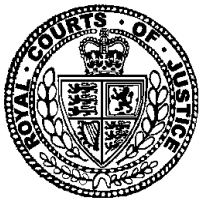

Neutral Citation Number: [2019] EWCA Civ 720

Case No: C6/2016/0756

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IAC)
MRS JUSTICE ELISABETH LAING DBE
JR/11169/2015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/04/2019

Before:

SENIOR PRESIDENT OF TRIBUNALS
LORD JUSTICE HOLROYDE
and
LORD JUSTICE MALES

- -

Between:

THE QUEEN on the application of ANWAR SAJJAD	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Rowan Pennington-Benton and Julia Lowis (instructed by **Connaught Law Limited**) for the **Appellant**
Zane Malik (instructed by **Government Legal Department**) for the **Respondent**

Hearing dates: 10th April 2019

- -

JUDGMENT

Lord Justice Holroyde:

1. This appeal against a refusal of permission to apply for judicial review raises an issue as to the requirements to be met by a person who applies pursuant to the Points Based System for further leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant and who claims points on the basis of his investment in a UK business.

The application for, and refusal of, further leave to remain

2. The appellant, a national of Pakistan, came to the United Kingdom in June 2011 with limited leave to enter as a Tier 1 (Entrepreneur) Migrant. On 1st April 2015 he submitted an application for further leave to remain as a Tier 1 (Entrepreneur) Migrant. His wife and their three children made applications as his dependants. Their applications were entirely dependent on his, and it is therefore not necessary to make separate reference to them. In saying that, I mean no disrespect to them and am fully conscious of the human reality of their positions.

3. The appellant's application was refused by the respondent on 27th May 2015. He exercised his right to request an administrative review of that adverse decision. On review, the original decision was upheld on 18th June 2015.

4. In making those decisions, the respondent relied upon a number of grounds. All but one of those grounds were however abandoned by the respondent at later stages of the proceedings, and it is no longer necessary to refer to them. I therefore focus on the one reason for refusal which remains relevant.

5. The appellant claimed points on the basis of his investment in Blanco Coffee Limited, latterly trading as Sajjad's Grill and Restaurant, a UK company of which he has at all material times been the sole director. He provided copies of the unaudited financial statements of that company, which confirmed his status as the sole director. A summary of the company's creditors showed a balance of £560,787 outstanding on the Director's Current Account as at 15th March 2015. The appellant also provided a letter from the company's accountants, dated 24th March 2015, which gave details of "the amounts deposited by Mr Sajjad in the company" in a total sum of £495,470. Further documents provided by the appellant showed that the total figure included both payments made by him directly into the company's bank account and payments which he had made, from his personal account, to creditors of the company. He had however entered the words "not applicable" in a section of the application form headed "legal agreement (for director's loans only)".

6. In refusing the application for further leave to remain, the respondent pointed to the fact that no director's loan agreement had been provided. In a letter confirming that the decision had been upheld on administrative review, the respondent said:

> "You have also registered as a director with Companies House; therefore you must show evidence of invested funds in the form of a director's loan agreement; this has not been provided".

The claim for judicial review

7. On 16th September 2015 the appellant issued in the Upper Tribunal, Immigration and Asylum Chamber, a claim for judicial review challenging the respondent's decision refusing his application for an extension of leave to remain. In his grounds relating to the respondent's decision that he had not provided the required evidence of invested funds, the appellant set out the annual amounts which he had invested in the business, totalling the figure of £495,470 already mentioned, and referred to letters from the company's accountants which had been submitted with his application. He also referred to a more recent letter from accountants dated 24th July 2015, which said:

> "The current account for March 2015 has the full details of capital introduced by Mr A Sajjad with the closing balance of £495,470. All the money in the Director's Current Account is an investment to run the business of Blanco, in legal terms it is considered as loan to the company without interest for an indefinite period. Loan agreement is not required but can be provided for this arrangement."

Relying on these various letters, he contended that the amount of money shown in the unaudited directors current account was clearly the amount of money invested by him, as he was the sole director. His Detailed Grounds continued:

> "Therefore the SSHD is wrong and has failed to assess the evidence properly which was submitted with the claimant's application. The claimant clearly satisfied paragraph 46-SD(b) of Appendix A of the Immigration Rules as he has submitted unaudited accounts which show the investment he has made here in the UK, which was confirmed in the attached covering letter by the claimant's accountants. Moreover, the SSHD has been too rigid in his application of the Immigration Rules, and due consideration should have been given to the evidence submitted, which clearly shows that the claimant has evidenced his said investment."

8. In Summary Grounds of Defence, the respondent contended that, as the claimed investment had been made by way of director's loan, paragraph 46-SD(a)(iii) of the Rules required evidence in the form of a director's loan agreement. No such agreement had been provided.

9. Permission to apply for judicial review was refused on the papers by Upper Tribunal Judge Smith. One of her reasons was that the appellant had loaned money to the company, and therefore was required to produce a director's loan agreement, but had not done so.

10. The appellant renewed his application to an oral hearing before Elisabeth Laing J sitting as a judge of the Upper Tribunal. In her decision, as summarised in a Judicial Review Decision Notice issued on 26th January 2016, she too held that the respondent was entitled to refuse the application because the requirement to submit a director's loan agreement had not been complied with.

11. The appellant gave notice of appeal to this court against Elisabeth Laing J's refusal of permission. His application for permission to appeal was originally refused on the papers, but was granted by Singh LJ following an oral renewal hearing on 6th June 2018.

The grounds of appeal

12. Pursuant to a direction given by Singh LJ, the appellant subsequently filed replacement grounds of appeal in which he advances two arguments. Ground 1 contends that the appellant's investment in his company did not take the form of a "director's loan" within the meaning of paragraph 46-SD(a)(iii) of the Immigration Rules and he was therefore not required to file a legal agreement detailing the terms of the loan. Ground 2 contends in the alternative that the phrase "a director's loan" is unclear, and that it was unfair/unreasonable for the respondent to refuse the appellant's application in reliance on that ambiguity without first contacting the appellant or giving him a chance to comply.

13. Before considering the submissions, it is convenient to set out the legal framework.

The Immigration Rules

14. Pursuant to section 3(2) of the Immigration Act 1971, the respondent has made, and Parliament has approved, the Immigration Rules. Part 6A of the Rules, as amended, establishes a points-based system ("the PBS") for persons seeking to enter or remain in the United Kingdom as, amongst other things, entrepreneurs. The objective of the PBS is to enable the respondent to process large numbers of applications fairly and expeditiously by applying clear and objective criteria. It is well established that applicants under the PBS must take great care to comply with its requirements. In *Kaur v SSHD* [2015] EWCA Civ 13 Burnett LJ (as he then was) said at [41]:

> "The points based system for determining whether to grant leave to enter or to remain in the United Kingdom… is designed to achieve predictability, administrative simplicity and certainty. It does so at the expense of discretion, that is to say it is prescriptive. The consequence is that failure to comply with all its detailed requirements will usually lead to a failure to earn the points in question and thus refusal."

Similarly, in *SSHD v Raju* [2013] EWCA Civ 754, [2013] 4 All ER 1043 Moses LJ said, at [12], that "there is no room in the points based scheme for a near miss".

15. In relation to the different categories of migrant who may apply for leave to remain under the PBS, the Rules require certain specified documents to be provided. Paragraph 39B of the Immigration Rules states, in material part,

> "(a) Where these Rules state that specified documents must be provided, that means documents specified in these Rules as being specified documents for the route under which the applicant is applying. If the specified documents are not provided, the applicant will not meet the requirement for which the specified documents are required as evidence.

> (b) Where these Rules specify documents that are to be provided, those documents are considered to be specified documents, whether or not they are named as such, and as such are subject to the requirements in (c) to (f) below."

The final sentence of sub-paragraph (a) is stated in stark terms. I shall consider shortly the limited circumstances in which some indulgence may nonetheless be granted to an applicant who fails to provide specified documents as required.

16. By paragraph 245DD of the Immigration Rules, again expressed in stark terms,

> "To qualify for leave to remain as a Tier 1 (Entrepreneur) Migrant under this rule, an applicant must meet the requirements listed below. If the applicant meets these requirements, leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.
>
> Requirements:
>
> …
>
> (b) The applicant must have a minimum of 75 points under paragraphs 35 to 53 of Appendix A. …"

17. The court has been provided with a copy of Appendix A in the form which is relevant to this appeal. It has subsequently been amended. At the material time, paragraphs 35 and 37 of Appendix A stated –

> "35. An applicant applying for entry clearance, leave to remain or indefinite leave to remain as a Tier 1 (Entrepreneur) Migrant must score 75 points for attributes.
>
> …
>
> 37. Available points are shown in Table 5 for an applicant who:
>
> (a) has had entry clearance, leave to enter or leave to remain as a Tier 1 (Entrepreneur) Migrant … in the 12 months immediately before the date of the application, or
>
> (b) is applying for leave to remain and has, or was last granted, entry clearance, leave to enter or leave to remain as a Tier 1 (Entrepreneur) Migrant …"

18. Table 5 was headed "Investment and business activity" and indicated that 25 points were available in the following (amongst other) circumstances:

> "The applicant has invested, or had invested on his behalf, not less than £200,000 (or £50,000 if, in his last grant of leave, he was awarded points for funds of £50,000) in cash directly into one or more businesses in the UK."

19. The explanatory notes which followed that Table included, materially, the following:

> "46. Documentary evidence must be provided in all cases. The specified documents in paragraph 46-SD must be provided as evidence of any investment and business activity that took place when the applicant had leave as a Tier 1 (Entrepreneur) Migrant…
>
> 46-SD. The specified documents in paragraph…46 are as follows:
>
> (a) The applicant must provide all the appropriate specified documents needed to establish the amount of money he has invested from the following list:
>
> (i) If the applicant's business is a registered company that is required to produce audited accounts, the audited accounts must be produced;
>
> (ii) If the applicant's business is not required to produce audited accounts, unaudited accounts and an accounts compilation report must be provided from an accountant who is a member of a UK Recognised Supervisory Body (as defined in the Companies Act 2006);
>
> (iii) If the applicant has made the investment in the form of a director's loan, it must be shown in the relevant set of accounts provided, and the applicant must also provide a legal agreement, between the applicant (in the name that appears on his application) and the company, showing:
>
> (1) the terms of the loan,
>
> (2) any interest that is payable,
>
> (3) the period of the loan, and
>
> (4) that the loan is unsecured and subordinated in favour of third-party creditors.
>
> (iv) …
>
> (b) Audited or unaudited accounts must show the investment in money made directly by the applicant, in his own name or on his behalf (and showing his name). If he has invested by way of share capital the business accounts must show the shareholders, the amount and value of the shares (on the date of purchase) in the applicant's name as it appears on his application. If the value of the applicant's share capital is not shown in the accounts, then share certificates must be submitted as documentary evidence. The accounts must clearly show the name of the accountant, the date the accounts were produced, and how much the applicant

> has invested in the business. The accounts must be prepared and signed off in accordance with statutory requirements. …
>
> 47. For the purposes of table 5 "investment and business activity" does not include investment in any residential accommodation, property development or property management, and must not be in the form of a director's loan unless it is unsecured and subordinated in favour of the business. …"

20. In cases of non-compliance with the requirement to provide specified documents, paragraph 245AA of the Immigration Rules, provides a limited degree of flexibility:

> "(a) Where Part 6A or any appendices referred to in Part 6A state that specified documents must be provided, the Entry Clearance Officer, Immigration Officer or the Secretary of State will only consider documents that have been submitted with the application, and will only consider documents submitted after the application where they are submitted in accordance with subparagraph (b).
>
> (b) If the applicant has submitted specified documents in which:
>
> (i) some of the documents in a sequence have been omitted (for example, if one bank statement from a series is missing);
>
> (ii) a document is in the wrong format (for example, if a letter is not on letterhead paper as specified); or
>
> (iii) a document is a copy and not an original document; or
>
> (iv) a document does not contain all of the specified information
>
> the Entry Clearance Officer, Immigration Officer or the Secretary of State may contact the applicant or his representative in writing, and request the correct documents. The requested documents must be received at the address specified in the request within 7 working days of the date of the request.
>
> (c) Documents will not be requested where a specified document has not been submitted (for example an English language certificate is missing), or where the Entry Clearance Officer, Immigration Officer or the Secretary of State does not anticipate that addressing the omission or error referred to in subparagraph (b) will lead to a grant because the application will be refused for other reasons.
>
> (d) If the applicant has submitted a specified document:
>
> (i) in the wrong format; or
>
> (ii) which is a copy and not an original document; or

> (iii) which does not contain all of the specified information, but the missing information is verifiable from:
>
> (1) other documents submitted with the application,
>
> (2) the website of the organisation which issued the document, or
>
> (3) the website of the appropriate regulatory body;
>
> the application may be granted exceptionally, providing the Entry Clearance Officer, Immigration Officer or the Secretary of State is satisfied that the specified documents are genuine and the applicant meets all the other requirements. The Entry Clearance Officer, Immigration Officer or the Secretary of State reserves the right to request the specified original documents in the correct format in all cases where (b) applies, and to refuse applications if these documents are not provided as set out in (b).''

21. The scope of paragraph 245AA was considered in the recent case of *Mudiyanselage v SSHD* [2018] EWCA Civ 65, [2018] 4 WLR 55. The effect of that decision is that evidential flexibility is limited to the particular circumstances for which paragraph 245AA itself provides, and there is no general policy to allow correction of minor errors. The court in reaching that decision recognised that the more limited scope of the evidential flexibility had increased the scope for harsh outcomes in cases where an application under the PBS failed because of a minor error or omission which could have been rectified if the applicant had been notified of it, but which did not fall into one of the specific categories identified in paragraph 245AA. Underhill LJ, at [56], said:

> ''There may be very particular cases where such an outcome can be avoided by the application of the common law duty of fairness; but I agree with Beatson LJ in *SH(Pakistan)* that the effect of that duty is constrained by the context of the PBS as expounded in the various authorities reviewed above. The clear message of those authorities including *Mandalia*, is that occasional harsh outcomes are a price that has to be paid for the perceived advantages the PBS process. It is important not to lose sight of the fact that the responsibility is on applicants to ensure that the letter of the requirements of the PBS is observed: Though that may sometimes require a good deal of care and attention to detail, because of the regrettable complexity of the Rules, it will normally be possible to get it right''.

22. Sir Brian Leveson P at [145], expressed a similar view:

> ''These are hard-edged decisions but the requirements of the PBS, Rules and Guidance are precise. Those who seek to make applications of this nature must take the utmost care to ensure that they comply with the requirements to the letter; they cannot

> expect discretionary indulgence beyond the very limited areas provided by evidential flexibility."

The submissions on appeal

23. Mr Pennington-Benton and Ms Lowis on behalf of the appellant, and Mr Zane Malik on behalf of the respondent, have set out their arguments in recent replacement skeleton arguments and have assisted the court with well-focused oral submissions, for which I am grateful.

24. As to ground 1, Mr Pennington-Benton submits that the appellant's investment in the company took the form of his crediting the company's bank account and then using the funds to develop the business. It is accepted that a debt owed by the company to the appellant was thereby created, and for the purposes of this appeal Mr Pennington-Benton does not seek to argue that at least some of the investment did not constitute a loan; but he submits that there was no "director's loan" for the purposes of Annex A, paragraph 46-SD. Reliance is placed on the decision of the House of Lords in *Potts Executors v IRC* [1951] AC 443, and to passages in the current edition of Chitty on Contracts, to show that where A pays money to B at the request of C, on the terms that he is to be repaid by C, it is not invariably the case that the transaction amounts to a loan by A to C. In the present case Mr Pennington-Benton submits that there is no inconsistency in acknowledging the existence of a debtor-creditor relationship but denying that there was anything amounting to a "director's loan". He concedes that on this approach the debt owed by the company to the appellant would have priority over the claims of shareholders in the company. Nonetheless, he submits, Table 5 requires that an applicant has invested a certain sum in cash directly into a UK business, but does not impose any further requirement as to the form which that investment takes. He argues that the investment could permissibly take the form of a gift to the company. Where the investment takes the form of a director's loan, or a purchase of shares, then paragraph 46-SD requires specified documents to be provided; but other forms of investment, such as the appellant made, do not impose any comparable obligation beyond what is contained in sub-paragraphs 46-SD(a)(ii) and (b). It is submitted that the evidence required in those sub-paragraphs was sufficiently provided by the documents which were supplied with the application for an extension of leave to remain.

25. As to ground 2, Mr Pennington-Benton submits in the alternative that the phrase "a director's loan" is unclear. It was reasonably understood by the appellant to mean that he was only required to provide the specified document if his investment took the particular form of a director's loan. If he was mistaken in that understanding, or mistaken in thinking that his form of investment did not constitute a director's loan, he had nonetheless clearly invested a very substantial amount. Mr Pennington-Benton accepts that case law emphasises the prescriptive nature of the PBS, but submits that the rationale for that approach breaks down if applicants cannot clearly understand what the Rules require of them. It is submitted that the respondent could not fairly rely on the ambiguous wording of the rules, and reject the application on the basis that no loan agreement had been provided, without giving the applicant the opportunity to supply the information which was thought to be missing. It is submitted that the purpose of the PBS cannot be achieved if the requirements are not accurately expressed in the Rules themselves. It is further submitted that, even if a request by the respondent for further documentary evidence would have been outside the limited scope of paragraph

245AA of the Rules, there is nonetheless a general residual discretion for the respondent to request further information. In support of this argument, counsel suggests that it would be obviously ridiculous and unfair if the respondent had no discretion to request further information when, for example, it was apparent that an applicant had by simple oversight failed to provide one necessary piece of information.

26. In support of both grounds, it is contended on behalf of the appellant that the court should have regard to the reality of the situation. It is not disputed that he had in fact invested nearly half a million pounds in a UK business; the fact that he had done so was sufficiently apparent from the documents which had accompanied his original application; and in the circumstances of the relevant business being a limited company of which the appellant was the sole director, a document formally recording a loan by the director to the company would in reality have added very little of value to the information which was already before the respondent.

27. On behalf of the respondent, Mr Malik submits that the effect of paragraphs 46 and 46-SD is that an applicant for leave to remain under the PBS, who seeks an award of points on the basis of an investment in a UK business, must establish that the investment has taken one of only two permissible forms: investment by way of a director's loan, or investment by way of purchase of share capital. The reason why the acceptable forms of investment are limited, and reasonably limited, in that way is that it is important for the respondent to be able to establish, quickly and accurately, the precise legal terms on which funds have been transferred. Otherwise, Mr Malik suggests, an applicant who was willing to abuse the system might take a loan from the company and then purport to credit that loan back to the company as an investment. Mr Malik further relies upon what Lord Brown said in *Mahad v Entry Clearance Officer* [2009] UKSC 16 at [10] as to the proper approach to the construction of the Immigration Rules:

> "The Rules are not to be construed with all the strictness applicable to a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that there are statements of the Secretary of State's administrative policy. … 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.".

Counsel submits that the interpretation of the Rules for which the appellant contends in this case is inconsistent with the wording of the Rules and inconsistent with the overall scheme of the PBS.

28. Mr Malik further submits that the appellant clearly did make his investment in the form of a director's loan: the accountant's letter of 24th July 2015, to which I have referred at [8] above, makes that plain. He was therefore required by paragraph 46-SD(a)(iii) to provide a legal agreement containing the important details listed in that sub-paragraph, but failed to do so. Indeed, he was not able to do so, because no such legal agreement has ever existed.

29. As to ground 2, the respondent relies on the decision in *Mudiyanselage*. This case cannot be brought within the limited exceptions for which paragraph 245AA provides: it is not a case in which some detail is missing from the document which has been provided, but rather a case of failure to submit the relevant specified document at all.

It follows that the respondent was not under any obligation, by virtue of paragraph 245AA, to ask for further documentation before refusing the application. In any event, the respondent cannot sensibly be criticised for failing to ask the appellant for a document, namely a legal agreement in respect of the loan, which did not exist and never has existed. Mr Malik responds to the suggested wider discretion by submitting that if an applicant cannot bring himself within the Rules, his only remedy (if any) lies in asking the respondent to consider an application based on exceptional circumstances falling outside the Rules. He points out that in numerous cases, of which *Mudiyanselage* itself is an example, the courts have criticised the Rules as lacking clarity, but have nonetheless construed the Rules and have not suggested that lack of clarity in the Rules obliges the respondent to seek further information.

30. Having briefly summarised the competing submissions in that way, I can indicate my views upon them.

Discussion

31. I consider first whether the investment made by the appellant in the company was a "director's loan" within the meaning of paragraph 46-SD(a)(iii) of the Immigration Rules. In my judgment, it is clear that it was. The Rules do not limit the ways in which a migrant may choose to invest in a UK business, but they do limit the circumstances in which an investment may qualify for an award of points in support of an application for leave to remain. Bearing in mind the nature and objective of the PBS, and adopting the approach directed by the Supreme Court in *Mahad*, it seems to me that the phrase "a director's loan" was intended to bear the simple and clear meaning of a loan made by a director to the company of which he or she is a director. It would be inconsistent with the nature and objective of the PBS to interpret the phrase 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. There is no doubt that the appellant has at all material times been a director of the company in which he made his investment; and the accountant's letter dated 24th July 2015 - which in my view reflects the plain reality of the situation - confirms that all the sums paid by the appellant to or for the benefit of the company, as reflected in the director's current account, were an investment in the business which in legal terms "is considered as a loan to the company without interest for indefinite period".

32. There is to my mind nothing unreasonable or unfair in interpreting the phrase in the way I have indicated. 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. That can effectively be done if the phrase is interpreted as covering any transaction in which a director pays money to or for the benefit of his company on the basis that it will one day be repaid. It cannot effectively be done if the respondent is to be required, on an application-by-application basis, to make an analysis of whether a particular transaction by which money passed from a director to a company amounted to a director's loan.

33. Furthermore, Mr Pennington-Benton's submission, that there may be a transaction between a director and his company which creates a creditor-debtor relationship but does not constitute a "director's loan" for this purpose, would give rise to surprising results. As has been noted at [23] above, paragraph 47 of Appendix A limits the form

of director's loan which will be eligible to attract points under the PBS, and paragraph 46-SD(a)(iii) specifies the four important details of the loan which must be evidenced by the specified document. Mr Pennington-Benton acknowledges that on his approach, not only would there be an absence of the required details (none of which are revealed by the documents which accompanied the appellant's application), but there would also be a loan which was not in fact subordinated in favour of third-party creditors. I can see no reason why the respondent should be taken to have intended that, in awarding points under the PBS, strict limitations would apply to a loan which came within a narrow definition of a "director's loan", but no limitations would apply to a transaction which created a creditor/debtor relationship between a director and his company but which fell outside that definition. More specifically, I can see no reason why the respondent should be taken to have intended that a director's loan by the appellant would have to be unsecured and subordinated in favour of the business (see paragraph 47 quoted at [20] above), but that unspecified other forms of loan need not be.

34. I therefore cannot accept the appellant's submission that his investment was not (or even arguably was not) a director's loan and so did not need to be evidenced by the specified document relevant to such a loan. Given that the form of investment adopted by the appellant clearly was in my view a director's loan, it follows that he was required to provide, as a specified document, a legal agreement showing the particulars specified in paragraph 46-SD(a)(iii). It is accepted that he did not do so. Upper Tribunal Judge Smith and Elisabeth Laing J were therefore correct to find that the respondent did not act unlawfully in rejecting the appellant's application for further leave to remain on the ground of a failure to provide the specified documentation.

35. That conclusion is in itself sufficient to defeat the appellant's first ground of appeal. It is therefore not necessary for me to go on to consider the submission that the appellant was entitled to rely on an investment which did not take either of the forms to which the Rules specifically refer. I am bound to say that I see considerable force in Mr Malik's argument that the provisions in Appendix A as to specified documents support his submission that the only forms of investment which may qualify for an award of points are those to which paragraph 46-SD specifically refers. As I have indicated, I can see no reason why the respondent should be taken to have intended that strict requirements must be observed as to the documents to be provided as evidence of two particular forms of investment, but that other forms of investment will qualify for an equal award of points without any evidential requirements beyond an entry in the company's accounts. However, since the point does not strictly arise for determination, I prefer not to express any concluded view upon it, or upon Mr Pennington-Benton's submission that a gift by a director to his company may be a form of investment for which points are available in support of an application for leave to remain as an entrepreneur.

36. I turn briefly to the second ground of appeal. This was narrowed in the course of argument, as Mr Pennington-Benton realistically acknowledged that he could not successfully bring his case within the limited scope for flexibility provided by Rule 245AA: this is not a case in which the appellant supplied a specified document but it was in the wrong format or lacked some necessary detail; nor is it a case in which a sequence of documents was submitted but one or more were missing. He therefore relied upon his submission that the respondent has a residual discretion, which in this case should have been exercised in the interests of fairness, to give the appellant an

opportunity to provide a director's loan agreement even though the appellant had stated that section of the application form to be "not applicable". That submission is in my view difficult to reconcile with the case law, to some of which I have referred, which emphasises that under the PBS, the advantages of certainty and efficiency will from time to time produce results in individual cases which may seem harsh. In any event, the premise of the submission is that the need to exercise a discretion in the appellant's favour arose because the phrase "a director's loan" was unclear and the respondent ought reasonably to have inferred that the appellant had misunderstood it. But as I have indicated, I do not accept Mr Pennington-Benton's submission that the meaning of the phrase was unclear, still less that it was so unclear as to impose a special requirement upon the respondent to assist an applicant who had not provided the specified documentation. I do not think it either necessary or appropriate in this appeal to consider the possible ambit of the suggested residual discretion, because I think it clear that on any view an appellant who denies ever having made a director's loan cannot realistically hope to succeed in an argument based upon the proposition that the respondent should have exercised a discretion to ask for evidence of the making of a director's loan.

Conclusion

37. For those reasons, and notwithstanding Mr Pennington-Benton's submissions, I conclude that there are no arguable grounds for judicial review of the respondent's decisions in this case, and that both Upper Tribunal Judge Smith and Elisabeth Laing J were accordingly correct to refuse permission to apply. I would therefore dismiss the appeal.

Lord Justice Males :

38. I agree that this appeal must be dismissed for the reasons given by Holroyde LJ. I add some comments of my own to explain why, despite the fact that (on the evidence before us) the appellant has used almost £500,000 of his money, mainly in discharging the debts of his UK business which has provided employment within this country, the fact that he does not qualify for leave to remain as a Tier 1 (Entrepeneur) Migrant under the points based system is not a mere technicality.

39. To obtain leave to remain as an Entrepreneur, an applicant must score 75 points. In the case of an applicant such as the appellant who obtained leave to enter as a Tier 1 (Entrepreneur) Migrant, the available points are those shown in Table 5. That table makes available a total of 80 points in four categories, so that in practice an applicant must score the available points in each category. In addition to the requirement for an investment of not less than £200,000, an applicant must be registered either as self-employed or as the director of a company. The applicant's business was carried on through a company and therefore, to qualify under this route, the applicant had to be a director of the company, as he was, in fact the sole director.

40. This is the context within which paragraphs 46 and 46-SD (including the concept of a director's loan) have to be considered. In the case of a company, the obvious ways in which to invest are either debt or equity. (There was some debate before us whether an outright gift would also qualify as an investment in the company, but as that is not what happened in this case it is unnecessary to reach any conclusion about this). An equity investment provides the investor with an ownership interest in the company, but in the

event of the company's insolvency the interests of shareholders rank behind those of the company's creditors.

41. Mr Pennington-Benton submitted that the investment made by the appellant in this case was a loan which, although made by a director (who had to be a director if he was to qualify under the points based system), was not a director's loan. I would reject that submission. In the context of the points based system, such a loan is necessarily to be regarded as a director's loan within the meaning of paragraph 46-SD(a)(iii).

42. That being so, the appellant was required to provide a legal agreement between himself and the company showing: "(1) the terms of the loan, (2) the interest that is payable, (3) the period of the loan, and (4) that the loan is unsecured and subordinated in favour of third-party creditors". As paragraph 46 makes clear by its insistence on documentary evidence and its mandatory terms ("must be provided in all cases"), the requirement is for a written agreement setting out these matters.

43. In the present case there was no such agreement. Mr Pennington-Benton submitted that a written agreement would have added nothing to the evidence already provided and that any failure by the appellant was entirely a matter of form as opposed to substance. He submitted that a written agreement would merely have been a piece of paper, signed by the appellant twice, once in his capacity as director-lender and then again on behalf of the company, recording that the money was an interest free loan repayable on demand.

44. Even if that were so, it would be no answer when the rules are clear in requiring a written agreement. In fact, however, it is not so. While such a piece of paper may have satisfied the first three matters required to be shown (terms, interest and period), it would not have addressed the fourth matter.

45. The fourth matter is important. The requirement that the loan be unsecured ensures that in the event of the company's insolvency, secured creditors will have priority over the debt payable to the director. The requirement for subordination ensures that other unsecured creditors will have such priority. In the absence of such a provision, the loan to the director would rank equally with debts to other unsecured creditors and, if the amount of the loan represents a substantial proportion of the company's debts, could mean that the director takes the greater part of whatever assets there are. Accordingly the requirement for subordination puts an applicant who chooses to invest in his company by making a loan in the same position, in the event of the company's insolvency, as one who makes an equity investment.

46. In the present case there has never been any suggestion that the terms on which the appellant loaned money to the company included a provision for subordination. Accordingly, while I have sympathy for the appellant and his family, the position is not merely that he failed to produce a piece of paper, but that he failed to produce the necessary evidence to qualify under the points based system on an important matter of substance.

Senior President of Tribunals:

47. I agree with both of my Lords' judgments.