

## ADMINISTRATIVE SILENCE AND UK PUBLIC LAW

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***Abstract:** This paper tells an increasingly familiar tale about UK public law: that, while UK public law often appears to approach things very differently, it faces essentially the same challenges as other systems and frequently – though not always – arrives at the same endpoints.<sup>1</sup> The tale could be told about many aspects of public law<sup>2</sup>, but administrative silence – here taken to correspond with the administration’s delay, failure to act, give reasons, etc – provides a particularly strong example. For instance, while many other legal systems have developed principles and practices to address the problem of “administrative silence”, UK public law doesn’t even use the term.<sup>3</sup> This may, at a superficial level, be taken to mean that the difficulties in administrative culture that cause silence – inefficiency, misfeasance, etc – are absent in the UK. However, the reality is very different indeed, and there are many statutory mechanisms and judge-made doctrines in the UK that seek to address the consequences that can follow from the administration’s inaction and failure to act. The language and normative bases for redress may therefore be different; but the mischief and corresponding challenges for public law are undoubtedly similar.*

*The paper begins by examining more closely the rationale for redressing administrative silence, and by linking that rationale to some key precepts of UK public law. It then considers the relative significance of two statutory schemes that address silence, namely, provision for the Parliamentary Commissioner for Administration (the Ombudsman), and the default control mechanisms that underlie planning legislation. The paper next surveys the protection offered to the individual by judicial review proceedings, focusing in particular on remedies and a number of general principles of law that cluster around notions of transparency, legality, and fairness.<sup>4</sup> These principles, which can raise difficult questions about the separation of powers, are sourced in the common law, although they have been developed with part reference to the general principles of European Union (EU) law and the European Convention on Human Rights (ECHR). The paper thus includes a final section that analyses more generally the significance of European influences on the domestic approach to administrative silence, before concluding with some evaluative comments on the existing statutory and judicial schemes.*

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<sup>1</sup> For a past example of differences on the question of the appropriate intensity of judicial review of administrative decisions see *R v Ministry of Defence, ex p Smith* [1995] 4 All ER 427 and *Smith and Grady v UK* [2000] 29 EHRR 493. But see now also *R v Secretary of State for the Home Department, ex p Daly* [2001] 3 All ER 433, accepting the *Smith and Grady* standard.

<sup>2</sup> See, e.g., BS Markesinis, J-B Auby, D Coester-Waltjen and SF Deakin, *Tortious Liability of Statutory Bodies* (Hart Publishing, Oxford, 1999).

<sup>3</sup> A lexis search brought forward only one UK case in which the term “silence of the administration” was used, namely, *La Banque Jacques Cartier v La Banque D’Pargne de la cit et du District de Montreal* [1887] 13 App Cas 111. But note that the term “UK case” is apt to mislead, as the case in fact originated in Canada and was heard on appeal by the Privy Council.

<sup>4</sup> M Fordham, ‘The Judge Over Your Shoulder: New Principles of Governmental Accountability’ [2004] *Judicial Review* 122.

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### ***Administrative silence in the UK: some comments about context***

Doctrinal approaches to administrative silence will often be underpinned by assumptions about whether the wider public interest is better served by prioritising the interests of the administration or those of the individual.<sup>5</sup> Administrative law can, for example, be viewed from a perspective that emphasises the need for the administration to be relatively unconstrained by external demands and to be free to make and unmake policies, subject only to overarching principles of legality and reasonableness.<sup>6</sup> Such approaches typically posit that the wider interest is better served by an efficient administration that takes decisions in a deliberate and measured fashion, something that, in terms of administrative silence, might be expected to lead to prior assumptions that silence will have a negative, rather than positive, form. Negative silence can for these purposes be taken to mean that, where an application is made to the administration and the administration does not reply/act on the request, the silence entails that the application has been rejected. By preferring such an outcome, an “administration centric” approach to silence would thus safeguard the administration’s primary control over activities and allow its policies to remain unaffected in the first instance by its own inactivity. Formal emphasis on the need for the administration expressly to authorise an individual’s activity would then also belie findings that administrative acquiescence in the face of activity does not prevent the administration from subsequently reasserting its powers where it had no original power to sanction the conduct in question.<sup>7</sup>

Problematic with such points of emphasis, however, is the fact that burdens in the public interest then tend to befall the individual. This can give rise to difficulties in respect of not only compliance with the ECHR<sup>8</sup>; it can also sit ill-at ease with other normative and conceptual reference points. Hence a competing view of administrative law might emphasise that the wider public interest is better served when individuals can plan their lives with a heightened degree of certainty and absent the threat of arbitrary changes of policy and decisions by public authorities.<sup>9</sup> While this “individual centric” approach does then not mean that the interests of the individual will always or immediately prevail, it does mean that any administrative decision that changes significantly the legal position of an individual requires a much closer justification.<sup>10</sup> This paradigm would also suggest that individuals have an implied right to a decision within a reasonable time; and, moreover,

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<sup>5</sup> On some models of administrative law see C Harlow and R Rawlings, *Law and Administration* (Butterworths, London, 2<sup>nd</sup> ed, 1997), chpts 1-5 and P Craig, *Administrative Law* (Sweet & Maxwell, London, 5<sup>th</sup> ed, 2003), chpt 1.

<sup>6</sup> See *R v Home Secretary, ex parte Hargreaves* [1997] 1 All ER 397. But see also *R v North and East Devon Health Authority, ex parte Coughlan* [2000] 2 WLR 622, as now read in the light of *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA 1363.

<sup>7</sup> *Cambridgeshire & Isle of Ely CC v Rust* [1972] 2 QB 426. But note the flip-side position, i.e. where an invalid administrative order has been made to an individual, the individual is not prevented from subsequently challenging its validity, even though he may have acquiesced in its face: *Swallow and Pearson v Middlesex CC* [1953] 1 WLR 422 (cf. *Hildenborough Village Preservation Association v Secretary of State for the Environment* [1978] JPL 708).

<sup>8</sup> *Dennis v Ministry of Defence* [2003] EWHC 793. But see now also *Marcic v Thames Water Utility* [2004] 1 All ER 135.

<sup>9</sup> S Schøenberg, *Legitimate Expectations in Administrative Law* (Oxford University Press, 2000), chpt 1.

<sup>10</sup> *R v North and East Devon Health Authority, ex parte Coughlan* [2000] 2 WLR 622 and *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA 1363.

that unreasonable delay in responding to a request would correspond with a positive silence that favours the individual's application.<sup>11</sup>

Of course, most developed legal systems will incorporate elements of both the administration and individual centric approaches, and this is certainly true of the UK. The Parliamentary Commissioner for Administration, for example, will be seen to sit at a mid-point between the two, as the existing statutory structures that facilitate the investigation of maladministration offer only limited formal remedies, focusing instead on voluntary administrative action in the face of the Commissioner's findings. And a much more openly administration centric approach can then be found in planning statutes that recognise negative silence in the event that the planning authorities do not determine an application within a prescribed timeframe.<sup>12</sup> Such silence activates a statutory appeal procedure, which offers the individual the chance to challenge the "decision" and, where successful, to have their application accepted. But whatever the option presented by an appeal, the central point remains the fact of an immediate administrative control of planning applications, something that reflects the assumed public interest in the retention of strong controls on the development of private property.<sup>13</sup>

Silence in the UK may, in the absence of a statutory remedy, then also be challenged by way of judicial review, and judicial decisions here have, in some respects at least, been to the fore of elaborating individual centric understandings.<sup>14</sup> The key for the individual of course lies ultimately in the remedies that are available on review, but it is the general principles of law used in substantive argument – which thereby govern access to the remedies – that have underpinned a heightened emphasis on the individual's interests. UK courts have, in short, increasingly referred to "root concepts" of "fairness", "abuse of power", "good administration", and the "rule of law"<sup>15</sup>, and these have coalesced with European standards to found the development of related principles of substantive legitimate expectations, the duty to give reasons, and proportionality.<sup>16</sup> Such principles have signified an important shift in some of the normative assumptions of UK public law, although corresponding concerns about the changing judicial role have also led to the grafting-on of doctrines that have safeguarded traditional separation of powers values.<sup>17</sup> The result is a complex body of case law that seeks to protect the individual from, among other things, administrative delay while recognising that there remain equally important and desirable limits to judicial intervention.

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<sup>11</sup> For elaboration of the first, and the beginnings of the second, of these points in the UK see *R v Home Secretary, ex p Phansopkar* [1976] QB 606, considered below.

<sup>12</sup> E.g., Article 33 of the Planning (Northern Ireland) Order 1991, considered below.

<sup>13</sup> But see, e.g., M Cunliffe, 'Planning Obligations – Where are we Now?' (2001) 29 *Journal of Planning and Environmental Law* 31.

<sup>14</sup> See generally C Forsyth (ed), *Judicial Review and the Constitution* (Hart Publishing, Oxford, 2000).

<sup>15</sup> See, e.g. *R v Home Secretary, ex p Moon* (1996) 8 Admin LR 477 (fairness); *R v Inland Revenue Commissioners, ex p Unilever* [1996] STC 681 (abuse of power); *R v Dairy Produce Quota Tribunal for England and Wales, ex parte Caswell and another* [1989] 1 WLR 1089 (good administration); and *R (Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604 (rule of law). The term "root concept" is borrowed from *R v Department of Education and Employment, ex p Begbie* [2000] 1 WLR 1115 (Laws LJ).

<sup>16</sup> On substantive legitimate expectations see the progression from *R v Secretary of State for Transport, ex parte Richmond upon Thames LBC* [1994] 1 WLR 74 and *R v Ministry of Agriculture, Fisheries and Food, ex parte Hamble (Off-shore) Fisheries Limited* [1995] 2 All ER 714 through *R v Secretary of State for the Home Department, ex parte Hargreaves* [1997] 1 All ER 397, *R v North and East Devon Health Authority, ex parte Coughlan* [2000] 2 WLR 622 and *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA 1363. On the duty to give reasons see, e.g., *R (Wooder) v Feggetter and Another* [2002] 3 WLR 591; and on proportionality see *R v Secretary of State for the Home Department, ex p Daly* [2001] 3 All ER 433. On the influence of EU law and the ECHR on these principles see G Anthony, *UK Public Law and European Law: The Dynamics of Legal Integration* (Hart Publishing, Oxford, 2002).

<sup>17</sup> For criticism of developments in respect of legitimate expectations see M Elliott, 'Coughlan: Substantive Protection of Legitimate Expectations Revisited' (2000) 5 *Judicial Review* 27. And for development of a separation of powers doctrine see the "discretionary area of judgment" doctrine used by the courts in human rights cases that raise issues of proportionality, e.g., *R v DPP, ex p Kebeline and others* [2000] 2 AC 326, 379. For criticism of the courts use of the doctrine see RA Edwards, 'Judicial Deference under the Human Rights Act' (2002) 65 *Modern Law Review* 859.

### ***The Parliamentary Commissioner for Administration***

The Parliamentary Commissioner for Administration – created under the Parliamentary Commissioner Act 1967 – is empowered to investigate claims of maladministration in respect of more than 250 central government departments and related bodies in the UK.<sup>18</sup> Complaints, which are channelled through Members of Parliament, can be made by “any member of the public who claims to have suffered injustice in consequence of maladministration”<sup>19</sup>, with members of the public defined as including corporations.<sup>20</sup> Maladministration in turn is not defined in the legislation, although it is generally taken to embrace “bias, neglect, inattention, delay, incompetence, ineptitude, arbitrariness and so on”<sup>21</sup> (many of which shortcomings may be the cause of silence). In investigating complaints the Commissioner enjoys significant powers of enquiry, for example accessing files and personnel<sup>22</sup>, although there are important limits to the office’s powers too. Thus in addition to the fact of some policy areas being excluded from the office’s remit<sup>23</sup>, the Commissioner must observe the problematic line that divides maladministration from “the unmeritorious” (which the Commissioner may not make findings upon)<sup>24</sup>, as well as the rule that investigations are not to be made where the complainant has or had a means of legal redress in the courts or tribunals.<sup>25</sup> This latter rule has inevitably given rise to litigation, and there have been instances where the Commissioner has been held to have acted *ultra vires* by proceeding with an investigation when there was an alternative means of legal redress.<sup>26</sup> However, the limiting effect of this rule must also be seen in the light of the Commissioner’s discretion to investigate a complaint where he/she is satisfied that in the particular circumstances it is not reasonable to expect the remedy or right to be, or to have been, invoked.<sup>27</sup> It is further significant that, whatever the formal legal position, there have been several – and in some instances celebrated – instances of overlap between the Commissioner and the courts.<sup>28</sup>

The principal remedy open to the Commissioner is the publication of a report that recommends that the investigated department take one or several courses of action.<sup>29</sup> The Commissioner does not, as such, have power to force a body to quash a decision, or change its practices and/or pay compensation, although the government department will often act on the recommendation. This thus represents the mid-point mentioned above: the Commissioner is not

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<sup>18</sup> P Leyland and G Anthony, *Textbook on Administrative Law* (Oxford University Press, 5<sup>th</sup> ed 2005), p 144. See s 5(1) of, and Sch 2 to, the Parliamentary Commissioner Act 1967, as amended by the Parliamentary and Health Service Commissioners Act 1987 and, e.g., the Parliamentary Commissioner Order 1999 (SI 1999/277). And note that there exist a number of other Ombudsmen in the UK in respect of specific matters (e.g., Health Service Commissioners, on which see the Health Service Commissioners Act 1993) and also at a number of “constitutional” levels, e.g., local and devolved government. On local government in England and Wales see the Local Government Act 1974. And in the context of devolution in Scotland and Wales see, respectively, s 91 of the Scotland Act 1998 and s 111 of, and Sch 9 to, the Government of Wales Act 1998. On Northern Ireland see the Commissioner for Complaints Act 1969, together with the Office of Assembly Ombudsman (the two offices are held by the same Commissioner).

<sup>19</sup> s 5(1) of the Parliamentary Commissioner Act 1967.

<sup>20</sup> s 6(1) of the Parliamentary Commissioner Act 1967.

<sup>21</sup> The so-called “Crossman catalogue”. On the open-ended nature of the catalogue see *R v Local Commissioner for Administration, ex p Bradford MCC* [1979] QB 287.

<sup>22</sup> See ss 8-9 of the Parliamentary Commissioner Act 1967.

<sup>23</sup> s 5(3) of, and Sch 3 to, the Parliamentary Commissioner Act 1967. The areas include: foreign relations; extradition; the investigation of crime; action taken in relation to contractual and commercial transactions by central government; and action taken in respect of appointments, removals and other personnel matters in relation to the civil service and armed forces.

<sup>24</sup> For judicial consideration of the line see *R v Local Commissioner for Administration, ex p Eastleigh Borough Council* [1988] QB 855.

<sup>25</sup> s 5(2).

<sup>26</sup> See, by analogy, *R v Commissioner for Local Administration, ex p Croydon London Borough Council* [1989] 1 All ER 1033.

<sup>27</sup> s 5(2).

<sup>28</sup> *Congreve v Home Office* [1976] 1 All ER 697, commented upon in Wade and Forsyth, *Administrative Law* (Oxford University Press, 9<sup>th</sup> ed, 2004), pp 94-95.

<sup>29</sup> Reports are published on-line and can be accessed at <http://www.ombudsman.org.uk/>.

empowered to make enforceable findings in respect of the administration (a position that follows from the need to safeguard Ministerial responsibility<sup>30</sup>), but the department will normally act when criticised and offer a remedy. That this is so can be highly significant, particularly where the government offers *ex gratia* payments of compensation. Case law on damages in the public law context has long been highly restrictive in respect of the individual's interests, with the domestic approach sometimes being censured by the European Court of Justice and European Court of Human Rights.<sup>31</sup> But even though European law has since given rise to the prospect of liability for maladministration – the point is returned to below – it remains generally the position that, in the absence of a statutory entitlement to compensation/*ex gratia* schemes<sup>32</sup>, an individual cannot claim for loss suffered in consequence of an *intra vires* act.<sup>33</sup> By being able to recommend the payment of compensation the Commissioner may therefore in effect – and paradoxically – offer a superior “remedy” to that offered by the restrictive jurisprudence of the courts.

### ***Planning law and “negative” silence***

The foremost area in which UK law recognises negative silence is, as indicated, planning law. In Northern Ireland, for example, Article 33 of the Planning (Northern Ireland) Order 1991 – titled *Appeal in Default of Planning Decision* – states: “Where (an application) is made to the Department, then unless within such period as may be specified by a development order, or within such extended period as may be agreed upon in writing between the applicant and the Department, the Department ... gives notice to the applicant of its decision on the application ... Article 32 shall apply in relation to the application ... as if the permission, consent, agreement or approval to which it relates had been refused by the Department.”<sup>34</sup> Article 32, which governs appeals, then requires that appeals be made to the Planning Appeals Commission (PAC) within 6 months of the decision/silence. Once made, the PAC “may allow or dismiss the appeal or may reverse or vary any part of the decision whether the appeal relates to that part thereof or not and may deal with the application as if it had been made to it in the first instance”.

There are two points that might be made about the significance of these appeal structures. The first concerns the extent to which they can prioritise the interests of the administration as a matter of practice. For instance, where there is a formal refusal of planning permission, the administration is under a corresponding statutory duty to give reasons for the refusal<sup>35</sup>, something that enables the appellant to structure their arguments around specific points. Under an Article 33 appeal, however, the appellant will come to the PAC ‘blind’ to the reasons for the assumed refusal, something that in turn has the clear potential to generate imbalance and unfairness. Although each appeal will of course be fact specific, the absence of reasons means that the appellant's ability to identify the failings in their application may depend on nothing more elaborate than a theory of ‘hit’ and ‘miss’. By remaining silent, the administration may therefore apparently allow an application to fail, while subsequently presenting its reasons (if they exist) as objections to the appellant's subsequent and potentially part misguided arguments.

The second point, however, concerns the possibility of the individual circumventing the Articles 32/33 appeal procedure – at least initially – by relying on judicial review proceedings on

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<sup>30</sup> See further Leyland and Anthony, n 18 above, p 136 ff.

<sup>31</sup> See P Craig, *Administrative Law* (Sweet & Maxwell, London, 5<sup>th</sup> ed, 2003) chpt 26.

<sup>32</sup> For an, e.g., of statutory based compensation see s 133 of the Criminal Justice Act 1988 (compensation for miscarriages of justice). And for an e.g. of an *ex gratia* scheme see the Slaughtering Industry (Emergency Aid) Scheme 1996 that was introduced to provide compensation for those in the British beef industry who were affected by the European Commission's ban on the export of British beef during the Mad Cow Disease crisis (Commission Decision 96/239/EC). And for a challenge to the working of the scheme see *R v Ministry of Agriculture, Fisheries and Food, ex parte First City Trading* [1997] 1 CMLR 250.

<sup>33</sup> But see the possibilities presented by *Barrett v Enfield LBC* [2001] 2 AC 550, discussed in T Hickman, ‘The Reasonableness Principle: Reassessing its Place in the Public Sphere’ (2004) 63 *Cambridge Law Journal* 166.

<sup>34</sup> And see in England and Wales s 78 of the Town and Country Planning Act 1990.

<sup>35</sup> As required under Art 13 of the Planning (General Development) Order (Northern Ireland) 1993, SR 1993/278.

the expiry of the 6 months period. Although judicial review is typically used only where the individual does not have an effective alternative remedy<sup>36</sup> (i.e. the individual would ordinarily be expected to rely upon Article 32), there is some authority to suggest that, where the individual has failed to make an appeal within the specified timeframe, judicial review may lie to force the planning authority to make a decision. The leading case on the point is *Bovis Homes (Scotland) Ltd v Inverclyde District Council*.<sup>37</sup> This case arose when the applicant had failed to bring an appeal within the timeframe specified in comparable Scottish legislation, and sought to rely on public law proceedings to compel the planning authority to make a determination.<sup>38</sup> In finding that the applicant could rely on public law proceedings in this way, the Court of Session emphasised that, even though the time limit for bringing an appeal had expired, this did not extinguish the authority's corresponding duty to determine the planning application.<sup>39</sup> The case, in other words, is authority for the proposition that, "if a local planning authority does not issue a decision on the planning application within (the set timeframe), it continues to be under an obligation to issue a decision and it is open to the applicant to go to court at any time thereafter (providing he has not deemed a refusal and appealed to the Secretary of State) to seek to enforce the planning authority's duty to issue a decision".<sup>40</sup>

This statement clearly suggests that, where negative silence activates a blind appeal procedure, it may be better for the individual to await the expiry of the statutory period, before bringing an application for judicial review to compel a decision that could be the subject of a focused appeal under Article 32. Although individuals adopting this approach may encounter judicial concerns about abuse of process<sup>41</sup> – there is also the more general question of whether all courts would take such a pragmatic view of the overlay between statutory appeal requirements and judicial review<sup>42</sup> – the selection of proceedings in this way would allow the individual to avoid the potentially deleterious consequences of the statutory regime. Put shortly, while planning law's emphasis on negative silence is clearly designed to favour the administration, the fact that the individual may seemingly select the more advantageous proceedings would allow the individual to bring to the fore a reasoned decision that might otherwise remain obscured. To the extent that it can survive concerns about abuse of process and the interface between statute law and common law, the *Bovis* principle may thus represent something of a residual check on the protected preferences of the administration.

### ***Judicial review: remedies and principles***

Beyond the context of planning law, judicial review is, of course, much more generally to the fore of the 'administration'/'individual' centric problematic. This, as outlined in the first section above, is largely because of the courts' elaboration of general principles of law that raise separation of powers concerns, although comparable issues can also be seen in relation to the remedies that are available on review. Of the five principal remedies, the most important in the context of administrative silence is the mandatory order (the other remedies, which may be sought in tandem with mandatory orders, are quashing orders, prohibiting orders, injunctions, and declarations;

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<sup>36</sup> For fuller judicial discussion of the point see, e.g., *Re Allan Kirkpatrick's Application* [2003] NIQB 49.

<sup>37</sup> [1982] SLT 473.

<sup>38</sup> The provisions in issue were s 26 of the Town and Country Planning (Scotland) Act 1972 and Art 7(3) of the Town and Country Planning (General Development) (Scotland) Order 1975.

<sup>39</sup> The Court relied heavily on the House of Lords judgment in *London and Clydeside Estates Ltd v Aberdeen District Council* [1979] 3 All ER 876.

<sup>40</sup> *Trusthouse Forte (UK) Ltd v Perth and Kinross District Council* [1990] SLT 737, 740.

<sup>41</sup> See, e.g., *O'Reilly v Mackman* [1983] 2 AC 237 (although note that the specific rule against abuse of process established in *O'Reilly* has since been overtaken by reform: see T Hickman, 'Clark: The Demise of *O'Reilly* Completed?' (2000) 5 *Judicial Review* 178).

<sup>42</sup> See, by analogy, the House of Lords emphasis on statutory remedies in the context of a nuisance action: *Marcic v Thames Water Utility* [2004] 1 All ER 135.

damages are typically not available as a public law remedy, a point that is returned to below).<sup>43</sup> Mandatory orders lie when a public authority is in dereliction of a public duty and they have the effect of compelling the authority to act in the light of its obligations.<sup>44</sup> While the orders thus offer to the individual a very strong corrective instrument – the courts have emphasised the need to use the remedy to constrain government<sup>45</sup> – obtaining an order is not always without difficulty. The courts have, instead, sometimes been reluctant to grant an order – the remedies are discretionary<sup>46</sup> – because of concerns about the need to safeguard the administration from undue burdens. This has been notably true in cases where the courts have considered that the authority has a wide discretion and only limited resources, for example, where duties fringe upon the provision of wider public services.<sup>47</sup> The remedy may therefore be far-reaching and of powerful effect when granted; but it is one that is sometimes refused because of concerns that the judicial enforcement of obligations could become defeating of the very purpose of government itself.<sup>48</sup>

It is at the level of general principles of law, however, that the issue of how best to balance the interests of the individual and the administration has been most pronounced in recent years. The courts have, on the basis of both the common law and European law, developed a number of general principles of law that cluster around overarching themes of transparency, legality, and fairness.<sup>49</sup> These principles and themes are broadly taken to have increased the standards of protection for the individual, particularly when the individual's fundamental rights have been in issue.<sup>50</sup> While the principles and themes have, as such, informed developments much more widely in UK administrative law, three lines of case law are of particular relevance to administrative silence. These concern, first, the requirement that public authorities communicate decisions to individuals; second, the rule that authorities avoid unreasonable delay when discharging obligations; and third, the common law requirement that authorities give reasons for decisions.

#### *The communication of decisions*

The leading case on the requirement that decision-makers communicate decisions to the individual – more specifically those decisions that have negative implications for the individual – is *R (Anufrijeva) v Secretary of State for the Home Department*.<sup>51</sup> In this case, the House of Lords held that the rule of law and related common law fundamental rights guarantees entail that, where an administrative decision is adverse to an individual, it has to be communicated to him/her before the decision can have the character of a determination with legal effect. The decision at issue in this case concerned refusal of an asylum application, a decision that also meant that the asylum seeker's entitlement to income support ended from the moment of the determination. The Home Office had not, as such, relayed the decision to the applicant and she only discovered that her asylum application had been determined when the social security agency explained why income support payments had ceased. However, the House of Lords, having stated that asylum applications involve determinations about fundamental rights, emphasised that the Home Office was required to inform the applicant of the decision to refuse the application before that decision had force of law:

*“The arguments for the Home Secretary ignore fundamental principles of our law. Notice of a decision is required before it can have the character of a determination with legal effect*

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<sup>43</sup> See further Craig, n 5 above, chpt 22. On the procedural issues that can arise in England and Wales, depending on the particular remedy sought see P Cane, *Administrative Law* (Oxford University Press, 4<sup>th</sup> ed, 2004), chpt 6.

<sup>44</sup> On public duties see A Harding, *Public Duties and Public Law* (Clarendon Press, Oxford, 1989).

<sup>45</sup> See, e.g., *R v Hanley Revising Barrister* [1912] 3 KB 518, 529, Darling J: “Instead of being astute to discover reasons for not applying this great constitutional remedy for error and misgovernment, we think it our duty to be vigilant to apply it in every case to which, by any reasonable construction, it can be made applicable”.

<sup>46</sup> See further T Bingham, ‘Should Public Law Remedies be Discretionary?’ (1991) *Public Law* 64.

<sup>47</sup> E.g., *R v Inner London Education Authority, ex p Ali* (1990) 2 Admin LR 822.

<sup>48</sup> See further J Allison, ‘The Procedural Reason for Judicial Self-restraint’ (1994) *Public Law* 452.

<sup>49</sup> See Fordham, n 4 above.

<sup>50</sup> But for wider and critical perspectives see G Richardson and M Sunkin, ‘Judicial Review: Questions of Impact’ (1996) *Public Law* 79.

<sup>51</sup> [2004] 1 AC 604.

*because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice. That is a fundamental and constitutional principle of our legal system.*

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*This view is reinforced by the constitutional principle requiring the rule of law to be observed. That principle too requires that a constitutional state must accord to individuals the right to know of a decision before their rights can be adversely affected. The antithesis of such a state was described by Kafka: a state where the rights of individuals are overridden by hole in the corner decisions or knocks on doors in the early hours. That is not our system. I accept, of course, that there must be exceptions to this approach, notably in the criminal field, e.g., arrests and search warrants, where notification is not possible. But it is difficult to visualise a rational argument which could even arguably justify putting the present case in the exceptional category.”<sup>52</sup>*

#### *Unreasonable delay*

The courts’ approach to the problem of delay in the decision-making process – delay here being taken to amount to temporary silence – is most readily associated with *R v Home Secretary, ex p Phansopkar*.<sup>53</sup> This case arose when two women who were married to British citizens, but who lived in India and Bangladesh, wished to avail of their right of abode in the UK as patrials under the Immigration Act 1971. To do so, they needed to obtain certificates of patriality from the British government representatives in their countries of origin, but delays in queues of people who were not claiming abode at the Embassies led the women to travel to the UK without the certificate. The Home Office thereupon refused to process their claims for certificates in the UK on the grounds that they could be better processed in their countries of origin and that it would be wrong to allow them to “jump” the queues they had been in. However, on an application for judicial review to compel the Home Secretary to process the claims in the UK the applicants succeeded because, as wives of UK citizens, they had a right of abode on production of a certificate, which certificate could not be arbitrarily refused/delayed without good cause. Having thus found that there was no good reason for the Home Office to refuse to process the applications – the result would have been to require the individuals to return to queues of people who were not in the same legal position as the applicants – the Court of Appeal held that the applicants were entitled to apply for a certificate of patriality and to have the application examined fairly and in a reasonable time. To put the point differently, the Court of Appeal was of the opinion that requiring the women to return to their countries of origin to have their claims processed would have amounted to an unreasonable delay in the decision-making process.

Two cautionary points should, however, be made about the significance of *Phansopkar*. The first is that the judgment does not mean that the individual will prevail in every instance of delay. Subsequent case law has emphasised that the ruling will apply more readily when there is a delay affecting fundamental rights (e.g. asylum)<sup>54</sup>, and it follows that the courts will tend to be more

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<sup>52</sup> [2004] 1 AC 604, 621, Lord Steyn, citing, among others, *Raymond v Honey* [1983] 1 AC 1, 10; *R v Secretary of State for the Home Department, ex p Leech* [1994] QB 198, 209; *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, 131. And note also that his Lordship cross-referred to the position under EU law: “In European law the approach is possibly a little more formalistic but the thrust is the same. It has been held to be a ‘fundamental principle in the Community legal order ... that a measure adopted by the public authorities shall not be applicable to those concerned before they have the opportunity to make themselves acquainted with it’: *Firma A Racke v Hauptzollamt Mainz* (Case 98/78) [1979] ECR 69, para 15; *Opel Austria GmbH v Council of European Union* (Case T-115/94)[1997] ECR II-39, para 124; Schwarze, *European Administrative Law* (1992), pp 1416-1420; Council of Europe Publishing, *The Administration and You, A Handbook* (1997) chapter 3, para 49.”

<sup>53</sup> [1976] QB 606.

<sup>54</sup> *R v Secretary of State for the Home Department, ex parte Mersin* [2000] INLR 511.

demanding when absolute rights (right to life; prohibition of torture etc) are in issue.<sup>55</sup> Moreover, where instances of delay do not affect absolute rights, there is related case law that emphasises that the courts will only condemn delay where it is *Wednesbury* unreasonable; that is, where the delay is “so unreasonable that no reasonable authority could have tolerated it”.<sup>56</sup> Although the *Wednesbury* principle has come under increasing strain in recent years as a result of the influence of the European proportionality principle<sup>57</sup>, its essential logic remains that of the need for judicial deference *vis-à-vis* exercises of administrative discretion, particularly when the discretion involves clear questions of resource allocation (when using the proportionality principle the courts therefore sometimes dilute the intensity of review by recognising the decision-maker’s “discretionary area of judgment”<sup>58</sup>). In respect of delay, the corresponding reasoning is that, as delay may be caused by questions of resource allocation within a government department, the courts should be reluctant to look too closely at the workings of a department, as this will be a matter for the relevant Minister. A clear example, therefore, of the continuing relevance of concerns about the separation of powers and of the need for comity between the different branches of the State.

The second point concerns remedies. As seen above, the courts are sometimes reluctant to grant a mandatory order where this would add to the pressure already generated by questions of resource allocation. Although the rule is by no means strict – a mandatory order was granted in *Phansopkar* where the principal issue was family life – delay that does not affect absolute rights might provide one example of when a court could be expected to use its discretion to decide not to award the remedy.<sup>59</sup> Consequently, and even though the individual might be able to make out that there has been unreasonable delay on the facts, it may be that the courts would nevertheless forego the more effective remedy in favour of a non-coercive declaration of the respective rights and obligations of the parties.<sup>60</sup>

### *The duty to give reasons*

The emergence of an enhanced duty to give reasons for decisions has in turn been founded upon common law notions of natural justice and fairness – which are inherently flexible and context sensitive<sup>61</sup> – as complemented by general principles of EU law and the ECHR.<sup>62</sup> Duties to give reasons for decisions will, of course, often be sourced in statute<sup>63</sup>, but where a statute is silent on the

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<sup>55</sup> See, in respect of Article 8 ECHR, *R (Mambakasa) v Secretary of State for the Home Department* [2003] EWHC 319.

<sup>56</sup> The words paraphrase Lord Greene MR’s famous *dictum* in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223, 233. And see *R v Secretary of State for the Home Department, ex parte Rofathullah* [1989] QB 219, 233.

<sup>57</sup> But see M Elliott, ‘The Human Rights Act 1998 and the Standard of Substantive Review’ (2001) 60 *Cambridge Law Journal* 301. Compare G Anthony, ‘Interacting Legal Orders and Inter-court Disputes: The ECHR “Beds-Into” UK Public Law’ in G Amato, G Braibant, and E Venizelos (eds), *The Constitutional Revision in Today’s Europe* (Esperia Publications, London, 2002) p 577.

<sup>58</sup> On the origins and nature of the “discretionary area of judgment” see *R v Director of Public Prosecutions, ex p Kebeline and others* [2000] 2 AC 326, 379, Lord Hope. For criticism see RA Edwards, n 17 above and M Hunt, ‘Sovereignty’s Blight: Why Contemporary Public Law Needs the Concept of ‘Due Deference’” in N Bamforth and P Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart Publishing, Oxford, 2003) p 337.

<sup>59</sup> See, by analogy, *R v Inner London Education Authority, ex p Ali* (1990) 2 Admin LR 822.

<sup>60</sup> For an e.g. of a court making a declaration while declining to make a mandatory order, see the Northern Ireland Court of Appeal’s judgment in *Re McKerr’s Application* [2003] NICA 1 (re: the State’s failure to investigate a controversial death in a manner compliant with Article 2 ECHR). But note that the decision to issue a declaration was overturned on appeal to the House of Lords: *In Re McKerr* [2004] 1 WLR 807.

<sup>61</sup> “(T)he so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative, or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework within which it operates.” See *Lloyd v McMahon* [1987] AC 625, 702-3 (Lord Bridge).

<sup>62</sup> For discussion see Sir Patrick Neill, ‘The Duty to Give Reasons: the Openness of Decision-making’ in C Forsyth and I Hare (eds), *The Golden Metwand and the Crooked Cord* (Clarendon Press, Oxford, 1998) p 161.

<sup>63</sup> For recent judicial consideration of the nature and extent of a statutory duty see, e.g., *South Bucks District Council v Porter (No 2)* [2004] 1 WLR 1953.

matter it falls to the common law to fill the gaps. This, historically, was something that the common law tended not to do<sup>64</sup>, as the courts considered that general obligations would create difficulties for the administration by, for instance, requiring the administration to deliver an apparently unanimous decision when the preceding deliberations were characterised by differences of opinion.<sup>65</sup> But, whatever the original justification, the courts increasingly started to emphasise how fairness could demand that reasons be given, with the principal rationale being the need for affected individuals to be able to challenge erroneous decisions.<sup>66</sup> As Leggatt LJ stated in the context of a disciplinary/employment dispute: “(I)t seems obvious that for the same reason of fairness that an applicant is entitled to know the case he has to meet, so should he be entitled to know the reasons for (the decision), so that in the event of error he may be equipped to apply to the court for judicial review”.<sup>67</sup>

Such changes in direction do not however mean that reasons are now to be given for all decisions<sup>68</sup>, and the duty is imposed more readily where the decision in question affects key interests such as personal liberty.<sup>69</sup> In *R v Home Secretary, ex p Doody*<sup>70</sup>, for example, questions were raised about the procedure whereby mandatory life sentence prisoners had their term of imprisonment set by the Home Secretary and reviewed by the Parole Board.<sup>71</sup> The Home Office had, since 1983, pursued a policy under which the Home Secretary would, after consultation with the judiciary, set the penal element of a prisoner’s sentence, thereby simultaneously establishing the date on which the Parole Board would review the prisoner’s sentence. However, the applicant considered that the Home Office had in his case increased the penal element of his sentence as originally recommended by the judiciary, and he argued that he should have been given reasons for the departure. In agreeing that reasons should have been given, the House of Lords held that, where Parliament confers an administrative power, there exists a corresponding presumption that the power will be exercised in a manner that is fair in all the circumstances.<sup>72</sup> Applying this principle to the Home Office procedure governing mandatory life prisoners, the House concluded that the “continuing momentum in administrative law towards openness of decision-making” obliged the Home Secretary to conduct a more transparent procedure:

*“It is not, as I understand it, questioned that the decision of the Home Secretary on the penal element is susceptible to judicial review. To mount an effective attack on the decision, given no more material than the facts of the offence and the length of the penal element, the prisoner has virtually no means of ascertaining whether this is an instance where the decision-making process has gone astray. I think it is important that there should be an effective means of detecting the kind of error which would entitle the court to intervene and*

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<sup>64</sup> On the historical position see, e.g., *Minister of National Revenue v Wrights’ Canadian Ropes Ltd* [1947] AC 109, 123 (Lord Greene MR).

<sup>65</sup> For a judicial survey of the ‘pros’ and ‘cons’ of imposing duties to give reasons see *R v Higher Education Funding Council, ex p Institute of Dental Surgery* [1994] 1 All ER 651, 665 (Sedley J).

<sup>66</sup> See, e.g., *R v Home Secretary, ex p Doody* [1994] 1 AC 531; *R v City of London Corporation, ex p Matson* [1997] 1 WLR 765; *R v Secretary of State for the Home Department, ex p Fayed* [1997] 1 All ER 228; and *R v Ministry of Defence, ex p Murray* [1998] COD 134. On the value of reasons more generally – whether statute or common law based – see A Le Sueur, ‘Legal Duties to Give Reasons’ (1999) 52 *Current Legal Problems* 150.

<sup>67</sup> *R v Civil Service Appeal Board, ex p Cunningham* [1991] 4 All ER 310, 323.

<sup>68</sup> *R v Higher Education Funding Council, ex p Institute of Dental Surgery* [1994] 1 All ER 651.

<sup>69</sup> For a brief survey of case law on when the duty does/does not arise see Wade and Forsyth n 28 above, pp 522-527.

<sup>70</sup> [1994] 1 AC 531.

<sup>71</sup> S 35 of the Criminal Justice Act 1991.

<sup>72</sup> See further, e.g., *R v Secretary of State for the Home Department, ex p Venables and Thompson* [1997] 2 All ER 97. And see also *R (Anderson) v Secretary of State for the Home Department* [2002] 4 All ER 1089, holding that the Secretary of State’s role in the setting of tariffs was incompatible with Article 6 ECHR (and see now Criminal Justice Act 2003, ss 303(b)(i), 332, Sch 37, Pt 8).

*in practice I regard it as necessary for this purpose that the reasoning of the Home Secretary should be disclosed.”*<sup>73</sup>

This emphasis on openness has since been said by some commentators to correspond in part with notions of transparency that underlie reason-giving obligations in EU law and the ECHR<sup>74</sup>, and this is one area in which the common law can increasingly be seen as augmented by European standards. The issue of European influences on silence more generally is returned to below, but the point as relates to reasons can be made with reference to *R (Wooder) v Feggetter and Another*.<sup>75</sup> The question for the court here was whether a mental-health patient who was to be administered a form of treatment to which he objected should be given the reasons for the decision that the treatment should proceed. In finding that reasons should be given, Sedley LJ relied upon the concept of personal autonomy in Article 8 ECHR to emphasise that the patient was entitled to reasons “not as a matter of grace or of practice, but as a matter of right”.<sup>76</sup> In doing so, the judge also held that, while the common law too would have required that reasons be given, the developing common law position nevertheless had a distance to travel before it would provide “a principled **framework of** public decision-making”. A suggestion, perhaps, both that ongoing development of the common law remains imperfect, and that the development could be hastened through an increased fusion with standards found in European law.<sup>77</sup>

### ***European influences on administrative silence***

The more general influence that European law has had on domestic approaches to silence has then followed from the courts’ willingness to integrate domestic and European standards. Integration occurs when the courts adapt domestic practice to accommodate European law in cases where EU law and/or the ECHR is in issue, and also when the courts allow European standards to “spill-over” into domestic cases in which European law is not directly in issue.<sup>78</sup> Spill-over has, as such, long been to the fore of debates about European legal integration<sup>79</sup>, and there have been several celebrated instances of such integration in the UK. EU law, for example, has provided a basis not only for the development of new and existing remedies<sup>80</sup>; it has also raised many questions about the need to develop new general principles of law. This has been notably true of the proportionality principle<sup>81</sup> and, while the courts were initially reluctant to develop the principle on the basis of EU law<sup>82</sup>, the coming into force of the Human Rights Act 1998 – which gives effect to

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<sup>73</sup> [1994] 1 AC 531, 565 (Lord Mustill). And see further, e.g., *R v Home Secretary, ex p Duggan* [1994] 3 All ER 277; *R v Home Secretary, ex p Follen* [1996] COD 169; and *R v Home Secretary, ex p Murphy* [1997] COD 478.

<sup>74</sup> E.g., Sir Patrick Neill n 62 above. In EU law the duty to give reasons is found both in the EC Treaty (Art 253) and in the general principles of law (see Case 222/86, *UNECTEF v Helyens* [1987] ECR 4097). The duty to give reasons in the ECHR typically follows from the need for effective protection of rights (see, e.g., *McKerr v UK* (2002) 34 EHRR 20).

<sup>75</sup> [2002] 3 WLR 591.

<sup>76</sup> [2002] 3 WLR 591, 602.

<sup>77</sup> Cf Brooke LJ’s judgment, which held, with sole reference to the common law, that reasons should be given.

<sup>78</sup> See G Anthony n 16 above; and ‘Community Law and the Development of UK Administrative Law: Delimiting the “Spill-over” Effect’ (1998) 4 *European Public Law* 253.

<sup>79</sup> See, most famously, J Schwarze, *European Administrative Law* (Sweet & Maxwell, London, 1992). But see JWF Allison, ‘Transplantation and Cross-fertilisation’ in J Beatson and T Tridimas (eds), *New Directions in European Public Law* (Hart Publishing, Oxford, 1998) p 169 and P Legrand, ‘European Legal Systems are not Converging’ (1996) 45 *International Comparative and Legal Quarterly* 52.

<sup>80</sup> See, e.g., the progression from *R v Secretary of State for Transport, ex p Factortame (No 2)* [1991] 1 All ER 70 to *M v Home Office* [1993] 3 WLR 433 and *Davidson v Scottish Ministers* [2005] UKHL 74 (availability of interim injunctions against Ministers of the Crown). See also, e.g., *Woolwich Building Society v Inland Revenue Commissioners (No 2)* [1992] 3 WLR 366, relying upon, *inter alia*, Case 199/82, *Amministrazione delle Finanze dello Stato v San Giorgio* [1985] 2 CMLR 658 when developing the law of restitution.

<sup>81</sup> See also the equality principle: see A Lester, ‘Equality and United Kingdom Law: Past, Present and Future’ (2001) *Public Law* 77. And see n 52 above for Lord Steyn’s consideration of EU principle in *Anufrijeva*.

<sup>82</sup> See G de Búrca, ‘Proportionality and *Wednesbury* Unreasonableness: The Influence of European Legal Concepts on UK Law’ (1997) 3 *European Public Law* 561.

most of the ECHR – has served as a catalyst for the principle’s fuller emergence.<sup>83</sup> The ECHR’s emphasis on effectiveness and transparency has likewise prompted a redefining of some other home-grown principles, for example, as govern bias and decision-making.<sup>84</sup>

However, the area of development that perhaps holds the most far-reaching implications is damages liability. UK law has not, as stated above, historically awarded damages as a public law remedy, and individuals have had to establish that a public law illegality is also actionable in private law (for instance, for negligence, breach of statutory duty, or misfeasance in public office).<sup>85</sup> While the historical position is by no means now obsolete, European law has impacted upon it in a number of ways. For example, one point of impact has been to cause the courts to reassess the restrictive basis of much of the domestic approach to liability. UK courts had, in short, adopted a narrow approach to the scope of private law actions, emphasising that the wider public interest was better served when additional pressures, in the form of the threat of ready damages claims, were not placed upon finite public resources.<sup>86</sup> But this administration-centric justification was to prove problematic both in terms of how it might accommodate EU law’s State liability doctrine<sup>87</sup> and in terms of providing effective relief in the face of violations of the ECHR.<sup>88</sup> The result was the opening-up of a debate about how far the elements of the EU State liability doctrine might in turn be used to inform a recasting of domestic law’s rules on liability<sup>89</sup>, together with a modification of judicial approach in concrete cases of a kind that had previously given rise to condemnation in Strasbourg.<sup>90</sup>

A second point of impact relates to the base requirement that the individual establish that there has been an unlawful act before damages can be awarded. Under the Human Rights Act 1998 an individual is entitled to bring a claim for damages in respect an action or inaction that violates his or her ECHR guarantees.<sup>91</sup> While violations of the ECHR will ordinarily entail public and/or private law illegality, there is some case law to suggest that damages may be available even in the absence of a recognised domestic public law or private law wrong. In *Anufrijeva v Southwark LBC*<sup>92</sup>, three claims were made by individuals who argued that maladministration and delay had interfered with their rights to family life under Article 8 ECHR (the facts had concerned neglect of special needs, impoverishment and failure to allow a refugee’s family to enter the UK). Although

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<sup>83</sup> *R v Secretary of State for the Home Department, ex p Daly* [2001] 3 All ER 433. On the Human Rights Act see J Wadham, H Mountfield, and A Edmundson, *Blackstone’s Guide to the Human Rights Act 1998* (Oxford University Press, 2003, 3<sup>rd</sup> ed).

<sup>84</sup> *Porter v Magill* [2002] 2 AC 357.

<sup>85</sup> See Craig, n 5 above, chpt 26. But see also n 33 above re: the significance of *Barrett v Enfield LBC* [2001] 2 AC 550. And note also that the tort of misfeasance is only ever available against public authorities, so this cause of action might better be termed as a public law tort.

<sup>86</sup> See, e.g., in relation to negligence actions, *Hill v Chief Constable of West Yorkshire* [1989] AC 53; *Metcalf v Chief Constable of the RUC* [1995] NI 446; and *X v Bedfordshire CC* [1995] 3 All ER 353 (and see now also *Brooks v Metropolitan Police Commissioner* [2005] 2 All ER 489, reaffirming in part the continuing relevance of *Hill*). And on breach of statutory duty and misfeasance in public office see, respectively, *O’Rourke v Camden LBC* [1998] AC 188 and *Three Rivers DC v Bank of England (No 3)* [2000] 2 WLR 1220.

<sup>87</sup> See, e.g., Joined Cases C-46 & 48/93, *Brasserie du Pêcheur SA v Germany*, *R v Secretary of State for Transport, ex p Factortame Ltd* [1996] 1 ECR 1029, 1154 (para 73), doubting that the tort of misfeasance in public office could provide an effective action for damages for breach of EU law (the suggestion that misfeasance should be the preferred tort was made by the House of Lords in *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] 1 QB 716). But note that the tort’s shortcomings *vis-à-vis* the protection of EU rights had already been noted by the domestic courts in advance of the ECJ ruling: *Kirklees Borough Council v Wickes Building Society Ltd* [1992] 2 CMLR 765, 785 (Lord Goff).

<sup>88</sup> See *Barrett v Enfield LBC* [2001] 2 AC 550, as read in the light of *Osman v UK* [1998] 29 EHRR 193. But see also the ECtHR subsequent ruling in *Z v UK* (2002) 34 EHRR 97.

<sup>89</sup> P Craig, ‘Once More Unto the Breach: The Community, The State and Damages Liability’ (1997) 113 *Law Quarterly Review* 67. But see J Allison, n 79 above. And for judicial consideration of the point see the opinions of Lords Bingham and Steyn in *Cullen v Chief Constable of the RUC* [2003] 1 WLR 1763.

<sup>90</sup> See, most notably, *Phelps v Hillingdon LBC* [2001] 2 AC 618 and *W v Essex CC* [2001] 2 AC 592. But see now also *D v East Berkshire Community NHS Trust* [2005] 2 All ER 443.

<sup>91</sup> ss 6-8.

<sup>92</sup> [2004] 2 WLR 603.

the claims were ultimately to fail – the Court of Appeal did not consider that the maladministration in question reached the threshold required for a violation of Article 8 ECHR<sup>93</sup> – it recognised that maladministration that falls short of a domestic public law wrong might nevertheless now found an action for damages. In doing so, the Court remained alert to the wider public interest, and it emphasised that awards of damages should be modest and certainly no more liberal than the ECtHR’s “just satisfaction” case law under Article 41 ECHR.<sup>94</sup> But within that, the Court’s acceptance of the fact that maladministration in the ECHR context can take domestic law beyond its historical constraints is certainly significant. Its acceptance of the fact also adds an interesting dimension to the above discussion of the Parliamentary Commissioner for Administration’s role in obtaining compensation for individuals who have suffered from “bias, neglect, inattention, delay, incompetence, ineptitude, arbitrariness and so on”.<sup>95</sup>

### **Conclusion**

This paper has sought to demonstrate that there are many mechanisms and doctrines in UK law that address “administrative silence”, notwithstanding that the term is not formally used in the domestic order. It has emphasised how the UK order faces a perennial problem in trying to balance the individual’s interests against those of the wider public, and it has identified strengths and weaknesses in some existing statutory and judge-made schemes. The paper has also considered some areas in which European law is arguably more advanced than the domestic system; and it has analysed how European norms are, both directly and indirectly, reshaping aspects of domestic principle and practice.

Whether such points of emphasis – in particular as concern UK law’s shortcomings *vis-à-vis* aspects of European law – mean that the UK order has on balance “got it wrong” is difficult to determine. Each legal system will, after all, have strengths and weaknesses, and, insofar as this is true of the UK system, it is likely also true of EU law and the ECHR.<sup>96</sup> Perhaps the most appropriate point to be made in conclusion, therefore, relates to the normative basis for the workings of UK public law. It has been seen in this paper that aspects of that basis have changed and, moreover, that they continue to do so (whether as a result of domestic or European influences).<sup>97</sup> While some of the developments have not been without difficulty, they nevertheless represent attempts to resolve a range of issues that include the problem of administrative silence. It is thus within this ongoing process of reinvention that any final equilibrium will likely be found.

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<sup>93</sup> Compare *R (Bernard) v Enfield LBC* [2003] LGR 423.

<sup>94</sup> s 8 of the Human Rights Act requires that the courts have regard for the ECtHR’s Art 41 ECHR case law when assessing damages (see also s 2). But see now also *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673, disapproving *Anufrijeva*.

<sup>95</sup> See n 21 above and text.

<sup>96</sup> For a critique of aspects of EU administrative law see, e.g., C Harlow, ‘European Administrative Law and the Global Challenge’ in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 1999) p 261. And for a critique of aspects of ECHR case law see D Oliver, ‘A Negative Aspect to Legitimate Expectations’ (1997) *Public Law* 558.

<sup>97</sup> On which see further J Jowell and D Oliver (eds), *The Changing Constitution* (Oxford University Press, 2004, 5<sup>th</sup> ed).