

A REASONED DECISION?

In a recent case the Court of Session, dealing with an extra-statutory concession, outlined a reminder of when reasons to a decision are necessary. In *HLW v Secretary of State for the Home Department*, Lord Kinclaven approved the approach that the function of the decision-making body or the nature of the issue is of an administrative character, as opposed to a judicial or "quasi-judicial" one is not determinative of a duty to give reasons. But the fact that it is carrying out a judicial function is a consideration in favour of a requirement to give reasons. The solution is to be found by a study of the whole circumstances, a consideration of the character of the decision-making body, the kind of decision it has to make and the framework in which it operates. The principle is one of fairness, and fairness may require that reasons be given. In general, as a matter of good practice, whether there is an obligation or not, it will be prudent for decision makers to give reasons, except in those cases where customarily reasons are never, or only exceptionally, given."

Lord Kinclaven noted that the principle is one of fairness and fairness may require that reasons be given. In this case the framework or context in which the challenged decision operated was extra-statutory. In that context a decision maker may be able to justify giving brief reasons - which do not go into the same detail or the same depth as for statutory decisions. The nature and extent of the reasons required for a particular decision will vary depending on the whole circumstances of the case and on the decision itself. In the present case, however, no adequate reasons had been stated.

Lord Kinclaven noted that the underlying question is whether the stated reasons are "adequate". That will depend to some extent on questions of fact and degree and upon the particular circumstances of the case concerned. In general terms, the duty imposed should be rigorous enough to produce adequate reasons for those affected by the decision - but not be so burdensome or impractical that the decision-maker could not reasonably be expected to comply. Each decision requires to be considered separately - on its own merits and in procedural context. However, there is room for a flexible approach - in order to reach a fair and reasonable conclusion in the particular circumstances of the case concerned. That seems to be an integral part of a "fairness test".

It was noted however, the respondent should be careful to avoid stating a conclusion in an extra-statutory context which might give the impression that the respondent has already formed an adverse view on a decision which has yet to be taken under statute. It could also be made clear, if that be the case, that the extra-statutory decision had been arrived at without prejudice to the petitioner's whole other rights and pleas including those under statute.

It was also held that if reasons are to be provided, it is generally best that they be stated at the time of the decision, or shortly thereafter, rather than in response to challenge.

Stephen Winter, of Terra Firma Chambers, appeared for the petitioner and Roddy McIlvride, also of Terra Firma Chambers, appeared for the respondent.