SHAPING A COMMON LAW DUTY TO GIVE REASONS IN SINGAPORE

Of Fairness, Regulatory Paradoxes and Proportionate Remedies

Although there are strong justifications for public authorities to give reasons for administrative decisions, the common law duty to give reasons has not found favour in most Commonwealth jurisdictions. This article examines why this is so, and argues that the position ought to be different in Singapore where the statutory duty to give reasons is relatively undeveloped. Moreover, implementing a common law duty to give reasons would be consistent with two key features of administrative law in Singapore – the green light conception and judicial deference. This article then suggests a three-stage framework that administrative decision-makers can consult to determine whether and to what extent reasons are required in each case. It also proposes legal and remedial measures that can achieve the purpose of the duty while taking into account Singapore's unique institutional conventions and the courts' prevailing attitude towards judicial review.

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I. Introduction

1 To the layperson, the giving of reasons for an administrative decision would seem not only desirable but also necessary for accountability, openness, principled decision-making and the requirements of legality. However, there remains no general duty to give reasons for administrative decisions in most common law jurisdictions ("the common law rule"). In Singapore, the Court of Appeal recently affirmed the common law rule in *Manjit Singh s/o Kirpal Singh v Attorney-General*[1] ("*Manjit Singh I*") and a subsequent decision involving

* This article was originally written as a directed research paper during the author's final semester at the Singapore Management University. The author would like to thank his project supervisor, Assoc Prof Eugene Tan, for his invaluable suggestions and tireless guidance in the writing of this article. The author is also grateful for the helpful comments from the anonymous referee. All views, mistakes and omissions in this article remain solely the author's.

1 [2013] 2 SLR 844.

the same parties[2] after a brief survey of existing Commonwealth authorities. Significantly, however, the court did not foreclose the possibility of re-examining the common law rule in future.

2 This article argues that introducing a general reason-giving duty in Singapore is justifiable in principle and policy, and also workable in practice. It examines four central issues:

(a) whether the advantages of recognising a reason-giving duty outweighs the disadvantages;

(b) whether departing from the common law rule would be justified in light of divided case law in Singapore and other Commonwealth jurisdictions with an established body of case law on the issue;

(c) whether introducing a reason-giving duty would be consistent with key features of administrative law recognised in Singapore; and

(d) how the duty should operate in practice if recognised.

3 Part II[3] considers the first issue by identifying the normative bases for requiring reasons and explaining how these have already found expression in the judicial duty to give reasons in Singapore. It argues that the underlying rationale of the judicial duty is equally applicable to many administrative decisions, and that the different functions between judicial and administrative decision-makers cannot *ipso facto* justify the vastly different standards for giving reasons. Key arguments for preserving the common law rule are then identified and weighed against arguments for departing from the rule.

4 Parts III[4] and IV[5] address the second issue. Part III considers the law in Singapore and concludes that the court is open to departure from the common law rule. Part IV surveys the law in the UK, Australia, Canada and Ireland to identify why courts have required reasons in particular circumstances and to draw common themes from among these jurisdictions. It also highlights differences between the statutory regimes in the jurisdictions surveyed and Singapore to argue that the slow pace of developments in these jurisdictions should not prevent Singapore courts from developing an autochthonous reason-giving duty.

2 *Manjit Singh s/o Kirpal Singh v Attorney-General* [2013] 4 SLR 483.
3 See paras 7–15 below.
4 See paras 16–19 below.
5 See paras 20–35 below.

5 Part V[6] examines the third issue by first explaining how a reason-giving duty would be consistent with the green-light conception of administrative law recognised in Singapore. It argues that instead of subjecting administrative decision-makers to greater judicial scrutiny, the duty could paradoxically achieve the opposite effect by enhancing the legitimacy of administrative decision-makers. The part then considers how the duty would justify the doctrine of judicial deference, which features prominently in Singapore. By linking the duty with unique features in Singapore administrative law, the part seeks to supplement existing literature, which has hitherto focused on the relationship between the duty and discrete components of administrative law like procedural fairness and irrationality.

6 Part VI[7] engages the fourth issue in three sections. The first discusses whether a categorisation approach, under which different categories of administrative decisions and their corresponding standards of reasons are identified at the outset, should be preferred to a context-sensitive approach. The second proposes a three-stage framework to determine whether and to what extent the duty should apply in each case. The third examines the legal and remedial consequences that should result from a breach of the duty. It suggests that Singapore courts should adopt proportionate remedies that can achieve the purpose of the duty while leaving intact an impugned decision instead of quashing the decision by default.

II. Why the need for reasons?

A. Arguments for the duty

7 The normative bases for requiring reasons may be divided into two categories: instrumental and non-instrumental. In the instrumental category, the first basis is that reasons may reduce the likelihood of unmeritorious challenges to administrative decisions when affected individuals are persuaded that the decision is legitimate. Even if the affected individual were still dissatisfied with the outcome, reasons may render the decision more acceptable and increase the likelihood that the decision will be complied with.[8] If published, reasons can also provide guidance to the decision-maker for its future decisions, and to applicants who would be able to gauge their likelihood of success. Second, the giving of reasons is widely regarded as one of the principles

6 See paras 36–50 below.
7 See paras 51–68 below.
8 Mark Elliott, "Has the Common Law Duty to Give Reasons Come of Age Yet?" [2011] PL 56 at 61–62.

of good administration because it encourages a "careful examination of the relevant issues, the elimination of extraneous considerations, and consistency in decision-making".[9] It also helps to control administrative discretion by focusing the decision-maker's mind on the right questions. Public confidence in the administrative system could be enhanced, and willingness to co-operate with the system improved, by demonstrating that decisions are made carefully and conscientiously.

8 The second category is aimed at promoting the dignitarian aim of administrative law by giving an aggrieved individual a proper chance to know possible grounds on which a decision may be challenged.[10] While this may have a beneficial effect on the quality of decisions, thereby contributing to fairness, the emphasis is on "treating a disappointed applicant with the respect which his dignity as a citizen demands".[11]

9 These normative bases are by no means purely theoretical. Many Commonwealth jurisdictions, including Singapore, have already recognised them in the context of the judicial duty to give reasons. In *Thong Ah Fat v Public Prosecutor*[12] ("*Thong Ah Fat*"), which involved a judicial decision, the Singapore Court of Appeal surveyed various English and Australian authorities and academic commentaries that discussed the nature and rationale for such a duty. The court observed how the giving of reasons (a) has a self-educative value; (b) hones the exercise of judicial discretion and encourages judges to give well-founded decisions;[13] (c) enables parties, who may ordinarily have legitimate interests in knowing these reasons to know why they have won or lost;[14] (d) ensures that the appellate court has the proper material to understand and do justice to the decisions at first instance;[15] and (e) helps to curb arbitrariness.[16] Granted, the rules that govern the exercise of judicial functions may not necessarily be applicable to administrative functions. Nevertheless, it is suggested that the "illocutionary force" of a legal decision, referred to in *Thong Ah Fat* to justify the judicial duty to give reasons,[17] applies equally to many administrative decisions. Like a legal decision, an administrative

9 Lord Woolf *et al*, *De Smith's Judicial Review* (Sweet & Maxwell, 7th Ed, 2013) at para 7-090.

10 Thio Li-ann, "Law and the Administrative State" in *The Singapore Legal System* (Kevin Y L Tan ed) (Singapore: Singapore University Press, 2nd Ed, 1999) at p 194.

11 Trevor Allan, "Procedural Fairness and the Duty of Respect" (1998) 18 OxJLS 497 at 499.

12 [2012] 1 SLR 676.

13 *Thong Ah Fat v Public Prosecutor* [2012] 1 SLR 676 at [20].

14 *Thong Ah Fat v Public Prosecutor* [2012] 1 SLR 676 at [21].

15 *Thong Ah Fat v Public Prosecutor* [2012] 1 SLR 676 at [22].

16 *Thong Ah Fat v Public Prosecutor* [2012] 1 SLR 676 at [23].

17 *Thong Ah Fat v Public Prosecutor* [2012] 1 SLR 676 at [17].

decision may declare the institutional fact of liability or non-liability; assert propositions of fact underlying or constitutive of the alleged guilt or non-guilt/non-liability; and/or ascribe legal character to the facts as found.[18] Consider the example of compulsory acquisition, a power available to the Housing and Development Board ("HDB") under s 56 of the Housing and Development Act[19] ("HDB Act") and recently considered by the High Court in *Per Ah Seng Robin v Housing and Development Board*.[20] In that case, the HDB decided that there were sufficient grounds to establish that the appellants were not residing in the property. It then exercised its power of compulsory acquisition under s 56(1)(*h*) of the HDB Act. In so doing, the HDB had:

(a) determined that liability under s 56(1)(*h*) exists;

(b) asserted propositions of fact underlying or constitutive of the said liability, namely that the appellants had sublet their entire flat without the HDB's prior written consent and were not in continuous physical occupation of the flat;[21] and

(c) ascribed legal character to the facts by deciding that compulsory acquisition should take place.

10 The above example shows that judicial and administrative decisions may share the same illocutionary force in spite of their different functions. Hence, the current divergence between the judicial duty to give reasons and the common law rule cannot be explained by the difference in functions alone. The difference also fails to explain why administrative decision-makers should be held to a much lower, and indeed non-existent, general standard in giving reasons. These deficiencies could explain Sir John Donaldson MR's opinion in *R v Lancashire County Council, ex parte Huddleston*[22] ("*Huddleston*"):[23]

> The analogy is not exact, but just as the judges of the inferior courts when challenged on the exercise of their jurisdiction traditionally explain fully what they have done and why they have done it, but are not partisan in their own defence, so should be the public authorities.

11 Accordingly, if a legal judgment "cannot be justified solely by the judge's statement of belief that it is right, without explaining any explanation as to why it is so",[24] the same should hold true for administrative decisions that exhibit the same illocutionary force.

18 *Thong Ah Fat v Public Prosecutor* [2012] 1 SLR 676 at [16].
19 Cap 129, 2004 Rev Ed.
20 [2015] 2 SLR 19.
21 *Per Ah Seng Robin v Housing and Development Board* [2015] 2 SLR 19 at [8].
22 [1986] 2 All ER 941.
23 *R v Lancashire County Council, ex parte Huddleston* [1986] 2 All ER 941 at 945.
24 *Thong Ah Fat v Public Prosecutor* [2012] 1 SLR 676 at [17].

Moreover, many administrative decisions have effects that are no less serious than court decisions and cannot be appealed on their merits to the courts. These make the availability of reasons to demonstrate the cogency and coherence of administrative decisions even more important.

B. Arguments against the duty

12 Arguments for preserving the common law rule were succinctly stated in the English Court of Appeal's decision in *R v Higher Education Funding Council, ex parte Institute of Dental Surgery*[25] ("Institute of Dental Surgery"). In that case, the court observed that a general reason-giving duty may:[26]

(a) place an undue burden on decision-makers;

(b) demand an appearance of unanimity where there is diversity;

(c) call for the articulation of sometimes inexpressible value judgments; and

(d) offer an invitation for the captious to comb the reasons for previously unsuspected grounds of challenge.

13 These objections are not without merit, and have been echoed in other decisions. For example, the Privy Council in *Marta Stefan v General Medical Council*[27] ("*Marta Stefan*") noted that introducing a general duty may "impose undesirable legalism into areas where a high degree of informality is appropriate and add to delay and expense".[28] The English Court of Appeal in *R v Chief Registrar of Friendly Societies, ex parte New Cross Building Society*[29] expressed concern that detailed reasons may tempt a reviewing court to erroneously assume appellate jurisdiction or even substitute its own decision for that of the original decision-maker's.[30] Competing interests, such as national security, may also outweigh the need for reasons.[31]

25 [1994] 1 WLR 242.
26 *R v Higher Education Funding Council, ex parte Institute of Dental Surgery* [1994] 1 WLR 242 at 256–257.
27 [1999] 1 WLR 1293.
28 *Marta Stefan v General Medical Council* [1999] 1 WLR 1293 at 1300.
29 [1984] QB 227.
30 *R v Chief Registrar of Friendly Societies, ex parte New Cross Building Society* [1984] QB 227 at 245.
31 Lord Woolf *et al*, *De Smith's Judicial Review* (Sweet & Maxwell, 7th Ed, 2013) at para 7-093.

14 Applied to Singapore, the concern of not placing undue burden on administrative decision-makers is probably the most pertinent since the Court of Appeal has emphasised the importance of efficiency as a marker of good public administration.[32] Having too many procedural safeguards may hinder good administration when "nothing could be done simply and quickly and cheaply".[33] In addition, the benefits to society from increased assurance that an administrative decision is just may be outweighed by the cost.[34] The difficulty with this and other arguments highlighted above is that potential problems like administrative burden, unmeritorious challenges and court overreaching inevitably arise once any requirement of good decision-making is imposed upon administrative decision-makers.[35] Hence, unless a reason-giving duty can be shown to be more onerous than other requirements of good administration, the reaction to the duty should be to moderate its intensity instead of excluding its general application altogether.[36] Doing so would dovetail with the common law approach towards applying principles of fairness, which is that they are "not to be applied by rote identically in every situation".[37] The article will consider how to formulate a reason-giving duty that is, in Elliott's words, "light enough to allay fears that a wide duty would be unduly burdensome and, on the other hand, so light as to be meaningless".[38]

15 In summary, the leading academic view that the advantages of providing reasons "so clearly outweigh the disadvantages that fairness requires that the individual be informed of the basis of the decision"[39] is persuasive. The article will argue that the green-light conception of administrative law, endorsed in Singapore, further tips the balance in favour of departing from the common law rule.[40] Before the balance can be struck, however, the current law in Singapore and in leading Commonwealth jurisdictions must be examined.

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32 See *Registrar of Vehicles v Komoco Motors Pte Ltd* [2008] 3 SLR(R) 375 at [70].

33 *Pearlberg v Varty* [1972] 1 WLR 534 at 547.

34 Paul Daly, "Administrative Law: A Values-based Approach" forthcoming in *Public Law Adjudication: Process and Substance* (Mark Elliott & Jason Varuhas eds) (Hart Publishing, 2015) at p 11.

35 Mark Elliott, "Has the Common Law Duty to Give Reasons Come of Age Yet?" [2011] PL 56 at 74.

36 Mark Elliott, "Has the Common Law Duty to Give Reasons Come of Age Yet?" [2011] PL 56 at 74.

37 *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531 at 560.

38 See paras 51–68 below. Mark Elliott, "Has the Common Law Duty to Give Reasons Come of Age Yet?" [2011] PL 56 at 65.

39 Lord Woolf *et al*, *De Smith's Judicial Review* (Sweet & Maxwell, 7th Ed, 2013) at para 7-093.

40 See paras 36–50 below.

III. The law in Singapore

16 There is a paucity of case law in Singapore on the common law duty to give reasons. Before the *Manjit Singh* cases, the only reported case to have examined the issue is *Re Siah Mooi Guat*.[41] The decision involved a Malaysian citizen whose re-entry permit and employment pass were cancelled on grounds that she was a prohibited immigrant. After appealing unsuccessfully to the Minister for Home Affairs, she brought judicial review proceedings to, *inter alia*, quash the Minister's decision on grounds that the Minister had breached the rules of natural justice. In rejecting the application, the High Court found that neither the common law nor the Immigration Act[42] required the Minister to give reasons for his decision.[43] Since the Minister had "carefully considered the [applicant's] appeal"[44] and gave evidence that he "gave due and careful consideration to the appeal of the applicant before he rejected it",[45] there was no breach of natural justice. Implicit in the court's reasoning is that it is sufficient for the Minister to have had reasons for his decisions. He is not required to disclose them.

17 The appellants in the *Manjit Singh* cases were advocates and solicitors whose former client lodged a complaint against them. In *Manjit Singh I*, the appellants objected to the appointment by the Chief Justice of a former judge as president of the Disciplinary Tribunal ("DT") convened to investigate the complaint. When their objections were dismissed, the appellants argued, among other things, that the Chief Justice should have given reasons for his decision as a matter of fairness because their reputations and livelihoods were at stake.[46] In dismissing the appeal, the Court of Appeal followed the English law position as stated by the House of Lords in *Doody v Secretary of State for the Home Department*[47] ("*Doody*"), which the Privy Council also adopted in *Marta Stefan*. The court held that there was no general duty to give reasons for administrative decisions, although exceptions may be made where a decision appears aberrant or involves matters of special importance such as personal liberty. On the facts, these circumstances did not exist.[48] The court also observed that the Chief Justice had no role in the disciplinary proceedings apart from the selection of the members.

41 [1988] 2 SLR(R) 165.
42 Cap 133, 1985 Rev Ed.
43 *Re Siah Mooi Guat* [1988] 2 SLR(R) 165 at [34].
44 *Re Siah Mooi Guat* [1988] 2 SLR(R) 165 at [34].
45 *Re Siah Mooi Guat* [1988] 2 SLR(R) 165 at [41].
46 *Manjit Singh s/o Kirpal Singh v Attorney-General* [2013] 2 SLR 844 at [83].
47 [1994] 1 AC 531.
48 *Manjit Singh s/o Kirpal Singh v Attorney-General* [2013] 2 SLR 844 at [85].

Accordingly, the appellants could not have succeeded even if the common law rule were re-examined in Singapore.[49]

18 *Manjit Singh II*[50] occurred several months later, after the appellants' former client had unreservedly withdrawn his complaints. The appellants wrote to the Chief Justice, seeking a revocation of the DT's appointment pursuant to s 90(3)(*a*) of the Legal Profession Act[51] ("LPA"). The Chief Justice replied that the disciplinary proceedings should take their course. The appellants then sought leave to apply for a mandatory order compelling the Chief Justice to revoke the DT's appointment. Among other things, the appellants argued that the Chief Justice had breached a duty to provide reasons for his decision. The Court of Appeal rejected the argument. Apart from reiterating the position stated in *Manjit Singh I*,[52] the court considered that the Chief Justice's role under the statutory scheme of the LPA was primarily of an administrative nature. Since the Chief Justice was under no duty to undertake an independent inquisition of his own in exercising his administrative powers, it would be "exceptional" for him to provide reasons for declining to revoke the appointment of a DT. Requiring the Chief Justice to give reasons may interfere with the investigations of the DT, which is responsible for the inquisitorial process.[53] Moreover, the Chief Justice's decision not to revoke the DT's appointment did not affect the appellant's substantive rights, since the Law Society still had to prove the charges it had brought against the appellants.

19 From the *Manjit Singh* cases, the law in Singapore on the reason-giving duty can be summarised as follows:

(a) There is no general reason-giving duty in Singapore. However, exceptions may be made where a decision appears aberrant or involves matters of special importance to the applicant.

(b) The appellant's substantive rights must have been affected before a reason-giving duty may be imposed.

(c) The statutory context and factual matrix of each case must be considered in determining whether a reason-giving duty exists.

(d) The court is not closed to the possibility of re-examining the common law rule in *Doody*.

49 *Manjit Singh s/o Kirpal Singh v Attorney-General* [2013] 2 SLR 844 at [85].
50 *Manjit Singh s/o Kirpal Singh v Attorney-General* [2013] 4 SLR 483.
51 Cap 161, 2009 Rev Ed.
52 *Manjit Singh s/o Kirpal Singh v Attorney-General* [2013] 4 SLR 483 at [10].
53 *Manjit Singh s/o Kirpal Singh v Attorney-General* [2013] 4 SLR 483 at [11].

IV. Comparative analysis

A. The UK

20 The English common law does not recognise a general reason-giving duty. Early decisions were influenced by an administrative policy outlined in cases like *The Queen v Bishop of London*[54] and *Alcroft v London Bishop*:[55] the lack of reasons or even bad reasons would not be grounds for quashing a decision provided that an administrative decision-maker was acting within its jurisdiction.[56] On the other hand, reasons were required in other 19th-century cases like *R v Sykes*[57] and *R v Thomas*,[58] where it was necessary to demonstrate that a decision was not arbitrary and within the administrative decision-maker's jurisdiction.[59]

21 The reason-giving duty first found expression in *Padfield v Minister of Agriculture, Fisheries and Food*,[60] ("*Padfield*") where the House of Lords held that if an administrative decision-maker made a decision while all the *prima facie* reasons pointed to an alternative course, the court may infer that the decision-maker has no good reason and is not using the power given by Parliament to carry out Parliament's intentions.[61] Hence, this early development was based on the well-established concept of legality: a person entrusted with discretion must direct himself properly in law, consider the matters that he is bound to consider and exclude irrelevant considerations.[62] *Padfield* was followed by *Huddleston*, where the court observed that when an administrative decision-maker is challenged in judicial review proceedings, reasons that can enable the court to ascertain whether the decision-maker had taken into account irrelevant considerations should be given.[63]

22 The progress made in *Padfield* and *Huddleston*, however, was halted in the later case of *R v Secretary of State for Trade and Industry, ex parte Lonrho*[64] ("*Lonrho*"). There, the House of Lords held that the absence of reasons for a decision where there was no statutory duty to

54 [1890] 24 QBD 213.
55 [1891] AC 666.
56 Rose Antoine, "A New Look at Reasons – One Step Forward – Two Steps Backward" (1992) 44 Admin L Rev 453 at 454.
57 [1875] 1 QB 52.
58 [1892] 1 QB 426.
59 Rose Antoine, "A New Look at Reasons – One Step Forward – Two Steps Backward" (1992) 44 Admin L Rev 453 at 455.
60 [1968] AC 997.
61 *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1053–1054.
62 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 at 229.
63 *R v Lancashire County Council, ex parte Huddleston* [1986] 2 All ER 941.
64 [1989] 1 WLR 525.

provide reasons cannot of itself provide any support "for the suggested irrationality of the decision".[65] The only significance of the absence of reasons is that if:[66]

> … all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision-maker, who has given no reasons, cannot complain if the court draws the inference that he had no rational reason for his decision.

Although *Lonrho* is consistent with *Padfield* in identifying legality as the conceptual basis for requiring reasons, it also represents a step backwards from *Padfield*. This is because whereas *Padfield* suggests that a reason-giving duty would arise where a *prima facie* case of illegality exists, *Lonrho* requires that all other known facts point overwhelmingly in favour of a decision different from that actually reached.

23 Subsequently, the conceptual basis for requiring reasons was expanded to include "fairness" in *R v Civil Service Appeal Board, ex parte Cunningham*.[67] In that case, the Civil Service Appeal Board ("the Board") refused to give any reasons for awarding the applicant, a former prison officer, compensation for unfair dismissal that fell far below the norm. The Board argued that its simple and informal procedures would be placed in jeopardy if it had to give reasons for its awards. The English Court of Appeal disagreed, holding that the Board was required to state its reasons on grounds of fairness. Additionally, the reasons had to be sufficient to show that the Board was acting lawfully and directing its mind to relevant considerations.[68] The "fairness" ground was elaborated upon in *Doody*, where the House of Lords held that reasons were required to enable the detection of errors that would entitle the court to intervene,[69] and to enable a person who would be adversely affected by a decision to make representations on his own behalf. When a person cannot make worthwhile representations without knowing what factors weighed against his interest,[70] he would be entitled to know the factors the decision-maker will take into account.[71] *Doody* was subsequently followed in *Marta Stefan*, where the Privy Council acknowledged that "cases where reasons are not required may be taking on the appearance of exceptions".[72]

65 *R v Secretary of State for Trade and Industry, ex parte Lonrho* [1989] 1 WLR 525 at 539–540.
66 *R v Secretary of State for Trade and Industry, ex parte Lonrho* [1989] 1 WLR 525 at 540.
67 [1991] 4 All ER 310.
68 *R v Civil Service Appeal Board, ex parte Cunningham* [1991] 4 All ER 310 at 319.
69 *R v Civil Service Appeal Board, ex parte Cunningham* [1991] 4 All ER 310 at 565.
70 *R v Civil Service Appeal Board, ex parte Cunningham* [1991] 4 All ER 310 at 560.
71 *R v Civil Service Appeal Board, ex parte Cunningham* [1991] 4 All ER 310 at 563.
72 *Marta Stefan v General Medical Council* [1999] 1 WLR 1293 at 1301.

24 Since the *Doody* line of cases, English law has not seen any significant decisions establishing new principles or guidance on when reasons should be given. Hence, while later cases have observed that "the trend of the law has been towards an increased recognition of the duty to give reasons",[73] English law "has not yet got to the stage where there is such a duty".[74] Nevertheless, it is argued that the UK's inertia should not inhibit developments in Singapore law. Unlike Singapore, the UK has developed an extensive tribunal system to review administrative decisions in a variety of issues ranging from tax to consumer credit licences, immigration and asylum. The Tribunals and Inquiries Act 1992[75] imposes a statutory duty to give reasons on almost all tribunals, and on ministers notifying decisions after the holding of a statutory inquiry or where the applicant could have required the holding of such an inquiry.[76] The range of exceptions is very narrow. Examples include where a decision concerns national security[77] and when the said decision is of a legislative and not an executive character.[78] This statutory duty is enforceable by a mandatory order, and non-compliance will ordinarily result in a quashing of the decision.[79]

25 Arguably, the need to impose a common law duty in the UK has been diminished by the widespread use of administrative tribunals and the statutory duty to give reasons. These features are not present in Singapore's legal landscape. As Lord Walker observed in an extra-judicial lecture, judges "must resolve justiciable issues brought before them" in the absence of legislative action.[80] While these comments were made in the context of the British parliament's reluctance to clarify or change the law on assisted suicide, the general principle that common law innovation is warranted when legislative action has been slow applies equally to a reason-giving duty.

73 *North Range Shipping Ltd v Seatrans Shipping Corp* [2002] 1 WLR 2397 at [15].
74 *R (on the Application of Birmingham City Council) v Birmingham Crown Court* [2010] 1 WLR 1287 at [46].
75 c 53 (UK).
76 Tribunals and Inquiries Act 1992 (c 53) (UK) Sch 1, s 10.
77 Tribunals and Inquiries Act 1992 (c 53) (UK) s 10(2).
78 Tribunals and Inquiries Act 1992 (c 53) (UK) s 10(5)(b).
79 Peter Leyland & Gordon Anthony, *Textbook on Administrative Law* (Oxford: Oxford University Press, 7th Ed, 2013) at p 380.
80 Robert Walker, "Developing the Common Law: How Far is Too Far?" (2013) 37 MULR 232 at 253.

B. Other Commonwealth jurisdictions

(1) Australia

26 In Australia, the High Court of Australia held in the leading case of *Public Service Board of New South Wales v Osmond*[81] ("*Osmond*") that there was no general duty to provide reasons for administrative decisions. *Osmond* has recently been affirmed in *Wingfoot Australia Partners Pty Ltd v Kocak*[82] ("*Kocak*"), a decision by the same court. However, the comparative value of *Osmond* is limited due to the lack of judicial consensus on the basis for rejecting a reason-giving duty at common law.[83] *Kocak*, the only other significant decision after *Osmond*, similarly provides little guidance for common law developments because the decision-maker in question, a medical panel, was already under a statutory duty to give reasons.[84]

27 Nevertheless, the lack of favourable Australian authorities should not limit developments in Singapore. Australia is unique in that statutory requirements to give reasons have been implemented in many states. These include the Administrative Appeals Tribunal Act 1975, which allows a person entitled to apply to the tribunal for review of an administrative decision to obtain a statement of reasons for the decision;[85] the Administrative Decisions (Judicial Review) Act 1977 ("ADJR Act"), which allows a person entitled to apply for judicial review of an administrative decision covered under the Act to obtain reasons for the decision;[86] and similar judicial review statutes in Victoria,[87] the Australian Capital Territory,[88] Queensland[89] and Tasmania.[90] While these statutes only apply to decisions "of an administrative character" and

81 (1986) 63 ALR 559.
82 (2013) 303 ALR 64.
83 In *Public Service Board of New South Wales v Osmond* (1986) 63 ALR 559, Gibbs CJ doubted whether the fairness of an administrative decision could be affected by providing reasons after the decision has been made (at 568), while Wilson J reasoned that the absence of legislation imposing a reason-giving duty suggested that Parliament had deliberately refrained from imposing the duty. Hence, it was inappropriate for the courts to do so (at 570–571). Deane J, who was sympathetic towards a reason-giving duty grounded in the notions of natural justice and fairness, preferred reading an implied duty into statutory provisions to imposing a common law duty where special circumstances or fairness required reasons (at 573).
84 *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 303 ALR 64 at [43].
85 Administrative Appeals Tribunal Act 1975 (Cth) s 28(1).
86 Administrative Decisions (Judicial Review) Act 1977 (Cth) s 13(1).
87 Civil and Administrative Tribunal Act (Vic) ss 45–47.
88 Civil and Administrative Tribunal Act (ACT) ss 22B–22F.
89 Administrative Decisions Review Act (Qld) ss 49–52.
90 Judicial Review Act (Tas) ss 28–37.

contain mechanisms to limit the right to reasons,[91] the statutory right to reasons regime in Australia is even more extensive than in the UK.

28 In contrast, few statutes impose a statutory duty to give reasons in Singapore. These include s 95(5) of the Civil Aviation Authority of Singapore Act;[92] s 25(3) of the Exchange Control Act;[93] s 23(5) of the Land Transport Authority of Singapore Act;[94] s 88(4) of the Patents Rules;[95] s 13(9) of the Planning Act;[96] and s 52(2) of the Registered Designs Rules.[97] In the Constitution of the Republic of Singapore[98] ("the Constitution"), Arts 22B(2), 22B(7), 22D(2) and 22D(6) require the President to publish reasons for his decisions in certain instances. Several other statutes expressly permit an administrative decision-maker to not give reasons. These include s 4(6) of the House to House and Street Collections Act[99] and ss 28(2)(*b*), 30M(3) and 30N(2) of the Monetary Authority of Singapore Act.[100]

29 Considering these differences, the preceding analysis of how statutory rights to reasons in the UK diminish the need for a general common law duty applies with even greater force to Australia. As Groves has observed, the "number and breadth of statutory right to reasons"[101]

91 Matthew Groves, "Reviewing Reasons for Administrative Decisions: *Wingfoot Australia Partners Pty Ltd v Kocak*" (2013) 35(3) *Sydney Law Review* 627 at 648.

92 Cap 41, 2014 Rev Ed (reasons required when the authority affirms, revokes or varies a decision).

93 Cap 99, 2000 Rev Ed (reasons required when the authority is not satisfied that the amount of payment made for the export of goods represent a return for the goods that is in accordance with the objects of the Act).

94 Cap 158A, 1996 Rev Ed (reasons required when the authority rejects a specified part of a claim or the entire claim for compensation under the Act).

95 Cap 221, R 1, 2007 Rev Ed (reasons required when the Registrar has given a decision after hearing the parties, or without a hearing if no party desires a hearing).

96 Cap 232, 1998 Rev Ed (reasons required when the competent authority refuses an application for permission to carry out any works within a conservation area, or grants the application subject to conditions).

97 Cap 266, R 1, 2002 Rev Ed (reasons required when the Registrar exercises any power under the Act that is adverse to any party).

98 1985 Rev Ed, 1999 Reprint.

99 Cap 128, 2014 Rev Ed (reasons not required when the Commissioner of Police refuses to grant a licence or revokes a licence which has been granted, on grounds that the collection is, *inter alia*, illegal, fictitious or objectionable on grounds of public policy).

100 Cap 186, 1999 Rev Ed (reasons not required when the authority (a) refuses to grant approval for any financial institution to carry on business in Singapore; (b) refuses any application to redeem any book-entry Monetary Authority of Singapore ("MAS") securities before these securities have reached maturity; and (c) refuses any application to take up book-entry MAS securities issued under Pt VA of the Act).

101 Matthew Groves, "Reviewing Reasons for Administrative Decisions: *Wingfoot Australia Partners Pty Ltd v Kocak*" (2013) 35(3) *Sydney Law Review* 627 at 648.

limit the need for developing a common law reason-giving duty in Australia because a general common law duty "could be at odds with the legislative decision to exclude some decisions from a duty to provide reasons".[102] Moreover, continual statutory innovations could render parallel common law developments unnecessary. Therefore, developments in Singapore should not be constrained by direct comparisons with Australia.

(2) Canada

30 In the leading Canadian decision of *Baker v Canada (Minister of Citizenship & Immigration)*[103] ("*Baker*"), the Supreme Court of Canada held that in certain circumstances, the "duty of procedural fairness will require the provision of a written explanation for the decision".[104] No particular form or quality of reasons was prescribed because the scope of this duty must be evaluated together with "recognition of the day to day realities of administrative agencies and the many ways in which the values underlying the principles of procedural fairness can be assured".[105] The content of fairness, including the duty to provide reasons, would be shaped by such non-exhaustive factors as the nature of the decision and the importance of the decision to the person affected.

31 Later Canadian cases[106] did not alter the position in *Baker* significantly. Instead, the debate shifted to whether the appropriate standard of review should be "reasonableness" or "correctness".[107] Under the reasonableness standard, a reviewing court may quash a decision "only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived".[108] Under the correctness standard, a reviewing court may quash a decision if it determines that the reasons given are inadequate after examining details of the hearing, the evidence

102 Matthew Groves, "Reviewing Reasons for Administrative Decisions: *Wingfoot Australia Partners Pty Ltd v Kocak*" (2013) 35(3) *Sydney Law Review* 627 at 648.
103 [1997] 2 SCR 817.
104 *Baker v Canada (Minister of Citizenship & Immigration)* [1997] 2 SCR 817 at [43].
105 *Baker v Canada (Minister of Citizenship & Immigration)* [1997] 2 SCR 817 at [44].
106 See, *eg*, *Canada (Director of Investigation and Research) v Southam Inc* [1997] 1 SCR 748.
107 William Shores & David Jardine, "Theirs to Reason Why: A Synopsis of the Administrative Law Jurisprudence Relating to Reasons" (2012) 3 *Canadian Journal of Administrative Law and Practice* 253 at 259.
108 *Ryan v Law Society (New Brunswick)* [2003] 1 SCR 247 at [55].

and the conclusions reached.[109] Hence, in *Law Society of Upper Canada v Neinstein*, the court quashed a decision of a tribunal even though "some 39 typed pages" of reasons were given because the court did not find the reasons compelling.[110]

32 These later cases usefully illustrate how the divide between procedural and merits review can be blurred when courts scrutinise reasons too strictly. Until the trend was reversed in a recent decision by the Supreme Court of Canada,[111] reasons in some cases "were scrutinised more strictly than court decisions would have been".[112] Guidelines on how courts can steer away from this danger will be considered below.[113]

(3) Ireland

33 In 2012, the Irish Supreme Court in *Mallak v Minister for Justice, Equality and Law Reform*[114] ("*Mallak*") quashed a decision of the Minister of Justice refusing to grant the appellant a certificate of naturalisation on the basis that the Minister had failed to give reasons for his decision. The appellant had argued that the Minister's failure to give reasons was unfair and unreasonable, and hindered any future applications he might make for naturalisation. In finding for the appellant, the court acknowledged that previous case law has not established a general reason-giving duty. However, it also observed that "a failure or refusal by a decision-maker to explain or give reasons for a decision may amount to a ground for quashing it"[115] in a wide range of circumstances. The court then held:[116]

> In the present state of evolution of our law, it is *not easy to conceive of a decision-maker being dispensed from giving an explanation either of the decision or of the decision-making process* at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: *the underlying objective is the attainment of fairness in the process*. If the

109 William Shores & David Jardine, "Theirs to Reason Why: A Synopsis of the Administrative Law Jurisprudence Relating to Reasons" (2012) 3 *Canadian Journal of Administrative Law and Practice* 253. See also *Law Society of Upper Canada v Neinstein* [2010] CarswellOnt 1459 and *Guttman v Law Society of Manitoba* [2010] CarswellMan 296.

110 *Law Society of Upper Canada v Neinstein* [2010] CarswellOnt 1459 at [63].

111 *Newfoundland and Labrador Nurses' Union v Newfoundland & Labrador (Treasury Board)* [2011] 3 SCR 708.

112 William Shores & David Jardine, "Theirs to Reason Why: A Synopsis of the Administrative Law Jurisprudence Relating to Reasons" (2012) 3 *Canadian Journal of Administrative Law and Practice* 253 at 263.

113 See paras 51–68 below.

114 [2012] IESC 59.

115 *Mallak v Minister for Justice, Equality and Law Reform* [2012] IESC 59 at [63].

116 *Mallak v Minister for Justice, Equality and Law Reform* [2012] IESC 59 at [66].

> process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision-maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded. [emphasis added]

34 The statement above is important for two reasons. First, it effectively establishes a general duty by stating that it is the norm for reasons to be given for administrative decisions. This interpretation finds support in other parts of the judgment where the court held that "it must be unusual for a decision-maker to be permitted to refuse to give reasons",[117] and in subsequent decisions that have qualified the general duty but not doubted its existence.[118] Accordingly, the Court of Appeal's finding in *Manjit Singh II* that common law cases, including *Mallak*, do not contain "an outright statement that administrative decision-makers are under a general duty to provide reasons",[119] while technically accurate, fails to recognise the substance of the decision in *Mallak*. Second, the statement in *Mallak* suggests that the duty to give reasons is a particular aspect of the duty to act fairly. Its requirements are therefore flexible and are in every case practically aimed at producing a fair, open and transparent result. This is consistent with the conceptual bases for requiring reasons in English and Canadian law.

35 The Irish Supreme Court's justifications for its holding are also significant. In particular, the court reasoned that the appellant would be unable to exercise his rights to reapply for a naturalisation certificate or ascertain whether he has grounds to apply for judicial review without the provision of reasons.[120] Moreover, it would be impossible for the court to effectively exercise its power of judicial review without reasons.[121] These considerations are equally applicable to Singapore.

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117 *Mallak v Minister for Justice, Equality and Law Reform* [2012] IESC 59 at [74].

118 See *Thomas Murphy v Ireland* [2014] IESC 19 at [39]–[43], where the Irish Supreme Court suggested (at [40]) that the common law duty might be subject to the same considerations "which underpin the limitation and the scope of the statutory right to reasons". Notwithstanding these qualifications, the court did not cast doubt on the existence of the common law duty. See also *Kelly v Commissioner of An Garda Síochána* [2013] IESC 47, where the Irish Supreme Court stated (at [15]) that the principles in *Mallak v Minister for Justice, Equality and Law Reform* [2012] IESC 59 ("*Mallak*") must be analysed "in the context of the relevant statutory or administrative regime" but recognised (at [30]) that *Mallak* stood for the proposition "that reasons are required as a matter of the general law". Because a statutory duty to give reasons existed on the facts, the courts did not have to apply the common law duty (at [20]). Nevertheless, the court relied on *Mallak* in *obiter* to strengthen its finding that reasons were required (at [41]).

119 *Manjit Singh s/o Kirpal Singh v Attorney-General* [2013] 4 SLR 483 at [10].

120 *Mallak v Minister for Justice, Equality and Law Reform* [2012] IESC 59 at [64]–[65].

121 *Mallak v Minister for Justice, Equality and Law Reform* [2012] IESC 59 at [64]–[65].

V. Compatibility with features of Singapore administrative law

A. The green-light conception

(1) Adoption in Singapore

36 Influenced by the utilitarian tradition, the main objective behind the green-light conception of administrative law is to achieve the greatest good for the greatest number. To this end, it encourages the establishment of organised institutions that are properly accountable and yet able to deliver public services effectively.[122] In this scheme, the role of administrative law is that of a regulator and facilitator to enable social policies to be implemented effectively and fairly. The courts are not seen as the first line of defence against administrative abuses of power because the Judiciary is considered to lack legitimacy in two ways: it is unelected, and its judgments may undermine the legitimacy of decisions made by democratically elected politicians. As such, reliance is placed on the legislative and executive branches of government to uphold high standards of public administration and policy.[123]

37 In contrast, the red-light concept of administrative law begins from the assumption that the bureaucratic and executive power of the State, if left unchecked, would threaten individual liberty. The primary role of administrative law is therefore to keep the powers of the Government within their legal bounds and compel public authorities to perform their duties if they fail to do so.[124] The Judiciary, which is regarded as autonomous and impartial, is centrally charged with securing good administration.[125]

38 In Singapore, the Court of Appeal has explicitly endorsed the green-light conception in the case of *Jeyaretnam Kenneth Andrew v Attorney-General*,[126] which involves the standing requirements for judicial review. In holding that members of the public do not have the right *per se* to bring judicial review against every decision made by

122 Peter Leyland & Gordon Anthony, *Textbook on Administrative Law* (Oxford: Oxford University Press, 7th Ed, 2013) at p 7.

123 Chan Sek Keong, "Judicial Review – From Angst to Empathy: A Lecture to Singapore Management University Second Year Law Students" (2010) 22 SAcLJ 469 at 480.

124 William Wade & Christopher Forsyth, *Administrative Law* (Oxford: Oxford University Press, 10th Ed, 2009) at pp 4–5.

125 Mark Elliott, Jack Beatson & Martin Matthews, *Beatson, Matthews and Elliott's Administrative Law Text and Materials* (Oxford: Oxford University Press, 4th Ed, 2011) at pp 2–3.

126 [2014] 1 SLR 345.

public bodies, the court stated that the red-light view must be approached with caution despite the "obvious intuitive appeal" of allowing a wide class of persons to draw the court's attention to any misuse of public power.[127] The court also emphasised the "obvious pragmatism of minimising disruptiveness caused by vexatious claims to the functioning of these bodies"[128] and opined that "extensive judicial intervention in the administrative process"[129] is not the only way to ensure good governance. These remarks resonate strongly with the green-light conception. Read together with the Court of Appeal's pronouncement in another decision that the "rules on standing espouse an ethos of judicial review focused on vindicating personal rights and interests through adjudication rather than determining public policy through exposition",[130] the position of the green-light conception in Singapore jurisprudence is beyond doubt. What does this mean for the duty to give reasons?

(2) The paradox of not giving reasons

39 If, as Harlow and Rawlings have suggested, the courts' influence should be minimised under the green-light conception,[131] additional requirements that can subject administrative decision-makers to judicial review should arguably be avoided. Instead, reliance should primarily be placed on the internal systems of checks and balances within administrative bodies. An additional safeguard is provided by the doctrine of ministerial responsibility,[132] which requires each Minister to supervise the activities of his subordinates by establishing policies and overseeing their implementation. In turn, the Minister is subject to external controls via responsibility to Parliament.[133] Refusing to give reasons because there are internal checks, however, can lead to what Findlay terms a "regulatory paradox". A regulatory paradox occurs when organisations adopt a regulatory policy designed to achieve a certain objective, but instead promotes the opposite result.[134] An example is

127 *Jeyaretnam Kenneth Andrew v Attorney-General* [2014] 1 SLR 345 at [54].
128 *Jeyaretnam Kenneth Andrew v Attorney-General* [2014] 1 SLR 345 at [55].
129 *Jeyaretnam Kenneth Andrew v Attorney-General* [2014] 1 SLR 345 at [56].
130 *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 at [34].
131 Carol Harlow & Richard Rawlings, *Law and Administration* (Cambridge: Cambridge University Press, 3rd Ed, 2009) at p 37.
132 See Art 24(2) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint), which provides that "the Cabinet shall have the general direction and control of the Government and shall be collectively responsible to Parliament". See also *The Singapore Legal System* (Kevin Y L Tan ed) (Singapore: Singapore University Press, 1999) ch 3, at p 85.
133 Carol Harlow & Richard Rawlings, *Law and Administration* (Cambridge: Cambridge University Press, 3rd Ed, 2009) at pp 39–40.
134 Mark Findlay, *Contemporary Challenges in Regulating Global Crises* (New York: Palgrave Macmillan, 2013) at p 25.

where an administrative body eschews the giving of reasons to avoid being subjected to external controls. Contrary to its intention, persons affected by its decisions may perceive the lack of reasons as indicative of poor administration, unfairness, or even irrationality. They are then more likely to resort to external controls to scrutinise the administrative body's decision.

40 In states governed by the rule of law, it may be argued that public authorities hesitate to give reasons not primarily to avoid scrutiny because checks and balances are inevitable.[135] After all, "the notion of a subjective or unfettered discretion [is] contrary to the rule of law".[136] Therefore, the rationale for not giving reasons may simply be to prevent inefficiency. As Woodrow Wilson remarked towards the end of the 19th century:[137]

> [The] object of administrative study [is] to discover, first, what the government can properly and successfully do, and secondly, how it can do these proper things with the utmost possible efficiency at the least possible cost either of money or of energy.

Though made more than a century ago, Wilson's remark sheds light on the mentality in modern bureaucracies, not least Singapore's, which prizes efficiency[138] and has consistently ranked highly on the World Bank's indicator on government effectiveness.[139] The importance of an efficient bureaucracy is further underscored by how Singapore's approach to the rule of law prioritises "effective, efficient and speedy" government action over strong checks and balances.[140] Efficiency, however, is not immune to the regulatory paradox and is likely to suffer if pursued in a way that does not also promote public confidence in the decision-making process. The increase in civil litigation between the public and the State in administrative and constitutional law issues,[141]

135 See Ministry of Law website, "Keynote Address by Minister for Law, K Shanmugam, at the Rule of Law Symposium 2012" at para 23 <https://www.mlaw.gov.sg>.

136 *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [86].

137 Woodrow Wilson, "The Study of Administration" (1887) 2(1) *Political Science Quarterly* 197 at 197.

138 See, *eg*, Jon S T Quah, *Public Administration Singapore-Style* (Bradford: Emerald Group Publishing, 2010) at pp 148 and 150.

139 Jon S T Quah, "Ensuring Good Governance in Singapore: Is This Experience Transferable to Other Asian Countries?" (2013) 26(5) *International Journal of Public Sector Management* 401 at 412–413.

140 Ministry of Law website, "Speech by Minister for Law K Shanmugam at the New York State Bar Association Rule of Law Plenary Session" (2009) at para 54 <https://www.mlaw.gov.sg>.

141 Attorney General's Chambers website, "Speech of the Attorney-General V K Rajah SC as Delivered at the Opening of the Legal Year 2015, 5 January" at para 16 <https://www.agc.gov.sg>.

partly because citizens are becoming more aware of their civil and constitutional rights, lends support to this analysis.

41 Contrariwise, imposing a reason-giving duty may enhance the legitimacy of administrative decision-makers and by doing so, paradoxically give courts more reasons to rely on decision-makers' internal controls. In regulatory terms, "legitimacy" refers to social credibility and acceptability. A regulator is legitimate when it is perceived as legitimate "by those it seeks to govern and those on behalf of whom it purports to govern".[142] The concept of legitimacy can also be further analysed at three different levels: pragmatic, moral and cognitive.[143] Pragmatic legitimacy is achieved when regulatees perceive the regulator will pursue their interests directly or indirectly; moral legitimacy, when the regulator's goals and procedures are perceived to be morally appropriate; and cognitive legitimacy, when the regulator is accepted as necessary or inevitable. When sound reasons are given for administrative decisions, pragmatic and moral legitimacy in the eyes of the public and moral legitimacy as perceived by the courts would arguably be enhanced.

42 A further issue is whether it is consistent with the green-light conception for the Judiciary to impose a reason-giving duty on the Executive. Although counter-intuitive, the answer is "yes" because it is the Judiciary's responsibility to "articulat[e] clear rules and principles by which the Government may abide by and conform to the rule of law"[144] under the green-light conception as part of its supporting role. Moreover, the result of encouraging good administration and reliance on administrative bodies' internal controls is consistent with the objectives of the green-light conception. As the next section will argue, the duty also helps to justify the doctrine of judicial deference, which features prominently in Singapore and has been used to explain the reluctance of Singapore courts to engage in substantive judicial review.[145]

142 Mark Findlay, *Contemporary Challenges in Regulating Global Crises* (New York: Palgrave Macmillan, 2013) at p 235.

143 Mark Findlay, *Contemporary Challenges in Regulating Global Crises* (New York: Palgrave Macmillan, 2013) at p 236.

144 Chan Sek Keong, "Judicial Review – From Angst to Empathy: A Lecture to Singapore Management University Second Year Law Students" (2010) 22 SAcLJ 469 at 480, para 29.

145 Daniel Tan, "An Analysis of Substantive Review in Singaporean Administrative Law" (2013) 25 SAcLJ 296 at 320, para 67.

B. Judicial deference

(1) Adoption in Singapore

43 Elliott defines "judicial deference" as a term "generally used in a fairly loose way to describe a range of judicial techniques which have the effect of increasing decision-makers' latitude".[146] In constitutional law, judicial deference is most clearly reflected in the traditionally strong presumption of constitutionality accorded to legislation enacted by Parliament.[147] Recently, this presumption was further strengthened in *Lim Meng Suang v Attorney-General*,[148] where the Court of Appeal held that the presumption also applies, though less strongly, to laws enacted prior to Singapore's independence.[149] In administrative law, judicial deference is seen from the Court of Appeal's express declaration that all officials, regardless of whether they hold constitutional office, enjoy a presumption of legality for their acts "as a matter of legal policy".[150] This presumption has been applied in scenarios that range from whether the Attorney-General had acted in unconscious bias or inadvertent error in submitting his opinion to the Cabinet *vis-à-vis* a drug trafficker who had been sentenced to death;[151] and whether a chief assessor's assessment of the annual value of an appellant's house at a much higher value than that of other properties in the same area had violated the equal protection clause in the Constitution.[152]

44 Judicial deference also finds expression in how the Singapore courts have applied the doctrine of irrationality, which has variable standards.[153] When important interests are affected by a decision, greater justification is needed to satisfy the court that the decision is reasonable.[154] This is known as the "anxious scrutiny"[155] standard. Conversely, grounds short of bad faith or improper motive would not suffice to find irrationality where complex questions that lie beyond the

146 Mark Elliott, "Proportionality and Deference: The Importance of a Structured Approach" in *Effective Judicial Review: A Cornerstone of Good Governance* (Christopher Forsyth, Mark Elliott & Swati Jhaveri eds) (Oxford University Press, 2010) at p 268.

147 *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [60].

148 [2015] 1 SLR 26.

149 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [107].

150 *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [47].

151 *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189.

152 *Howe Yoon Chong v Chief Assessor* [1990] 1 SLR(R) 78.

153 John Laws, "Wednesbury" in *The Golden Metwand and Crooked Cord: Essays on Public Law in Honour of Sir William Wade* (Christopher Forsyth & Ivan Hare eds) (Oxford: Hart Publishing, 1998) at pp 185 and 187.

154 *R v Ministry of Defence, ex parte Smith* [1996] QB 517 at 554.

155 *R v Secretary of State for the Home Department, ex parte Bugdaycay* [1987] AC 514 at 531.

courts' areas of expertise and legitimacy are involved.[156] This has been termed the "light touch" standard. Although the Singapore courts have never applied the "anxious scrutiny" standard, the "light touch" standard has often featured because of the courts' willingness to defer to executive assessment on issues concerning public order or interests, regardless of the competing rights or interests at stake. Illustrative examples include *Re Wong Sin Yee*[157] ("*Wong Sin Yee*"), where the court elevated "public safety, peace and good order" to the status of non-justiciability, applying a minimal level of judicial review even though the appellant's right to liberty was at stake;[158] and *Colin Chan v Public Prosecutor*,[159] where "public order and social protection" justified the application of a very low standard of reasonableness even where religious freedom, a fundamental liberty, was impinged upon.[160]

(2) Justifications for judicial deference

45 There are two principal justifications for judicial deference. The first is legitimacy-based and underpinned by normative rather than merely practical considerations. As previously discussed, the Judiciary under the green-light approach is seen as lacking democratic legitimacy *vis-à-vis* the legislative and executive branches. Accordingly, it is normatively right that the good faith and validity of decisions made by public authorities, whose powers are a facet of executive power, be presumed.

46 The second justification, which Elliott calls "expertise-based deference",[161] is underpinned by practical justifications. The court defers to an administrative decision-maker because of its superior expertise in a particular realm *versus* the court's limitations both in terms of resources and expertise. Should superior expertise be assumed, or must it be proved? A cursory glance at other areas of law suggests that it should be the latter. In the law of evidence, for example, the court always examines whether an expert's evidence is based on sound grounds and supported by basic facts.[162] The court also assesses the consistency and logic, credentials, and relevant experience of the experts in their areas of

156 *R v Secretary of State for the Environment, ex parte Hammersmith and Fulham London Borough Council* [1991] 1 AC 521 at 596.
157 [2007] 4 SLR(R) 676.
158 *Re Wong Sin Yee* [2007] 4 SLR(R) 676 at [46].
159 [1994] 3 SLR(R) 209.
160 *Colin Chan v Public Prosecutor* [1994] 3 SLR(R) 209 at [64].
161 Mark Elliott, "Proportionality and Deference: The Importance of a Structured Approach" in *Effective Judicial Review: A Cornerstone of Good Governance* (Christopher Forsyth, Mark Elliott & Swati Jhaveri eds) (Oxford University Press, 2010) at p 269.
162 *Saeng-Un Udom v Public Prosecutor* [2001] 2 SLR(R) 1 at [26].

knowledge[163] – even in highly specialised fields like medical science in which courts have acknowledged their inaptitude.[164] Similarly, expertise-based deference can arguably be justified only after courts have assessed and are convinced by a decision-maker's relative expertise by investigating its reasons.

47 The giving of reasons may indicate whether and to what extent a decision-maker is an expert relative to the court in three ways.[165] First, reasons that are given in a sophisticated form may suggest that a decision-maker is a relative expert, regardless of whether these reasons are sound. Second, reasons may indicate that a decision-maker had considered relevant material that is unfamiliar to the court. Third, the court can compare the decision-maker's reasoning with its own. Assessing the degree of the decision-maker's relative expertise is necessary because there are reasons apart from expertise-based deference, such as legitimacy-based deference, for and against deference. Whether the court should defer and the extent to which it should defer depend on the balance of all these factors. The more inexpert a decision-maker is *vis-à-vis* the court, the stronger the other factors in favour of deference must be for the court to defer, and *vice versa*.

(3) The necessity of reasons to justify expertise-based deference

48 There are two potential counterarguments against the necessity of reasons to demonstrate relative expertise. First, can it not be assumed that the decision-maker always has superior expertise? For example, a government agency responsible for immigration issues would be a relative expert at assessing the suitability of an applicant for permanent residency because of its experience, institutional knowledge and access to the relevant information. A record of reasons is not necessary for this fact to be known. To presume that a decision-maker is always a relative expert simply because it regularly makes similar decisions, however, is to permit the decision-maker to pull itself up by its own bootstraps. While a presumption may be justified for legitimacy-based deference based on reasons like the constitutional separation of powers, the utility-based justification behind expertise-based deference would be severely weakened if the expertise of decision-makers were presumed and not proven.

49 Second, can decision-makers not demonstrate their relative expertise in ways other than giving reasons? For example, an

163 *Sakthivel Punithavathi v Public Prosecutor* [2007] 2 SLR(R) 983 at [75].
164 *Khoo James v Gunapathy Muniandy* [2002] 1 SLR(R) 1024 at [3].
165 Farrah Ahmed & Adam Perry, "Expertise, Deference, and Giving Reasons" [2012] PL 221 at 226–228.

immigration controller may rely on its track record of handling similar cases, or highlight the credentials of its officers in managing immigration issues. As Allan has noted, however, such general indicators of expertise only demonstrate a capacity for the type of reliable judgment that constitutes expertise. To justify expertise-based deference, it is necessary to demonstrate that the decision-maker had exercised its capacity in a particular case.[166] Moreover, requiring evidence of expertise has the additional advantage of allowing the court to defer selectively in cases where the decision-maker is an expert on certain sub-issues, but the court on other sub-issues. A combination of relative expertise may yield more reliable judgment than either the court or the decision-maker could have reached independently.[167]

50 The preceding analysis has sought to show that a reason-giving duty provides justification for expertise-based deference and enables the court to assess when and how much to defer. While commentators have urged caution in the development of expertise-based deference, these concerns lie in the fear that deference is given based on "mere subservience to the credentials of the decision-maker without true consideration of the reasons given".[168] It is precisely because unquestioning submission to the Executive would be "an abdication of the judicial role and a failure to protect legal rights"[169] that the appropriate degree of deference should be determined by:[170]

> … the court's assessment of the balance of public and private interests in light of the reasons presented to it, informed by the evidence adduced in their support.

In this exercise, the necessity of reasons is beyond doubt.

166 Trevor Allan, "Deference, Defiance and Doctrine: Defining the Limits of Judicial Review" (2010) 60 UTLJ 41 at 59.

167 Farrah Ahmed & Adam Perry, "Expertise, Deference, and Giving Reasons" [2012] PL 221 at 229.

168 Daniel Tan, "An Analysis of Substantive Review in Singaporean Administrative Law" (2013) 25 SAcLJ 296 at 322, para 70.

169 Trevor Allan, "Human Rights and Judicial Review: A Critique of 'Due Deference'" (2006) 65 Camb LJ 671 at 680.

170 Trevor Allan, "Common Law Reasons and the Limits of Judicial Deference" in *The Unity of Public Law* (David Dyzenhaus ed) (Oxford: Hart Publishing, 2004) at p 299.

VI. Implementing the duty

A. Content of the duty

(1) A categorisation versus *context-sensitive approach*

51 In implementing the suggested duty, a preliminary issue is whether different categories of administrative decisions should be identified at the outset. Depending on who the decision-maker is and the type of interests affected, a uniform standard of reasons required can then be formulated for each of these categories. Woolf's view that it is better to not separate out the different grounds[171] has much merit. Compared to the categorisation approach, a "unitary test" which rests on considerations of fairness[172] has the benefit of flexibility. Flexibility is important because everything in the law depends on context,[173] especially in public law where the subject matter of proceedings can be infinitely diverse. A context-sensitive duty, with its contents shaped by the circumstances of each case, would be able to accommodate these diverse scenarios.

52 Moreover, a context-sensitive approach that does not necessarily require a formal statement of reasons would address the objection that giving reasons may be onerous for small or under-resourced decision-makers.[174] Instead, the emphasis is on whether the objective of the duty, namely that the affected individual is able to understand the basis for a decision, is fulfilled. As the House of Lords observed in *South Bucks District Council v Porter (No 2)*[175] ("*South Bucks*"), which involves the adequacy of reasons given under a statutory duty, reasons can be briefly stated provided that they are intelligible and adequate, enabling the reader to understand how the conclusions on the principal issues of controversy were reached.[176] The facts of *South Bucks* illustrate how the two approaches can lead to very different outcomes. A district council had challenged a planning inspector's decision to grant the applicant planning permission to retain her mobile home, on grounds of, *inter alia*, inadequate reasons for the decision. The inspector reasoned

171 Lord Woolf *et al*, *De Smith's Judicial Review* (Sweet & Maxwell, 7th Ed, 2013) at para 7-099.

172 *R v Higher Education Funding Council, ex parte Institute of Dental Surgery* [1994] 1 WLR 242 at 256.

173 *R v Secretary of State for the Home Department, ex parte Daly* [2001] 2 AC 532 at [28].

174 Tim Cochrane, "A General Public Law Duty to Provide Reasons: Why New Zealand Should Follow the Irish Supreme Court" (2013) 11 NZJPIL 517 at 543.

175 [2004] 1 WLR 1953.

176 *South Bucks District Council v Porter (No 2)* [2004] 1 WLR 1953 at [36].

that the applicant's status as a gypsy, the lack of an alternative site for her to relocate in the area and her chronic ill health constituted "very special circumstances" to override planning policies. The court below, which appears to have adopted a categorisation approach, held that a "comprehensive approach" with "clear and cogent analysis"[177] is required whenever planning policies are overridden on hardship grounds in order to prevent the concept of hardship from being devalued and the planning system from being undermined.[178] The House of Lords, which appears to have adopted a contextual approach, disagreed with the lower court. It considered the inspector's decision to be a value judgment on whether the applicant's hardship was sufficiently extreme to justify the environmental harm caused by her remaining on the land. It neither involved disputes of law or fact nor suggested that the inspector had acted irrationally.[179] Accordingly, the court held that the inspector's brief reasons were "clear and ample".[180] The court's nuanced analysis, which considered the circumstances of the decision and not just the category it belonged to, is clearly preferable to a rigid categorisation approach.

(2) Framework to determine the standard of reasons required

53 A context-sensitive approach must avoid the extremes of requiring reasons that are too onerous for the decision-maker, and accepting reasons that are too scant to fulfil the objectives of the duty. Additionally, "context-sensitive" does not mean that the standard of reasons should depend on judicial discretion. Elliott[181] and Woolf[182] have identified several key features from English case law that may call for a heavier or lighter duty to give reasons. These features may be distilled into a three-stage framework[183] that decision-makers can consult in each case to determine whether and to what extent reasons are required.

54 At the first stage, the issue is whether there are strong public policy considerations that should displace the general duty. In particular, reasons may be inappropriate in non-justiciable decisions, which are areas of executive decision-making that "are, and should be, immune from judicial review" because of the doctrine of the separation

177 *South Bucks District Council v Secretary of State for Transport, Local Government and the Regions* [2004] JPL 207 at [31].

178 *South Bucks District Council v Secretary of State for Transport, Local Government and the Regions* [2004] JPL 207 at [35].

179 *South Bucks District Council v Porter (No 2)* [2004] 1 WLR 1953 at [38].

180 *South Bucks District Council v Porter (No 2)* [2004] 1 WLR 1953 at [41].

181 Mark Elliott, "Has the Common Law Duty to Give Reasons Come of Age Yet?" [2011] PL 56 at 66–67.

182 Lord Woolf *et al*, *De Smith's Judicial Review* (Sweet & Maxwell, 7th Ed, 2013) at paras 7-102 and 7-103.

183 See Annex A below for a diagram of the suggested framework.

of powers.[184] Examples include issues of foreign affairs, national defence[185] and national security.[186] Judicial review in these cases is limited to determining whether the decision was in fact based on non-justiciable grounds;[187] the existence of procedural improprieties;[188] whether the power was exercised in bad faith for an extraneous purpose; and whether constitutional protections and rights have been contravened.[189] Displacing the general duty can be justified on the basis that non-justiciable decisions often involve a decision-making process that cannot be assessed using a fixed adjudicative standard, or that it may not be in the public interest to reveal their underlying reasons.

55 A potential objection to this approach is that non-justiciable decisions may often affect fundamental liberties, such as in *Wong Sin Yee*. To always displace the general duty when this occurs would be to deprive the affected person of reasons when reasons are most needed. In response, it is argued that reasons should always be given for decisions that affect fundamental liberties because such decisions should always be justiciable. In *Yong Vui Kong v Attorney-General*[190] ("*Yong Vui Kong*"), the Court of Appeal held that the court has jurisdiction:[191]

> … to adjudicate on every legal dispute on a subject matter in respect of which Parliament has conferred jurisdiction on it, including any constitutional dispute between the State and an individual.

The court also added that there should be "few, if any, legal disputes between the State and the people from which the judicial power is excluded".[192] On the facts, an important reason for the court's holding that the President's clemency power under Art 22P of the Constitution is justiciable was that the clemency power is "a corollary of the right to life and personal liberty guaranteed by Art 9(1) of the Singapore Constitution".[193] Whereas cases like *Wong Sin Yee* may have given non-justiciability an expansive interpretation, these cases must be read in light of the Court of Appeal's approach in *Yong Vui Kong*, which signals a jurisprudential shift towards according greater protection to fundamental liberties. Nevertheless, an exception exists for national security decisions made under the Internal Security Act.[194] Such

184 *Lee Hsien Loong v Review Publishing* [2007] 2 SLR(R) 453 at [95].
185 *Lee Hsien Loong v Review Publishing* [2007] 2 SLR(R) 453 at [96].
186 *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [89].
187 *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [89].
188 *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 at [83].
189 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [149].
190 [2011] 2 SLR 1189.
191 *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 at [31].
192 *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 at [31].
193 *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 at [84].
194 Cap 143, 1985 Rev Ed.

decisions would be non-justiciable even if they affect fundamental liberties because Art 149(3) of the Constitution restricts the courts' supervisory jurisdiction in respect of these decisions to reviewing them for procedural improprieties only.[195] Accordingly, reasons need not be given for these decisions under the proposed framework.

56 Even where fundamental liberties are not involved, the court should nevertheless carefully examine whether a case indeed falls within a non-justiciable area to ensure that decision-makers do not use non-justiciability as a cloak to hide their reasons. In *Lee Hsien Loong v Review Publishing*,[196] for example, the court distinguished between the making of a treaty, which is non-justiciable because it involves foreign policy considerations, from the construction of a treaty in light of international law principles and instruments, which is justiciable.[197] Without such careful examination, the general duty would be rendered purely academic.

57 Although policy considerations militating against the general duty may also arise in justiciable cases, reasons should nevertheless be given to the extent that is consistent with the policy interest that would be compromised by more extensive disclosure. In this regard, guidance may be gleaned from New Zealand's Official Information Act,[198] which presumes that information should be made available unless there are good reasons to withhold it. The Act provides two categories of reasons to withhold disclosure. The first category contains "conclusive" reasons like preventing prejudice to national security and defence or serious damage to the economy.[199] Where conclusive reasons exist, information may be withheld without further justification. Reasons in the second category, such as protecting personal privacy, must be balanced against public interest in disclosure before information may be withheld.[200] Australia has adopted a similar approach by setting out classes of decisions for which the statutory duty to give reasons does not apply.[201] Applied to Singapore, considerations that can justify the withholding of reasons or a lighter duty may be developed on a case-by-case basis, taking into account how "the plurality of societies will yield variations in matters such as the interpretation and scope of rights, duties and goods".[202]

195 *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 at [79].
196 [2007] 2 SLR(R) 453.
197 *Lee Hsien Loong v Review Publishing* [2007] 2 SLR(R) 453 at [99]–[104].
198 Official Information Act 1982 (Act 156 of 1982) (NZ).
199 Official Information Act 1982 (Act 156 of 1982) (NZ) s 6.
200 Official Information Act 1982 (Act 156 of 1982) (NZ) s 7.
201 Administrative Decisions (Judicial Review) Act 1977 (Cth) Sch 2.
202 Thio Li-ann, "Between Apology and Apogee, Autochthony: The 'Rule of Law' Beyond the Rules of Law in Singapore" [2012] 2 Sing L Rev 269 at 296.

58 The second stage involves considering the relevant statutory background of the case. This entails, like in *Manjit Singh II*, an assessment of whether the power exercised is of an administrative or substantive nature. If a power only affects the procedural aspects and not the merits of a decision, the duty is unlikely to apply: firstly, because the power would probably not affect substantive rights; and secondly, because the giving of reasons may prevent the decision-maker that eventually determines the merits of the decision from exercising its powers independently, for such reasons as to avoid inconsistency or embarrassment. The Chief Justice's power to select members of the DT in the *Manjit Singh* cases is one such example. In addition, the statutory background may reveal Parliament's intent for a common law reason-giving duty to be displaced or curtailed, for example, where a statute imposes a limited reason-giving duty or expressly states that reasons are not required.

59 At the third stage, the interests of the person affected by the decision and unusual features that require further explanation, if any, are balanced against pragmatic and policy considerations. The more important the interests at stake, the greater the need for detailed reasons, systematic analysis and precision to enable the affected individual to understand why the decision-maker decided as it did. For example, such higher standards would apply to a decision that significantly affects an individual's fundamental liberties, as in *Wong Sin Yee*, as compared to one involving the quantum of a research grant, as in *Institute of Dental Surgery*. Higher standards would also apply if a decision were unusual, in that it contradicts authoritative advice received by the decision-maker,[203] involves overturning first instance decisions[204] or departs substantially from the established norm in similar decisions.[205] With the recognition of the doctrine of substantive legitimate expectations in Singapore,[206] higher standards should apply when the decision-maker is seeking to depart from its representation on grounds under which the doctrine may be displaced. On the other hand, a high threshold of impracticability should be required before pragmatic considerations can justify reasons that are less detailed, well analysed or precise. This is because the normative and instrumental arguments in favour of the duty, which would have been accepted if the duty were recognised, should not be easily overridden by administrative convenience. For the same reason, public policy considerations that do

203 See *UK Coal Mining Ltd v North Warwickshire Borough Council* [2008] EWHC 23 at [36]–[39].

204 *R (on the application of Viggers) v Pensions Appeal Tribunal* [2006] EWHC 1006 at [22]–[30].

205 *R v Civil Service Appeal Board, ex parte Cunningham* [1991] 4 All ER 310.

206 *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [119].

not displace the general duty at the first stage, unless compelling, should not easily justify a lower standard of reasons.

60 Apart from a general framework, it is difficult to prescribe a threshold that reasons must satisfy due to the nature of a context-sensitive approach. Nevertheless, several other guidelines may be drawn from the UK and Australia. First, courts and decision-makers should be cognisant that unless the issues at hand are "extremely important", a less exacting standard should ordinarily be applied to administrative decision-makers than judges.[207] Second, decision-makers should be given "a certain latitude in how they express themselves"[208] for it may be difficult in the time available to "express themselves with judicial exactitude".[209] Third, reasons need not be lengthy[210] provided that they have fulfilled the key purpose of the duty, as in the *South Bucks* decision, and are not just formulaic statements of statutorily prescribed conclusions.[211] Fourth, reasons need not necessarily deal with every material consideration if they have already addressed the main issues.[212] Whenever possible, the administrative value of brevity should be preferred to imposing excessive requirements that may make reasons "less accessible, and too focused on potential judicial review applications rather than communication of the basis of the decision".[213]

B. Remedies for breach of the duty

61 In English law, the usual remedy for a failure to give reasons or adequate reasons, where the duty applies, is a quashing order against the impugned decision.[214] A mandatory order to require the decision-maker to give reasons, while recognised in the *Institute of Dental Surgery* case,[215] is seldom preferred due to the disadvantages of late reasons. These include the possibility of decision-makers "shoring up defective decisions"[216] instead of pursuing good administration or even formulating

207 Lord Woolf *et al*, *De Smith's Judicial Review* (Sweet & Maxwell, 7th Ed, 2013) at para 7-102.
208 *R v Brent London Borough Council, ex parte Baruwa* [1997] 29 HLR 915 at 929.
209 *R v Brent London Borough Council, ex parte Baruwa* [1997] 29 HLR 915 at 929.
210 *Marta Stefan v General Medical Council* [1999] 1 WLR 1293 at 1304.
211 See, *eg*, *R v Birmingham City Council, ex parte B* [1999] ELR 305 at 311.
212 *South Bucks District Council v Porter (No 2)* [2004] 1 WLR 1953 at [36].
213 Australian Administrative Review Council, *Federal Judicial Review in Australia* (Report No 50, 2012) at para 9.58.
214 Lord Woolf *et al*, *De Smith's Judicial Review* (Sweet & Maxwell, 7th Ed, 2013) at para 7-112.
215 *R v Higher Education Funding Council, ex parte Institute of Dental Surgery* [1994] 1 WLR 242 at 263.
216 Abigail Schaeffer, "Reasons and Rationalisations: Late Reasons in Judicial Review" (2004) 9 *Judicial Review* 151 at 155.

ex post facto rationalisations to satisfy a reviewing body.[217] In contrast, quashing the decision avoids these risks and encourages focused decision-making.[218] On the other hand, the English courts have also observed that quashing an otherwise valid decision for the sole reason that reasons had not been given "is likely to be a disproportionate and inappropriate response to a failure to give adequate reasons".[219] Indeed, regard must be had to the "exceptional nature" of the judicial review remedy in Singapore[220] and the fact that few decisions are vulnerable to judicial review because public authorities routinely seek advice from the Attorney-General's Chambers before making decisions that may affect private rights.[221] These institutional conventions, coupled with prevailing judicial attitudes towards judicial review as highlighted in the section on deference, strongly militate against a presumption in favour of quashing.

62 Instead of a quashing order, it is suggested that a decision-maker be allowed to cure its error by providing reasons or supplementing reasons that have already been given, as the case may be, at a later stage. A quashing order should only be granted when these are not forthcoming. This is the approach under German law, where procedural errors, including the lack of reasons for an administrative act, may be cured by providing reasons at a later stage, "up to the final court of administrative proceedings".[222] Its underlying rationale is to reduce the number of judicial review applications, especially in cases where courts quash decisions on procedural grounds and the applicant subsequently applies for judicial review of the same matter on different grounds.[223] Germany's approach has been criticised on two grounds. The first is that it "devalue[s] … procedural guarantees within the administrative procedures",[224] and the second is that it may lead to problems associated with the giving of late reasons. It is argued that these criticisms are unpersuasive for two reasons.

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217 Abigail Schaeffer, "Reasons and Rationalisations: Late Reasons in Judicial Review" (2004) 9 *Judicial Review* 151 at 154.

218 Michael Fordham, *Judicial Review Handbook* (Hart Publishing, 6th Ed, 2012) at para 62.5.

219 *Adami v The Ethical Standards Officer of the Standards Board for England* [2005] EWCA Civ 1754 at [26].

220 Daniel Tan, "An Analysis of Substantive Review in Singaporean Administrative Law" (2013) 25 SAcLJ 296 at 320, para 64.

221 Chan Sek Keong, "Judicial Review – From Angst to Empathy: A Lecture to Singapore Management University Second Year Law Students" (2010) 22 SAcLJ 469 at 475, para 15.

222 Administrative Procedure Act 1976 (Germany) s 45(1)(2).

223 Martina Künnecke, *Tradition and Change in Administrative Law: An Anglo-German Comparison* (Berlin: Springer, 2007) at p 152.

224 Martina Künnecke, *Tradition and Change in Administrative Law: An Anglo-German Comparison* (Berlin: Springer, 2007) at p 156.

63 First, the proposal in this article would only allow a breach of the reason-giving duty, and not all procedural errors, to be cured at a later stage. In this regard, the reason-giving duty should be distinguished from other requirements of procedural fairness such as the rule against bias and the right to a fair hearing. Because these requirements seek to condition a decision-maker's behaviour before it makes a decision, doubt is cast on the substantive reliability of the decision when they are not adhered to.[225] For example, a decision-maker might not have taken into account material considerations if it had denied the applicant the opportunity to make representations. In contrast, a failure to give reasons would not usually lead to a similar inference because a reason-giving duty is contemporaneous with the making of a decision. Like in *Re Siah Mooi Guat*, the decision-maker could have had reasons for his decision but simply not disclosed them for one reason or another. This is especially so if, like the Minister in *Re Siah Mooi Guat*, the decision-maker had given "due and careful consideration" to the case.

64 If the content of a decision had not been tainted by a breach, quashing the decision would be meaningless except that it promotes the non-instrumental aims of the reason-giving duty, which can arguably be met with more proportionate remedies. Granted, the failure to give reasons in some cases, such as where a decision appears *prima facie* aberrant, may suggest that the content of the decision has been tainted. Requiring the decision-maker to consider the matter afresh may then be justified on substantive grounds like illegality[226] or irrationality.[227] As not every failure to give reasons will permit such an inference, however, a failure to give reasons should usually be treated differently from other procedural irregularities for the reasons stated above.

65 Second, the disadvantages of late reasons should be balanced against the negative consequences of quashing an impugned decision by default. These include financial costs and compromises in efficiency when an otherwise valid decision has to be reconsidered, and prejudice to the interests of third parties when the finality of a decision is delayed. If, as the green-light conception posits, the role of administrative law is "collectivist in character, advancing the claim to promote the public interest or common good",[228] more proportionate remedies should be

225 Mark Elliott, "Has the Common Law Duty to Give Reasons Come of Age Yet?" [2011] PL 56 at 71.

226 See *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1053–1054.

227 See *R v Secretary of State for Trade and Industry, ex parte Lonrho* [1989] 1 WLR 525 at 539–540.

228 Mark Elliott, Jack Beatson & Martin Matthews, *Beatson, Matthews and Elliott's Administrative Law Text and Materials* (Oxford: Oxford University Press, 4th Ed, 2011) at p 3.

preferred so long as the risks in accepting late reasons can be managed. Three such methods are proposed.

66 First, the risk of manufactured reasons can be reduced by prohibiting late reasons that lead to a change in the nature of the decision.[229] In the UK, courts have accepted late reasons only when there is no "real risk that the later reasons have been composed subsequently",[230] and when late reasons do not alter or contradict contemporaneous reasons.[231] Second, the inaccuracy of late reasons can be minimised by limiting the period when late reasons may be given after a decision has been made or after a request for reasons has been received. In Australia, the ADJR Act requires reasons to be given "as soon as practicable, and in any event within 28 days" after a decision-maker has received a request for reasons.[232] Third, potential prejudice to an applicant from not having materials with which to apply for judicial review can be addressed by allowing the court to consider the duration of and explanation for the delay in deciding whether or not to accept the late reasons. Where appropriate, the court may also consider making an adverse costs order against the decision-maker to compensate the applicant.[233]

67 Consistent with the presumption that administrative decision-makers intend to act legally, the risk of a court decision that the duty to give reasons has not been complied with is arguably sufficient to encourage decision-makers to give reasons. While conceptually ideal, Elliott's argument that "a consistent judicial policy of quashing stands the greatest chance of fully exploiting the discipline-inducing potential of the duty to give reasons"[234] is premised on preferring external to internal controls on administrative action. This is strongly reminiscent of the red-light conception, which has not gained credence in Singapore.

68 Finally, it may be worth considering an expedited procedure that enables the court to require reasons from a decision-maker without the applicant having to first commence judicial review proceedings. A separate procedure would enhance access to justice by sparing applicants the expense of commencing judicial review proceedings. In

229 Martina Künnecke, *Tradition and Change in Administrative Law: An Anglo-German Comparison* (Berlin: Springer, 2007) at p 153.

230 *R (Nash) v Chelsea College of Art and Design* [2001] EWHC 538 at [34].

231 *R v Westminster City Council, ex parte Ermakov* [1996] 28 HLR 819 at 833.

232 Administrative Decisions (Judicial Review) Act 1977 (Cth) s 13(2).

233 For an indication of the courts' increasing willingness to make adverse costs orders against public bodies exercising regulatory or public functions, see *Ang Pek San Lawrence v Singapore Medical Council* [2015] 2 SLR 1179.

234 Mark Elliott, "Has the Common Law Duty to Give Reasons Come of Age Yet?" [2011] PL 56 at 73.

addition, it would prevent the crowding of court dockets from multiple proceedings, where applicants commence judicial review proceedings just to determine whether grounds for challenging a decision on substantive grounds exist.[235]

VII. Conclusion

69 In its review of English administrative law in 1988, the Justice-All Souls Committee concluded:[236]

> [N]o 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.

Almost three decades since then, the wide scope of the statutory duty to give reasons in the UK and Australia has significantly reduced the necessity for a parallel common law duty. This article has argued that since similar legislative developments have not taken place in Singapore, courts should feel less constrained in following Ireland's lead to recognise a common law duty that not only dovetails with but also justifies key features of Singapore administrative law.

70 Understandably, the courts have been reluctant to do so perhaps due to the lack of a structured framework to determine how a reason-giving duty would interact with policy considerations, pragmatic concerns and statutory provisions. This article has therefore proposed a framework to negotiate the tensions between the proposed duty and the counter-constraints highlighted above. By disapplying the general duty for non-justiciable issues and where Parliament has intended for reasons to not be given, the framework gives ample recognition to the doctrine of the separation of powers. At the same time, the framework seeks to maximise the utility of the duty by not allowing administrative convenience and justiciable policy considerations to easily disapply the duty or lower the standard of reasons required. The proposed remedies, which are less intrusive than a quashing order but can nevertheless achieve the purpose of the duty with the appropriate safeguards, also seek to mediate these tensions. While formulated against the backdrop of the green-light conception of administrative law, these remedies can equally be applied in other jurisdictions that seek a better balance between fairness and proportionality in remedies for breach of the duty.

235 Australian Administrative Review Council, *Federal Judicial Review in Australia* (Report No 50, 2012) at para 9.65.

236 Justice-All Souls Committee Report, *Administrative Justice, Some Necessary Reforms* (Oxford University Press, 1988) at p 71.

71 Just as for its judicial counterpart, the strongest case for the administrative duty to give reasons is encapsulated in the time-honoured notion that "justice must not only be done but must be seen to be done".[237] Indeed, fairness in fact and appearance is arguably the cornerstone of administrative justice, while procedural fairness and its components are "instrument[s] of that rationality which the logic of the law and the rule of law demands".[238] The duty to give reasons is no exception. The sooner the courts recognise this, the sooner the duty can be harnessed to meet the public's growing demand for fairness and justification, and public authorities' need for legitimacy.

237 *Thong Ah Fat v Public Prosecutor* [2012] 1 SLR 676 at [24].

238 Robert French, "Singapore Academy of Law Annual Lecture 2013 – The Rule of Law as a Many Coloured Dream Coat" (2014) 26 SAcLJ 1 at 16, para 37.

Published on e-First 30 March 2016

Annex A