

TRANSPARENCY, PUBLIC ADMINISTRATION AND THE COMMON LAW

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ABSTRACT: *One of the central challenges that any advanced system of public administration faces is the need to reconcile effective decision-making with that which is legitimate. In general terms, this “effectiveness-legitimacy” problematic often reduces to the question of how far a decision-making process should be transparent. The purpose of this paper is to give some examples of how the common law addresses the question of transparency and the effectiveness-legitimacy problematic.¹ Using as case studies three areas of recent and ongoing development, it highlights some of the established strengths of the common law as well as one area in which further development of the law may be desirable.*

KEYWORDS: *transparency, decision-making process, effectiveness-legitimacy problematic, common law.*

JEL CLASSIFICATION: *K 00, K 23*

I. INTRODUCTION

One of the central challenges that any advanced system of public administration faces is the need to reconcile effective decision-making with that which is legitimate. In general terms, this “effectiveness-legitimacy” problematic often reduces to the question of how far a decision-making process should be transparent. For instance, it is axiomatic that administrative law conceptions of transparency may require a decision-maker to consult with parties to be affected by a decision; to take the content of that consultation into account when making a final decision; and to give reasons for a decision so that an affected party may challenge its legality before a court or other competent tribunal.² However, while decision-making on this model would speak to a high level of legitimacy – transparency would dovetail with the values of participation and accountability – it also has the potential to undermine effectiveness in public decision-making. The point here is that the prioritisation of procedural requirements can lead decision-making processes to become overly cumbersome, with the

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¹ Note that the more specific focus of the paper is on developments in the common law of Northern Ireland and England and Wales. But note too that the same public law principles typically apply in Scotland: see generally, e.g., J McFadden & D McFadzean, *Scottish Administrative Law* (Dundee University Press, 2007).

² Of course, debates about transparency exist far beyond the realm of administrative law scholarship alone: see in relation to broader patterns in governance, e.g., C Hood and D Heald (eds), *Transparency: The Key to Better Governance* (Oxford University Press, 2006).

result that the administration may be unable to act expeditiously in circumstances where that is deemed necessary or appropriate. To the extent that any developed system of public administration will typically (and correctly) make a presumption in favour of transparency, tensions within the effectiveness-legitimacy problematic thus mean that the presumption should be regarded as rebuttable.

The purpose of this paper is to give some examples of how the common law addresses the question of transparency and the effectiveness-legitimacy problematic.³ Using as case studies three areas of recent and ongoing development, it highlights some of the established strengths of the common law as well as one area in which further development of the law may be desirable. Taking first the strengths, the paper notes that the common law has done much to foster increased levels of transparency (and legitimacy) by, for instance, requiring communication of decisions that have legal implications for individuals, and by moving towards a modified position on pre-legislative consultation. However, in a more cautious vein the paper notes that assumptions about efficiency continue to retard the development of a general common law duty to give reasons for administrative decisions.⁴ Although the common law has changed significantly its approach in this context, it has stopped short of imposing a general duty because of the difficulties that such a duty is said to entail for decision-makers. The paper suggests that that position is unnecessarily restrictive and as at odds with wider developments in the common law (both as analysed here and elsewhere). It also considers the apparent disjunction between common law and European approaches to reason-giving, and examines some *dicta* that have suggested that the common law should evolve in the light of wider European practice.

II. SOME BACKGROUND COMMENTS

Before turning to the case studies it is, however, important to identify the parameters within which common law conceptions of transparency function. The term “parameters” here refers to those factors that limit and define the workings of the common law, whether as internal aspects of judicial reasoning or as external institutional considerations (such as international law) that interact with judge-made norms. Although such factors may not always be referred to expressly by the courts, they underlie virtually every aspect of the common law approach to transparency. They therefore provide an important analytical reference point for understanding the dynamics of the common law system.

The first factor is the relationship that the common law has with “statute law”, *viz* primary legislation enacted by the Westminster Parliament and, to a lesser extent, the devolved legislatures.⁵ As is well-known, the UK constitutional order is founded upon the doctrine of legislative sovereignty/supremacy, and the role of the courts has historically been defined

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⁴ See, most recently, *R (Hasan) v Secretary of State for Trade and Industry* [2008] EWCA 1312.

⁵ On the competences of the devolved legislatures see H Barnett, *Constitutional and Administrative Law* (Routledge-Cavendish, London, 2009, 7th ed) ch 11.

⁶ Although note that the doctrine of legislative supremacy is increasingly under threat. For the seminal academic statement see M Hunt, *Using Human Rights Law in English Courts* (Hart Publishing, Oxford, 1997), chs 1 & 2; and for judicial recognition of the point see *Jackson v Attorney-General* [2006] 1 AC 262 at [102], Lord Steyn.

by the need to give effect to Parliament's intentions.⁶ In terms of transparency in public decision-making this means that, where the legislature has delegated a power of decision to a public authority, the first task for the court is to ensure that a decision-maker has observed any procedural requirements that may have been imposed by the empowering legislation.⁷ However, while this is consistent with the doctrine of legislative supremacy, it does not mean that the common law is wholly irrelevant to the resolution of proceedings where statute is in issue. This is because the courts have long emphasised that common law standards can supplement those found in legislative schemes; that is, that it can "fill the gaps" that may have been left by the legislature. In doing so, the courts may also impute to Parliament a particular intention that corresponds with the common law's understanding of how decisions should be taken.⁸

A second point concerns terminology. Although transparency is a term of increased contemporary prominence⁹, it exists more as a normative value that informs the workings of long established public law principles rather than as a named ground for impugning decisions. Case law is, instead, typically driven by headings such as "fairness", "procedural impropriety" or "*ultra vires*", and judicial use of those terms will depend very much on the context to a case. Hence, where a case involves questions about adherence to statutory procedures the language of *ultra vires* may dominate as the question for the court will be whether the decision-maker has acted outside the four corners of the powers delegated to them.¹⁰ However, where common law requirements are central to a case, the language of "fairness" will prevail as that concept has long underscored key developments in judge-made law.¹¹ "Procedural impropriety", in turn, is an umbrella term that can embrace both statutory and common law requirements. As Lord Diplock put it: "I have described the third head as 'procedural impropriety' rather than a failure ... to act with procedural fairness ... because susceptibility to judicial review under this head covers also failure to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of (fairness)."¹²

⁷ But note that the nature of those requirements will be crucially affected by judicial interpretation of the legislation in question: see P Leyland G Anthony, *Textbook on Administrative Law* (Oxford University Press, 6th ed, 2008) ch 14.

⁸ See, e.g., *R v Secretary of State for the Home Dept, ex p Doody* [1994] 1 AC 531, 560, Lord Mustill; and *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539, 573-4, Lord Browne-Wilkinson.

⁹ See, e.g., *Re Officer O's Application* [2008] NIQB 52, at [50], Gillen J.

¹⁰ Although note that failure to observe a statutory procedural requirement need not result in a decision being held unlawful: all will depend on context. See Leyland and Anthony, n 6 above.

¹¹ Note that earlier case law often refers to the rules of "natural justice" that were applied, historically, to judicial decision-makers (*viz*, the right to a hearing [*audi alteram partem*] and the rule against bias [*nemo iudex in causa sua*]). However, while there is little if anything to distinguish the content of fairness from natural justice, the term fairness is now used much more readily by the courts given that the rules of fairness apply far beyond the original context of judicial decision-making. On the evolution of the terminology see P Craig, *Administrative Law* (Sweet & Maxwell, London, 2008, 6th ed) ch 12.

¹² *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410-411.

¹³ See, e.g., *Lloyd v McMahon* [1987] AC 625, 702, Lord Bridge: "[The] so-called rules of [fairness] 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 upon 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".

A third point concerns the variable nature of common law fairness. In sum, the judicial approach to the requirements of fairness always depends on context¹³, and it is this factor that allows the common law to move between the demands of efficiency and legitimacy. For instance, it is axiomatic that there is an enhanced need for legitimacy where an individual's fundamental rights will be affected by a decision, and the common law ordinarily proceeds on the understanding that the full range of fair hearing guarantees should be observed before, during, and after a decision is taken.¹⁴ However, even here the common law remains highly responsive to context as the demands of fairness may be less strict where there are countervailing considerations of national security or where the decision-maker is considering evidence that is otherwise sensitive.¹⁵ Of course, the corollary of this is that the further one moves away from the circumstance where rights or vital interests are affected by a decision the less an individual can expect by way of corresponding protection. The paradigm example is that of the individual who is applying, for the first time, for a licence for an economic activity: while the common law will require that an application be considered in accordance with consistent principles it may not require a hearing where that is not ordinarily offered by the authority.¹⁶

A fourth – and final – point goes to the relationship between the common law and European law (here meaning EU law and the law of the ECHR). In short, many more recent developments in the common law can be attributed to either the direct or the indirect influence of European norms.¹⁷ For instance, Article 6 ECHR has led both to a reinvention of the rule against bias¹⁸ and to an ongoing debate about how closely the High Court should scrutinise decisions on an application for judicial review¹⁹ (albeit that there has also been some doubt about how far administrative decision-making processes are embraced by the Article²⁰). And beyond the context of fair trial guarantees, Articles 2 & 8 ECHR have raised questions about the duty to give reasons, as, indeed, has the parallel experience of giving effect to the

¹⁴ See *McInnes v Onslow Fane* [1978] 3 All ER 211.

¹⁵ See, e.g., *Re Shuker's Application* [2004] NI 367 and *Re McClean* [2005] UKHL 46; [2005] NI 490.

¹⁶ See *McInnes v Onslow Fane* [1978] 3 All ER 211, 218, Megarry V-C. On the requirement of consistency see, e.g., *R v Home Secretary, ex p Urmaza* [1996] COD 479 and *R v Home Secretary, ex p Gangadeen* [1998] 1 FLR 762.

¹⁷ For fuller analysis see Craig, n 10 above, chs 12-13; and G Anthony, *Judicial Review in Northern Ireland* (Hart Publishing, Oxford 2008) ch 7.

¹⁸ *Porter v Magill* [2002] 2 AC 357.

¹⁹ See *R (Alconbury) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 and *Runa Begum v Tower Hamlets LBC* [2003] 2 AC 430. But see too J Howell, 'Alconbury Crumbles' (2007) JR 9.

²⁰ It is now generally assumed that public law rights are covered by Article 6 ECHR only where they are of a personal and economic nature and are not contingent upon a large measure of official discretion: see *Runa Begum v Tower Hamlets LBC* [2003] 2 AC 430, 465, para 112, Lord Walker. And note that the common law rules of fairness have a broader reach than the ECHR's conception of civil rights: see e.g., *Re Glasgow's Application* NIQB 34 (disciplinary proceedings against a police officer not governed by Art 6 ECHR but covered by the common law rules of fairness).

²¹ See G Anthony, *UK Public Law and European Law: The Dynamics of Legal Integration* (Hart Publishing, Oxford, 2002), pp 125-130.

²² See, e.g., *Chung Chi Cheung v The King* [1939] AC 160, 168 (Lord Atkin), noting the overlap between the common law and customary international law.

rudiments of EU law.²¹ Consequently, if the common law could ever have been considered in isolation from external norms²², it is axiomatic that it can no longer be so.

III. TRANSPARENCY AND THE “RULE OF LAW”

We can turn now to address the first of our three cases studies, which concerns the requirement that a decision be communicated to an individual who is, or will be, affected by the decision. At one level, this is perhaps nothing other than an outworking of the well-established common law requirement that an individual be given notification that a decision is to be taken so that he or she can make representations to the decision-maker and, moreover, be familiar with the arguments against his or her position.²³ However, while the notification requirement in this way provides for participation in the decision-making process, the importance of the communication requirement lies elsewhere. This is because the communication requirement sounds not in respect of a decision that is *to be taken*, but rather a decision that has *already been taken*. In the instance where an individual has not participated in the decision-making process – whether for lack of entitlement or because of an unlawful failure to grant a hearing – communication therefore provides at least some opportunity to challenge a decision that is, or may be, prejudicial to the individual’s interests.

The leading case on the communication requirement is *R (Anufrijeva) v Secretary of State for the Home Department*.²⁴ In that 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 the case was the 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 discovered that her asylum application had been determined only 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 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.

...

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

²³ *Kanda v Government of Malaya* [1962] AC 322, 337, Lord Denning.

²⁴ [2004] 1 AC 604.

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."²⁵

There are two points that should be made about *Anufrijeva*. However, two preliminary points can be made here. The first is that, issues of transparency aside, the case illustrates the nature of the "rule of law" doctrine as now applies in contemporary UK public law. While that doctrine was previously synonymous with the formalistic Diceyan understanding that Acts of Parliament should apply equally to all those affected by them²⁶, it has since become much more focused on the value of legality and the imperative of preventing the "abuse of power" by public decision-makers.²⁷ Seen from this perspective, *Anufrijeva*, with its emphasis on transparency, is one of a number of recent House of Lords judgments that have reinvented public law in the UK.²⁸

Point two relates to the indirect influence of EU law. As noted above, the courts sometimes refer to European norms when seeking to justify developments in the common law. The corresponding logic is that the domestic system should not be allowed to fall beneath standards that apply elsewhere in Europe and, while the courts will not integrate a European norm without question, they will strive to modernise the common law and to maintain symmetry between standards of protection under domestic and EU law.²⁹ When holding that the Home Office had acted unlawfully, Lord Steyn thus referred to the fact that communication was a key feature of EU jurisprudence too: "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'.³⁰

IV. CONSULTATION AND SUBORDINATE LEGISLATION

The second – positive – common law development in recent years has been that concerned with consultation requirements during the process of making secondary legislation.

²⁵ [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.

²⁶ See AV Dicey, *An Introduction to the Law of the Constitution* (1885).

²⁷ See further J Jowell, 'The Rule of Law and its Underlying Values' in J Jowell and D Oliver (eds), *The Changing Constitution* (Oxford University Press, 2007, 6th ed), p 5.

²⁸ Others include, e.g., *R v Secretary of State for the Home Department, ex p Fire Brigade's Union* [1995] 2 AC 513 (on controlling the royal prerogative) and *R v Secretary of State for the Home Department, ex p Daly* [2001] 2 AC 532 (on the intensity of judicial review in human rights cases).

²⁹ On which phenomenon see M L Fernandez Esteban, 'National Judges and EC Law: The Paradox of the Two Paradigms of Law' (1997) 4 *MJ* 143.

³⁰ [2004] 1 AC 604, 622, citing *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.

³¹ *Bates v Lord Hailsham* [1972] 3 All ER 1019.

Here, the historical approach has been to deny that there is any common law obligation to consult in the absence of primary legislation imposing a statutory consultation requirement.³¹ The corresponding rationale has centred on (a) the fact that there is Parliamentary control of such choices and that additional judicial control is thereby unnecessary and (b) the fact that the range of individuals who may be affected by legislation could be so diverse as to render consultation unworkable.³² However, while some recent case law has endorsed this “efficiency” approach³³, other case law has recognised that there are circumstances when common law intervention is appropriate. The emphasis in the latter case law has thus been on legitimacy rather than efficiency, and on the need for transparency both before choices are made (through consultation) and after (through the possibility of judicial review).

The doctrine that the courts have used when making this shift is legitimate expectation.³⁴ In recent years, the story of that doctrine has been very much concerned with the emergence of its substantive dimension, although the dimension of relevance in this instance is procedural.³⁵ Under the procedural dimension, the courts have long held that the actions of a public authority may lead an individual legitimately to expect that he or she will be consulted before an administrative decision will be taken (the actions of the authority may be in the form of a representation, in a policy document, or in a prior practice).³⁶ While the question whether an individual has a legitimate expectation in a particular case will ultimately depend on the full legal and factual context to the dispute³⁷, the normative objective of the doctrine is to facilitate participation in the administrative decision-making process. Procedural legitimate expectations, in that sense, exist as a contemporary off-shoot of the age-old common law right to a hearing.

The case in which the doctrine was used to found a successful challenge to the subordinate legislative process was *Re General Consumer Council's Application*.³⁸ The applicant here was a statutory body with, among other things, the function of promoting and safeguarding the interests of consumers in Northern Ireland.³⁹ Its application to the High Court had challenged, for lack of consultation, a government decision to lay before Parliament a draft Order in Council that proposed to change the nature of water services in Northern Ireland.⁴⁰ Granting the application for judicial review, the High Court held that the applicant had a legitimate expectation of consultation both because of prior government representations about consultation and because of the unique statutory

³² *Re General Consumer Council's Application* [2006] NIQB 86, para 30.

³³ *Re Northern Ireland Commissioner for Children and Young People's Application* [2004] NIQB 40, para 12, Girvan J.

³⁴ On the doctrine see S Schönberg, *Legitimate Expectations in Administrative Law* (Oxford University Press, 2000).

³⁵ On the doctrine's evolution see Leyland and Anthony, n 6 above, ch 13.

³⁶ See, most famously, *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. See too, e.g., *R v Secretary of State for the Home Department, ex p Khan* [1984] 1 WLR 1337; *R v Secretary of State for the Home Department, ex p Ruddock* ([1987] 2 All ER 518; *R v Inland Revenue Commissioners, ex p Unilever* [1996] STC 681.

³⁷ *Re Findlay* [1985] AC 318, 338.

³⁸ [2006] NIQB 86.

³⁹ General Consumer Council (Northern Ireland) Order 1984.

⁴⁰ *Viz*, the Water and Sewage Services (Northern Ireland) Order 2006.

⁴¹ See para 36: “In the present case I am satisfied that the applicant had a legitimate expectation of consultation in relation to the draft Order. First of all this arose because a programme of consultation with the applicant was announced in advance of the process. Secondly, the applicant was regarded as a key party to and a major stakeholder in this process. Thirdly, the applicant has a special statutory position in relation to consumer issues and thus a particular statutory interest in the matters which are the subject matter of this draft Order. Fourthly the applicant has a special position in the new legislative scheme set up by the draft Order as a guardian of the consumer interest.”

position that it occupies.⁴¹ In reaching this decision, the court moreover doubted the force of point (b), above, because it considered that the adversely affected interests here were relatively limited and that reference to them would not overly complicate the decision-making process. The applicant thus had a legitimate expectation which, on the facts, had been frustrated because such consultation as had occurred had been inadequate.⁴²

It is important, at one level, not to overstate the significance of the judgment, as it is a decision of the High Court that has since been distinguished by that same court.⁴³ However, it is also true that it represents (at least the beginnings of) a significant departure from previous practice in an area of considerable constitutional importance. Put briefly, while the subordinate legislative process was previously considered immune from common law requirements, *Consumer Council* makes clear that such immunity can no longer be taken automatically to exist. In the evolutive method of the common law, it may therefore yet become established as a key departure in the case law.⁴⁴

V. REASONS

We can consider now our final case study, namely the common law approach to the duty to give reasons for administrative decisions. As indicated in the introduction, this is one area in which the common law arguably could do more to facilitate transparency. Although we will see that the common law has modified significantly its position in recent years, there is still no general duty to give reasons in the circumstance where statute does not prescribe such an obligation⁴⁵ (any general duty would, of course, be subject to arguments of public interest against giving reasons in a particular case). This approach has previously been justified with reference to arguments of administrative convenience⁴⁶, although it is

⁴² When assessing the adequacy of consultation UK courts address four issues: (1) whether the consultation occurred at a time when proposals were still at a formative stage; (2) whether the consultee was given adequate information on which to respond; (3) whether the consultee was given adequate time in which to respond; and (4) whether the decision-maker considered conscientiously the response to consultation. See *R v Brent London Borough Council ex p Gunning* [1986] 84 LGR 168, 189.

⁴³ *Re Christian Institute's Application* [2007] NIQB 66 (applicants challenging the Equality Act [Sexual Orientation] Regulations [NI] 2006 as procedurally flawed: while application was granted in part, it was held that the applicant had had no legitimate expectation of consultation as there was nothing in their circumstances that was comparable to those of the consumer council).

⁴⁴ See too, e.g., *Re Campbell and Ors' Application* [2005] NIQB 59 (common law may impose a duty to give reasons for a subordinate legislative choice where the corresponding legislation does not require reasons and where there is no subsequent Parliamentary scrutiny of the choice).

⁴⁵ *R (Hasan) v Secretary of State for Trade and Industry* [2008] EWCA 1312. Note that, where reasons are required, they must be "adequate and intelligible": see *R v Mental Health Tribunal, ex p Pickering* [1986] 1 All ER 99, 102, Forbes J.

⁴⁶ 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. Note that the arguments in favour of reasons include that they concentrate the mind of the decision-maker; demonstrate to the recipient that this has been so; show that the issues have been conscientiously addressed; and/or alert the recipient to a justiciable flaw in the process. The arguments against are that reasons can demand an appearance of unanimity where there is diversity; call for the articulation of sometimes inexpressible value judgments; and lead to unmeritorious challenges to the decision at hand.

⁴⁷ 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.

⁴⁸ See J Schwärze, *European Administrative Law* (2nd ed, 2006).

well-known that it exists at one remove from that adopted in other legal systems.⁴⁷ It would consequently appear that, even though the common law has taken steps towards greater transparency in this area, it still falls short of the minimum standard that applies elsewhere.⁴⁸

The primary consideration that guides the courts when deciding whether there is a common law duty to give reasons in any particular case is “fairness”.⁴⁹ That concept, again, is one that is heavily dependent on context and on the nature of the individual right or interest that is to be affected by a decision. To take once more the example of an individual who has made a first time application for a licence for an economic activity, reasons for a refusal would likely not be required as that would place an unnecessary burden on the decision-maker (who may, moreover, then be required to give reasons in respect of a large number of first time applicants). However, where an individual has been subject to disciplinary proceedings in circumstances where he or she has lost their job, fairness would clearly require a process of reasoning. As has been said, “(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”.⁵⁰

Perhaps the most famous decision on reasons remains *R v Home Secretary, ex p Doody*.⁵¹ This was a case in which 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.⁵² 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.⁵³ 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.⁵⁴ 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

⁴⁹ 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; *R v Ministry of Defence, ex p Murray* [1998] COD 134; *Re McCallion’s Application* [2005] NICA 21; and *Re Officer O’s Application* [2008] NIQB 52. On the value of reasons more generally – whether based upon statutory or common law duties – see A Le Sueur, ‘Legal Duties to Give Reasons’ (1999) 52 *Current Legal Problems* 150.

⁵⁰ *R v Civil Service Appeal Board, ex p Cunningham* [1991] 4 All ER 310, 323, Leggat LJ.

⁵¹ [1994] 1 AC 531.

⁵² S 35 of the Criminal Justice Act 1991.

⁵³ Note that the Secretary of State no longer plays any role in sentencing as a result of concerns about compliance with Article 6 ECHR. On those concerns see *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837; and Criminal Justice Act 2003, ss 303(b)(i), 332, Sch 37, Pt 8.

⁵⁴ See too, e.g., *R v Secretary of State for the Home Department, ex p Venables and Thompson* [1997] 2 All ER 97.

*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 in practice I regard it as necessary for this purpose that the reasoning of the Home Secretary should be disclosed.*⁵⁵

It might be doubted, given such comments, whether criticism of the common law is justified. Certainly it is true that reasons will be required in a great many cases and that the common law will, in that sense, reach the same terminus as other systems. However, the essence of the criticism is not about the outcome of one or other case, but rather about the normative framework within which administrative decisions are taken. As the case law has emphasised many times⁵⁶, the common law starts with the premise that reasons should not be given unless fairness requires otherwise, whereas the contrary approach would require that reasons be given save where there is some public interest justification for withholding them. This latter approach is, of course, much more immediately inclined towards transparency, and its comparative merit was alluded to by the Court of Appeal in England and Wales in *R (Wooder) v Feggetter*.⁵⁷ The issue there 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”.⁵⁸ In doing so, the judge also held that, while the common law too would require 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.⁵⁹

VI. CONCLUSION

This paper has considered some of the ways in which the common law views the need for transparency in public administration. Little would be gained from trying to summarise each the points made throughout, so one general comment will be offered in conclusion. That point is simply that the common law has shown itself to be increasingly concerned about the need for transparency in public administration and for the related value of legitimacy in the public decision-making process. While that concern has not yet led the courts fully to reinvent some aspects of the common law (notably in respect of reasons), it has resulted with the courts emphasising the importance of the rule of law (through the communication of decisions) and of public participation in key governmental processes (*viz* in the making of subordinate legislation). Should further reinvention occur in respect of reasons – whether with reference to European standards or otherwise – it will surely consolidate transparency’s place as one of the defining values of the modern administrative state.

⁵⁵ [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.

⁵⁶ See, e.g., the Privy Council ruling in *Stefan v General Medical Council* [1999] 1 WLR 1293.

⁵⁷ [2002] 3 WLR 591.

⁵⁸ [2002] 3 WLR 591, 602.

⁵⁹ *Cf* Brooke LJ’s judgment, which held, with sole reference to the common law, that reasons should be given.