



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/06539/2016

THE IMMIGRATION ACTS

Heard at Field House
On 4th December, 2017

Decision & Reasons Promulgated
On 11th January 2018

Before

UPPER TRIBUNAL JUDGE CHALKLEY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SERHAT MERTOGLU
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr T Wilding, Home Office Presenting Officer

For the Respondent: Mr P V Thorpe, a partner in the practice of Thoree & Co Solicitors

DECISION AND REASONS

1. The appellant in this appeal is the Secretary of State for the Home Department. To avoid confusion, I refer to her as being, "the claimant". The respondent is a national of Turkey, who was born on 26th November 1992.
2. On 20th May 2016, the claimant refused to grant to the respondent an EEA family permit to join his stepmother and father in the United Kingdom under Regulation 7 of the Immigration (EEA) Regulations 2006. The claimant noted that the respondent was over the age of 21 years at the date of decision, had lived in Turkey all his life and was registered as a student at Firat University. It was noted that as evidence of

dependency, seven money transfers sent from the United Kingdom between 2013 and 2016 had been provided by the respondent, but six of these were from the respondent's father and one from the respondent's stepmother. The claimant was not satisfied that these ad hoc money transfers were evidence that the respondent is wholly or mainly dependent on his stepmother. The claimant noted that the stepmother could continue to provide financial support to the respondent from the United Kingdom.

3. The judge heard oral evidence from the respondent's stepmother and from the respondent's father. The judge recorded that the stepmother gave evidence stating that the respondent was dependent on her and her husband and needs support for school and for life generally. He is 25 years of age and not working. He has never worked and was studying and wanted to finish his university studies and join the family in the United Kingdom. He had been supported since the age of 6. The judge recorded that the respondent's stepmother claimed that over the years she and her husband, the respondent's father, have sent up to about £12,000. The judge records that the witness gave a breakdown for between 2012 and 2016. Unfortunately, the determination is unclear. It is not clear whether the sum of £12,000 is the total sum which has been sent to the respondent since he was 6 (he is now 25 years of age) and it is not clear how much the witness claimed had been sent to the respondent between the years 2012 and 2016.
4. The judge heard oral evidence from the respondent's father. He is a British citizen and also a Turkish national. He claims that for the whole of the respondent's life he and the respondent's stepmother had been sending money to him. The money has been sent through his cousin and friend.
5. The judge recorded that the sponsor confirmed that the profit from the sponsor's business is about £14,000 pa, of which his share is £7,000 pa, because he has a business partner. He also has rent of £100 a week to pay and he has three other children, who are currently in the United Kingdom and who he is supporting. Before his current business he was employed as a lift engineer. The judge found credible the evidence of the EEA sponsor, that she has been sending money to the respondent before she stopped working in 2010. He also found it credible and plausible that documents recording money transfers would have been lost. The judge recorded that the respondent has recently concluded his education and is not working.
6. The judge found the evidence of the witnesses to be credible and found that the respondent is a dependant on the EEA sponsor and his father jointly.
7. The claimant challenged the judge's decision, because the evidence before the judge was that the EEA stepmother had not been working since the birth of her third child some six years earlier, and the respondent's father's take home pay is in the order of £7,000 pa, from which £100 a week is paid for rent, between them, the respondent's stepmother and father have three children in the United Kingdom. The evidence of the sponsor's ability to provide for the basic needs of the respondent had simply not,

it was suggested, been made out on the evidence. However, even if the evidence of support had been credible, the issue in front of the Tribunal was whether the support provided by the sponsors was necessary to enable the respondent to meet his basic needs.

8. Reliance was placed on *Lim v Entry Clearance Officer (Manila)* [2015] EWCA Civ 1383 and on paragraph 32 in particular. The grounds submitted that the judge merely found that the respondent is dependent, without any further elaboration as to whether what appears to be sporadic support provided, was actually necessary to meet the respondent's basic needs. The evidence before the judge was that the respondent lived with his mother and his grandmother has some form of pension, the implication being that if the respondent is dependent upon anybody for his basic needs, it is his mother and/or his grandmother in Turkey.
9. Mr Wilding pointed out that the judge had simply focused on the sole issue of whether money was being sent back to Turkey or not, rather than whether the respondent is in a position to support himself or not. The test is highlighted by Lord Justice Elias at paragraph 32 of *Lim*. The respondent lives with his mother and grandmother. The evidence which appears to have been given to the judge (it is not clear because the judge does not make clear findings of fact) is that the respondent's stepmother and father have sent about £12,000 to him and they gave a breakdown for the years 2012-2016. Unfortunately, the judge does not record what those were. However, the evidence before the judge in the form of accounts from the respondent's father's business show amongst other things, that during the year ended 31st July, 2016, the respondent's father earned a net £5,105 from his fish and chip shop business from which he is responsible for his rent of £100 per week and for the maintenance of himself, his wife and three children in the United Kingdom.
10. For the year ended 31st July, 2014, the net profit from the father's business was some £6,437 and so it was simply not credible that the respondent's father and stepmother, who herself had ceased working some six years earlier, could have sent money in recent years. However, the real error in the judge's determination, submitted Mr Wilding was that First-tier Tribunal Judge Adio had failed to make any assessment of the respondent's needs, or of his dependency.
11. Mr Thoree suggested that the determination clearly shows a remittal of monies to the respondent by his family in the United Kingdom. Mr Thoree suggested that the respondent's basic needs would be less than £70 per week which is what the United Kingdom Government believes is necessary for one person's maintenance. The cost of living, he submitted, would be much cheaper in Turkey and so it would be far less than £70 per week. The respondent would, of course, require money for food, heat, light, clothing and presumably some monies for his entertainment and personal enjoyment. The sponsor claimed to have sent £4,000 and in giving evidence to the judge, asserted that it had come from his business. Mr Thoree submitted that the determination was sound and should be upheld. I reserved my decision.

12. Giving judgment in *Siew Lian Lin v Entry Clearance Officer (Manila)* [2015] EWCA Civ 1383 Lord Justice Elias said at paragraph 25 this:

“In my judgment, this makes it unambiguously clear that it is not enough simply to show that financial support is in fact provided by the EU citizen to the family member. There are numerous references in these paragraphs which are only consistent with a notion that the family member must need the support from his or her relatives in order to meet his or her basic needs. For example, paragraph 20 refers to the existence of ‘a situation of real dependence’ which must be established; paragraph 22 is even more striking and refers to the need for material support in the state of origin of the descendant ‘who is not in a position to support himself’; and paragraph 24 requires that the financial support must be ‘necessary’ for the putative defendant to support himself in the state of origin. It is also pertinent to note that in paragraph 22 in the context of considering the Citizens Directive, the courts specifically approve the test adopted in *Jia* at paragraph 37, namely that:

“the need for material support must exist in the state of origin of those relatives or the state whence they came at the time when they applied to join the community national’.”

13. At paragraph 32 Lord Justice Elias went on to say:-

“In my judgment, the critical question is whether the claimant is in fact in a position to support himself or not and Reyes now makes that clear beyond doubt, in my view. That is a simple matter of fact. If he can support himself, there is no dependency, even if he is given financial support by the EU citizen. Those additional resources are not necessary to enable him to meet his basic needs. If, on the other hand he cannot support himself from his own resources, the court will not ask why that is the case, save perhaps where there is an abuse of rights. The fact that he chooses not to get a job and become self-supporting is irrelevant. It follows that on the fact of this case there was no dependency. The appellant had the funds to support herself. She was financially independent and did not need the additional resources for the purpose of meeting her basic needs.”

14. The First-tier Tribunal Judge has not considered the question of whether or not the respondent can support himself from his own resources. Indeed, there was very little evidence adduced at all in relation to his situation, other than the fact that he lives with his mother and grandmother, that his mother does not work and that the grandmother has some form of pension, presumably earned by the grandfather. The respondent’s financial situation in Turkey is far from clear. The respondent was paying for his dormitory fees while he was in full-time education. His education was free in Turkey and he has now completed it. He now lives with his mother and grandmother, but the respondent has adduced no evidence at all to show that he is dependent on money being sent to him by his father or stepmother and in any event, as I have pointed out, it is unclear precisely what monies have been sent to him, given evidence of the earnings of the respondent’s father and the lack evidence of earnings now by the respondent’s stepmother. I have concluded, therefore, that the determination of First-tier Tribunal Judge Adio **does contain an error of law**, namely a failure to consider the question highlighted by Mr Justice Elias in paragraph 32 of *Lim*.
15. However, on the evidence before the judge, it was not possible for the judge to have made a finding on whether the respondent is in fact in a position to support himself or not. There was a complete lack of evidence. There was evidence that the

respondent's father and stepmother had over the years been sending some money, but a lack of evidence as to the ability of the respondent to support himself. I have concluded therefore that the respondent has simply failed to demonstrate that he is wholly or mainly dependent on his father and stepmother.

16. The making of the decision by First-tier Tribunal Judge Adio involved the making of an error on a point of law. The error of the judge is material because he has failed to consider the question of the respondent's position to support himself or not. I set aside the decision of Judge Adio and remake the decision myself. The respondent's appeal is dismissed.

Notice of Decision

The respondent's appeal is dismissed.

No anonymity direction is made.

Richard Chalkley

A Judge of the Upper Tribunal.

TO THE RESPONDENT

FEE AWARD

There is no fee award since the appeal is dismissed.

Richard Chalkley

A Judge of the Upper Tribunal.

Date: 5th January 2018