

ARTICLES

The right to be given reasons as part of a fair administrative procedure: A comparative study of Namibian, South African and German law

Cornelia Glinz*

Abstract

The right to be given reasons for an administrative decision is an essential component of a fair administrative procedure in a democratic state. In Article 18 of its Constitution, Namibia has an administrative justice provision that is part of the Bill of Rights, and which states the requirement of a fair procedure. The superior courts interpreted this provision in the context of common law principles, notably the *audi alteram partem* rule, but referred to the right to be given reasons only in a general way and in a small number of cases. So far, Article 18 is the only statutory basis for the right to a fair procedure; but in 2008, the Law Reform and Development Commission, under the auspices of the Ministry of Justice, introduced and initiated the preparation of an enactment in the field of administrative law. The first step they undertook was to open a discussion amongst legal experts and politicians on the possibilities of such an Act. This paper argues that, in order to efficiently prepare draft legislation, the Commission will need to look at similar provisions in other countries and learn from their experiences. To this end, the German Law on Administrative Procedure of 25 May 1976 sets an interesting example, as does the South African Promotion of Administrative Justice Act, 2000.¹ Before that is done, however, Namibian legal materials – mainly Court decisions – should be analysed to lay a well-grounded foundation for the discussion. The aim of this article is to provide a contribution to the law reform process, highlighting the right to be given reasons.

Introduction

Meaning

It is a common opinion that, in a democratic state, the right to be given reasons for an administrative decision is an essential component of a fair administrative procedure. To begin with, a general meaning of the right is as

* Research Fellow at the Max Planck Institute for Comparative Public Law and International Law (Heidelberg, Germany). Special thanks to my colleague Freya Baetens for her great help in finalising the manuscript.

1 No. 3 of 2000.

follows: if an administrator issues an administrative action to a citizen, the latter has the right to be given reasons for why this action was taken. Article 18 of the Constitution of the Republic of Namibia includes an administrative justice provision that is part of the Bill of Rights laid down in Chapter 3. It prescribes a fair procedure as a condition of administrative justice. Thus, fair procedure is every Namibian citizen's fundamental right, and has to be defended and effectively carried out.

To understand the importance of this right, the underlying arguments for granting it will be outlined. The right envisages three aspects:²

- As already mentioned, the right focuses on helping the citizen to defend his/her rights. When the affected person knows the reasons for the decision, s/he can properly consider the prospects of success in a legal action against such decision, and can defend his/her right against the arguments of the administration before a court or tribunal in a review process.
- The right is directed towards the administration itself because furnishing reasons is one of the fundamentals of good administration. It encourages rational and structured decision-making, whilst minimising arbitrary and biased outcomes – thereby facilitating accountability and openness on the part of the administration, and
- The reasons given assist courts and tribunals to render a judgment on the validity of an administrative action in a review process.³

The discussion about law reform

So far, the constitutional provision on administrative justice – as interpreted by the Namibian superior courts – is the only statutory basis for a fair procedure. However, the question arises whether this is sufficient to give effect to this fundamental right, or whether Namibia should follow the lead of other countries in enacting legal rules for the promotion of administrative justice in which a provision on the right to be given reasons would be an essential part. As reported in the last issue of the *Namibian Law Journal (NLJ)*, a recent initiative of the Law Reform and Development Commission, under the auspices of the Ministry of Justice, opened this debate via a conference entitled “Promoting Administrative Justice in Namibia” (hereafter referred to as the *PAJN Conference*), held in Windhoek from 18 to 21 August 2008.⁴ The

2 Ziekow, J. 2006. *Verwaltungsverfahrensgesetz*. Stuttgart: Kohlhammer, section 39, para. 1.

3 Burns, Y & M Beukes. 2006. *Administrative law under the 1996 Constitution* (Third Edition). Durban: LexisNexis Butterworths, p 251.

4 Hinz, MO. 2009. “More administrative justice in Namibia? A comment on the initiative to reform administrative law by statutory enactment”. *Namibia Law Journal*, 1(1):81. The initiative as well as the Conference were supported by the Rule of Law Programme for Sub-Saharan Africa, run by Germany's Konrad Adenauer Foundation.

legal experts from Namibia and abroad who attended the Conference reached the joint conclusion that an enactment was advisable since it would provide for legal certainty and, therefore, would overcome many of the problems identified in the practice of administration.⁵

As one part of the discussion, this paper will highlight the necessity of creating a provision in the envisaged Act on the important right to be given reasons for an administrative decision, and will demonstrate where law reform would be fruitful in this respect. To this end, a summary of Namibian case law will first be presented to create a comprehensive basis for further development. Secondly, a comparison will be made between the statutory administrative provisions of two countries, namely South Africa and Germany, whose legislation expressly provides for the right to be given reasons for an administrative decision.⁶

Namibia: Cases involving the right to be given reasons

Article 18 of the Constitution

The starting point for an analysis of administrative law in Namibia is Article 18 of its Constitution, entitled “Administrative Justice”. It reads as follows:

Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.

The Article expresses the main principles of administrative law, therefore, and provides a basis for interpretation that is realised by the superior courts in developing a plethora of jurisprudence. As Namibian administrative law has been greatly influenced by English common law,⁷ the Article has to be seen and interpreted in the context of its principles, notably natural justice – including the *audi alteram partem* rule. Namibian jurisprudence has indeed applied these general rules in numerous cases, and has developed more concrete requirements.

5 Law Reform and Development Commission. 2008. “Conference resolutions and recommendations”. Unpublished paper presented to the conference entitled “Promoting Administrative Justice in Namibia”, Windhoek, 18–21 August 2008.

6 These two countries presented their Administrative Justice Acts to the PAJN Conference.

7 Parker, C. 1991. “The ‘Administrative Justice’ provision of the constitution of the Republic of Namibia: A constitutional protection of judicial review and tribunal adjudication under administrative law”. *The Comparative and International Law Journal of Southern Africa*, XXIV:89.

However, there is no definite rule or principle in common law which compels the administrator to comply with a citizen's right to be given reasons.⁸ Despite this fact, the superior courts have developed this right, on the basis of Article 18, as an essential component of a fair procedure. In the following section, the main cases forming part of this evolution will be outlined.

The Katofa case

A pre-Independence case that dealt with the right to be given reasons is *Katofa v Administrator-General for South West Africa & Another*, which is also quoted by the later *Frank* case.⁹ The court had to consider whether the Administrator-General could be compelled to give reasons for the arrest and detention of Mr Katofa. In terms of the applicable proclamation, the Administrator-General was expressly obliged to give reasons to the detainee himself; however, —¹⁰

... the question is, whether or not the Administrator-General is obliged to divulge these reasons to the Court to justify the detention.

The court laid down the purpose for the applicable provision which —¹¹

... is to enable the detainee to ascertain whether there are grounds for his detention ...

and concluded that —¹²

... the Court would not be able to judge therefrom whether legal grounds do exist.

Accordingly, the court held that there was an obligation to give reasons to the detainee as well as to the court. These formulated objects – to assist the aggrieved person as well as the court in its decision-making – can be seen as the initial basis for the further development of the right to be given reasons.

The Frank case

In the first case that dealt extensively with the administrative justice provision – the case of *Frank & Another v Chairperson of the Immigration Selection Board*¹³ – Levy AJ stated in the first instance judgment of the High Court that —¹⁴

8 Burns & Beukes (2006:251).

9 *Katofa v Administrator-General for South West Africa & Another*, 1985 (4) SA 211 (SWA).

10 (ibid.:221 I–J).

11 (ibid.:222 B).

12 (ibid.:222 E).

13 *Frank & Another v Chairperson of the Immigration Selection Board*, 1999 NR 257 (HC); 2001 NR 107 (SC).

14 *Frank*, 1999 NR 257 (HC), 265 D–E.

The right to be given reasons as part of a fair administrative procedure

[a]n unfair or unreasonable decision entitles an aggrieved person to redress by the Court[,] but the Court cannot judge what is reasonable or unreasonable unless the administrative body gives its reasons for arriving at its decision.

Therefore, he came to the conclusion that –¹⁵

... the respondent was obliged to give reasons where such exist.

In the case, Ms Frank, a German national, applied for a permanent residence permit from the Immigration Selection Board, which rejected her application. Ms Frank requested reasons for the decision, but these were withheld because the Board did not consider itself to be compelled to furnish reasons. The application before the High Court was granted and the Board was ordered to furnish the requested permanent residence permit within 30 days of the judgment.

Subsequently, the Board brought the case before the Supreme Court, which once again elaborated on Article 18 and the right to be given reasons. In his minority judgment, Strydom CJ dealt broadly with the administrative justice requirement; with his findings on this point, he had the support of the majority.¹⁶ Firstly, he emphasised that, because Article 18 formed part of Chapter 3 of the Constitution, it was a fundamental human right – which, apart from expressly stating the requirements of reasonable and fair decisions, demanded transparency as an inherent condition of the prescribed fair procedure. Strydom CJ concluded as follows:¹⁷

[A]n administrative organ exercising a discretion is obliged to give reasons for its decision. There can be little hope for transparency if an administrative organ is allowed to keep the reasons for its decision secret. The Article requires administrative bodies and officials to act fairly and reasonably. Whether these requirements were complied with can, more often than not, only be determined once reasons have been provided.

Additionally, only with the obligation to give reasons can one give effect to the right stated in Article 18 that an aggrieved person can seek redress before a competent court or tribunal. According to the decision of *Government of the Republic of Namibia v Cultura 2000*, from its nature as a fundamental right this entails that the Article has to be –¹⁸

... interpreted broadly, liberally and purposively to give to the article a construction which is most beneficial to the widest possible amplitude.

15 (ibid.:265 A).

16 *Frank*, 2001 NR 107 (SC), 158 C–178 B.

17 (ibid.:174 I–175 A).

18 *Government of the Republic of Namibia v Cultura 2000*, 1993 NR 328 (SC), 340 B–D.

ARTICLES

Although Strydom CJ considered that there can be exceptions from the general obligation, —¹⁹

[w]here there is a legitimate reason for refusing, such as State security, that option would still be open.

The majority judgment in the *Frank* case before the Supreme Court delivered by O’Linn AJA agreed with these findings. In addition, O’Linn AJA emphasised that the reasons, —²⁰

... if not given prior to an application to a Court for a review of the administrative decision, must at least be given in the course of a review application.

This was what happened in the *Frank* case: although the Board had initially refused to give reasons for its decision, such reasons were later brought before the High Court. Finally, the appeal was upheld by the Supreme Court because of other breaches of the natural justice rule by the Board in taking the decision to refuse.

Consequently, in the *Frank* case, the Supreme Court laid down the obligation to furnish reasons for an administrative action in order to comply with fair procedure, as required by Article 18 of the Constitution, but stated at the same time that there could be exceptions to this obligation; however, these were not defined in any way. The Court also stated that the reasons did not necessarily have to be delivered at the same time as the decision, but could still be furnished at a later stage in the course of the review procedure.

The Sikunda case

In the case of *Government of the Republic of Namibia v Sikunda*, the judgment of the two court instances expanded on the findings of the *Frank* case concerning the constitutional provision on administrative justice and developed them further, implicitly in the judgment before the High Court and clearly in that of the Supreme Court.²¹

The facts of the case were as follows: Mr Sikunda’s father had been detained under section 49 of the Immigration Control Act.²² It had been alleged that he was a UNITA²³ collaborator, so state security had been called in. The Minister of Home Affairs had carried out certain investigations and then recommended to the Security Commission, established in terms of Article 114

19 *Frank*, 2001 NR 107 (SC), 175 C.

20 *Frank*, 2001 NR 107 (SC), 110 A–C.

21 *Government of the Republic of Namibia v Sikunda*, 2001 NR 181 (HC); 2002 NR 203 (SC).

22 No. 7 of 1993.

23 *União Nacional de Independência Total de Angola*, a resistance movement whose stated aim was the total independence of Angola.

The right to be given reasons as part of a fair administrative procedure

of the Constitution, that Mr Sikunda's father be declared a persona non grata. The Commission heeded the Minister's recommendation and the father was subsequently detained.

Mr Sikunda sought redress against this decision before the High Court and demanded his father's release. Among the questions that arose was whether or not a fair procedure had been granted, i.e. whether the Minister's decision to declare Sikunda a persona non grata without affording him the opportunity to make representations was valid. The respondent stated that –²⁴

... in certain circumstances audi alteram partem may take place after a decision has been taken, for example, where a statute authorises it expressly or impliedly and where an urgent decision has to be taken.

An example of an urgent action would be the involvement of state security, which is relevant to the case. Mainga J agreed with this statement, but in consideration of the –²⁵

... nature of the right to be heard as a fundamental right which should be observed at all times when the civil rights and responsibilities of an individual are determined[.]

he could not find any reasons for urgency in the matter. Therefore, the applicant's father should have been heard before the decision was taken.

Concerning the right to be given reasons, the judgment of the High Court failed to deal with it expressly; nonetheless, it mentioned this right in the context of the right to be heard, classifying it as part of the latter, and stated that –²⁶

... the Security Commission and the Minister were bound to communicate the allegations to the applicant's father, so as to enable him to deal with the allegations or rebut them where possible.

Only through the quotation of the relevant part of the minority judgment of Strydom CJ in the *Frank* case was the requirement for reasons directly mentioned. As a result, the Minister's decision was set aside, and Mr Sikunda's father was ordered to be released.

In the Minister's appeal before the Supreme Court, the judgment referred openly to the right to be given reasons as a requirement of fair procedure, distinguishing it clearly from the right to be heard – unlike the judgment of the High Court – and again quoted Strydom CJ's pertinent statement in the *Frank* case. O'Linn AJA draws from this quotation two conditions for the case in which a decision affects both the fundamental rights of a person and state

24 *Sikunda*, 2001 NR 181 (HC), 187 G).

25 (ibid.:189 C).

26 (ibid.:191 D–E).

security. Firstly, the administrative body is required to state explicitly why it refuses to furnish reasons. Secondly, O'Linn concludes that —²⁷

... the administrative tribunal cannot avoid to give reasons for its decision altogether ... Reasons for the decision must be given, not necessarily in great detail[,] but at least in substance.

Accordingly, where state security is involved, administrative bodies are still required to furnish *some* reasons for their decisions. The latest point at which these reasons are to be provided “in substance, is in the course of the judicial review”.²⁸ Taking into account the violation of this requirement amongst others in the case, notably the *audi alterem partem* rule, the Supreme Court dismissed the appeal.

In conclusion, in the *Sikunda* case, the Supreme Court referred broadly to the *Frank* case, but went a step further by stating that even the exceptions of the application of the right to be given reasons have to be interpreted narrowly in order to give the best effect to this fundamental right. As a result, the value of the right to hear the reasons for an administrative decision as part of a fair procedure increased.

Findings

Deriving from the interpretation of Article 18 by the superior courts, mainly the Supreme Court, the right to be given reasons is a condition of a fair administrative procedure. However, there are only a small number of cases that deal explicitly with this right, most notably the *Frank* and *Sikunda* cases. On the other hand, far more cases refer to the *audi alteram partem* rule, which states that the citizen is required to be given information about the basis of an administrative decision so that s/he can make representation; however, no clear distinction is made between the *audi alteram partem* rule and the right to be given reasons.²⁹ Furthermore, because there is no legislation on the matter apart from the general declaration that this right exists and some vague statements about its meaning, there are no concrete guidelines as such. Clarification is required on the following aspects:

27 *Sikunda*, 2002 NR 203 (SC), 228 D–E.

28 (ibid.:228 F).

29 See e.g. *Kaulinge v Minister of Health and Social Services*, 2006 (1) NR 377 (HC) (administrative decisions to be based on facts and not mere suspicions); *Günther Kessl v Ministry of Lands and Resettlement & 2 Others*, Case No. 27/2006 and 266/2006 (expropriations of three German farmers did not comply with a fair administrative procedure). See also Wiechers, M. 1985. *Administrative law*. Durban: Butterworths, p 212. Wiechers (ibid.) classifies the right to be given reasons expressly as a part of the *audi alteram partem* rule. Also, Parker (1991), in his comprehensive overview on the administrative justice provision, does not mention the right clearly.

The right to be given reasons as part of a fair administrative procedure

- The scope of application of the duty, i.e. is there a distinction between *discretionary* and *binding* decisions?³⁰ How does the right to be given reasons relate to the audi alteram partem rule?
- The exceptions to the obligation
- The required content and form of the reasoning, and
- The point at which such reasons are due, i.e. must they be furnished alongside the decision, or can they be furnished later? If the latter, at what point exactly do they have to be furnished?

A survey conducted amongst legal experts by the Law Reform and Development Commission with the assistance of the Konrad Adenauer Foundation in preparation for the PAJN Conference discovered that, despite the superior courts having defended this right, in the practice of administrative decision-making there was a culture of not giving reasons.³¹ The lack of concrete rules mentioned earlier could be one reason for this. Thus, the enactment of a clear provision should give administrators better guidelines and raise awareness of this right amongst both administrators and citizens, and in so doing, help give effect to the fundamental right of administrative justice. This is, therefore, an important field to be targeted by law reform.

Germany: The right to be given reasons

Could a comparison to German administrative law be fruitful?

The German Law on Administrative Procedure of 25 May 1976, i.e. the *Verwaltungsverfahrensgesetz* (VwVfG) provides a statutory basis for general rules that are applicable to all administrative proceedings. Before the law was implemented, a controversial discussion took place on its possible benefits.³² The legislator had different aims when it finally came to the enactment, however. Firstly, the legislation was to contribute to simplifying and rationalising of the administration, since it provided for clear and authoritative rules. Secondly, the enactment intended to ease the legislator's burden, by providing these general rules to consult when enacting further laws on special fields of administrative law. Finally, the legislation was meant to serve citizens, whose rights were now to be expressly stated and guaranteed.³³

30 Wiechers (1985).

31 Glinz, C. 2008. "Administrative law in Namibia: Its current state, challenge and proposals for law reform". Unpublished paper presented to the conference entitled "Promoting Administrative Justice in Namibia", Windhoek, 18–21 August 2008.

32 Maurer, H. 2009. *Allgemeines Verwaltungsrecht* (Seventeenth Edition). Munich: Beck, p 100.

33 (*ibid.*:104).

Since its enactment, the law has shown huge merit in practice and has indeed succeeded in realising its aims. A specialised branch – the administrative courts – interprets the Act and sees to its constant development.³⁴ Thus, today, the Act serves as a sound basis for administrative decision-making. In particular, it has a specific provision dealing with the right to be given reasons for an administrative decision. Therefore, the right stands on a firmer foundation in German law than it does in most other common law countries, including the United Kingdom and India³⁵ and, thus, can provide a good example how to give effect to the right in the law reform process.

The constitutional basis

Deriving from the rule of law as prescribed in subsection 3 of Article 20 in the *Grundgesetz*,³⁶ i.e. the Constitution of the Federal Republic of Germany, every citizen who is affected by an administrative act has a right to be informed of the grounds of the decision. Only then s/he can effectively defend his/her rights. Consequently, compliance with the right to be given reasons is considered to be an essential part of fair administrative procedure.³⁷

The provision under the VwVfG

Part 3 of the VwVfG deals with the formation of an administrative act.³⁸ Section 39, which prescribes the requirement for reasons, is a component of this Part and reads as follows:³⁹

Section 39 Grounds for an administrative act.

- (1) An administrative act issued in writing or electronically or confirmed in writing or electronically must be accompanied by a statement of grounds. This statement of grounds must contain the chief material and legal grounds which have caused the authority to take its decision. The grounds given in connection with discretionary decisions shall also contain the point of view which led the authority to exercise its powers of discretion.

34 With financial assistance from the Konrad Adenauer Foundation, a group of Namibian legal experts recently went to Germany on a study visit to learn about the German administrative court system.

35 This statement was made by an Indian legal academic (Singh) and thus, from a common law perspective; see Singh, MP. 2001. "German administrative law in common law perspective". In Frowein, AbrJ & R Wolfrum (Eds). *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht* (Second Edition). Berlin/Heidelberg/etc.: Springer, p 73.

36 "Basic Law".

37 Stelkens, P, HJ Bonk & M Sachs (Eds). 2008. *Verwaltungsverfahrensgesetz* (Seventeenth Edition). Munich: Beck, section 39, para. 2.

38 German law uses administrative act, while Namibian law uses administrative action. I use the applicable term in the context concerned.

39 Translation of the provisions of the VwVfG in Singh (2001:286–314, 294), updated by this author.

The right to be given reasons as part of a fair administrative procedure

- (2) No statement of grounds is required:
1. when the authority is granting an application or is acting subsequent to a statement and the administrative act does not infringe upon the rights of another,
 2. when the person for whom the administrative act is intended or who is affected thereby is already acquainted with the opinion of the authority as to the material and legal positions or able to grasp it without argumentation,
 3. when the authority issued identical administrative acts in considerable numbers or issued administrative acts with the help of automatic equipment and individual cases do not merit a statement of grounds,
 4. when this derives from legal provisions, [or]
 5. when a general order is publicly promulgated.

The scope of application

Every administrative act issued or confirmed in writing is legally required to contain written reasons. Thus, the scope of application is broad: it covers not only administrative acts that adversely affect the rights of the addressee, but all administrative acts.⁴⁰ However, concerning the acts in favour of the addressee, subsection (2)1 will apply as an exception in many of the cases.

The duty to furnish reasons is not relevant in the case of a verbal administrative act.

As to the required form of an administrative act, it may be issued in written, verbal or any other form.⁴¹ However, a verbal administrative act has to be confirmed in writing if there is justified interest that this should be done, and the person affected immediately requests it. Again, written reasons for the decision have to be furnished.

Form and content

The requested form of the reasoning follows the main part of the administrative act and, thus, it is in writing or electronically. This consequence is the result of the assumption that the reasons are an essential part of the administrative act and, therefore, have to comply with the same formal standards as the decision itself.⁴² The statement of reasons needs to give the principal material and legal grounds on which the administrative body based its decision. The degree of detail given as regards such grounds depends on the circumstances of the concrete case. On the one hand, a certain standardisation of the formulation is allowed if the *relation to the individual case* is still obvious. On the other hand, it would not be sufficient to deliver only a formulaic sequence

40 Ule, CH & H Laubinger. 1995. *Verwaltungsverfahrenrecht* (Fourth Edition). Cologne: Heymann, p 522.

41 VwVfG, section 37(2).

42 BVerwG NVwZ, 1993, 67.

of set phrases or the blanket reference to compulsory grounds.⁴³ In the case of a discretionary decision, the reasons also need to indicate clearly the administrator's knowledge of the need to exercise discretion, and, in so doing, s/he considered and balanced the interests of the persons involved. The primary aspects that were considered have to be mentioned.⁴⁴ The use of "shall" in sentence 3 of section 37(1) has to be understood in the sense that the basis for the discretion has to be furnished as a rule and can only be omitted in an exceptional case.⁴⁵

Looking at the requirements of section 39(1) of the VwVfG, it is important to note that this provision only lays down a formal requirement to give reasons. As a general rule, an administrative act under German law is not unlawful just because the reasons given are inaccurate. If a court concludes that the law was properly applied to the facts of the case, the inadequacy of the reasons given does not matter. However, if the authority exercises its discretion and its reasons prove inadequate, this generally indicates that the discretion was not used properly.⁴⁶

Exceptions of the application

Section 39(2) of the VwVfG delivers five exceptions to the broad scope of application of section 39 (1) outlined above. This list of exceptions is a conclusive enumeration and each one is only open to narrow interpretation. Only in the case of extreme urgency, where the reasoning would lead to prejudices, is there the possibility for the administrator to deliver shorter grounds than usually required.

However, detailed reasoning must be furnished later.⁴⁷ Unlike this German rule, urgency was mentioned in the *Sikunda* case before the High Court as a possible ground *not* to furnish reasons.⁴⁸

Two of the exceptions in section 39(2) of the VwVfG deserve to be highlighted:

- The exception in subsection (2)1 had to be established because of section 39(1)'s broad scope of application. As the general requirement to furnish reasons is applicable to all administrative acts, including those in favour of the addressee, the grounds do not have to be provided if the administrative act approves the application of the party concerned and does not infringe on the rights of a third party. In the latter case, nobody has an interest in a review process and, therefore,

43 Ziekow (2006:section 39, para. 4–5).

44 Kopp, FO & U Ramsauer. 2003. *Verwaltungsverfahrensgesetz* (Eighth Edition). Munich: Beck, section 39, para. 26.

45 Ziekow (2006:section 39, para. 6).

46 Kopp & Ramsauer (2003:section 39, para. 2).

47 (ibid.:section 39, para. 33).

48 *Sikunda*, 2001 NR 181 (HC), 189 F.

The right to be given reasons as part of a fair administrative procedure

the objectives of the duty to provide reasons for a decision are not affected.⁴⁹

- Subsection (2)4 prescribes that no statement of reasons is required if a law so allows. Notably, this specifically covers provisions that protect an interest in secrecy, notably in the name of the state.⁵⁰

Thus, as in Namibian law, state security under German law can result in a waiver of the duty to provide a motivated decision.

The audi alteram partem rule

To complete the picture, it should be mentioned that, in addition to section 39 on the right to be given reasons, the VwVfG contains a provision that deals particularly with the right to have a hearing:⁵¹

Section 28. Hearing of participants.

- (1) Before an administrative act affecting the rights of a participant may be executed, the latter must be given the opportunity of commenting on the facts relevant to the decision.
- (2) This hearing may be omitted when not required by the circumstances of an individual case and in particular when:
 1. an immediate decision appears necessary because of the risk involved in delay or in the public interest,
 2. the hearing would jeopardise the observance of a period vital to the decision,
 3. it is intended not to diverge, to his disadvantage, from the factual statements made by a participant in an application or statement,
 4. the authority wishes to issue a general order or similar administrative acts in considerable numbers or administrative acts using automatic equipment, [or]
 5. measures of enforcement are to be taken.
- (3) A hearing shall not be granted when this is grossly against the public interest.

In the final analysis, one could say that section 39 VwVfG is a short legal provision that, with the interpretation of the German administrative courts, delivers a detailed and comprehensive regulation and, therefore, concrete guidelines for administrative decision-makers, citizens and courts in review procedures.

Summary of the main differences between the German and Namibian systems

One initial difference between the German and Namibian rule is the broad scope of application of the former. The provision sets a general rule to furnish

49 Ziekow (2006:section 39, para. 8).

50 See VwVfG, section 29(2).

51 Translation of the provisions of the VwVfG in Singh (2001:286–314, 291), updated by this author.

reasons upon the delivery of an administrative act, even if it is in favour of the addressee. In contrast, under Namibian administrative law, the right to be given reasons is only applicable if a person is affected by an administrative action since the right is deduced from the *audi alteram partem* rule, which is likewise only applicable in the latter case.⁵² Therefore, from a comparative perspective, the scope of application is rather narrow in the Namibian case.

The German rule also defines exactly the required extent of the content of the reasons to be furnished, with an additional condition concerning discretionary decisions. Moreover, the mandatory content is broadly concretised by the courts, and the provision determines the form of the reasoning. In contrast, superior courts in Namibia state that the obligation to furnish reasons exists in general, but the exact content and required form are not specified. In the decisions mentioned above, no express distinction was made between a *discretionary* or *bound* decision, so clarification in this field would be helpful.

Another difference between the German and Namibian systems is that, in section 37(2) of the *VwVfG*, the German law enumerates an exclusive list of exceptions to the provision. These exceptions have to be interpreted in narrowly in order to prevent the right from being undermined. Consequently, urgency in the matter does not constitute an exceptional case. In the Namibian law, the possible exceptions are not defined, although state security and urgency were mentioned as likely reasons for an exception.

Finally, two different rules exist under German law: one for the right to be given reasons, and one for the right to be heard, which provides for a clear distinction the two rules. In contrast, this differentiation is not made in all Namibian court decisions. For example, only cursory reference was made to the right to be given reasons in the first instance judgment of the *Sikunda* case. This situation is not satisfactory, and a clear statement for a right to be given reasons would help to ensure a fair procedure.

Conclusions for law reform in Namibia

What could be derived from this analysis for the benefit of the Namibian law reform process? To create a provision on the protection of the right to be given reasons would signal a serious commitment to its recognition as an autonomous requirement in addition to the *audi alteram partem* rule. It could give an answer to the above revealed need for clarification and thus provide for legal certainty in the field. What should be considered when it comes to legal drafting is that in Namibia the background of concretisation as it exists under German law by its court decisions is missing. Therefore it would be advisable to have some more detailed sentences to provide for a better understanding from the legal text itself.

52 Baxter, L. 1984. *Administrative law*. Cape Town: Juta, p 536.

South Africa: German legal concepts adopted in a foreign law system

The constitutional basis

In the Bill of Rights enshrined in Chapter 2 of the 1996 Constitution of the Republic of South Africa, the individual's right to just administrative action is entrenched.⁵³ Section 33 reads as follows:

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must [-]
 - (a) provide for the review of administrative action by a Court or, where appropriate, an independent and impartial tribunal;
 - (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - (c) promote an efficient administration.

Essential differences between the South African and Namibian systems

There are two main differences between the South African and Namibian systems when it comes to the constitutional provision on administrative justice. The first is apparent from Section 33(2), which states the right to be given reasons expressly as part of administrative justice, and therewith gives the right a special emphasis. This is clearly different under Namibian law, as discussed earlier. Secondly, section (33)3 of the South African Constitution cited above contains the imperative to enact legislation in this field, whereas no similar provision exists under Namibian law.

Administrative law reform in South Africa

The South African Parliament gave effect to the constitutional imperative by adopting and promulgating the Promotion of Administrative Justice Act (PAJA),⁵⁴ which came into operation on 3 February 2000. The Act spells out the ambit, content and application of the rights and duties contained in the constitutional declaration.⁵⁵

Apart from the fact that Article 18 of the Namibian Constitution does not provide for such a constitutional imperative, the starting point for law reform in

53 See section 33.

54 No. 3 of 2000.

55 Burns & Beukes (2006:6).

South Africa and Namibia was quite similar; indeed, the aims of an enactment were essentially the same. Besides the purpose to correspond with the constitutional imperative, the intention of the South African law reform process was to promote just administrative action by regulating the administration – and thereby create a culture of accountability, openness and transparency.⁵⁶ The outcome of the implementation of the PAJA was a *major innovation* in South African administrative law: for the first time, basic rules and principles of administrative procedure and of the corresponding court procedure were defined in a statute.⁵⁷

An interesting fact about the law reform process – following from the fact that it was broadly assisted by Germany's *Gesellschaft für Technische Zusammenarbeit*⁵⁸ (GTZ) – was that the PAJA incorporated specific concepts from German law.⁵⁹ Consequently, the question arises as to whether or not this was a successful strategy. This will be analysed in the discussions to follow with particular reference to the section on the requirement to furnish reasons for an administrative action.

The right to be given reasons under the PAJA

Section 5 of the PAJA, which gives effect to section 33(2) of the Constitution, reads as follows:

- (1) Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.
- (2) The administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action.
- (3) If an administrator fails to furnish adequate reasons for an administrative action, it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason.
- (4) (a) An administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances, and must forthwith inform the person making the request of such departure.

56 (ibid.:7).

57 Pfaff, R & H Schneider. 2001. "The Promotion of Administrative Justice Act from a German perspective". *South African Journal of Human Rights*, 17(1):59.

58 Literally, "Association for Technical Cooperation". The GTZ is an international cooperation enterprise for sustainable development with worldwide operations. It is federally owned and supports the German Government in achieving its development policy objectives; see also <<http://www.gtz.de/en/index.htm>>.

59 Pfaff & Schneider (2001:60).

The right to be given reasons as part of a fair administrative procedure

- (b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including –
 - (i) the objects of the empowering provision;
 - (ii) the nature, purpose and likely effect of the administrative action concerned;
 - (iii) the nature and the extent of the departure;
 - (iv) the relation between the departure and its purpose;
 - (v) the importance of the purpose of the departure; and
 - (vi) the need to promote an efficient administration and good governance.
- (5) Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure.
- (6) (a) In order to promote an efficient administration, the Minister may, at the request of an administrator, by notice in the *Gazette* publish a list specifying any administrative action or a group or class of administrative actions in respect of which the administrator concerned will automatically furnish reasons to a person whose rights are adversely affected by such actions, without such person having to request reasons in terms of this section.
 - (b) The Minister must, within 14 days after the receipt of a request referred to in paragraph (a) and at the cost of the relevant administrator, publish such list, as contemplated in that paragraph.

Section 5 should be read with Chapter 4 of the Regulations on Fair Administrative Procedure, which set out the formal requirements with regard to the format of any request for reasons. Additionally, the Rules of Procedure of Judicial Review of Administrative Action provide for forms with regard to the request for reasons and for the response of the administrator, and give further guidelines on the grounds for a refusal of the requested reasons (Part B 3).

From a first reading of section 5(1), it is notable that the right was not furnished with the same strong emphasis as in the German model: the provision does not state a right to be *given* reasons – only the right to *request* them. Consequently, the affected person is responsible for obtaining written reasons if they were not provided by the administrator.⁶⁰ In terms of section 3(2)(e) of the PAJA, all the administrator needs to do is give adequate notice of the right to request reasons. In the law reform process, this final provision was not the same as the one discussed initially. In its first draft, the South African Law Reform Commission's Project Committee proposed that, as a general rule, administrators should give adequate reasons for their actions, incorporating the essential facts and the legal basis for the action in question, or a reference

⁶⁰ Burns & Beukes (2006:256).

to the right to request reasons.⁶¹ In amending this draft, the legislature clearly watered down this right.⁶²

Section 5(6) provides for a way to overcome this problem: the Minister can define in a list those circumstances under which reasons will automatically be furnished, without a person needing to formally request them. However, it must be noted that, to date, no such list has been published.⁶³

Another remarkable point concerns section 5(4), which establishes the conditions under which the administrator can depart from the requirement to furnish written reasons. The departure has to be reasonable and justifiable in the circumstances, while subsection (4)(b) prescribes factors to consider when it comes to whether or not the conditions have been met. As a result, section 5(4) provides for a broad scope of exceptions which can be problematic to determine in individual cases. Also, the Rules of Procedure of Judicial Review of Administrative Action, which, in section 3(5) of Part B, deal with the refusal of a request, do not deliver much further concretisation of possible exceptions of the duty to furnish reasons. Only two comprehensive cases are prescribed: firstly, if written reasons have already been furnished to the person requesting them; and secondly, if the reasons are publicly available and the person requesting them has been informed of where and how they have been made available.

In conclusion, the broad scope of section 5(4) of the PAJA does not help to add legal certainty on the one hand, and to give the administrator concrete guidelines on the conditions for a rejection on the other. Therefore, it does not effectively support the aim to protect the constitutional right to obtaining reasons for a decision.

Evaluation

Although it is a notable improvement that the right to be given reasons is explicitly set out in a statutory provision, the decision to provide only for a right to *request* reasons is not in accord with the purpose of the PAJA to give effect to the citizen's constitutional right to such reasons. Considering the relatively low levels of literacy and the lack of awareness of rights in South Africa, a huge number of citizens do not use their right to request reasons for an administrative action.⁶⁴ The small number of cases that have so far been brought before the courts to enforce this right proves that the majority of the population is not aware of the right to be given reasons for a decision under the PAJA. Thus, although a right to *request* reasons exists on paper, it does

61 South African Law Reform Commission. 1999. *Project 115 Administrative Justice Report (August 1999)*. Pretoria: SALRC, p 26.

62 Pfaff & Schneider (2001:81).

63 Burns & Beukes (2006:260).

64 Pfaff & Schneider (2001:81).

The right to be given reasons as part of a fair administrative procedure

not have the expected implication in effect. Similarly, the provision does not adequately enhance the aim to ensure rational decision-making on the part of the administrator; likewise, it adds little to ensure the administration's openness and accountability. The administrative official has to base his/her decision on sound grounds before taking a decision. Therefore, it is more effective to write down the grounds at the same time and to furnish them with the decision to the person affected by it. If done at a later stage, it will probably become complicated and annoying to reconstruct the circumstances.⁶⁵ Furthermore, the system is very complicated and bureaucratic – which is borne out by the length of section 5 in combination with the load of additional provisions and forms that are made in aforementioned regulations to the PAJA.

Conclusion and recommendation

The German concept of the right to be given reasons for an administrative action, as set out in section 39 of that country's VwVfG, offers an example of a precise provision with a strong emphasis on the protection of the right. This model sheds light on how such a right could possibly be incorporated into Namibian legislation. Of course, not all the aspects of the German provision should be implemented in the same way as was done in German law: a rule has to be created which fulfils the specific needs of the Namibian context.

However, one should learn from the South African experience as well, and avoid devolving the responsibility to the citizen to obtain the reasons for an administrative act. More advisable would be to formulate a comprehensive provision that sets a firm basis for the administrator to furnish reasons for an administrative action at the same time as such action is delivered.

Considering the importance of the right to fair procedure enshrined in the Namibian Constitution, and in a bid to prevent bureaucratic inefficiency, the best solution would be to develop a statutory provision containing a procedure that is effective in protecting the constitutional right of the citizen as well as being uncomplicated for administrators to comply with in their daily work.

65 (ibid.:82); Burns & Beukes (2006:257).