Resisting the Perceptible Trend Towards a Duty to State Reasons 'Marshall v The Director of Public Prosecutions' – Revisited

By Mr. Duwayne Charles Lawrence

Introduction

It is well understood by both practitioners and students of Administrative Law 'that the law does not at present recognize a general duty to give reasons for an administrative decision.'[287] Though this may be true, 'it is equally beyond question that such a duty may in appropriate circumstances be implied...'[288]

The issue of an administrator's duty to state reasons for his decisions has once more been brought to the fore by the Privy Council's decision in the very recent case of *Leonie Marshall v The Director of Public Prosecutions*[289] from Jamaica. On this occasion it was the Director of Public Prosecutions' (DPP) duty (or lack thereof) to state his reasons for deciding not to prosecute that was in issue. The Board, although making a few passing remarks on that question, refused to decide whether the DPP in the circumstances of the particular case had a duty to state reasons since 'the sufficiency of reasons [was] not in their Lordships' opinion determinative of this appeal.'[290]

It is within this context of uncertainty that this paper primarily seeks to discuss the issue: whether, in exercising his

[287] *Doody v Secretary of State for the Home Department* [1993] 3 All ER 92, 110
[288] Ibid
[289] 70 WIR 193
[290] Ibid 200

functions to either prosecute or not to prosecute, or to enter a nolle prosequi, the requirements of fairness demand that the DPP state reasons for his decisions.

In addressing this central issue, this paper will firstly, outline the constitutional basis of the office and powers of the DPP and the current position as it regards judicial review of his decisions; secondly, it will engage in exploring the legal history and evolution of an administrator's duty to state reasons, showing in the process that in certain circumstances the courts are giving force to the concept of fairness and require thereby that reasons for decisions be given. Thirdly, although the assertions of the board in *Marshall* relating to the DPP's duty to state reasons were clearly obiter, this paper will critically assess these remarks in the light of other cases, bearing in mind that that dicta will be highly persuasive to lower courts in the Commonwealth Caribbean, to future Boards and to the Caribbean Court of Justice; finally, this paper will seek to suggest the way forward.

Constitutional Basis of the Office and Powers of the DPP and the current position as it regards Judicial Review of his Decisions

Forte P, sitting In the Court of Appeal decision of *Marshall*[291] stated that:

> The DPP is an office created by the Constitution and whose powers are set out therein. Some may say he has awesome powers, being able to determine whether to initiate criminal proceedings against any citizen, as also to bring to an end any such proceedings which have been commenced. He is not subject to the control or direction of any other authority...

In addition to the powers noted by the Court of Appeal is the power of the DPP to take over and continue any criminal proceedings that may have been instituted by a third party.

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[291] JM 2005 CA 15

These 'awesome' powers are granted to the DPP by (in the case of Jamaica) section 94 of the Constitution of Jamaica. By virtue of s 94 (1), the DPP is a public officer. And by virtue of s 94 (3) the DPP is given power in any case in which he considers it desirable so to do –

(a) to institute and undertake criminal proceedings against any person before any court other than a court-martial in respect of any offence against the law of Jamaica;
(b) to take over and continue any such criminal proceedings that may have been instituted by any person or authority and;
(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.

The 'awesome' powers of the DPP, though made obvious by s 94 (3), do not end there. His constitutionally granted freedom from interference further enhances his powers. By virtue of s 94 (5):

> The powers conferred upon the DPP by paragraphs (b) and (c) of this section shall be vested in him *to the exclusion of any other person or authority:*
> Provided that where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority with the leave of the court. (emphasis mine)

And further, by virtue of s 94 (6):

> In the exercise of the powers conferred upon him by this section the DPP shall not be subject to the direction or control of any other person or authority.

In addition to these provisions which ensure the DPP's freedom from interference in the exercise of his powers, his office is further made independent, and rightly so, by the grant of security of tenure, similar to that of a judge of the Supreme Court, under s 96 (4). That section reads as follows:

> The DPP may be removed from office only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) of for misbehaviour and shall not be so removed except in accordance with the provisions of this section.

The DPP is clearly no ordinary creature of the law, his role, security and independence are of paramount importance to the proper functioning of any system of justice within the Commonwealth Caribbean and this is properly reflected in our Constitutions. Nevertheless, it does not follow that he may do as he pleases. He must still be subject to the law which granted him these powers, for as the thirteenth-century jurist Bracton once said, 'the King should be under no man but under God and the Law because the Law makes him King.'[292]

Our Constitutions draw from the 'classical civic republican tradition, inspired by Aristotle and developed in Ancient Rome, whose hallmarks are its emphasis on equality and its reliance on traditional mechanisms in the form of checks and balances between the different branches of government...'[293] It means that the DPP, though not under the control or authority of any other person or authority, is subject to the checks and balances inherent in our Constitutions. His powers can only be legitimately exercised within their true legal limits and can be 'questioned in the context of judicial review in court by virtue of s 1 (9) of the Constitution.'[294] Therefore, the limitations on the DPP's powers are first found in the text of the Constitution itself.

According to that section:

> No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in exercising any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with this Constitution or any other law.

Second, it is not surprising that the grounds of judicial review available under traditional public law principles can also be

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[292] John Alder, *General Principles of Constitutional and Administrative Law* (4th edn Palgrave Macmillan, 2002) 93

[293] Ibid 8-9

[294] *Marshall v DPP* JM 2005 CA 15

used to guard against abuses of power by the DPP. Judicial review, broadly speaking, 'is the power of the courts to keep public authorities within proper bounds [of] legality.'[295] This important jurisdiction of the court must be 'invoked at the instance of a person who is prejudiced or aggrieved by an act or omission of a public authority.'[296]

An aggrieved person, however, cannot, merely because of his dissatisfaction with the decision of a public authority, seek the court's assistance by way of judicial review. Instead, he must base his claim on one of the grounds of review recognized at law. These grounds are well known and need not be elaborated here. Suffice it to say that these grounds were 'famously classified'[297] by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service*[298] (*CCSU*) under the three broad heads of illegality, irrationality and procedural impropriety. As to the third ground, Lord Roskill, also speaking in *CCSU* said:

> 'The third is where it has acted contrary to what are often called "principles of natural justice." As to this last, the use of the phrase is no doubt hallowed by time and much judicial repetition, but it is a phrase often widely misunderstood and therefore as often misused. That phrase perhaps might now be allowed to find a permanent resting place and be better replaced by speaking of a duty to act fairly.'[299]

The grounds however, are not exhaustive, and as was stated in *Boddington v British Transport Police*[300] although categorizing the heads of challenge assist 'in an orderly exposition of the principles underlying our developing public law...these are not watertight compartments [but] run together.'

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[295] Albert Fiadjoe, *Commonwealth Caribbean Public Law* (3rd edn Routledge-Cavendish 2008) 15

[296] Ibid

[297] John Alder, *General Principles of Constitutional and Administrative Law* (4th edn Palgrave Macmillan 2002) 365

[298] [1985] AC 374

[299] [1985] AC 374, 414

[300] [1998] 2 All ER 203, 208

The importance of the court's jurisdiction to review the actions of public officials in a democratic society is deeply appreciated by both those trained in the law and those who are not; albeit on different levels. To the lawyer, judicial review is appreciated as a 'fundamental mechanism for keeping public authorities within due bounds and for upholding the rule of law'[301], for 'no one is above the law [and] public officials must justify interference with individual liberty by reference to a power given to them by the law.'[302] Lord Hoffmann embraced and added weight to this view when he said in *Alconbury Developments v Secretary of State*[303] that:

> 'There is however, another relevant principle that must exist in a democratic society. *That is the rule of law.* When ministers or officials make decisions affecting the rights of individuals, they must do so in accordance with the law. The legality of what they do must be subject to review by independent and impartial tribunals...The principles of judicial review give effect to the rule of law. They ensure that administrative decisions will be taken rationally, in accordance with a fair procedure and within the powers conferred by Parliament.' (emphasis added)

To the man in the street, judicial review is just as important. He however, best appreciates it when his building is demolished by a public authority without allowing him a fair hearing[304] or where his licence is unjustifiably and arbitrarily revoked[305] or where his legitimate expectation is frustrated by not allowing the completion of his appeal to an international tribunal afforded by a ratified treaty[306] – in such cases a remedy for him may only be obtained by means of judicial review.

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[301] HWR Wade and CF Forsyth, *Administrative Law* (9th edn OUP, Oxford 2000) 34

[302] John Alder, *General Principles Of Constitutional and Administrative Law* (4th edn Palgrave Macmillan 2002) 96

[303] [2001] 2 All ER 929, 981

[304] *Cooper v Wandsworth Board of Works* (1863) 143 ER 414

[305] *Congreve v Home Office* [1976] QB 629

[306] *AG and others v Joseph and Boyce* (2006) 69 WIR 104

The decisions of the DPP are, in a sense, no different. Given the enormous powers vested in him and the possible implications of the exercise of any of them for the lives and liberty of citizens, it is readily accepted that his decisions must be amenable to review. But the availability of the remedy is a completely different issue from how readily it will be granted. The courts, although affirming the reviewability of the decisions of the DPP, have jealously guarded it, making the grant of a remedy by way of judicial review a very rare occurrence. This is readily seen from an examination of the cases.

In the old case of *Tappin v Lucas*[307] for example, the appellant's son was shot and killed by the respondent, a police officer. The jury at a coroner's inquest returned a verdict that no one was criminally responsible and neither the police nor the DPP sought to prosecute the respondent. The appellant thereafter, instituted a private prosecution for the murder of her son but the DPP, in exercising his power to discontinue criminal proceedings under the Constitution of Guyana, decided to discontinue the prosecution. The appellant's application for judicial review was dismissed by the Full Court and by the Court of Appeal.

Bollers C.J., delivering the decision of the Court of Appeal declared:

> 'In the exercise of his powers under art 47 of discontinuing a prosecution, the DPP is in effect performing an administrative act in nature akin to the exercise of a quasi judicial function, which it must be presumed will be exercised fairly and honestly within the ambit of the wide discretion bestowed on him by the Constitution, but he must keep within the legal limits of the exercise of his powers as laid down by the Constitution...Parliament, in conferring those powers upon him, would expect him to exercise them fairly, reasonably and in good faith...as long as he keeps within the statutory limits of those powers his decisions cannot be the subject of judicial review.'[308]

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[307] 20 WIR 229

[308] Ibid 237

In dismissing the appeal, the court held that:

> 'In the circumstances of this case then, there can be no question of a judicial review of the decision by the DPP to discontinue the prosecution, and there is nothing to suggest that he did not exercise his discretion bona fide. It must be borne in mind that there is no question here of the DPP having to satisfy himself that the private prosecutor had or may have had a good case. There may be questions of policy relating to the public interest which he is entitled to take into consideration in deciding to continue or discontinue the prosecution though the final decision by him is a completely independent one.'[309]

The scope of the DPP's powers and the latitude that will be allowed him in exercising them before the courts will allow judicial review of his decisions is appropriately reflected in the words of the Chief Justice when he remarked: 'Learned authors have concluded that discretionary power should not mean arbitrary power, but the limits of discretion may be so wide that almost anything may be ordered; this comes close to arbitrariness, and the DPP under the Constitution appears not to be too distant from that position.'[310]

In another case, *Re King's Application*[311], emanating from the High Court of Barbados, an application for judicial review of the director's decision not to prosecute was dismissed under circumstances where a coroner, inquiring into the death of the applicant's son, had ruled that the deceased had been murdered by a police sergeant.

In the course of judgment Sir Denys Williams CJ made it clear 'that the court is meant to have jurisdiction to review the exercise by the director of his functions under the Constitution.'[312]

On the facts, the coroner and counsel for the applicant were of the view that a prima facie case of murder was made out. The

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[309] Ibid
[310] Ibid
[311] (1998) 40 WIR 15
[312] Ibid 34

director, however, acting on the evidence advised the police that there was no sufficient evidence to provide a foundation for a charge of murder. He therefore refused to prosecute. In the circumstances it was held that the applicant had to show 'that the director's decision was so manifestly wrong as to amount to an unreasonable, irregular or improper exercise of his power, in *Wednsbury* terms, that no DPP, properly directing himself, could on the evidence reasonably or regularly or properly have formed a decision not to direct that [the police officer] be charged and prosecuted.'[313] In arriving at his conclusion the learned chief justice found 'it impossible to say that the decision was unreasonable, improper or irregular within the *Wednsbury* principles.'[314]

These earlier cases reveal a marked reluctance on the part of the courts to grant judicial review in circumstances where an exercise of the prosecutorial discretion is being challenged. This attitude has not waned. The very recent trilogy of decisions handed down by the Privy Council remind us that the courts display very great respect towards the director's prosecutorial discretion and will be slow to grant judicial review of his decisions.

The first of the trilogy was *Mohit v The Director of Public Prosecutions of Mauritius*[315]. The issue before the Board was 'whether a decision by the DPP of Mauritius to discontinue a private prosecution in exercise of his powers under section 72 (3) (c) of the 1968 Constitution (which is identical in terms to sec 94 (1) of the Constitution of Jamaica) was in principle susceptible to review by the courts.' The Board, in addressing the issue, categorically stated that 'like any other public officer, he must exercise his powers lawfully, properly and rationally, and an exercise of power that does not meet those criteria is open to

[313] Ibid 35
[314] Ibid 36
[315] [2005] UKPC 31

challenge and review in the courts.'[316] This signaled the death-knell for any argument that the decisions of the DPP were beyond the scope of judicial review. The question now was the scope of that power to review.

Approving its own earlier decision in *Matalulu v Director of Public Prosecutions*[317], the Board outlined instances in which 'a purported exercise of power would be reviewable.' These include instances where the DPP acts in bad faith, or acts in excess of his constitutional or statutory power, or where the director could be shown to have acted under the direction or control of another person or authority and failed to exercise his or her own independent decision, or where the DPP has fettered his or her discretion by a rigid policy[318]- all circumstances in which the DPP has acted contrary to the authority given to him by the Constitution, that is, where he has acted ultra vires. The list, it must be noted, is not exhaustive.

> The Privy Council went on to explain that:
> 'the establishment in the Constitution of the office of the DPP and the assignment to him and him alone of the powers listed in [the] Constitution, the wide range of factors relating to available evidence, the public interest and perhaps other matters which he may properly take into account; and in some cases, the difficulty or undesirability of explaining his decisions: these factors necessarily mean that the threshold of a successful challenge is a high one. It is, however, one thing to conclude that the courts must be very sparing in their grant of relief to those seeking to challenge the DPP's decisions not to prosecute or to discontinue a prosecution and quite another to hold that such decisions are immune from any review at all...'[319]

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[316] Ibid [18]
[317] [2003] 4 LRC 712
[318] [2005] UKPC 31, [12]

[319] [2005] UKPC 31, [18]

The following year, the Privy Council handed down the case of *Sharma v Director of Public Prosecutions et al*[320] which deals with the issue of judicial review of the decision of the DPP. In that case the Chief Justice of Trinidad and Tobago 'faced the imminent prospect of prosecution on a charge of attempting to pervert the course of public justice.'[321] The Chief Justice then obtained leave to seek judicial review of the decision of the DPP to prosecute him. The decision at first instance to grant leave to seek judicial review was set aside by the Court of Appeal. The issue before the Board was 'whether the decision to prosecute the Chief Justice, by whosoever made, should be examined by way of judicial review, or whether the criminal process should be allowed to take its course.'[322]

In arriving at the conclusion that the decision to prosecute should be left undisturbed, their Lordships addressed the question of the reviewability of the DPP's decisions. Lord Bingham of Cornhill and Lord Gestingthorpe in their joint judgment said:

> 'It is well established that judicial review of a prosecutorial decision, although available in principle, is a highly exceptional remedy. The language of the cases shows a uniform approach: "rare in the extreme" (R v Inland Revenue Commissioners, ex parte Mead [1993] 1 All ER 772, 782); "sparingly exercised" (R v Director of Public Prosecutions Ex p C [1995] 1 Cr App R 136, 140); "very hesitant" (Kostuch v Attorney General for Alberta (1995) 128 DLR (4th) 440, 449; "very rare indeed" (R (Pepushi) v Crown Prosecution Service [2004] EWHC 798 (Admin); "very rarely" (R (Bermingham) v Director of the Serious Fraud Office [2006] EWHC 200 (Admin), [2006] 3 All ER 239, 63.'[323]

It was then described by Baroness Hale of Richmond, Lord Carswell and Lord Mance as an 'exceptional remedy of last resort.'[324]

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[320] [2006] UKPC 75
[321] Ibid [1]
[322] Ibid [2]
[323] Ibid [5]
[324] Ibid [16]

Completing the trilogy of Privy Council decisions is *Marshall v The Director of Public Prosecutions*. In that case a man was shot and killed by police officers. An inquest jury subsequently brought in a verdict which read "person or persons criminally responsible", but the DPP decided not to bring any prosecution. The appellant, the mother of the deceased, sought judicial review of the DPP's decision but this was denied in the Jamaican courts. She was then granted leave by the Court of Appeal to appeal to the Privy Council. The Board accepted in their entirety the statements of previous Privy Council decisions on the question of the availability of judicial review viz, that it is a "highly exceptional remedy", then, after examining the appellant's case, decided that the appeal should be dismissed.

In the light of the fact that judicial review of the DPP's prosecutorial discretion is such a "highly exceptional remedy", one that is "sparingly exercised" and can even be described as an "exceptional remedy of last resort", it would seem that when a case arises where the applicant has overcome this hurdle and has been granted judicial review, further efforts should not be made to thwart his success. Instead, as far as is possible, the necessary information required to achieve the desirable end of justice should be called upon for scrutiny by the courts. It is suggested that an integral part of this information, at least in some cases, are the DPP's reasons for his decision and where the fairness or justice of the case requires it he should be bound to state those reasons.

Before examining the DPP's duty to state reasons for his decisions however, it is necessary to consider the history and evolution of the common law's hesitancy to provide for a general duty on administrators to state reasons for their decisions. It is to this issue that I now turn.

The History and Evolution of an Administrator's Duty to State Reasons at Common Law.

'The law does not at present recognize a general duty to give reasons for administrative decisions.'[325] This state of the law has been subject to severe criticism and 'has long been condemned as a major defect of our system of administrative law.'[326] The Justice-All Souls Committee, expressing its view on the lack of a general duty to state reasons emphatically declared that 'no single factor has inhibited the development of English administrative law as seriously as the absence of any general obligation upon public authorities to give reasons for their decisions.'[327]

It seems that this absence of a general duty had its origins in the fact that a 'statement of reasons is not required by the rules of natural justice and therefore there is no duty to state reasons for the decisions of courts, juries, licensing justices, administrative bodies and tribunals or domestic tribunals.'[328] Since 'courts are not obliged at common law to give reasons for their decisions, the minimum standards [of fairness] cannot be higher than those prescribed by the courts for themselves.'[329] This old common law position is reflected in cases such as *The Queen v London Bishop*[330] and *Alcroft v London Bishop*[331]. Those cases, 'clearly outlined the common law's reluctance to inquire...into administrative policy and demonstrated the absence of any clear

[325] *Stefan v General Medical Council* [1999] 1 WLR 1293, 1300
[326] H Woolfe and others *De Smith's Judicial Review* (6th edn Sweet and Maxwell, London 2007) 414
[327] Ibid
[328] Michael Akehurst, 'Statements of Reasons for Judicial and Administrative Decisions' (1970) 33 MLR 154
[329] H Woolfe and others *De Smith's Judicial Review* (6th edn Sweet and Maxwell, London 2007) 414
[330] [1890] 24 QB 213
[331] [1891] AC 666

rule under the common law that reasons be given for administrative decisions.'[332]

Needless to say, the position with regards to the courts has changed; 'today, not only the higher courts, but all courts, at least in relation to some of their decisions, are under such an obligation.'[333] Despite the fact that the law has progressed to the point where courts are now under an obligation to state reasons, thereby eroding the basis upon which the absence of a legal duty to provide reasons once stood, administrative law in particular, though making strides, has not kept pace. Administrative decision makers are yet to be subject to a general duty to give reasons.

An attempt at establishing such a general duty was made in *R v Lambeth LBC ex parte Walters*[334] where Sir Louis Blom-Cooper Q.C, sitting as a deputy judge of the Queen's Bench Division, suggested that reasons should be given unless some special justification existed for not doing so. His Lordship was of the view that:

> 'English law had now arrived at the point where there was at least a general duty to give reasons whenever the statutorily impregnated administrative process was infused with the concept of fair treatment to those potentially affected by administrative action.' [And that] 'in many cases, exceptions to the duty to give reasons might be regarded as justifying more limited forms of reasons rather than an absence of any duty to give reasons.'[335]

The approach in *Walters* however, has not been adopted; 'the dominant view seems to be that a duty to give reasons must either be expressed or implied in the relevant statute or there must

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[332] RMB Antoine 'A New Look at Reasons-One Step Forward-Two Steps Backward' 44 Administrative Law Review 447, 448

[333] H Woolfe and others *De Smith's Judicial Review* (6th edn Sweet and Maxwell, London 2007) 411

[334] The Times 6 October 1993 (QB)

[335] Ibid

be some special justification for giving reasons.'[336] Notwithstanding, the courts do demand that reasons be given 'in a wide range of cases, drawing upon the general principle of fairness which allows the court to take all the circumstances into account.'[337]

In the case of *R v Civil Service Appeal Board ex parte Cunningham*[338], for example, Lord Donaldson M.R. drew upon this principle of fairness to require the giving of reasons. He was clearly of the view that if reasons were not provided the desirable end of justice could not be met.

In *Cunningham,* the applicant, a prison officer, was dismissed from the prison service. When he appealed to the Civil Service Appeal Board, it was decided that his dismissal was unfair and a recommendation was made for his reinstatement. This recommendation, however, was not followed and the Board assessed his compensation for his dismissal at an amount substantially less than that which would have been awarded if the applicant was not precluded by statute from appealing to an industrial tribunal. The Board refused to give reasons for its meagre award. The applicant then applied for judicial review of the Board's decision on the grounds that the award was prima facie irrational and that the Board's refusal to give reasons was a breach of natural justice.

At first instance, it was held that the decision of the Board to award the low sum plus its refusal to give reasons was unlawful. The judge made it clear that his decision rested upon 'the failure to give reasons either initially or upon request.'[339] Even in the Court

[336] John Alder *General Principles of Constitutional and Administrative Law* (4th edn Palgrave Macmillan 2002) 397
[337] Ibid
[338] [1991] 4 All ER 310
[339] Ibid 313

of Appeal the Board insisted that it was under no obligation to provide reasons for its award.

Dismissing the appeal, the Master of the Rolls explained that:

> 'If leave to apply for judicial review was granted by the court, the court was entitled to expect that the respondent would give the court sufficient information to enable it to do justice and that in some cases this would involve giving reasons or fuller reasons for a decision than the complainant himself would be entitled to.'[340]

Clearly, Lord Donaldson's statement does not declare a right of applicants to reasons for administrative decisions. The Master of the Rolls himself, goes on to say that 'the applicant may still not be entitled to reasons, but the court is.'[341] Further, although conceding that there was no rule of the common law nor any principle of natural justice that gave public authorities an obligation to give reasons, Lord Donaldson did not shrink from holding that the interests of justice could import such a requirement into the common law in particular circumstance when he said:

> 'I do not accept that, just because Parliament has ruled that some tribunals should be required to give reasons for their decisions, it follows that the common law is unable to impose a similar requirement upon other tribunals, if justice so requires.'[342]

The applicant was held to have been entitled to reasons 'upon the ground that *fairness* requires a tribunal such as the board to give reasons for its decision to enable the parties to know the issues to which it addressed its mind and that it acted lawfully.'[343]

In the seminal case of *R v secretary of State for the Home Department ex parte Doody*[344] the 'obvious human desire to be

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[340] Ibid 315
[341] Ibid 316
[342] Ibid 318
[343] Ibib 320
[344] [1994] 1 AC 531

told the reasons for a decision so gravely affecting [one's] future'[345] did not go unnoticed by the House of Lords. There, four applicants had each received mandatory sentences of life imprisonment following convictions of murder. The Home Secretary, in accordance with powers given to him by the Criminal Justice Act (1967), considered the date by which the applicants could be released on licence. The Secretary followed the procedure laid out by the Act and informed the prisoners of the minimum period of imprisonment they would have to serve before their cases would be reviewed.

The applicants sought judicial review of the Secretary's decision on the ground that, *inter alia*, if the Secretary departed from the judiciary's recommendation as to the period the prisoners were to serve, the Secretary should give reasons for so departing.

The House of Lords, in agreeing that reasons should be given, expounded upon the requirements of fairness. In a passage worth repeating in full, Lord Mustill stated that:

2. 'Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.
3. The standards of fairness are not immutable. They may change with the passage of time, both in general and in their application to decisions of a particular type.
4. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent upon the context of the decision, and this is to be taken into account in all its aspects.
5. An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.
6. Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its ratification; or both.

[345] Ibid 551

7. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.'[346]

Lord Mustill 'accepted without hesitation'[347] that the law did not impose a general duty upon administrators to give reasons for their decisions, but added that 'it is equally beyond question that such a duty may in appropriate circumstances be implied.'[348] And the facts of *Doody* presented such appropriate circumstances.

It is obvious from their Lordships' judgment that the gravity of the right to freedom was a significant element which compelled the giving of reasons. As Lord Mustill said:

> '...I would simply ask whether a *life prisoner whose future depends vitally* on the decision of the Home Secretary as to the penal element and who has a right to make representations upon it should know what factors the Home Secretary will take into account. In my view he does possess this right, for without it there is a risk that some supposed fact which he could controvert, some opinion which he could challenge, some policy which he could argue against, might wrongly go unanswered.'[349]

It was further emphasized that 'there should be an effective means of detecting the kind of error which would entitle the court to intervene, and in practice...it [was] necessary for this purpose that the reasoning of the Home Secretary should be disclosed.'[350]

This final statement of Lord Mustill however, as was indicated by Sedley J in *R v Higher Education Funding Council ex parte Institute of Dental Surgery*[351] during the following year, should not be taken to mean:

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[346] Ibid 560
[347] Ibid 564
[348] Ibid
[349] Ibid 563
[350] Ibid 565
[351] [1994] 1 WLR 242, 256

> '...that reasons are called for wherever it is desired to know whether grounds for challenge exist: for to do so would be to create just such a general duty as Lord Mustill...was careful to exclude. Rather, he was holding that in the situation of near total ignorance and impotence in which the prisoner found himself about something as vital to him as his prospects of liberty, such a duty arose.'

In *Ex parte Institute of Dental Surgery,* the decision of the court was that reasons, in the circumstances of the case, need not be given. But the decision is an invaluable one as it further elaborates the principles of fairness in relation to the duty to state reasons.

The facts were that the Higher Education Funding Council (the council) was responsible for the funding of research in higher education. In order to allocate research grants it decided to rank institutions on a scale of one to five, according to the quality of each institutions research. The council duly informed the interested institutions how the assessment would be carried out. The Institute of Dental Surgery (IDS) which was previously ranked at 2.6 received a lower ranking of 2 upon the completion of the assessments. This reduction in grade meant that the grant awarded to the IDS would be reduced substantially and also that the amount of funding from other sources could be expected to fall. The IDS demanded reasons for the unfavourable ranking but none was forthcoming. It then sought judicial review of the council's decision, requesting, inter alia, an order of mandamus to require the council to reconsider the matter and provide reasons.

Before Sedley J, counsel for the applicant submitted that the council had acted unfairly by its refusal to give reasons for its decision and that without reasons the decision should be treated as irrational. In Sedley J's view 'these submissions [were] straight forward; the law, unfortunately was not.'[352]

[352] Ibid 251

The primary issue according to the judge was 'whether the court could properly require the council to give reasons for the kind of decision which was made here.'[353] He further broke down this issue into two questions:

> 'One is whether either the general demands of fairness or the characteristics of a particular decision can call forth reasons when the decision in question is a collective expert evaluation of quality. The other is whether, if in principle this can happen, reasons ought to be given in the present case.'[354]

Mr. Justice Sedley, in answering the issue before him, considered the arguments for and against the duty to state reasons. He stated that:

> 'The giving of reasons may among other things concentrate the decision-maker'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; or alternatively alert the recipient to a justiciable flaw in the process. On the other side of the argument, it may place an undue burden on decision-makers; demand an appearance of unanimity where there is diversity; call for the articulation of sometimes inexpressible value judgments; and offer an invitation to the captious to comb the reasons for previously unsuspected grounds of challenge. It is the relationship of these and other material considerations to the nature of the particular decision which will determine whether or not fairness demands reasons.'[355]

In a particularly memorable illustration, Sedley J depicted his understanding of the relationship between fairness and the duty to state reasons. He said:

> 'In the light of such factors each case will come to rest between two poles, or possibly at one of them: the decision which cries out for reasons, and the decision for which reasons are entirely inapposite. Somewhere between these two poles comes the dividing line separating those cases in which the balance of factors calls for reasons from those where it does not. At the present there is no sure indication of where the division comes.'[356]

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[353] Ibid
[354] Ibid
[355] Ibid 257
[356] Ibid

In an examination of *Doody* and *Cunningham,* Sedley J identified two classes of cases where reasons may be required.

Firstly, the class where 'the nature of the process itself calls in fairness for reasons to be given.'[357] Cases such as *Doody* fell into this category. And the class into which cases such as *Cunningham* fell where 'it is something peculiar to the decision which in fairness calls for reasons to be given.'[358] It was his view however, that the fact that there were different classes of cases did not mean that different tests of fairness were to be applied, 'only that...the requirements of fairness will vary with the process to which they are being applied.'[359]

In dismissing the application, it was held that:

> 'Where what is sought to be impugned is on the evidence *no more* than an informed exercise of academic judgment, fairness alone will not require reasons to be given. This is not to say for a moment that academic decisions are beyond challenge. A mark, for example, awarded at an examiners' meeting where irrelevant and damaging personal factors have been allowed to enter into the evaluation of a candidate's written paper is something more than an informed exercise of academic judgment...But purely academic judgments, in our view, will as a rule not be in the class of case, though by no means exhausted by *Ex parte Doody,* where the nature and impact of the decision itself call for reasons as a routine aspect of procedural fairness. They will be in the *Ex parte Cunningham* class where some trigger factor is required to show, that, in the circumstances of the particular decision, fairness calls for reasons to be given.'[360]

It was concluded that no trigger factor existed in the decision of the council; the court holding that 'neither intrinsically nor on the evidence is there a sufficient basis on which this court can hold the eventual rating to be so aberrant as in itself to call for an explanation.'[361]

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[357] Ibid 258
[358] Ibid
[359] Ibid
[360] Ibid 261
[361] Ibid

Six years later the case of *Stefan v General Medical Council*[362] was decided by the Privy Council. It involved a doctor who, after a series of periodical suspensions due to the impairment of her fitness to practice, was suspended indefinitely without intelligible reasons. The issues to be determined were, whether, if there was an obligation to give reasons, it was one which arose in the special circumstances of the case and whether the Health Committee which had made the decision was under a general obligation to give reasons for all its decisions. Both questions were answered in the affirmative.

Lord Clyde, delivering their Lordships' opinion, recognized that the law was trending towards a duty upon decision makers to give reasons and that this trend was in line with a greater recognition of transparency in administrative and governmental matters. Lord Clyde did not fail to mention however, that 'the trend is proceeding on a case by case basis...and has not lost sight of the established position of the common law that there is no general duty universally imposed on all decision-makers.'[363]

Their Lordships stated the law as being that:

> 'It is well established that there are exceptions where the giving of reasons will be required as a matter of fairness and openness. These may occur through the particular circumstances of a particular case. Or, as was recognized in *R v Higher Education Funding Council Ex parte Institute of Dental Surgery* there may be 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.'[364]

In a clear expression of how far their Lordships viewed the law to have come, Lord Clyde opined that 'there is certainly a strong argument for the view that what were once seen as

[362] [1999] 1 WLR 1293
[363] Ibid 1300
[364] Ibid 1300 – 01

exceptions to a rule may now be becoming examples of the norm, and the cases where reasons are not required may be taking on the appearance of exceptions.'[365]

The Law Lords examined a number of different factors which they agreed were in favour of reasons being given in the particular case and in favour of the position that the committee should give reasons generally.

Firstly, the decision was one which was open to appeal under the statute, that being the case, fairness required that reasons be given in order to assist in determining whether there were grounds of appeal and in the presentation and determination of that appeal. Secondly, the procedure and function of the committee were akin to that of a court which had to give reasons. As regards to this factor, Lord Clyde pointed out that:

> 'The distinction between administrative and judicial decisions as a factor in the susceptibility of a decision to review was destroyed by *Ridge v Baldwin*[366]. Thus the fact that an administrative function is being performed does not exclude the possibility that reasons may be required to be given for a decision...but the carrying out of a judicial function remains...a consideration in favour of a requirement to give reasons.'[367]

The third factor was that the issue was very important to the applicant, in that the suspension caused considerable hardship both in financial terms and in her own desire to spend her life in a meaningful way in the medical service. The Board, in making mention of this factor, seems to have placed much weight on the subjective view of the applicant, meaning, how the applicant must have felt about the matter. This is reflected in Lord Clyde's statement that: 'the importance of the issue may not closely equate

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[365] Ibid 1301

[366] [1964] AC 40

[367] *Stefan v GMC* [1999] 1 WLR 1293, 1301-02

with the importance of personal liberty, but the matter is of very real significance in her own eyes and deserves to be respected.'[368]

This seems to have taken the law a step further, since in *Ex parte Institute of Dental Surgery* Sedley J did not seem to have placed much emphasis on the importance of the reduced grade in the view of the institute; in fact, he commented that if he accepted a particular submission by counsel it would be 'of such width that it would make a duty to give reasons a universal rule to which the only exception would be cases of no importance to anybody.'[369]

The fact that the applicant had repeatedly asked for reasons and the fact that the applicant's improved circumstances and favourable report by the doctor who examined her were pointing to a contrary decision to the one actually made were also circumstances taken into consideration. Finally, according to Lord Clyde 'it was the first time that an indefinite suspension was decided upon. The departure from periodic suspension which had been imposed before was certainly a legitimate course under the legislation but, particularly in light of an apparently less serious condition, the selection of it called for an explanation.'[370]

Their Lordships also decided that the Health Committee had an obligation, in all cases heard by them to give reasons for their decision since they were bound to carry out their duties with due regards to fairness. Their conclusion was based on the right of appeal from the Committee's decisions, the judicial character of the body and also the fact that the cases that came before the committee would be concerned with the important right of the individual to work.

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[368] Ibid 1302
[369] *Ex parte Institute of Dental Surgery* [1994] 1 WLR 251, 258-59
[370] *Stefan v GMC* [1999] 1 WLR 1293, 1303

The substance of the reasons given, in their Lordships view, '... must depend upon the circumstances. They need not be elaborate nor lengthy. But they should be such as to tell the parties in broad terms why the decision was reached.'[371] .

The development in the case law of the administrator's duty to state reasons, although proceeding on a case-by-case basis has been rapid. Even recently, Sedley LJ has suggested that if *Ex parte Institute of Dental Surgery* were decided today reasons may be required.[372]

Such developments in the law are to be welcomed; in fact, lauded. The advantages of a duty to give reasons are numerous. They include the fact that giving reasons can only enhance confidence in the decision making process, the fact that 'basic fairness and respect for the individual often requires that those in authority over others should tell them why they are subject to some liability or have been refused some benefit [and that giving reasons may also] render it easier to determine if a decision is irrational or erroneous.'[373]

The giving of reasons also has implications for the rule of law. 'The rule of law emphasizes that those who enforce the law keep within its limits.'[374] Providing reasons will indicate to the courts whether the decision maker has kept within legal parameters and thereby secure respect for the rule of law.

The disadvantages of a duty to provide reasons should, however, not be overlooked. It has been argued that 'reasons, especially if published would unduly increase legalization and the formal nature of the decision making process, place burden on

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[371] Ibid 1304

[372] *R v (on the application of Wooder) v Feggetter* [2003] QB 219, 230

[373] H Woolfe and others, *De Smith's Judicial Review* (6th edn Sweet and Maxwell, London 2007) 415

[374] John Alder, *General Principles of Constitutional and Administrative Law* (4th edn Palgrave Macmillan 2002) 92

decision makers that would occasion administrative delays and encourage the disappointed to pore over the reasons in hope of detecting some short comings for which to seek redress in the courts.'[375]

Nevertheless, as was said by Professor John Alder 'these concerns do not meet the main justification for the giving of reasons, which lies in the value of respect for human dignity and equality so that those who purport to exercise power are accountable.'[376]

Moreover, such 'concerns can be accommodated by ensuring any reasons requirement under the duty of fairness leaves sufficient flexibility to decision makers by accepting various types of written explanation for the decision as sufficient.'[377]

Finally, it is worth mentioning that some jurisdictions have introduced legislation, imposing a statutory duty upon decision makers to give reasons. Two such pieces of legislation are the Administrative Justice Act of Barbados 1980 and the Trinidad and Tobago Judicial Review Act 2000.

Section 16 of the Trinidad and Tobago statute for example allows a person who is adversely affected by a decision in which the Act applies to request from the decision maker reasons for the decision; and if the decision maker fails to comply, the court, upon granting leave for judicial review may compel such compliance. It is to be noted that the statute, does not place a general duty upon the decision maker to giver reasons but makes such a duty contingent upon a request for reasons being made.

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[375] H Woolfe and others, *De smith's Judicial Review* (6th edn Sweet and Maxwell, London 2007) 416

[376] John Alder, *General Principles of Constitutional and Administrative Law* (4th edn Palgrave Macmillan 2002) 397

[377] *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 (Madam Justice L'Heureux Dube)

It is hoped nonetheless, that these statutes will enhance the quality of decision making within those jurisdictions and that they will prove to other Commonwealth Caribbean states that the social benefits which are derived from the fact that aggrieved individuals know how their cases are decided far outweigh the costs of providing reasons.

Marshall v DPP - Revisited

The circumstances in *Marshall v DPP* seem to come very close to the pole (in Sedley J's illustration) which cries out for reasons. Nevertheless, though not deciding the point, the Privy Council seemed to suggest that the DPP did not have to give reasons at all. It stated that:

> 'If the appeal turned on this issue *the Board would have some difficulty in accepting either that the DPP was bound to give reasons at all or that the reasons when given were insufficient in the circumstances.* It does not have to express any opinion on the former point since the DPP did state in his affidavit that he decided that there was not sufficient evidence in law to charge anyone.'[378](emphasis added)

This dictum will be analyzed at two levels. Firstly, whether in the circumstances of the case, fairness required the DPP to give reasons for his decision not to prosecute and secondly, whether the reasons actually given by the DPP were sufficient.

In *Marshall*, the DPP gave very limited reasons for not initiating a prosecution in circumstances where the deceased was shot to death by police officers and the jury at a coroner's inquest into the circumstances of the shooting had returned a verdict that a person or persons were criminally responsible. The DPP stated as his reason for not prosecuting that, there was not sufficient evidence to charge anyone; the issue whether this reason was sufficient will be examined later. At this stage, the question to be considered is whether in such circumstances as outlined, the principles of fairness require that the DPP give reasons despite the

[378] [2006] UKPC 2 [15].

fact that the Board seemed to suggest that no reasons need be given at all.

In *Ex parte Doody,* Lord Mustill made it clear that the principles of fairness are not to be applied by rote to every situation. He further pointed out that the context of the decision was critical when considering what fairness demanded and that the statute that created the discretion was an essential feature of that context. The office of the DPP is created, secured and made independent by the Constitution. He is granted security of tenure and can only be removed for inability to perform his function or for misbehaviour. The Constitution gives him powers that are extremely broad and were described as "awesome" by the Court of Appeal in *Marshall.* Further, he exercises these powers under the control and direction of no other person or authority. It could not be deemed unfair or an undue burden for one with such "awesome" powers and independence to be required to state the reasons for his decisions which may so gravely affect the lives and liberty of citizens especially when those reasons contradict all reasonable expectation. In fact, greater authority must come with greater levels of accountability and it is submitted that fairness in such a context will mean a greater need to give reasons for decisions than that of an ordinary administrator.

This will build confidence in the process of the administration of justice in the minds of citizens. This is just as important as the administration of justice itself; for if citizens perceive that they have been denied justice, the consequences will be very much the same as if they were in fact denied it. Such a consideration must have loomed large in the mind of Hewart CJ in *R v Sussex Justices ex parte McCarthy* when he said '...it is not merely of some importance but it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'[379] So it is here, where the DPP decides *not to prosecute* in circumstances where an inquest

[379] [1924] 1 KB 256, 259

determined that there *was criminal responsibility*, reasons should be given to show to those affected and the society at large that the DPP has acted within the law and justice has not been denied. One should readily embrace the opinion of Forte P in the Court of Appeal that the DPP is 'accountable to the People of Jamaica whom he serves, and should be expected, except in cases where it is not in the public interest to be open in respect to the processes by which he makes his decisions.'[380]

Furthermore, in *Stefan*, the Privy Council viewed the judicial character of the body as an essential factor indicating that reasons should be given. The DPP does not exercise a judicial function but an administrative one. Nonetheless, where he makes a decision not to prosecute or to enter a *nolle prosequi*, his decision effectively denies access to the court, the citizen's last source of determining his rights and obligations, and in the same way that courts are required to give reasons when deciding those rights and obligations, the DPP, as a matter of fairness and good administration should give reasons for this denial where the circumstances of the case require them.

Cases such as *Ex parte Cunningham* and *Stefan* show that the principles of fairness require reasons to be given for a decision where there is a right of appeal from that decision or where judicial review is available. As this will greatly assist in determining whether there exist any grounds for review and further to assist the court itself in deciding whether the decision maker has acted within the ambit of his authority.

Moreover, it has been held that 'the greater the protection from judicial review accorded to a tribunal the greater may be the need for reasons.'[381]

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[380] *Marshall v DPP* JM 2005 CA 15

[381] *Future Inns Canada Inc. v Nova Scotia (Labour Relations Board) (1997), 4 Admin L.R.. (3d) 248 (N.S.C.A)*

It has been established that the DPP's decisions, though amenable to judicial review are afforded much protection from this remedy. The cases show that its grant is 'highly exceptional'.

In cases such as the present where the applicant has overcome this difficult hurdle and has been granted judicial review, fairness demands that the reasons for the decision be given so that the court's endeavour to do justice may not be impeded.

The principles of fairness will also imply a duty to state reasons where the right under consideration is of great importance. The right to liberty in *Ex parte Doody* and the right to work in *Stefan* were seen as sufficiently important to necessitate the implying of a duty to state reasons. In fact, this played a key role in *Stefan* in deciding that all decisions of the Committee required the provision of reasons. *A fortiori*, where, as in the present case, the right to life is being considered. The right to life is of utmost importance, and where the DPP's decision means that persons who are found criminally responsible for the death of another will not be prosecuted, fairness and the interests of justice demand that reasons be given.

The subjective view of the victim's mother of the importance of the matter should also be considered. In *Stefan,* Lord Clyde placed reliance on the importance of the issue in the eyes of the applicant, saying that 'the matter is of very real importance in her own eyes and deserves to be respected.' In this case the issue of her son's death is of real significance in the applicant's eyes and must also be respected. Out of respect for human dignity, and the observation made by Lord Mustill in *Ex parte Doody* of the 'obvious human desire to be told the reasons for a decision so gravely affecting' the individual, fairness will require a statement of reasons.

Further, as seen in *Stefan,* fairness requires reasons to be provided where the decision that is made is the opposite of what was reasonable to expect. In *Stefan,* the doctor who had examined the applicant concluded that her medical condition had improved

and she may be able to work under supervision. It was therefore not expected that her suspension would be made indefinite – fairness therefore demanded reasons. In the present case the jury at the inquest decided that there was criminal responsibility and the persons implicated were known. One would therefore expect a prosecution to follow, hence, the DPP's decision not to prosecute required, as a matter of fairness, the provision of reasons.

In the circumstances of *Marshall,* the suggestion that the DPP may not have to state reasons at all is also in direct conflict with earlier precedent. The suggestion ignores the statements of Lord Bingham of Cornhill in *R v Director of Public Prosecutions ex parte Manning*[382] where the facts are remarkably similar.

In *Manning,* the applicant in the judicial review application was the brother of the deceased. He had been remanded in prison custody awaiting trial but died following an altercation with two officers. A coroner's inquest was held and returned a verdict of unlawful killing. The Crown Prosecution Service decided not to prosecute, giving as its reasons that there was insufficient evidence to justify any criminal prosecution and that it did not believe the available evidence would provide a realistic prospect for a conviction of the officers. After requests for further reasons for the decision were not met the applicant sought judicial review.

It is worth stating for the most part, the approach taken by Lord Bingham in dealing with the duty of the DPP to state reasons in such circumstances. His Lordship sated:

> 'It is not contended that the Director is subject to an obligation to give reasons in every case in which he decides not to prosecute...we do not understand domestic law or the jurisprudence of the European Court of Human Rights to impose an absolute and unqualified obligation to give reasons for a decision not to prosecute. But the right to life is the most fundamental of all human rights. It is put at the forefront of the Convention. The power to derogate from it is limited. The death of a

[382] [2003] 3 WLR 463

> person in the custody of the state must always arouse concern...and if the death resulted from violence inflicted by agents of the state that concern must be profound. The holding of an inquest in public by an independent judicial officer, the coroner, in which interested parties are able to participate must in our view be regarded as a full and effective inquiry. Where such an inquest following a proper direction to the jury culminates in a lawful verdict of unlawful killing, implicating a person who, although not named in the verdict, is clearly identified, who is living and whose whereabouts are known, the ordinary expectation would naturally be that a prosecution would follow. In the absence of compelling grounds for not giving reasons, we would expect the Director to give reasons in such a case: to meet the reasonable expectation of interested parties that either a prosecution would follow or a reasonable explanation for not prosecuting be given, to vindicate the Director's decision by showing that solid grounds exist for what might otherwise appear to be a surprising or even inexplicable decision.'[383]

Having applied the principles of fairness to the facts in *Marshall,* having considered it by analogy to the earlier decision in *Manning,* and bearing in mind the overwhelming advantages of providing reasons, it is submitted that the dicta of the Board regarding reasons is misleading and should not be adopted by future courts. Instead, the decision in *Manning* should be used for guidance.

As for the second issue, whether the reasons actually given by the DPP were sufficient, it is necessary to consider the requirements of fairness within the context in which the reasons were given, the actual reason itself, and the remarks of the Board in dealing with its sufficiency.

The appellant was the grieving mother of the deceased, seeking an intelligible answer as to why her son's killers, who were agents of the state, found criminally responsible at an inquest, were not being prosecuted. The sole answer to her cry for reasons was that 'there was not enough evidence in law to charge

[383] Ibid 477-78

concepts of sovereignty and non-intervention.[130] From their early origins in 1648 these concepts over the years have featured prominently in the customary law which governed state practice up until 1945. With the creation of the UN both concepts crystallized in the form of articles 2(4) and 2 (7) of the Charter.[131]

Sovereignty shielded the state hermetically from the scrutiny of the global community about how it treated its citizens or whether it was capable of protecting them from atrocities which shock the conscience of mankind. This inadvertently ensured that like the years prior to 1648, the period after, even more troublingly, the period following the UN Charter, was still exemplified by a litany of mass atrocities macabre enough to make even the strongest breakdown and weep.[132] States shirked their responsibilities to protect and became participants in, or eye-witnesses to, genocide and ethnic cleansing,[133] leaving one diplomat to assert that the essence of sovereignty seemed to be tantamount to the absence of responsibility.[134]

1.2 Early Origins of Humanitarian Intervention

Regrettably, sovereignty institutionalized indifference to the notion of a common humanity. Suffice it to say, this indifference was reflective of, on the one hand, the condemnation of acts of humanitarian intervention by former colonial territories in the developing world suspicious that military force used to save

[130] Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Brookings Institution Press, Washington D.C. 2008) 17-18

[131] Thomas G. Weiss, *Humanitarian Intervention* (polity Press, Cambridge UK 2007) 12-14

[132] Gareth Evans, 16

[133] See generally, Michael Barnett, *Eyewitness to A Genocide* (Cornell University Press, Ithaca, New York 2003) 1-21

[134] See the comment of the Secretary of State Robert Sansing in Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (Penguin, London 2000) 210

anyone.'[384] Surely, the average citizen would not be able to understand or accept such an answer after a verdict of criminal responsibility was reached by a jury at an inquest; *a fortiori* a grieving mother. Certainly, there must have been some evidence before the inquest that was relied on. The jury there, made up of average citizens, assessed that evidence and upon a lawful direction believed that there was criminal responsibility. The DPP should therefore be required to do more than simply say - 'insufficient evidence'. He should say what he addressed his mind to and why that evidence was insufficient so that his own decision may be vindicated and to satisfy the society's sense of justice.

In *Stefan,* the Privy Council held that the substance of the reasons given '*must depend upon the circumstances.* They need not be elaborate nor lengthy. *But they must be such as to tell the parties in broad terms why the decision was reached.*'[385] And in *Manning,* where the facts were almost identical and where the reasons given were the same as in the present case, it was held that such reasons did very little to shed light on the decision and that 'time and skill would be needed to prepare a summary which was reasonably brief but did not distort the true basis of the decision.'[386]

It is not suggested that the reason given in *Marshall* distorted the true basis of the decision, but that the reason was too broad and too vague to tell the parties interested why the decision was reached in light of the surrounding circumstances.

In response to the DPP's reasons the Privy Council said that it was:

> 'not convinced that further elaboration was required...once [the DPP] had stated that there was not sufficient evidence...the persons interested and the courts were in a position to examine the evidence and gauge its strength for themselves, so that any elaboration by the DPP would be mere debate on points of detail. If it had appeared that he had

[384] *Marshall v DPP* [2006] UKPC 2 [11]
[385] *Stefan v GMC* [1999] 1 WLR 1293 , 1304
[386] *Manning* [2003] 3 WLR 463, 478

> misapprehended or left out of account an important piece of evidence some explanation could be required.'[387]

It is submitted that this very last sentence of the Board in the quoted passage, supports, instead of diminishes the point that more detailed reasons were necessary. For how else would those interested know whether the DPP 'misapprehended or left out of account' an important piece of evidence? Extrinsic evidence would have to be sought and assessed in order to indicate to the parties interested what were the thought processes of the DPP's mind. If the DPP had given more detailed reasons however, there would be no doubt as to what he apprehended or misapprehended and as to what he took into or left out of account.

The point is borne out by a further passage in the Board's judgment. Counsel for the applicant had advanced an argument that a radio interview done by the DPP revealed that the DPP did not take into account the opinion of the forensic analyst about expecting to find gunpowder residues on the back of the hand of the deceased if he had fired a weapon. The Board, describing counsel's submission as 'misplaced'[388] said:

> 'The interviewer put to him that the analyst had said that "such residue as there may have been was inconsistent with Mr.Genius[389] firing or discharging a firearm." Ms. Dunbar[390] did not use those words, though what she said carried such an implication. In view of that it may not be altogether surprising that the DPP said that he could not recall such a statement being made by the forensic expert. *That is not in their Lordships' view sufficient to establish that he had overlooked that piece of evidence.*'[391] (emphasis mine) .

The passage shows that the courts and other interested parties have to resort to assessing extrinsic evidence to establish whether the DPP took into account all the evidence. Such a state of

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[387] *Marshall* [2006] UKPC 2 [15]
[388] Ibid
[389] The deceased
[390] The forensic analyst
[391] *Marshall* [2006] UKPC 2 [15]

affairs could easily be avoided and should be avoided, in the interests of justice, by requiring the DPP to state more detailed reasons in such exceptional circumstances. The reasons, of course, do not have to be elaborate or lengthy, but may be a 'reasonably brief summary'[392] telling the parties interested why the decision was reached.

The circumstances which occurred in *Marshall* clearly called for reasons to be given, and not simply vague and unhelpful reasons, but reasons which would indicate to the parties interested why the decision was reached. The case falls within the *Ex parte Cunningham* category of cases where there is some trigger factor which shows that in the circumstances of the particular decision, fairness calls for reasons to be given. The trigger factor, being the fact that the DPP's decision allowed persons who were found criminally responsible by a Coroner to walk free without a case being brought against them.

Surely, in such circumstances, the mother of the deceased deserves more – she deserves to be given intelligible reasons why her son's killers are not being prosecuted. The society at large also deserves more. It has a vested interest in seeing that justice is done, and that those who enforce the law also abide by it. Providing reasons in these circumstances can only enhance confidence in government and foster greater respect for the justice system. Withholding them will only achieve the opposite.

The Way Forward

The lack of an obligation for administrators to state reasons for their decisions has, for many years, been considered a 'serious gap'[393] in public law. Much is required to remedy this problem. The legislature in Commonwealth Caribbean territories where no

[392] *Manning* [2003] 3 WLR 463, 478

[393] Michael Akehurst, 'Statements of Reasons for Judicial and Administrative Decisions' (1970) 33 MLR 168

statutory obligation exists would do well to consider enacting similar statutes to those which exist in Barbados and in Trinidad and Tobago.

Meanwhile, courts need to fill this gap. They must be vigilant in ensuring that efforts of past courts to develop this area of the law are not undermined by a fear of holding, even in novel circumstances, that fairness requires a statement of reasons. It has been noted that:

> 'drafting a statement of reasons might make slight inroads into a tribunal's time, and might lead to a slight increase in litigation challenging the tribunal's decisions; but these inconveniences would be more than offset by increased fairness in judicial and administrative processes, and by increased public confidence in the fairness of such processes.'[394]

It would be good for the development of Caribbean administrative law for judges to embrace and give effect to such an outlook.

The decisions of the DPP should not be left as an island to themselves – treated as especially resistant to the 'perceptible trend' towards openness and transparency in government. Bearing in mind the width of considerations that may play upon the DPP's mind as discussed in *Sharma,* it is not suggested that he should give reasons for all of his decisions. But considering the vast powers vested in him, his freedom from interference, the security of tenure afforded him, the resistance of his decisions to judicial review in the first place, and the severe consequences his decisions may have for individual citizens, courts should not hesitate to demand reasons in cases where fairness requires them.

This may even be more so when the DPP's decision is not to prosecute; as Louis Blom-Cooper argues 'reasons alone will

[394] Ibid

often satisfy the public that a prosecution is not justified. Silence simply feeds suspicion of some political or ulterior motive.'[395]

In our Caribbean societies, where there is a pervading and palpable culture of mistrust of government officials, courts, including the Caribbean Court of Justice, should avoid acceptance of the non-binding pronouncements of the Board in *Marshall* regarding reasons. Instead, our courts should chart a course towards greater openness and transparency with regards to reasons for the DPP's decisions.

'No doubt, the common law will develop as the common law does, case by case.'[396] As this development proceeds, it can only be hoped that Caribbean judges will play an integral role in adding to that already expanding body of jurisprudence which invokes the principles of fairness, in various circumstances, to require a statement of reasons.

[395] Louis Blom-Cooper, 'Reasons for not Prosecuting' [2000] PL 560, 561

[396] *R v Higher Education Funding Council ex parte Institute of Dental Surgery* [1994] 1 WLR 242, 257