for lending you funds? If so, please provide details</p>	<p>I'm not sure as my mum has managed the whole thing</p>
<p>23. What arrangements/agreements are in place to repay the loan with Maxwell Asset Management?</p>	<p>Initial agreement is for 3 years and if I want to extend I can To how many years? Not sure but I think I can renew it for another 2 years</p>
<p>24. Are you paying interest on the loan? If yes, (a) How much is this? (b) (b) is the interest being paid back to Maxwell Asset Management?</p>	<p>Yes We have already paid £600,000 up front this includes 3 years interest and the service charge. Is this just for your own loan? Yes my mother paid other amounts.</p>
<p>25. How much interest have you paid back to Maxwell over the past 2/3 years on the loaned funds?</p>	<p>£600,000 as above which includes service charges as well.</p>
<p>29. How did you originally become aware of Eclectic Capital?</p>	<p>When I signed the loan agreement Maxwell he suggested some companies and UK gilts and bonds as well as Eclectic. I compared all these investments and</p>

	made my choice.
30. Why did you seek to invest in Eclectic Capital rather than any other company?	Eclectic projects compared to other options I think will bring me a more lucrative return. The gilts was a less return. The shares involved too much risk. I have to make sure the investment retain its value.
31. What due diligence/checks did you do on Eclectic Capital before decided to invest on them?	I have had a look at their profile and companies house at the time it was trading.
32. What made you choose this company?	For the same reason I think the investment projects will give better return than other products in other companies.
36. What is your return from your investment with Eclectic?	I haven't received anything yet it will take 6 years for me to receive any return.
37. Are you able to redeem your investment when you like? Or can only Eclectic redeem it?	Yes
38. How does this compare with other investments you have considered? (If haven't considered any investment, why not?)	Its just that I like their projects better, I followed my mum's suggestion and advice
39. How much interest or dividends have you received from Eclectic in the past 2/3 years? Are you getting a fixed return?	None. I'm not sure, my focus is on my carer
41. Are you able to sell the shares to third parties and invest elsewhere? Or do you need the consent of Eclectic or Maxwell?	No it is purely my decision.
53. Are you an investor who has virtually no prospect of benefitting from the success of the company but stand losing capital if the company is not successful?	I wouldn't say so because I am following my mum's suggestion and she is very successful businesswoman and friend has done this and been successful. Because my parents are doing this for me I have confidence in their decision. So you receive dividends after 6 years in your investment? That's right yes according to the investment agreement You said loan and then changed to investment so is the money an investment and not a loan from Maxwell?

	<p>It is a loan</p> <p>What happens when you have to pay Maxwell back?</p> <p>I haven't considered about the repayment yet but if the investment is doing well then I will look at paying the loan by other means but if the investment is not doing well I will regain the investment and repay the loan.</p> <p>If you repay Maxwell by withdrawing your investment you will not receive dividends is this correct?</p> <p>This is the case but I have no reason to withdraw, I don't have to repay the loan after 5/6 years, I can extend the loan.</p> <p>How much would this cost?</p> <p>It should remain the same 3%.</p> <p>So to clarify is the loan from Maxwell an interest only loan?</p> <p>Yes</p>
<p>54. Why did you choose to invest in this way?</p>	<p>Any investment is a risk</p>
<p>61. What address did you visit when making arrangements to invest in Eclectic?</p>	<p>At the same address as Maxwell. I signed the authorisation at Maxwell's office.</p> <p>...</p>