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WHITMORE LECTURE 2012

THE REASON FOR
ADMINISTRATIVE REASONS –
OSMOND REVISITED

The Hon. Michael Kirby AC CMG

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THE REASON FOR ADMINISTRATIVE REASONS –
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THE HON MICHAEL KIRBY AC CMG*

HARRY WHITMORE REMEMBERED

My purpose is to explore the rights of the people. Not the unquestioned power of our parliaments to grant rights, such as a right to reasons for administrative decisions. Not the morality of expecting that public officials should give reasons to those whose taxes pay their salaries. Not the discipline of good administration that support the giving of reasons for official action. Not even the political failings of the romantic idea of official accountability through ministers to parliament for wrongs done by officials¹, my focus is none of these. It is upon the rights of the people, as declared by the judges and derived from the great principles of the common law defensive of those rights.

If ever there was an Australian academic lawyer who could be described as a ‘man of the people’ it was Harry Whitmore. He was born in England in 1922. In 1939, he began his career in the British Civil Service, an experience that was interrupted by the Second World War. In that War, he served in the Royal Armoured Corps of the British Army², exposed to hair raising dangers as an ordinary soldier. At War’s end, he resumed his life as a civil servant, with a little luck, he might have ended up as a quintessential Sir Humphrey Appleby. But in 1950, he took an assisted passage and

* Justice of the High Court of Australia (1996-2009); President of the NSW Court of Appeal (1984-1996); Judge of the Federal Court of Australia (1983-84); Chairman of the Australian Law Reform Commission (1975-85); Deputy President of the Australian Conciliation and Arbitration Commission (1975-83). The assistance of James Chin (UTS, Sydney) is acknowledged in the provision of materials used.

¹ A.F. Mason, *Democracy and the Law: The State of the Australian Political System* (November 2005) *Law soc J.* (NSW) 68 at 60.

² D. Harding, “Professor Harry Whitmore” (1982) 5 UNSWLJ 189.

immigrated to Australia, taking up a position as assistant secretary to the Public Service Board of New South Wales.

Whitmore acquired his first degree in law at the University of Sydney in 1958. He took a masters degree at Yale University, studying under Alexander Bickel, like Julius Stone a noted legal realist³. Unsurprisingly, with this unusual background, when he returned to Sydney University as a lecturer in 1961 he showed himself a progressive, no-nonsense scholar and teacher, with a keen interest in civil liberties. With Enid Campbell he published *Freedom in Australia*⁴, the first monograph to explore the everyday rights of members of the Australian public. He and other law teachers of the same vintage were to play a critical role in creating new law schools, the Australian National University (ANU), the University of New South Wales and Monash University, in the first two of which he was to serve as a professor.

He staked out his claim to the new and suspect field of administrative law⁵. He did so by publishing in 1963 a general remonstrance, castigating Australia's inertia in the field⁶ and by co-authoring with David Benjafield *Principles of Australian Administrative Law* (1966). Before he left Sydney for the Australian National University in 1965, he had served as sub-dean during my last year of studies at the Sydney Law School. Although I was never taught by him, my recollection is of a friendly, energetic student-supporting teacher, impatient with the self satisfaction and uncritical ethos of the dixonian philosophy of "strict and complete legalism". As a junior public servant, fighting soldier, assistant immigrant, he had witnessed the realities of England and its derivative societies. He was a man on the march, determined to see wrongs righted.

At the ANU, Harry Whitmore was quickly appointed Dean of the Law School (1966, 1970-2). He mixed with powerful administrators in Canberra, recognising in them

³ A.F. Mason, "*The Kerr Report of 1971: Its Continuing Significance*", inaugural Harry Whitmore Lecture 19 September 2011.

⁴ Sydney University Press (1966) see Harding above in 2, 190.

⁵ Which A.V. Dicey had suggested was a feature of civil law but not common law countries. See A.V. Dicey, *The Law of the Constitution* (MacMillan, London 1959) 328.

⁶ H. Whitmore, "*Australian Administrative Law – A Study in Inertia*" (1963) 36 ALJ 255. For a later perspective, see H. Whitmore, "*Administrative Law in the Commonwealth : Some Proposals for Reform*" (1972) 5 Fed L Rev. 7.

both the strengths and weaknesses of the British tradition that he had known in England. When in October 1968, Attorney-General Nigel Bowen Q.C. decided to create a committee, chaired by Justice John Kerr, it was natural that he should appoint to the committee A.F. Mason Q.C. (Solicitor-General), R.J. Ellicott Q.C. and Harry Whitmore.

The principal recommendations of the Kerr committee heralded a peaceful legal revolution in the federal law and practice in Australia dealing with the accountability of administration. Amongst the major changes recommended were legislation to clarify and simplify the grounds of judicial review; establishment of a general administrative appeals tribunal; enlargement of requirements to disclose documents (F.O.I.); creation of an office holder later to be named Ombudsman; establishment of a supervisory administrative review council; and the introduction of an obligation on the part of federal decision makers to provide findings and to state reasons at the request of any person affected by the making of a decision⁷. Each of these recommendations was fiercely and bitterly opposed by the resourceful leaders of the federal bureaucracy. As Sir Anthony Mason, a member of the Kerr committee, recounted:⁸

“Let there be no mistake about this. There was very strong bureaucratic opposition to the Kerr Committee recommendations. The mandarins were irrevocably opposed to external review because it diminished their power. Even after the reforms were in place, Sir William Cole, Chairman of the Public Service Board⁹ and Mr John Stone, Secretary of the Treasury were implacable opponents of the reforms”.

To try to ease the path of reform, the government resorted to a well known bureaucratic strategy: the committee on the committee. A further body was created under Sir Henry Bland. Harry Whitmore was also appointed to this committee. His greatest achievement was to press forward the recommendation for merits review. He knew that judicial review for legal and jurisdictional error was frequently limited in what it could achieve for some, it represented a reoccurring foible of the English

⁷ A.F. Mason, “*The Kerr Committee*” p.3.

⁸ Mason, *ibid*, p2.

⁹ W. Cole, “*The Public Sector: The Conflict Between Accountability and Efficiency*” (1988) *Aust. JI Public Admin* 223.

common law: with its attention to procedure rather than actuality; form over substance. Fortunately, the Bland committee eased the path to reform. The steps were put in place for statutory reforms, beginning with the Whitlam Government and the Administrative Appeals Tribunal Act 1975 (Cth) and continuing under the Fraser Government with the Federal Court of Australia Act 1976 (Cth); Administrative Decisions (Judicial Review) Act 1977 (Cth). The Ombudsman Act 1977 (Cth) and the Freedom of Information Act 1977 (Cth). A common feature of all of these statutes was the significant enhancement by Parliament of the rights of the people. This enhancement occurred through the enlargement of the accountability of federal administration to the people. A common ingredient in this enhancement of accountability was the provision, by federal legislation, of obligations on the part of relevant federal officials to make findings and to state reasons for their decisions affecting individuals¹⁰.

The rights of the people of Australia were greatly enhanced by the statutory reforms under successive governments, to which Harry Whitmore contributed his own life's experiences and his firm grasp of the necessity and urgency of the challenge. Notably, Prime Minister Fraser, when asked in 2001 to name the greatest achievements of his government, he identified them as being, the Administrative Appeals Tribunal Act, the Ombudsman, the Human Rights Commission and the embrace of multi-culturalism¹¹.

Harry Whitmore joined the newly created Law School at the University of New South Wales in 1973, serving a term as Dean, in succession to Prof. Hal Wootten, until 1975. Typical of a man of the people, he retired without ceremony and travelled overseas. He retained a healthy interest in administrative law and welcomed the inauguration of a lecture series named after him. Especially when the first lecture was given in September 2007 by one of his colleagues on the Kerr Committee, Sir Anthony Mason. He died on 15 September 2008, shortly before the second lecture was to be given by Justice Garry Downes, then President of the AAT. Harry Whitmore never lost his links to his origins or his affinity with ordinary citizens in

¹⁰ *Administrative Appeals Tribunal Act 1975 (Cth)*, s22(1); *Administrative Decisions Judicial Review Act 1977 (Cth)*, s13(1).

¹¹ A.F. Mason, above n3, p5 citing E. Willheim, "Recollections of an AG's Department Lawyer" (2001) 8 *Aust J Admin Law* 151 at 162.

unequal struggles with unyielding administration. His lectures were peppered with stories of the struggles which he and other ordinary citizens had with government in its various guises, in quest of administrative justice¹². Harry Whitmore, on his graduation from Yale, won the Felix Cohen Prize for legal philosophy. His was not a career of patchwork reform and bandaids. It was a struggle with the very nature of public administration in a world of hugely expanded numbers and significantly increased responsibilities and power. For him, accountability was the key not only to efficiency but also to justice. And these were the rights of the people in dealing with those who called themselves their public servants.

OSMOND'S CASE IN THE NSW COURT OF APPEAL

In 1984, after a decade as chairman of the Australian Law Reform Commission (ALRC), I was appointed President of the New South Wales Court of Appeal. I took up my duty on 24 September 1984. In the same week, on 28 September 1984, with Justices Harold Glass and Bill Priestley, I heard argument in the case *Osmond v Public Service Board of New South Wales*¹³. The case involved a challenge by Mr Osmond to the refusal of the Board to give reasons to Mr Osmond for dismissing his application for promotion to a higher position. The Board was represented by a wily advocate, Chester Porter Q.C. (with Paul Menzies). Mr Osmond was represented by David Bennett Q.C. later Solicitor-General of the Commonwealth (with Geoff Shaw Q.C., subsequently Attorney-General for New South Wales).

I came to the judgment feat with what a modern writer of judicial biography would describe as psychological “baggage”¹⁴. First, as a child of young and loving parents, I always received answers to my question “why?” rare indeed was the answer “because I say so”¹⁵. It was this feature of my upbringing that made it astonishing for me to witness early cases as an article clerk where a particular judge of the Compensation Commission would often dismiss hard fought cases with no more

¹² ANU, College of Law, “*Vale Emeritus Professor Harold Whitmore*”.

¹³ [1984] 3 NSWLR 447.

¹⁴ c.f. A.J. Brown, *Michael Kirby – Paradoxes / Principles* (Federation Press 2011), 183-185, 210-213.

¹⁵ Contra M. McCusker (Governor of Western Australia), “The Need for Reasons” (John Toohey Oration, 2012), Perth 27 April 2012, p.3.

than the proclamation: “this claim fails, award for the respondent”¹⁶. Such conduct left a psychological wound on me as I had to struggle to imagine and explain the outcome to devastated clients, usually twice my age. It was an affront to my sense of justice. I had truly believed many of the fictions that I was taught about our system of government. Including that public officials were servants of the people, deriving their powers from the Crown or the law, to be exercised for the benefit of the people as a whole and on their behalf.

By the time I took that central seat in the court room in Sydney, I had also served *ex officio* because of my role in the ALRC, as a member of the Foundation Administrative Review Council of the Commonwealth. It was there that I worked with Justice F.G. Brennan, initial Chairman of the Council and first President of the AAT. It was there that I witnessed the struggles between the proponents of administrative law reform, including Robert Ellicott Q.C. who had become Attorney-General and the opponents including Sir William Cole and John Stone. Whatever the defects in my other fields of knowledge, I was well versed in the controversies of administrative law and judicial review. I knew of the question that had been pending for some years, as to whether the common law had advanced to impose upon administrative officials (as it had earlier done upon judicial officers¹⁷), a general duty to express reasons for significant decisions adverse to the interests of a claimant.

The facts in *Osmond* were straightforward. John Osmond had been born in 1936 and was thus three years older than I. He joined the New South Wales public service in 1954, engaged initially under the Public Service Act 1902 (NSW) and later under the Act of the same name of 1979. In 1963 he secured qualifications as a registered surveyor. In 1981 he was appointed District Surveyor at Armidale in New South Wales. In 1982 he applied for the advertised position of Chairman of the Local Lands Boards, an office within the Department of Local Government and Lands. The appointment was formally made by the Governor of the State on the recommendation of the departmental head pursuant to the 1979 Act. There were a number of eligible applicants. By s62 of the 1979 Act, the head of department was

¹⁶ Told in M.D. Kirby, “Reasons for Judgment – Always Permissible, Usually Desirable and Often Obligatory” (1994) 12 Aust Bar Rev. 121.

¹⁷ Upheld in New South Wales in *Pettitt v Dunkley* [1971] 1 NSWLR 375 (CA).

obliged to make a recommendation of the officer whose efficiency was greater than that of others. If no officer was singled out in this way, the senior officer within the group was to be appointed. Mr Osmond was not recommended. Another officer was preferred. Pursuant to s116 of the 1969 Act, the Appellant appealed to the Public Service Board whose decision, by the Act, was “final”. Although appeals lay from the Board in disciplinary proceedings to the government and related employees appeal tribunal, no such provision was made for appeals in the case of promotion decisions. The Board dismissed Mr Osmond’s appeal. Despite requests, it declined to give reasons “upon the ground that it’s not the Board’s practice to give such reasons”¹⁸. Differentially, the Board had reasons. Knowing those reasons could sometimes be helpful to a candidate to address any felt defects in his or her qualification, conduct or behaviour. Mr Osmond sought judicial review from the Supreme Court of New South Wales. The Board raised two objections to the appeal. The first was a privative provision in the 1979 Act which purported to render the decision of the Board final¹⁹. The second was that, in any case, the Board was within its rights as there was no statutory or common law duty to provide reasons. In this respect, the New South Wales legislation had not followed the accountability provision recently enacted in the federal administrative law reforms.

I shall recount the reasons why the majority of the Court of Appeal rejected the appeal to the privative provisions. Courts have always adopted a strict approach to such provisions. In more recent times, the attempt to exclude the supervision of state Supreme Courts has been disallowed by the High Court of Australia on constitutional grounds²⁰.

If the Court of Appeal decide the case on 21 December 1984. By majority (Justice Priestley and myself; Justice Glass dissenting) we upheld Mr Osmond’s arguments, rejected both suggested impediments; and issued a declaration that, in deciding to dismiss the Osmond appeal, the Board was obliged to give reasons for that decision. The Court of Appeal ordered the Board to give such reasons and provided for costs.

¹⁸ Cited by Hunt J. at first instance: *Osmond v Public Service Board* [1983] 1 NSWLR 691 at 693.

¹⁹ *Public Service Act 1979* (NSW), s116(3).

²⁰ *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

It is interesting, looking back, to re-read judicial reasons offered by each of the appellate judges in 1984. It is hard for contemporary lawyers to recapture the mood of the judiciary and legal profession of those days. Because Privy Council appeals remain, at least in relation to most orders of state courts, the attitude of deference to English authority was still evident. The reasoning of the court began with English cases and English text books such as *deSmith Judicial Review of Administrative Action*, 4th Ed. (1980) and *Wade's Administrative Law*, 4th Ed. (1977). All of us examined the reason of the English judge because, to that time it was English judges who had the last word in most important Australian cases. In a real sense, they were seen as still the voice of authenticity and legitimacy in the common law.

Thus, in my reason I began with observations by Lord Justice Denning, always then a good source of reminders of basic legal principles and a willingness to question rigid authority that was not always present in the more "timorous" Australian judiciary of the time²¹.

Great importance was attached to Lord Reid's statement in *Padfield v Minister for Agriculture, Fisheries and Food*²², disagreeing with the notion that a minister's decision would not be questioned if no reasons were given:

"If it is the minister's duty not to act so as to frustrate the policy and objects of the Act, and if it were to appear from all the circumstances of the Act that has been the effect of the minister's refusal [to give reasons], then it appears to me that the court must be entitled to act"

We were citing the English authorities because that was how the case was argued. But we were doing so because, at the back of our mind was the possibility that the case might be taken to London rather than the High Court. And that even if it went to the High Court, the final Australian court would obey and apply the approach of the English judges on such a fundamental question of the common law. It was Lionel

²¹ Thus in *Osmond* [1984] 3 NSWLR 447 at 453, on the Privative Issue citing Denning L.J. in *R.v Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1952] 1kb 338; as did Glass J.A. at 475. On the substantive issue 453 citing Denning L.J. in *Ex parte Shaw* and Priestley J.A. at 483 referred to *AEU* [1971] 2QB 175 at 191 and *Morgan v Launchbury* [1973] AC 127.

²² [1968] AC 997 at 1032-1033.

Murphy who questioned the legitimacy and propriety of this intellectual difference²³. At the time, the attitude of most judges and lawyers to his intervention was akin to that towards a person who had broken wind in a cathedral. Time has vindicated his approach and I am embarrassed to see how I was mentally captured by the outlook of which he was warning. Such discoveries are the price extracted of those who continue to long in the law.

Having paid obeisance to the English judges, I turned to two streams in my reasons to justify taking a new step in the common law. The first was the line of authority in Australia that had abandoned the notion that judicial officers were also exempt from having to give reasons. In *Pettitt v Dunkley*²⁴ in 1971, the NSW Court of Appeal had found that the common law had moved to accept a legal obligation in these public office holders. Logically, this could not be explained only by the need to facilitate rights of appeal. Otherwise, at least in federal matters where appeals to the Privy Council had been abolished, the same rule would not apply to the High Court itself. The reason for the new step was obviously some element in the public character of the donee of the power of decision. It was that public character that should now be extended to judicial officers to at least a high body of public officers, such as the public service board of the State.

But was there any clear authority of the High Court of Australia standing in the way of taking this step? On the contrary, I found a number of then recent opinions in the High Court in cases concerned with administrative decisions by the Commissioner of Taxation. Thus in *Giris Pty Ltd v Federal Commissioner of Taxation*²⁵ Barwick CJ drew an inference from a statutory obligation imposed on the Commissioner to take certain matters into account that:

“... The taxpayer is entitled to be informed of it, and upon the taxpayer’s request, the Commissioner should inform the taxpayer of the facts he has taken into account in reaching his inclusion.”

²³ See e.g. *Viro v the Queen* (1978) 141 CLR 88.

²⁴ [1971] 1 NSWLR 376.

²⁵ (1969) 119 CLR 365 at 373.

Lest this might be viewed as simply an instance of Barwick CJ's occasional hostility to the Commissioner of Taxation, I cited the concurring opinion of Windeyer J.²⁶:

“[T]he Commissioner's decision is not removed entirely from examination by the Court ... because I think he could be asked by a taxpayer to state the grounds of his opinion; and if asked, that he should do so.”

There were several available decisions that show the development of this line of thinking. I was able to call in a number of appellate and first instance decisions in Australia supporting the advance of the common law.

It was at this point that I made what I can now see to have been a strategic mistake. It was one that grew naturally enough for me from my decade working in the Australian Law Reform Commission. I looked beyond the United Kingdom and Australian law. I collected the reasoning of courts in the United States of America, Canada, New Zealand, Fiji and India.

Two full paragraphs of my reason were devoted to decisions of the Supreme Court of India and State High Courts in that country upholding a legal obligation on the part of administrative decision makers²⁷ specifically, I cited two cases in which Justice Bajgwati (later to be Chief Justice of the Supreme Court of India) declared that the modern understanding of the principles of natural justice obliged administrators to state reasons for decisions under statute: *Siemens Engineering and Manufacturing Co of India Ltd v Union of India*²⁸ and *Maneka Gandhi v Union of India*²⁹. Demonstrating the chance elements in these matters, I can now reveal that my knowledge of this Indian jurisprudence did not come from deep research. In 1984 we did not have access to the internet and case books from the sub-continent tended to be years behind. The truth is that Justice Bajgwati was visiting the law courts in Sydney in the interval during which *Osmond* stood for judgment. We had been supplied with some Indian cases but he delivered the clearest possible

²⁶ (1969) 119 CLR 365 at 384.

²⁷ [1984] 3NSWLR 447 at 461.

²⁸ AIR 1976 SC1785.

²⁹ AIR 1978 SC 597.

reference to decisions on the point by an important final national court of the common law tradition.

Having afforded these judicial sources, I then turned to consider and evaluate the arguments of legal policy. Would declaration of a new principle add unduly to the costs of administration? Was there an intuitive distinction between judicial and administrative reasons? Would a legal obligation result template reasons by officials, little better than no reasons? Would it produce excessive legalism? Would it be best to leave any step forward to the legislature? As against these considerations, I listed the reasons of policy that seemed to me to favour adapting the new principle in *Pettitt's* case to apply to *Osmond's* case: there had been a growth in administrative tribunals and decision making bodies, so that a new rule could be justified for the new legal circumstances. Requiring a statement of reasons ensured decision makers would have reasons and clarify them in their own minds. In many cases (as here) forms of review would be available and reasons would assist in the success of that process. A provision of reasons would promote public confidence in public decision making. It would obviate the feeling of disturbance that surrounded a refusal to provide reasons. It would place a check upon the uncontrolled exercise of public power. Academic power was unanimously in favour of taking the step. No direct authority of the High Court of Australia or Privy Council stood in the way. Taking the step would be consonant with broad developments in the field of statutory law. It was therefore timely for the Court of Appeal to override the conclusion that the Board could decline its reasons to Mr Osmond the trend of legal authority and the advantages to administrative justice warranted such a conclusion. Justice Glass dissented strongly and sharply³⁰:

“It is not unflattering to the judicial ego to be invited to join the ranks of those bold spirits who have the courage to provide a remedy where justice so requires and to be credited with the strength of mind to eschew the company of timorous souls³¹... but the power of the courts to renovate the law is not untrammelled. It is subject, one must assume, to a condition that it be exercised with a due sense of responsibility. Accordingly, the choices presented to the court ... are two in number viz whether we

³⁰ [1984] 3 NSWLR 447 at 471.

³¹ Citing *Candler v Carne Christmas and Co* [1951] 2kb 164 at 178.

should authorise a new principle conferring novel rights and duties or whether we should practise judicial restraint.”

Special leave was granted to appeal to the High Court of Australia against the order favoured by the majority in the Court of Appeal in *Osmond*. In the High Court, led by Chief Justice Gibbs, the Court unanimously came down on the side of judicial restraint.

OSMOND IN THE HIGH COURT OF AUSTRALIA

Chief Justice Gibbs, ever polite, apologised to readers of his opinion for dealing with the issue of the common law right to reasons “at what may be regarded as tedious length”³². He regarded it as undeniable that the bulk of authority to which he paid attention was against any common law duty on administrative decision makers to give reasoned decisions. But this had initially been so also in the case of judicial decision makers. Chief Justice Gibbs was prepared to accept that the duty on their part to give reasons had past into a requirement of the law in Australia. So what was it that led him to dismiss the views of the majority in the court below?

As with the reasoning in the Court of Appeal, Chief Justice Gibbs started with the opinions of the English judges. He spent some time analysing the opinions of Lord Denning M.R., pointing, with fairness, to some inconsistency with those reasons over the years. He also dismissed the reasoning in English Industrial Court decisions to which the majority in the Court of Appeal had appealed. He concluded that these were out of line with other authorities.

Chief Justice Gibbs did not see an inconsistency in the law’s taking a step forward with respect to the judicial obligations but holding back in the case of administrative tribunals and decisions makers. He said³³:

“... [T]here is no justification for regarding rules which govern the exercise of judicial functions as necessarily applicable in administrative functions which are different in

³² *Public Service Board v Osmond (Public Service Board of NSW v Osmond)* (1986) 159 CLR 656.
³³ *Ibid.*

kind. Moreover, the principle that judges and magistrates ought to give reasons in any case in which an appeal lies from the decision provides quite an inadequate basis for the suggested further principle that a body exercising discretionary administrative powers must give reasons to enable persons affected by the exercise of the power to bring proceedings for judicial review. That suggested principle would undermine the rule, well established at common law ... that reasons do not form part of the record, for the purposes of certiorari, unless the tribunal chooses to incorporate them.”

Chief Justice Gibbs was most dismissive of the suggestion of Barwick CJ that the Tax Commissioner should give reasons. If this were so, he concluded, that depended upon the view that the court had taken of the particular statutory provisions and did not establish any new general principle of the common law.

The shortest shrift was given to the overseas authority, particularly those from India and the United States of America. Chief Justice Gibbs said that it would be “hazardous” to assume that they had not been influenced by the constitution or local statutes. Moreover, in a somewhat “chauvinistic” passage³⁴ he declared that it was only where Australian law was unclear or uncertain that any assistance might be gained from overseas authorities:

“When the rules are clear and settled [in Australia] they ought not to be disturbed because the common law of countries may have developed differently in a different context³⁵”

Chief Justice Gibbs also criticised the use that had been made of statutory provisions in Australia affording a right to reasons. Far from evidencing an advance in the “justice of the common law”, he and Justice Wilson (in a short concurring argument) considered that the rule against reasons applied with special force in the case of decisions touching the employment of persons “in the service of the Crown”.

³⁴ The word is that of Professor Michael Taggart, “*Osmond in the High Court of Australia: an Opportunity Lost*” in M. Taggart (Ed.), *Judicial Review of Administrative Action in the 1980's: Problems and Prospects*, OUP Oxford, 1986, 53 at 62.

³⁵ *Osmond* above n.32 [p11].

Chief Justice Gibbs, like so many other judges approached the issue before the court, affirmed that it would be desirable that bodies such as the Public Service Board exercising discretionary powers, should give reasons for their decisions. This has been a *mantra* in the field of decisions on the duties of administrators, just as earlier it had been in the case of judicial decisions. But it was for the legislature, not the courts, to change this rule of the common law because to do so would involve “a departure of a settled rule on grounds of policy”³⁶ so common and repeated were these statements of desirable practice that one Canadian judge declared³⁷:

“Unless the Court is prepared to compel the Board to give written reasons I cannot see any useful purpose in repeatedly expressing a desire that the Board furnish written reasons for its decision”

The net result of the opinions of the plurality in the High Court (which included Justice Brennan who was later to write the leading opinion of the Court in *Mabo v Queensland [No.2]*³⁸ (reverse 150 years of settled common law doctrine governing indigenous land rights) amounted to something of a slap across the knuckles for the majority of the Court of Appeal. Only the opinion of Justice Deane salvaged the severe remonstrations. Whilst accepting that the common law position remained that established by the authority referred to by Chief Justice Gibbs, Justice Deane emphasised that the rules of nature justice of fairness were “neither standardised nor immutable” and that their content “may vary with changes in contemporary practice and standards”. He went on³⁹:

“[T]he statutory developments referred to in the judgments ... in the Court of Appeal ... are conducive to an environment within which the courts should be less reluctant than they would have been in times past to discern in statutory provisions a legislative intent that the particular decision-maker should be under a duty to give reasons *or* to accept that *special circumstances* might arise in which contemporary standards of natural justice or procedural fair play demand that an administrative decision-maker

³⁶ *Ibid*, p.11

³⁷ Hall J.A. in re Glendenning Motorways Inc. and Royal Transportation Ltd (1975) 59 DLR (3rd) 89 at

92.

³⁸ (1992) 175 CLR 1.

³⁹ *Osmond* (1989) 159 CLR at 23 per Deane J.

provide reasons for a decision to a person whose property rights or legitimate expectations are adversely affected by it. Where such *circumstances* exist, the statutory provisions conferring the relevant decision making power should, in the absence of a clear intent to the contrary, be construed so as to impose upon the decision maker an implied *statutory duty* to provide such reasons.”

This approach by Justice Deane was similar of that expressed in the then current edition of *deSmith’s Judicial Review of Administrative Action*⁴⁰ this, indeed, is the way in which the English law and judicial decisions have developed. The near unanimous opinion of the High Court of Australia, at hearing to what Professor Taggart described as the “safety of a Maginot Line” ensured that there would be no easy path to expand the duty to provide reasons to administrators unless legislatures, in clear terms, accepted that principle and imposed that duty by or under statute.

I have known judges of intermediate appellate courts who sent their associates to local hearings to listen out for any criticism ventured by the High Court justices, particularly during special leave applications. I never did this. Nor did I ever allow the pain of reversal of a hard-worked opinion and order to cause more than momentary grief. Life in an intermediate court in Australia is much busier than on the High Court. There is little time for mortification. I had great respect and admiration for Chief Justice Gibbs and never allowed his dismissive approach to the great question posed for our governance in *Osmond* to get in the way of a developing friendship⁴¹.

Nevertheless, when I was appointed to the High Court of Australia in February 1996, I anticipated that, in my term, I would have an opportunity to re-visit the holding in *Osmond*. Of course, I retained an open mind. But it was one of the relatively few cases of reversal, where most respectfully, I considered that whilst the High Court had stated the law, the Court of Appeal had the better side of the argument.

⁴⁰ J.M. Evans, *deSmith’s Judicial Review of Administrative Action* (4th Ed., 1980) 149. See Taggart, above n.34 at 67.

⁴¹ Taggart above n 34, 69 citing Justice William O’Douglas “*Stare Decisis*” 49 *Colorado LREV* 735 (1949).

REACTIONS TO OSMOND

My opinion in this regard was not unique or isolated. By and large, the academic commentary about Osmond was kinder to the judges *a quo* than they were to the Justices of the High Court.

The decision in Osmond was actually handed down on a day where Justice Brennan and I were in Auckland for a conference on new directions administrative law and judicial review. The story is told in a chapter contributed by Michael Taggart, later Professor and Dean of Law at the University of Auckland. He described Osmond as “an opportunity lost”⁴². As he pictured the scene:⁴³

“At the conference Kirby P. introduced the foregoing paper by announcing that the decision of the High Court of Australia in *Public Service Board of New South Wales v Osmond*, an appeal from the majority decision of the New South Wales Court of Appeal in which he wrote the leading judgment, was expected the very next day. The following afternoon a terse telephone message came through to the conference venue saying simply ‘Osmond overruled’. Saturday’s *Sydney Morning Herald* told the story⁴⁴. The High Court of Australia had unanimously rejected the decision of the majority of the Court of Appeal that the Public Service Board was obliged as a matter of common law to give reasons for decision.”

In his article, Professor Taggart deconstructed the decision in Osmond. He concluded that the analogy to the judicial obligations had not been satisfactorily distinguished, nor the analogy to the taxation decisions unfavourable to one administrator: the Commissioner of Taxation. He was highly critical of the treatment of the overseas authorities in the High Court. He considered that the way ahead was to develop the “implied statutory duty” posited by Justice Deane. He cited a number

⁴² The reference is to associations in the Australian Academy of Forensic Sciences and Australian’s for Constitutional Monarchy and ultimately through the High Court of Australia.

⁴³ Taggart, above n.34, 53.

⁴⁴ *Lock cit.*

of New Zealand authorities which seemed more consonant with the Deane view than with that of Chief Justice Gibbs. And he noted that the Chief Justice himself had assumed, as he put it, “not without some difficulty” that “in special circumstances natural justice may require reasons to be given”. But he asked why the Osmond case was not such an instance. After all, here was a senior, high level public decision making body with the important duty of deciding a matter significant for appointee and candidates alike. Why was that not special enough? Michael Taggart went on:⁴⁵

“I believe Osmond’s case to be just that; a lost opportunity to correct ‘a serious gap’⁴⁶ in the common law by a Court with the power to depart from even well-settled rules. In my view it would have been possible, and highly desirable, for the High Court of Australia to pull together the strands of reasoning and the lines of cases discussed above, much as Kirby P. did, to develop a common law reasons requirement”.

Other commentators and scholars offered similar views. In his book on administrative law, Michael Head concluded⁴⁷:

“[T]he common law situation remains unsatisfactory. In *Public Service Board of New South Wales v Osmond* ... the High Court rejected the argument that procedural fairness requires reasons, or at least said it was not required on the facts of the case. Yet in the Court below, the NSW Court of Appeal, led by Kirby P., held strongly to the view that such a reason exists. ... [T]he judgments are excellent examples of how the same authorities can be relied upon to support quite different conclusions. The reasons given by the NSW Court seem more cogent than the negative arguments of the High Court. ... [the approach taken by Deane J.] ... has indeed happened to an extent over the past decade, as observed by Fitzgerald P. in the Queensland case of *Cypressvale Pty Ltd v Retail Shop Leases Tribunal*⁴⁸. Moreover, even where there is no express legal duty to give reasons, failure to do so may invite a reviewing court to infer that the decision-maker had no good reasons for the decision and thus acted in

⁴⁵ *Sydney Morning Herald*, 22 February 1986, 1.

⁴⁶ Taggart, above Ed. 34, 69.

⁴⁷ Akerhurst, “Statements of Reasons for Judicial and Administrative Decisions” (1970) 33 *Modern LRev.* 154 J. Akerhurst.

⁴⁸ M.Head, *Administrative Law: Context and Critique* (Federation Press 2005), 60-61.

an abuse of power, under one of the headings [such as] failure to take into account relevant considerations, unreasonableness or no evidence:⁴⁹.

The Canadian Supreme Court in *Baker v Canada (Minister of Citizenship and Immigration)*⁵⁰ and *Suresh v Canada (Minister of Citizenship and Immigration)*⁵¹ expressly rejected the approach in ... *Osmond*, and followed an English trend in deciding that at least in many circumstances procedural fairness requires reasons.”

And in an editorial written earlier this year, Professor Damien Cremean revisited the *Osmond* case a quarter century on. He took as his principle the fact that, as Aristotle argued long ago, the human being is a *politikon zoon*, i.e. a political animal that is curious and wants to know why things happen. In that context, declared Professor Cremean:⁵²

“*[Osmond]* is a most unfortunate precedent because, time and time again, administrative decision-makers – bureaucrats and others deciding people’s rights and duties – hide behind the ruling in *Osmond* to deny any obligation to give reasons for their actions. This means they do not have to justify what they decide – unless they are required under statute to do so. They could be deciding something on an entirely erroneous basis – and no one will ever find out. Or they could be completely biased. They are not under any obligation to give reasons unless required by statute. ... [S]urely, the giving of reasons is *part* of the decision itself – and does not logically occur afterwards. It would be irregular in our system if decisions were made and reasons were then found for them. In other words, giving reasons is part of the decision-making process. And it is only by regarding reasons as part of the decision-making process itself that one can tell whether, in the body of the decision, the arguments advanced, in the course of the opportunity to be heard, were given consideration or not. That is to say, whether the decision reveals that one’s opportunity to be heard was meaningfully exercised – whether one was listened to or understood or not.”

⁴⁹ [1996] 2QdR 402.

⁵⁰ *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC997.

⁵¹ [1999] 2SCR84.

⁵² [2002] SCC1.

According to Professor Cremean, the approach of Chief Justice Gibbs was greatly affected by the old learning that distinguished between the *decision and the record* which alone was available for review under the traditional prerogative writs. The advance in the removal of such impediments could be seen as undermining an essential reason for the approach favoured in *Osmond*. Professor Cremean concludes⁵³:

“In this day and age of accountability, it is time for the rule upheld in *Osmond* to be reviewed. No longer should it provide a cover for those who do not want to disclose why they have decided something in some particular – perhaps odd or irrational or biased – way ... the fundamental principle of the common law is that justice must not only be done but must manifestly be seen to be done. ... but how is the appearance of justice, or the real doing of justice, promoted by not requiring administrative decision-makers outside statute, to give reasons? Reasons show the very thing that is the fundamental principle of the common law in question⁵⁴.”

Some reference is made in the above commentaries to the approach taken in jurisdictions other than Australia to the obligation of administrators to give reasons. Because we now live in an intellectual community linked by the internet and global reports of judicial decision⁵⁵, no national court’s authority, however distinguished, is now able to withstand the force of global movements in thinking and expressing universal human rights⁵⁶ and global trends in the common law.

REASONS POST OSMOND

United Kingdom: Because the judges in the United Kingdom were not faced by an emphatic, hostile, binding authority such as *Osmond*, they continued to identify special cases and particular circumstances, where the common law would impose a duty on an administrator to state reason for a decision. In *R. v Higher Education*

⁵³ DJ Cremean, “Obligation to Give Reason” (2012) 19 AdJ AdminL 57 at 57.

⁵⁴ *Ibid* at 58

⁵⁵ Citing *R.v Sussex Justices; Ex parte McCarthy* [1924] 1KB 256 at 259 per Lord Hewart CJ, applied in *Ferguson v Tasmania* [2011] TASSC 51 at [35], per Wood J.

⁵⁶ Such as in the *Law Reports of the Commonwealth* (Butterworths LexisNexis, London).

*Funding Council Ex parte Institute of Dental Surgery*⁵⁷, Justice Sedley identified a categories of case which he suggested a duty to give reasons would arise. This was where:

“Subject matter is an interest so highly regarded by the law (for example, personal liberty), that fairness requires that reasons, at least for particular decisions, be given as of right”⁵⁸

The important decision of the House of Lords in *R. v Secretary of State for the Home Department; Ex parte. Doodey*⁵⁹ was such a case. The Home Secretary decided that the claimants, who were convicted murderers, subject to mandatory life sentences, should serve a longer minimum detention (or tariff) period than that which had been judicially recommended. Lord Mustill held that fairness demanded the giving of reasons. The length of the tariff period was so important to life sentence prisoners, and its impact upon their rights and interests was so fundamental, that it was inconsistent with the basic precepts of fairness to permit the Minister to behave as if a “distant oracle”⁶⁰.

The common law often retreats from absolutes. Its nine century history has taught the almost inevitable variation in factual circumstances. Retaining a certain looseness, or flexibility, is the way justice will better be achieved. The approach in *Doodey* was more akin to that favoured in Australia by Justice Deane than was the more categorical approach of the *Osmond* majority.

Post- *Doodey* decisions began to find, and explain the categories in which a common law right to reasons would be upheld.

⁵⁷ *Mabo v Queensland* [No. 2] (1992) 175 CLR 1 at 42.

⁵⁸ [1994] 1WLR 242.

⁵⁹ [1994] 1WLR 242 at 263.

⁶⁰ [1994] 1AC 531.

Thus, in *R. v Royal Borough of Kensington and Chelsea*⁶¹ the English Court of Appeal explained that, whilst there was no general duty to give reasons for administrative decisions, two exceptions might be identified.⁶²

“... [F]irst, where there is something in a decision which “cries out for some explanation”, and where the absence of any explanation will support the inference that the reasoning is flawed for aberrant ... and, secondly, where “the subject matter is an interest so highly regarded by the law ... that fairness requires that reasons, at least for particular decisions, be given as of right.”

When courts below the Court of Appeal in England had felt able to follow my reasoning in *Osmond*, in preference of that of the High Court of Australia⁶³, the English Court of Appeal bound by *Doodey* thought this had gone too far. Thus Lord Justice Neill in the *Borough of Kensington* case concluded⁶⁴:

“There may come a time when English law does impose a general obligation on administrative authorities to give reasons for their decision. But there is no such requirement at present.⁶⁵ Nevertheless, such an obligation might be implied from the circumstances. These would include the “nature of the adjudicating process and the facts of the particular case”. In the circumstances of the instant case, the Court of Appeal had no difficulty in inferring that, despite the unsatisfactory state of the record, the decision maker had accepted the advice of an official. He had concluded that, in all the circumstances, the accommodation offered to the applicant was not unsuitable, given the state of housing stock available for allocation.”

A similar approach has been followed in subsequent cases including *R. rel hasan v Secretary of State for Trade and Industry*⁶⁶. In that case the English Court of Appeal concluded that the passage of the Freedom of Information Act, affording a statutory framework for the disclosure of information held by public authorities, “militates

⁶¹ [1994] 1AC 531 at 564-5.

⁶² [1996] 26HLR 94.

⁶³ [1996] 28HLR 94 at 95.

⁶⁴ See e.g. *R. v Lambeth London Borough Council; ex parte Waters* (1993) 26 HLR 170, per Sir Louis Blom-Cooper.

⁶⁵ *Ex parte Grillo* (1995) 94 LGR 144; (1996) 28 HLR 94 at 105.

⁶⁶ Citing *Doodey* [1994] 1 AC 531 at 564.

against the incremental judicial perception of a common law duty to the same or any wider extent”⁶⁷. In an English medical disciplinary decision made the Judicial Committee of the Privy Council in 1999, their lordships edged the applicable law forward, just a fraction. The case concerned the suspension of the registration of a medical practitioner where the relevant committee concluded that her fitness to practice was impaired. The reasons given by the committee were very brief and enigmatic. It “again judged your fitness to practice to be seriously impaired [so] we have directed that your registration be suspended indefinitely”. In the light of the judicial character of the proceedings and the statutory framework in which it operated, together with the facility of a right of appeal, Lord Clyde, delivering the judgment of the Privy Council, concluded that there was, in the case, a common law obligation to give at least a short statements of the reasons for the decision. He said that very few sentences would suffice; but that the explanation given was unsatisfactory.

In the course of explaining this conclusion, and after noting the English law as stated in *Doodey*, Lord Clyde examined the growing body of law in the European Court of Human Rights on the duty of courts to give reasons for their decisions⁶⁸. By Article 6(1) of the European Convention on Human Rights, a duty is imposed upon courts to act fairly and this has been held to include giving reasons for their decisions. The system of appeal to the Privy Council had been upheld as adequate, but only because the European Commission had examined the full transcript of the hearing, demonstrating the reasoning not otherwise apparent. In these circumstances, Lord Clyde found that the existence of the statutory right of appeal did not, in the circumstances, imply the provision of reasons. He therefore turned to examine whether such an implication should be drawn, by the application of the common law. He went on:

“The trend of the law has been towards an increased recognition of the duty upon decision-makers of many kinds to give reasons. This trend is consistent with the current development towards an increased openness in matters of government and administration. But the trend is proceeding on a case by case basis ... [T]here may be

⁶⁷ [2009] 3 all ER 539; [2008] EWCA Civ 539.
⁶⁸ *Ibid* para [18].

classes of cases where the duty to give reasons may exist in all cases of that class. Those classes may be defined by factors relating to the particular character or quality of the decisions, as where they appear aberrant, or to factors relating to the particular character or particular jurisdiction of a decision-making body, as where it is concerned with matters of special importance, such as personal liberty. There is certainly a strong argument for the view that what were once seen as exceptions to the rule may now becoming examples of the norm, and the cases where the reasons are not required may be taking on the appearance of exceptions ... [T]he present case [does not] provide an appropriate opportunity to explore the possibility of such a departure. [We] are conscious of the possible re-appraisal of the whole position which the passing of the Human Rights Act 1998 may bring about ... [in] the particular circumstances of the present case, their lordships are persuaded that there was a duty of common law upon the committee ... to state the reasons for their decision ... [it] was open to appeal under the statute. The appeal was only on the ground of law but, ... the existence of such a provision points to the view that as a matter of fairness in deciding whether there are grounds for appeal, and as a matter of assistance in the presentation and determination of any appeal, the reasons for the decision should be given. Secondly, ... the procedures which [the committee] follows and the function which it performs are akin to those of a court where the giving of reason would be expected ... thirdly, the issue was one of considerable importance for the practitioner ... fourthly, Dr Stafan has repeatedly asked for an explanation of the committees view and for the diagnosis which they have reached of her condition ... fifthly, the only expert evidence who had examined Dr Stafan and appeared to give evidence before the committee ... stated in his written report that she was now well able to control ... the matter of earlier concern ... sixthly, this was the first time that an indefinite suspension was decided upon ... [seventhly] certain questions were put to Dr Stafan ... about her qualifications to undertake ophthalmic work. Consideration of her qualifications was irrelevant to the issue before the committee.”

In departing from the case, the Privy Council went beyond the instant matter and declared that they were persuaded that “... in all cases heard by the Health Committee there will be a common law obligation to give at least some brief statement of the reasons that form the basis for their decision ... the extent and substance of the reasons must depend upon the circumstances. They need not be

elaborate nor lengthy. But they should be such to tell the parties in broad terms why the decision was reached” although it might fairly be said that the reasoning of the Privy Council in *Stefan* was greatly influenced by the growing jurisprudence under the European Convention on Human Rights, that source of principle concerns little more than the general statement that courts must act fairly. As this has been a basic principle of the common law for centuries, all that can be said is that, arguably, the the English courts had become complacent and blind to the injustice to unexplained administrative decisions. If it has taken outsiders, from a different legal tradition, to remind common lawyers of this, one might lament the absence of such a voice in the Australian legal context. Particularly as that context is given, even more than England today, to be self satisfied and complacent. The trend of the English authority has continued to move in the direction mapped by Lord Clyde in *Stefan*. After analysing more recent cases, Mark Elliott, in an essay, “Has the Common Law Duty to Give Reasons Come of Age Yet?⁶⁹” places the developments of the common law in the context of the broader movement of the English law to develop a body of principles governing good administration. This movement has occurred both in statute and in common law decisions; both in European courts and in local decisions; both legal rules and administrative practice. It is part of the shift of English law away from uncritical faith in trusted decision making institutions toward a greater “commitment to rationality”⁷⁰. At its heart, this shift can be understood as serving a ‘dignitarian’ function quite distinct from the arrangements for securing sound decision⁷¹. It is because English courts have increasingly adopted this approach that the situation has emerged quite different from that of the common law in Australia, as stated in *Osmond*. The courts have acknowledged the “special” duty to give reasons; but have concluded that adequate reasons were given in the circumstances of the case⁷². There may still be no existence of a general duty. But the recognition of a suitably flexible duty to given reasons, the discharge of which and remedies for which, will be viewed with a practical eye⁷³. Thus, “the duty to give

⁶⁹ E.g. *van de Hurk v The Netherlands* (1984) 18 EHRR 481 at 501; *Bryan v United Kingdom* (1995) 21 EHRR 342.

⁷⁰ *Stefan v General Medical Council* [1999] 1WLR 1293 at 1300.

⁷¹ [2011] *Public Law* at 56.

⁷² To A. Le Sueur, “Legal Duties to Give Reasons” (1999). 52 CLP 150 at 154.

⁷³ T Allan, “Procedural Fairness at the Duty of Respect” (1998) 18 OTLS 497 at 499.

reasons as a principle of English administrative law has developed considerably over recent decades ... [so that now] it is on the brink of maturity”⁷⁴.

New Zealand: In New Zealand, the decisions of the High Court of Australia are sometimes influential. The reasoning of the court in *Osmond* has been noted many times in New Zealand cases⁷⁵. The overriding rule, explained by Davison C.J. in *Potter v New Zealand Milk Board*⁷⁶ has been “fairness in the circumstances of the particular case”. In *Gurusinghe* Davison C.J. observed “notwithstanding the criticisms by Gibbs C.J. in *Osmond* ... of the judgement of Kirby P. in that case, we conclude that the trend of New Zealand authority brings fairness in to the decision-making process where the unsuccessful party has a right of appeal. The procedure for determining the rights of party is not closed until the right is exercised or abandoned. Procedural fairness requires that the decision-making process does not tend to close off the right of appeal by prejudicing that right.”

In 2000, the New Zealand Court of Appeal delivered a unanimous appeal in *Lewis v Wilson and Horton Limited*⁷⁷. The judgment of the court⁷⁸ was delivered by Elias C.J.. One of the issues in contention was a complaint of the obligation of the primary judge to give reasons. The High Court of New Zealand had concluded that there was such a duty; but that the failure to give reasons did not warrant disturbance. Following *Osmond’s* case⁷⁹ in the High Court of Australia and other authorities, the New Zealand Court of Appeal upheld the complaint that the judges failure to give reasons was an error of law requiring the setting aside of his orders. This decision shows that, as late as 2000, in some jurisdictions, the duty of judges to provide reasons was not seen as a universe rule of law. It demonstrates the evolutionary character of this area of the law and, hence, the need to examine old authorities with a critical eye.

⁷⁴ See e.g. *R.(on application Asha Foundation) v Millennium Commission* [2003] EWCA88.

⁷⁵ Le Sueur, opsit n 72, 72-74.

⁷⁶ See e.g. *Gurusinghi v Medical Council of New Zealand* [1988] NZHC528; [1989] NZLR 139. [1983] NZLR 620 at 621.

⁷⁷ [2001] 2LRC 205 (NZCA).

⁷⁸ Elias CJ. Richardson P., Keith, Blanchard and Tipping JJ.

Since that decision, important questions have arisen, both in New Zealand⁸⁰ and Australia⁸¹ concerning the ambit of the duty of participants in alternative dispute resolution (adjudicators and arbitrators) to give reasons for their findings and awards. In New Zealand, the conclusion was reached that the adjudicator “must give sufficient reasons to answer in fairness the arguments for and against a claim and [to] render his or her decision intelligible and free from unreasonableness”⁸². In Australia, notwithstanding arguments for judicial deference to the legitimate reasoning of arbitrators in international commercial arbitrations, and strong competitive grounds for withholding relief, the High Court of Australia concluded that the reasons given in an arbitration were inadequate to sustain the award, justifying and requiring judicial relief⁸³. Accordingly, the trend is to enlarge the duty to provide proper reason and to insist upon it in the case of courts, adjudicators and arbitrators.

Canada: A similar trend in judicial explanations of administrative law can be seen in Canada. In *Baker v Canada (Minister of Citizenship and Immigration)*⁸⁴, the question arose as to whether the duty of procedural fairness, as understood in Canada, extended to oblige a junior official to afford reason to a person affected by his decision. The leading opinion was given to the Supreme Court of Canada by Justice L’Heureux Dubé. After noting the adverse conclusion of the High Court of Australia in *Osmond*, Her Ladyship stated:⁸⁵

“In my opinion, it is now appropriate to recognise that, in certain circumstances, the duty of procedural fairness will require the provision on a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggests that, in cases such as this where the decision has important significance for the individual, where there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere. The circumstances of the case at bar in my opinion,

⁸⁰ (1986) 159 CLR 656 at 667, per Gibbs CJ. See *ibid* [75].

⁸¹ *Canam Constructions (1955) Ltd v Lahatte*, NZHC, 30 October 2009 per Keane J.

⁸² *Westport Insurance Corp v Gordian Runoff Ltd* (2011) 85 ALJR 1188.

⁸³ *Canam* [59] see *F. Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* [2004] 61 NSWLR 421(CA)

⁸⁴ *Westport Insurance Corp v Gordian Runoff Ltd* (2011) 85 ALJR 1188 at 1198 [49] ff per French CJ, Gummow, Crennan and Bell JJ.

⁸⁵ *Baker* [1999] 2SCR 817.

constitutes one of the situations where reasons are necessary. ... it would be unfair for a person subject to a decision such as this one, which is so critical to their future, not to be told why the result was reached.”

A similar decision was expressed by the Supreme Court of Canada in *Suresh v Canada (Minister of Citizenship and Immigration)*⁸⁶. That too was a case concerned with the rights of a convention refugee from Sri Lanka to be provided with written reasons for a decision of expulsion which would deal with all relevant issues. In a unanimous decision, the Supreme Court applied its earlier ruling in *Baker* and held:⁸⁷

“The Minister must provide written reasons for her decision. These reasons must articulate and rationally sustain a finding that there are no suitable grounds to believe that the individual who is the subject of a ... declaration will be subjected to torture, execution or other cruel or unusual treatment, so long as the person under consideration has raised those arguments. The reasons must also articulate why, subject to privilege or valid legal reasons for not disclosing detailed information, the Minister believes the individual to be a danger to the security of Canada ... in addition, the reasons must also emanate from the person making the decision, in this case the Minister, rather than take the form of advice or suggestion, ... [the] report [to the Minister] ... is more like a prosecutor’s brief than a statement of reasons for a decision. These procedural protections need not be invoked in every case, as not every case of deportation of a convention refugee ... will involve risk to an individual’s fundamental right to be protected from torture or similar abuses ... if the refugee establishes that torture is a real possibility, the Minister must provide the refugee with all the relevant information and advice she intends to rely on, provide the refugee an opportunity to address that evidence in writing, and after considering all the relevant information issue responsive written reasons. This is the minimum required to meet the duty of fairness and fulfil the requirements of fundamental justice under *s7 of the Charter*.

In the foregoing cases, the obligation to give reasons was ultimately based on the *Canadian Charter of Rights and Freedoms*. However, other decisions have been

⁸⁶ [1999] 2SCR 87 at [43].

⁸⁷ [2002] 1SCR 3; [2002] 4LRC 640 (SC Canada).

reached in Canada, in less fraught circumstances, concerning the duty of administrative agency to provide reasons pursuant to their statute. Where the Act imposes a duty, courts have repeatedly described it as “salutary”, invoking *Baker* to explain the purposes that reasons fulfil. To ensure that there is “better decision making ... that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of righting reasons for decision by itself maybe a guarantee of better decision.”⁸⁸ Providing assurance that submissions have been contained and facilitating rights of appeal are other reasons that touch both the duty to give reasons and the content of any reasons given.

The decision in *Baker* has been interpreted in Canada as pushing forward the common law requirement of reasons on the part of administrators, at least where it would be unfair to subject the person to the decision critical for their future without being told why the reason was reached⁸⁹. Increasingly, the Canadian jurisprudence has referred of late to a factor important to my own thinking. Where an “organ of the state” is involved and is subject to a constitutional, statutory or common law duty to give reasons, its failure to do so as a public body may be deemed to amount to arbitrary action in violation of its duty of procedural fairness⁹⁰.

Hong Kong: Because of the link between Hong Kong and the English judiciary which lasted until the termination of privy council appeals in 1998, it is natural that the law in Honk Kong has developed a long line similar to that in England. However, the opinion of the High Court of Australia in *Osmond* has also been noticed and referred to in decisions of the Hong Kong judiciary.

In *Lau, Tak Pui v Director of Immigration*⁹¹ a question arose as to whether an applicant had been born in Hong Kong and thus enjoyed the right of abode there. Provision for appeal against an adverse administrative order was made to the Immigration Tribunal pursuant to *s54A of the Immigration Ordinatees* (Cap115). An appeal from a director of immigration was taken to the Immigration Tribunal which, in

⁸⁸ [2002] 1SCR 3 at [126].

⁸⁹ *VIA Rail Canada Inc. v National Transportation Agency* [2001] 2FC 25 at [17] citing *Baker* [1999] 2SCR 817 at 845.

⁹⁰ *PT and ST v Department and Minister of Social Development* [2011] NBQB 318 at [121].

⁹¹ *Congregation des témoins de Jéhovah v Municipality of La Fontaine* [2004] 2SCR 650 at [12] per McLachlan CJ. (Iacobucci, Binnie, Arbour and Fish JJ concurring).

very short terms, dismissed them. The primary judge (Mayo J.) found that the reasons given failed to adequately set out the findings of fact implicit in the disposition of appeals under the Ordinates. The question on appeal, as explained by Kempster J.A. was whether, “in the absence of statutory requirement express or implied the applicants have made good their submission that natural justice or the principle of fairness demands reasons”.

The Court of Appeal accepted that the decision in *Osmond*, in Australia, suggested that there was no such obligations to give reasons and that the rules of natural justice would not remedy the omission. However, the Hong Kong court cited more extensively from reasons noted English decisions noted by Chief Justice Gibbs, but not elaborated. Kempster J.A. distinguished *Osmond* on the basis that a different rule applied where the decision in question was administrative and where it was judicial in character. So far as he was concerned, the Hong Kong Administrative Tribunal was of the later character so that it fell more readily under the additional duties to observe procedural safeguards so as to ensure the attainment of fairness⁹² in this way, *Osmond* was not disapproved. It was simply sidelined, and confined, to purely administrative decisions.

Having concluded in this way, the question remained whether the decisions given were adequate to the circumstances of the case. “After considerable hesitation” the Court of Appeal of Hong Kong determined that they were⁹³. A line of distinction was drawn by the judges between the instant case and cases where statute imposed a duty to provide reason.

In other cases in Hong Kong, in accordance with growing English authority, the question for decision was increasingly reduced to the Delphic puzzle as to whether, for default of a statutory obligation to give reasons, a “special” ground existed for inferring that duty from the principles of natural justice⁹⁴ in default of adequate clarification of what cases were “special” or how these could be distinguished from

⁹² Court of Appeal (HK) 9 January 1992, per Kempster JA.

⁹³ *Lau Tak Pui v Immigration Tribunal* [1992] 1HKLR 374 at 382 per Sir Derek Cons, citing *Lloyd v McMahon* [1987] 1AC 625 at 702-3.

⁹⁴ *Ibid* at 683.

cases that were not, it was unsurprising that claim for relief on the grounds of inadequate administrative reasons usually failed.

Every now and again the courts of Hong Kong would reaffirm the desirability of the provision of reasons for administrative decisions. Thus in *Tong Pon Wah v Hong Kong Society of Accountants*⁹⁵, the High Court of Hong Kong dismissed a challenge to the order of the Disciplinary Committee of the Hong Kong Society of Accountants (given force by the *Professional Accounts Ordinance*, Cap. 50, that Mr Tong should be reprimanded for an inadequate audit. Unanimously, the High Court dismissed an appeal. The reasons followed the predictable course: the general rule against a legal obligation to provide reasons was sourced in the decision in the High Court of Australia in *Osmond*⁹⁶. Judicial decisions were exempted. Special exceptions were acknowledged, as stated by Lord Mustill in *Doodey*. Implications could sometimes be drawn from statutory requirements that natural justice or the fulfilment of the given process would require [more or better] reasons⁹⁷. There even began to creep in citations of the Hamlyn Lectures of Lord Justice, (later Lord) Woolf:⁹⁸

“If I were to be asked to identify the most beneficial improvement that could be made to English Administrative Law I would unhesitatingly reply that it would be an introduction of a general requirement that reasons should normally be available, at least on request, for all administrative actions”.

Dismay is even expressed that reasons are not standard practice by contemporary administrators. But the bottom line prevails that, start with the stern words of *Osmond*, judges feel disinclined to take in respect of administrators the step they had earlier robustly applied to themselves.

The *Tong* appeal was unanimously dismissed. An important consideration woven through the reasons is the obvious reluctance of a generalist court to intrude on the

⁹⁵ *Lu Sum Wo v Medical Council of Hong Kong* [2993] HKCFI 68.

⁹⁶ High Court, HKSAR 3 June 1998.

⁹⁷ See reasons of Liu JA at p.15.

⁹⁸ *R. v Higher Education Funding Council; ex parte Institute of Dental Surgery* [1994] 1WLR 242 at 261.

assessments made by professional experts⁹⁹ at least where the court has not felt disabled from performing its function by the sparse reasons given, the Hong Kong jurisprudence initially reflected more of the *Osmond* approach than of the later English and Canadian decisions.

There is evidence that a shift in the opposite direction has occurred with the advent of the Final Court of Appeal. In *Oriental Daily Publisher v Commissioner for Television and Entertainment Licensing Authority*¹⁰⁰ the question for decision was whether reasons given by the Obscene Articles Tribunal were adequate. The Court of Appeal had earlier held that the Tribunal was under a duty to give reason in deciding whether an article was obscene or indecent. As Chief Justice Li observed, this ruling accorded “with the trend in public law towards greater openness in decision making”. It was not challenged in the *Oriental Daily* case. But it was contended that the reasons of the Tribunal, were more in the nature of a conclusion than of an explanation of the Tribunal’s approach and reasoning. With this submission, the Court of Final Appeal unanimously agreed. Chief Justice Li observed:

“In my view, the reasons given are inadequate to discharge the Tribunal’s duty to give reasons in the circumstances of this case. They are conclusions rather than reasons. They do not show that the Tribunal has addressed the issues raised and why it came to the conclusion of indecency. It was pointed out to the Tribunal that the nipples [of young women displayed in advertisements] had been blocked and the private part covered and submitted that photographs similar to these are not uncommon in public places and newspapers. In other words, this is relevant to measuring community standards. Did the Tribunal reject this submission? Or if accepted it, why did it conclude that the articles were indecent as violating and exceeding community standards. It was submitted to the Tribunal in effect that these are newsworthy items to inform our community of others’ cultures. What was the Tribunal’s view on that submission? It was submitted that the articles in question were in an adult section of

⁹⁹ H. Woolf, “*Protection of the Public – a New Challenge*”, Hamlyn Lectures, Series 41 (1990), 92. See F. Liu JA in Tong above p.18.

¹⁰⁰ See Liu JA., p.19.

newspaper. Was this accepted or rejected? Did the Tribunal consider that for a daily newspaper there is no distinction between various parts of the newspaper? ...

Contrary to the views expressed in the Courts below, I do not consider that the articles in question are obviously indecent and virtually speak for themselves. In the circumstances of this case, it was incumbent upon the Tribunal to explain why they were considered indecent. I venture to suggest that if these photographs are considered indecent, the Tribunal would be coming close to holding that photographs of semi-naked females are *per se* indecent according to community standards. If that is the Tribunal's reason, it should so explain. Accordingly, I conclude that the reasons given were inadequate.”

This is a strong decision, and the more so because it was unanimous. It substituted hand ringing invocations of the desirability of providing some or better reasons, for a judicial order, which is much more likely to improve administrative practice and afford administrative justice.

In the more recent case of *HKSAR v Egan*¹⁰¹ the principle expressed by Chief Justice Li in *Oriental Daily* was applied by Mr Justice Gleeson (formerly Chief Justice of Australia and now a non-permanent judge of the Court of Final Appeal¹⁰²) as he explained:

“The adequacy of reasons in the circumstances of a particular case is to be considered in the light of the purposes that are served by the obligation to give reasons. It promotes good decision-making, and the acceptability of decisions to the public. It means that the parties are given an explanation of the outcome. It serves the interests of the parties and the public by facilitating appropriate appellate supervision.”

Having explained this principle, Mr Justice Gleeson applied it, quite rigorously, in upholding the Court of Appeal's determination to set aside the conviction of one of the accused, Mr Egan:¹⁰³

¹⁰¹ HKCFA, 25 November 1998.

¹⁰² *HKSAR v Egan*.

¹⁰³ *Egan* at [386] (citations omitted).

“On the issue of belief dealt with ... in ... the trial judge’s reasons, there was a ... failure of analysis, in this case, perhaps encouraged by the rolled-up form in which some of the evidence was given. There was a need to discriminate between Mr Egan’s belief [on one issue] ... and Mr Egan’s belief, or doubts, [on another] ... there was evidence on which the trial judge could have made a finding adverse to Mr Egan. Whether he made such a finding is not clear and, if he did, he did not adequately explain his reasons. ... the appeal against the Court of Appeal’s decision ... should be dismissed.”

Although this conclusion (which was supported by the unanimous opinion of the Court) demonstrates that the rigorous principle for the provision of reasons expressed in the *Oriental Daily* case is also maintained in respect of criminal trials in Hong Kong. But the more general question of administrative justice continue to observe hesitations and anxieties to which, I believe the strongly adverse conclusion of the High Court of Australia has added fuel and contributed to Professor Taggart’s “lost opportunity”.¹⁰⁴

CONCLUSIONS

The Context of Statute: Since the decision in *Osmond*, many statutory provisions have been enacted that help fill the gap in the common law in which the ruling of the High Court of Australia upheld in that case. In particular, the State¹⁰⁵ and Territory¹⁰⁶ statutory provisions have been enacted to provide a right to reason and new federal provision have been adopted to clarify that entitlement in proceeding before specified federal tribunals¹⁰⁷. Depending upon one’s point of view, such statutory provision may support or undermine an enlargement of the relevant common law principle.

¹⁰⁴ *Ibid* at [393]-[394]. See also *HKSAR v Okafor Nwabunwanne*, Court of Final Appeal, 18 November 2011 where the Court, in the circumstances, rejected requirements of more extended reasons for evidentiary rulings.

¹⁰⁵ Swati Jhaveri, Michael Ramsden and Anne Scully-Hill, *Hong Kong Administrative Law*, LexisNexis, Hong Kong, 2010.

¹⁰⁶ See e.g. *Administrative Decisions Tribunal Act 1997* (NSW) ss49, 50, 51, 52; *Queensland Civil and Administrative Tribunal Act 2009* (QLD), ss 21, 121, 122, 148, 157,158, 159, 160; *Interpretation Act 1954* [Qld], s27B; *Victorian Civil and Administrative Tribunal Act 1998* (Vic), ss 45-47, 49; *State Administrative Tribunal Act 2004* (WA) ss 21, 22, 24, 77, 78.

¹⁰⁷ *Civil and Administrative Tribunal Act 2008* (ACT), s22B, 22C, 22D, 22E, 60.

Although the idea of enlargement did not appeal to Chief Justice Gibbs in *Osmond*, it is far from heretical to say that the common law, declared by the judges is informed by the orbit of statute in which it now travels¹⁰⁸ at the very least the statutes respond to the same civic expectation that public officers will respect the dignity of those affected by their decisions and treat them in accordance with the “three little words” that permeate our administrative law: with lawfulness; fairness; and respect for rationality.

Resulting Paradigm: A review of the judicial decisions across many common law countries showed how *Osmond* in the High Court of Australia, initially provided a road block that reinforced judicial reluctance to take, in respect of administrators, the step that had then recently been taken in respect of judicial decisions. Nowadays, few would argue that judicial officers are exempt from giving reasons for their decisions, at least where the decision is final and subject to appeal; where it is asked for; and where it is on more than purely procedural or incidental matters, not sufficiently explained by the context, and possibly the transcript¹⁰⁹. This principle of the common law has now generally been extended (even in default of legislative provisions) to tribunals which make important decisions in court-like circumstances, even although not strictly judicial in constitutional terms.

There remains the hard core of purely administrative decision-making. As the cases demonstrate, this can vary from the high status body, such as the statutory Public Service Board (whose decision was in question in *Osmond*) to a lowly frontier immigration officer (whose decision was in question in *Baker*). The very range of such decision-making has continued to make common law courts reluctant to impose a duty stated in general terms. Instead, they have accepted that “special” circumstance, either in the legislative setting or the significance of the decision, may call out for reasons to fulfil the requirements of “and legitimate expectations for” procedural fairness.

¹⁰⁸ *Administrative Tribunals Act 1975* (Cth), ss28(1aaa), 28(1aa), (1AC), (1A), (1B), 28(3A), 37(1aaa), and 37(1AC).

¹⁰⁹ *Warnik v J. Townend & Sons (Hull) Ltd* [1979] AC731 at 741 per Lord Diplock; *esso cf. esso Australia Resources v Federal Commissioner of Taxation* (1999) 201CLR 49 at 62 [24].

In this respect, the more nuanced approach of Justice Deane, in his concurring reasons in the High Court of Australia in *Osmond*, appears to chart the way ahead. But what is “special” and how a trial and intermediate court will give, vary significantly amongst decision-makers. Sadly, the common law continues to produce more “timorous souls” than “bold spirits”. That is does so in the context of the huge growth in public administration and enhancement of the powers of officials is particularly worrisome. Least satisfactory of all are the judicial response urging the value of reason whilst withholding relief. It is the frequency of that outcome that makes the recent line of decisions in the Hong Kong Court of Final Appeal particularly noteworthy¹¹⁰.

A Parting Case: As a contemporary instant the outfall of *Osmond* it is worth observing the decision of the Supreme Court of South Australia, Full Court, in *Watson v South Australia*¹¹¹. Mr Watson was convicted in 1986 and was sentenced to life imprisonment. His non-parole period, fixed at the time of sentence, expired on 24 January 2002. The Parole Board of South Australia on five occasions recommended to the Governor, pursuant to the Correctional Services Act 1982 (SA), s67(6) that Mr Watson should be released on parole. On each occasion the Governor of South Australia, acting on advice of the executive government, refused to order that Mr Watson be released. On some of the occasions of refusal, the Premier or the Attorney-General made public comments supporting the decision of the Governor, effectively rejecting the recommendation of the Parole Board, on what might be described as ‘law and order’ grounds. The State of South Australia is served by two newspapers of the same publishing house with a *penchant* for ‘law and order’ campaigns. Despite requests, Mr Watson has never been given reasons in the ordinary sense” for any of the decisions made in his case and is left in “an unfortunate position”¹¹². He does not know why the Parole Board’s recommendations have not been accepted by the Governor. He does not know how he might change the situation. He does not know why some other prisoners have been released and he has not. He has served 25 years imprisonment. This is well

¹¹⁰ *Apps v Pilet* (1987) 11 NSWLR 350 at 354. Discussed H.L. Ho, “The Judicial Duty to Give Reasons” legal studies, 2006, 42 at 53-54.

¹¹¹ The Common Law’s Reluctance to Encourage Public Interest Litigation is another instance. See M.D. Kirby, “Deconstructing the Law’s Hostility to Public Interest Litigation” (2011) 127LQR 53.

¹¹² (2010) 208 ACrimR1.

beyond the meaning of “life” imprisonment as that term is normally understood in Australia.

Mr Watson brought proceedings in the Supreme Court of South Australia challenging the validity of the most recent decision of the Governor, arguing that it is legally invalid. He contended that he had been denied procedural fairness; that the Governor must ordinarily accept the recommendation of the Parole Board; and that the refusal to do so was unreasonable or irrational in the *Wednesbury* sense¹¹³.

In the face of *Osmond*, counsel for Mr Watson could not argue that the decision of the governor was invalid because unaccompanied by reasons. However, in effect his argument contended that the Governor, as the repository of statutory power, was obliged to act conformably to the statute. Whilst this notion was obvious, the breadth of the language conferring the discretion made an attack on the broad ambit of the power extremely difficult.

The Supreme Court took the unusual course of inviting submission on the consequences of the failure to provide reasons in the particular circumstances of Mr Watson’s case. Naturally, that began its analysis with cited passages from the reasons of Chief Justice Gibbs in *Osmond*¹¹⁴.

Chief Justice Doyle, giving the principle reasons in *Watson* explained the injustice of the situation in which Mr Watson found himself¹¹⁵:

“Reasons for the Governor’s decision might assist Mr Watson to improve his prospects of release by identifying aspects of his circumstances or behaviour that was seen as an obstacle to release. As things stand, Mr Watson has no idea why the Governor has refused to release him on parole, and he is left contemplating a blank wall. The decision made by the Governor is a decision in his particular case. It has an impact on his hopes of regaining his liberty. Even if the decision is based on broad public policy considerations, one would expect there to be a rational link between

¹¹³ (2010) 208 ACrimR1 at 4 [2], [3].

¹¹⁴ The *Wednesbury* Principle has been expressed and explained in *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [123]-[124], Crennan and Bell JJ.

¹¹⁵ (2010) 208 ACrimR1 at 26 [115]-[118].

those broad considerations and Mr Watson’s particular circumstances. So considerations of utility and justice might support a conclusion that in the particular circumstances of this case, the reasons for decision are required.”

The Court went on to note the advance in English court, whilst accepting the general rule in *Osmond*, to uphold by way of exception, an obligation on the part of an administrative decision-maker to give reasons. Reference was made, for example to *Doodey* and to cases in Australia where an exception has been acknowledged but repeatedly no occasion has been found to invoke its application¹¹⁶. Having gone so far as to expose the problem, Chief Justice Doyle proceeded to dismiss the action. Justice Anderson¹¹⁷ agreed. Justice Peak acknowledged and cited the extended passage from the reasons of Justice Deane in *Osmond* and asked himself whether the generality of the grant of power to the Governor gave rise to a “special case”. He noted that this point had not been fully argued. He joined in rejection of the appeal.

Watson’s case is, I regret to say, an instance of the hand ringing that has accompanied this area of the law ever since the High Court of Australia delivered its decision in *Osmond*. He hesitation of intermediate judges, at least in Australia, is understandable under the light of the dressing down they have received in recent years¹¹⁸. Notwithstanding the encouragement to enter intermediate courts to shoulder their share of the burden of developing and declaring principles of the common law not foreclosed by express holdings of the final court¹¹⁹.

As Mr Watson languishes in his predicament of unexplained extended incarceration, he could perhaps be forgiven for thinking, as he faced the “blank wall” that he had found himself in a soviet Gulag or one of Kafka’s prisons¹²⁰. This is a state of the law of which few civilised citizens could be proud and for which the mechanisms of

¹¹⁶ (2010) 208 ACrimR1 at 26-27 [119].

¹¹⁷ (2010) 208 ACrimR1 at 27 [123] citing *Coope v Guiliano* (1996) 65 SASR 405; *Canwest Global Communications Corporation v Treasurer* (1997) 147 ALR 509 (FCA); *York v General Medical Assessment Tribunal* [2003] 2QdR104 and Aronson, Dyer and Groves, *Judicial Review of Administrative Act* (4th Ed., Law Book 2009) at 8.485] – [8.515].

¹¹⁸ (2010) 208 ACrimR1 at 28 [127].

¹¹⁹ See e.g. *Garcia v National Australia Bank* (1998) 194 CLR395 at 403[17]; cf at 420 [64] *Farrar Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230CLR 89 at 149-151 [131] (“grave error”) – 134; *Western Export Services v Gireh International* (2011) 86ALJR 13[4] (“it should not have been necessary to reiterate the point here”) see F.P.W. Young, “Authority of the High Court” (2012) 86ALJ 7-8.

¹²⁰ *Nguyen v Nguyen* (1990) 169 CLR 245 at 268-270. See also *R.v Gee* (2003) 212CLR 230 at 273 [126].

parliamentary accountability, for which executive accountability, parliamentary reform and judicial review offer no current solution in Australia.

Such an outcome is not legally necessary, anymore for significant administrative decisions than for judicial ones. Under the rule of law, every public official is not only to conform to formal rules but also the requirements of universal human rights. The implication that a donee of statutory power must act justly in its exercise is not a particularly bold step for courts to take. In fact, it involves to attributing to legislatures and the attribute of legality, fairness, rationality and proportionality that lie at the heart of administrative law. Great progress has been made in common law countries in advancing these values in our law. Acceptance of a general duty of reasons, where asked, for administrative decisions is a proper step for the common law to take. The debate about 'exceptions' should be switched. Public servants who pretend to the powers of unaccountable potentates should be obliged to justify their assertions. A general rule respectful of the dignity of the people should be accepted so that our Governors are made to understand where sovereignty lies in the people.

FOOTNOTES

121: R. (Application Anufriera) v Secretary of State for the Home Department [2003] UKHL 36; [2004] 1AC 604 at [28], per Lord Steyn; Cf. M.Elliott, "Has the Common Law Duty to give Reasons Come of Age Yet?" [2011] P.L. 56 at 62-63.