



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

Appeal Number: HU/03174/2017
& HU/03176/2017

THE IMMIGRATION ACTS

Heard at Field House

**Decision and Reasons
Promulgated**

On 23 November 2018

On 29 November 2018

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

**YVR AND AGY
(ANONYMITY ORDER MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Akinbolu, of Counsel, instructed by BIC Ltd

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

- 1.** The appellants are minors and half siblings born respectively on 3 February 2002 and 12 October 2005. They are South African nationals and entered the UK on 5 July 2016 as visitors accompanied by AY who is the father of the second appellant and step-father of the first. AY is a British national. He was previously in a nine- year relationship with

M, the mother of the appellants, but is now in a relationship with MD who entered the UK on a Tier 2 visa and was subsequently granted 30 months' discretionary leave as a partner on 27 July 2018. AY was awarded full custody rights by a South African court in September 2013 because the mother of the appellants was not considered to be a fit parent.

- 2.** On 30 November 2016, the appellants sought to remain with AY but their application was refused under paragraph 322(1) and (2) on the basis that there was no provision to vary their visitors' status and that deception had been used to obtain their entry clearance. AY accepts he always intended for them to stay here permanently. They appealed on human rights grounds and their appeal was heard and dismissed by First-tier Tribunal Judge Fox by way of a determination promulgated on 26 March 2018.
- 3.** The appellants had been living with AY and his partner in South Africa but it is claimed that following a particularly harrowing experience of burglary, AY and his partner moved to the UK in December 2015 leaving the children with their maternal grandfather until they could settle themselves here.
- 4.** Judge Fox considered that whilst the children themselves had not practised deception under paragraph 322(2), overlooking that fact would essentially mean that any adult could make false representations involving children and suffer no adverse consequences. He found that this rule fell within the general rules for refusing applications under paragraph 298 and accordingly concluded that the appellants could not succeed under the Immigration Rules.
- 5.** The judge then went on to consider article 8 and the best interests of the children. He found that although they had a good family life with AY, they had been unilaterally removed from South Africa and hence from the contact with their mother that had been recommended in the court order. He concluded that their best interests were to return to South Africa and for an informed assessment of the position and future best interests of the children to be undertaken in conjunction with the authorities.
- 6.** Permission to appeal was granted by First-tier Tribunal Judge O'Brien on 4 July 2018 and the matter then came before me on 6 September 2018. Three grounds were argued. The first was that the appellants had not themselves practised deception, that paragraph 322(2) required the applicant himself to be the one using deception but that the rule was, in any event, discretionary and that the judge had failed to consider the exercise of discretion particularly given that all the other requirements of the rules had been met. The second ground

was that the judge's approach to the court order was erroneous and this was not a case where the children had been unlawfully removed from South Africa. The third complaint concerned the best interests of the children. They were now established in school and had settled down well. AY's partner had been granted leave on the basis of her relationship to him and they had established a close family unit.

7. On 13 September 2018 I set aside Judge Fox's determination for the reasons given in my judgement and which I reproduce here for convenience:

"20. I deal with each of the grounds in turn although I take the view that it is the cumulative effect of all three issues that lead me to conclude that the decision is not sustainable.

21. There is logic in the judge's interpretation of paragraph 322(2). Plainly the rules cannot have meant to permit false representations and deception made by an adult in respect of children to draw no adverse consequences. Plainly also, the relevant provision of the rule does not require that the deception has to have been practised by the applicant. That ground on its own would not therefore have persuaded me that the judge had erred. The stronger point in respect of this argument is that the application of this provision was discretionary and given the particular circumstances, there should have been consideration as to whether the provision should have been applied. I cannot see that the judge has engaged with this issue at all. Nor has there been any consideration of the Chikwamba principles in assessing proportionality. This is particularly important given the inference that the requirements of the rules have been met. These are errors and they are material because they impact of the possible outcome of the appeal.

22. The issue of the court order is a further difficulty. It does appear that the order is a final document and that there is scope within it for a change of residence for the children without further intervention. To that extent, therefore, the judge's focus on the order appears to have skewed his findings to some extent. Given the importance of the issues under consideration, I am unable to find that the conclusions about the court document are sustainable. There are, however, valid concerns raised about the probative value of the mother's statement particularly when it is maintained that she is unfit to make decisions (at 71 and 75) and where the signature differs so greatly from that which appears on the court order and where the signature on the more recent letters are not sworn or witnessed and where I have no copy of her passport or other document bearing a signature to compare it with.

I would therefore direct that a sworn affidavit be obtained by the appellants' representative to resolve this concern.

23. Finally, there is the question of the best interests of the children. They had written statements setting out their wishes, but these were not given any weight by the judge who found, without any good reason, that they would have been influenced by AY. A balance assessment of their best interests has not been undertaken given the lack of importance given to their views and the undue weight given to the court order”.

- 8.** The following findings were preserved: (1) AY made false representations when bringing the appellants to the UK; (2) AY is a British citizen and is present and settled in the UK; (3) the first appellant is his step daughter and the second appellant is his biological son; (4) the appellants do not lead independent lives; (5) the maintenance and accommodation requirements of paragraph 298 are met; (6) there is family life between the appellants and AY; (7) AY and his partner are in a genuine and subsisting relationship; (8) AY is a positive influence and a stabilising force for the appellants and is devoted to them; (9) AGY has developmental issues and is susceptible to depression; (10) AY has a good relationship with the maternal grandfather of the appellants ; (11) AY is not subject to immigration control in South Africa and his partner, MD, has maintained her professional ties there and (12) AY is financially self-sufficient.

9. The Hearing

- 10.** I heard evidence from the sponsor, AY, the second appellant, YVR and the sponsor's partner, MD. AY gave evidence first. He adopted his statements and confirmed the contents as true and accurate. He stated that he was now working as a postman but his hours allowed him to be home for the children after school. He stated that his parents were deceased and he had no family left in South Africa. He had uncles, cousins and a stepbrother in the UK. He said that M lived with her father, OJR, and his partner. M's mother was deceased. MY was his eldest child. She had lived with her own mother in South Africa and when she completed schooling, she applied for an ancestral visa and was now living with him. She had entered the UK earlier this year.
- 11.** When asked about the contact between the appellants and their mother, he stated that they spoke on the phone every week. She had been living with them at her father's house before they came to the UK. He said that he had discussed future visits with her and it was planned that the appellants would visit South Africa annually and stay

with OJR during school holidays. AY would provide them with funds for their maintenance. OJR was in his sixties and in good health. Long term, he was concerned that the children would not be happy there. There were accommodation issues and they had to share a room. He was also concerned about M so they would have to be under OJR's care. It would also be difficult to them to return to school there and they would be behind in Afrikaans as they had not used it since they left.

- 12.** AY said that M had found some work but had now taken up studying. He did not know whether she was currently in good health. He said the children did not speak to him about her. He confirmed that she had been in a position to make a decision about their departure from South Africa. He and M had never married.
- 13.** In cross-examination, AY confirmed that only MY had been to the UK before. AGY had received speech therapy in South Africa, not the UK. They had lived in North Riding (in Johannesburg). M obtained her ancestry visa through her British mother. There was no re-examination.
- 14.** I then heard evidence from YVR who confirmed and adopted the contents of her statement. She stated that she was now studying for her A levels at school. She spoke to her mother a couple of times a week and they texted too. AGY also spoke to her. YVR said that she felt happier in the UK. She had been unhappy living with her mother and there had been bullying at school. It was also dangerous to go out alone whereas here she was more independent; she enjoyed life at home and school was good.
- 15.** In cross-examination, YVR confirmed plans to visit her mother during school holidays when they would stay with her and their grandfather. She said that M had been in rehab for a few years and she was currently studying. When she and AGY had lived there, they had to share a room.
- 16.** There was no re-examination. In response to my questions, YVR said that she was happy here and that although she missed her mother she would prefer to remain here with AY.
- 17.** Lastly, I heard from MD. She adopted her statements and confirmed that's he was still employed. She had a sister in the USA and parents, a brother and a sister in the UK. She had an aunt and uncle in South Africa. She stated that all decisions regarding the children were made by AY.

- 18.** There was no re-examination. That completed the oral evidence.
- 19.** In submissions Mr Melvin stated that the Tribunal was required to balance the false representations made by the sponsor against the best interests of the children. He helpfully confirmed that no issue was taken by the respondent to any of the evidence put forward and he expressed a view that in the particular circumstances of this case it would not be surprising if the Tribunal found in favour of the appellants. I indicated that I would not need to hear from Ms Akinbolu and that I would be allowing the appeals. I now give my reasons for so doing.

20. Findings and Conclusions

- 21.** I have considered the large amount of documentary and oral evidence before me with care. I am satisfied that apart from AY's misrepresentations to the ECO, I have been given a full and true picture of the family and private lives of this family.
- 22.** Whilst not condoning the false representations made, and agreeing with Judge Fox that it is not acceptable for an adult to misrepresent the situation for minors and to face no adverse consequences, the fact remains that the children were entirely innocent in this whole matter. That alone, however, does not mean that AY's behaviour should be disregarded. It is the particular circumstances of the case that lead me to conclude that discretion should have been exercised in favour of the appellants and that paragraph 322(2) should not have been applied. Once that ground for refusal is set aside, all the requirements of paragraph 298 are met.
- 23.** I turn now to the specific circumstances of the case. M's psychiatric condition and dependency upon alcohol and drugs led to a South African court granting full custody of the children to AY in 2013. Their mother retained visitation rights and the evidence confirms that AY has not prevented the appellants from having contact with their mother; indeed, they shared accommodation with her whilst they lived with their grandfather after AY left South Africa to settle himself here. Even now, I find that he encourages contact and the first appellant has confirmed that there is communication with M and that annual visits to see her are planned. It is quite clear from the substantial amount of documentary evidence adduced, that all decisions regarding the children were taken by AY, even to the extent of choosing their bunkbeds. The evidence confirms that whilst under the care of their grandfather, AY was in frequent contact, was consulted both by OJR and YVR about all kinds of daily matters and that he met all expenses for their maintenance and schooling. That dependency has continued since they left.

- 24.** Mr Melvin did not seek to argue that the requirements of the rules had not been met and that AY did not have sole responsibility for their upbringing.
- 25.** I am satisfied when considering the best interests of the children, that these are met by the continuation of their current family life. They are back with AY after what appears to be a difficult period of separation and they are clearly well settled and enjoy a stable and loving family environment with their father, M and MD. The children are doing well at school, have made friends, set down roots and are blossoming. AY appears to be a devoted and committed father and has arranged his life so that he is able to be a full-time father out of school hours. In circumstances where their best interests are to remain here in a safe and stable environment and where their unchallenged ability to meet the requirements of the rules is a weighty matter against the public interest in their removal, I can see no basis on which these joint appeals could fail.
- 26. Decision**
- 27.** The decision of the First-tier Tribunal was set aside. I re-make the decision and allow these joint appeals on article 8 grounds.
- 28. Anonymity**
- 29.** The anonymity order is continued.

Signed



Upper Tribunal Judge

Date: 23 November 2018