



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

Appeal Number: DA/00586/2013

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 29 October 2013**

**Determination**

**Promulgated**

**On 29 November 2013**

**Before**

**UPPER TRIBUNAL JUDGE CRAIG**

**Between**

**MR EDWARD KABETU GITAU**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr F Okungbowa, Solicitor, of Duncan Lewis & Co Solicitors  
(Harrow Office)

For the Respondent: Mr P Deller, Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant, who was born on 11 March 1974, is a national of Kenya. He appeals with leave against a decision of a panel of the First-tier Tribunal (First-tier Tribunal Judge Andonian and Mr A E Armitage, Non-

Legal Member) which in a determination promulgated on 13 August 2013 following a hearing at Taylor House on 31 July 2013 had dismissed his appeal against the respondent's decision dated 7 March 2013 refusing to revoke a deportation order which had been made against him.

2. The appellant's immigration history was set out in both the respondent's letter dated 21 March 2013 and the panel's determination and is summarised below.
3. The appellant arrived in the UK on 4 March 1998, claiming asylum on arrival in a false name (Edward G Kabetu, who was said to have been born on 17 March 1980). This asylum claim was refused on 28 July 1999 and a subsequent appeal was dismissed on 17 November 2000. Thereafter, it appears that he avoided the attention of the respondent (and the immigration authorities) although he did not escape the attention of the courts, because he was convicted of a number of offences, including arson, for which he was sent to prison.
4. On 20 February 2004, the appellant made a claim under Article 3 of the ECHR, but his application was refused on 21 June 2004 and his appeal against this refusal was dismissed on 25 October 2004.
5. Then, on 4 March 2005 the appellant applied for indefinite leave to remain under the Family Exercise, still using the false name in which he had originally applied for asylum. On 1 February 2006 he was granted indefinite leave to remain in that false name (Edward G Kabetu).
6. The appellant continued committing criminal offences and on 24 April 2006, he was convicted at Stratford Magistrates' Court of various motoring offences (including driving with excess alcohol, which was not the first time he had been convicted of this offence). The appellant was sentenced to six months' imprisonment, suspended for two years, in respect of these offences on 6 May 2006, but then on 7 November 2006 at Barking Magistrates' Court he was convicted of other offences, making him in breach of the suspended sentence and he was sentenced to six months' imprisonment. He did not appeal against either conviction or sentence. By this time, it appears that since arriving in the United Kingdom, in a false name and having given a false date of birth, the appellant had accrued a total of seven convictions for seventeen offences including driving with excess alcohol, no insurance, driving other than in accordance with his licence, and also arson and destroying or damaging property. I note that his sentence for arson was 18 months' imprisonment, having been reduced from the initial sentence of 30 months' imprisonment by the Court of Appeal. His prison sentences totalled three years.
7. It appears that on 20 July 2006 the appellant changed his name by deed poll from Geoffrey Edward Kabetu Gitau (not the name in which he had been given indefinite leave to remain) to Edward Kabetu Gitau.

8. On 2 February 2007 the appellant was served with notice of the respondent's decision to make a deportation order against him in light of his criminal convictions in the UK. He was due to be released from prison at the end of his custodial sentence three days later, but instead on 5 February 2007 he was placed into immigration detention.
9. The appellant's appeal against the deportation decision was lodged on 7 February 2007 but dismissed a month later on 8 March 2007. A deportation order was signed on 23 March 2007 and a High Court review was sought. This review was refused on 3 April 2007 and a further High Court review was refused on 10 October 2007. On that date the appellant's appeal rights became exhausted.
10. The appellant was released on immigration and asylum bail on 24 October 2007, but he was re-detained on 26 November 2007, removal directions having been set for 5 December 2007. These removal directions were later cancelled on 4 December 2007 and re-set for 11 December, a week later. Because the appellant applied for an injunction, that removal did not take place and he was released from detention on 12 December 2007.
11. On 11 June 2008, the respondent was informed that an application which the appellant had made under Rule 39 of the Rules of the European Court of Human Rights had been refused and there were no barriers to his removal. He was accordingly again detained on 7 July 2008 and removal directions set for four days after, on 11 July 2008. However, further representations were made on his behalf which were treated as an application to revoke the deportation order. This application was considered under paragraph 353 of the Immigration Rules and was refused on 10 July 2008.
12. The following day, an application for judicial review was lodged and removal directions were deferred. The appellant was then released from immigration detention on 15 July 2008.
13. On 15 April 2009 the judicial review application was withdrawn on the basis that the respondent would reconsider the submissions the appellant had made. Accordingly, the submissions were again treated as an application to revoke the deportation order, but this application was refused on 14 August 2009, under Section 96(3) of the Nationality, Immigration and Asylum Act 2002 as amended, thereby removing his right of appeal. However, due to an administrative error, on 28 October 2009 the deportation order was revoked, but a fresh deportation order was signed on 30 October 2009.
14. Another application for judicial review was lodged on 13 November 2009, which was withdrawn on 4 March 2010 on the basis that the decision to refuse to revoke the deportation order dated 14 August 2009 was replaced as withdrawn and a fresh decision served granting an in country right of appeal. On 17 March 2010 a fresh decision to refuse to revoke a

deportation order was made, and a subsequent appeal was dismissed on 14 July 2010. Further applications for permission to appeal were refused on 9 August 2010 and 26 August 2010 and the appellant's appeal rights became exhausted on 26 August 2010.

15. The respondent then made arrangements to detain the appellant pending removal, but was unable to do so because the appellant failed to adhere to his reporting restrictions from September 2010 and absconded. He remained out of sight of the immigration authorities until 6 September 2012 when he resumed reporting. Following a letter written to the appellant to enquire as to whether there had been any claimed changes in his circumstances during the time when he had absconded, further representations were received on 6 November 2012, which were again treated as an application to revoke the deportation order. It was the refusal of this application on 7 March 2013 which was appealed to the panel, and it is the panel's decision dismissing this appeal which has given rise to this appeal before the Upper Tribunal.
16. The foundation of the appellant's appeal is that his removal would be in breach of his Article 8 rights, because he is married to a British citizen (the marriage had taken place in September 2004, before a number of the decisions rejecting the appellant's various applications and appeals had been made) and on 16 April 2009 they had had a daughter, Eliza, who is now 4 years old and a British citizen. The appellant has claimed that the interference with his family life and the interference with the Article 8 rights of his daughter and wife are such that his removal would be disproportionate.
17. The panel set out the background to the application fully, as I have done above. The panel also heard evidence both from the appellant and his wife, but, as the panel remarks at paragraph 6 of its determination, it "did not consider the appellant to be a credible witness". There were a number of inconsistencies between the evidence which he gave and the evidence given by his wife, and the panel took into account not only that he had absconded, but also that he had been arrested for travelling on a bus without a ticket and with intent to avoid payment. The panel considered the explanation which the appellant gave was dishonest, and that there was no legitimate or credible reason for his absconding. Having noted that the sentencing judge in 2006 had found that there was a high risk of the appellant re-offending unless he controlled his abuse of alcohol, the panel observed that the appellant still drank alcohol, even though he said he no longer drank in the quantities that he had drunk before. Having considered all the evidence in the round, and having in mind that the appellant's evidence before the Tribunal had been untruthful, that he had absconded and that he had been arrested for a further offence (even if not as serious as some of the offences of which he had been convicted before) the panel, at paragraph 12, found that "we take the view that the appellant is still at high risk of committing offences in the UK".

18. At paragraph 13 the panel stated that it had considered the best interests of the appellant's child in light of Section 55 of the Borders, Citizenship and Immigration Act 2009, but noted that "whilst we accept that the child's welfare and interests are of primary consideration, they are not an overriding consideration above all else". The panel then continued as follows:

"In these circumstances, the appellant's blatant lies before this Tribunal outweigh in our view the interests and welfare of the child to the extent that it would be proportionate under Article 8 and in the interests of the public good for this appellant to be removed from the UK. There is private and family life in this case, but we consider such interference to be lawful in all the circumstances and also proportionate."

19. The panel did not accept that there were "such serious obstacles to the exercise of family and private life in Kenya to make removal disproportionate", but in any event:

"It must also not be forgotten in assessing the likelihood of further risk to consider the appellant's character generally as someone who is prepared to go to any length no matter what the outcome to achieve his desired result. In that regard he made a single application for asylum to come to the UK and utilised his intervening years to exhaust his rights under the appeal process, needless to say he did not rely on any asylum reason in the appeal before us."

20. The panel also noted, still at paragraph 13, that the Court of Appeal had said in the case of *Richards* [2013] that:

"There is a strong public interest in removing foreign nationals convicted of serious offences and not only lest they commit like offences in future. A further important asset is the role of a deportation order as an expression of society's revulsion at serious crimes and in building public confidence in the treatment of foreign citizens who have committed serious crimes."

The panel considered in this case that:

"It is the UK government's duty to maintain law and order and in the circumstances of this case it is therefore proportionate for the appellant to be removed. We accept there may well be certain disruptions in the UK whilst the appellant's daughter and to a lesser extent his stepson Napoleon are in the UK, but we do not find such disruption disproportionate in terms of the balancing of a state's right to order a fair controlled immigration."

21. As already noted, the appellant has appealed against this decision, and the grounds can be summarised as follows. First it is said that the panel, when considering the risk of the appellant re-offending, failed to take into

account all of the material evidence. It is submitted in the grounds that the panel should have placed weight on the fact that the appellant had not been charged with travelling without buying a ticket or with the offence of absconding. It is suggested that this must be because the authorities had not considered it to be in the public interest to pursue a criminal charge against the appellant. It is further argued that even though the appellant's evidence might have been inconsistent with that of his wife, the panel still placed excessive weight on these offences, especially as a decision had been taken not to prosecute him in respect of them.

22. It is said that the contention that the panel had not taken account of the fact that his last serious offending was six years ago went to the core of his claim and was not just a disagreement with the panel's findings.
23. The second ground of appeal is that the panel also failed to take account of all material evidence when considering the appellant's family life in this country. It should not have considered whether or not there was "serious obstacles" to the appellant's daughter going to Kenya and in particular placed undue weight on its finding that she was able to speak some of the native language of Kenya. It is argued that the panel should have placed greater weight on the fact that her primary language was English, that her ties to this country were "extremely significant" and that she had a genuine relationship with her father.

### **The Hearing**

24. Before me, on behalf of the appellant, Mr Okungbowa relied on the grounds. The panel's finding that the appellant was a risk to the public was based on the pre-sentence report which had been written many years previously. Weight was also placed on the fact that the appellant had not been found credible in terms of issues relating to his not paying his bus fare. The appellant had never been charged with not paying his bus fare; he had gone to the police station and released without penalty.
25. The other issue was to do with the fact that the appellant had absconded for two years. However, that was not an offence which was before the court. In terms of re-offending, he had not offended since 2006. In answer to an observation from the Tribunal that he had offended by absconding, Mr Okungbowa responded by saying that if the respondent had felt this was sufficiently serious, the appellant should have been charged. The approach of the panel was one-sided. It did not consider properly the facts relating to the risk of re-offending.
26. With regard to the second ground, the panel had applied the wrong test when deciding what was in the best interests of the appellant's child, at paragraph 13 of the determination. When the panel found that "we cannot accept that there are such serious obstacles to the exercise of family life and private life in Kenya to make removal disproportionate" this

was the wrong test. The relevant test was whether or not it was in the child's best interests either to relocate to a foreign country or to lose a father for ten years. Nowhere in the determination had the panel articulated what was in that child's best interests. The panel did not consider that the child's primary language is English, that her ties to the UK were extremely significant and that she had a genuine and subsisting relationship with her father. That was accepted in the respondent's refusal letter. More importantly, the appellant was responsible for the day-to-day care of his child, although it was accepted he was not her primary carer. However his wife was a social worker and went to work and the panel did not consider the impact of his removal on his family.

27. Other than his problems in terms of not paying his bus fare, he had not been in trouble, and for the panel to conclude that he had a propensity to commit further offences and was a risk to the public was not sustainable.
28. On behalf of the respondent, Mr Deller submitted that the Tribunal was of course entitled to set aside the First-tier Tribunal's determination if it found an error of law such that it was right to do so. However, in this particular instance the key question was whether the First-tier Tribunal had identified and weighed all the relevant issues. Of these issues, propensity to re-offend was a significant one, the best interests of the child in the case were, as is known, a primary consideration, but they were both components in the overall consideration of the case.
29. Taking these two factors in turn, the panel's reasoning appeared to be that despite the appellant's protestations that he would not re-offend, and had not offended since the birth of his daughter, first there were reasons why his evidence should be disbelieved and secondly there had been further offending by virtue of his travelling without paying for a ticket and also absconding. These were offences, even though they had not been prosecuted. It was possibly considered that the best use of public funds and resources would be to remove him rather than prosecuting him. Taking these factors into account, it was the respondent's position that the First-tier Tribunal had given adequate reasons for disbelieving the appellant and had been entitled to find that a propensity to re-offend should inform the weight to be given to the public interest aspect, when enforcing the deportation order.
30. The other significant factor in this appeal to the Upper Tribunal was the approach the panel took to the best interests of the child, Eliza. The panel found that although the child's welfare and interests were a primary consideration, nonetheless these interests were outweighed by the other factors. The respondent's position overall was that this was a decision properly open to the panel and that accordingly, there had been no material error of law in its determination.

## **Discussion**

31. As can be seen from the chronology of the appellant's immigration history which has been set out above, on 17 March 2010 a fresh decision to refuse to revoke a deportation order was made, and a subsequent appeal was dismissed on 14 July 2010. This was the latest in a long succession of applications and appeals, all of which were ultimately rejected. Further applications for permission to appeal were refused and the appellant's appeal rights were exhausted on 26 August 2010. At that stage the respondent's arrangements to detain him for removal were frustrated because the appellant absconded. Had he not done so, he would have been deported then.
32. Accordingly, what is effectively being argued on the appellant's behalf is that because he managed to avoid being deported by absconding and during the period he has subsequently, unlawfully, remained in this country he has not got into any further serious trouble, he should now be allowed to remain. His daughter (who was alive when his appeal rights were exhausted) is now 2 years older, and he has not actually been charged with any further criminal offences.
33. The panel was not impressed with this argument, and in particular did not consider that the appellant had turned over a new leaf. There were three main reasons why the panel was sceptical of the appellant's claim to be a reformed character. In the first place, it was not accepted that he had kept out of trouble during the period in which he had remained in this country as an absconder. First, he had been arrested for evading his fare on the bus. While this might not be the most serious offence which this appellant has committed, it was compounded by his lying about it to the Tribunal. The second factor which the Tribunal took into account was that the absconding itself was criminal behaviour, which, as it noted, cannot be excused. As the panel stated at paragraph 6:
 

“...He was an absconder as he failed to report. He tried to justify these actions by saying that he had a housing problem at that time and for the sake of his family he did not report because he was afraid of being removed from the UK if he reported. That was not a credible reason for not reporting and breaching the law. He could have mentioned his difficulties about housing to the immigration authorities. He could have written and asked to report at other times and at longer intervals until he sorted out his housing problem, but he chose to flout the law and simply took it upon himself not to report and go to ground.”
34. The other reason why the panel did not accept that he was no longer a risk to the community was because of what they refer to as his “blatant lies before this Tribunal”.
35. In my judgment, the panel was entirely justified in reaching the conclusion that it did that this appellant was someone “who is prepared to go to any length no matter what the outcome to achieve his desired result”, which was to remain in this country.



36. It is in the context of this finding that the panel considered whether or not the interests of the appellant's child were sufficiently strong as to outweigh the reasons why it was in the public interest to remove him. In my judgment, the panel was entitled, when considering the weight to be given to these interests, to take account of the fact that Eliza did in fact speak the language native to Kenya (yet another matter about which the panel found the appellant had tried to deceive the Tribunal). On this matter, the panel noted that the appellant's wife had confirmed that their daughter understood the native language and spoke to her grandmother, the appellant's wife's mother in Kenya, in that language.
37. The panel was also entitled to take account of the fact that (again contrary to what the appellant had told the Tribunal) the appellant's mother had a number of relatives in Kenya as well as her mother.
38. The panel was also, in my judgment, both entitled and correct to consider the need to build public confidence in the treatment of foreign citizens who had committed serious crimes as a weighty factor. This is a case where undoubtedly public confidence in the efficacy of this country's immigration control would be seriously diminished if this appellant were now to be allowed to remain. Effectively, it would be giving a green light to any foreign criminal who was about to be deported that if he or she absconded, there might be a good chance of being allowed to remain after all.
39. These were all factors which the panel was entitled to take into account and in my judgment its determination does not contain any material error of law. It follows that this appeal must be dismissed and I will so order.

## **Decision**

**There being no material error of law in the determination of the First-tier Tribunal, this appeal is dismissed.**

Signed:

Dated: 18 November 2013

Upper Tribunal Judge Craig