Upper Tribunal
(Immigration and Asylum Chamber)

Andell (foreign criminal – para 398) [2018] UKUT 00198 (IAC)

THE IMMIGRATION ACTS

Heard at Field House (IAC)	**Determination Promulgated**
On 13 th November 2017 and 12 th March 2018	.....

Before

UPPER TRIBUNAL JUDGE COKER

Between

DANIEL ANDELL

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

DANIEL ANDELL

Respondent

Representation :

For Mr Andell: Mr D Sellwood instructed by Duncan Lewis & Co

For the SSHD: Mr P Deller, Senior Home Office Presenting Officer

Paragraph 398 of the Rules includes not only foreign criminals as defined in the 2002 Act and the 2007 Act but also other individuals who in the view of the Secretary of State, are liable to deportation because of their criminality and/or their offending behaviour.

DECISION AND REASONS

1.
The issue in this case stems, in part, from the definition of “a foreign criminal” in the UK Borders Act 2007 (“2007 Act”), the definition of that same phrase in the Nationality, Immigration and Asylum Act 2002 (“2002 Act”) and the use of the words ‘foreign criminal’ in the Immigration Rules (“the Rules”).

In both the 2007 Act and the 2002 Act a foreign criminal is defined as a person who has been convicted and sentenced in the UK. In the Rules, there is no requirement the criminal offence(s) should be limited to UK convictions only.

Outline immigration history

2.
Mr Andell is a citizen of Trinidad and Tobago, born 31 st May 1980.

3.
He arrived in the UK on 9 th November 2015. He came to the attention of the UK authorities on 14 th December 2015 when he was arrested on suspicion of having false documents. On 29 th December 2015, he was served with illegal entry paperwork dated 24 th December 2015. On 5 th January 2016, he was convicted after a plea of guilty to "possess/control identity documents with intent" and sentenced to 10 months' imprisonment with a £100 victim surcharge.

4.
On 3 rd March 2016 whilst in detention he informed the SSHD he wished to claim asylum; he was screened on 22 nd March 2016 and underwent a substantive interview on 31 st March 2016. On 3 rd June 2016 Mr Andell was served with notice of liability to deportation dated 26 th May 2016 and a s120 notice. The SSHD received an undated letter with enclosures from Mr Andell on 30 th June 2016. The SSHD refused Mr Andell's protection and human rights claim for reasons set out in a letter dated 11 th August 2016 and these proceedings are his appeal against that decision.

5.
His appeal against refusal of his protection and human rights claim was heard in the First-tier Tribunal on 5 th January 2017 and, for reasons set out in the decision promulgated on 16 th January 2017, First-tier Tribunal judge Raikes dismissed his appeal on asylum/protection grounds and on human rights grounds.

Convictions in Trinidad and Tobago

6.
In Trinidad and Tobago, Mr Andell was sentenced to 36 months hard labour in 2012 following a conviction for 'receiving'. He has received fines for disturbing the peace by fighting and making a false report in 1998. According to the Trinidad and Tobago Police Service Criminal Records Office document, Mr Andell had been charged with other offences for which he was 'discharged'.

7.
There remain a number of pending charges against him in Trinidad and Tobago including 'buggery' (11 October 2011); kidnapping ransom (10 October 2008); buggery (10 October 2008) grievous sexual assault (10 October 2008) Disorderly behaviour (9 March 2006); larceny (29 November 2000). It is not clear why some of those charges were not dealt with by the criminal courts at the same time as other charges were heard and resulted either in conviction or discharge. It is important to bear in mind that these are not convictions. They have not, correctly, been taken into account by the SSHD in determining whether Mr Andell is a foreign criminal; they are not relevant to the question of whether he is a foreign criminal.

Decision to deport

8.

On 26 th May 2016, the SSHD decided to make a deportation order against Mr Andell under s5(1) Immigration Act 1971. The reasons for the decision to deport are set out in the decision dated 26 th May 2016 (no appeal). This states, where relevant:

Reasons for deportation

On 21 September 2012 at Port of Spain Magistrate Court in Trinidad & Tobago, you were convicted of receiving, for which you were sentenced to 3 years imprisonment.

You also have 1 conviction for 2 offences in Trinidad & Tobago on 13 August 1998 and 1 conviction for 1 offence in the UK on 05 January 2016. As a result of your criminality, your deportation is considered to be conducive to the public good and as such you are liable to deportation by virtue of s3(5)(a) of the Immigration Act 1971.

Paragraph 396 of the Immigration Rules (as amended) provides that there is a presumption that the public interest requires the deportation of a person who is liable to deportation. Therefore the Secretary of State has decided to make a deportation order against you under s5(1) of the Immigration Act 1971.

9.
In her decision to refuse the protection and human rights claim dated 26 May 2016 (the appeal against which is the subject of these proceedings), the SSHD states:

Reasons for deportation

7. On 5 January 2016 at Luton Crown Court you were convicted of possess/control identify documents with intent and sentenced to 10 months' imprisonment and to pay £100 victim surcharge.

8. In addition to the above conviction received in the UK it is noted that you have previously been convicted of receiving (indictable offence) sec 35(1) in Trinidad & Tobago, in 2012, for which you were sentenced to 36 months' hard labour. You have also received convictions for the offences of disturbing the peace by fighting and making false report in 1998, for which you received fines. In light of these convictions, your continued presence in the UK is not considered to be in the public interest. There are also a number of impending charges against you in your country of origin and a warrant out for your arrest.

….

83. Your deportation is conducive to the public good and in the public interest because you have been convicted of an offence which has caused serious harm/are a persistent offender. This is because you were sentenced in your country of origin for the offence of 'receiving' which is considered as a serious harm offence in light of the sentence handed down, namely 36 months hard labour. It is also noted that you have two other previous convictions and a number of pending charges outstanding against you in Trinidad and Tobago (including 2 counts of buggery, kidnapping, grievous sexual assault from 2008) and have received a conviction in the UK almost immediately following your arrival here. Therefore in accordance with paragraph 398 of the Immigration Rules, the public interest requires your deportation unless an exception to deportation applies. The exceptions are set out in paragraphs 399 and 399A Immigration Rules.

10.
The Immigration Rules, in so far as relevant to this appeal, read as follows:

Deportation and Article 8

A398. These rules apply where:

(a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom’s obligations under Article 8 of the Human Rights Convention;

(b) a foreign criminal applies for a deportation order made against him to be revoked.

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

(a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;

(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or

(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

11.
There was no challenge to the conclusion of the First-tier Tribunal judge that Mr Andell did not meet Exception 1 or 2 in either the Rules or s117C 2002 Act – he has no wife or partner or qualifying child.

Permission to appeal

12.
Mr Andell was given permission to appeal the decision of the First-tier Tribunal on 4 grounds:

(a)
It was arguable the judge had failed to have adequate regard to a country expert on conditions in prison in Trinidad and Tobago;

(b)
It was arguable the judge had failed to apply the correct standard of proof in the light of past persecution;

(c)
It was arguable the judge had failed to take into account the medical evidence when determining Mr Andell’s credibility; and

(d)
It was arguable there were procedural defects in the decision regarding the human rights claim such that the decision was unlawful.

13.

The SSHD was granted permission to appeal on 6 grounds:

(a)
It was arguable there was procedural unfairness in reaching a finding that the appellant was not a foreign criminal as defined by s117D(2) Nationality Immigration and Asylum Act 2002;

(b)
It was arguable the findings relating to persistent offender and/or caused serious harm were obiter and there was no finding that the underlying deportation order was unlawful;

(c)
It was arguable, having allegedly failed to seek the SSHD's views on persistent offender/serious harm, the judge ought to have considered publicly available documents containing the SSHD's policy in relation to these issues;

(d)
It was arguable the combined failure of the First-tier Tribunal Judge to have regard to guidance and to fail to canvass the issue at the hearing has resulted in inadequately reasoned findings. It was arguable the judge failed to have regard to both the three-year sentence in Trinidad and the 10 month sentence in the UK.

(e)
It was arguable the judge was simply wrong to find that Mr Andell had not been convicted of an offence that caused serious harm; and

(f)
It was arguable the judge did not have jurisdiction to substitute her own decision for that made by the SSHD where the SSHD has made a decision under s3(5)(a) Immigration Act 1971.

14.
I heard submissions from both parties on 13 th November 2017 and adjourned part heard to enable both parties to file and serve written submissions on:

What is the effect of a finding that an individual has not caused serious harm and is not a persistent offender where the deportation proceedings were issued on the basis that he had caused serious harm and/or was a persistent offender;

What is the relevance of the third question in Razgar ie is the decision in accordance with the law.

Grounds of appeal by Mr Andell: 12(a) to (c) above

15.
Mr Deller was correct to accept that the First-tier Tribunal judge had materially erred in law in failing to have adequate regard to the medical evidence, the expert report and country evidence relied upon by the appellant in reaching his decision that Mr Andell was not at risk of being persecuted if removed to Trinidad and Tobago. This was not only because of the evidence of prison conditions but also the underlying claim of being targeted. It follows that I set aside the decision that Mr Andell was not at risk of being persecuted. The decision is to be remade, no findings retained.

Were there procedural defects in the human rights decision (12(d) above).

16.

Mr Selwood in written submissions relied upon Greenwood No 2 (para 398 considered) [2015] UKUT 00629 (IAC) and submitted that where it was established that the decision of the SSHD was not in accordance with the law, there remained a 'not in accordance with the law' jurisdiction of the Tribunal and the decision should be remitted to the Secretary of State for a lawful decision to be taken. Before me on 12 th March 2018, both parties had a copy of Charles (human rights appeal: scope) [2018] UKUT 00089 (IAC) which at that time was unreported. I informed the parties that it was likely that a decision on whether Charles was going to be reported may be made within the following couple of weeks and agreed with them that they were at liberty to make written submissions on the 'not in accordance with the law' point within seven days if they wished. Charles was reported on 19 th March 2018 and neither party has made any submissions. I have proceeded as set out in Charles, namely that it is no longer possible for the Tribunal to allow an appeal on the ground that a decision is not in accordance with the law and to that extent Greenwood No 2 should not be followed.

17.
As Charles explains, if an appellant has any criticism of the Secretary of State's decision making under the Rules or various Immigration Acts, s/he will, if the circumstances engage Article 8(2), be able to advance those criticisms in the Article 8 appeal and, specifically when considering the proportionality of the decision.

18.
I have found that the First-tier Tribunal erred in law in its consideration of Mr Andell's protection and human rights claim appeal and the decision on those elements is set aside to be remade. It is not necessary for me to establish whether there were procedural defects in the decision(s) by the SSHD. If there were procedural defects in the decision(s) of the SSHD, they can be considered when the First-Tier Tribunal re-determines the appeal.

Grounds of appeal by the SSHD

19.
These are, in essence, whether the finding by the First-tier Tribunal judge that Mr Andell was not a foreign criminal was infected by a material error of law. There are two elements to this: firstly, whether there is, as submitted by Mr Deller, a contradiction between the approach to be taken to paragraph 398(c) of the Immigration Rules which refers to persistent offending/serious harm being "in the view of the Secretary of State" and the definition of foreign criminal including a persistent offender or someone causing serious harm to be found in Part 5A Nationality Immigration and Asylum Act 2002. Secondly whether, in this particular case, the First-tier Tribunal judge erred in law in his finding that Mr Andell was not a foreign criminal.

Is there a contradiction?

20.
The SSHD is required to make a deportation order (s32(5) UK Borders Act 2007) if an individual is a foreign criminal as defined in ss32(1), (2) and (3) of the 2007 Act [1] . Mr Andell is not a foreign criminal as so defined. 'Foreign criminal' is defined in s117D for the purpose of Part 5A (my emphasis) of the 2002 Act and, in so far as is relevant to Mr Andell, reads as follows

117D (2)In this Part, "foreign criminal" means a person—

(a)who is not a British citizen,

(b)who has been convicted in the United Kingdom of an offence, and

(c)who—

(i)has been sentenced to a period of imprisonment of at least 12 months,

(ii)has been convicted of an offence that has caused serious harm, or

(iii)is a persistent offender.

21.
The definition of a foreign criminal for the purpose of s117D of the 2002 Act therefore includes a person who is a foreign criminal as defined by s32(2) of the 2007 Act. S117C of the 2002 Act sets out the additional matters to be taken into account where an individual is a foreign criminal (as defined in the 2002 Act) in deciding whether the deportation would breach the UK's obligations under Article 8.

22.
The Immigration Rules, ss117A-D of the 2002 Act and the SSHD's various policies and guidance set out the various matters that are to be taken into account when considering the proportionality of a decision to grant or refuse a human rights claim. In accordance with s5(1) Immigration Act 1971 ("1971 Act"), where a person is liable to deportation under s3(5) or (6) of the 1971 Act the SSHD may make a deportation order against him. s3(5), in so far as is relevant to Mr Andell reads as follows

A person who is not a British Citizen is liable to deportation from the United Kingdom if –

(a)
The Secretary of State deems his deportation to be conducive to the public good;

(b)
…

23.
The decision whether to make a deportation order against someone who is not a 'foreign criminal' as defined in the 2002 Act or the 2007 Act is a decision to be taken by the SSHD. That decision is not predicated upon the individual being a foreign criminal as defined in the 2002 Act or the 2007 Act but is a decision to be taken by the SSHD on the basis that she deems the individual's deportation to be conducive to the public good. That decision by the SSHD is not amenable to challenge in a statutory appeal but, as per Charles (see [17] above) any alleged deficiencies in that decision can be addressed in the human rights statutory appeal rather than by way of parallel judicial review proceedings.

24.
Paragraph 398(c) Immigration Rules refers to "in the view of the Secretary of State". Mr Deller submitted that it seemed this could not be challenged in a statutory appeal, only by way of judicial review. He acknowledged however that this appeared to contradict Chege ("is a persistent offender") [2016] UKUT 187 (IAC) which confirms that it is open to the Tribunal, in a statutory appeal, to consider for itself whether an individual is a persistent offender or has caused serious harm. It is unsatisfactory if this apparent contradiction does in fact exist and if so for it to result in parallel proceedings; it would result in considerable delay and cost both to the individual and to the public purse.

25.
But this is to confuse the use of the words "foreign criminal" in the context in which it is used. In the context of the 2007 Act it is a term of art which requires certain criteria to be fulfilled. Similarly, in the 2002 Act it is a term of art, but with different criteria. In the Immigration Rules which are not to

be construed with the same exactitude as a statute but as an expression of the SSHD's policy, they are simply words denoting that a person is a criminal and a foreigner.

26.
I do not however take the view that there is a contradiction.

(a)
If an individual has committed crimes which bring him within the 2007 Act, he is a foreign criminal for the purpose of the making of an automatic deportation order;

(b)
If an individual meets s117D (2) (which will include those who are foreign criminals as defined by s32(2) of the 2007 Act), he is a foreign criminal and his appeal will include consideration by the Tribunal of the matters set out in s117C;

(c)
If the Secretary of State has decided that an individual's deportation is conducive to the public good (a 1971 Act deportation decision), whether or not he has been convicted of a criminal offence, the Rules govern the approach to be taken in the human rights appeal.

27.
The Rules cover, in a designated section, deportation and Article 8. Paragraph A398 of the Rules refers to "foreign criminal". Paragraph 398 of the Rules refers to "a person". It must be that the word person includes not only individuals who are foreign criminals as defined in the 2002 Act and the 2007 Act but other individuals who, in the view of the SSHD, are liable to deportation under the 1971 Act. This will include "foreigners" who are also "criminals". Paragraph 398 of the Rules imports the language of the 2002 Act and thus the consideration to be undertaken in assessing the UK's obligations under Article 8. The 2007 Act and the Immigration Act 2014 which amended the 2002 Act are a deliberate legislative intention to distinguish between those who are convicted of criminal offences in the UK and those who are not. S117C of the 2002 Act applies only to those convicted of an offence in the UK and meet the other criteria in s117D of the 2002 Act.

28.
On the face of it, it appears the Rules have sought to reintroduce a deportation mechanism for individuals who are not caught by the 2007 and 2002 Acts. But that is to ignore the continuing discretion of the SSHD to take a decision to deport an individual under the 1971 Act. It is unsurprising that the SSHD, in deciding whether an individual is liable to deportation under the 1971 Act, should draw upon the legislative intention relating to UK convictions. Hence the deportation section in the Rules is not only concerned with UK convictions but also convictions abroad (paragraphs 398(a) and (b) of the Rules). This must include consideration of s117C of the 2002 Act in determining the appeal against the rejection of the human rights claim. The assessment in a human rights appeal by the Tribunal will include, as per Charles, consideration of any submissions regarding the SSHD's decision, including whether a conviction abroad with a sentence of more than 12 months imprisonment would be comparably treated in the UK.

29.
Paragraph 398(c) does not refer to convictions but to offending. This appears to be a deliberate distinction from criminality as evidenced by conviction. There is no requirement for a criminal conviction; it is the SSHD's view as to whether the behaviour is such as caused serious harm or

amounts to being persistent offending. This approach chimes with the concept of a broad discretion available to the SSHD; the discretion to take a deportation decision under the 1971 Act.

30.
In SC (Zimbabwe) [2018] EWCA Civ 929, the Court of Appeal doubted the approach taken in LT(Kosovo), DC (Jamaica) [2016] EWCA Civ 1246 which referred to the significant weight to be attached to the Secretary of State's view of "serious harm". In SC (Zimbabwe) McCombe LJ said [19]

"….It seems to me quite clear that once the matter comes before a tribunal or court, what has to be applied is s.117D(c) of the Act….the view of the Secretary of State or indeed of a judge in sentencing remarks may be of assistance to a Tribunal or court in deciding whether an offence has caused serious harm or whether an offender is a persistent offender, but I do not see that the statutory words compel any particular weight to be given to the Secretary of State's view on either in the assessment..."

31.
It is open to a First-tier Tribunal judge, on the evidence before him/her to reach a decision on whether an individual is a persistent offender or has caused serious harm such as to bring him within s117D 2002 Act – see Chege . Where an individual does not fall within the 2002 Act or 2007 Act definition of foreign criminal but the SSHD has taken a decision under the 1971 Act, her decision and her view as to the circumstances that led her to that decision are matters that will be considered by the Tribunal in determining the proportionality of the human rights decision – see Charles and SC (Zimbabwe).

Is there an error of law by the First-tier Tribunal in finding Mr Andell is not a foreign criminal.

32.
The issue of whether Mr Andell was or was not a foreign criminal was not, it is submitted by the SSHD, canvassed at the First-tier Tribunal hearing. The presenting officer’s note of proceedings has not been produced; it does not seem from the skeleton argument relied upon by Mr Andell at the hearing before the First-tier Tribunal that it was submitted by him that he was not a foreign criminal. The decisions of the SSHD which have led to the appeal, refer to Mr Andell being a persistent offender/having caused serious harm. It is not therefore a matter that the SSHD would have been unable to address before the First-tier Tribunal had it been raised. It is not apparent on the face of the determination that the issue was live before the judge. The conclusions of the First-tier Tribunal have been very ably addressed by both representatives before me. Mr Deller did not pursue this ground of appeal with any great vigour, relying predominantly on the issue of whether the First-tier Tribunal had erred in finding Mr Andell not to be a foreign criminal, the relevance of the SSHD’s opinion that he was and the consequences.

33.
The First-tier Tribunal Judge found:

49. It is clear that [Mr Andell] cannot be viewed to be a persistent offender in the UK alone, having only been convicted of one offence here which resulted in imprisonment of less than 12 months. In respect of serious harm, the Secretary of State appears to be relying on a conviction of receiving from Trinidad and Tobago of which I have little detail presented to me, other than a summary form the Criminal Records Office. It is unclear from the refusal decision whether the Secretary of State has formed the view, in her discretion, and based on his offending in the UK, that paragraph 398(c) of the Rules applies in respect of serious harm and therefore the public interest requires his deportation unless one of the exceptions applies. I note that the Secretary of State went on to consider the private life exception under 399A and found it did not apply. However, I cannot on the basis of the contents of

the refusal decision and the conclusions in there establish whether the Secretary of State has or has not formed the view that 398(c) did apply.

50. Having come to this conclusion, in deciding whether the decision breaches [Mr Andell's] rights under Article 8 ECHR, I have taken into account Sections 117A to 117D and the public interest considerations relating to this.

The First-tier Tribunal Judge then considered the definition of 'foreign criminal" in s117D (2) of the Nationality Immigration and Asylum Act 2002 and found:

53. Given the nature of [Mr Andell's] offending behaviour in the UK and the conviction which was for a period of less than twelve months, I cannot be satisfied that [Mr Andell] is a foreign criminal as defined by Section 117C [sic]. I have therefore in the alternative gone on to consider [Mr Andell's] Article 8 claim under the public interest considerations applicable in all cases contained in s117B of the NIAA 2002 and also paragraph 276ADE of the Immigration Rules, on the basis of his private life only as [Mr Andell] has not sought to raise any issue under family life.

….

34.
Dealing first with the First-tier Tribunal Judge's conclusion that Mr Andell is not a persistent offender, it is difficult to see on what basis the First-tier Tribunal Judge reached that conclusion other than by considering only the offence committed in the UK. It is of course to be remembered that this appeal arises from the refusal of a human rights/protection claim made subsequent to a decision to deport under the 1971 Act, not subsequent to an automatic deportation order under the 2007 Act. There has been no analysis by the First-tier Tribunal Judge of the impact of Mr Andell's convictions in Trinidad & Tobago on whether he is a persistent offender. The most recent conviction in Trinidad and Tobago was 2012 with a sentence of 36 months. During that time in prison he would be unable to commit any further offences outside prison in society. It cannot be otherwise than that convictions in another country should be taken into account in determining whether an individual is a persistent offender. The SSHD plainly took the view – see extract from decision letter at [8] above – that Mr Andell was a persistent offender and reached her decision to deport, in part, on that basis. The First-tier Tribunal judge did not address this at all but, in reaching a decision that he is not a foreign criminal considered only the length of his prison sentence and his conviction in the UK – see extract from First-tier Tribunal decision at [33] above. It may well be that a conclusion that Mr Andell is not a persistent offender is correct. Some of the offences he was convicted of in Trinidad are very old and there is little information about the nature of the offences or what has happened to the outstanding charges. Nevertheless, the First-tier Tribunal judge has materially erred in law in only considering the UK conviction to establish whether Mr Andell is a persistent offender; he therefore failed to carry out the assessment required.

35.
In so far as whether Mr Andell's offence in the UK caused serious harm, the First-tier Tribunal Judge did not address this at all other than to comment that the Secretary of State appeared to be relying upon the conviction in Trinidad and Tobago to identify serious harm. The judge did not reach his own decision despite having earlier referred to Chege (is a persistent offender) [2016] UKUT 187 (IAC). Although it might have been helpful had the Secretary of State set out exactly which offences she considered fell within "serious harm", which fell within "persistent offending" and which were both, Mr Andell knew what he had been convicted of, knew the Secretary of State considered his

deportation to be conducive to the public good because he was a persistent offender/caused serious harm and it was plainly open to him to object to that classification.

36.
The failure of the First-tier Tribunal judge to address the issue of serious harm, a reason given by the Secretary of State for finding Mr Andell's deportation to be conducive to the public good, is a material error of law.

37.
The SSHD decision letters refer to both persistent offending and serious harm. It is clear that the decision has been taken because of Mr Andell's offending behaviour. The SSHD makes reference to the convictions in Trinidad and Tobago and to the UK conviction. It is plain that the SSHD took the view that these matters were sufficient to require his deportation.

38.
The First-tier Tribunal judge, in considering whether Mr Andell was a persistent offender and failing to consider whether he had caused serious harm, failed to consider the Secretary of State's view. The First-tier Tribunal judge materially erred in law.

39.
Each of the above errors are material to the outcome of the appeal. If the First-tier Tribunal judge did in fact fail to raise with the parties that he was considering whether Mr Andell was in any event a foreign criminal, that is also a material error of law.

40.
It follows that the decision of the First-tier Tribunal with regard to the finding that Mr Andell was not a foreign criminal is materially legally flawed and I set it aside to be remade.

Consideration of Mr Andell's private life consequent to the finding that he is not a foreign criminal.

41.
Although I have set aside the First-tier Tribunal decision that the appellant is not a foreign criminal I have considered the submission by Mr Selwood that the approach by the First-tier Tribunal judge, having found that Mr Andell is not a foreign criminal as defined in Part 5A of the 2002 Act, to then take a decision under the administrative removal process in a conducive deportation case is problematic because the deportation order remains in place.

42.
That is not the case. There is, so far as I can ascertain, no deportation order. As §101 of the decision to refuse the protection and human rights claim (the 11 th August 2016 decision) makes clear

If you do not appeal, or you appeal and the appeal is unsuccessful, or your human rights claim is later certified under s94B of the 2002 Act, a deportation order **will** (my emphasis) be made against you and you will be removed to Trinidad & Tobago.

Although the previous legislative regime whereby an appeal lay against the decision to make a deportation order has ceased to exist, where a decision to deport on conducive grounds, ie under the 1971 Act, is made, the deportation order is not signed until the appeal rights on the protection and human rights claim are exhausted. In this case, there was a decision to make a deportation order on conducive grounds under the 1971 Act but a deportation order has not been signed. Mr Andell's appeal rights are continuing.

43.
As explained above, if an individual is not a foreign criminal as defined in the 2002 Act or the 2007 Act, that does not prevent a decision to deport being taken under the 1971 Act; paragraph 398 applies to such decisions. The First-tier Tribunal judge further materially erred in law in addressing the deportation of Mr Andell under s117B of the 2002 Act (the administrative removal provisions), having failed to reach a lawful decision on whether Mr Andell was a persistent offender or had caused serious harm.

44.
Mr Andell's appeal is an appeal against the refusal of his protection and human rights claim. It is not an appeal against a decision to deport or a deportation order or an administrative removal decision. Whether an individual is a foreign criminal is a factor that is taken into account in reaching a decision on the appeal, as are any criminal convictions or offending behaviour, even if an individual is not a foreign criminal as defined in the 2002 Act or the 2007 Act.

Summary of conclusions

45.
Drawing this together:

(a)
A decision by the Secretary of State to make a deportation order under the 1971 Act is not predicated upon an individual being a "foreign criminal" as defined by the 2002 Act or the 2007 Act.

(b)
"Foreign criminal" is a term of art in the 2002 Act and the 2007 Act whereas in the Rules the words simply denote that the individual is a "foreigner" and a "criminal".

(c)
Paragraph 398 of the Rules includes not only foreign criminals as defined in the 2002 Act and the 2007 Act but also other individuals who in the view of the Secretary of State, are liable to deportation because of their criminality and/or their offending behaviour.

(d)
A human rights appeal will include consideration of submissions regarding the Secretary of State's decision relating to convictions abroad, offending behaviour and alleged procedural defects.

Decision

46.
The making of the decision of the First-tier Tribunal did involve the making of material errors on points of law such that I set aside the decision in its entirety, no findings preserved.

47.
The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal.

48.
When I have set aside a decision of the First-tier Tribunal, s.12(2) of the TCEA 2007 requires me to remit the case to the First-tier Tribunal with directions or re-make it for myself. In this case the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-

made is such that, having regard to the overriding objective, it is appropriate to remit the case to the First-tier Tribunal.

49.
I remit the appeal to the First-tier Tribunal for rehearing, no findings preserved.

Date 30 th April 2018

Upper Tribunal Judge Coker

---

[1] 32(1)In this section “foreign criminal” means a person—

(a)who is not a British citizen,

(b)who is convicted in the United Kingdom of an offence, and

(c)to whom Condition 1 or 2 applies.

(2)Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.

(3)Condition 2 is that—

(a)the offence is specified by order of the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (c. 41) (serious criminal), and

(b)the person is sentenced to a period of imprisonment.