



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: HU/02071/2019
HU/02088/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 8 January 2020**

**Decision & Reasons Promulgated
On 28 January 2020**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

**RAKSHYA [M]
ANIRAJ [S]
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr I Khan, Counsel instructed by CND Parker

For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants, Rakshya [M] and Aniraj [S], are citizens of Nepal born on 26 March 1990 and 21 December 1981 respectively. They are married and have a son together who is nearly 3 years old. They appeal against a decision of First-tier Tribunal Judge Devittie promulgated on 16 August 2019 dismissing their appeal against the Secretary of State's decision dated 16 January 2019 to refuse their applications for leave to remain based on their human rights.

Factual background

2. The Secretary of State have refused the appellants' human rights claims on suitability grounds, relating to alleged cheating in an English language test by the first appellant, and because the appellants did not meet the private life provisions of the Immigration Rules in any event.
3. There is no challenge by the Secretary of State to Judge Devittie's exoneration of the first appellant on suitability grounds. The judge found that the allegations that had been made by the Secretary of State that the first appellant had used a proxy test taker not to have been made out, in light of the explanation provided by the first appellant. Turning to the substantive Immigration Rules, the only applicable provisions capable of being engaged in the case of the appellants were those relating to their private life under paragraph 276ADE.
4. There is, essentially, a discrete ground of appeal raised on behalf of the appellants, namely that the judge failed to consider the best interests of the appellants' child. Permission to appeal was granted by First-tier Tribunal Judge Appleyard on that basis.

Discussion

5. It is common ground that the judge did not consider what the appellants' son's best interests were. Mr Khan, who appears for the appellants, realistically accepts that, although there is some superficial force in the sole ground of appeal, the failure to have conducted that assessment was not material. Although Mr Khan stressed that he did not formally concede the issue, in my judgment he adopted a realistic approach.
6. The assessment of the best interests of a child must be taken conducted by reference to the real world context in which the child's parents find themselves. In the present matter that context is as follows. Both parents are citizens of Nepal. Neither had leave to remain in this country; that is the context within which the assessment of their child's best interests was to have taken place. In KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53, Lord Carnwath endorsed what was said in EV (Philippines) v The Secretary of State for the Home Department [2014] EWCA Civ 874 concerning this issue at [58]. Lord Carnwath said that the approach of the Court of Appeal in EV (Philippines) to assessing the best interests of children was sound. At [58] the Court of Appeal said:

"In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts as they are in the real world if one parent has no rights to remain, but the other does, that is the background against which the assessment is conducted. If neither parent has the rights to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it right to expect the child to follow the parent with no rights to remain to the country of origin?"

Applying those considerations to this matter and bearing in mind the absence of submissions from Mr Khan to the contrary, in my judgment it is reasonable for the appellants to return to Nepal with their son. He has been raised in this country, but he is of such an age as to be able readily to adapt to any environment he may be in in the future. His best interests are plainly to remain with both his parents in whichever country they may be residing in for the time being. As citizens of Nepal, they will enjoy the full panoply of rights to which citizens of Nepal are entitled. They are familiar with the language, the culture and the customs. They will be well-placed to bring their son up within the wider cultural context of his own nationality and ethnicity.

7. Against that background, it follows that, although the judge failed to assess what the best interests of the appellants' son were, had he done so that analysis would have admitted of only one conclusion: that it would be reasonable to expect the appellants' son to return to Nepal with them, and his best interests were therefore to be with his parents, wherever they were.
8. It follows that although the decision of the First-tier Tribunal involved the making of an error of law, that was not an error of law such that the decision must be set aside. The error was not material.
9. This appeal is dismissed.

Notice of Decision

This appeal is dismissed. The decision of Judge Devittie stands.

No anonymity direction is made.

Signed *Stephen H Smith*

Date 21 January 2020

Upper Tribunal Judge Stephen Smith