Upper Tribunal
(Immigration and Asylum Chamber)

Wilson (NIAA Part 5A; deportation decisions) [2020] UKUT 00350(IAC)

THE IMMIGRATION ACTS

Heard at Field House by Skype	**Decision & Reasons Promulgated**
On 3 November 2020	.....

Before

THE HON. MR JUSTICE LANE, PRESIDENT

UPPER TRIBUNAL JUDGE KEITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AKIM TYLER WILSON

(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation :

For the Appellant: Mr A Tan, Senior Home Office Presenting Officer

For the Respondent: Ms A Childs, Counsel, instructed by Duncan Lewis & Co Solicitors

(A) section 117D(2)(b)(ii): "caused serious harm"

The current case law on "caused serious harm" for the purposes of the expression "foreign criminal" in Part 5A of the 2002 Act can be summarised as follows:

(1) Whether P's offence is "an offence that has caused serious harm" within section 117D(2)(c)(ii) is a matter for the judge to decide, in all the circumstances, whenever Part 5A falls to be applied.

(2) Provided that the judge has considered all relevant factors bearing on that question; has not had regard to irrelevant factors; and has not reached a perverse decision, there will be no error of law in the judge's conclusion, which, accordingly, cannot be disturbed on appeal.

(3) In determining what factors are relevant or irrelevant, the following should be borne in mind:

(a) The Secretary of State's view of whether the offence has caused serious harm is a starting point;

(b) The sentencing remarks should be carefully considered, as they will often contain valuable information; not least what may be said about the offence having caused “serious harm”, as categorised in the Sentencing Council Guidelines;

(c) A victim statement adduced in the criminal proceedings will be relevant;

(d) Whilst the Secretary of State bears the burden of showing that the offence has caused serious harm, she does not need to adduce evidence from the victim at a hearing before the First-tier Tribunal;

(e) The appellant’s own evidence to the First-tier Tribunal on the issue of seriousness will usually need to be treated with caution;

(f) Serious harm can involve physical, emotional or economic harm and does not need to be limited to an individual;

(g) The mere potential for harm is irrelevant;

(h) The fact that a particular type of offence contributes to a serious/widespread problem is not sufficient; there must be some evidence that the actual offence has caused serious harm.

B. Deportation decisions and human rights appeals

(1) In a human rights appeal, the decision under appeal is the refusal by the Secretary of State of a human rights claim; that is to say, the refusal of a claim, defined by section 113(1) of the Nationality, Immigration and Asylum Act 2002, that removal from the United Kingdom or a requirement to leave it would be unlawful under section 6 of the 1998 Act. The First-tier Tribunal is, therefore, not deciding an appeal against the decision to make a deportation order and/or the decision that removal of the individual is, in the Secretary of State’s view, conducive to the public good. It is concerned only with whether removal etc in consequence of the refusal of the human rights claim is contrary to section 6 of the Human Rights Act 1998. If Article 8(1) is engaged, the answer to that question requires a finding on whether removal etc would be a disproportionate interference with Article 8 rights.

(2) The Secretary of State’s decisions under the Immigration Act 1971 that P’s deportation would be conducive to the public good and that a deportation order should be made in respect of P would have to be unlawful on public law grounds before that anterior aspect of the decision-making process could inform the conclusion to be reached by the First-tier Tribunal in a human rights appeal.

DECISION AND REASONS

A. OVERVIEW

1.
The Secretary of State appeals against the decision of First-tier Tribunal Judge Kainth who, following a hearing at Harmondsworth on 16 December 2019, allowed the appeal of the respondent (hereafter, claimant) against the refusal by the Secretary of State of the claimant’s human rights claim. That refusal occurred on 5 November 2018. It followed representations made by the claimant, pursuant to a notice served on him under section 120 of the Nationality, Immigration and Asylum Act 2002, in consequence of the Secretary of State’s decision on 19 September 2018 to make a deportation order in respect of the claimant.

2.
Having heard evidence from the claimant and other witnesses, Judge Kainth found that the claimant had not been convicted of an offence that had “caused serious harm”, within the meaning of section 117D(2)(c)(ii) of the 2002 Act. The conviction in question was in respect of the offence of possessing a

blade/pointed article in a public place, for which the claimant was sentenced to six months' imprisonment, to run consecutively with a period of five months' imprisonment for breach of a suspended sentence. For the reasons we shall give, Judge Kainth was not wrong in law to reach his conclusion on the "serious harm" issue.

3.
As a result of his finding on this issue, the judge held that the Secretary of State's decision to make a deportation order in respect of the claimant was "not in accordance with the law". Since deportation would, according to the judge, be unlawful, any attempt to remove the claimant from the United Kingdom, pursuant to the deportation order, would necessarily represent a disproportionate interference with the claimant's rights under Article 8 of the ECHR. Having reached that conclusion, Judge Kainth ended his decision by saying that he had "not gone on to consider Article 8 in light of my above findings or the exceptions to deportation or the provisions as contained within the amended, Nationality, Immigration and Asylum Act 2002, section 117A - section 117D" (paragraphs 28 and 30). As we shall explain, Judge Kainth's approach here was legally erroneous.

B. THE APPELLANT AND HIS CRIMINALITY

4.
The appellant is a citizen of St Lucia, born in 1996. He entered the United Kingdom in either 2000 or 2002, in order to visit his father. He had leave to enter as a visitor for six months. In 2006, the claimant was granted discretionary leave to remain until June 2008. The leave was subsequently extended to June 2011.

5.
In May 2018, the appellant was convicted of the offence described above. In passing sentence, HHJ Canavan referred to the fact that the claimant had twice breached his suspended sentence order, which related to an offence of affray in respect of which the claimant was convicted and sentenced in 2016. In May 2017, the claimant had committed an offence of criminal damage; but the suspended sentence was (wrongly) not activated at that time.

6.
The judge's sentencing remarks continued as follows:-

"What was your response to the second opportunity that you had been given? It was, essentially, to go out and commit yet another offence and, in many ways, the most serious offence that you have committed in your relatively young life, you being 22 years of age, because, on 24 April, you went out in possession of a lock knife. A knife you knew you were not entitled to have.

The dangers of knife crime are all too obvious to all of us. You, in particular, because of your unfortunate family circumstances, can hardly say that you are unaware of the consequences of, often young, men carrying knives and using them or having them used on them in public places.

Every day, it seems, on television, we see sad tales of families torn apart, of lives wrecked, by the use of unlawful knives on our streets. That is why carrying a knife in a public place is so serious.

In your case, it is made even worse by the fact that was your third breach of the suspended sentence …

I take into account your guilty plea at the first available opportunity …"

7.

HHJ Canavan’s observation that the claimant could not have unaware of the consequences of men carrying knives is explained at paragraph 22 of Judge Kainth’s decision. The judge accepted the claimant’s evidence -

“ that he was carrying the lock knife because he was fearful after his uncle (husband of Ms Goodman) was stabbed and his cousin having been threatened. Ms Goodman in her evidence before me explained that her family were trying to remove a gang of people from selling drugs from their building. Her evidence was not challenged. ”

C. LEGISLATION

Immigration Act 1971

8.
Section 3(5) of the Immigration Act 1971 identifies who is liable to deportation:-

“(5) 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; or

(b) another person to whose family he belongs is or has been ordered to be deported.”

9.
Section 3(6) makes provision for liability to deportation, where certain persons who are not British citizens are convicted of an offence.

10.
Section 5 sets out the procedure for deportation, along with some related provisions. Section 5(1) provides:-

“(1) Where a person is under section 3(5) or (6) above liable to deportation, then subject to the following provisions of this Act the Secretary of State may make a deportation order against him, that is to say an order requiring him to leave and prohibiting him from entering the United Kingdom; and a deportation order against a person shall invalidate any leave to enter or remain in the United Kingdom given him before the order is made or while it is in force.”

11.
Section 5(3) restricts the power to make a deportation order in respect of a family member, in certain circumstances.

Nationality, Immigration and Asylum Act 2002

12.
Part 5A of the 2002 Act is entitled “Article 8 of the ECHR; public interest considerations”. Section 117A explains when Part 5A applies:-

“(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), “the public interest question” means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).”

13.
Section 117B contains a number of public interest considerations, which are applicable in all cases. These include the consideration that little weight should be given to a private life or a relationship formed with a qualifying partner, where the same is established by a person at a time when they are in the United Kingdom unlawfully. Little weight should be given to a private life established by a person at a time when that person’s immigration status is precarious (section 117B(4) and (5)).

14.
Section 117B(6) states that in a case of a person who is not liable to deportation, the public interest does not require that person’s removal where he or she has a genuine and subsisting parental relationship with a qualifying child; and it would not be reasonable to expect the child to leave the United Kingdom. Definitions of “qualifying partner” and “qualifying child” are to be found in section 117D.

15.
Section 117C contains “additional considerations in cases involving foreign criminals”. The deportation of foreign criminals is stated to be in the public interest. In the case of a foreign criminal who has not been sentenced to a period of imprisonment of four years or more, the public interest requires deportation unless certain specified exceptions apply. These are set out in section 117C(4) and (5).

16.
As well as defining “qualifying partner” and “qualifying child”, section 117D contains this definition of “foreign criminal”:-

“(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.”

Immigration Rules

17.
The Immigration Rules on deportation are contained in Part 13 of HC 395 (as amended) Paragraph 396 provides as follows:-

“ **396.** Where a person is liable to deportation the presumption shall be that the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation order in accordance with section 32 of the UK Borders Act 2007.”

18.
Paragraph 397 provides:-

“ **397** . A deportation order will not be made if the person’s removal pursuant to the order would be contrary to the UK’s obligations under the Refugee Convention or the Human Rights Convention. Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed.”

19.
Paragraphs A398 to 399D apply to foreign criminals liable to deportation. The expression “foreign criminal” is not defined in the Immigration Rules. Paragraphs 398, 399 and 399A broadly reflect what is to be found in section 117C of the 2002 Act. Paragraph 398(c), however, refers to a person whose deportation is said to be 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”.

20.
It will be seen that the Immigration Rules make reference to the UK Borders Act 2007. That Act operates by reference to the deportation provisions in the 1971 Act.

UK Borders Act 2007

21.
Section 32 of the 2007 Act provides as follows:-

“ **32. Automatic deportation**

(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.

(4) For the purpose of section 3(5)(a) of the Immigration Act 1971 (c. 77), the deportation of a foreign criminal is conducive to the public good.

(5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33).

(6) The Secretary of State may not revoke a deportation order made in accordance with subsection (5) unless—

(a) he thinks that an exception under section 33 applies,

(b) the application for revocation is made while the foreign criminal is outside the United Kingdom, or

c) section 34(4) applies.

(7) Subsection (5) does not create a private right of action in respect of consequences of non-compliance by the Secretary of State."

22.
Section 33 provides for exceptions to the propositions that the deportation of a foreign criminal is conducive to the public good and that the Secretary of State must make a deportation order in respect of such a person. For our purposes, the relevant provisions are as follows:-

" **33. Exceptions**

(1) Section 32(4) and (5)—

(a) do not apply where an exception in this section applies (subject to subsection (7) below), and

…

(2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach—

(a) a person's Convention rights, or

(b) the United Kingdom's obligations under the Refugee Convention.

…

(7) The application of an exception—

(a) does not prevent the making of a deportation order;

(b) results in it being assumed neither that deportation of the person concerned is conducive to the public good nor that it is not conducive to the public good; but section 32(4) applies despite the application of Exception 1 or 4."

D. CASE LAW ON "CAUSED SERIOUS HARM"

LT (Kosovo) and another v Secretary of State for the Home Department [2016] EWCA Civ 1246

23.
It is now necessary to refer to the relevant case law on what is meant by " caused serious harm". In LT (Kosovo) and another v Secretary of State for the Home Department [2016] EWCA Civ 1246, the Court of Appeal was concerned with the expression, as found in paragraph 398(c). The issue in both of the appeals before the court was whether an offence of supplying a Class A drug fell within the category of offences causing "serious harm" within the meaning of paragraph 398(c), regardless of the particular circumstances of the offending.

24.
Laws LJ, giving the judgment of the court, held that:-

“18. There is clearly no rule of law which requires every instance of supply of a Class A drug to be treated as causing serious harm for the purpose of deportation decisions, certainly nothing in the text of paragraph 398(c). Nor however, in my judgment, does the rule exclude from its ambit a case where such a view is taken. Nor again is 398(c) limited to the case where the sentenced passed does not apparently reflect the gravity of the offending. I would reject Mr Sedon's submission to the contrary. Serious harm is not defined in the Rules.”

25.
At paragraph 21, Laws LJ disagreed with any suggestion that the First-tier Tribunal and the Upper Tribunal -

“were bound by the Secretary of State’s opinion as to serious harm: such a conclusion would nullify the right of appeal and reduce it to a residual Wednesbury review [1948] 1 KB 223, whereas it is elementary that the right of appeal to the FTT is on the merits … That position is not shifted by the reference in paragraph 398(c) to the Secretary of State’s view. That feature of the language of the rule cannot, in my judgment, deprive the appellants of their rights to a merits appeal.”

26.
However, Laws LJ pointed out that this was -

“not to say that the reference to the Secretary of State’s view is of no significance. The Secretary of State is the primary decision-maker. She has a constitutional responsibility to make judgments as to the force of the public interest in deportation cases. That circumstance has to be balanced against the appellants' right to a merits appeal. In my judgment, that is to be done by requiring the tribunals in a paragraph 398(c) case, while considering all the facts put before them, to accord significant weight to the Secretary of State's view of "serious harm". They are not to be bound by it, but they are to treat it an important relevant factor. I should add that I cannot see that this approach is in any way undermined by the new provisions in section 117C and D of the Nationality, Immigration & Asylum Act 2002, to which Mr Seddon referred this morning.”

27.
Laws LJ continued:-

“23. In LT's case the Secretary of State's deportation decision of 7 August 2013 had this:

"It is considered that paragraph 398(c) applies in your client's case as he was convicted of a drugs offence, namely supplying a Class A drug. It is the view of the Home Secretary that all drugs offences are, by their nature, serious offences."

24. As to that, I can well see that the proposition that all drugs offences are by their nature serious may be questionable, but what matters here is the Secretary of State's undoubted view that supplying Class A drugs causes serious harm. In my judgment, that is a perfectly reasonable view, though Mr Sedon would not have it so. He submitted today that the Secretary of State would have to provide narrative reasons for taking such a view; reasons which would demonstrate a particular expertise. I do not agree. It is a matter of social and moral judgement. The Secretary of State with her constitutional responsibilities is entitled to take the overall view she did and express it as she has. She was entitled to take that view in both of these cases. Her doing so was not repugnant to her extant policy.”

SC (Zimbabwe) v Secretary of State for the Home Department [2018] EWCA Civ 929

28.
The Court of Appeal returned to the construction of “serious harm” in SC (Zimbabwe) v Secretary of State for the Home Department [2018] EWCA Civ 929. Unlike LT (Kosovo) , which involved appeals determined by the First-tier Tribunal under the appellate regime as it was before the changes made by the Immigration Act 2014, SC (Zimbabwe) was directly concerned with Part 5A of the 2002 Act, as inserted by the 2014 Act. McCombe LJ, giving the judgment of the court, disagreed with the final sentence in paragraph 21 of the judgement of Laws LJ:-

“19. The LT case was concerned solely with the application of paragraph 398 (c) of the Rules. With respect to the short obiter dictum in the last sentence of the passage just quoted, I do not agree. It seems to me to be quite clear that once the matter comes before a tribunal or a court, what has to be applied is s.117D(c) of the Act. The words of that provision are the words which Parliament has chosen to enact, without more. The three elements of that paragraph of the subsection are in clear terms and do not require any gloss to be put upon them by the reference to the Rules. 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. I would, therefore, reject Mr Pilgerstorfer's first submission.”

29.
At paragraph 26, McCombe LJ reiterated the point as follows:-

“26. … I would also reject [Mr Pilgerstorfer’s] submission that s.117D(2)(c) requires a court or tribunal, in applying that provision, to attribute "significant weight" to the Secretary of State's anterior view that paragraph 398(c) of the Rules had been satisfied for the purposes of her own decision to make a deportation order in the first place. …”

R (Yasir Mahmood) and others v Secretary of State for the Home Department [2020] EWCA Civ 717

30.
In June 2020, the Court of Appeal handed down judgment in R (Yasir Mahmood) and others v Upper Tribunal (Immigration and Asylum Chamber) and Secretary of State for the Home Department [2020] EWCA Civ 717.

31.
Beginning at paragraph 34, McCombe LJ dealt with the expression “serious harm” in section 117D(2)(c):-

“34. Various issues arise as to the interpretation of this provision; but a number of preliminary points can be made.

35. First, the three categories in subsection (2)(c) have a potential to overlap. Plainly an offender who has received a sentence of more than 12 months may have done so because he committed an offence which caused serious harm. Equally, an offender who persistently offends is likely to receive a longer sentence (and more than 12 months) because of a poor antecedent history.

36. Second, the provision must be given its ordinary meaning informed by its context. The three categories must be read together. This is more than simply a conventional approach to statutory interpretation. It is plain, for example, from the structure of the provision that an offender who has been sentenced to a term of less than 12 months for an offence may nevertheless be treated as a 'foreign criminal' if the offence caused serious harm; and that 'serious harm' will only be relevant when the sentence for an offence is less than 12 months. This throws light on what may be encompassed by an offence which causes serious harm. While it is possible to think of offences which, despite causing the most serious harm, would not typically attract an immediate prison sentence of at least 12 months (causing death by careless driving is an example), in general paragraph (c)(ii) is not concerned with the most serious kind of harm which comes before the Crown Court.

37. Third, Mr Biggs drew our attention to s.32(1)-(5) of the UK Borders Act 2007 ('UKBA 2007'). Section 32(3) provides that, where an offender is sentenced to imprisonment for an offence specified by the Secretary of State by order, a deportation order may be made under s.5(1) of the IA 1971. His submission was that allowing the 'serious harm' test under s.117D(2)(c)(ii) to be satisfied where a given type of offence has been committed, merely because of a perceived generalised harm caused by such offending, would 'trespass into territory' covered by s.32(3) of the UKBA. We are not persuaded that there is any merit in this argument. Section 32(3) has not been brought into legislative effect and the Secretary of State has not made any order as envisaged; and Part 5A of the NIAA 2002 was introduced so as to provide a structured approach to the issue of deporting foreign criminals by reference to rights under article 8 of the ECHR."

32.
With respect to the Court of Appeal, it does not appear its statement that section 32(3) of the 2007 Act had not been brought into legislative effect is correct; nor that the Secretary of State has yet to make any order under section 72(4)(a) of the 2002 Act. The important point, however, is that made in the last part of the final sentence of paragraph 37 of the judgment. Section 117A precisely defines the circumstances in which Part 5A has application. It is where a court or tribunal is determining whether a decision made under the Immigration Acts breaches a person's Article 8 rights and so would be unlawful under section 6 of the Human Rights Act 1998. In such a circumstance, the court or tribunal must have regard to certain considerations when considering "the public interest question", which will be when the court or tribunal is conducting a "proportionality balancing exercise" under Article 8(2). As we shall see, although that exercise, conducted in the course of an appeal against a refusal of a human rights claim, may determine whether the Secretary of State can remove someone who is liable to deportation, it is conceptually separate from the issue of the legality of the making of a decision to deport.

33.
McCombe LJ continued as follows:-

"39. So far as the word 'caused' is concerned, the harm must plainly be causatively linked to the offence. In the case of an offence of violence, injury will be caused to the immediate victim and possibly others. However, what matters is the harm caused by the particular offence. The prevalence of (even minor) offending may cause serious harm to society, but that does not mean that an individual offence considered in isolation has done so. Shoplifting, for example, may be a significant social problem, causing serious economic harm and distress to the owner of a modest corner shop; and a thief who steals a single item of low value may contribute to that harm, but it cannot realistically be said that such a thief caused serious harm himself, either to the owner or to society in general.

Beyond this, we are doubtful that a more general analysis of how the law approaches causation in other fields is helpful.

40. As to 'harm', often it will be clear from the nature of the offence that harm has been caused. Assault Occasioning Actual Bodily Harm under s.47 of the Offences Against the Person Act 1861 is an obvious example.

41. Mr Biggs argued on behalf of Mahmood that the harm must be physical or psychological harm to an identifiable individual that is identifiable and quantifiable. We see no good reason for interpreting the provision in this way. The criminal law is designed to prevent harm that may include psychological, emotional or economic harm. Nor is there good reason to suppose a statutory intent to limit the harm to an individual. Some crimes, for example, supplying class A drugs, money laundering, possession of firearms, cybercrimes, perjury and perverting the course of public justice may cause societal harm. In most cases the nature of the harm will be apparent from the nature of the offence itself, the sentencing remarks or from victim statements. However, we agree with Mr Biggs, at least to this extent: harm in this context does not include the potential for harm or an intention to do harm. Where there is a conviction for a serious attempt offence, it is likely that the sentence will be more than 12 months.

42. The adjective 'serious' qualifies the extent of the harm; but provides no precise criteria. It is implicit that an evaluative judgment has to be made in the light of the facts and circumstances of the offending. There can be no general and all-embracing test of seriousness. In some cases, it will be a straightforward evaluation and will not need specific evidence of the extent of the harm; but in every case, it will be for the tribunal to evaluate the extent of the harm on the basis of the evidence that is available and drawing common sense conclusions."

34.
At paragraph 44, Simon LJ disagreed with the view of Laws LJ in LT (Kosovo) that the Sentencing Council's Definitive Guidelines were not of assistance:-

"That may be putting the matter too high, since the characteristic of an offence as causing 'serious harm' within the Sentencing Council Definitive Guidelines may be referred to in the sentencing remarks which are likely to be of assistance. On the other hand, the fact that the offence is not characterised as one causing 'serious harm' for sentencing purposes [under the Criminal Justice Act 2003 and its definition of "serious harm"] is plainly not determinative of the issue that arises under s. 117D(2)(c)(ii)."

35.
Having held that the burden is on the Secretary of State to prove each element of section 117B(2)(c)(ii) to the civil standard, Simon LJ examined what this might mean in practice:-

"51. Mr Biggs argued that the Secretary of State must prove the case against the offender by adducing specific items of evidence that would include, if the seriousness of the harm were in issue, evidence from the victim. We see no proper basis for this argument. In many cases, a victim statement will be put before the sentencing judge. This will describe the impact caused by the offence as at the date of the statement. A victim statement adduced in criminal proceedings has the status of evidence which a defendant has an opportunity to challenge before sentence is passed (R v. Perkins [2013] 2 Cr. App. R. (S) 72). There is no justification for allowing a second such opportunity in proceedings before the FtT. In cases where the Secretary of State relies on the causing of serious harm alone for treating an offender as a 'foreign criminal', we would expect the sentencing remarks (if available) and

the victim statement (if it exists) to form part of the Secretary of State's evidence before the tribunal. However, we recognise that in many cases a victim or those less directly affected by a crime may be reluctant to make a statement as to the harm endured by an offence, and no proper conclusions can be drawn from the lack of such a statement.

52. The suggestion that a victim of crime should have to give evidence of the effect of that crime before a tribunal, with the prospect of cross-examination by or on behalf of the perpetrator can be rejected outright: not least because of the potential for causing additional harm to a victim.

53. While an offender may choose to give evidence about the underlying criminality, the FtT will be aware that this will not necessarily be the whole, or even a truthful, picture. As the tribunal observed at §43 in the case of Mahmood, it had heard about the circumstances of the offending, 'as described by the Appellant.'"

36.
At paragraph 55, Simon LJ agreed with the conclusion in SC (Zimbabwe) that the statutory words do not compel any particular weight to be given to the Secretary of State's view as to whether an offence has caused "serious harm". However:-

"56. … The views of the Secretary of State are a starting point and the reasoning of a decision letter may be compelling; but ultimately the issues that arise under s.117D(2)(c)(ii) will be a matter for the FtT. Provided the tribunal has taken into account all relevant factors, has not taken into account immaterial factors and has reached a conclusion which is not perverse, its conclusion will not give rise to an actionable error of law."

37.
Some insight into how these principles apply in practice can be discerned from McCombe LJ's analysis of the case of Estnerie, one of the linked appeals in R (Mahmood) . Estnerie had committed offences of being in possession of false identity documents and seeking to obtain leave to remain by deception. The First-tier Tribunal concluded that, in order for an offence to cause serious harm, it was not necessary to identify individual victims. The Upper Tribunal agreed. So did the Court of Appeal; but with this important rider:-

"66. No doubt each offence of this nature contributes to a serious and perhaps widespread problem. However, the issue under s.117D(2)(c)(ii) is whether the offender has been convicted of 'an offence' which has caused serious harm. We accept that an individual offence of this sort can be said to cause serious harm, but there has to be some evidence that it has done so. The decision letter refers to the undermining of the integrity of the revenue and benefits system, banking and employment, and even national security; but there was insufficient evidence that these offences, even if aggregated, had such an effect. These offences usually result in a prison sentence because identity fraud is regarded as a serious matter; but that cannot, of itself, be enough to satisfy the requirement of causing 'serious harm'."

38.
In order to surmount this difficulty, the Secretary of State filed a respondent's notice with the Court of Appeal, contending that, on the facts found by the First-tier Tribunal, Estnerie was a "persistent offender", which made him a "foreign criminal" by reason of section 117D(2)(c)(iii). The Court of Appeal took account of the respondent's notice and dismissed Estnerie's appeal on the basis that he was a persistent offender.

E. CRIMINALITY: ARTICLE 8 ECHR CASES (VERSION 8.0)

39.
The Secretary of State's document : Criminality: Article 8 ECHR cases (version 8.0 – 13 May 2019) has this to say about "serious harm":-

"It is at the discretion of the Secretary of State whether he considers an offence to have caused serious harm.

An offence that has caused 'serious harm' means an offence that has caused serious physical or psychological harm to a victim or victims, or that has contributed to a widespread problem that causes serious harm to a community or to society in general.

The foreign criminal does not have to have been convicted in relation to any serious harm which followed from their offence. For example, they may fit within this provision if they are convicted of a lesser offence because it cannot be proved beyond reasonable doubt that they were guilty of a separate offence in relation to the serious harm which resulted from their actions.

Where a person has been convicted of one or more violent, drugs or sex offences, they will usually be considered to have been convicted of an offence that has caused serious harm."

F. THE DECISION OF THE FIRST-TIER TRIBUNAL

40.
We can now return to the decision of the judge in the present case. At paragraph 13, Judge Kainth summarised the grounds of appeal. These contended that the claimant's removal would "interfere with his Article 8 rights. As well as having a British partner, he has a son and his partner is currently pregnant. He has extended family members in the United Kingdom. He has no family in St Lucia".

41.
The claimant was said to be apologetic and "there was very little chance of a repetition of past behaviours because he had learnt a solitary [sic] lesson from his recent period of incarceration" (paragraph 14). It was also submitted that he could rely upon section 117C(4)(a) of the 2002 Act, in that he had been lawfully resident in the United Kingdom for most of his life; that he had a genuine and subsisting relationship with a qualifying partner/qualifying child; and that the effects of his deportation on the partner and child would be unduly harsh (paragraph 15).

42.
As we have noted, the judge heard oral evidence from the claimant, his aunt, his father and his current partner. He also heard submissions from Ms Childs, Counsel for the claimant. She submitted that the offence which had given rise to the decision to deport was not one that caused "serious harm". Judge Kainth engaged with this submission in some detail:-

"21. I have considered very carefully the sentencing remarks of HH Judge Canavan with respect to the knife offence;

"It was, essentially to go out and commit yet another offence and in many ways, the most serious offence that you have committed in your relatively young life, you being 22 years, because on 24 th April, you went out in possession of a lock knife. A knife you knew you were not entitled to have. The dangers of knife crime are all too obvious to all of us. You, in particular because of your unfortunate family circumstances, can hardly say that you are unaware of the consequences of, often young men carrying knives and using them or having them used on them in public places. Every day, it seems, on

television, we see sad tales of families torn apart, of lives wrecked, by the use of unlawful knives on our streets. That is why carrying a knife in a public place is so serious. … I take into account your guilty plea at the first available opportunity …"

22. Although the learned judge made reference to the impact upon communities with respect to knife crime, one should not forget that the knife in possession of the appellant was a lock knife. It was not brandished, waived [sic] or shown to anybody. The appellant volunteered possession of the knife when he was spoken to by the police. It was not an offence that caused physical or psychological harm. It is not the prosecution's case that the knife was used offensively or that it was ever shown to members of the public. I accept the appellant's explanation that he was carrying the lock knife because he was fearful after his uncle (husband of Ms Goodman) was stabbed and his cousin having been threatened. Ms Goodman in her evidence before me explained that her family were trying to remove a gang of people from selling drugs from their building. Her evidence was not challenged.

23. It would appear from the sentencing remarks of Judge Canavan that she was unimpressed with the fact the appellant had breached the terms of a suspended sentence on no fewer than three occasions. Had it not been for those breaches, the judge commented,

"Mr Ali, on your behalf, has sought to persuade me that, somehow, I ought to give you another opportunity. But I am afraid to say, Mr Wilson, had your compliance with the order been better from July of last year, there might have been some merit to that suggestion …"

24. In order to obtain some guidance with respect to whether or not the index offence is one that causes serious harm, I have considered the sentencing Counsel's guidelines on bladed articles and offensive weapons. When determining the offence category, there are a number of factors listed. The appellant's offence comes within culpability A, because by the very nature of the lock knife it is a bladed article. On the question of harm, it does not come within category 1 because the offence was not committed at a school or other place where vulnerable people are likely to be present, it was not committed in prison, it was not committed in circumstances where there was a risk of serious disorder or serious alarm and distress. It could therefore be classified as culpability A, category 2 with a starting point of six months' custody and with a category range of three months to one year's custody. That is before credit for a guilty plea and taking into account one's individual personal circumstances. The aggravating feature as acknowledged by the Judge was the fact the appellant was on a suspended sentence. Had he not been on a suspended sentence, there is scope in the light of the Judge's comments for a non-immediate custodial sentence which had it been imposed would mean that it would have been unlikely the respondent would have initiated deportation proceedings.

25. There was no attempt by the appellant to conceal/dispose of the item.

26. Whilst I acknowledge that the sentencing judge was well within her powers to make the observations that she did about the impact upon knife crime, it has not been asserted that the appellant was going to use the item found in his possession. The impact upon communities with respect to knife crime cannot be elevated by way of risk unless it is deemed to be a prevalent offence in a designated neighbourhood. In order for that to apply, there would need to be an official statement with respect to prevalence in order to an offence to attract a higher level of punishment. I have considered the case of **SC (Zimbabwe) v SSHD** **[2018] EWCA Civ 99** where at paragraph 19 the court held that the statutory words "serious harm" do not compel any particular weight to be given to the respondent's view.

27. After very careful scrutiny of the evidence, with some reluctance, I conclude that the offence of possession of a bladed article does not amount to serious harm because the circumstances of the offence are unique to this particular appellant and his very close family members.“

43.
In the light of his conclusion that the offence was not one that caused “serious harm”, Judge Kainth then dealt with the appeal as follows:-

“28. Because I have accepted that the appellant has not committed an offence that has caused serious harm, then the decision of the respondent is not in accordance with the law. The deportation order should not have been issued and it would be disproportionate to remove the appellant from the jurisdiction of the United Kingdom. In arriving at this conclusion, I take into account the decision in **Childs (** sic) **(human rights appeal – scope) [2018] UKUT 00089 (IAC)** :

“(58) So far as concerns the requirements addressed in question (3) that the interference be in accordance with the law, both Strasbourg and domestic authority suggests that the question whether the proposed interference (here, deportation) has a proper basis in domestic law, including whether that law is accessible to the person concerned and foreseeable as to its effect (see **Egab v Her Majesty’s Advocate** **[2017] UKSC 25** , paragraph 25). In the present case, the law of deportation under the 1971 Act read with the UK Borders Act 2007 in the case of foreign criminals, satisfies these requirements.

(59) The issue therefore, is what effect Judge Malone’s finding on the application of Section 7 of the 1971 Act had on question (5); that is to say, on whether the interference would be proportionate. As the judge found, the proper application of the law on deportation meant that the claimant was entitled to rely upon the statutory exemption in Section 7. Since, on the facts found, any hypothetical attempt by the Secretary of State to deport the claimant would be unlawful, that hypothetical action on the part of the Secretary of State would, quite obviously, represent a disproportionate interference with Article 8 rights of the claimant.”

29. The appellant is fully aware as to how close he has come to being deported. He, together with his witnesses, gave credible evidence that he has learnt a very valuable and solitary lesson from his recent period of imprisonment and that the scope of repetition is far removed than before.

30. I have not gone on to consider Article 8 in light of my above findings or the exceptions to deportation or the provisions as contained within the amended, Nationality, Immigration and Asylum Act 2002, Section 117A-Section 117D.”

G. THE SECRETARY OF STATE’S APPEAL

44.
The Secretary of State appealed to the First-tier Tribunal for permission to appeal to the Upper Tribunal against Judge Kainth’s decision. The grounds contended that Judge Kainth had erred in law in concluding that the events of possessing a bladed/pointed article in a public place had not caused serious harm. Whether the claimant had intended to use the lock knife or simply carrying it out of fear was, the Secretary of State submitted, of limited relevance. The grounds pointed to the remarks of the sentencing judge, who, as we have seen, had spoken of “sad tales of families torn apart, of lives wrecked, by the use of unlawful knives on our streets. That is why carrying a knife in a public place is so serious”. It was submitted that the First-tier Tribunal should be “slow to go behind the finding that

carrying a knife in a public place is ‘so serious’”. Judge Kainth had failed to consider the potential for serious harm, had the police not intervened when they did.

45.
On 27 January 2020, the First-tier Tribunal granted permission to appeal. Judge Shimmin considered it “arguable that the judge has made a material misdirection of law in respect of the definition of serious harm and, furthermore, has failed to give adequate reasoning”.

46.
In a skeleton argument on behalf of the Secretary of State, filed and served in February 2020, Mr Tan relied upon SC (Zimbabwe) as authority for the proposition that the sentencing remarks may be of assistance to a tribunal or court in deciding whether an offence has caused serious harm. It was not clear what weight, if any, Judge Kainth had given to these.

47.
Paragraphs 9 and 10 of Mr Tan’s skeleton argument read as follows:-

“9. Whilst not set out in the grounds for permission to appeal, the FTTJ has allowed the appeal on the basis “the decision of the respondent is not in accordance with the law. The deportation order should not have been issued …” [28]. At [30] the FTTJ fails to make a consideration under Article 8. It is submitted that the FTTJ has erred by allowing the appeal on the basis that the deportation decision was not in accordance with the law.

10. The appeal is one made under the provisions in section 82 of the 2002 Act following amendment by the Immigration Act 2014. As such, the only decision which could be under challenge in this case is the decision to refuse the Appellant’s human rights claim. That could only be appealed on the basis that “the decision” (i.e. the decision to refuse the human rights claim) is unlawful under section 6 Human Rights Act 1998. Having failed to conduct a consideration and proportionality assessment under Article 8, that being the issue in the appeal is a material error. It is submitted that this is ‘Robinson’ obvious point, and on that basis the decision of the FTTJ cannot stand.”

48.
In a document dated 2 November 2020, Mr Tan made an application to vary the Secretary of State’s grounds. As well as seeking an amendment to encompass paragraphs 9 and 10 of his skeleton argument of February 2020, Mr Tan’s application sought to permit the Secretary of State to contend that Judge Kainth erred in law in not finding that the claimant was also a “persistent offender” within the meaning of section 117D and, accordingly, a foreign criminal in any event.

49.
At the hearing on 3 November, Ms Childs objected to the application to amend. Mr Tan had sought to support the application in respect of the “persistent offender” amendment by attaching a record compiled by the Presenting Officer who had appeared before Judge Kainth. This suggested that the Presenting Officer had submitted to Judge Kainth that the appellant was a persistent offender.

50.
Ms Childs informed us that this did not correspond with her recollection of the hearing. Furthermore, the Presenting Officer’s note is at complete variance with paragraph 10 of Judge Kainth’s decision, in which he stated: “the respondent did not suggest that the appellant was a persistent offender notwithstanding he has 5 convictions encompassing 7 offences”.

51.

We declined to permit Mr Tan to amend the Secretary of State's grounds in order to encompass the "persistent offender" issue. It was, at best, not apparent that this had been advanced before Judge Kainth. The matter was not prefigured in Mr Tan's skeleton argument of February 2020.

52.
We did, however, permit the amendment regarding the judge's conclusion that his finding on the "serious harm" issue meant that the Secretary of State's decision was not in accordance with the law; such that the decision was, for that reason, a disproportionate interference with the claimant's Article 8 rights. Ms Childs accepted that permitting this amendment would not take the claimant by surprise. She had been able to engage with it in her written submissions of 24 April 2020. The issue is, furthermore, in our view one of some general significance.

H. DISCUSSION

(a) "caused serious harm"

53.
The current case law on "caused serious harm" for the purposes of the expression "foreign criminal" in Part 5A of the 2002 Act can be summarised as follows (drawing predominately from the judgment of Simon LJ in R (Mahmood and others) :-

(1) Whether P's offence is "an offence that has caused serious harm" within section 117D(2)(c)(ii) is a matter for the judge to decide, in all the circumstances, whenever Part 5A falls to be applied.

(2) Provided that the judge has considered all relevant factors bearing on that question; has not had regard to irrelevant factors; and has not reached a perverse decision, there will be no error of law in the judge's conclusion, which, accordingly, cannot be disturbed on appeal.

(3) In determining what factors are relevant or irrelevant, the following should be borne in mind:

(a) The Secretary of State's view of whether the offence has caused serious harm is a starting point;

(b) The sentencing remarks should be carefully considered, as they will often contain valuable information; not least what may be said about the offence having caused "serious harm", as categorised in the Sentencing Council Guidelines;

(c) A victim statement adduced in the criminal proceedings will be relevant;

(d) Whilst the Secretary of State bears the burden of showing that the offence has caused serious harm, she does not need to adduce evidence from the victim at a hearing before the First-tier Tribunal;

(e) The appellant's own evidence to the First-tier Tribunal on the issue of seriousness will usually need to be treated with caution;

(f) Serious harm can involve physical, emotional or economic harm and does not need to be limited to an individual;

(g) The mere potential for harm is irrelevant;

(h) The fact that a particular type of offence contributes to a serious/widespread problem is not sufficient; there must be some evidence that the actual offence has caused serious harm.

54.

Having identified these propositions, we need to apply them to the findings of Judge Kainth. At paragraph 21 of his decision, the judge set out the passage from HHJ Canavan's sentencing remarks, regarding the dangers of knife crime and the reasons why carrying a knife in a public place is "so serious". There follow the important findings in paragraph 22 (see paragraph 42 above).

55.
The Secretary of State criticises Judge Kainth for going "behind the finding of the sentencing judge that carrying a knife in a public place is "so serious"" and that he "limited the assessment to an absence of physical or psychological harm", failing "to consider the potential of serious harm had the police not intervened". Thus, Judge Kainth "failed to consider the offending holistically and as contributing to a societal problem as highlighted by the sentencing judge".

56.
We do not find that these criticisms have force. Applying our synthesis of the binding case law on the meaning of "cause serious harm", it is apparent that Judge Kainth had regard to all relevant circumstances. In setting out the remarks of the sentencing judge at paragraph 21 of his decision, and in what he said at the beginning of paragraph 22, Judge Kainth was well aware of the reason that Parliament has seen fit to criminalise the possession of a bladed article in a public place. In doing so, Parliament intended to reduce the prevalence of crimes of violence involving knives, by criminalising their possession, in certain circumstances.

57.
As we have seen, however, in order for the offence to be categorised as one that has "caused serious harm", there must be some evidence that actual harm has been caused. In the case of the claimant, Judge Kainth was entitled to find that no such harm had ensued. The claimant had not brandished the knife. Whilst the claimant's explanation was, of course, not a valid mitigation of the offence of possession – since carrying a knife for the avowed purpose of self-defence is part of the problem that the criminalisation of knife possession is intended to address – it was not an irrelevant factor in the judge's assessment of whether the offence had "caused serious harm" for the purposes of Part 5A of the 2002 Act.

58.
At paragraph 24, Judge Kainth had regard to "the Sentencing Counsel's [sic] guidelines of bladed articles and offensive weapons". He noted that the offence came within category A for culpability "because by the very nature of the lock knife it is a bladed article". So far as harm was concerned, the claimant's offence did not come within category 1 "because the offence was not committed at a school or other place where vulnerable people are likely to be present, it was not committed in prison, it was not committed in circumstances where there was a risk of serious disorder or serious alarm and distress". We consider that Judge Kainth was entitled to have regard to those matters. Whilst the claimant's possession of a knife plainly carried the risk of harm, were the claimant to have encountered those whom he alleged to fear, Judge Kainth was in our view entitled to regard such a risk as not amounting to actual harm, or as contributing to actual harm.

59.
At paragraph 26 of his decision, Judge Kainth was referring to the sentencing guidance regarding prevalence. This guidance provides that, in order for the prevalence of an offence to play a material part in the sentencing exercise, evidence needs to be provided to the court by a responsible body or by a senior police officer. Even if such material is provided, a sentencer will only be entitled to treat prevalence as an aggravating factor if satisfied that the level of harm caused in a particular locality is

significantly higher than that caused elsewhere; that the circumstances can properly be described as exceptional; and that it is just and proportionate to increase the sentence for such a factor in the particular case being sentenced. Otherwise, sentencing will, in any event, take account of collective social harm, with offenders being normally sentenced by a straightforward application of the guidelines without aggravation for the fact that their activity contributed to a harmful social effect upon a neighbourhood or community.

60.
We conclude that, in saying what he did at paragraph 26 of his decision, Judge Kainth was aware of the fact that "prevalence" could, in theory, be relevant to his assessment of whether the claimant's offence had "caused serious harm". It might be said that the guidance on prevalence, with its reference to "a harmful social effect upon a neighbourhood or community" supports the Secretary of State's criticism of paragraph 22 of the decision, where the judge concentrated on whether the claimant's offence had caused "physical or psychological harm". In our view, however, such criticism remains misplaced, since Judge Kainth's conclusion accords with paragraph 53(3)(h) above, whereby the contribution of an offence to a serious or widespread problem is not sufficient; there needs to be some evidence that the offence has caused serious harm (see paragraphs 41 and 66 of R (Mahmood)).

61.
For these reasons, we conclude that Judge Kainth did not err in law in concluding that the claimant's offence was not one that had "caused serious harm", so as to make the claimant a "foreign criminal" for the purposes of Part 5A of the 2002 Act.

(b) The relationship between Part 5A and deportation decisions

62.
The remaining question, upon which we gave the Secretary of State permission to amend her grounds, is whether Judge Kainth erred in law in the use he made of that finding, in paragraphs 28 to 30 of his decision. As we have seen, Judge Kainth concluded that his finding on serious harm meant that the decision of the Secretary of State "is not in accordance with the law. The deportation order should not have been issued and it would be disproportionate to remove the [claimant] from the jurisdiction of the United Kingdom" (paragraph 28). Because of that conclusion, Judge Kainth did not "consider Article 8 … within the amended, Nationality, Immigration and Asylum Act 2002, section 117A-Section 117D" (paragraph 30).

63.
In this jurisdiction, it is often dangerous for a judicial fact-finder to decide that he or she can deploy a "short cut", so as to avoid the exercise inherent in Article 8(2) of deciding whether removal of an individual would be a disproportionate interference with the Article 8 rights of the latter and/or some other person or persons. Such is the case here. Judge Kainth fell into legal error at paragraphs 28 to 30 of his decision.

64.
In order to understand why this is so, it is necessary to return to section 3(5) of the 1971 Act. As we have seen, this provides that a person who is not a British citizen is liable to deportation if (in our case) the Secretary of State deems his deportation to be conducive to the public good. In her decision of 19 September 2018, that is precisely what the Secretary of State decided. Having described the claimant's conviction for possession of a knife and his three previous convictions for four offences between December 2016 and July 2017, the Secretary of State said: "as result of your criminality the

Secretary of State deems your deportation to be conducive to the public good and as such you are liable to deportation under section 3(5)(a) …".

65.
It will be observed that, in reaching that conclusion, the Secretary of State did not purport to categorise the claimant as someone who had committed an offence that caused serious harm. Even if she had done so, however, the Secretary of State's decision would, in any event, only be susceptible of challenge on "Wednesbury" grounds.

66.
The significance of the Secretary of State concluding that a person's deportation is conducive to the public good was highlighted by the Asylum and Immigration Tribunal in EO (Deportation appeals: scope and process) Turkey [2007] UKAIT 00062. At paragraph 31, the AIT said the following:-

"Contrary to what might be supposed, it is clear throughout that the liability to deportation does not arise from an individual's misconduct. It arises from the Secretary of State taking a view: a person is liable to deportation under s3(5)(a) if the Secretary of State deems his deportation to be conducive to the public good. In cases of this sort, therefore, the first stage is the process by which the Secretary of State decides that a person's deportation is conducive to the public good. It is that decision of the Secretary of State which renders the individual liable to deportation."

67.
Since EO was decided, the UK Borders Act 2007 provides for "automatic deportation" in the case of a person who is a "foreign criminal", as defined in section 32(1) to (3). Section 32(4) provides that for the purpose of section 3(5)(a) of the 1971 Act, the deportation of a foreign criminal is conducive to the public good. In such a case, therefore, the Secretary of State is not required to reach her own decision on that matter in a particular case. Furthermore, section 32(5) provides that the Secretary of State must make a deportation order in respect of a foreign criminal, subject to the exceptions in section 33. None of this, however, impacts upon the Secretary of State's continuing ability to deem a person's deportation to be conducive to the public good, thereby making that person liable to deportation.

68.
The distinction between the Secretary of State's power to deem a person's deportation to be conducive to the public good, because the Secretary of State considers that their offending has caused serious harm or that they are a persistent offender, and the task of the First-tier Tribunal in determining an appeal against the Secretary of State's decision to refuse a human rights claim by a person liable to deportation, is evident from SC (Zimbabwe) . As set out in paragraph 29 above, in paragraph 26 of his judgment in that case, McCombe LJ rejected the submission of Counsel for the Secretary of State that:

"s.117D(2)(c) requires a court or tribunal, in applying that provision to attribute "significant weight" to **the Secretary of State's anterior view that paragraph 398(c) of the Rules has been satisfied for the purposes of her own decision to make a deportation order in the first place** " (our emphasis).

There is no suggestion there or, indeed, elsewhere in the Court of Appeal authorities mentioned above, that a finding by the First-tier Tribunal, in a human rights appeal, that an individual is not a "foreign criminal" for the purposes of Part 5A of the 2002 Act means the Secretary of State's "anterior" decision under section 3(5)(a) and section 5 of the 1971 Act must, without more, be treated as unlawful.

69.
The reason for that is plain. Section 117A of the 2002 Act delineates the scope or application of Part 5A. Subsection (1) explains that Part 5A applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches Article 8 and would as a result be unlawful. In an appeal under section 82(1)(b), the decision in question is the refusal by the Secretary of State of a human rights claim; that is to say, the refusal of a claim, defined by section 113(1), that removal from the United Kingdom or a requirement to leave it would be unlawful under section 6 of the 1998 Act. The First-tier Tribunal is, therefore, not deciding an appeal against the decision to make a deportation order and/or the decision that removal of the individual is, in the Secretary of State's view, conducive to the public good. It is concerned only with whether removal etc in consequence of the refusal of the human rights claim is contrary to section 6 of the Human Rights Act 1998. If Article 8(1) is engaged, the answer to that question requires a finding on whether removal etc would be a disproportionate interference with Article 8 rights.

70.
As was established by the House of Lords in Huang v Secretary of State for the Home Department [2007] UKHL 11, on an appeal of this kind, the First-tier Tribunal must itself strike the proportionality balance, rather than leaving that matter to the Secretary of State, subject only to a Wednesbury challenge. Part 5A is intended to guide the First-tier Tribunal in that exercise. The fact that, in doing so, the First-tier Tribunal must decide for itself whether the individual is a foreign criminal within the meaning of section 117D(2) will, of course, inform the Tribunal's conclusion on whether the refusal of the human rights claim is, or is not, unlawful and, accordingly, whether the appeal should be allowed or dismissed. There is, however, nothing in Part 5A that requires or permits the First-tier Tribunal to extend that exercise to the anterior deportation decisions with which we are concerned.

71.
At paragraph 28 of his decision, Judge Kainth purported to rely upon a decision of the Upper Tribunal that is, in fact, called Charles (human rights appeal – scope) [2018] UKUT 89 (IAC). That decision, however, underscored the point that a human rights appeal can be determined only through the provisions of the ECHR; usually Article 8. In Charles , the Upper Tribunal found that, because of the date on which the claimant entered the United Kingdom, the claimant was exempt from deportation by reason of section 7 of the 1971 Act. Since deportation was the means by which the Secretary of State proposed to remove the claimant, the fact that she had no legal power to do so was relevant in deciding whether removal would be a disproportionate interference with Article 8 rights.

72.
By the same token, in the present case, the Secretary of State's decisions that the claimant's deportation would be conducive to the public good and that a deportation order should be made in respect of him, would have to be unlawful on public law grounds before that anterior aspect of the decision-making process could inform the conclusion to be reached by the First-tier Tribunal in the human rights appeal. To reiterate, such unlawfulness is not established by the judge's conclusion for the purposes of Part 5A of the 2002 Act that the individual is not a "foreign criminal" within the meaning of section 117D(2).

73.
Ms Childs submitted that, even if Judge Kainth had fallen into error at paragraphs 28 to 30 of his decision, that error was not material. Had the judge gone on to make an Article 8 proportionality assessment, Ms Childs submitted it was inevitable that the assessment would have led to the allowing of the claimant's appeal.

74.
We are unable to agree. The fact that, on the finding of the judge, section 117C would not apply does not mean that the claimant would be bound to succeed. Paragraph 396 of the Immigration Rules says:-

“Where a person is liable to deportation the presumption shall be that the public interest requires deportation.”

75.
It is, therefore, for the claimant to rebut that presumption. In order to do so, a finding is needed on the effect of deportation, not only on the claimant but also on members of his family in the United Kingdom. Judge Kainth made no findings on these issues. He also made no findings on the considerations set out in section 117B. In that regard, we observe that section 117B(6) cannot assist the claimant, since he is a person who is liable to deportation.

76.
Accordingly, we find that there is an error of law in Judge Kainth’s decision, such that that decision should be set aside, save for the finding that the claimant’s offence of having a knife/bladed article in a public place did not cause serious harm within the meaning of Part 5A and that the claimant is, accordingly, not to be treated as a foreign criminal for the purposes of that Part. For the reasons we have given, the contention that the claimant is a persistent offender is not available to the Secretary of State, as an alternative means of invoking section 117C.

77.
In view of the nature and extent of the fact-finding that will be required in order to re-decide the matter, we have concluded that the appeal should be remitted to the First-tier Tribunal. Since Judge Kainth has not undertaken the task of deciding where the proportionality balance should lie; and given the nature of the error of law which has caused us to set aside his decision, we conclude that it is appropriate to remit the case to Judge Kainth. The parties will need to adduce evidence as to the up-to-date position, as it bears on the Article 8 issue.

I. DECISION

The Secretary of State’s appeal is allowed. The decision of the First-tier Tribunal is set aside, subject to what is said in paragraph 76 above. The case is remitted to Judge Kainth in the First-tier Tribunal for its reconsideration, on that basis. If it is not reasonably practicable for Judge Kainth to hear the case, another First-tier Tribunal judge may do so, on the same basis.

No anonymity direction is made.

Signed Mr Justice Lane Date: 19 November 2020

The Hon. Mr Justice Lane

President of the Upper Tribunal

Immigration and Asylum Chamber