Reason-giving in English and European Community Administrative Law

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In a previous issue of this journal Professor Graham identified the lack of a general obligation on public administrators to give reasons for their decisions as the great lacuna in English public law.[1] The purpose of this Scrutiny piece is, first, to compare the recent approach of the English courts with that of the European Court of Justice and, second, to bring to light a possible means of filling this lacuna.

Before proceeding any further it would be appropriate to ask why it is that reasons for administrative decisions should be given. It appears that there are sound arguments in favour of reason-giving by administrators. The obligation to provide reasons may concentrate the administrator's mind on the right questions; demonstrate to the recipient that this is so; show that the issues have been conscientiously addressed and how the result has been reached.[2] For example, in relation to the fixing of tariffs for mandatory life prisoners it has been recognized that the prisoner is very much an outsider in this process and that reasons could make it more transparent.[3] Reason-giving can be a valuable form of self-discipline for the decision-maker.[4] Furthermore, reasons may allow identification of a flaw in

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1 C. Graham, 'English public law' [1995] 1 EPL 156, 163.

2 *R.* v. *Higher Education Funding Council ex parte Institute of Dental Surgery* [1994] 1 All ER 651, 665j *per* Sedley J.

3 See e.g. *Doody* v. *Secretary of State for the Home Department* [1994] 1 AC 531, 551E-F, 565A-D *per* Lord Mustill.

4 *R* v. *Islington London Borough Council ex p. Trail, The Times*, 27 May 1993 *per* Sir Louis Blom-Cooper QC.

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the decision-making process. However, reason-giving may also have its disadvantages. It may place an undue administrative burden upon administrators, demand an appearance of unanimity where there is diversity, call for the articulation of sometimes inexpressible value judgments and facilitate more legal challenges.[5] Such a demand may also overlegalize informal procedures.[6]

The English Law Approach

In the absence of a general duty to give reasons the English common law has developed a variety of approaches to the issue,[7] the most prominent of which is grounded in the doctrine of 'fairness'. Fairness, or the duty to act fairly, derives from the rules of natural justice which cover the right to a fair hearing and the rule against bias. In commonly cited *dicta* Lord Bridge has explained:

> the 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 in which it operates.[8]

The decision-making body must therefore act fairly towards those affected by its decision. This duty to act fairly may manifest itself in different forms depending upon the factors outlined above by Lord Bridge. The decision-maker may have to give notice to those likely to be affected or give the person a hearing. The duty to act fairly may also require the decision-maker to give reasons for its decisions. Using the doctrine of fairness the English courts have recently begun to make exceptions to the proposition that English law does not generally require reasons to be given.

In *Padfield* v. *Minister of Agriculture, Fisheries and Food*[9] the House of Lords held that if a decision-maker adopted one course of action while all the reasons seemed to point to an alternative course, then the court could infer that she/he had no good reason. However, in a later case the House of Lords[10] emphasized that there must be an overwhelming case for the court to make this inference.

The case which signalled a change of attitude in the higher judiciary was the

5 *Institute of Dental Surgery* case, *supra* note 2, 665j *per* Sedley J.

6 Lord Woolf, *Protection of the Public: A New Challenge* (The Hamlyn Lectures), London, 1990, p. 94.

7 For more detailed examinations see Craig, 'The common law, reasons and administrative justice' [1994] 53 CLJ 282; de Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, Sweet & Maxwell, 1995, pp. 457–72.

8 *Lloyd* v. *McMahon* [1987] AC 625, 702H.

9 [1968] AC 997.

10 *R* v. *SS Trade and Industry ex parte Lonhro* [1989] 2 All ER 609

House of Lords case *Doody* v. *Secretary of State for the Home Department*.[11] This involved a challenge to the Home Office procedure for the release of mandatory life prisoners on licence. On behalf of the applicants, it was argued that the prisoner was entitled to know the judicial view of the penal element of his sentence, the reasons for the judges, recommendation and for any departure from this by the Home Secretary. Lord Mustill, giving the unanimous opinion of the House of Lords, stated that there was no general duty to give reasons placed upon decision-makers. Nevertheless a specific duty to give reasons could, in certain circumstances, be implied. Whether such a duty could be implied depended upon the answer to the following question: is the refusal to give reasons fair? In the present case this refusal had been unfair. The procedure prevented life prisoners from knowing what other prisoners know as a matter of course. Lord Mustill added that the same conclusion could be arrived at through a different route. The Home Office procedure prevented the applicant from mounting an effective attack upon the decision. The 'continuing momentum in administrative law towards openness of decision-making'[12] required the Home Secretary to operate a transparent procedure. The Home Secretary was therefore obliged to provide his reasons for departing from the period recommended by the judiciary which a life prisoner should serve for the purposes of retribution and deterrence.

The thrust of the *Doody* decision towards open decision-making was followed by the *Institute of Dental Surgery* case.[13] Here a dental school had been subject to a research assessment and had been given a lower than expected research rating. As the level of the research rating was crucial to the amount of research resources the dental school would receive from the Government, it applied for judicial review to find out the reasons for the decision. Through the emerging case law Sedley J. identified two general types of case evolving. First, there were those cases where the nature of the process itself called in fairness for reasons. Where the decision affects a matter highly regarded by the law, such as personal liberty as in *Doody*, then fairness will require reasons to be given. Second, there are cases where there is something peculiar or aberrant in the decision itself which in fairness calls for reasons to be given.[14] An aberrant decision would require reasons in order that the applicant could know whether the aberration was real or merely apparent. In the actual case Sedley J. reasoned that the decision as an exercise of pure academic judgment did not require the giving of reasons. The court could not detect anything peculiar in the decision as it lacked the expertise to judge whether it was extraordinary or not.

English law has, then, developed specific obligations to give reasons in the absence of a general duty by determining whether the refusal to give reasons was fair. This

[11] *Supra* note 3.
[12] *Ibid.*, 111ff.
[13] *Supra* note 2.
[14] Sedley J. instanced the earlier Court of Appeal decision in *R.* v. *Civil Service Appeal Board ex parte Cunningham* [1991] 4 All ER 310 as an example of the second type of case.

approach represents the pragmatism typical of the common law.[15] By using the fairness doctrine the courts can make incremental change on a case-by-case basis. It is submitted here that while these developments are welcome they are not sufficient for two reasons. First, fairness cannot compel the provision of reasons in every case. Outside the two classes of case identified by Sedley J. fairness will not call for reasons to be given. For example, in *R* v. *Bristol County Council ex parte Bailey*,[16] fairness did not require reasons for a refusal of a renovation grant. Nor does fairness require reasons to be given under Part III of the Housing Act 1985.[17] While the application of fairness may over time become more generous it is clear that it cannot require reasons to be given for a wide range of public decisions. Second, fairness is not sufficiently principled to ground a general duty to give reasons upon. The vague notion of fairness, while malleable to the circumstances of an individual case, does not form a well-reasoned basis for the development of a wider reason-giving duty. Furthermore, there is a fear that fairness could be manipulated to deny the provision of reasons to unmeritorious applicants in certain cases.

The European Community Law Approach[18]

European Community law provides for the disclosure of reasons for acts by both Community institutions and the Member States. Article 190[19] of the EC Treaty provides that regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons upon which they are based and shall refer to any proposals or opinions that are required to be obtained pursuant to the Treaty. In relation to Article 190 the European Court requires that the Community institution must clearly and unequivocally show its reasoning for the contested measure so as to enable the persons concerned to ascertain the reasons for it and to enable the Court to exercise judicial review, though the institution is not obliged to go into every relevant point of fact and law.[20]

The European Court has examined the importance of a duty to give reasons by national authorities in relation to the protection of the free movement of workers in

[15] See generally Atiyah, *Pragmatism and Theory in English Law* (The Hamlyn Lectures), London, 1987.
[16] (1995) 27 HLR 307.
[17] *R.* v. *Royal Borough of Kensington and Chelsea ex parte Grillo* (1996) 28 HLR 94.
[18] For comparative analyses of the duty to give reasons across Europe see Schockweiler, 'La motivation des decisions individuelles en droit communautaire et en droit national' [1989] CDE 3; Schwarze, *European Administrative Law*, Sweet & Maxwell, 1992, pp. 1384–1400.
[19] See Shapiro, 'The giving reasons requirement' (1992) *U. Chic. Legal Forum* 179. See also Schwarze, *op. cit.*, note 18, pp. 1400–20.
[20] Case C-122/94 *Commission* v. *Council* [1996] ECR I-881, para. 29.

UNECTEF v. *Heylens*.[21] The facts were that Heylens, a Belgian national with a Belgian football trainer's diploma, was employed by the Lille Olympic Sporting Club, which had a football team in the French first division. The French National Equivalence Committee refused to recognize Heylens' diploma as equivalent to the corresponding French certificate, whereupon the French Minister for Youth and Sport asked Heylens not to continue working as a football trainer in France. Neither the National Equivalence Committee nor the Minister had provided any reasons for this decision. However, Heylens refused to give up his job with the Lille team and consequently later faced criminal charges for the wrongful assumption of titles before the *Tribunal de Grande Instance* in Lille. The Tribunal, confronted with an issue of Community law, decided to refer a question to the European Court of Justice, by means of Article 177, asking whether the requirement that someone wishing to be employed as a sports trainer must hold a French diploma, or a foreign diploma recognized as the equivalent thereto by a committee which did not have to give reasons for its decision, constituted a restriction of the free movement of workers provided by Article 48.

In its decision the European Court stressed the fundamental nature of the right to the free movement of workers. The European Court stated it is essential that an individual have a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right in order to secure the effective protection of the individual's right. This principle of effective protection formed a general principle of Community law underlying the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 of the European Convention of Human Rights.[22] The European Court continued:

> Effective judicial review, which must be able to cover the legality of the reasons for the contested decision, presupposes in general that the court to which the matter is referred may require the competent authority to notify its reasons. But where, as in this case, it is particularly a question of securing the effective protection of a fundamental right conferred by the Treaty on Community workers, the latter must also be able to defend that right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in their applying to the courts.[23]

The existence of a judicial remedy and the duty to state reasons was, however, limited to final decisions and did not extend to opinions and other measures occurring during the preparation and investigation stage. The European Court stated that it must be possible for a decision affecting a fundamental right of Community law to be subject to judicial proceedings and for the person concerned to ascertain the reasons for the decision.

[21] Case 222/86 [1987] ECR 4097.

[22] See Case 222/84 *Johnston* v. *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para. 18.

[23] *Heylens*, *supra* note 21, para. 15.

The reasoning of the European Court is instructive. Effective protection required that the individual be able to defend her/his right under the best possible conditions. This would involve judicial review of the national authority's decision restricting that right. For judicial review to be effective this required that the court could call upon the authority to provide its reasons. While the right to effective protection could not be defeated by the national authority positively committing an act which prevented effective judicial review, as in *Johnston*,[24] where the European Court found that a national security certificate could not prevent effective judicial protection, neither could it be defeated by the national authority's lack of action such as the failure to give reasons. What can be clearly seen from the Heylens case is that the European Court attaches great importance to effective judicial protection and will impose obligations upon the national authority, such as the giving of reasons, in order that the individual is able to protect her/his rights in so far as they arise in a Community law context.

The Inconsistency Argument

According to Galmot, a former judge of the European Court, in developing general principles of law the European Court will choose those which are the best performing in terms of achieving the purposes of the Community and not settle for the lowest common denominator.[25] The principle of effective protection therefore forms the best or most successful principle for the Community. The fact the European Court of Justice can choose the most successful legal principles exerts a pressure on Member States either to fall into line or be open to charges of providing inadequate legal protection when compared with the Community and other European States. National laws untouched by the scope of Community law will not be directly affected by it and so can therefore fall behind. The existence of different legal rules, one set of rules for purely internal situations and another for those situations governed by Community law, can lead to an inconsistent approach to the protection of the individual. Former Advocate General Van Gerven has argued that to prevent a 'drifting apart *from within*, of national laws governing similar situations depending on whether they fall within, or outside, the sphere of Community law, ways must be found to keep the two sets of rules together'.[26] In other words if national law does not provide legal protection at least the same as Community law then an inconsistency in the protection of the individual opens up to

[24] *Ibid.*

[25] Galmot, 'Réflexions sur le recours au droit comparé par la Cour de justice des Communautés européennes' [1990] 6 RFDA 255, 258–9.

[26] Van Gerven, 'Bridging the gap between Community and national laws: towards a principle of homogeneity in the field of legal remedies?' (1995) 32 CML Rev 679, 699–702; Van Gerven, 'Towards a coherent constitutional system within the European Union' [1996] 2 EPL 81, 97–8.

the detriment of both the individual and the reputation of the national legal order. In this way Community law may facilitate the evolution of a common European administrative law.[27]

There are signs that the English judiciary is beginning to appreciate that English law should keep up with Community law. For example, Lord Woolf thought it would be 'most regrettable'[28] if English law did not provide interim injunctions against the Crown, while under Community law such interim relief had to be possible.[29] When discussing the status of the principle of proportionality in English law[30] Neill L.J. has recognized that 'there is much to be said for the view that all the courts in the European Community should apply common standards in the field of administrative law'.[31] However, as well as pressures for the convergence of European administrative law there are also divergent forces.[32] The difference between common law pragmatism and the more principled continental approach may sometimes be a strong pressure for divergence. For example, this may explain why the House of Lords refused to adopt the principle of proportionality.[33]

The inconsistency argument has not been explicitly mentioned by an English judge in relation to the duty to give reasons. It might be contemplated whether the English courts could have been motivated to develop standards of fairness in reason-giving due to Community law. However, it is clear that an inconsistency has appeared between the effectiveness of judicial protection over the rights of British citizens under Community law and their rights under solely domestic law. The inconsistency may be expressed in its strongest terms in the following way. Should an individual have her/his rights under Community law curtailed then she/he has a right to effective judicial protection and can demand to know the reasons for the decision? However, if the same individual wishes to enforce rights under English domestic law then it will have to be seen whether the refusal to give reasons was unfair. If the failure is not unfair then the judicial protection of rights under domestic law is at a disadvantage when compared to Community law. What puts the inconsistency into sharper focus is the fact that it might be the same national courts which have to apply different sets of rules if the individual enforces his Community and domestic rights. For example, under domestic law there is no general duty to give reasons for

[27] See generally Rivero, 'Vers un droit commun européen. Nouvelles perspectives en droit administratif' in Cappelletti (ed.) *New Perspectives for a Common Law of Europe*, Florence, 1978; Schwarze, 'Towards a common European public law' [1995] 1 EPL 227.

[28] *In re M* [1994] 1 AC 377, 422G.

[29] See *R* v. *Secretary of State for Transport ex parte Factortame Ltd. (No. 2)* [1991] 1 AC 603.

[30] See Jowell, 'Is proportionality an alien concept?' [1996] 2 EPL 401.

[31] *R* v. *Secretary of State for the Environment ex parte National and Local Government Officers Association* [1993] 5 *Admin. L.R.* 785, 800G.

[32] See generally Bell, 'Convergences and divergences in European administrative law' [1992] *Rivista Italiana di Diritto Pubblico Comunitario* 3.

[33] *R* v. *Secretary of State for the Home Department ex parte Brind* [1991] 1 AC 696.

decisions concerning merger control,[34] but when issues concerning Community law rights are raised then the situation may be different.[35] The opening up of a split in the legal protection of the individual's different sets of rights is therefore not only detrimental for the individual concerned but also for the domestic legal order which is being out-paced by the Community legal order. An essential difference between Community law and English law is that in the former the ineffectiveness of judicial review when reasons are not given forms the basis of a duty to give reasons while in the latter it is only one factor going to the fairness of the refusal to give reasons.

A Principled Solution for English Law?

Sir John Laws, a judge in the Queen's Bench Division, has advanced a possible solution which could enable English public law to provide a general duty to give reasons based upon well-established authority.[36] The argument begins from the proposition that the principle of *Wednesbury* unreasonableness[37] requires public decisions to be reasonable. If a decision passes the test of not being so unreasonable that no reasonable authority could ever have arrived at it, then there will be reasons for that decision. The existence of reasons will be an essential precondition to the decision's legality. Not only must these reasons exist but they must be communicated to the court in order that the decision be upheld. If the court does not know of the reasons for the decision then it is precluded from applying the principles devised to ascertain administrative legality. For example, the court cannot determine whether the decision-maker took account of irrelevant considerations or excluded relevant ones, or acted with an improper purpose, or made an unreasonable decision if the reasons supporting the decision are kept secret and undisclosed. This point is exactly the same as that made by the European Court of Justice in *Heylens*. The efficacy of judicial review is dependent upon the availability of the decision-maker's reasoning. If a public decision is made without its reasons being made public then the court will be prevented from exercising full and effective judicial review. Such a decision becomes the 'inscrutable face of a sphinx'.[38] An unlawful decision might therefore be

[34] *R* v. *Secretary of State for Trade and Industry ex parte Lonhro* [1989] 2 All ER 609.

[35] See Weatherill, 'The changing law and practice of UK and EEC merger control' [1991] 11 OJLS 520, 532–4.

[36] Sir John Laws, 'A duty to give reasons' 2 Hare Court/IBC Seminar 25 September 1992.

[37] *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 KB 223. In *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] AC 374, 410G Lord Diplock later classified this as 'irrationality', which included those decisions which 'outrageously defied logic or accepted moral standards'.

[38] *R* v. *Nat Bell Liquors Ltd.* [1922] 2 AC 128, 159 *per* Lord Sumner when discussing the Summary Jurisdiction Act 1848 which provided that the record of a conviction did not have to include any statement of evidence for the conviction.

upheld as lawful if the decision-maker withholds her/his reasons. As such a conclusion would be contrary to the rule of law, this makes the need for a general duty to give reasons imperative. However, while this demonstrates the need for a duty to give reasons it does not found the basis of a legal obligation.

Administrators, being under a duty to act reasonably, may decide whether they should give reasons. The important point Sir John Laws stresses is that the decision as to whether or not to provide reasons is the same as any other public decision and as such it is subject to the same burden of being invalidated by the court on the ground of unreasonableness. Whilst the actual decision must be reasonable so must the decision as to whether or not to provide reasons to the applicant. This is the basis of the duty to give reasons:

> If legal certainty and the avoidance of capricious power require reasons to be given, and nothing save perhaps a modicum of administrative inconvenience and cost points the other way, a decision to refuse reasons will be an irrational one; and so will itself be in breach of duty.[39]

The decision by the decision-maker to refuse to provide reasons being a public decision, then like any other public decision it must not be unreasonable. The reasonableness of such a decision can be determined by asking whether the decision-maker should inhibit the efficacy of judicial review, and thus the rule of law, by withholding its reasons due to cost and inconvenience. Sir John Laws concludes that if this formed the basis of a refusal to provide reasons then it would itself be unreasonable. As the maintenance of the rule of law is fundamental, refusal to give reasons would be generally unjustifiable and therefore reasons would generally have to be provided. Therefore a general obligation can be established by holding that the reasonableness of a refusal to provide reasons would be generally unreasonable as the need to uphold the rule of law outweighs any counter-argument based upon expense or administrative disturbance.

This duty to give reasons is not absolute but general. Administrators could not be forced to disclose their reasons when it would be unreasonable to do so. For example, in cases concerning national security the disclosure of reasons could involve risks to the security forces and because the judicial process cannot deal adequately with such problems.[40] As national security raises issues fundamental to the security of the state the need for consistency with Community law[41] is unlikely to be as strong.

[39] Laws, *op. cit.*, note 36, para. 12.

[40] However, Sir John Laws, 'Is the High Court the guardian of fundamental constitutional rights?' [1993] PL 59, 76 has stated that questions of national security are not 'necessarily best served by a blank wall with no doors or windows'.

[41] See *Johnston, op. cit.*, note 22. See Graham, 'Towards a European administrative law? The English case' [1993] 3 *Rivista trimstrala di diritto publico* 16–17.

Conclusion

In no English case has the question of the existence of a general duty to give reasons been openly accepted. Rather it has been assumed that because such a duty does not exist therefore it cannot exist. However, it is submitted that that is wrong. Accordingly all dicta stating that a general duty does not exist in English public law are precisely that, *obiter*. It is possible for the courts to construct a general reason-giving obligation upon the lines above. There are compelling reasons for the establishment of such an obligation: the need to uphold the rule of law and to provide consistency with Community law. In his conclusion Professor Graham stated that English public law is at a cross-roads.[42] In one direction there is a principled model drawing upon European public law while in the other is the standard English pragmatic approach. If the courts decline to develop a general obligation it will be because the approach of fairness appeals as a pragmatic solution which can be applied on a case-by-case basis. Whereas if the courts do take the step of developing a general duty it will mean that the gap in the judicial protection of rights in Community law and domestic law will be sealed and the maintenance of the rule of law by subjecting such decisions to full judicial review. Such an approach would signal a positive step in the direction of the principled model.

[42] *Supra* note 1, 164.

The Case for a European Cartel Office

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The competition policy of the European Commission has come under fire for some time now. In particular, four criticisms can be detected. First, the pragmatic approach to competition policy taken by the Belgian Competition Commissioner Mr Karel van Miert has met with opposition. He has repeatedly emphasized that 'competition policy is not an end in itself to be pursued dogmatically. Rather it is an instrument, a crucial instrument, in making the best out of one's economic potential and serving the common good.'[1] A second criticism concerns delays in decision-making.[2] Unlike the European Merger Regulation (4064/89/EEC), which imposes very stiff time limits for merger assessments, there are no time limits for proceedings under Articles 85 and 86 EC (cf. Regulation 17/62/EEC). Third, the German Federal Cartel Office (*Bundeskartellamt*) has criticized the alleged lack of transparency which exists at the decision-making stage.[3] The last and greatest reservations, however, relate to political influences on decision-making processes by the Commission.[4] Since only one of the twenty Commissioners presents competition issues, whereas the

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1 Quoted in Wilks and McGowan, 'Disarming the Commission: the debate over a European Cartel Office' [1995] JCMS 259 at 263.

2 Cf. House of Lords Select Committee on the European Communities, *Enforcement of Community Competition Rules*, Session 1993–4, 1st Report, at 48; Memorandum by the Federal Cartel Office (*Bundeskartellamt*), in *ibid.*, 197 at 199.

3 Cf. Wilks and McGowan, *op. cit.*, note 1 at 265 and 266–7.

4 *Ibid.*, at 265; Hort, 'Ein Kartellamt für Europa', *Frankfurter Allgemeine Zeitung*, 9 May 1996; *Financial Times*, 19 October 1994. Töllner, *Errichtung einer Europäischen Wettbewerbsbehörde*, not published, at 2. I have to thank Herrn Wilko Töllner, LLM (Brugge) for the permission to quote and to discuss his work.

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