Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/20325/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 20 July 2017	**On 21 July 2017**

Before

Deputy Upper Tribunal Judge MANUELL

Between

Mr MEHMET MAYBARSKAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T Hodson, Authorised Representative (Immigration Legal Services)
For the Respondent: Mr D Clarke, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The Appellant appealed with permission granted by First-tier Tribunal Judge Landes on 9 June 2017 against the determination of First-tier Tribunal Judge Zahed who had dismissed the appeal of the Appellant seeking settlement outside the Immigration Rules on Article 8 ECHR grounds on the grounds of his marriage to a British Citizen. The decision and reasons was promulgated on 28 November 2016.

2. The Appellant is a national of Turkey. The Appellant had entered the United Kingdom lawfully as a Tier 4 (General) Student Migrant in 2009, with leave to enter for 6 months. He failed to leave the United Kingdom after his application for further leave to remain was refused. He remained in the United Kingdom unlawfully from 11 January 2010. In April 2010 he met his British Citizen wife whom he married on 9 November 2013. It was accepted that the Appellant was unable to meet the financial requirements of Appendix FM. The judge found that the marriage was genuine and subsisting, as indeed had not been challenged by the Secretary of State, but that it was not unreasonable for the wife to relocate to Turkey with the Appellant to continue their family life there. She would have access to support in the form of her husband and his family, and could remain in contact by modern means of communication with her own family who would remain supportive. There were no insurmountable obstacles and there were no exceptional circumstances. There was no disproportionality in Article 8 ECHR terms when the balancing exercise was performed. The judge dismissed the appeal on that basis. (There was no discussion of Chen [2015] UKUT 00189 (IAC) and the impact of temporary separation.)

3. Permission to appeal was granted on a limited basis because it was considered arguable that the judge had erred by failing to consider whether the effect of a move to Turkey on the Appellant's wife's mental health would amount to an insurmountable obstacle for proportionality purposes under Article 8 ECHR.

4. Standard directions were made by the tribunal. A rule 24 notice opposing the appeal was filed by the Respondent.

Submissions

5. Mr Hodson for the Appellant relied on the grounds of onwards appeal and grant. In summary he sought to argue that the judge had completely failed to address the central issue of insurmountable obstacles. The judge had applied the wrong test, as had been pointed out in the grant of permission to appeal. Agyarko [2017] UKSC applied to reasonableness. The judge's findings could not be related to reasonableness. He had not dealt properly with the medical evidence. The determination should be set aside and remade.

6. Mr Clarke for the Respondent relied on the rule 24 notice and submitted that there was plainly no material error of law. It had been accepted that Appendix FM had not been met and the judge's Article 8 ECHR findings were open to him. The substance of Agyarko had been applied. The judge had found as a fact that the Appellant's wife would have support available to her in Turkey. The onwards appeal should be dismissed.

No material error of law finding

7. In the tribunal's view the grant of permission to appeal was generous, and failed to reflect the fact that the appeal was in reality a misconceived one, with very weak evidence. Unfortunately it is typical of many appeals seen in the First-tier Tribunal and again in the Upper Tribunal involving couples seeking to rely on Article 8 ECHR grounds. Had the Appellant returned to Turkey in 2010 as he should have done, he would have been able to enter the United Kingdom to join his wife under the far less stringent provisions of the now repealed paragraph 281 of the Immigration Rules. Those Immigration Rules were replaced by from 9 July 2012 by the much more demanding provisions of Appendix FM. There was no evidence that those provisions could not with appropriate efforts be complied with. The Appellant's wife complained in her witness statement that it would take a long time to comply with Appendix FM but provided no evidence about

any attempts to do so in the past. The current unhappy situation was created by the parties. Compliance with the law is not a matter of individual choice. Time and money have been wasted seeking the impossible, when obvious and satisfactory solutions were available.

8. The live issues before the judge were not indicated by the grounds of appeal attached to the Appellant's Notice of Appeal to the First-tier Tribunal. They were generic, uninformative and largely incomprehensible. Such grounds fail to serve a client's interests and are a breach of the overriding objective: see the Tribunal Procedure Rules 2014, rule 2.

9. Despite the lack of assistance which the Notice of Appeal provided, it was obvious to the judge that the issues before him were whether family life could be lived in Turkey and whether that would be proportionate in Article 8 ECHR terms, in other words, whether there would be "insurmountable obstacles": see the reasons for refusal letter. Although the judge is criticised for failing to apply Agyarko (above), that useful guidance was not available to him, as the Supreme Court's decision was issued in February 2017, months after the judge's (regrettably delayed) promulgation of his decision. As indicated below, however, the judge in substance applied the principles further explained in Agyarko.

10. The evidence before the judge of "insurmountable obstacles" consisted of two principal items, the Appellant's wife's witness statement and a letter from her GP. The witness statement all too typically of this appeal failed to comply with standard directions. The paragraphs were not numbered. That is another breach of the overriding objective. On page 3 in an unnumbered paragraph the Appellant's wife stated that she had been suffering from depression for 6 years and that her family had been her rock and that her husband had provided "useful support." Although she stated that she had been under the care of a psychiatrist and a psychologist, the only medical evidence placed before the tribunal was a brief letter from her GP, Dr Timothy Reed. Dr Reed stated that her family had been of great and continuing support, and stated that the lack of family support available in Turkey "is likely to result in deterioration in Mrs Selcuk's mental health." The letter

was very short of detail and gave little indication of the current seriousness of the Appellant's condition. There was no discussion of any medicines currently prescribed, the dosage or their effect, let alone their availability in Turkey. The obvious inference is that the illness is no longer serious, otherwise the doctor would have said so. The letter was plainly written to support his patient's appeal. There was no discussion of the benefits of the Appellant's company for his wife. There was no discussion of Mrs Selcuk's ability to study at tertiary level (as she had been doing) or her own insight into her condition.

11. The Appellant also produced a serious of colour photographs of his family life with Mrs Selcuk. These show a variety of every day family events. These invariably show Mrs Selcuk looking cheerful and smiling, leading a normal life. This was the evidence the Appellant chose to produce. No doubt these photographs properly informed the judge's findings of fact, i.e., that Mrs Selcuk's depression is under control.

12. The judge's formal findings are mainly set out at [8] and [9] of the decision and reasons. Although the judge does not say so in express terms, it is clear from [2] and [3] of the decision that he is addressing the live issues for Article 8 ECHR proportionality, i.e., whether there are insurmountable obstacles to family life being led in Turkey. It might have been useful had the judge been more explicit, but any error of law here is not material as the context shows the issues being addressed.

13. It must be remembered as part of the judge's analysis that Mrs Selcuk is of Turkish heritage, and has relatives of her own in Turkey such as her grandmother. Although Mrs Selcuk was born in London, she chooses as is her right in a free society to remain within Turkish culture, as is for example indicated by her traditional Turkish dress: see the photographs. It was perhaps too obvious for the judge to say that adaptation to life in Turkey was not shown to be a serious problem for her, albeit without certain advantages she has in the United Kingdom.

14. The judge examined the evidence before him of the impact of the Appellant's wife's depression on living with her husband in Turkey. Again this might with advantage have

been done more explicitly, but the substance is clear: the Appellant would continue to have at least adequate support, primarily from her husband (in his witness statement at page 3 he pledged his "eternal support" for her) but also from his family in Turkey. The judge also found, as was open to him, that the Appellant could remain in contact with her own family in the United Kingdom by various modern means. There was no evidence that they could not visit her there. All of these findings were based on the evidence, and are logical and sustainable. Indeed, as Mr Clarke pointed out, in substance they follow the guidance set out at [42] and [43] of Agyarko (above).

15. There was no suggestion that the experienced judge had misunderstood any of the evidence. Section 117B of NIA 2002 was adequately applied to the findings of fact. The Appellant had been in the United Kingdom precariously for some 6 years by the date of the hearing and his wife was well aware of his lack of status. He was not financially independent. Mr Hodson's submissions, like the onwards grounds, amount to no more than disagreement with the judge's decision.

16. The tribunal finds that the onwards appeal has no substance and that there was no material error of law in the decision challenged. Plainly the Appellant and his wife have several reasonable options open to them for the continuation of their family life, i.e., to live together in Turkey or to travel there together on a visit while entry clearance is sought or to separate on a temporary basis while the Appellant obtains entry clearance on the terms prescribed by the Immigration Rules.

DECISION

The appeal is dismissed

The making of the previous decision did not involve the making of a material error on a point of law. The decision stands unchanged.

Signed **Dated** 20 July 2017

Deputy Upper Tribunal Judge Manuell