

[1980–87 Gib LR 11]

**IN THE MATTER OF MARRACHE**

SUPREME COURT (Davis, C.J.): February 4th, 1981

*Taxation—income tax—remission of tax—Governor’s discretion to remit tax under Income Tax Ordinance (cap. 76), s.64 if “just and equitable to do so” to be exercised judicially in accordance with natural justice—applicant to have opportunity to be heard and answer representations opposing application—power to be interpreted strictly and exercise amenable to judicial review*

*Administrative Law—judicial review—grounds for review—review available whenever person with legal authority to make decision “affecting the rights of subjects” has duty to act judicially—exercise of Governor’s discretion to remit tax under Income Tax Ordinance (cap. 76), s.64 therefore subject to judicial review*

The applicant sought judicial review of the decision of the Governor remitting income tax to him in exercise of his powers under the Income Tax Ordinance (cap. 76), s. 64.

The applicant was taxed on his Gibraltar income in respect of four consecutive years in which he had been resident abroad. He objected to the Commissioner of Income Tax and gave oral notice of objection to the assessments but did not pursue it or exercise his right of appeal to the courts. His petition for remission of the tax (in a letter to the Deputy Governor) set out his case but it was only granted to the extent of 40% and he applied for judicial review of the decision, seeking to increase the percentage. When granting leave, the court indicated that it wished the question whether the Governor’s powers under s.64 were subject to judicial review to be determined as a preliminary issue.

The applicant submitted that the Governor’s discretion (to “remit, wholly or in part, the tax payable . . . if he is satisfied that it will be just and equitable to do so”) was amenable to review and that in this case the Governor had failed to exercise his discretion judicially. He had not observed the rules of natural justice and had not satisfied himself of the fairness of only partially remitting the applicant’s tax liability.

The Attorney-General submitted in reply that the Governor had no duty to act judicially in exercising his discretion under s.64 and the power of remission was therefore not reviewable, since (a) the Income Tax Ordinance contained elaborate provisions for revising assessments, appealing to the Supreme Court, and applying to the Commissioner for a refund,

following which the assessment became final—and the Governor’s power to order remission only arose when these other remedies had been exhausted (which in this case they had not been); (b) although the Governor had to believe that remitting the tax was “just and equitable,” his duty extended to satisfying himself that it would be just and equitable not only for the taxpayer but also in the interests of the public and the public revenues; (c) although certiorari would lie whenever a person with legal authority made a decision affecting the rights of a subject, there was no question of affecting the applicant’s right here: remitting his tax conferred a benefit on him, equivalent to an act of clemency in other contexts; (d) any question of law arising would already have been decided before the Governor’s power of remission came into play, hence the requirement that his decision be “just and equitable” was no more than a guideline that he should act fairly in exercising his discretion; and (e) whatever decision was reached, it remained open to the applicant to reapply for remission of tax paid.

**Held**, allowing the application to continue:

(1) The court was not satisfied that certiorari would not lie in this case and would therefore decide the preliminary issue in favour of allowing the application for judicial review to continue (para. 25).

(2) Judicial review was available whenever someone with legal authority had the power to make decisions “affecting the rights of subjects” and had a duty to make those decisions judicially. “Affecting the rights of subjects” was a phrase that had been interpreted broadly over the years and it was clear here that the Governor’s decision to remit tax under s.64 affected the interests of the applicant as a subject (paras. 14–19).

(3) Nevertheless, once the court was satisfied that the Governor was exercising his powers under s.64 in his official capacity and that the wording of the section imposed a duty on him to act in accordance with natural justice, the court would interpret his decision strictly and not on the assumption that wide and unfettered authority was being conferred upon him. It was certainly the case that the words of s.64 went beyond merely providing guidelines to the Governor on how he should exercise his administrative functions—he was obliged to give the applicant an opportunity to be heard and to answer any representations made opposing his application (para. 20; paras. 24–25).

**Cases cited:**

- (1) *Australian Communist Party v. Commonwealth* (1951), 83 C.L.R. 1; [1951] HCA 5, distinguished.
- (2) *Benn, Re* (1964), 6 W.I.R. 500, distinguished.
- (3) *Ceylon Univ. v. Fernando*, [1960] 1 W.L.R. 223; [1960] 1 All E.R. 631, referred to.
- (4) *De Verteuil v. Knaggs*, [1918] A.C. 557, referred to.

- (5) *Education & Science Secy. v. Tameside Metrop. B.C.*, [1977] A.C. 1014; [1976] 3 W.L.R. 641; [1976] 3 All E.R. 665, applied.
- (6) *Hoggard v. Worsbrough U.D.C.*, [1962] 2 Q.B. 93; [1962] 1 W.L.R. 676; [1962] 1 All E.R. 468; [1962] R.V.R. 347, referred to.
- (7) *Horwitz v. Connor* (1908), 6 C.L.R. 38; [1908] HCA 290, distinguished.
- (8) *Laker Airways Ltd. v. Department of Trade*, [1977] Q.B. 643; [1977] 2 W.L.R. 234; [1977] 2 All E.R. 182, referred to.
- (9) *McInnes v. Onslow Fane*, [1978] 1 W.L.R. 1520; [1978] 3 All E.R. 211, observations of Megarry, V.-C. referred to.
- (10) *Marks v. Commonwealth* (1964), 111 C.L.R. 549; [1964] HCA 45, distinguished.
- (11) *Padfield v. Minister of Agriculture, Fisheries & Food*, [1968] A.C. 997; [1968] 2 W.L.R. 924; [1968] 1 All E.R. 694, referred to.
- (12) *R. v. Criminal Injuries Compensation Bd., ex p. Lain*, [1967] 1 Q.B. 863, *dicta* of Lord Parker, C.J. and Ashworth, J. considered.
- (13) *R. v. Electricity Commrs., ex p. London Elec. Joint Ctee. Co. (1920) Ltd.*, [1924] 1 K.B. 171, *dicta* of Atkin, L.J. considered.
- (14) *R. v. Governor of S. Australia* (1907), 4 C.L.R. 1497; [1907] HCA 31, distinguished.
- (15) *Ridge v. Baldwin*, [1964] A.C. 40; [1963] 2 W.L.R. 935; [1963] 2 All E.R. 66, observations of Lord Reid referred to.

**Legislation construed:**

Income Tax Ordinance (Laws of Gibraltar, *cap.* 76), s.64: The relevant terms of this section are set out at para. 4.

*J.E. Triay* for the applicant;

*E. Thistlethwaite, Crown Counsel*, for the Attorney General.

1 **DAVIS, C.J.:** This is an application for judicial review made under O.53 of the Rules of the Supreme Court.

2 On March 19th, 1980, the applicant, Samuel Abraham Marrache, applied under O.53 for leave to apply for judicial review of the decision of the Governor made under s.64 of the Income Tax Ordinance (*cap.* 76) remitting 40% of the tax found to be payable by the applicant for the years of assessment 1969/70, 1970/71, 1971/72 and 1972/73.

3 Leave was granted in accordance with O.53, r.3 on April 2nd, 1980. In granting such leave the then Chief Justice indicated that he was not satisfied that such an application lay in respect of a decision of the Governor made in the exercise of his discretion under s.64 of the Income Tax Ordinance and that he wished to have this point fully argued before him. Accordingly when this matter came up for hearing on November 20th, 1980, counsel addressed me on this preliminary point alone.

4 Section 64 of the Income Tax Ordinance in so far as relevant reads as follows: “The Governor may remit, wholly or in part, the tax payable by any person if he is satisfied that it will be just and equitable to do so.”

5 Mr. Triay for the applicant compared the discretionary power to remit tax conferred on the Governor in this section with other discretionary powers conferred on the Governor by other Ordinances. He compared the position of the Governor in the exercise of these statutory powers with that of a Minister of the Crown in England exercising comparable discretionary powers conferred on such Minister by English statutes, and he drew my attention to the many recent authorities in which the courts in England have inquired into the exercise by a Minister or officer of the Crown of a discretionary power conferred on him by some English statute.

6 Mr. Triay submitted that the courts have always been prepared to review the exercise of a statutory power where the exercise of that power affected the rights of a subject of the Crown and the authority on whom the power was conferred had a duty to act judicially in exercising the power. Mr. Triay referred me in particular in this connection to *Padfield v. Minister of Agriculture, Fisheries & Food* (11); *Laker Airways Ltd. v. Department of Trade* (8) and *Education & Science Secy. v. Tameside Metrop. B.C.* (5).

7 In so far as the present case is concerned, Mr. Triay submitted that the applicant had a right under s.64 of the Income Tax Ordinance to have his application for remission of tax considered fairly and that the use of the words “if he is satisfied that it will be just and equitable to do so” in s.64 clearly indicated that in exercising his discretion to remit tax the Governor was under a duty to act judicially and to satisfy himself as to the fairness of a total or partial remission of tax on the basis of justice and equity.

8 Mr. Triay disputed that the Governor, by virtue alone of his position as Governor, in exercising discretionary powers conferred on him by statute, was in any different position from that of a Minister of the Crown in England exercising similar discretionary powers conferred on him by some English statute. He submitted that, in deciding on whether or not the applicant had a right or rights affected by the exercise of the Governor’s discretion under s.64 and whether or not in exercising his discretion the Governor had acted judicially, the court should examine the facts of this particular case and that it should not reject the application at this stage without an examination of the events leading up to the present application. He added that this would not preclude the court from refusing the application at a later stage after examination of the facts.

9 The Attorney-General on behalf of the Crown stated that while he did not go so far as to say that the discretionary powers conferred on the Governor by statute were never reviewable by the courts, the court had in each case to examine the nature of the power exercised, and he submitted

that the power of remission conferred by s.64 of the Income Tax Ordinance was not a power that was reviewable by the court.

10 The learned Attorney-General reviewed the provisions of the Income Tax Ordinance under which the obligation to pay tax was to be determined: having assessed a person for tax, the Commissioner of Income Tax was empowered under s.53(2), on receiving an objection to an assessment, to revise such assessment; under s.55, any person aggrieved by an assessment made on him could appeal to the Supreme Court against the Commissioner's assessment; s.56 provided for the finality of an assessment where no valid objection or appeal was lodged or where the assessment had been agreed or determined on objection or appeal; s.65 empowered the Commissioner to refund tax overpaid. The Attorney-General submitted that the Governor's power of remission under s.64 fell outside this framework and only came into operation after the taxpayer's legal rights and obligations had been determined, whether on appeal to the court or otherwise. He described the exercise of the power of remission by the Governor as an act of clemency—a remission of what was legally payable by releasing the taxpayer from payment of the tax payable by him, and he submitted that this power of remission was conferred on the Governor in his capacity as Governor, not in any ministerial capacity—as in that case the obvious person to be nominated for the exercise of the power of remission under s.64 would have been the Financial and Development Secretary—but in his capacity as a figure quite outside the ambit of the Income Tax Ordinance suited to exercise such a power of financial clemency in the same way that under the Constitution the royal prerogative of pardon was conferred on the Governor.

11 While accepting that the exercise by the Governor of his power of remission under s.64 was not untrammelled, in that in exercising the power the Governor had to be satisfied that it was just and equitable to do so, the Attorney-General submitted that this did not mean that the Governor had to be satisfied that remission would be just and equitable for the taxpayer alone: he had further to be satisfied that remission of tax would be just and equitable in the interests of the public and the public revenues.

12 The Attorney-General accepted that it had been established that certiorari would lie in respect of the decision of a person or body having legal authority to determine questions affecting the rights of a subject and having a duty to act judicially, but he submitted that insofar as the present case and the Governor's power of remission under s.64 were concerned, there was no question of the rights of a subject being affected by the exercise of the Governor's power of remission. No right to liberty, to carry on business, or the like was involved in this case, he said: on the contrary, rather than affecting the rights of the subject, the exercise of the Governor's power to remit tax conferred a benefit.

13 Furthermore, in considering s.64 in relation to the present case, the Attorney-General submitted that the words “if he [the Governor] is satisfied it is just and equitable to do so” imposed no duty on the Governor to consider any question of law in the case as these would all have been decided in earlier proceedings. He submitted that these words were intended as no more than guidelines to the Governor, in exercising his discretion, to act fairly. In addition he pointed out that whether the Governor declined to exercise his power of remission or exercised it so as to remit only partially the tax payable (as occurred in the present case), this did not render the Governor *functus officio*, it remained open to the taxpayer to reapply for remission. All this, the Attorney-General suggested, indicated that the Governor had no duty to act judicially in exercising his power of remission under s.64. Not only, in his submission, therefore, did the exercise of the Governor’s power of remission not affect the rights of the applicant in the present case in that all question of the legal liabilities to pay tax had been exhausted by the time the provisions of s.64 were called into play, but there being no obligation on the Governor to act judicially under s.64, this was not a case where certiorari would lie. Persuasive though the learned Attorney-General’s able argument is, I find I am not convinced by it.

14 The principle that certiorari may issue “wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially,” act in excess of their legal authority was laid down by Atkin, L.J. in *R. v. Electricity Commrs., ex p. London Elec. Joint Cttee. Co. (1920) Ltd.* (13) in the following passage ([1924] 1 K.B. at 204–205):

“The matter comes before us upon rules for writs of prohibition and certiorari which have been discharged by the Divisional Court. Both writs are of great antiquity, forming part of the process by which the King’s Courts restrained courts of inferior jurisdiction from exceeding their powers. Prohibition retrains the tribunal from proceeding further in excess of jurisdiction; certiorari requires the record or the order of the court to be sent up to the King’s Bench Division, to have its legality inquired into, and, if necessary, to have the order quashed. It is to be noted that both writs deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a Court of Justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognized as, Courts of Justice. *Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction*”

*of the King's Bench Division exercised in these writs.*" [Emphasis supplied.]

15 The words emphasized have been frequently quoted in subsequent cases. They were discussed at length by Lord Reid in *Ridge v. Baldwin* (15) ([1964] A.C. at 74–79) and in *R. v. Criminal Injuries Compensation Bd., ex p. Lain* (12) ([1967] 1 Q.B. at 880–881, *per* Lord Parker, C.J. and at 892, *per* Ashworth, J.). They are also cited in *de Smith's Judicial Review of Administrative Action*, 4th ed., at 383–384 (1980). But as can be seen from *de Smith* and the cases of *Ridge v. Baldwin* and *R. v. Criminal Injuries Compensation Bd.*, the courts have adopted a flexible approach to the principle as laid down by Atkin, L.J.

16 In *R. v. Criminal Injuries Compensation Bd.*, the widow of a police officer who was not satisfied with the award of compensation made to her by the Board in respect of the death of her husband had applied for an order of certiorari to quash the decision of the Board. Counsel for the Board, citing the words of Atkin, L.J., submitted that the Board was not a body of persons having authority "to determine questions affecting the rights of subjects" "in that a determination of the Board gave rise to no enforceable rights but only gave the applicant an opportunity to receive the bounty of the Crown (see Lord Parker, C.J., *ibid.*, at 880). In relation to this contention, Lord Parker said (*ibid.*, at 881): "With regard to Mr. Bridge's second point. I cannot think that Atkin L.J. intended to confine his principle to cases in which the determination affected rights in the sense of enforceable rights."

17 In the same case Ashworth, J., referring to the words of Atkin, L.J., said (*ibid.*, at 892):

"For my part I doubt whether Atkin, L.J. was propounding an all-embracing definition of the circumstances in which relief by way of certiorari would lie. In my judgment the words in question read in the context of what precedes and follows them, would be of no less value if they were altered by omitting 'the rights of' so as to become 'affecting subjects'. I regard the duty to act judicially, in a public as opposed to a private capacity, as the paramount consideration in relation to relief by way of certiorari."

18 *De Smith*, in considering the meaning of Atkin, L.J.'s phrase "affecting the rights of subjects" (*op. cit.*, at 389 *et seq.*) lists "rights" which have been the subject of judicial decisions and says (*op. cit.*, at 390):

"This catalogue is by no means exhaustive; for, as we have already observed, in this context the term 'rights' is to be understood in a very broad sense and is not to be confined to the jurisprudential concept of rights to which correlative legal duties are annexed. It

comprises an extensive range of legally recognised interests, the categories of which have never been closed.”

See also in this connection Megarry, V.-C.’s disquisition on the meaning of a “right” in *McInnes v. Onslow Fane* (9) ([1978] 1 W.L.R. at 1528).

19 In the light of these authorities, it appears to me that the exercise by the Governor of his power to remit tax under s.64 *can* be said to affect the right of the applicant to relief from tax insofar as this case is concerned (and it appears to me that each case must be determined on its merits). Whether this is so or not (and I find that I am in no position at this stage to come to any decision as to this), it can surely be said that the exercise of the Governor’s discretion to remit tax affects the interests of the applicant or, to adopt the words of Ashworth, J. in *R. v. Criminal Compensation Bd.* cited above, affects the applicant as a subject.

20 Turning then to the question whether the Governor in exercising his discretion has any duty to act judicially, it appears to me that the use of the words in s.64 “if he is satisfied that it will be just and equitable to do so” must be taken as indicating that in exercising his discretion the Governor must act fairly and in accordance with the principles of natural justice—that he must therefore give the applicant an opportunity to put his case and to answer any representations made in opposition to his application by any other person. With respect to the argument put forward by the Attorney-General, I find it difficult to accept that the use of these words indicates no more than a guide to the Governor in the exercise of a purely administrative function entailing no requirement that he act judicially insofar as the applicant is concerned, and I refer in this connection to the judgments in *De Verteuil v. Knaggs* (4) ([1918] A.C. at 560); *Ceylon Univ. v. Fernando* (3) ([1960] 1 W.L.R. at 232); *Hoggard v. Worsbrough U.D.C.* (6) ([1962] 2 Q.B. at 100–101), and *Education & Science Secy. v. Tameside Metrop. B.C.* (5) ([1977] A.C. at 1024–1025, *per* Lord Denning, M.R.; at 1047–1048, *per* Lord Wilberforce; at 1064–1065, *per* Lord Diplock) as regards the meaning of “satisfied” and expressions corresponding to “just and equitable.”

21 The Attorney-General also drew attention to the Australian cases of *R. v. Governor of S. Australia* (14); *Horwitz v. Connor* (7); *Australian Communist Party v. Commonwealth* (1); *Marks v. Commonwealth* (10) and the West Indian case of *Re Benn* (2), as authority for saying that the prerogative orders would not lie against the decision of the Governor.

22 I observe that 6 *Halsbury’s Laws of England*, 4th ed., para. 1050, at 496, in dealing with *Commonwealth & Dependencies*, citing these and other cases, says:

“No order of mandamus will lie to the Governor in respect of acts which he can perform only with the advice of his Executive Council



or Cabinet or any other case in which he is acting as the representative or agent of the Crown or otherwise in his capacity as Governor. This immunity extends in respect of the other prerogative orders, injunctions and other like equitable remedies.”

23 Paragraph 1037, at 489–490 in the same volume, on the nature of the Governor’s authority, says, however:

“His [*i.e.* the Governor’s] authority, being derived from his Commission, is confined to the powers thereby expressly or impliedly entrusted to him, including such prerogatives as may be delegated, and the statutory powers of the office. The scope of these powers may be examined by the courts and will not be interpreted on the assumption that wide or unfettered authority will naturally be bestowed; where the Governor has power to interfere with the personal liberty of the inhabitants of the territory, that power will be strictly construed.”

24 It appears to me that for the Governor, on receiving an application from a subject to exercise his power of remission under s.64, to accede to the request, he must first have satisfied himself that it is just and equitable to do so. As I have said, it appears to me that in so satisfying himself the Governor is obliged to act judicially, that is to say in accordance with the principles of natural justice. In these circumstances it does not appear to me that the Australian cases and the case of *Re Benn* (2) cited by the Attorney-General and by *Halsbury’s Laws* (*loc. cit.*, para. 1050, at 496) are applicable and I consider that this court is entitled to inquire whether or not the Governor in exercising his discretion acted in accordance with the provision conferring the power upon him.

25 While I am satisfied that the Governor in exercising his power of remission under s.64 is acting in his capacity as Governor, I am not satisfied at this stage, in the light of recent authorities, that certiorari will not lie in relation to the exercise of that power. Accordingly, I find that I am not prepared at this stage to rule that this application for judicial review fails.

*Ruling accordingly.*