



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/02104/2019

THE IMMIGRATION ACTS

Heard at Field House, London
On Thursday 5 March 2020

Determination Promulgated
On 21 April 2020

Before

UPPER TRIBUNAL JUDGE SMITH

Between

[S E]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms K McCarthy, Counsel instructed by Kent Solicitors

For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. By a decision promulgated on 23 January 2020, I found an error of law in the decision of First-tier Tribunal Judge C Greasley allowing the Appellant's appeal. I therefore set aside that decision and gave directions for further evidence and a resumed hearing. My error of law decision is appended hereto for ease of reference.

2. The background to the Appellant's case is set out at [9] to [14] of my decision. I do not need to repeat that although I will expand on parts of that case in what follows.
3. Similarly, I do not need to set out again the law which applies in this case. As I explained at [16] to [27] of my earlier decision, the essential question in this case is whether there are insurmountable obstacles to the Appellant's family life with her husband continuing in Turkey. If there are not, since the Appellant cannot satisfy the Immigration Rules ("the Rules") based on her family life unless such obstacles exist (applying paragraph EX.1 of Appendix FM to the Rules - "EX.1"), the Appellant cannot succeed within the Rules. As I also there explained, if she is unable to succeed within the Rules, that is relevant to whether she can succeed in establishing outside the Rules that the consequences of her removal are "unjustifiably harsh". When making an assessment outside the Rules, I must also have regard to the factors set out in Section 117B Nationality, Immigration and Asylum Act 2002 ("Section 117B").

THE EVIDENCE AND ANALYSIS OF THE EVIDENCE

4. The Appellant had previously filed a bundle for the hearing before the First-tier Tribunal paginated to [507]. A further bundle was provided for the hearing before me (in accordance with the direction which I gave in my earlier decision). However, the bundle as filed with the Tribunal was deficient as it was incomplete, and Mr Kotas did not have a copy at all. He agreed however that it was appropriate to proceed. I gave a direction that the Appellant's solicitor file a complete and properly paginated bundle following the hearing which was finally received in hard copy on 17 March 2020. I refer to the documentary evidence in what follows as [AB/xx].
5. Although I heard oral evidence from the Appellant, her husband, [Mr AE], and her mother-in-law, [Mrs ZE], I do not need to say much about this evidence. Although the witnesses confirmed that they could understand the interpreter provided by the Tribunal for the hearing, in the course of Mr [E]'s testimony, an issue arose as to whether a question and answer given by the Appellant had been properly interpreted. The court interpreter thought that a question had been asked by Mr Kotas during the Appellant's testimony which was not consistent with either my or Mr Kotas' note of the question. As a result, the court interpreter considered that the discrepancy which Mr Kotas put to Mr [E] was not an inconsistency in the way in which the prior question and answer had been translated by him.
6. It is not clear whether this was an error in the understanding of the interpreter or an error in his interpretation. The interpreter confirmed that if there was a discrepancy in the answers given, it might be due to an error of interpretation on his part. He also indicated however that he was having some difficulty in providing a full interpretation of the Appellant's answers as she was giving her answers at some length and quite fast. Although she was asked to slow down and take appropriate pauses to allow for interpretation, it appeared that there were still some difficulties.
7. Furthermore, having adjourned over lunch prior to submissions, Ms McCarthy returned with a request for an adjournment based on what she said were further

errors in the interpretation of the evidence. Her submission in this regard was based on what she had been told by the Appellant's brother-in-law who had sat in court throughout the Appellant's evidence. I did not hear evidence from this gentleman who it appears works as a cab driver and is not a qualified interpreter. It is not clear what is the level of his own English and therefore his ability to ascertain any errors in interpretation, particularly since he was sat at the back of quite a large court room at some distance from the witness and interpreter.

8. Nonetheless, based on the Tribunal's decision in TS (interpreters) Eritrea [2019] UKUT 00352 (IAC), Ms McCarthy submitted that I should adjourn to a later resumed hearing with a different interpreter in fairness to the Appellant. She confirmed that she did not intend any personal criticism of the interpreter.
9. Mr Kotas objected to the adjournment request. He drew my attention to [5] of the headnote in TS which reads as follows:

"A challenge by a representative to the competence of a Tribunal-appointed interpreter must not be made lightly. If made, it is a matter for the judge to address, as an aspect of the judge's overall duty to ensure a fair hearing. Amongst the matters to be considered will be whether the challenge appears to be motivated by a desire to have the hearing aborted, rather than by any genuine material concern over the standard of interpretation."
10. As Mr Kotas pointed out, there was no formal evidence from the Appellant's brother-in-law as to the interpretation errors which he is said to have identified. I had no evidence to show that the Appellant's brother-in-law had a sufficient grasp of English and Turkish to provide the necessary evidence, were he to be asked to do so. Nonetheless, as Ms McCarthy pointed out, there was a concern about at least one of the answers given by the Appellant and whether that was discrepant with the answer given by her husband or whether any inconsistency might be due to interpretation problems.
11. In the course of Mr Kotas' submissions regarding the adjournment, however, it became clear that it would be possible to complete the hearing without any unfairness to the Appellant if the Respondent agreed not to rely on any inconsistencies in the oral evidence given by the Appellant and her witnesses. Mr Kotas submitted that, even if he were to exclude such reliance, the Appellant could not succeed in showing either that there were insurmountable obstacles to family life continuing in Turkey or that it would be unjustifiably harsh to return her to that country. I therefore refused the adjournment on the basis that the Respondent would proceed in this way and submissions were made on that premise.
12. Before turning to consider the cases of the respective parties, it is therefore appropriate for me to set out what the evidence shows about the factors relied upon by the Appellant as reasons why she cannot be returned to Turkey.

Evidence of the Appellant

13. The Appellant has provided two witness statements dated 22 July 2019 (unpaginated) and one dated 14 February 2020 ([AB/508-512]).
14. In her first statement, the Appellant relies on the following matters:
 - Her relationship with her husband and his family who live in the UK. His parents and two brothers live here as do his cousins. She also has cousins living here. She also says at [9] of that statement that she “also [has] good relationship with [her] relatives”. In light of later evidence, I understand her to mean that the relationship with such family as she has in the UK including her husband’s family is good rather than that she has a good relationship with her family remaining in Turkey (which would be contrary to her other evidence).
 - Fertility treatment which she and her husband are undergoing in the UK. According to their evidence, this treatment is being privately funded.
 - Her psychological health. In her first statement, she attributes her problems to her inability to have a child. She says that she is “originally coming from rural area of Turkey” and that when a woman is unable to have a child “the family will put pressure on husband to marry to a new wife”. She says that her husband would not divorce her, but she is concerned that his “close family” would put pressure on him to do so.
 - Her relationship with her own family who remain in Turkey. She says that she does “not have connection with [her] family in Turkey and it is unlikely they will accept [her] to the family”. She says that she was “subject to domestic violence from [her] elder brother and due to this [she] would not be able to return to [her] family”.
15. The Appellant’s second statement largely repeats what is said in her first statement. She provides the following additional evidence:
 - Her husband came to the UK with his family aged sixteen years and obtained settlement as the family member of a refugee. He has however returned to Turkey for “short periods on holiday”. He has only “distant relatives” in Turkey with whom he has no contact. She says that her husband could not return to Turkey with her “as he will have problems fitting in and finding a job”.
 - Fertility treatment is ongoing. She had an appointment with her husband on 11 February 2020 to discuss further treatment. She does not wish to change hospitals and consultants as all their records are there and they have confidence in the hospital – Guys and St Thomas – “which [they] know is one of the best Hospitals in the world”.
 - The medical condition of the Appellant’s brother-in-law ([F] who is not the brother who attended the hearing). The Appellant’s husband provides his mother with “a lot of help” in this regard as his mother is [F]’s full-time carer.

The Appellant's husband provides his mother with respite at weekends when not working and helps with personal care as [F] is an adult and therefore his mother has some difficulty with his personal care.

- The Appellant has three brothers all living in Turkey. Her brothers did not want her to marry her husband. One of her brothers beat her and she had to leave home to live with her aunt before coming to join her husband in the UK. She says that her husband also fears her brother and that she fears that her brother will use her infertility "as an excuse to use violence on [her] and continue to bully [her]".

16. In her oral evidence, the Appellant confirmed the following matters:

- She and her husband attended the hospital appointment on 11 February 2020 and were given options for further treatment. Although I indicated in the course of that evidence that the Appellant could provide evidence about that further treatment after the hearing, I do not have any update in that regard but I accept her evidence that they intend to continue with treatment (at private expense). She said that it would take two years to get back to the position they are in now if returned to Turkey. She said that conceiving will be more difficult as she gets older. When asked whether she could obtain a copy of her records to take back with her to Turkey, she said that she could not go back. She did not offer any evidence that the records could not be obtained and taken back to Turkey or be transferred there.
- In relation to her ill-treatment by her brothers, the Appellant said that one of her brothers who lived at home had beaten her several times. She has problems with her hip caused by the beatings. Her brother did not like her working. He did not want her to marry her husband. She said that her brother had also assaulted her husband several times. She feared that her brother would find her wherever she went in Turkey. Her parents did not stop her brother beating her because in their culture, she was expected to do as her elder brother told her.
- As a result of the ill-treatment, the Appellant confirmed that she had moved to live with her aunt following her engagement to her husband in 2011. She had remained there until 2013. The Appellant's family lived in Gaziantep province. Her aunt lived in the same province but had since moved to Cyprus. The Appellant's brother had tried to contact her at her aunt's house but was not let in. He had tried to assault her but was not given the opportunity.
- The Appellant said that her husband had visited the family home on one occasion to ask permission to marry her. Her brother was opposed to the marriage as was her father initially, but he had relented when the Appellant said that she loved her husband. Following their engagement in 2011, the Appellant's husband had come to visit her once in Gaziantep, but her brother said that he could not come and so they met elsewhere (in Elbistan) about three hours from the Appellant's hometown.

- The Appellant married her husband in Gaziantep province in a registry office. They celebrated their marriage when they returned to the UK.
- The Appellant indicated that she was presently only receiving medication in connection with her IVF. She had been taking other medication for depression but had discontinued that when she started IVF treatment. She had received psychological treatment from Ozden Bayraktar. His report appears at [AB/519-521]. I deal with that later in this decision. She had also seen Tarkan Mustafa who had prepared a report dated 23 July 2019 (separate from the bundles). She has not consulted any other doctors.

Mr [AE]

17. The Appellant's husband has provided two witness statements, the first dated 22 July 2019 (unpaginated) and the second dated 13 February 2020 ([AB/513-516]). He also gave oral evidence.
18. In his first statement, Mr [E] confirmed that he has been living in the UK for seventeen years. He is now aged thirty-four years. He, his parents and his two brothers are all now British citizens. In his second statement, he says that the family came to join his father by way of family reunion in June 2002. It appears from his statement that his father came to the UK to avoid oppression as an Alevi Kurd. I assume from what is there said that his father was a recognised refugee. In his second statement, Mr [E] says that he fears discrimination in Turkey due to his ethnic group. He says that he would find it difficult to obtain employment. However, there is no background evidence produced in that regard.
19. Mr [E] confirms that he married the Appellant on 15 June 2012. He is employed in the UK and is privately funding their fertility treatment. He also confirms that his wife suffers from depression. He says that he no longer has any connection with Turkey and is not able to live there.
20. In his second statement, Mr [E] provides more information about his employment. He works as an advertising and distribution assistant for Emirtax Ltd. As I understood his evidence, his work involves distribution of leaflets. He commenced this employment in August 2018. Before that, he worked as a chef. He currently earns £19,200 gross per annum.
21. Mr [E] confirms his wife's evidence that, because they emanate from a rural area of Turkey, "[his] relatives are encouraging [him] to divorce [the Appellant] because she cannot conceive and to marry someone who will be able to have children". He does not say if that is his relatives in the UK or in Turkey. However, as he says at [12] of his statement, he has no contact with his distant relatives in Turkey. In any event, he says that he has no intention of divorcing the Appellant even though "there would be a lot more pressure on both [him] and [the Appellant] if [they] were to live in Turkey as this would be seen as a genuine reason to divorce".

22. In relation to his brother, [F], Mr [E] confirms that he gives his mother assistance with his brother's care. He says that his mother had an operation on her right arm due to torn tendons and she cannot therefore lift anything heavy. He provides no detail of the level of care which [F] requires but his evidence implies that [F] requires constant care to meet his personal and essential needs.
23. Mr [E] confirmed in his oral evidence that he only visited the Appellant once or twice in Turkey whilst they were engaged because her family disapproved of the relationship. He also confirmed that they had celebrated the marriage in the UK.
24. Mr [E] also confirmed that he was paying privately for the IVF treatment. The total cost was as yet unknown but was expected to reach £7,000. He said he could afford this from his salary.
25. When asked why he could not return to Turkey, Mr [E] said that he was used to this country and the system here. He had been here for seventeen or eighteen years and he did not know the system in Turkey. There was a problem with diversity, and it would be difficult for him to find a job there. He confirmed that in addition to his current job distributing leaflets, he had previously worked in the UK as a chef. He also said that he could not relocate to Turkey because he has no family there to live amongst.

Mrs [ZE]

26. Mrs [E] is the Appellant's mother-in-law. She has provided a witness statement dated 14 February 2020 ([AB/517-518]). She also provided oral evidence.
27. In her statement, Mrs [E] says that she lives with her husband and two of her sons, [F] and [E]. She confirmed in her oral evidence that [E] is the son who was present at the hearing and that he works as a minicab driver. [F] is aged twenty-one years and, she says, requires a lot of care due to his disability. She says that the Appellant and the Appellant's husband provide a lot of help with [F]'s care. She confirms that due to an operation on her right arm, she is unable to lift anything heavy. She also says that [F] is "very fond" of the Appellant who he sees as a sister. She says that [F] has difficulty in communicating with people but that, over time, the Appellant has gained his trust.
28. Mrs [E] also confirms that her husband came here as a refugee and the rest of the family joined him by way of family reunion. She says that her son, the Appellant's husband, would find it difficult to return to Turkey due to the ongoing discrimination against Alevi Kurds and because he would not have the support of his family there. She said however that she still returned to Turkey and was there last year (in Bodrum). She said that the Appellant's husband was last in Turkey when they got married. Although she confirmed that she still has family in Turkey, she said that these were only distant relatives.
29. In her oral evidence, Mrs [E] confirmed that all of the Appellant's husband's family approve of his relationship with the Appellant. She said that it is only the

Appellant's family which disapproves of this relationship. She said this was because the Appellant's brother wanted her to marry someone else. She also confirmed that the Appellant is no longer in contact with her family in Turkey. I am prepared to accept that this is the position although I note that there is mention in the Appellant's application for leave to remain at [AB/447] that she returned to Turkey between 25 July 2015 to 28 August 2015 for "brother's wedding". Since both of her husband's brothers live in the UK, I assume that this must be her brother although of course not necessarily the brother with whom she lived prior to coming to the UK and who she says ill-treated her.

Other Documentary Evidence

Medical Evidence: Appellant's Mental Health Problems

30. In relation to the Appellant's mental health problems, I have the following documents:
 - Report of Tarkan Mustafa, MA dated 23 July 2019 (unpaginated, separate from bundle)
 - Report of Ozden Bayraktar, MSc, Phd Candidate ([AB/519-521])
31. Neither report contains a CV setting out the relevant experience of the writers of the reports. Neither contains a paragraph recognising their duties to the Tribunal as independent experts. It is not clear from Mr Mustafa's report what degree of interaction he has had with the Appellant nor over what timescale. That is relevant in particular because the report wrongly records certain aspects of the Appellant's history as I refer to below. Although Mr Bayraktar mentions "a number of sessions" with the Appellant, he does not record how many nor of what length. He says that those sessions occurred only in January 2020.
32. Dealing first with Mr Mustafa's report, the only evidence about his qualifications comes from the heading to his report. His only formal qualification appears to be a MA. The subject of that degree is not stated. The heading then includes the words "Psychotherapy and Analysis" which does not indicate that he is himself qualified as a psychotherapist or analyst. His only stated professional qualification is as an "Associate Member of the School of Natural Health Sciences".
33. Mr Mustafa says that the Appellant "is suffering from panic attacks, anxiety, depression, insomnia and severe aches and pains throughout her body as a result of her high levels of stress". He records that she has suffered panic attacks for a year, insomnia for the past two years and depression for the past three years. It is not clear that this relies on anything other than the Appellant's own reporting of her problems. There is no mention of him having seen her medical records. Those are not in evidence before me. He does not say that he has been treating her for those conditions.
34. Mr Mustafa attributes the deterioration to "depressing events in her life". The events are said to have started with the Appellant's inability to conceive. Mr Mustafa also

says that the Appellant's problems included the refusal of leave to remain with her husband on three occasions. He says that she would suffer at the hands of her family on return to Turkey. I accept that this is consistent with the Appellant's evidence.

35. However, Mr Mustafa (wrongly) records that the Appellant has claimed asylum twice and been refused twice. The Appellant confirmed in her evidence that this is not the case. He also says that the Appellant has been caring for her mother-in-law for the past three years following an accident. Although I accept that the evidence of the Appellant's husband and mother-in-law is that her mother-in-law had an operation as a result of which she is unable to lift heavy weights and therefore requires assistance with [F]'s care, that is not the same as the Appellant's mother-in-law herself requiring care.
36. In any event, it is unclear that Mr Mustafa recognises the function of an expert (insofar as Mr Mustafa has relevant expertise in diagnosis of mental illnesses). Most of his report is merely a record of what he has been told by the Appellant (which record itself contains inaccuracies). The only medical opinion is contained in the penultimate sentence where he states that he "also believe[s] that if [SE] is sent back to Turkey this would be very detrimental to her well-being and her sanity". He offers no evidential underpinning for that opinion which appears to be based solely on what he has been told by the Appellant herself about her mental health history and the causes to which that history might be attributed.
37. I can give no weight to Mr Mustafa's report. It is unclear that he has relevant qualifications or experience. He does not recognise his duty of independence as an expert (if that is what he purports to be). It is not clear whether and for how long he met with the Appellant. There is no indication that he has been treating her over the time that she has been experiencing problems. There is no reference to him having seen or consulted the Appellant's medical notes. Even if Mr Mustafa has been treating the Appellant over time, there is no record of what he observed during any consultations he had with her. He has simply accepted the history he has been given and at times has misunderstood that history. In any event, he offers no reasons for the one sentence opinion he gives.
38. Turning then to Mr Bayraktar's report, he is said to be a "Psychologist and Counselor (sic)". He works privately. There is no indication that he is a member of any professional association. He does not say for how many years he has practised in the field nor what is his relevant experience.
39. Once again, a large part of Mr Bayraktar's report is made up of a recitation of the Appellant's history as given to him. That history is largely consistent with the Appellant's evidence although her evidence makes no mention of an overdose taken in 2018. Mr Bayraktar, in common with Mr Mustafa, records that the Appellant has panic attacks, severe migraines and is very depressed. He says that the Appellant "reports that she might harm or kill herself if she had to leave the UK". There is no mention of that in any of her statements before me. He also reports, consistently with the Appellant's evidence, that she has problems with one of her legs which arises

from one of the assaults on her by her brother. The only medical evidence in the bundle which relates to physical problems consists of two letters dated 10 November 2016 and 28 December 2016 relating to two appointments for physiotherapy as an outpatient in December 2016 and January 2017 ([AB/288-289]) but those appear to be linked to a problem with the Appellant's shoulder.

40. There appears to be some confusion about the Appellant's position on return to Turkey. Mr Bayraktar appears to assume that the Appellant would be forced to return to her home alone and would not be able to do so as her family do not accept her due to her marriage. He does not consider what the situation would be if her husband returned with her. Mr Bayraktar also expresses the opinion that if the Appellant's husband were to go to visit her in Turkey this would affect their ability to save for IVF. He says that it would also be difficult for her mother-in-law if the Appellant were removed as "she is old and needs affection". The Appellant's mother-in-law is aged fifty-two years. Overall, the passage contained in the last two paragraphs at [AB/520] and first two paragraphs at [AB/521] appears as submissions advocating for the Appellant's case and does not disclose that Mr Bayraktar recognises his duty of independence to this Tribunal. That affects the weight I can give to his opinions.
41. The only section which contains opinion on the matters on which Mr Bayraktar may have relevant expertise in any event reads as follows:
- "As a psychologist, I strongly believe that if [SE] would be deported to Turkey, it would be a very destructive and a disastrous event for her mental and psychological well being. She has the risk of committing suicide and she is already in a very major depression episode. She would be a victim of her society, her surrounding and her own family by not being able to live freely, safely and confidently. She is already terrified from her brother who had abused her physically and caused her leg to be operated on.
- Thus, I strongly advise [SE] not to be deported back to Turkey as it would be a disastrous for her life..."
42. As I have already noted, Mr Bayraktar has misunderstood the position in relation to the Appellant's return to Turkey and whether it is likely that she would return alone. Even if she would, it is not clear on what Mr Bayraktar bases his analysis of the situation for a single woman in Turkey. It is not evident that he has any specific knowledge of circumstances generally in Turkey. In any event, none of that analysis is for him. As a person offering expertise in mental health, I would expect to see some reference to the Appellant's presentation and a consideration whether the symptoms she exhibits are consistent with a diagnosis and if so the nature of that diagnosis. There is no reference to her medical notes which is relevant to the asserted overdose in 2018. That is not mentioned in any of the witness evidence.
43. Overall, this report discloses a lack of independence, a lack of relevant reasoned evidence as to the Appellant's mental health problems or any formal medical diagnosis or prognosis. For those reasons, I give this report no weight.

44. Whilst I am prepared to accept that the Appellant may have suffered some mental health problems which may have been caused or exacerbated by her infertility and IVF as well as her immigration problems, I cannot accept that she has been formally diagnosed with any mental health condition. She herself said that she was no longer taking any medication for depression because of concerns as to the impact on the IVF treatment. As below, she began that treatment some years ago and therefore, on her own case, she has not received medication for depression for several years. The only doctors who the Appellant said she had consulted for her mental health problems were Mr Mustafa and Mr Bayraktar. Mr Bayraktar mentions sessions with her only in January 2020. Mr Mustafa's report does not disclose when or how often he has met with the Appellant. Neither report provides me with any formal history of her mental health problems or treatment. Her medical notes are not in evidence.

Medical Evidence: IVF

45. The evidence confirms that the Appellant's last appointment for IVF treatment was on 11 February 2020 ([AB/618]). I accept that the treatment is ongoing although the evidence which was offered in relation to next steps has not materialised. It appears that treatment began, at least with the current provider, in December 2015 ([AB/30]).
46. Due to the lack of updated evidence, there is an absence of any report about the next steps in the couple's treatment plan. The most recent evidence prior to the February 2020 appointment is dated in August/September 2018 informing the couple that the NHS Trust has one embryo frozen for future use ([AB/327]) and that a previous course of treatment had unfortunately failed ([AB/329]).
47. There is evidence that payments have been made for some of the treatment ([AB/619]) and I therefore also accept that the couple are privately paying. It appears from the price list at [AB/620] that the recent amount paid (£300) is for an initial consultation which suggests that the couple are at the beginning of the current round of treatment. It is not entirely clear how the couple intend to pay the large sums needed for further treatment; the bank statements in the Appellant's bundle do not disclose surplus funds. However, I do not take issue with the Appellant's husband's evidence that they are privately paying for the treatment (there is for example a debit to Guys Hospital on 11 December 2018 of £1400 which appears to be for this treatment - the price equates with the cost shown on the price list for some items included a round of treatment).
48. I cannot however accept that the entire cost has been privately funded to date. The letter from Guy's and St Thomas' NHS Foundation Trust dated 24 March 2017 ([AB/291]) clearly states that some treatment was to be funded through Lambeth Clinical Commissioning Group, although I accept that there are receipts in the bundle indicating that at least some contribution has been made by the Appellant and her husband ([AB/317]).

Medical Evidence in relation to [F]

49. The medical evidence in relation to [F] appears at [AB/598-599] and [AB/605-616]. He is also under the care of Guy's and St Thomas' NHS Foundation Trust. The first letter is dated 13 April 2018. [F] was at that time aged just under twenty years. The letter is mainly concerned with [F]'s "severe obstructive sleep apnoea" which it had been thought was improving but was again causing problems. Although the report concludes with a promise of further progress reports in that regard, none are in evidence.
50. The report refers to a number of other conditions, the main one of which appears to be Bardet-Bledl syndrome which is not explained in the report. [F] has visual impairment, and moderate learning difficulties. It is confirmed in the second letter dated 9 October 2019 that he is registered blind. He is said to have been previously obese but now of a normal BMI. He has also undergone previous spinal surgery and an adenoidectomy. The first letter also refers to "Reduced factor Xiii levels" and "Insulin-resistance" but those conditions are also unexplained.
51. The second letter indicates positive progress. It is said that [F]'s weight is "healthily adjusted for his height" and that "he is living an active lifestyle". He is said to swim every week, uses the gym at the college which I assume he is therefore attending and walks. In relation to his sleeping difficulties, the second letter reports that "[h]e is now on nocturnal APAP and is tolerating this well reporting better energy levels". He is said to be under regular review with the haematology team for his Factor X1 deficiency and with the spinal team following corrective surgery to deal with scoliosis "a few years ago". The second letter notes routine tests being undertaken at that time and a review after eighteen months.
52. There is evidence that the Appellant's mother-in-law receives carer's allowance of £64.60 per week (in March 2018) ([AB/601]) which I am prepared to accept is for the care of [F] but there is no evidence about the level of care which [F] requires. The reports from the hospital do not indicate that [F] is physically disabled to the extent of needing lifting or helping with his essential needs; in fact, quite the opposite - the second letter reports an active lifestyle. Nor does the evidence explain why the Appellant's father-in-law and brother-in-law (who lives with his parents) cannot assist to the extent necessary.

Financial Information

53. A letter from Mr [E]'s current employer at [AB/595-596] confirms that he has worked for that organisation (Emirprint Ltd) since 6 August 2018 as a permanent Advertising and Distribution Assistant earning £19,200 gross per annum. That is confirmed as continuing by payslips at [AB/69-72 and AB/557-596].
54. Prior to that date, Mr [E] was working as a chef. Unfortunately, there is neither a witness statement dealing with previous earnings nor any schedule setting out what

the documents show. Doing the best I can based on the documents, those appear to show the following about the Appellant's previous employment and earnings:

- Working for Eastern Delight (P60 at [AB/150] – earnings of £15660 in tax year to 5 April 2014 which covers the date when the Appellant entered the UK).
 - Working for Capital Kebab Ltd from March 2015 to 1 February 2016 earning £676 gross per month (P60 at [AB/125] - £676 in tax year to 5 April 2015; P45 at [AB/129-130] - £6843.20 earned to date in tax year to 5 April 2016; payslips from March 2015 to January 2016 at [AB/139]).
 - Working for Eren Kebab Ltd t/a Eastern Delight from 1 April 2016 to June 2016 earning £936 gross per month (letter at [AB/123-4]); payslips for April to June 2016 at [AB/135-138].
 - Working for Utkueren Ltd from July 2016 to March 2017 and for May and June 2017 earning £1247.98 gross per month for July 2016 to January 2017 and £975 gross per month for May and June 2017 (P45 at [AB/127-128 and 156] - £11543.86 earned to that date in tax year ending 5 April 2017; payslips for July 2016 to January 2017 and May/June 2017 at [AB/162-171]). This is the period when the Appellant made her first application for an extension of leave to remain.
 - Working for Son Chare Ltd from February to 30 April 2017 earning £780 gross per month (P60 at [AB/126] - £1497.60 in tax year to 5 April 2017, £11,543.86 in previous employment for that year as above; P45 at [AB/132-33] - £780 up to 30 April 2017 in that tax year; pay slips from February to April 2017 at [AB/151-155]).
 - Working for Korkmaz Catering Ltd from 1 July 2017 to 28 February 2018 earning £975 gross per month and £1200 per month from December 2017 - £14,400 per annum (pay slips from July to November 2017 at [AB/157-161] and from December 2017 at [AB/182]; P45 at [AB/177-179] - £11,205 earned to that date in tax year ending 5 April 2018; letters at [AB/180-181 and 185]). This is the period when the Appellant made her second application for an extension of leave to remain.
 - Working for Dalkilic Ltd (P60 at [AB/176] - £1620 in tax year to 5 April 2018).
 - Working for Denhaz Ltd from April to July 2018 earning £1585 gross per month (payslips for April to July 2018 at [AB/172-175]).
55. The Appellant has also worked in the UK although confirmed in her oral evidence that she is no longer doing so as she is not permitted to work as an overstayer. The documents at [AB/183-4 and 196-200] show that she was earning £780 gross per month as at 16 January 2018 when she made her second application. She had been working from June 2017 part time with London Bar Staff Ltd. Before then she was working as a cleaner/ kitchen porter at Ocean Blue Fishbar part time from 1 April 2016 on a gross monthly salary of £464.53 per month (£5574.36 per annum) ([AB/186-195]).

Evidence as to Appellant's English Language Skills

56. The Appellant's certificates and other documents in this regard appear at [AB/39-40 and 43-47]. She has achieved an Entry Level 1 award in ESOL skills for life in 2015 and an Entry Level 2 award in 2016. The documents also show enrolment for Entry Level 3 in September 2017 to December 2017 but no certificate in that regard. In addition, a letter dated 12 August 2009 at [AB/41] confirms that Mr [E] has achieved ESOL Skills for Life at Entry Level 1 in order to naturalise as a British citizen.
57. Although I have no reason to doubt the genuineness of the qualifications, other evidence casts some doubt on the Appellant's ability to speak English.
58. I do not take into account in this regard that the Appellant gave her oral evidence at the hearing in Turkish. In the unfamiliar surroundings of a court room, it is to be expected that an appellant will wish to give evidence in her mother tongue. However, both her written witness statements including that made as recently as 14 February 2020 had to be translated into Turkish for her.
59. Furthermore, some of the documents associated with the couple's IVF treatment indicate that neither the Appellant nor her husband are sufficiently proficient in English to communicate with doctors without an interpreter (see [AB/304, 306, 312 and 315]). Some of those documents are not recent and the lack of language ability may be explained on that basis. However, the letter at [AB/315] is dated as recently as July 2018 (after all of the Appellant's qualifications were obtained). It appears on that occasion that the Appellant asked that messages be translated for her which the hospital was unable to do. She therefore asked that messages be left with her brother (I assume her brother-in-law) or her partner. It appears however that there were also difficulties with the hospital delivering messages in that way. I accept however that the communications in this regard relate to medical treatment and may therefore involve the use of technical language. For that reason, I am prepared to assume for the purposes of this appeal that the Appellant speaks some English and probably sufficient to get by in normal day-to-day life.

Evidence as to Appellant's Immigration History

60. The Appellant entered the UK on November 2013 with the appropriate entry clearance as a spouse following her marriage in Turkey on 12 June 2012. She had leave to remain until 31 July 2016 (a period of thirty months).
61. As appears from the Respondent's refusal decision dated 4 December 2017 (at [AB/372-379]), the Appellant applied for further leave to remain by application received on 18 July 2016. That application is not in the Appellant's bundle. For that reason, it is unclear from that letter why the Appellant applied for leave to remain on a ten-year route rather than the five-year route which would apply if she were able to meet all the Rules.
62. However, the clue behind this appears in the Respondent's consideration of whether paragraph EX.1 applies. There it is said that the Respondent had considered whether

the Appellant was “exempt from meeting certain eligibility requirements under Section R-LTRP of Appendix FM” on the basis that EX.1 applied. Since it is accepted in the decision that the Appellant meets the suitability requirements of the Rules, the relationship requirements (E-LTRP.1.1 to 1.12) and immigration status requirements (E-LTRP.2.1 to 2.2), that leaves only the financial requirements (E-LTRP.3.1 to 3.4) and/or the English language requirements (E-LTRP.4.1-4.2).

63. Whether or not both reasons for rejection applied at that time, it appears to have been accepted by the Appellant that she could not meet all the requirements as at July 2016, first because she made an application on the ten-year route and not the five-year route and, second, because that decision was not challenged. I appreciate that the Appellant’s evidence is that she was poorly advised because at that stage she waited to consider judicial review proceedings rather than making a further application immediately. Whatever, the position though, she did not bring any application to judicially review the decision dated 4 December 2017 and her leave to remain ended on that date (as would have been the position even if she had judicially reviewed the decision unless the decision were later withdrawn for reconsideration). As such, the Appellant has been an overstayer since 4 December 2017.
64. Turning then to the second application made by the Appellant, she made that on 17 January 2018. A copy of the application appears at [AB/403-473]. In terms of the financial requirement, the Appellant relied on her husband’s income of £14,400 per annum and her own income of £9,360 per annum, together totalling £23,760 per annum. In relation to the English language requirement, she relied on the Entry Level 2 certificate from Trinity College.
65. The Respondent initially refused the application by letter dated 4 July 2018 and rejected it as a fresh claim, applying paragraph 353 of the Rules ([AB/389-396]). That was because the Respondent had previously certified the human rights claim within the earlier application under Section 94 Nationality, Immigration and Asylum Act 2002.
66. However, following a judicial review challenge to that decision, the Respondent agreed to withdraw that decision and reconsider the second application, culminating in the decision under appeal (see decision of Upper Tribunal Judge Kebede dated 18 January 2019 at [AB/350-351]). As was recognised in the judicial review claim form at [AB/365-366], the difficulty with the Appellant’s case under the Rules was the income threshold requirement and whether it could be met. It was of course also the case that, by this time, the Appellant no longer met the immigration status requirement under the Rules, her leave having expired on 4 December 2017 and her next application having been made out of time.
67. The reconsideration led then to the Respondent’s decision under appeal, dated 18 January 2019 which appears at [AB/22-29]. I do not need to dwell on the Respondent’s reasons for refusing the application save to note that those include not only the Appellant’s inability to meet the immigration status requirements due to timing of the second application but also an inability to meet both the financial

requirements and English language requirements due to insufficiency of documentation. The evidence as to financial requirements did not cover a sufficient period and the English language certificate did not meet the evidential requirements. For those reasons, paragraph EX.1 continued to apply and, the Respondent concluded, was not met as there were no insurmountable obstacles to family life continuing in Turkey.

DISCUSSION AND CONCLUSIONS

68. The essential question in this case is whether there are insurmountable obstacles to the family life enjoyed by the Appellant and her husband continuing in Turkey. Before I turn to that, though, it is appropriate to say something about the Appellant's immigration history as that may be relevant to consideration of the position outside the Rules.
69. I accept that the Appellant entered the UK in accordance with the Rules with entry clearance as a spouse. I also accept that she made an application within time to extend her leave in that category. That was refused because paragraph EX.1 was not met. The Appellant insinuates by her evidence, though, that if she had either challenged that decision at that time or taken prompter steps to make the second application, paragraph EX.1 would not have applied at all because she would not have fallen foul of the immigration status requirement. I reject that suggestion for the following reasons.
70. First, there were two principal reasons why the first application was rejected. The first was that the couple's income could not be shown to meet the financial requirements of the Rules. Even if the total figure at the date of the first application (16 July 2016) exceeded the minimum income threshold, it could only do so from 1 July 2016 as prior to that date the combined earnings of the Appellant and her husband fell short of the £18,800 required. Their combined income prior to 1 July 2016 was £1400.53 per month or £16806.36 per annum. As such, they would not have met the evidential requirements for that threshold within the Rules. They were still unable to meet those requirements eighteen months later when making the second application.
71. Second, the English language documents did not comply with the evidential requirements even at the time of the second application. Appendix O did not change in its requirements in the interim. Indeed, the First-tier Tribunal Judge who allowed the Appellant's appeal accepted as much (see extract cited at [15] of my error of law decision). Accordingly, the Appellant would still have been unable to satisfy all the requirements within the Rules for leave to remain as a partner without the application of paragraph EX.1.
72. Turning then to whether that test is met in this case, I refer to paragraphs [17] and [18] of my error of law decision which set out respectively the terms of paragraph EX.1. and the relevant parts of the judgment in Agyarko and Ikuga v Secretary of State for the Home Department [2017] UKSC 11 ("Agyarko").

73. As I accepted at [20] of my error of law decision, it is rarely helpful to rely on factual analogies in Article 8 cases. That comment was made in relation to the Respondent's reliance on the similarity between the facts relied upon here, particularly the IVF treatment, and the facts in the Ikuga case which the Supreme Court said were insufficient to amount to insurmountable obstacles.
74. Furthermore, Ms McCarthy places reliance on the Court of Appeal's judgment in Lal v Secretary of State for the Home Department [2019] EWCA Civ 1925 ("Lal") which judgment makes clear that it is the cumulative effects of the various factors which must be considered when assessing whether there are insurmountable obstacles to family life continuing in the Appellant's home country. The Court of Appeal also indicated that one has to look at the factors relied on in an objective sense rather than on the basis of what the appellant and/or the appellant's spouse perceive to be the difficulties. I accept that this is the appropriate method of assessment, subject only to the caveat that I must still determine the question whether return would entail "very serious hardship" based on the evidence which was before me and not otherwise (as is made clear by the Court of Appeal at [43] of the judgment).
75. I turn then to what those factors are in this case. In so doing, I adopt Mr Kotas' submission that the relevant factors are the IVF treatment which the couple are undertaking, that the Appellant's husband has lived in the UK for seventeen years, is a British citizen, is in permanent employment here and has all his family here, and that the Appellant has had problems with her family, in particular her brother, who continue to live in Turkey.
76. I did not understand Ms McCarthy to disagree that those are the relevant factors. However, she also submitted that those factors require further individual analysis before they are considered cumulatively. I accept that this is appropriate.
77. Dealing first with the IVF treatment, Ms McCarthy pointed out that the Appellant and her husband have been trying to conceive for a number of years. Based on the evidence, the couple have sought treatment from Guy's and St Thomas' hospital since December 2015. I accept that they will have grown to trust the team with whom they are dealing. Ms McCarthy said that, if they returned to Turkey, they would not be able to continue their treatment - they would have to go back to square one with the implications that would have on success due to the Appellant's age. Although I note that she is currently aged only twenty-seven, I accept that it will become more difficult to conceive as her age increases. Ms McCarthy also submitted there would be a knock-on effect of a difference in earnings capacity which may have implications for the couple's ability to fund the treatment.
78. The difficulty with both of those submissions is that they are not dealt with in the evidence. As in the case of Lal, it may well be the Appellant's perception that the couple would have to return to the beginning of their treatment rather than continuing with it. Leaving aside that the evidence appears to show that they are nearing the end of their available options in the UK as they are left with only one frozen embryo, there is no evidence to show that they would not be able to take their

medical notes from the UK to Turkey or to arrange transfer of those notes so that they could undertake a further course of treatment of the same nature as previously in the UK. That would at least obviate the need for the further tests which the evidence shows were conducted prior to the treatment in the UK.

79. The Appellant accepts that IVF treatment is available in Turkey. There is no evidence as to the cost of treatment in that country when compared with the cost in the UK (which is not insignificant). The couple are privately paying in the UK and, as I have already observed, their finances indicate that they may struggle to find the money to pay the cost of treatment here. It is not speculative to suggest, when looking at the bank statements in the bundle, that they may have to borrow the money to pay for that treatment here. There is nothing to suggest that they could not do likewise in Turkey.
80. Neither is there any evidence of the earnings capacity of the Appellant and her husband in Turkey when compared with the UK. The Appellant said that she worked for a time as a tailor in Turkey. She is not unskilled. She has not had skilled employment in the UK. I accept that the Appellant's husband has not worked in Turkey - he left there when he was aged only sixteen. However, he too has skills working as a chef and there is no evidence that he could not find work in that capacity or indeed in unskilled work as he appears to be doing currently.
81. Although the Appellant's husband has lived in the UK for seventeen or eighteen years and is now a British citizen, he is clearly able to speak Turkish. Indeed, as Mr Kotas observed, his Turkish is probably better than his English (an observation borne out by some of the other documentary evidence). The Appellant clearly still also speaks that language.
82. The Appellant's husband also comes from Turkey and grew up there. His family come from that country. I appreciate that he and his family came here as a refugee and family due, it appears, to their ethnicity. However, the evidence is that the Appellant has returned to Turkey albeit for short periods as has his mother. There is no evidence from his father. More importantly, there is no evidence relied upon about the current difficulties for Alevi Kurds. The Appellant's father-in-law obtained refugee status about two decades ago.
83. That brings me on to the issue of the Appellant's family situation in Turkey. Accepting for these purposes that she no longer has contact with her family there and that she has had the problems she says she has in the past, in particular with one of her brothers, there is no reason why she and her husband have to return to her hometown.
84. I was told that the Appellant's aunt with whom she lived before she came to the UK lived in the same province as the Appellant's hometown but, although the Appellant's brother tried to contact her there, he was not able to do her harm. I recognise that the Appellant's aunt no longer lives in Turkey. However, the evidence shows that the Appellant's brother would not be able to trace her even if she moved

somewhere within the same province, let alone if she and her husband moved to one of the larger cities in Turkey. There is no evidence that the Appellant's brother has tried to make contact with her or threaten her since she came to the UK. She is said to have lost all contact with her family and there is no evidence to show that her brother or any other family member has any continued interest in her whereabouts or her relationship.

85. I accept that the Appellant may have some mental health problems but there is no formal diagnosis of any mental health condition. She is not receiving medication for her mental health. There is no evidence that she is undergoing any other treatment on a regular basis. There is no evidence on which I can place weight which indicates that return to Turkey would cause a deterioration in her mental health condition. That condition is, as the evidence shows, likely to be caused by the IVF treatment and concerns about infertility as well as the Appellant's immigration status. The former trigger will continue whether the Appellant is in the UK or in Turkey and the latter will cease to exist once the Appellant's status is resolved. I accept that the anxiety about continuation of IVF in Turkey may exacerbate the Appellant's mental health condition to some extent in the short-term (as a matter of common sense) but there is no evidence to show that it would have such a serious effect as to amount to an insurmountable obstacle to her return to Turkey.
86. I do not accept that the family circumstances of the Appellant's husband in the UK amount to any obstacle, let alone an insurmountable one, preventing his return to Turkey. There is evidence that [F] is registered disabled, it appears because he is severely visually impaired. He also suffers from other medical conditions. However, there is no evidence that he is so disabled that he requires the sort of personal care and assistance which requires heavy lifting on a regular basis. He is said to live an active lifestyle. Nor is there any evidence to show that if such assistance is required to help the Appellant's mother-in-law with [F]'s care that this could not be provided by the Appellant's father-in-law or brother-in-law.
87. I accept that the Appellant and her husband are part of the family unit with his family in the UK but that does not mean that they enjoy family life in legal terms. The couple live apart from his family and have their own lives. Whilst return of the Appellant and her husband would no doubt be upsetting for his family, that upset is not an insurmountable obstacle to the Appellant's husband returning to Turkey with her.
88. Having considered those factors individually, when considered cumulatively, I conclude that there are no insurmountable obstacles to the Appellant's family life with her husband continuing in Turkey.
89. The Appellant will be able to access IVF in Turkey. There is no evidence to show that the earnings capacity of the Appellant and her husband would be any less than in the UK, particularly when the cost of treatment is set against the cost in the UK. They may find it difficult to pay for that treatment, but the evidence is that they may find it difficult to do so also in the UK.

90. There is no evidence that the Appellant and her husband would not be able to find work, either that for which they are skilled, or other unskilled labour. They would not have to return to the Appellant's hometown or even home province. They could relocate to another part of Turkey. There is no evidence that the Appellant's family have any continued interest in her and would try or be able to trace her elsewhere in Turkey.
91. There is no evidence as to the discrimination suffered by Alevi Kurds nor indeed whether that is the same throughout Turkey or is confined to the Appellant's husband's home area. I note in that regard, that the Appellant's father acquired refugee status nearly two decades ago. There is evidence that the Appellant and his mother have returned to Turkey since they came to the UK, albeit for short periods.
92. The evidence does not show that there would be such a deterioration in the Appellant's mental health on return that removal would cause "very serious hardship" for her. Nor does the evidence show that the effect on the Appellant's husband of separation from his family in the UK would have such consequences.
93. The Appellant left Turkey about seven years ago. However, she lived there until she was in her early twenties. The Appellant's husband lived there until he was aged sixteen. Both speak Turkish. The Appellant's husband's family also come from Turkey and he will therefore have grown up with the culture from that country.
94. For all those reasons, the Appellant has failed to show that there are insurmountable obstacles to family life with her husband continuing in Turkey. Paragraph EX.1. is not met. Accordingly, the Appellant cannot meet the requirements of the Rules.
95. Turning then to the case outside the Rules, I do not need to repeat the factors above which constitute the interference with the Appellant's family life and that of her husband. In relation to her private life and that of her husband, whilst they may prefer to live in the UK, the evidence does not show that there are very significant obstacles to the Appellant's integration in Turkey.
96. I have already dealt with the Appellant's case concerning problems with her family and her mental health condition. I do not repeat those matters. As I have already observed, the Appellant grew up in Turkey and lived there until she was aged twenty-one. Although the Appellant's husband left at an earlier age, he too grew up in Turkey. Both speak Turkish. I accept that the Appellant and her husband going to live in Turkey will be upsetting for his family. However, there is no reason why they cannot go to visit them there.
97. The issue outside the Rules is whether the effect of the Appellant's removal is unjustifiably harsh when balanced against the public interest. In that regard, I refer to the extract from the judgment in Agyarko set out at [19] of my error of law decision.
98. When considering the case outside the Rules, I am bound to have regard to Section 117B. Maintenance of effective immigration control is in the public interest. That is

particularly important where, as here, the Appellant is unable to meet the Rules which are laid down by the Respondent as guidance as to the appropriate balance between individual rights and the public interest.

99. As I have already recorded, in this case the Appellant entered the UK with leave as a spouse and remained here lawfully. However, at the point when she sought to extend her leave, she was unable to meet the Rules (unless she could show that there were insurmountable obstacles to family life continuing in Turkey) due to an inability to meet the evidential requirements in relation to the financial threshold or English language ability.
100. I accept that Section 117B does not require me to give only little weight to the Appellant's family life as it was formed whilst she was here lawfully at least until 4 December 2017. In terms of her private life, however, she has had only limited leave and therefore I can give that private life only little weight. The factors relied upon by the Appellant however are largely concerned with her family life with her husband and I accept that this should be given such weight as is due to it based on the evidence. I bear in mind, however, what is said by the Supreme Court in Agyarko about the circumstances in which a family life established whilst in the UK precariously is likely to tip the proportionality balance in favour of an appellant (see [54] of that judgment as set out at [19] of my error of law decision).
101. Section 117B also requires me to have regard to whether the Appellant is able to support herself without recourse to public funds. Although the evidence suggests that the Appellant and her husband have had some financial assistance with IVF treatment, he, as a British citizen, is entitled to that assistance where it is available and I accept on the evidence that the Appellant has supported herself without recourse to public funds. Although I have expressed some concerns about the Appellant's English language ability, she has certificates showing that she has passed tests in speaking, reading and writing and I also accept that she is able to speak English, at least to the extent necessary for day-to-day life. However, both of those factors are neutral in the proportionality balance.
102. Balancing the interference with the Appellant's private and family life and that of her husband and the impact on her husband's family against the public interest, I have concluded that removal of the Appellant is proportionate for the reasons which follow.
103. Whilst I accept that the Appellant has only remained here as an overstayer whilst trying to regularise her status having made her first application to extend leave in time, I place weight on the fact that she could not meet the Rules at that time and is still unable to do so unless she can show that paragraph EX.1. is met. Whilst the Appellant may have been able to satisfy the Rules as to financial support and English language in principle by the time of this appeal, she was and still is unable properly to evidence that she meets those requirements, at least so far as English language is concerned. In addition, she is now an overstayer and therefore cannot satisfy the Rules unless paragraph EX.1. is met.

104. Moreover, the reason that the Appellant is unable to satisfy the Rules without those requirements turns on the conclusion I have reached that there are no insurmountable obstacles to her continuing her family life with her husband in her home country. As such, the impact on the family and private lives of the Appellant and her husband which I have to weigh in the balance is less than the situation which was being considered by the Supreme Court in R (MM (Lebanon) and others v Secretary of State for the Home Department [2017] UKSC 10 on which the Appellant places some reliance. In some of those cases which involved entry clearance decisions, the impact of refusal based on failure to meet the income threshold was to maintain a split in the family life because the spouse living in the UK could not go to join his or her foreign national spouse. That is not this case. In this case, I have concluded that the Appellant is unable to show that she cannot continue her family life in Turkey. It is for that reason that she cannot satisfy the Rules. That is relevant to the strength of the public interest being weighed in the balance. Even in the MM cases, the Supreme Court recognised the need to give weight to the “considerable weight to judgments made by the Secretary of State in the exercise of her constitutional responsibility for immigration policy” ([75] of the judgment).
105. Whilst I recognise that a failure to meet the Rules does not automatically mean that an appeal will fail outside the Rules, the inability to meet the Rules is highly relevant to the assessment and the strength of the public interest. In particular, I bear in mind what is said at [46] to [48] of the judgment in Agyarko as follows:

“46. In considering that question [whether the situation is compatible with Article 8], it is important to appreciate that the Rules are not simply the product of a legal analysis: they are not intended to be a summary of the Strasbourg case law on article 8. As was explained at para 10 above, they are statements of the practice to be followed, which are approved by Parliament, and are based on the Secretary of State's policy as to how individual rights under article 8 should be balanced against the competing public interests. They are designed to operate on the basis that decisions taken in accordance with them are compatible with article 8 in all but exceptional cases. The Secretary of State is in principle entitled to have a policy of the kind which underpins the Rules. While the European court has provided guidance as to factors which should be taken into account, it has acknowledged that the weight to be attached to the competing considerations, in striking a fair balance, falls within the margin of appreciation of the national authorities, subject to supervision at the European level. The margin of appreciation of national authorities is not unlimited, but it is nevertheless real and important. Immigration control is an intensely political issue, on which differing views are held within the contracting states, and as between those states. The ECHR has therefore to be applied in a manner which is capable of accommodating different approaches, within limits. Under the constitutional arrangements existing within the UK, the courts can review the compatibility of decision-making in relation to immigration with the Convention rights, but the authorities responsible for determining policy in relation to immigration, within the limits of the national margin of appreciation, are the Secretary of State and Parliament.

47. The Rules therefore reflect the responsible Minister's assessment, at a general level, of the relative weight of the competing factors when striking a fair

balance under article 8. The courts can review that general assessment in the event that the decision-making process is challenged as being incompatible with Convention rights or based on an erroneous understanding of the law, but they have to bear in mind the Secretary of State's constitutional responsibility for policy in this area, and the endorsement of the Rules by Parliament. It is also the function of the courts to consider individual cases which come before them on appeal or by way of judicial review, and that will require them to consider how the balance is struck in individual cases. In doing so, they have to take the Secretary of State's policy into account and to attach considerable weight to it at a general level, as well as considering all the factors which are relevant to the particular case. This was explained in *Hesham Ali* at paras 44-46, 50 and 53.

48. The Secretary of State's view that the public interest in the removal of persons who are in the UK in breach of immigration laws is, in all but exceptional circumstances, sufficiently compelling to outweigh the individual's interest in family life with a partner in the UK, unless there are insurmountable obstacles to family life with that partner continuing outside the UK, is challenged in these proceedings as being too stringent to be compatible with article 8. It is argued that the Secretary of State has treated "insurmountable obstacles" as a test applicable to persons in the UK in breach of immigration laws, whereas the European court treats it as a relevant factor in relation to non-settled migrants. That is true, but it does not mean that the Secretary of State's test is incompatible with article 8. As has been explained, the Rules are not a summary of the European court's case law, but a statement of the Secretary of State's policy. That policy is qualified by the scope allowed for leave to remain to be granted outside the Rules. If the applicant or his or her partner would face very significant difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship, then the "insurmountable obstacles" test will be met, and leave will be granted under the Rules. If that test is not met, but the refusal of the application would result in unjustifiably harsh consequences, such that refusal would not be proportionate, then leave will be granted outside the Rules on the basis that there are "exceptional circumstances". In the absence of either "insurmountable obstacles" or "exceptional circumstances" as defined, however, it is not apparent why it should be incompatible with article 8 for leave to be refused. The Rules and Instructions are therefore compatible with article 8. That is not, of course, to say that decisions applying the Rules and Instructions in individual cases will necessarily be compatible with article 8: that is a question which, if a decision is challenged, must be determined independently by the court or tribunal in the light of the particular circumstances of each case."

106. It cannot be said that there are any such "exceptional circumstances" in this case. Put another way, when the interference with the Appellant's family and private life is balanced against that public interest, the consequences of removal are not unjustifiably harsh. For that reason, the Appellant's case fails also outside the Rules.

CONCLUSION

107. For the foregoing reasons, the Appellant is unable to show that paragraph EX.1. is met. There are no insurmountable obstacles to family life with her husband continuing in Turkey. For that reason, her claim under the Rules fails. When

balanced against the public interest, the removal of the Appellant is not unjustifiably harsh. The decision to remove the Appellant is proportionate and therefore lawful under Section 6 Human Rights Act 1998.

DECISION

The Appellant's appeal is dismissed.

A handwritten signature in black ink, appearing to read 'J. Smith', written in a cursive style.

Signed:
Upper Tribunal Judge Smith

Dated: 14 April 2020

APPENDIX: ERROR OF LAW DECISION



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/02104/2019

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice, London
On Monday 13 January 2020

Determination Promulgated

.....23 January 2020.....

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[S E]

Respondent

Representation:

For the Appellant: Mr S Kotas, Senior Home Office Presenting Officer

For the Respondent: Mr E Wilford, Counsel instructed by Kent Solicitors

DECISION AND REASONS

BACKGROUND

1. This is an appeal by the Secretary of State. For ease of reference, I refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge C Greasley promulgated on 8 August 2019 ("the

Decision”) allowing the Appellant’s appeal on human rights grounds (Article 8 ECHR). The Appellant is a national of Turkey. Her human rights claim is based on her relationship with her husband, [AE], who is also of Turkish origin but who has lived in the UK for seventeen years and is now a British citizen. The Appellant’s human rights claim was refused by the Respondent by the decision under appeal, dated 18 January 2019.

2. The Judge accepted that the Appellant was unable to meet the Immigration Rules (“the Rules”) based on her family and private life. The Respondent had given three reasons why she was unable to do so. First, the Appellant and her husband were unable to meet the income threshold under the Rules (“the MIR”). Second, although the Appellant was found by the Judge to speak English, she did not produce a certificate in proper form. Third, the Appellant had overstayed her leave to remain. Accordingly, the Respondent concluded that, in order to succeed, the Appellant would have to show that there are “insurmountable obstacles” to family life continuing in Turkey in order to satisfy paragraph EX.1. of Appendix FM to the Rules (“EX.1.”). The Respondent concluded that the Appellant could not meet that test.
3. Having accepted that the Appellant could not meet the Rules, the Judge went directly to an assessment of Article 8 outside the Rules. He concluded that the Respondent’s decision to remove the Appellant was disproportionate.
4. The Respondent appeals on the basis that the Judge has failed to provide adequate reasons for his findings, has failed to make a material finding of fact and has misdirected himself in law. The first ground focusses on the Judge’s failure to consider whether EX.1. is met. It is asserted that this failure contaminates the assessment outside the Rules. The second ground is a failure to explain why the undergoing of IVF treatment amounts to an unjustifiably harsh consequence given the Supreme Court’s observations in *Agyarko and Ikuga v Secretary of State for the Home Department* [2017] UKSC 11 (“*Agyarko*”). The Appellant in the *Ikuga* case was also undergoing fertility treatment. The Supreme Court rejected that as an insurmountable obstacle or a sufficiently exceptional circumstance to justify the grant of leave to remain. The third ground challenges the Judge’s failure to consider whether IVF could be continued in Turkey and whether the Appellant’s mental health would be worse if removed to Turkey either in the presence of her husband or not.
5. Permission to appeal was refused by First-tier Tribunal Judge Landes on 18 November 2019 in the following terms so far as relevant:

“...3. It is right that the judge did not expressly state that there were insurmountable obstacles to family life being continued in Turkey. He did however refer to no issue being taken with the observations of Tarka Mustafa and that report highlighted that it would be very detrimental to the appellant’s well-being and sanity if she were “sent back” to Turkey.

4. It is right that fertility treatment in itself may not amount to an exceptional circumstance but the judge was entitled to look at all the circumstances in the

round which included not only the fertility treatment but also the appellant's mental health and, significantly the fact that the financial requirements of immigration rules were met, that the appellant was able to speak English and she had only overstayed for a limited period of time because she had not appreciated her position about submitting a new application. The report of Tarka Mustafa with which no issues were taken explains the reason why the appellant's mental health would worsen in Turkey; the judge was entitled to conclude that bearing in mind that her husband would remain in the UK and taking into account all the circumstances the refusal was disproportionate. The contrary is not arguable."

6. On renewed application to this Tribunal, permission to appeal was granted by Upper Tribunal Judge Coker in the following terms:
- "1. It is arguable the First-tier Tribunal Judge failed to give adequate or any weight to the failure of the appellant to meet the requirements of the Immigration Rules.
 2. It is arguable the First-tier Tribunal judge failed to apply EX1 and failed to make any or any adequate findings in relation thereto.
 3. I grant permission on all grounds."
7. The matter comes before me to determine whether the Decision contains a material error of law and, if it does, to re-make the decision or remit the appeal to the First-tier Tribunal to do so.

THE EVIDENCE AND THE DECISION

8. Before I turn to consider the grounds, I set out the relevant evidence and passages of the Decision so that the discussion which follows can be understood in context.
9. Dealing first with the Appellant's immigration history, she came to the UK with entry clearance as a spouse on 12 November 2013. Her leave was valid to 31 July 2016. In July 2016, she applied for further leave on the ten years' route to settlement. The application was refused on 4 December 2017 and certified as clearly unfounded. Her leave to remain therefore expired upon service of that decision as she had a right of appeal only from outside the UK. She considers with the benefit of hindsight that she ought to have judicially reviewed the refusal on that occasion. That would have made no difference to whether her leave continued at that time. As it was, she made a further application on 17 January 2018 which was also refused in July 2018 as not amounting to a fresh claim. At that point in time, she judicially reviewed the decision (in September 2018). The July decision was withdrawn and reconsidered. The Judge said at [6] of the Decision that the application was submitted 43 days after the Appellant's leave expired. Although that is true of the January 2018 application and the Respondent withdrew the July decision and agreed to reconsider (again refusing leave), it does not mean that the overstaying is confined to that period. The Appellant has had no leave to remain in the UK since the December 2017 decision was served. The application made in January 2018 was eventually refused by the decision under appeal, the Respondent having issued the further decision letter on 18 January 2019.

10. The Appellant married her husband on 16 June 2012 in Turkey. As I have already noted, he originates from Turkey but is now a British citizen. He has lived in the UK for seventeen years. As appears from his statement, he is in full-time employment in the UK. As appears from other documents in the Appellant's bundle, he is an Advertising and Distribution Assistant employed on a permanent basis by Emirtax Ltd on a gross salary of £19,200 per annum. He began this job on 6 August 2018. Prior to that date, he worked as a chef for Eren Kebab Ltd trading as Eastern Delight on a salary of £11,232 and then for Son Chare Ltd, Utkueren Ltd, Korkmaz Catering Ltd, Denhaz Ltd and Dalkilic Ltd. He earned £13,041.46 in the tax year to 5 April 2017. He was on a salary of £14,400 per annum on 15 January 2018 when the application was made (working for Korkmaz Ltd). It is therefore as a result of his change of employment that the Appellant and her husband are now able to meet the MIR (as the Judge found to be the position at [27] of the Decision).
11. The Appellant had also been employed part-time as a cleaner and kitchen porter and then for London Bar Staff Ltd but was not employed as at the date of the hearing before Judge Greasley ([19] of the Decision).
12. The Appellant and her husband are undergoing IVF treatment in the UK. The Judge noted at [19] of the Decision that this was still continuing and that the next cycle would resume in September 2019. Although the Judge there noted the Appellant's acceptance that IVF is available in Turkey, she said that "she would need her husband there to participate in the program and he was in full-time work in the United Kingdom."
13. The Appellant has family in Turkey in the form of her parents and brothers although, according to what is said at [19] of the Decision, she is not in contact with them. The Judge says at [18] of the Decision that the Appellant has been refused asylum on two occasions. There is nothing in the immigration history which I have set out above which supports that assertion and nor does the Appellant say that this is the case. She refers obliquely at [14] of her statement to having suffered domestic violence at the hands of her brother but does not say that she feared ill-treatment on return to Turkey. She says that, because she comes from a rural area in Turkey, she feared that her husband's family would put pressure on him to find a wife who is able to conceive. However, I can find nothing in her statement to support the finding at [18] of the Decision that "the appellant would suffer at the hands of her family and community due to her inability to conceive". Nor can I find anything in the Appellant's husband's statement to support the finding that he would be unable to relocate (or indeed has any necessity to do so) if he were to return to Turkey.
14. Mr Wilford had no instructions about any asylum claim. What is said by the Judge in that regard and his findings about potential ill-treatment on return appears to come from what is said in the report of Tarkan Mustafa, MA who is an Associate Member of the School of Natural Health Sciences. The fact of an asylum claim having been refused on two occasions appears as part of the narrative in that report as do the other references which I have set out above. Mr Kotas very fairly accepted that, as the report was not challenged by the Respondent at the First-tier Tribunal

hearing nor in the grounds, he could say little about it by way of formal criticism. It does appear that what is said by the Judge at [18] of the Decision is lifted from this report. However, Mr Kotas' point is that, irrespective of any contradictions with other supporting evidence about what is there said, the report is merely a narrative of what he has apparently been told and the only salient opinion offered is to be found in the penultimate sentence that if the Appellant were sent back to Turkey "this would be very detrimental to her well-being and her sanity". There is no formal diagnosis as to the reasons for the Appellant's mental health problems nor any formal, reasoned prognosis for the future. I note for completeness that it is not clear that Mr Mustafa was aware that his report would be used in court proceedings nor that he intended to offer any view as an expert. The report is headed "TO WHOM IT MAY CONCERN". There is no reference to his duty to the Tribunal as an expert. The report does not set out his relevant expertise.

15. Having set out the evidence which I have summarised so far as relevant above at [10] to [20] of the Decision, the Judge made his assessment of the Article 8 claim in the following passage:

"23. I accept as Mrs McCarthy concedes, that this appeal cannot be allowed under the United Kingdom immigration rules based principally on the fact that the appellant was an overstayer 43 days and given that the English language certificate upon which the appellant relies, is not accepted certificate, at an acceptable level, for purposes of the UK immigration rules.

24. I must therefore go on and consider whether there are any exceptional circumstances beyond the immigration rules which are likely to give rise to undue hardship for the appellant to be removed to Turkey.

25. For reasons that follow, based upon the totality of the evidence before me, including that which I have not specifically referred, I find that this appeal must be allowed substantively in terms of Article 8 ECHR family and private life interests, under a classic Razgar analysis.

26. I accept that the appellant and sponsor are in a genuine and subsisting relationship. This was not challenged either in the refusal decision, or indeed at the appeal hearing. I also accept that the appellant is undergoing IVF treatment together with her husband and unfortunately, to date, this treatment has not been successful. I also accept that there is ongoing treatment and that the next cycle is due to begin in September 2019. The treatment is being taken at the Guys and St Thomas's Hospital who will have biological records of all the treatment taken thus far, including storage of sperm samples which the appellant and sponsor are currently paying for.

27. I do not find that it is simply a question of the appellant and her husband being able to relocate to Turkey and recommence IVF with a different clinic and with different medical personnel. I accept entirely that the IVF process is likely to be highly stressful, and will involve a degree of anxiety and depression. These are matters which had been highlighted in the report from Tarka Mustafa of 23 July 2019. No issue was taken with these observations. I also accept the sponsor is in gainful employment in the United Kingdom where he supports his wife, the appellant. He is now resided in the United Kingdom for 17 years. Whilst I accept that the sponsor now satisfies financial requirements under the rules,

unfortunately the English language certificate which the appellant provides is not compliant with current requirements; nonetheless, I do accept that the appellant was able to speak some English at the appeal although I understand why she did in fact elect to use an interpreter for purposes of getting formal evidence at the hearing.

28. Whilst I note that the appellant did technically overstay for 43 days in the United Kingdom, I accept that she only did this because she did not decide to pursue the judicial review application, and instead made the thought of the paid application [sic] for leave to remain in the United Kingdom. I accept this is the only point in her otherwise unblemished immigration history in the United Kingdom.

29. I also accept that the appellant and sponsor have one frozen embryo in the United Kingdom; it is likely that this may well be used in any future treatment. In all the circumstances, and for the reasons stated, when considering classic Razgar analysis, I accept that the appellant and sponsor have established a right to family and private life in the United Kingdom and ultimately I conclude that removal would not properly serve any public interest in terms of proper immigration control, and would therefore be both unlawful and disproportionate.

30. I accept the IVF treatment is likely to be time limited and to become increasingly expensive the longer there is delay. The appellant genuinely suffers from depression and anxiety, not only linked to her infertility problem but also her unresolved immigration status. I find that her personal circumstances, and her current medical conditions, are likely to be exacerbated if she is forced to separate from a husband and returned to Turkey, even to seek re-entry. Having her husband present with her is a critical factor in their family and private life interests at this time.

31. I have also considered the principles appearing within section 117B of the Nationality, Immigration and Asylum Act 2002. I accept that the financial requirements are met and that the appellant is able to speak some English as well as to be financially independent. These are both matters which the above legislation deems individuals better able to integrate into UK society."

DISCUSSION AND CONCLUSIONS

16. I begin with the ground on which Mr Kotas focussed namely the Judge's failure to consider paragraph EX.1. Mr Wilford accepted that this was not considered but said it was not an error or at least not a material one.
17. Paragraph EX.1. reads as follows (so far as relevant):
 - "EX.1. This paragraph applies if
 - (a) ...; or
 - (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner."

18. The Supreme Court in Agyarko considered the meaning of the "insurmountable obstacles" requirement at [43] to [45] of the judgment as follows:

"43. It appears that the European court intends the words "insurmountable obstacles" to be understood in a practical and realistic sense, rather than as referring solely to obstacles which make it literally impossible for the family to live together in the country of origin of the non-national concerned. In some cases, the court has used other expressions which make that clearer: for example, referring to "un obstacle majeur" (*Sen v The Netherlands* (2003) 36 EHRR 7, para 40), or to "major impediments" (*Tuquabo-Tekle v The Netherlands* [2006] 1 FLR 798, para 48), or to "the test of 'insurmountable obstacles' or 'major impediments'" (*IAA v United Kingdom* (2016) 62 EHRR SE 19, paras 40 and 44), or asking itself whether the family could "realistically" be expected to move (*Sezen v The Netherlands* (2006) 43 EHRR 30, para 47). "Insurmountable obstacles" is, however, the expression employed by the Grand Chamber; and the court's application of it indicates that it is a stringent test. In *Jeunesse*, for example, there were said to be no insurmountable obstacles to the relocation of the family to Suriname, although the children, the eldest of whom was at secondary school, were Dutch nationals who had lived there all their lives, had never visited Suriname, and would experience a degree of hardship if forced to move, and the applicant's partner was in full-time employment in the Netherlands: see paras 117 and 119.

44. Domestically, the expression "insurmountable obstacles" appears in paragraph EX.1(b) of Appendix FM to the Rules. As explained in para 15 above, that paragraph applies in cases where an applicant for leave to remain under the partner route is in the UK in breach of immigration laws, and requires that there should be insurmountable obstacles to family life with that partner continuing outside the UK. The expression "insurmountable obstacles" is now defined by paragraph EX.2 as meaning "very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner." That definition appears to me to be consistent with the meaning which can be derived from the Strasbourg case law. As explained in para 16 above, paragraph EX.2 was not introduced until after the dates of the decisions in the present cases. Prior to the insertion of that definition, it would nevertheless be reasonable to infer, consistently with the Secretary of State's statutory duty to act compatibly with Convention rights, that the expression was intended to bear the same meaning in the Rules as in the Strasbourg case law from which it was derived. I would therefore interpret it as bearing the same meaning as is now set out in paragraph EX.2.

45. By virtue of paragraph EX.1(b), "insurmountable obstacles" are treated as a requirement for the grant of leave under the Rules in cases to which that paragraph applies. Accordingly, interpreting the expression in the same sense as in the Strasbourg case law, leave to remain would not normally be granted in cases where an applicant for leave to remain under the partner route was in the UK in breach of immigration laws, unless the applicant or their partner would

face very serious difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship. Even in a case where such difficulties do not exist, however, leave to remain can nevertheless be granted outside the Rules in "exceptional circumstances", in accordance with the Instructions: that is to say, in "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate."

19. The Supreme Court held that the requirements were Article 8 compliant, recognising that the requirements reflected the Minister's view of where the public interest lay. As the Supreme Court also made clear, even where those requirements are not met, an applicant may still be granted leave if the consequences of removal result are "unjustifiably harsh". However, as the Supreme Court went on to say when looking at the grant of leave to remain outside the Rules, this will only arise in exceptional circumstances. The rationale for that approach is explained at [54] and [55] of the judgment as follows:

"54. As explained in para 49 above, the European court has said that, in cases concerned with precarious family life, it is "likely" only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8. That reflects the weight attached to the contracting states' right to control their borders, as an attribute of their sovereignty, and the limited weight which is generally attached to family life established in the full knowledge that its continuation in the contracting state is unlawful or precarious. The court has repeatedly acknowledged that "a state is entitled, as a matter of well-established international law, and subject to its treaty obligations, to control the entry of non-nationals into its territory and their residence there" (*Jeunesse*, para 100). As the court has made clear, the Convention is not intended to undermine that right by enabling non-nationals to evade immigration control by establishing a family life while present in the host state unlawfully or temporarily, and then presenting it with a *fait accompli*. On the contrary, "where confronted with a *fait accompli* the removal of the non-national family member by the authorities would be incompatible with article 8 only in exceptional circumstances" (*Jeunesse*, para 114).

55. That statement reflects the strength of the claim which will normally be required, if the contracting state's interest in immigration control is to be outweighed. In the *Jeunesse* case, for example, the Dutch authorities' tolerance of the applicant's unlawful presence in that country for a very prolonged period, during which she developed strong family and social ties there, led the court to conclude that the circumstances were exceptional and that a fair balance had not been struck (paras 121-122). As the court put it, in view of the particular circumstances of the case, it was questionable whether general immigration considerations could be regarded as sufficient justification for refusing the applicant residence in the host state (para 121)."

20. Although I accept, as the Respondent asserts in the grounds, that the circumstances of Mrs Ikuga in Agyarko bear some similarities to the Appellant's case (fertility treatment and husband in full-time employment in the UK), it is rarely helpful to consider Article 8 based on an analogy with the facts of another case as each case turns on its own facts.

21. Mr Wilford accepted that, if the only barrier to the Appellant meeting the Rules had been the Appellant's immigration status, rather than being the combined effect of the lack of English language certificate and lack of status, the Judge could not have circumvented the proper consideration whether the Appellant could meet the Rules by not looking at paragraph EX.1. That was clearly relevant when status was at issue. As I pointed out, the situation ought not to be any different merely because there was an additional reason for refusal under the Rules. Although he accepted the validity of that point, he said that the error was not material because the Judge had gone on to consider the claim outside the Rules and had therefore considered whether the impact of removal was unjustifiably harsh for the Appellant and her husband.
22. I cannot accept that submission for two reasons. First, the question whether an applicant can succeed outside the Rules incorporates consideration whether they can meet the Rules and if not, why not. Whilst Mr Wilford was entitled to draw my attention to [28] of the Decision where the Judge refers to the Appellant's overstaying (although possibly not on the right analysis for the reasons I set out at [9] above), that does not fully answer the point. The public interest in removal to which the Judge has regard takes into account that the Appellant was here for at least some time unlawfully (although possibly less time than the Judge thought was the position). However, it is not apparent that this is weighed in the balance to the correct threshold when considering the public interest. There is no reference to the maintenance of effective immigration control or, as Judge Coker pointed out when granting permission, the relevance in that regard of the Appellant not meeting the Rules.
23. That brings me on to the second point which is that the Judge does not consider whether the Appellant's husband could accompany the Appellant to Turkey through the appropriate lens. If the Judge had considered paragraph EX.1., the issue whether the Appellant's husband could relocate would no doubt have occurred to him. As it is, there is an assumption in the Judge's findings at [26] to [30] of the Decision that the Appellant's husband would remain in the UK and the Appellant would be separated from him (although there is some contradiction between what is said at [27] and [30] of the Decision in any event). What the Judge does not do though is provide reasons why it would be unjustifiably harsh for the Appellant's husband to accompany the Appellant to Turkey.
24. Mr Wilford said that the Appellant's husband could not relocate to Turkey with the Appellant because he is in full-time employment here and has lived here for 17 years. However, those factors could not without more equate to insurmountable obstacles nor indeed to exceptional circumstances or unjustifiably harsh consequences. They are the commonplace impacts of removal on a British citizen or settled partner and do not explain why that partner could not go to live in the country of which his/her partner is a national (particularly where, as here, the British citizen or settled partner originates from that country). There is in any event no reasoned finding by the Judge to that effect. The Judge has therefore misdirected himself also on this issue.

25. That failure impacts on the Judge's assessment read as a whole. The Judge's finding that removal would lead to unjustifiably harsh consequences is not based only on the continuing IVF treatment. He accepts at [27] that the Appellant's case is not simply based on the difficulties of relocating and continuing IVF in Turkey. He accepts on the Appellant's evidence that IVF is available in Turkey. That factor is to be added to the Appellant's mental health issues. Leaving aside the adequacy or otherwise of Mr Mustafa's report in this regard (and possible connected errors or discrepancies in relation to the background of this case in terms of risk on return), if, as the Judge says, those problems are caused in part by the stress of IVF treatment, then they will continue whether the Appellant is in the UK or Turkey. If they are due to the Appellant's immigration position, that will be resolved by this appeal. If, as the Judge finds at [30], such problems are "exacerbated" by a return to Turkey without her husband, it follows that the Judge had to explain why it would be unjustifiably harsh for the Appellant's husband to accompany her or, put another way, why there would be insurmountable obstacles to the couple relocating to Turkey to continue their family life there.
26. Although, as Mr Wilford rightly pointed out, the assessment outside the Rules is a proportionality balance between the interference with the Appellant's (and her husband's) family and private lives on the one hand and the public interest on the other, the burden of establishing the interference to be balanced in the equation falls on the Appellant. It is then for the Respondent to justify the interference. In this case, it is difficult to see on the evidence what it was by way of interference that the Judge has balanced in the equation and, in any event, when assessing whether the interference was outweighed by the public interest, the Judge has failed properly to take into account why the Appellant cannot meet the Rules and has failed properly to assess the situation on return to Turkey, in particular whether and if not why the Appellant's husband would or could accompany her.
27. It follows from that analysis that the error in failing to consider paragraph EX.1. is a material one. The Decision is not rescued by the Judge's analysis outside the Rules, predominantly because the Judge has failed to consider the position outside the Rules through the appropriate lens and therefore has failed properly to analyse the wider position. He has failed to explain why the Appellant's husband could not be expected to return to Turkey with her. As such, he has failed properly to analyse and explain why the consequences of removal are unjustifiably harsh.

NEXT STEPS

28. For the foregoing reasons, I set aside the Decision. Although there may be a degree of fact finding needed when re-making the Decision, the facts of the case are not complex. I do however consider it necessary to hear evidence. I understand why the Appellant has not made an application to adduce further evidence at this stage as she was the successful party in the First-tier Tribunal. I would however be assisted by further evidence on the following matters:
- Whether there has been any previous asylum claim or whether the Appellant says that there are any reasons why she fears return to Turkey. I stress in that

regard that, were she to do so, this would amount to a new matter for which consent would be required from the Respondent, but it would be helpful to be clear about the basis on which she says she cannot return to Turkey. It would also be helpful to have further details about any other reasons why she needs to remain in the UK and her circumstances in Turkey.

- It would equally be helpful to have evidence about all and any reasons why the Appellant's husband is unable or unwilling to return to Turkey including evidence as to his family and other circumstances in the UK and in Turkey.
- I note that the couple were to undertake a further round of IVF starting in September 2019. Updating evidence in that regard would be of assistance. Similarly, it would be helpful to have evidence as to the Appellant's mental health issues from an appropriately qualified source and/or her medical records in that regard.

29. Mr Wilford asked that I preserve certain of the factual findings made by Judge Greasley. Although I indicated that I was prepared to preserve the finding in relation to the Appellant and her husband meeting the MIR, as Mr Kotas pointed out, I will have to reconsider this in any event as the issue must be considered at date of hearing. That may be particularly pertinent in this case as the Appellant's husband has changed jobs on a number of occasions in recent years. The Appellant will therefore need to ensure that evidence about his financial circumstances is updated if necessary.
30. Although I also indicated that I would be inclined to preserve the finding that the Appellant can speak English, having reviewed some of the evidence to which I was not taken during the hearing, I do not do so. Although I do not take into account that the Appellant used an interpreter for the hearing (which is understandable as the Judge found), there is other evidence in the Appellant's bundle which shows that, for example, she has used an interpreter for medical appointments and is said not to speak English. I will therefore reconsider that issue afresh at the resumed hearing. I emphasise that I will take no point about the use of an interpreter for the Appellant's evidence at the resumed hearing. It is understandable that an appellant will wish to give evidence in his/her mother tongue in the unfamiliar environment of a court room. However, the Appellant may wish to provide some evidence of her English-speaking ability if she has not already done so.
31. It is not appropriate to preserve any of the other findings as they form part of the assessment which I have found to be flawed and, as indicated above, I would be assisted by further evidence to assist determination of the salient facts.

CONCLUSION

32. For the foregoing reasons, I am satisfied that the Decision contains a material error of law. I set aside the Decision. I have made directions below for a resumed hearing.

DECISION

I am satisfied that the decision of First-tier Tribunal Judge Greasley promulgated on 8 August 2019 discloses an error of law. I set aside that decision. I make the following directions for a resumed hearing:

1. Within 28 days from the date when this decision is sent, the Appellant shall file with the Tribunal and serve on the Respondent any further evidence on which she wishes to rely.
2. The resumed hearing is to be relisted before me on the first available date after six weeks from the date when this decision is sent with a time estimate of 1/2 day. A Turkish interpreter is to be booked for the hearing unless the Appellant indicates otherwise.



Signed:
Upper Tribunal Judge Smith

Dated: 16 January 2020