# RIGHTS, REASONS, AND INTERNATIONAL NORMS

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*This article focuses on access to environmental justice. In particular, the article focuses on the right to remedy and redress articulated in Principle 10 of the Rio Declaration 1992 and the effective transposition of the principle in domestic law by interrogating three recent decisions from the senior courts in England and Wales, Ireland, and New Zealand concerning the reasons given for environmental decisions. These decisions provide substantive justification for reasoned decision-making so that interested persons are given the human dignity of knowing what was decided and why, for viewing this question from the perspective of a person who did not participate in the proceedings, for avoiding judicial deference on appeal by requiring that original decisions should be objectively reasonable and based on sound evidence, and (as a matter of natural justice) focusing remedial discretion on quashing defective decisions.*

## I INTRODUCTION

This article focuses on three recent decisions from the senior courts in the England and Wales, Ireland, and New Zealand concerning the reasons given for environmental decisions: *Dover District Council v CPRE Kent* (*Dover*),[1] *Connelly v An Bord Pleanala* (*Connelly*),[2] and *Franco Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* (*Belgiorno-Nettis*).[3]

Central to the issues in these decisions is access to justice in relation to environmental decision-making. This right is now firmly established as a basic principle of international and domestic environmental law. It is designed to reinforce an "environmental rule of law"[4] and is defined "authoritatively" by the Rio Declaration 1992.[5] Principle 10 states:

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by

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[1] *Dover District Council v CPRE Kent* [2017] UKSC 79.

[2] *Connelly v An Bord Pleanala* [2018] IESC 31.

[3] *Franco Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2019] NZCA 175.

[4] IUCN World Declaration on the Environmental Rule of Law 2016, Principle 10.

[5] Ellen Hey, *Advanced Introduction to International Environmental Law* (Edward Elgar Publishing, Cheltenham, 2016), 16.

> public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. *Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.* [Emphasis added].

The scope of the access to justice right in Principle 10 of the Rio Declaration has been determined by the writings of the most highly qualified publicists in the field of environmental law. For example, Jonas Ebbesson observed that the law and policy regarding access to justice in environmental decision-making has been shaped by the increased involvement of non-governmental organisations (NGOs) during the period since the Stockholm Conference on the Human Environment 1972. He also noted that "access to judicial and administrative proceedings" encouraged by Principle 10 of the Rio Declaration represented a paradigm shift (similar to advances in human rights law) into the realm of state sovereignty.[6] In particular, Ebbesson found that "the right of access to effective judicial proceedings and remedies in environmental matters draws on the right to a fair trial, set out in most human rights documents, while adapting it to the specific features of environmental problems".[7]

Additionally, Jona Razzaque noted the critical relationship between substantive rights to a clean or healthy environment and procedural rights that guarantee the right to be heard in relation to decisions that could affect such substantive rights.[8] In particular, he noted that information and participation rights "will have little meaning" absent access to justice and observed:

> The right of access to justice allows people to enforce environmental laws and remedy any breach – it thus establishes a right to a clean environment.[9]

Generally, the development of procedural rights has been influenced by a number of different factors, including, increased political expectations about access to justice, putting checks and balances in place, and establishing

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[6] Jonas Ebbesson, "Public Participation" in Daniel Bodansky, Jutta Brunee, and Ellen Hey (eds) *The Oxford Handbook of International Environmental Law* (Oxford University Press, Oxford, 2007) 683-684.
[7] Ebbesson (n 6) 687.
[8] Jona Razzaque, "Human rights to a clean environment: procedural rights" in Malgosia Fitzmaurice, David M Ong, and Panos Merkouris (eds) *Research Handbook on International Environmental Law* (Edward Elgar Publishing, Cheltenham, 2010) 284.
[9] Razzaque (n 8) 284.

administrative principles for good government.[10] Procedural rights also have a strong foundation in human rights law (as noted above) and are closely linked to the right to an effective remedy and the right to a fair hearing in arts 8 and 10 of the Universal Declaration of Human Rights 1948, art 6 of the European Convention on Human Rights 1950, and arts 2.3 and 14 of the International Covenant on Civil and Political Rights 1966 (ICCPR).

Notwithstanding the importance of these treaty provisions at international and regional level, Razzaque also noted the importance of national legal systems in giving effect to environmental procedural rights particularly in "the absence of a global treaty".[11] Decisions from domestic courts (the focus of this article) will therefore be critically important for effective implementation of international norms such as the right of access to environmental justice (including redress and remedy).

At national level, procedural rights can be found in specific environmental legislation, or in the general law. In particular, judicial review (the focus of the three decisions critically analysed in this article) provides a specific mechanism for supervising public decision-making and enables affected persons to challenge environmental decisions before the senior courts. For example, s 27(2) of the New Zealand Bill of Rights Act 1990 (NZBORA) (that is designed to implement the ICCPR) provides that every person (both natural and juridical) whose legal rights or interests have been adversely affected by decisions made by tribunals or public authorities has the right to apply to the New Zealand High Court (NZHC) for judicial review of the decision in accordance with the Judicial Review Procedure Act 2016.

Subsequently, Ebbesson also noted that while Principle 10 of the Rio Declaration does not include any reference to "rights", it would be difficult in practice for states to comply with Principle 10 without conferring rights on

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[10] Benjamin J Richardson and Jona Razzaque, "Public Participation in Environmental Decision-making" in Benjamin J Richardson and Stepan Wood (eds) *Environmental Law for Sustainability* (Hart Publishing, Oxford, 2006) 165-194; Barry Barton, "Underlying Concepts and Theoretical Issues in Public Participation in Resource Development" in Donald Zillman and others (eds) *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford University Press, Oxford, 2002) 77-120; Patricia Birnie, Alan Boyle, and Catherine Redgwell, *International Law & the Environment* (3rd edn Oxford University Press, Oxford, 2009) 288.

[11] Razzaque (n 8) 292.

citizens under national law (similar to s 27(2) of the NZBORA).[12] He also found that implementation of Principle 10 is weak in the Pacific due to the relative absence of regional treaties (e.g. Aarhus Convention) and that implementation via national law therefore assumes greater importance.[13]

Beyond that, Vasiliki Karageorgou found that there is a real distinction in terms of the normative implementation of Principle 10 of the Rio Declaration at the national level between states where international standards have been incorporated into national law on the one hand, and states where no international standards have been incorporated into national law on the other hand. Generally, she observed that effective access to environmental justice is provided by those states that are parties to the Aarhus Convention (that is open to accession by any member of the United Nations).[14] But Karageorgou also noted that statutory restrictions (e.g. requiring leave to be granted before judicial review proceedings can proceed to a substantive hearing) prevent access to justice.[15] The success of judicial review also depends on liberal rules of standing that enable community and environmental groups to bring proceedings before the courts.[16] Leave and standing were not an issue in the three cases considered in this article.

## II *CONNELLY*

The decision of the Supreme Court of Ireland (IESC) in *Connelly*[17] concerned the grant of planning permission for a wind farm by the Planning

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[12] Jonas Ebbesson, "Principle 10: Public Participation" in Jorge E Vinuales (ed) *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press, Oxford, 2015) 291 and 307.

[13] Ebbesson (n 12) 293; Ben Boer, "Environmental Law and Human Rights in the Asia-Pacific" in Ben Boer (ed) *Environmental Law Dimensions of Human Rights* (Oxford University Press, Oxford, 2015) 135; Vasiliki (Vicky) Karageorgou, "Access to justice in environmental matters: recent developments at international and regional level and the repercussions at the national level" in James R May and Erin Daly (eds) *Human Rights and the Environment: Legality, Indivisibility, Dignity and Geography* (Edward Elgar Publishing, Cheltenham, 2019) 163.

[14] United Nations Economic Commission for Europe, Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998 (Aarhus Convention) (entry into force: 30 October 2001).

[15] Karageorgou (n 13) 166-167.

[16] *R v Inspectorate of Pollution, ex parte Greenpeace Ltd* [1994] 4 All ER 329; *R v Secretary of State for Foreign Affairs, ex parte WDM Ltd* [1995] 1 All ER 611; *R v Somerset County Council and ARC Southern Ltd, ex parte Dixon* (1997) 75 P&CR 175; *Moxon v Casino Control Authority* (High Court, Wellington, Fisher J, M324/99); *Massachusetts v Environmental Protection Agency* (2007) 549 US 497.

[17] *Connelly* (n 2).

Board on appeal after considering further information from the developer including a Natura Impact Statement (NIS) provided in response to concerns about the potential impact of the development on sensitive sites designated under the European Union Habitats Directive[18] (that provided foraging habitat for Hen Harriers) raised by an Inspector appointed by the Board, and carrying out an Appropriate Assessment (AA) of the development under the Directive.

Ms Connelly applied for judicial review alleging (inter alia) that the Planning Board gave no reasons for the decision. As a result, the Irish High Court[19] (IEHC) quashed the decision to grant planning permission. It found that while the Inspector's report and the Board's decision could "lawfully … be read in tandem" it was not acceptable for a decision-maker to refer to "an ocean of material consulted or relied upon" to support the decision "and leave an affected party … to fish in that ocean for what she might catch there of relevance …".[20] The Planning Board appealed to the IESC.

To determine the challenge regarding the absence of reasons the IESC considered four broad questions, namely, the purpose behind reasons, where reasons can generally be found, whether any reasons could be found in this case, and whether any reasons given were adequate.

### A *The purpose behind reasons*

The IESC emphasised that questions regarding reasons are in practice focused on the criteria used by the courts to determine whether the reasons given in any particular decision are adequate. The IESC carried out a detailed review of the Irish jurisprudence. For example, it noted that in *Mallak v Minister for Justice, Equality and Law Reform*,[21] concerning the naturalisation of a Syrian refugee, Fennelly J found that reasons are critical to ensure that redress and remedy via judicial review is effective and stated:

> 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

[18] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats of wild fauna and flora.
[19] *Connelly v An Bord Pleanala* [2016] IEHC 322.
[20] *Connelly* (n 2) at [4.7].
[21] *Mallak v Minister for Justice, Equality and Law Reform* [2012] IESC 59.

> matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the 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. Several converging legal sources strongly suggest an emerging commonly held view that persons affected by administrative decisions have a right to know the reasons on which they are based, in short to understand them.[22]

This led Clarke CJ in *Connelly* to note that reasons ensure that affected persons can understand why the decision was reached, and enable them to assess whether any grounds for appeal or judicial review exist.[23] Significantly, Fennelly J in *Mallak* also emphasised that a perfunctory or "box ticking" approach cannot be adopted in relation to reasons,[24] and that reasons underpin procedural fairness. Other decisions from the Irish courts also supported these conclusions. For example, in *Meadows v Minister for Justice*, Murray CJ stated:

> An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and context.
>
> Unless that is so then the constitutional right of access to the courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective.[25]

Subsequently, in similar vein Clarke CJ also stated in *Rawson v Minister for Defence*:

> As pointed out by Murray CJ in *Meadows* a right of judicial review is pointless unless the party has access to sufficient information to enable that party to assess whether the decision sought to be questioned is lawful and unless the courts, in the event of challenge, have sufficient information to determine that lawfulness. How that general principle may impact on the facts of an individual case can be dependent on a whole range of factors, not least the type of decision under question, but also, in the context of the issues with which the Court is concerned on this appeal, the particular basis of challenge.[26]

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[22] *Mallak* (n 21) at [66].
[23] *Connelly* (n 2) at [6.9].
[24] *Connelly* (n 2) at [5.4].
[25] *Meadows v Minister for Justice* [2010] 2 IR 701; *Connelly* (n 2) at [6.11].
[26] *Rawson v Minister for Defence* [2012] IESC 26 at [6.8].

These statements led Clarke CJ in *Connelly* to note that providing adequate reasons to enable affected persons to understand generally why the decision was made is a requirement of procedural fairness, and that providing affected persons with sufficient information to consider whether the decision should be challenged by appeal or judicial review also assists the courts to "engage properly in such an appeal or review".[27] More importantly, it also underpins the principle of legality.

### B *Where reasons can generally be found*

The IESC then considered where the reasons for decisions could generally be found. In particular, Clarke CJ referred to his previous judgment in *Christian v Dublin City Council*, concerning the adoption of a development plan, where he found that the reasons for the decision could either be included in the plan or in other documents referred to in the plan and stated:

> However, the requirement of reasonable certainty as to the reasons seems to me to necessitate that any documentation said to represent the reasons must either be expressly referred to in the development plan or be, by necessary implication, clearly adopted by those voting in favour of the development plan as part of the reasoning concerned.[28]

Clarke CJ then made the important point in *Connelly* that decisions may sometimes affect both persons who have participated in any decision-making process and persons who have not previously participated in the process and stated:

> Clearly, the ability of a person who was not involved in the process, but who is nonetheless entitled to challenge the decision, to identify the reasons for a decision, where those reasons are to be derived from a diffuse range of sources, will differ greatly from the ability of a person who was involved in the process.[29]

The critical point is that all affected persons should be able to readily locate any reasons given for the decision and understand them.

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[27] *Connelly* (n 2) at [6.15].
[28] *Christian v Dublin City Council* [2012] IEHC 163 at [9.2].
[29] *Connelly* (n 2) at [7.6].

### C *Whether any reasons could be found in this case*

The IESC approached the question of whether any reasons could be found to support the Board's decision to grant planning permission from the perspective of a person who had not previously been involved in the process before the Board. A preliminary question was whether such a person would have "free access" either online or otherwise to all of the relevant documents.[30]

Having established the legal duty to give reasons for the statutory decision, the IESC held that the relevant test was that set out in *Christian* (noted above) that:

> Any materials can be relied on as being a source for the relevant reasons subject to the important *caveat* that it must be reasonably clear to any interested party that the materials relied on actually provide the reasons which led to the decision concerned. … The trial judge was clearly correct to state that a party cannot be expected to trawl through a vast amount of documentation to attempt to discern the reasons for a decision. However, it is not necessary that all of the reasons must be found in the decision itself or in other documents expressly referred to in the decision. The reasons may be found anywhere, provided that it is sufficiently clear to a reasonable observer carrying out a reasonable enquiry that the matters contended actually formed part of the reasoning. If the search required were to be excessive then the reasons could not be said to be reasonably clear.[31]

Beyond that, the IESC observed that a reasonable observer could not allege that any reasons given were inadequate because they were unduly "complicated or scientific" in cases where the evidence relied on was "complex or based on scientific questions".[32] The IESC also noted that planning is iterative, and that the process of commissioning reports from inspectors and requesting and receiving further information from developers is designed to assist the Board in deciding whether any concerns or reservations identified by an inspector have been met.[33] This led the IESC to find that inspectors' reports continue to be relevant as the "backdrop" to the subsequent decision-making process.[34] Clarke CJ therefore concluded:

> … In essence, the general reasons issue in this case comes down to one of assessing whether the Board has given adequate reasons for being satisfied that

[30] *Connelly* (n 2) at [9.1].
[31] *Connelly* (n 2) at [9.2].
[32] *Connelly* (n 2) at [9.3].
[33] *Connelly* (n 2) at [9.4].
[34] *Connelly* (n 2) at [9.5].

> the initial concerns expressed in the Inspector's report, and which would appear to have found favour with the Board at least on a *prima facie* basis, had been adequately dealt with by the additional information …[35]

The test for whether "adequate reasons" were given by the Board was therefore an objective test viewed from the perspective of a reasonable "interested party" who had not previously been involved in the process.[36]

### D *Whether the reasons given were adequate*

The IESC emphasised (as noted above) that giving reasons should not be regarded as a "box ticking exercise", and that decision-makers are required to occupy the "middle ground" between "an entirely perfunctory statement" of reasons on the one hand and "the sort of broad discursive consideration which might be found in the judgment of a court" on the other hand.[37] The IESC therefore found that the "modern position" encourages decision-makers to give detailed reasons for their decisions, and that decision-makers will normally be "afforded a significant margin of appreciation" because the courts on review "will not second guess sustainable conclusions of fact" or "the exercise of broad judgment" that clearly lies within the statutory powers conferred on the relevant decision-maker.[38] This led Clarke CJ to state:

> Giving an explanation as to why the decision maker has concluded one way or the other does not affect that position. What may, however, lead to a successful challenge is if a court concludes that it is not possible either for interested parties or, indeed, the court itself to know why the decision fell the way it did.[39]

The IESC also emphasised again (as noted above) that any "reasonable observer" would appreciate that the reasons given by the Board in *Connelly* formed part of the statutory process for deciding the planning application and that they should therefore be read in the context of the concerns raised in the Inspector's report.[40] The IESC reviewed the reasons given by the Board (e.g. regarding residential amenity and noise and flicker effects) and concluded that adequate reasons were given (referencing the additional information received

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[35] *Connelly* (n 2) at [9.7].
[36] *Connelly* (n 2) at [9.9].
[37] *Connelly* (n 2) at [10.1] and [10.3].
[38] *Connelly* (n 2) at [10.2].
[39] *Connelly* (n 2) at [10.2].
[40] *Connelly* (n 2) at [10.8].

from the developer in response to the concerns identified in the Inspector's report) "for ultimately reaching a different conclusion" on each of the six matters in contention (including residential amenity and the potential effects on the foraging habitat of the protected Hen Harrier).[41] The IESC's task on review was therefore to ensure that the reasons for the decision were known, that any interested party reading the decision should be "informed as to why the Board ultimately came to be satisfied in respect of each of the aspects of the Inspector's report which were negative" including "any specific materials which played an important part in persuading the Board to come to that view", and that it was not the IESC's task to "second guess the judgment of the Board as to whether it reached the correct conclusions".[42] Put simply, the law on reasons did not require the court on review to "agree with the reasons given".[43] The question of law was whether any adequate reasons had been given for the decision.

### E *The decision in Connelly*

The IESC therefore concluded that adequate reasons had been given by the Board for its decision to grant planning permission for the revised wind farm development and reversed the IEHC decision.[44] On the questions of European Union law, the IESC also found that an appropriate EIA had been carried out, but concluded that the AA did not contain "the sort of complete, precise and definitive findings which could underpin a conclusion that no reasonable scientific doubt remained as to the absence of any identified potential detrimental effects on a protected site" as required under the Habitats Directive. The planning decision was therefore quashed for that reason and referred back to the Board for the decision to be taken afresh.[45]

## III *DOVER*

In *Dover*,[46] the council granted planning permission to construct a hotel and conference centre, 521 residential units and a retirement village on site that was

[41] *Connelly* (n 2) at [10.10] – [10.12].
[42] *Connelly* (n 2) at [10.14].
[43] *Connelly* (n 2) at [10.14].
[44] *Connelly* (n 2) at [14.1].
[45] *Connelly* (n 2) at [14.2] and [14.3].
[46] *Dover* (n 1).

partly located within the Kent Downs Area of Outstanding Natural Beauty (AONB) against the recommendation of its officers. The Kent branch of the Council for the Protection of Rural England (CPRE), an environmental NGO established in 1926, filed judicial review proceedings regarding the failure to give reasons for the decision. The United Kingdom Supreme Court (UKSC) finally determined the proceedings. In particular, the UKSC indicated when granting leave "that it would wish to consider generally the sources, nature and extent of a local planning authority's duty to give reasons for the grant of planning permission".[47]

### A *Sources of the duty to give reasons*

The UKSC found that the primary Town and Country Planning legislation was silent about whether councils are required to give reasons for their decisions. However, it noted that subordinate legislation imposed duties on the Secretary of State for the Environment on appeal, local authority officers exercising delegated powers, and councils when deciding applications requiring environmental impact assessment to give reasons for their decisions. Generally, the UKSC noted that the courts had firmly sheeted such provisions back to administrative law principles. For example, in relation to the powers of the Secretary of State on appeal it noted the statement of Lord Bridge in *Save Britain's Heritage v Number 1 Poultry Ltd*:

> That they should be required to state their reasons is a salutary safeguard to enable interested parties to know that the decision has been taken on relevant and rational grounds and that any applicable statutory criteria have been observed. *It is the analogue in administrative law of the common law's requirement that justice should not only be done, but also be seen to be done.*[48] [Emphasis added].

Beyond that, the UKSC also noted the United Kingdom's international obligations under art 6.9 of the Aarhus Convention, namely, that:

> Each Party shall ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with the appropriate procedures. Each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based.

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[47] *Dover* (n 1) at [20].

[48] *Save Britain's Heritage v Number 1 Poultry Ltd* [1991] 1 WLR 153 at 170.

It is for note that while Australia and New Zealand are not parties to the Aarhus Convention they could (as members of the United Nations) accede to the Convention at any time in the future should they wish to do so.

### B *Nature and extent of the duty to give reasons*

Turning to the standard of the reasons given, the UKSC based its judgment in *Dover* on the general statements of Lord Bridge in *South Buckinghamshire District Council v Porter (No 2)*,[49] and Sir Thomas Bingham MR in *Clarke Homes Ltd v Secretary of State for the Environment*.[50] For example, in *South Buckinghamshire* Lord Bridge stated:

> The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. *The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration.* They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon such future applications.[51] [Emphasis added].

While Sir Thomas Bingham MR stated in the context of a ministerial appeal decision that:

> … whether the decision … leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication.[52]

In the course of argument in *Dover*, the developer attempted to read down the requirement for councils to give reasons based on the difference in wording

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[49] *South Buckinghamshire District Council v Porter (No 2)* [2004] 1 WLR 1953.
[50] *Clarke Homes Ltd v Secretary of State for the Environment* (1993) 66 P & CR 263.
[51] *South Buckinghamshire* (n 49) at [36].
[52] *Clarke Homes* (n 50) at 271-272.

between the various subordinate legislative provisions that related to different decision-makers or to different types of decisions. For example, the developer submitted that only "summary reasons" were required and that councils acting administratively at first instance should not be expected to provide statements of reasons to the same standard as could be expected from the Secretary of State when adjudicating appeals.[53] However, the UKSC noted that Lord Bridge in *South Buckinghamshire* had based his statements on decision-making generally and that they were not limited to specific types of planning decisions. In particular, Lord Carnwath found the submissions by the developer unhelpful and stated:

> I am not persuaded that the difference between the two processes bears such significance. In both the decision-maker may have to take into account and deal fairly with a wide range of differing views and interests, and reach a reasoned conclusion on them. *Where there is a legal requirement to give reasons, what is needed is an adequate explanation of the ultimate decision.* The content of that duty should not in principle turn on differences in the procedures by which it is arrived at …[54] [Emphasis added].

Then focusing specifically on council decision-making, he observed:

> There is of course the important difference that … the decision-letter of the Secretary of State or a planning inspector is designed as a stand-alone document setting out all the relevant background material and policies, before reaching a reasoned conclusion. In the case of a decision of the local planning authority that function will normally be performed by the planning officers' report. If their recommendation is accepted by the members, no further reasons may be needed. Even if it is not accepted, *it may normally be enough for the committee's statement of reasons to be limited to the points of difference.* However the essence of the duty remains the same, as does the issue for the court: that is, in the words of Sir Thomas Bingham MR, whether the information so provided by the authority leaves room for "genuine doubt ... as to what (it) has decided and why".[55] [Emphasis added].

Accordingly, the UKSC found that the standard of reasons expected from decision-makers is the same regardless of their place in the hierarchy, whereas there is some latitude in terms of the format of decisions that enables councils to provide supplementary statements of reasons designed to be read in

[53] *Dover* (n 1) at [38] and [39].
[54] *Dover* (n 1) at [41].
[55] *Dover* (n 1) at [42].

conjunction with their planning officers' reports. The three key elements of any statement of reasons in environmental law are, therefore, that there should be no element of genuine doubt as to what was decided or why, that the statement of reasons should address the main issues in dispute, and that it should address any points of difference between the planning officers' recommendations and the conclusion arrived at by the planning committee.

### C *The duty to give reasons at common law*

For completeness, the UKSC in *Dover* also considered the position at common law because this had been controversial "in planning circles" and because the UKSC had invited full argument on the matter.[56] While it found that public authorities are not generally obliged at common law to give reasons for decisions, the UKSC observed:

> … it is well-established that *fairness* may in some circumstances require it, even in a statutory context in which no express duty is imposed …[57] [Emphasis added].

This observation was based on the House of Lords decision in *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531 regarding a ministerial decision setting a minimum parole period in relation to a mandatory life sentence for murder where Lord Mustill stated:

> To mount an effective attack on the decision, given no more material than the facts of the offence and the length of the penal element, the prisoner has virtually no means of ascertaining whether this is an instance where the decision-making process has gone astray. I think it important that there should be an effective means of detecting the kind of error which would entitle the court to intervene, and in practice I regard it as necessary for this purpose that the reasoning of the Home Secretary should be disclosed. *If there is any difference between the penal element recommended by the judges and actually imposed by the Home Secretary, this reasoning is bound to include, either explicitly or implicitly, a reason why the Home Secretary has taken a different view* …[58] [Emphasis added].

Essentially, the decision in *Doody* was designed to ensure that the right to judicial review would be effective in a similar way to the guarantee provided by s 27(2) of the NZBORA (noted above).

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[56] *Dover* (n 1) at [50].
[57] *Dover* (n 1) at [51].
[58] *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531 at 565.

The UKSC also noted that the principle in *Doody* had been affirmed in a planning context by the Civil Division of the England and Wales Court of Appeal (EWCA Civ) in *Oakley v South Cambridgeshire District Council*,[59] where the members of the planning committee had departed from the planning officer's recommendation and had granted planning permission for significant development in the Green Belt contrary to established policies. In these circumstances the EWCA Civ found that:

> … some explanation is required ... the dictates of good administration and the need for transparency are particularly strong here, and they reinforce the justification for imposing the common law duty.[60]

Notwithstanding this line of authority, the council in *Dover* submitted that *Oakley* should be treated with caution, because simplifying and streamlining legislation in 2013 had repealed the previous statutory requirement for reasons to be given for the grant of planning permission. This submission was, however, rejected by the UKSC because two larger principles were engaged: the need to ensure fairness "between the state and the individual citizen" (*Doody*), and the need to ensure "open justice or transparency" (*Save Britain's Heritage*) in both common law and statutory settings.[61] Lord Carnwath stated:

> In my view *Oakley* was rightly decided, and consistent with the general law as established by the House of Lords in *Doody*. Although planning law is a creature of statute, the proper interpretation of the statute is underpinned by general principles, properly referred to as derived from the common law. *Doody* itself involved such an application of the common law principle of "fairness" in a statutory context, in which the giving of reasons was seen as essential to allow effective supervision by the courts. Fairness provided the link between the common law duty to give reasons for an administrative decision, and the right of the individual affected to bring proceedings to challenge the legality of that decision.[62]

Put simply, the UKSC found that this approach was appropriate because the statutory provisions regarding the duty to give reasons had evolved in a "piecemeal" way "without any apparent pretence at overall coherence", and because supplementing the simplified and streamlined statutory provisions with the common law duty to give reasons was not "inconsistent" but ensured

[59] *Oakley v South Cambridgeshire District Council* [2017] 2 P & CR 4.
[60] *Oakley* (n 59) at [61].
[61] *Dover* (n 1) at [55].
[62] *Dover* (n 1) at [54].

that transparency (an objective of the statutory reforms) could be achieved by "filling in" the gaps.[63] This approach was also consistent with the United Kingdom's international obligations under the Aarhus Convention. Beyond that, the UKSC held that this approach to the duty to give reasons would "typically" be appropriate in cases where:

> … as in *Oakley* and the present case, permission has been granted in the face of substantial public opposition and against the advice of officers, for projects which involve major departures from the development plan, or from other policies of recognised importance …[64]

As a result, Lord Carnwath concluded:

> Thus in *Oakley* the Court of Appeal were entitled in my view to hold that, in the special circumstances of that case, openness and fairness to objectors required the members' reasons to be stated. Such circumstances were found in the widespread public controversy surrounding the proposal, and the departure from development plan and Green Belt policies; combined with the members' disagreement with the officers' recommendation, which made it impossible to infer the reasons from their report or other material available to the public. The same combination is found in the present case, and, in my view, would if necessary have justified the imposition of a common law duty to provide reasons for the decision.[65]

### D *The decision in Dover*

Ultimately, the decision in *Dover* focused on the remedies available regarding a failure to provide adequate reasons for a decision, because it was accepted that the council was in breach of the specific requirements of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011. The UKSC was however "clear" that the courts retain "a discretion to refuse relief if … there has been no substantial prejudice" to the plaintiff.[66] While alternative remedies to cure any breach of the duty to give reasons were canvassed before the UKSC in *Dover* including declarations and mandatory orders to provide reasons, it was not persuaded by the argument (advanced by the council) that mandatory orders could not justifiably be made in this case. First, because no attempt had been made by the council in the period following

[63] *Dover* (n 1) at [56] and [58].
[64] *Dover* (n 1) at [59].
[65] *Dover* (n 1) at [57].
[66] *Dover* (n 1) at [49].

the grant of planning permission to provide any reasons to remedy the breach, which underlined "the difficulty of reconstructing the operative reasons of the committee on the basis simply of what is in the minutes".[67] Second, because the basis for the difference between the views of the planning committee and their officers' regarding the potential for landscape mitigation to "reduce or offset the harm" to the AONB should have been explained given the context of the officers' view that mitigation would be "largely ineffective" in this case.[68]

Overall, the UKSC found that these matters "were fundamental to the officers' support for the amended scheme", and held that the failure of the planning committee to address them in the statement of reasons given for the decision raised:

> … "substantial doubt" (in Lord Brown's words) as to whether they had properly understood the key issues or reached "a rational conclusion on them on relevant grounds".[69]

Accordingly, the UKSC concluded that these defects in the reasons given for the decision undermined its validity, and it affirmed the decision of the EWCA Civ to quash the planning permission.

## IV *BELGIORNO-NETTIS*

The New Zealand Court of Appeal (NZCA) decision in *Belgiorno-Nettis*[70] concerned the reasons given by the Panel for recommendations on submissions made about zoning and height controls in the proposed Auckland Unitary Plan. The Panel heard competing evidence regarding zoning and height control issues. The submission points made by Mr Belgiorno-Nettis were not allowed, and the council subsequently adopted the Panel's recommendations. Mr Belgiorno-Nettis appealed to the New Zealand High Court (NZHC) under the Local Government (Auckland Transitional Provisions) Amendment Act 2013 (LGATPAA) and applied concurrently for judicial review alleging that no reasons (or no "adequate" reasons) were given for the recommendations and decisions.[71]

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[67] *Dover* (n 1) at [64].
[68] *Dover* (n 1) at [67].
[69] *Dover* (n 1) at [68].
[70] *Belgiorno-Nettis* (n 3).
[71] *Belgiorno-Nettis* (n 3) at [1] and [3].

The NZHC[72] concluded that the reasons for the decisions "were clearly expressed" in the Panel reports and that "any reasonably informed reader … would have no difficulty identifying and understanding the Panel's reasons for its recommendations",[73] and dismissed the appeal and the application for judicial review because there had been no error of law and because natural justice had been observed.[74] In particular, the NZHC held:

> … While the Panel's reasons for zoning and height control recommendations are set out in a number of places in its Overview Report, topic reports and maps, the reports are clearly organised by subject matter as enables a reader to locate parts of particular relevance. Given the approach of grouping the submissions, *it is inevitable that individual submitters must look to the Panel's reasons as expressed in general terms, and apply that reasoning to the zoning and height controls as appear in the Panel's version of the planning maps, in order to determine the Panel's reasons.*[75] [Emphasis added]

Mr Belgiorno-Nettis then appealed to the NZCA against the refusal by the NZHC to grant judicial review.[76] The issue before the NZCA was whether the NZHC "was right in concluding that adequate reasons were given by the Panel".[77]

### A *The obligation to give reasons*

The NZCA noted the general position under New Zealand law that although there is no common law duty to give reasons for decisions that it is nevertheless sensible to give reasons in order to ensure open justice.[78] For example, in *Lewis v Wilson & Horton Ltd* the NZCA discussed three reasons why reasons should be given.[79]

First, because giving reasons is "an important part of openness in the administration of justice".[80] Put simply, giving reasons will be "good judicial practice".[81] For example, in *Belgiorno-Nettis* the NZCA stated:

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[72] *Franco Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2017] NZHC 2387.
[73] *Belgiorno-Nettis* (n 3) at [41].
[74] *Belgiorno-Nettis* (n 3) at [42] and [43].
[75] *Belgiorno-Nettis* (n 72) at [125].
[76] *Belgiorno-Nettis* (n 3) at [3].
[77] *Belgiorno-Nettis* (n 3) at [44].
[78] *Belgiorno-Nettis* (n 3) at [46].
[79] *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 at [74]-[87].
[80] *Lewis* (n 79) at [76].
[81] *Belgiorno-Nettis* (n 3) at [47]; *R v Awatere* [1982] 1 NZLR 644 at 648-649.

> Open justice, the ability to see and understand the court process, is critical to the maintenance of public confidence in our court system. If no reasons are given for judicial and quasi-judicial authority being exercised in a particular way, an aspect of open justice is lost. The parties cannot be sure why they won or lost and the party who lost will be left wondering about the efficacy of participating in a process where if you lose, you do not know why. The rule of law is not seen to be working. …[82]

Second, because the failure to give reasons "means that the lawfulness of what is done cannot be assessed by a Court exercising supervisory jurisdiction".[83] Put simply, giving reasons will "render the right of appeal effective".[84] For example, the NZCA emphasised in *Belgiorno-Nettis* that:

> As an aspect of this, the giving of reasons is important also because if reasons are not given, it is impossible to know whether there has been an error or mistake made by the decision-maker. A party is obliged to guess or infer. When a decision does not accord with submissions received it is a possible inference that this is because none of the submissions have been found to be satisfactory and the decision-maker has found its own path. However, there are always other possibilities, for instance that the decision-maker has misunderstood or overlooked a submission or perhaps acted entirely capriciously. …[85]

Third, because giving reasons provides "a discipline for the Judge which is the best protection against wrong or arbitrary decisions".[86] For example, the NZCA noted in *Belgiorno-Nettis* that this is important as it focuses the mind and because:

> … It will ensure considered decision-making. Requiring reasons is in itself … a way of forcing the observation of natural justice.[87]

Against the background of these considerations the NZCA noted that while s 144 of the LGATPAA provided the Panel with a discretion to group submissions either according to the relevant plan provisions or the matters that they related to and did not require the Panel to address each submission individually where submissions were grouped, s 144(8)(c) nevertheless provided that reasons "must" be given "for accepting or rejecting submissions"

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[82] *Belgiorno-Nettis* (n 3) at [47].
[83] *Lewis* (n 79) at [80].
[84] *Belgiorno-Nettis* (n 3) at [49]; *R v MacPherson* [1982] 1 NZLR 650 at 652 per Somers J; *R v Civil Service Appeal Board ex parte Cunningham* [1991] 4 All ER 310 at 319 per Lord Donaldson MR.
[85] *Belgiorno-Nettis* (n 3) at [48].
[86] *Lewis* (n 79) at [82].
[87] *Belgiorno-Nettis* (n 3) at [50].

regardless of whether they were grouped or not.[88] The NZCA also noted the limited appeal rights provided under the LGATPAA (primarily) to the NZHC on questions of law, that the Panel was chaired by an Environment Judge and "had some features of a court hearing process". In particular, the NZCA stated:

> In practical terms these limited appeal rights mean that the merits of a submission will be considered only once. It might be thought that this in some way indicates that reasons are less important, as factual determinations cannot be challenged save in limited circumstances so the reasons for the factual determinations do not need to be stated. It is true that this aspect of the need for reasons may apply with less force, but it is more than counteracted by the even greater need for justice to be seen to be done by the public, with the reasons for the unchallenged decisions being apparent. Otherwise the reasons could be entirely arbitrary and no-one would know or be able to challenge recommendations or the decisions by judicial review, a remedy expressly recognised as still applicable under the Transitional Provisions Act. In our view the very limited rights of appeal weigh in favour of the giving of discernable reasons, rather than against. An unsuccessful submitter should be able to understand why the submission has failed. A submitter who cannot understand why a submission has been rejected, and who has no right of appeal against the decision is more likely to be left nursing a sense of uncertainty and unfairness.[89]

The NZCA also noted that the council had contended throughout the proceedings that reasons could be inferred from "statements of general principle" and the "results" recorded in the Panel's reports.[90] For example, the council cited other appeal decisions from the NZHC regarding separate aspects of the plan in support of this argument, but the NZCA found that these decisions were unhelpful because they related either to much broader zoning issues where specific statements about the policy choice that underpinned them were recorded in the recommendations and decisions,[91] or because they related to issues of scope and merely noted that reasons should be given in relation to the relevant topic where submissions were grouped.[92] The NZCA also noted that the NZHC decision in *Albany North Landowners v Auckland Council* focused on the practical need to group submissions that was not in issue,[93] but the NZCA was not convinced that the need to group submissions "excused" the

[88] *Belgiorno-Nettis* (n 3) at [53].
[89] *Belgiorno-Nettis* (n 3) at [58].
[90] *Belgiorno-Nettis* (n 3) at [59].
[91] *Belgiorno-Nettis* (n 3) at [61]; *Hollander v Auckland Council* [2017] NZHC 2487 at [65]-[73].
[92] *Belgiorno-Nettis* (n 3) at [62]; *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [143].
[93] *Belgiorno-Nettis* (n 3) at [63]-[64]; *Belgiorno-Nettis* (n 72) at [111].

need to give reasons and noted that reliance on statements of general principle in the recommendations should be approached "with considerable caution" as:

> … Inferences drawn from the results because there is no other way to discern why the result has been reached can be wrong, and tantamount to guess work. That is why the authorities we have mentioned have placed such importance on the giving of reasons.[94]

More specifically, the NZCA held:

> We accept … that it would be sufficient for the Panel to group submissions by reference to "matters" if particular features arising from submissions were stated and submissions on those topics grouped, and reasons on each topic given. Accepting this, there is still a duty to give reasons for accepting or rejecting submissions on a topic even if those submissions are grouped, and the reasons be of a summary nature. … While grouped and summarised reasons could be sufficient in the context of the particular process, some articulation of the Panel's thinking was required. A reader should understand why a decision such as the zoning and height levels for a significant block of land has been made. This can be in short form, and depending on the circumstances a few paragraphs or even a few sentences may be enough. But the "why" should be stated.[95]

The NZCA then turned to the reasons that were given by the Panel for the recommendations made about the zoning and height controls.

### B *What reasons were given?*

The NZCA considered the recommendation reports prepared by the Panel and noted the general statements of policy in the reports regarding the focus on intensification of development around existing metropolitan and town centres and transport corridors, the need to meet residential demand for additional dwellings, and the provision made for more intensive residential development.[96] Based on the NZHC decision, the council contended that these statements were sufficient to articulate why the decisions about zoning and height controls had been made, and that nothing more specific was required.[97] The NZCA rejected these arguments. It stated:

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[94] *Belgiorno-Nettis* (n 3) at [59].
[95] *Belgiorno-Nettis* (n 3) at [65].
[96] *Belgiorno-Nettis* (n 3) at [72]-[75], [79], [82], and [88].
[97] *Belgiorno-Nettis* (n 3) at [67], [68] and [71]; *Belgiorno-Nettis* (n 72) at [118].

> We do not see these general statements as providing any sort of a reason for the acceptance or rejection of a specific submission or group of submissions when they are competing. It is no more than a statement of principle or approach. We are unable to agree with the submission that this was a reason for the rejection of Mr Belgiorno-Nettis's submission. The competing evidential positions … are not mentioned at all. There is not sufficient material to be able to say why the Panel made its recommendations concerning those Blocks. It is not self-evident … there were no reasons either grouped or otherwise, that could explain the … decisions.[98]

More specifically, the NZCA noted that the ultimate recommendations and decisions reflected a compromise somewhere in between the "extremes" in the evidence presented to the Panel by Mr Belgiorno-Nettis and the council but found that:

> … How the submissions and evidence worked to achieve this result is left unstated. It is unknown, and the reader is left to speculate about a compromise.[99]

Additionally, the NZCA held that a general statement in the recommendation reports that all submission points had been taken into account was not sufficient to "satisfy the underlying policy requirement of transparent and challengeable reasoning".[100] No reasons had therefore been given for the recommendations or decisions.

### C *The impracticality argument*

The NZCA observed that the volume of submissions made about the plan was a matter that had clearly influenced the NZHC when determining the *Belgiorno-Nettis* appeal, and that it was also clearly a theme that pervaded the council's case on further appeal. For example, the NZHC stated:

> … The numeric volume of the submissions was such as would have made it simply impossible for the Panel to respond to even groupings of site-specific submissions and complete its task within the tight timeframe prescribed by the Act. …[101]

The NZCA was not persuaded by this argument because: it was clear from the spreadsheets prepared by the council's witnesses during the plan hearing

[98] *Belgiorno-Nettis* (n 3) at [77]-[78].
[99] *Belgiorno-Nettis* (n 3) at [80].
[100] *Belgiorno-Nettis* (n 3) at [89].
[101] *Belgiorno-Nettis* (n 72) at [116].

process that reasons had been provided for their planning analysis; the LGATPAA streamlined the process by allowing submissions to be grouped; reasons had clearly been given by the Panel in relation to submissions made about other plan provisions; and (more importantly) giving reasons was mandatory under the LGATPAA.[102] Accordingly, the failure to give reasons was found to be an error of law and procedurally unfair.[103]

### D *The decision in Belgiorno-Nettis*

Having found that the Panel recommendations and the council decisions were unlawful and unfair the NZCA turned to consider what remedy would be appropriate in the circumstances. It could quash the decisions and return them back to the council for determination afresh, or it could require that the Panel should provide reasons for the recommendations.[104]

The NZCA chose to require that the Panel should provide non-contemporaneous reasons after the event because (controversially): there had been no breach of natural justice;[105] the *Belgiorno-Nettis* decision did not involve human rights;[106] and the Panel process chaired by an Environment Judge was quasi-judicial.[107]

Subsequently, Mr Belgiorno-Nettis applied for leave to appeal the NZCA decision to the New Zealand Supreme Court (NZSC) based on the potential "risk of reconstruction of reasons after the decision".[108] The NZSC was not persuaded by this argument and noted (like the NZCA) that "the Panel's process was a quasi-judicial process and the Panel was chaired by a Judge of the Environment Court".[109] Accordingly, the application for leave to appeal was dismissed because the NZSC was "satisfied" that the NZCA decision regarding remedy (requiring the Panel to reconstruct reasons after the event) did not

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[102] *Belgiorno-Nettis* (n 3) at [95]-[98].
[103] *Belgiorno-Nettis* (n 3) at [98] and [101].
[104] *Belgiorno-Nettis* (n 3) at [104]-[105]; *Marshall Cordner & Co v Canterbury Clerical Workers Union* [1986] 2 NZLR 431 (CA) at 434 per Cooke P; *Awatere* (n 81) at 649.
[105] *Belgiorno-Nettis* (n 3) at [103].
[106] *Belgiorno-Nettis* (n 3) at [105].
[107] *Belgiorno-Nettis* (n 3) at [106].
[108] *Franco Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2019] NZSC 112 at [6].
[109] *Belgiorno-Nettis* (n 108) at [6].

involve "a sufficiently apparent error" by the NZCA "of such a substantial character that it would be repugnant to justice to allow it to go uncorrected".[110]

## V INTERROGATING THE DECISIONS

The UKSC decision in *Dover* is likely to have an important persuasive influence on how the duty to give reasons in environmental decision-making is applied. First, because *Dover* articulates the need to ensure fairness between the state and the individual citizen, and the need to ensure open justice or transparency. Second, because *Dover* illustrates the dynamic capacity of the common law to apply fairness as the yardstick for importing the duty to give reasons and the corresponding remedy of judicial review into the general context of statutory administrative decision-making. Third, because *Dover* clearly identifies three key elements of any statement of reasons in environmental law: that there should be no element of genuine doubt as to what was decided or why, that the statement of reasons should address the main issues in dispute, and that it should address any points of difference between the planning officers' recommendations and the conclusion arrived at by the planning committee or independent commissioners. These broad conclusions are (as noted below) fully supported by the decisions of the IESC in *Connelly* and the NZCA in *Belgiorno-Nettis*.

More controversially, three further conclusions can also be drawn from the UKSC decision in *Dover*. Fourth, *Dover* makes plain that council decisions should be read in a straightforward manner, recognising that they are addressed to interested persons who are likely well aware of the issues involved and the arguments advanced. Fifth, *Dover* clarifies that reasoning may be explicit or implicit, and may need to be inferred (wholly or partly) from the reports and recommendations that were before the council. Sixth, *Dover* indicates that a relevant consideration as to remedies for the court on judicial review will be whether the aggrieved person has genuinely been substantially prejudiced by any failure to provide an adequately reasoned decision. Arguably, these three further conclusions are too narrow and should not be accorded persuasive value. For example, (as noted below) the IESC decision in *Connelly* approached the interpretation of environmental decisions from the wider perspective of the reasonable observer, and it defined the boundary of the legitimate search for reasons by introducing proportionality to distinguish extreme cases where any

[110] *Belgiorno-Nettis* (n 108) at [12].

reasons found will be unlikely to be regarded (objectively) as adequate or clear reasons capable of supporting the decision. In these respects, the IESC decision in *Connelly* is closer to the spirit of Principle 10 of the Rio Declaration in affirming the access to justice rights of "all concerned citizens".

The decision of the IESC in *Connelly* also provides a handle for debate regarding the current evolutionary state of the law regarding the duty to give reasons for decisions (including the consequences of any failure to provide adequate reasons). First, the decision in *Connelly* firmly anchors the duty to give reasons for decisions as an essential component of achieving fairness and ensuring that decisions are lawful. Second, the decision in *Connelly* emphasises the importance of giving reasons for decisions as a foundation for ensuring that effective judicial review is available. Third, the decision in *Connelly* refocuses the legal test regarding the adequacy of any reasons given for decisions through the lens of the reasonable observer who has standing to challenge the decision but who has not previously participated in the process that led to the decision. Fourth, while reasons can be implicit and found anywhere, the decision in *Connelly* defines the boundary of the legitimate area of search for reasons through the requirement that any reasons found (by carrying out reasonable enquiry) actually formed part of the reasoning and were clearly adopted by the decision-maker. Fifth, any reasonable enquiry to locate the reasons for a decision will be limited to the relevant documents that were freely available online or could otherwise have been obtained under official information requests by the reasonable observer in a timely way. Sixth, because the focus in *Connelly* on the reasonable observer carrying out a reasonable enquiry to locate the reasons for a decision firmly introduces proportionality into the equation, that will be relevant in extreme cases where the search for reasons (from the ocean of available material) would otherwise be excessive - with the result that any reasons found in such extreme cases will be unlikely to be regarded as adequate or clear reasons capable of supporting the decision.

More generally, the decision of the IESC in *Connelly* reflects modern academic thought regarding the duty to give reasons. For example, Mark Elliott argued that the classic doctrine that there is no general common law duty to give reasons should be replaced by a more "sensitive" approach to reasons (like the duty to act fairly) that "manipulates" the content and depth of the duty in the context of what should be required in relation to the particular decision, and that breach of the duty to give reasons should normally render the decision

unlawful (with a "narrow" remedial discretion to avoid quashing the decision in appropriate cases).[111] In particular, Elliott argued that there are strong instrumental reasons for imposing a common law duty to give reasons similar to the reasons advanced by the NZCA in *Lewis v Wilson & Horton Ltd* – as an important part of openness in the administration of justice, to enable the court on review to assess the lawfulness of what has been done, and as a discipline for decision-makers to avoid wrong or arbitrary decisions.[112]

Additionally, based on the views put forward by Trevor Allan, Elliott also noted that there are strong human rights based reasons for imposing a common law duty to give reasons - for example, Allan observed that "giving reasons may be regarded as an integral part of treating a disappointed applicant with the respect which his dignity as a citizen demands".[113] The decision in *Connolly* builds on both of these normative bases for articulating a modern approach to the duty to give "adequate" reasons in a statutory context.

While quashing a decision based solely on the absence of reasons could be viewed as "pyrrhic" because it would (arguably) simply result in the same decision being taken again, Elliott articulated three contrary arguments that support a "narrow" approach to remedial discretion.[114] First, because absent reasons it will not be possible to conclude that the decision is lawful in all other respects.[115] Second, because interested persons are "entitled to a decision which is accompanied by contemporaneous reasons". For example, there is a risk that requiring the decision-maker to provide reasons after the event may not be "reliable" because the decision-maker's recollection has "dimmed" over time, or because there could be a temptation to show the decision in a "better light than is deserved".[116] Third, because the discipline for decision-makers to avoid wrong or arbitrary decisions (noted above) could be negated if contemporaneous reasons are not required. For example, Elliott argued that "a consistent judicial policy of quashing stands the greatest chance of fully exploiting the discipline-inducing potential of the duty to give reasons", and

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[111] Mark Elliott, "Has the Common Law Duty to Give Reasons Come of Age Yet?" [2011] Public Law, 56.
[112] *Lewis* (n 79) at [76], [80], and [82].
[113] Elliott (n 111) at 62; T Allan, "Procedural Fairness and the Duty of Respect" (1998) 18 Oxford Journal of Legal Studies 497 at 499; James R May and Erin Daly (eds) *Human Rights and the Environment: Legality, Indivisibility, Dignity and Geography* (Edward Elgar Publishing 2019).
[114] Elliott (n 111) at 70-71 and 74.
[115] Elliott (n 111) at 72.
[116] Elliott (n 111) at 73.

noted that allowing reasons to be given after the event could simply "encourage a sloppy approach by the decision-maker".[117]

Beyond that, the IESC in *Connelly* found that decision-makers will generally be afforded a significant margin of appreciation, and that the courts on review will not normally second guess the decision-makers conclusions of fact or the exercise of broad judgement. However, the IESC was careful to qualify these statements by clearly indicating that conclusions of fact must be "sustainable", and that broad judgment must be exercised lawfully (including both complying with statutory powers and observing administrative law principles). This qualified approach is largely consistent with the "no deference" principle articulated by the International Court of Justice in *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* where it found that decisions under review should be objectively reasonable (from the reviewing court's perspective) and supported by the best available expert evidence and sound reasoning before according any deference to inferior decision-makers.[118]

Generally, the New Zealand courts have been reluctant to find a common law duty to give reasons for decisions. But notwithstanding this position, the courts have advanced clear guidance about why giving reasons is important for the administration of justice: the need to uphold the principle of transparency; the need to provide protection against wrong, arbitrary, or inconsistent decisions; and the need to provide a basis on which the lawfulness of decisions can be assessed on appeal or in applications for judicial review.[119]

Inferences drawn from general statements of principle in recommendations or decisions regarding policy statements and plans are (from the NZCA decision in *Belgiorno-Nettis*) not enough. Clearly, something more is required to explain to the reader why the particular decision was made. This is important in the context of submissions about policy statements and plans because the notified provisions will be contested, and policy choices and compromises will need to be made by decision-makers regarding the form and nature of the provisions that should ultimately be included in the operative document. Giving reasons articulates why the decision was made. Generally, the substantive decision of the NZCA in *Belgiorno-Nettis* is consistent with the

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[117] Elliott (n 111) at 73-74.

[118] *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* [2014] ICJ Rep 226; Trevor Daya-Winterbottom, "No deference" [2017] NZLJ 351 at 355.

[119] *Awatere* (n 81), *Potter v NZ Milk Board* [1983] NZLR 620 per Davison CJ at 624, and *Lewis* (n 79) at 565-567.

IESC decision in *Connelly* and therefore provides an important contribution to the law in this area.

But the reasons given by the NZCA for choosing not to quash the NZHC decision are problematic because: the NZCA clearly found that the NZHC decision was procedurally unfair;[120] the duty to give reasons underpins effective access to judicial and administrative proceedings and clearly engages civil and political rights;[121] deference to the quasi-judicial nature of the Panel process could only be justified where the decision was found to be objectively reasonable;[122] and the NZCA cited *De Smith's Judicial Review* which concludes that breach of the duty to give reasons renders a challenged decision unreasonable.[123] Likewise, the NZSC decision dismissing leave to appeal the NZCA decision to the NZSC (noted above) is also problematic because it deferred too readily to the Panel's decision without enquiring whether it was objectively reasonable and soundly reasoned.

Arguably, having found that the failure to give reasons was procedurally unfair the NZCA should have quashed the NZHC decision (and the NZSC should have corrected the NZCA decision for the same reason).[124] This appears to be the starting point for exercising discretion about remedies from the decision of the UKSC in *Dover*.[125] Importantly, the UKSC in *Dover* also drew attention to the United Kingdom's international obligations to underscore the importance of the right to reasons in the context of access to justice in environmental decision-making. A more principled approach to decision-making taking account of the components of Principle 10 from the Rio Declaration including, in particular, "redress and remedy", and access to justice and its basis in civil and political rights could therefore have provided a better

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[120] *Belgiorno-Nettis* (n 3) at [101].
[121] Rio Declaration 1992, Principle 10; New Zealand Bill of Rights Act 1990, s 27; *Westfield (NZ) Ltd v North Shore City Council* [2005] NZRMA 337 at [54] per Keith J; Susan Glazebrook, "Human Rights and the Environment" in Paul Martin et al (eds) *In Search of Environmental Justice* (Edward Elgar Publishing, Cheltenham, 2015), ch 5; Margaret Bedggood et al (eds) *International Human Rights in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2017), 932-938; Peter Salmon and David Grinlinton (eds) *Environmental Law in New Zealand* (2nd ed Thomson Reuters, Wellington, 2018), 210-218 and 330-332.
[122] *Whaling in the Antarctic* (*Australia v Japan: New Zealand intervening*) ICJ Reports 2014, 226 at 425 per Judge Xue (separate opinion); Trevor Daya-Winterbottom, "No deference" [2017] NZLJ 351-355.
[123] *Belgiorno-Nettis* (n 3) at [105]; Harry Woolf et al, *De Smith's Judicial Review* (8th ed, Sweet & Maxwell, London, 2018), [7-115].
[124] *Belgiorno-Nettis* (n 3) at [101].
[125] *Dover* (n 1) at [49].

framework for the discussion in *Belgiorno-Nettis* about remedies and provided a different outcome.

Finally, the focus on the impact on the parties of the failure to give reasons was too narrow. For example, when deciding whether adequate reasons had been given for a planning decision the IESC in *Connelly*[126] also noted the wider public interest in such decisions and the general need for other persons not involved in the proceedings to understand how the decision had been reached.

## VI CONCLUSION

Overall, the decision of the IESC in *Connelly* confirms the important role played by adequately reasoned decisions in achieving fairness, ensuring that decisions are lawful, and underpinning the importance of effective judicial review. But more importantly, the decision in *Connelly* confirms that the test regarding the adequacy of any reasons given for a decision is objective, and that it should be viewed through the lens of the reasonable observer who has standing to challenge the decision but who has not previously participated in the process that led to the decision. The decision in *Connelly* is also founded on converging legal sources that strongly support the view that persons affected by administrative decisions have a right to know the reasons on which they are based, and to be afforded the human dignity of being able to understand them.

Finally, the decision in *Connolly* confirms (like *Dover*)[127] that the starting point for redress and remedy where adequate reasons are not given should be quashing the decision, and that remedial discretion to allow decision-makers the opportunity to give non-contemporaneous reasons after the event should be viewed with caution and exercised sparingly. As a result, the decision in *Connolly* will be highly persuasive, and should influence how the courts in comparable common law jurisdictions exercise remedial discretion in the future.[128] Put simply, it provides a blueprint for how the international obligation to provide effective access to justice, including redress and remedy, in Principle 10 of the Rio Declaration can be implemented at the national level.

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[126] *Connelly* (n 2).
[127] *Dover* (n 1); Trevor Daya-Winterbottom, "Reasons in environmental law" [2018] NZLJ 174 at 178.
[128] *Belgiorno-Nettis* (n 3); Trevor Daya-Winterbottom, "Editorial: Rights and reasons" (2019) 12 BRMB 187 at 190.