Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00825/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 25 June 2013, 6 August 2013 and 12 September 2013	**On 24 December 2013**
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Before

UPPER TRIBUNAL JUDGE CRAIG

Between

AGEELL CHIYAMALENDRAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Easty, Counsel, instructed by Duncan Lewis and Co Solicitors (Harrow Office)
For the Respondent: Respectively, Mr Tufan, Mr Allan and Mr Deller, Home Office Presenting Officers

DETERMINATION AND REASONS

1. The appellant is a German national, who was born on 8 August 1992. He claims to have arrived in this country in 2006, although it was the respondent's case that he had not established that he had been in this

country before 2007. His family had arrived in the UK in or about 2006. The appellant went to school in England.

2. The appellant has committed a number of criminal offences. On 10 December 2010 he was convicted of battery at Harrow Magistrates' Court. A community order was made with a curfew requirement for ten weeks with electronic tagging and the appellant was required to participate in a thinking skills program. He also had to pay compensation and costs. Then on 21 March 2012, at Northwest London Magistrates' Court he was convicted again of battery, for which on 14 April 2012, he was sentenced to 42 days in a young offenders' institution, and a restraining order was issued against him, in order to protect his victim from harassment by him.

3. On 6 August 2012, the appellant was convicted of intimidating a witness who had made a complaint about him, which offence was committed whilst he was on bail. For this offence, he was sentenced to twelve months' imprisonment in a young offenders' institution.

4. On 31 August 2012, the respondent notified the appellant that she was considering whether his deportation was justified on grounds of public policy and requested reasons why he should not be deported from the United Kingdom. Following consideration of those representations which were made, on 15 October 2012 made a decision to deport the appellant to Germany. The respondent's reasons are set out in her "reasons for deportation" dated 15 October 2012, in the course of which it was stated that the respondent considered that the appellant had not acquired the right of permanent residence in the United Kingdom, because it had not been established that he had been residing in the UK in accordance with the Immigration (EEA) Regulations 2006 for a continuous period of five years. Accordingly, the respondent considered that she did not have to establish that his deportation was justified on serious grounds of public policy or public security.

5. The appellant appealed against this decision and his appeal was heard before a panel of the First-tier Tribunal consisting of First-tier Tribunal Judge Traynor and Mr G F Sandall, sitting at Taylor House on 18 February 2013.

6. In a determination promulgated on 26 April 2013, the panel dismissed the appellant's appeal. In the course of its determination, the panel found that the appellant had not established that his family had been present in the UK until March 2007, and that because by the date of decision the appellant had already spent 42 days in a young offenders' institution, he had not established a continuous and unbroken presence in this country for five years, and that for this reason the respondent did not have to establish that there were serious grounds of public policy or public security in order to justify her decision to deport him.

7. The appellant appealed against this decision and was granted permission to appeal by First-tier Tribunal Pullig on 15 May 2013. When giving his reasons for granting permission, Judge Pullig stated as follows:

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> 3. At paragraph 66 of the determination the panel found that the earliest date of which there is evidence of the appellant's presence was 2 March 2007. The respondent's decision is dated 15 October 2012. At paragraph 67 of the determination, the panel found that the appellant had already spent 42 years in a young offenders' institution, as a consequence had not established five years' continuous residence. As the grounds state, that sentence was imposed on 24 April 2012, by which time the appellant would have already completed five years' residence in this country, which appears to have been continuous.
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> 4. I find that this amounts to an arguable error of law as it results in the panel applying the wrong level of protection against removal. For that reason along permission but [be] granted and all grounds are arguable."

8. The hearing before me commenced on 25 June 2013, at which hearing the appellant was represented by Ms Easty (who has continued to represent the appellant through the proceedings) and the respondent was represented by Mr Tufan. As I recorded following this hearing, on behalf of the respondent Mr Tufan accepted that the panel had not addressed the question of whether or not the appellant had been exercising treaty rights in this country during the period he had resided here or whether he was a member of a qualified person who had been exercising such treaty rights. He accepted that the panel had found, wrongly, that he had not even been in this country for five years before going to prison, whereas on any view he had in fact been present for more than five years.

9. As I stated during the hearing on that date, and repeat in this determination, that was a material error of law, because in fact, on its own finding, the panel had accepted that the appellant had been in this country at least from 2 March 2007, which was more than five years before he was sentenced in April 2012. The panel had not then gone on to consider whether during that period the appellant had either been exercising treaty rights or been the family member of a qualified person who had been exercising treaty rights, which it needed to do in order to determine whether or not the respondent needed to establish that there were "serious grounds of public policy or security" requiring his removal. As the panel had not determined this issue, but had considered the appeal only on the basis that the appellant's removal was justified on grounds (but not serious grounds) of public policy, public security or public health, its decision must be set aside and remade.

10. Following my decision that the panel's determination had contained a material error of law such that its decision must be remade, I proceeded to hear evidence with a view to re-making the decision. I heard evidence from the appellant and his father which was directed primarily to the issue of whether or not the appellant's father had been exercising treaty rights in this country for over five years, during a period when the appellant had been living with him as a family member, but before he went to prison. During the course of this hearing, the appellant's father claimed to have been seeking work since August 2006 and to have obtained employment as a minicab driver in December 2007. He claimed that he had various documents at his home which could support this claim.

11. Because there was in any event insufficient court time available to conclude the hearing without a further adjournment, I adjourned the hearing part-heard until 6 August 2013, and gave directions for the service of further documents by the appellant. I recorded that Mr Tufan was unable to state whether or not he would be able to attend at the resumed hearing on behalf of the respondent, and, as will be apparent below, in the event he was not.

12. The hearing resumed on 6 August 2012, on which date the respondent was now represented by Mr Allan. On this date I heard further evidence from the appellant and his mother and father, all of whom were cross-examined. Although the evidence was concluded, there was insufficient time available for the Tribunal to hear submissions and so the hearing had to be adjourned yet again and I gave further directions giving permission to the appellant to adduce further evidence as appropriate, but in particular with regard to documents relating to the education of the appellant, which was an issue that had arisen during the hearing. It was felt that it might be possible to establish when the appellant had first arrived in this country more accurately if relevant school reports could be made available.

13. The hearing then resumed again on 12 September 2013, at which hearing, unfortunately, Mr Allan could not be present, because of other commitments. On this date, the respondent was represented by Mr Deller.

14. I made a contemporaneous note of the evidence and submissions during all the hearings, in which I attempted to set out everything which was said during the course of the hearing. As these notes are contained in the Records of Proceedings, I shall not set out below everything which was said, but only such part of the evidence and submissions as are necessary for the purposes of this determination. However, I have had regard to all the evidence I heard, and to everything said to me on behalf of the parties, as well as to all the documents contained within the file, whether or not the same is specifically referred to below.

Signed Date

Upper Tribunal Judge Craig