Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03716/2019
HU/03719/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 February 2020	**On 7 February 2020**

Before

UPPER TRIBUNAL JUDGE LANE

Between

KEVINKUMAR RAMESHBHAI PATEL
SHITALBEN KEVINKUMAR PATEL

Appellant

(ANONYMITY DIRECTION NOT MADE)

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr O'Brien
For the Respondent: Ms Jones, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are husband and wife and were born on 15 June 1982 on 14 February 1985 respectively. They are citizens of India. They appealed against decisions of the Secretary of State made on 8 February 2019 refusing them leave to remain in the United Kingdom. The First-tier Tribunal, in a decision promulgated on 13 September 2019, dismissed the appeal. The appellants now appeal, with permission, to the Upper Tribunal.

2. I am satisfied that the decision of the First-tier Tribunal is flawed by legal error and should be set aside. My reasons for reaching the conclusion are as follows.

3. First, I am satisfied that judge has failed correctly to address the evidence given by the second appellant by way of an innocent explanation for what had happened at the ETS test centre to which he had travelled in order to undertake an English-language examination. The second appellant's explanation was that the recording of her speech was terminated by someone from the centre who claimed the recording equipment was not working properly and that she was asked to leave the premises. The first line of the judges analysis of this explanation at [28] ('*the appellant since innocent explanation is simply that he who sat the tests at the ...'*) makes no sense and indeed appears to have been interpolated from another decision. The judge then recounts that the appellant claimed never to have submitted to a voice recording. Although the judge does not refer to the broken machine in that paragraph, he does so earlier in the decision during his record of second appellant's evidence [22]. However, even assuming that, at [28], the judge had recalled that the appellant claimed to have left the premises after the machine had broken, his next comment *('thus she cannot be claiming to be one of the 'false positives' of which Prof French speaks in his report')* makes no sense in the context.; for the appellant to have been one of the 'false positives' it follows that her voice must have been recorded. The judge then embarks on an assessment as to whether the second appellant's explanation is plausible. In this assessment, he conflates consideration of the explanation (which needed only to be brief) with discussion of extraneous matters such as a subsequent ETS examination which the appellant had taken a different centre and passed. The judge notes that the appellant did not take up the issue of the broken machine with ETS nor did she seek to be allowed to sit the final element of her examination at a later date no additional cost. It is not clear what those observations have to do with determining the simple plausibility of the appellant's explanation. Moreover, I agree with Mr O'Brien, who appeared for the appellants, that, having introduced extraneous matters into his analysis of plausibility it was incumbent upon the judge to be even-handed; he makes no mention, for example, of the fact that the second appellant did not attempt to use her test result from the college to support an application for leave to remain. I acknowledge that the absence of any evidence from the college regarding the broken machine may have been a possible factor in deciding whether the respondent had discharged the legal burden upon him, but, in my opinion,

the structuring of the discussion by the judge is so poor as to constitute legal error.

4. Moreover, I agree with Mr O'Brien that the judge's analysis of the suitability requirements under paragraph 276ADE of HC 395 (as amended) is inadequate. The judge was required to consider the character, conduct and associations of the appellants and, if he considered it appropriate, to find that their presence in the United Kingdom was undesirable. Instead, the judge makes only an assertion [33] that the second appellant fails to meet the suitability requirements. Even if the judge was correct in finding that the appellant had used deception on one occasion in an English language test which she has not sought to use to support any application for leave to remain, he still needed to analyse suitability in greater detail; even on the facts as he found them, unsuitability was not axiomatic. The second appellant is entitled to know exactly why her presence in the United Kingdom is deemed undesirable.

5. Finally, the Article 8 ECHR analysis in the decision is inadequate. There is, for example, no analysis at all of the best interests of the appellant's child who is with them in the United Kingdom (see section 55 of the Borders, Citizenship and Immigration Act 2009). Moreover, the judge makes no reference to the existence or absence of significant obstacles which might hinder the return of the appellants to India. The reference by the judge at the end of the decision to the dismissal of the appeal 'under the Immigration Rules' is, perhaps, some indication of the lack of clarity in his analysis of the issues in this appeal. In the circumstances, the decision is set aside. The appeal is returned to the First-tier Tribunal for that tribunal to remake the decision following a hearing *de novo.*

Notice of Decision

The decision of the First-tier Tribunal is set aside. None of the findings of fact shall stand. The appeal is returned to the First-tier Tribunal (not Judge Ian Howard) for that Tribunal to remake the decision following a hearing *de novo.*

Signed Date 5 February 2020

Upper Tribunal Judge Lane