Judicial Review: The Review Of The Cases Of Jasmine And Farhad

The following report will review the cases of Jasmine and Farhad to determine how successful a Judicial Review or Appeal would be. First it will look to see whether either claimant meet the pre-action protocol for Judicial Review. This involves ensuring the claim has been bought within the specific time frame, the defendant is a public body and they have sufficient standing to make a claim; The senior Courts Act 1981 s31(3) [2] states that leave from the high court will only be granted if the claimant can show they have sufficient standing. The time frame as specified in the Civil procedure rules [3] 54.5 (1) is three months, however, according to the Human Rights Act 1998 [4] s.6 (1) it up to one year if there has been a breach of the European Convention of Human Rights ECHR [5]. The report will summarise the grounds for Judicial Review and will attempt to show whether the recent departure of the European Union would have any effect on the Judiciary Review, will see if either Jasmine or Farhad have the right to appeal, and finally it will determine whether Jasmine or Farhad will be successful in their claim. [2: Senior Courts Act 1982 s31(3)] [3: The Civil Procedure Rules. Rule 54.5 (1)] [4: Human Rights Act 1996 s.6(1)] [5: European Convention of Human Rights]

Judiciary review allows for the checks and balances in the separation of powers; allowing the judiciary to supervise the legislative and executive branches when they exceed their authority. It is the process that brings the actions of the executor and legislator under review by the judiciary. A court that has the authority for Judicial review can invalidate laws, acts and government actions that are incompatible with a higher authority.

An application for judicial review is made to the high court. It is then for the court to determine whether a public body, as defined the Human Rights Act 1998 [6], has acted ultra vires or beyond its powers [7]. Before the Judicial Review can take place, the claimant would need to apply for leave from the High court as stated in the Senior Courts Acts 1981 s.31(3) [8]. [6: Human Rights Act] [7: Jo Anne Boylan-Kemp, English Legal System (4t Edition, Sweet & Maxwell)] [8: Senior Courts Act 1981 s.31 (3)]

Judicial review is a process where the judge reviews the lawfulness of the decision made by a public body, it is one of the principal means that enforces the rule of law, enabling people to question the actions of public authorities on the grounds of them misunderstanding, exceeding or abusing their powers. It enables people to protect their rights under the Human Rights Act 1998 and the European Convention of Human Rights.

Lord Clyde [9] stated that ‘Judicial Review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case’ meaning that Judicial Review only allows the way in which a decision was made to be challenged, it is only concerned with whether the correct laws and procedures were followed and not the conclusion of the case. [9: Reid v Secretary of State for Scotland (1999)]

Jasmine, a naturalized Citizen with two children, was detained and charged for Glorying Acts of Terrorism. She called for a ‘Jihad’ in a demonstration to her partners incarceration, initially held

for 28 days, she was sentenced to 12 months imprisonment. On her release, she was served an order of deportation from the Secretary of State. Farhad, a Somalian asylum married to Jasmine is currently serving a 4-year sentence for armed robbery. The Secretary of State are taking steps for deportation. This report will be looking briefly at Jasmine right to appeal the order for deportation but will focus on the Judiciary Review processes which allows the High Courts to examine decisions made by public bodies on points of law [10]. It will also determine whether Farhad is able to prevent a deportation order. [10: Colin Faragher, Concentrate Public Law (6th Edition, Oxford)]

The actions and decisions of public bodies can be challenged on the following grounds, illegality, irrationality and proportionality and unfairness. It can also be challenged if rights under the ECHR have been breached. Although, it would need to be determined whether the ECHR would still be relevant in domestic law since the UK left the European Union. According to the European Union (withdrawal) Act 2018 [11] the charter is no longer part of domestic law; however, this could be argued that it would conflict with the Human Rights Act (HRA) 1998 [12]. The HRA was created to encompass the ECHR into UK Law, which had to be created due to Parliament being Sovereign in UK law. [11: European Union (withdrawal) Act 2018] [12: Human Rights Act 1998]

Lord Diplock [13] said ‘The decision-maker must correctly understand the law that regulates the decision-making powers and must give effect to it’ [13: Andrew Le Sueur, Maurice Sunkin, Jo Eric Murkens, Public Law (4th Edition, Oxford)]

Section 32(5) [14] of the UK Borders Act 2007 states that unless certain circumstances apply, the home secretary must make a deportation order against a foreign criminal; defined as a person who is convicted of more than 12 months imprisonment. Although Jasmine received a 12-month sentence should argue that as a naturalized citizen she does not meet these criteria of ‘foreign criminal’, under section 32(1)(a) [15] a foreign criminal is defined as a person who does not have citizenship. [14: UK Borders Act 2007 s.32(5)] [15: UK Borders Act 2007 s.32(1)(a)]

However, it could be argued against Jasmine that Nationality Act 1982 s.40(2) [16] states that the secretary of State can order and deprive a person of citizenship states if they are satisfied it would be beneficial to the public good. Section 40(5) [17] states that before the Secretary of State is able to make this order, they must give the person, Jasmine, written notice specifying they are planning to make an order, the reasons for the order and the person’ right to appeal under section 40A(1) [18] or under the Special Immigration Appeals Commissions Act 1997 section 2B [19] if they have not entitlement to appeal. It would need to be clarified if all of the correct procedures were followed, whether the correct notice was sent to Jasmine informing her of the Secretary of State’s decision, as the brief states that she was served deportation papers on her release from prison. however, in the case for Farhad, he already knows that the secretary of state is taking steps to deport him, so it can be assumed that he has had the correct notification. This information could be used to form an appeal against Jasmines citizenship being revoked. [16: Nationality Act 1981 s.40 (2)] [17: Nationality Act 1981 s40 (5)] [18: Nationality Act 1981 s.40A(1)] [19: Special Immigration Appeals Commissions Act 1997 s.2B]

Jasmine, as a naturalised citizen, who is being deprived of her citizenship, could use her right to appeal to the First Tier Tribunal against the Home Secretary’s decision [20]. Although the

success of the appeal would depend on multiple factors, many of those mentioned above and also whether depriving her citizenship would leave her stateless, as case law demonstrates that the Secretary of State is unable to leave a person stateless, as shown in the case of Al-Jedda v Secretary of State for the Home Department [21]. [20: Terry McGuiness and Melanie Gower, 'Deprivation of Citizenship and Withdrawal of passport facilities'(House Of Commons,2017)] [21: Al-Jedda v Secretary of State for the Home Department]

Section 15 of the Immigration Act 1972 [22] gives the home Secretary the powers to deport any foreign national whose removal from the UK would be conductive to the public good. However, Lord Slynn [23] stated in Secretary of State for the Home Department v Renham (2001) that there is 'no definition or limitation of what can be conductive to the public good', therefore is only at the discretion of the Secretary of State. This information could be used during the Judiciary Review as there has been no clarification of how the removal of wither Jasmine or Farhad would benefit the public. [22: Immigration Act 1972 s.15] [23: Secretary of State for the Home Department v Renham (2001) UKHL 47 para 8]

Jasmine was charged for glorying Terrorism, however article 10 [24] of the ECHR provides the right to free speech. Freedom of speech is also protected under Article 19 of the International Covenant on Civil and Political Rights (ICCPR) [25]. It could be argued that Jasmine should not have been charged with glorifying acts of terrorism and to do so breaches these rights. The Human Rights Committee issued guidance stating that parties should ensure that counter-terrorism measures are compatible with paragraph 3 of the ICCPR, which states 'that offences such as glorifying praising or justifying terrorism should be clearly defined to ensure it does not lead to an unnecessary or disproportionate interference with freedom of expression'. Jasmine called for a Jihad, the literal meaning of 'Jihad' is struggle or effort [26], therefore it could be argued that she was not inciting terrorism as but rather she was publicly announcing her own struggle at that point in time. [24: European Convention of the Human Rights Article 10] [25: International Covenant on Civil and Political Rights Article 19] [26: BBC, 'Religion: Jihad' (BBC, 03/08/2009) 17/02/2020]

Lord Diplock stated that a 'decision would be irrational if it were so outrageous in its define of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided would have arrived to it' [27] [27: Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374)]

In the case of Pham v Secretary of State for the Home Department [28] it was argued that by depriving Pham of his citizenship was also depriving him of his he EU citizenship, the courts are compelled to have due regard to EU law when reviewing the decision. Pham argued that the deprivation of EU citizenship was unlawful under EU Law. Lord Mance stated that he saw no difference between EU proportionality and domestic reasonableness 'Removal of citizenship under the power provided by section 40(2) of nationality Act 1981 is, on any view, a radical step, particularly if the person affected has little real attachment to the country'. Jasmine would be able to argue that the removal of her citizenship could violate her right also, even though the UK has left the European Union, EU Law is still relevant in the UK until the end of the transitional period [29] which will last until 31st December 2020 at least. [28: Pham v Secretary of State for the Home Department [2015] UKSC 19.] [29: European Commission,'Questions and Answers on the United Kingdom's withdrawal from the European Union on 31 January 2020'(ec.europa.eu,31/01/2020)https://ec.europa.ue/commission/presscorner/detail/en/qanda_20_104> 18/02/2020]

Jasmine is being stripped of her citizenship and being deported to Somalia. She has two children, who would either be left in the UK without their parents or would be returning to Somalia with her. It would not be ‘reasonable’ to expect her children to leave the UK as they are both citizens. Under Article 8 [30] of the ECHR, the parents should also be given leave to remain if it can be shown that they have a genuine and substantial parental relationship with the children. However, because of the criminal charges that both parents now have it would also have to be shown that the effect of the parents’ removal from the UK would be unduly harsh on the children. However in the case of KO (Nigeria)v Secretary of State for the Home Department [2018] [31] the supreme court held that the misconduct of parents, whether it be criminal or immigration, should not be used to form the assessment of whether a child is removed from the UK, as a result of this it should also not form part of the assessment under Article 8 which requires a parent remain in the UK with the child. [30: European Convention of Human Rights Article 8] [31: KO (Nigeria)v Secretary of State for the Home Department [2018] UKSC 53]

Wednesbury(1948) [32], which states that if it is so unreasonable that no reasonable person acting reasonably could have made it, established a high threshold for reviewing the actions of public bodies, which was further reinforced by Lord Diplock in CCSU (1984) [33] when he formulated the rationality test, which stretched the traditional Wednesbury test to pubic authority decisions or actions. By 2000 the courts recognised the concept of the sliding scale of rational review depending in the same gravity of the same case. at the same time the human rights act 1998 required judges to apply a test of proportionality, derived from the ECHR. [32: Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 KB 223] [33: Council of Civil Service Unions v Minister for the Civil Service [1984] UKHL 9,]

In conclusion, both Jasmine and Farhad can demonstrate that they both have the legal right to file for their cases to be heard under Judicial Review. If Jasmine can demonstrate that she was not given the correct notice regarding the removal of her citizenship, then she could also file for an appeal.

As Jasmine is naturalised citizen it would be more likely that she would be successful during Judicial review as she does not meet the definition defined ender UK Borders Act 2007 s.32(1)(a) of a foreign criminal.

However due to the length of Farhad’s incarceration and due to him not being a citizen it is more likely he would not be successful if he received a deportation order, Although he could state that he has the right to a family life under Article 8, however due to the time he has served in prison it could be hard to prove a sustainable relationship with the children. Recent case law could also be used against both Jasmine and Farhad as it has been determined by the supreme courts that the criminal activity of the parents should not be used to determine whether a child is removed from the UK, as a result it should also not form part of the assessment as to whether article 8 requires that parent to remain in the UK with the child.

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