



Press Summary

21 June 2023

R (on the application of Wang and another) (Respondents) v Secretary of State for the Home Department (Appellant)

[2023] UKSC 21

On appeal from: [2021] EWCA Civ 679

Justices: Lord Briggs, Lord Kitchin, Lord Burrows, Lady Rose, Sir Declan Morgan

Background to the Appeal

This appeal relates to the interpretation of the Immigration Rules, in particular the Tier 1 (Investor) Migrant regime (as in force in December 2017 – it has since been closed). This regime was designed to grant leave to remain to high-net-worth individuals making a substantial financial contribution to the UK. To qualify individuals were required to have £1 million (of either their own money or money borrowed from a UK-regulated financial institution) under their control in the UK. They must also have invested at least £750,000 of such sum in the UK through UK Government bonds or in shares in or loans to active and trading UK-registered companies (subject to certain further restrictions and exclusions).

Ms Wang is an individual who (among over 100 others) subscribed to a scheme designed to ensure qualification for leave to remain under the Tier 1 (Investor) Migrant regime. Under this scheme Ms Wang borrowed the necessary £1 million from Maxwell Asset Management Ltd (“**MAM**”, a UK-regulated financial institution). This was on terms that it was required to be used for investment in shares in or loans to active and trading UK-registered companies.

Ms Wang also signed a “services agreement” with a company called Maxwell Holdings Ltd (“**Holdings**”). Under this agreement Holdings was to provide services including advising on the Tier 1 regime requirements and ensuring that monies were used for authorised investments. To do this Holdings was to have discretion as to how to invest the monies loaned by MAM on behalf of Ms Wang and to act on behalf of Ms Wang under a power of attorney. Holdings also guaranteed repayments of the loan to MAM, and agreed to make all interest payments under the loan to MAM at no expense to Ms Wang. In return for this Ms Wang paid a fee of £200,000, which was repayable if she did not obtain Tier 1 (Investor) migrant status.

The £1 million was then invested on behalf of Ms Wang (as with all the participants in the scheme) in a company called Eclectic Capital Limited (“**Eclectic**”) by way of a loan which was convertible to shares at Eclectic’s election (which would pay a dividend lower than the interest rate on the loan from MAM). The loan funds were transferred directly from MAM to Eclectic, which invested the money almost exclusively in Russian companies.

Each of MAM, Holdings and Eclectic were wholly owned and controlled by two Russian nationals, Dimitry Petrovich Kirpichenko and his wife Nika Kirpichenko .

In 2017 Ms Wang applied for leave to remain in the UK as a Tier 1 (Investor) Migrant on the basis of her participation in this scheme. The Secretary of State refused Ms Wang’s application on two grounds: (1) that the loan from MAM did not result in her having the £1 million “under [her] control” because she had no choice about where to invest the money; and (2) that the investment in Eclectic was not a qualifying investment because it was an excluded type of company. This decision was upheld following an administrative review within the Home Office.

Ms Wang then applied for judicial review. This was dismissed by the Upper Tribunal. However, that decision was overturned by the Court of Appeal, which allowed Ms Wang’s appeal and set aside the Secretary of State’s decision. The Secretary of State appealed to the Supreme Court.

Judgment

The Supreme Court unanimously allows the appeal and restores the Secretary of State’s decision to refuse Ms Wang’s application for leave to remain. Lord Briggs gives the only judgment, with which the other members of the panel agree.

Reasons for the Judgment

The principal question for the Supreme Court was whether the £1 million loaned to Ms Wang was “money under [her] control” within the meaning of the Immigration Rules.

The Supreme Court explained that the Immigration Rules are to be interpreted in light of their context and purpose, in accordance with the general principles of statutory interpretation [29]-[31]. In applying the rules the court must take an unblinkered and realistic approach to analysing the facts. In a case such as this, that includes considering the relevant scheme in question as a whole or “in the round” [2]-[7];[31]. That was the case even though the Tier 1 (Investor) Migrant regime was a points-based or “tick-box” system which sacrifices discretion and perfect fairness for efficiency, transparency and predictability [32]-[35].

Following this approach the Supreme Court considered that the Secretary of State had correctly interpreted “under [her] control” as requiring that an applicant has a real choice about the use and disposition of the relevant money [47]. The Court of Appeal had erred in interpreting the requirement as only being that the money be available to Ms Wang personally as opposed to as a nominee. This was because the requirement of the money to be “of [her] own” would already exclude nominees, and so render “under [her] control” redundant and emasculate its natural and ordinary meaning [42]-[46].

Looking at the terms, commercial rationale, and practical operation of the Maxwell scheme in the round, the Supreme Court agreed with the Secretary of State (and the courts below) that Ms Wang did not have any real choice about the use of the loaned money. It was pre-ordained by the scheme that the £1 million would be invested in Eclectic (or possibly some other company owned and controlled by Mr and Mrs Kirpichenko). Any choice lay with Mr and Mrs Kirpichenko and the companies they controlled not Ms Wang [48]-[51].

The Secretary of State was therefore right to conclude that Ms Wang did not have the money “under [her] control” for the purposes of the Immigration Rules. The appeal is therefore allowed and the Secretary of State’s decision to refuse leave to remain is restored [52];[55].

It was not therefore necessary for the Supreme Court to consider the Secretary of State’s second reason for refusing leave to remain (i.e. that the investment in Eclectic was not a qualifying investment) [53]-[54].

References in square brackets are to paragraphs in the judgment

NOTE:

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: [Decided cases - The Supreme Court](#)