[1980–87 Gib LR 80]

ATTORNEY-GENERAL v. MARRACHE

COURT OF APPEAL (Forbes, P., Hogan and Spry, JJ.A.): January 28th, 1982

Taxation—income tax—remission of tax—no requirement that Governor's discretion to remit tax under Income Tax Ordinance (cap. 76), s.64 to be exercised judicially—that remission to be "just and equitable" not sufficient to impose duty to act judicially—remains unfettered discretion to make ex gratia payment not amenable to judicial review

Taxation—income tax—improper assessment—repayment of tax—if Commissioner acts wrongly and arbitrarily in assessing tax, liable to action at suit of taxpayer—inappropriate to seek remission of tax by Governor under Income Tax Ordinance (cap. 76), s.64 before exhausting other legal remedies

Administrative Law—judicial review—grounds for review—review available in principle whenever official has legal authority to make decision "affecting the rights of subjects"—decision need not alter legal rights or liabilities of subject but may be merely step in process having that result—no judicial review of decision if unfettered discretion and no reasons required

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 Supreme Court (Davis, C.J.) allowed the application for judicial review to continue on the basis that (a) 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; and (b) the Governor was exercising his powers under s.64 in his official capacity and the wording of the section imposed a duty on him to act in accordance with natural justice, obliging him to give the applicant an opportunity to be heard and to answer any representations made opposing his application. The decision of the Supreme Court is reported at 1980–87 Gib LR 11.

On appeal, the Attorney-General submitted that (a) since the Supreme Court had held that the Governor had been acting in his official capacity in granting remission under s.64, his discretion was not subject to judicial review; and (b) if this were wrong and the Governor's decision was in principle amenable to judicial review, it could not be used here because this was not a situation affecting the right of the taxpayer to any relief; it did not affect the right of the taxpayer as a subject; and in any case the Governor was not obliged to act judicially.

The taxpayer repeated his submissions in the Supreme Court but addionally submitted that the Commissioner of Income Tax had acted arbitrarily and outside his statutory authority.

Held, allowing the appeal:

(1) The Governor's exercise of his discretion under s.64 was not subject to judicial review. In principle, the fact that he had exercised his discretion in his official capacity did not in itself take it outside the scrutiny of the courts; similarly, judicial review in theory remained available even if the exercise of the discretion did not of itself alter the legal rights or liabilities of the subject but constituted merely one step in a process which might have that result. The respondent therefore *prima facie* had a sufficient interest in making the present application (paras. 15–17).

(2) Nonetheless, the Governor was not obliged to act judicially because the assessment of the Commissioner of Income Tax was final (subject to the statutory rights of appeal, which the taxpayer had in this case not exercised) and the fact that the Governor had the right to make inquiries or seek advice in deciding whether to exercise his power of *ex gratia* remission of tax imposed no special duties on him as to how he should exercise the right and the Income Tax Ordinance itself gave no guidance. That his decision was to be "just and equitable" under s.64 did not require him to act judicially—indeed, it would be inappropriate for him to act judicially since the judicial process for questioning the assessment had already been completed by the taxpayer's failure to pursue his right of appeal. Moreover, it should be presumed that the Governor's conduct had been correct and the court should only interfere when there was some indication to the contrary. In the absence of reasons for his decision (which were not required by the Ordinance) or bad faith (which was not suggested here), he had a discretion which could not be questioned by judicial review (para. 20; para. 30; paras. 33–34).

(3) In considering preliminary points of law, it was always assumed for the purposes of argument that the alleged facts of the case were correct. In

the present case, however, the question put to the Supreme Court had been phrased and answered in too general terms, with the result that it had improperly considered abstract or hypothetical questions. It was not the role of a court to do this but rather to deal specifically with the facts of the case before it (paras. 31–32).

(4) If it were in fact the case that the Commissioner had acted arbitrarily and beyond his statutory authority in deducting tax for the years in which the taxpayer had not been resident in Gibraltar, the present proceedings against the Governor for remitting part of that tax were misconceived—they should have been brought instead against the Commissioner for his arbitrary and unlawful act in deducting it in the first place (paras. 21–22).

Cases cited:

(1) *Allen* v. *Gulf Oil Refining Ltd.*, [1980] Q.B. 156; [1979] 3 W.L.R. 523; [1979] 3 All E.R. 1008, referred to.
(2) *Board of Education* v. *Rice*, [1911] A.C. 179, referred to.
(3) *de Freitas* v. *Benny*, [1976] A.C. 239; [1975] 3 W.L.R. 388; [1976] Crim. L.R. 50, distinguished.
(4) *De Verteuil* v. *Knaggs*, [1918] A.C. 557, applied.
(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, *dicta* of Lord Wilberforce considered.
(6) *Eleko* v. *Officer Administering Government of Nigeria (No. 2)*, [1931] A.C. 662, applied.
(7) *Horwitz* v. *Connor* (1908), 6 C.L.R. 38; [1908] HCA 33, distinguished.
(8) *McInnes* v. *Onslow-Fane*, [1978] 1 W.L.R. 1520; [1978] 3 All E.R. 211, *dicta* of Megarry, V.-C. considered.
(9) *Marks* v. *Commonwealth of Australia* (1964), 111 C.L.R. 549; [1964] HCA 45, distinguished.
(10) *R.* v. *Criminal Injuries Compensation Bd., ex p. Lain*, [1967] 2 Q.B. 863; [1967] 3 W.L.R. 348; [1967] 3 All E.R. 770, *dicta* of Diplock, L.J. applied.
(11) *R.* v. *Governor of S. Australia* (1907), 4 C.L.R. 1947; [1907] HCA 31, distinguished.

Legislation construed:

Income Tax Ordinance (Laws of Gibraltar, *cap.* 76), s.64: The relevant terms of this section are set out at para. 19.

E. Thistlethwaite, *Crown Counsel*, for the Attorney-General;
J.E. Triay for the respondent.

1 **SPRY, J.A.,** delivering the judgment of the court: The respondent in this appeal, who, at the relevant time, was resident outside Gibraltar, failed to make a return of his Gibraltar income for the years 1969/70, 1970/71, 1971/72 and 1972/73. In consequence, assessments were raised by the

Commissioner of Income Tax under the provisions of s.49(3) of the Income Tax Ordinance (*cap*. 76). The respondent, it appears, saw the Commissioner of Income Tax on February 1st, 1977, and gave oral notice of objection to the assessments. However, he failed at that time to pursue the objection or to exercise his right of appeal under the Ordinance. In December 1979, the respondent applied to the Governor for remission in whole or in part of the tax payable by him under the assessments, and in January 1980, he was notified that the Governor had remitted 40% of the tax originally assessed. In March 1980, the respondent applied to the Supreme Court 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, to remit only 40% of the tax payable.

2 On April 2nd, 1980, leave to make application for judicial review of the Governor's decision was granted, but in making the order the then Chief Justice said, *inter alia*:

> "I am not at present satisfied that such an application lies against the Governor in exercise of the power conferred by s.64 of the Income Tax Ordinance. This is a matter of great public importance and I should like to hear it fully argued before I give any decision on it."

3 The matter came before the present Chief Justice of Gibraltar on November 20th, 1980, when counsel addressed him on the preliminary point above. On February 4th, 1981, it was decreed—

> "(1) that in the exercise of his discretion to remit tax under s.64 of the . . . Income Tax Ordinance the Governor is obliged to act judicially;
>
> (2) that an application for judicial review may lie in respect of the decision of the Governor given in the exercise of his discretion to remit tax under the said section."

It is against this decision that the appellant now appeals, the ground for his appeal being that "the learned Chief Justice erred in law in coming to the conclusions at (1) and (2) respectively."

4 The appeal came on for hearing on October 20th, 1981, and the learned Attorney-General then based his appeal on the propositions—

(1) that the learned Chief Justice having held that the Governor was acting as Governor in exercising his powers under s.64, it followed that his discretion was not subject to judicial review;

(2) that having regard to the nature of the remedy of judicial review, if the first proposition was too narrow, then the court should come to the view that it ought not to extend the remedy because (a) this was not a situation affecting the "right" of a taxpayer to any relief; (b) it should not

be regarded as affecting the right of a taxpayer or the taxpayer as a subject; and (c) the Governor was not under a duty to act judicially.

5 He based his argument in support of the first of these propositions on three Australian decisions: *R.* v. *Governor of S. Australia* (11); *Horwitz* v. *Connor* (7); and *Marks* v. *Commonwealth of Australia* (9) and one decision of the Judicial Committee, *de Freitas* v. *Benny* (3).

6 The *South Australian* case concerned an application for mandamus in a constitutional dispute regarding the filling of a vacancy in the Senate and involving the relationship between the Commonwealth and the State. The High Court of Australia held that mandamus would not lie against the Governor of a State in respect of a duty cast upon him as the constitutional head of the State.

7 *Horwitz's case* concerned an application for mandamus in respect of the exercise by the Governor in Council of the prerogative of mercy and in a judgment of one paragraph the High Court of Australia stated that mandamus would not lie to the Governor in Council.

8 *Marks's case* concerned the right of an officer in the Army to resign his commission. Constitutional issues were referred to in argument but were not fully pursued. Windeyer, J. did make some observations which must be regarded as *obiter*, saying (111 C.L.R. at 564) that—

> ". . . the Court can, I do not doubt, restrain executive action that is contrary to law. But this does not, as I understand the law, mean that the Court can direct the manner of the exercise by the Governor-General of any discretion lawfully exercisable by him on the advice of the Executive Council; and the Court cannot dictate to ministers what advice they should give in such a case. I do not dispute that if the law imposes a duty upon the Crown to act in a particular manner, as distinct from arming it with a discretion so to act, the Court may declare the duty and compel its performance."

9 Apart from the fact that Australian decisions are only persuasive in the courts of Gibraltar, although regarded with great respect, it seems to me that there is nothing in these decisions to support a proposition as wide as that propounded by the Attorney-General.

10 The case of *de Freitas* (3) was another case concerning the prerogative of mercy. The Attorney-General cited a passage from the judgment of the Judicial Committee which reads ([1976] A.C. at 247):

> "Mercy is not the subject of legal rights. It begins where legal rights end. A convicted person has no legal right even to have his case considered by the Home Secretary in connection with the exercise of the prerogative of mercy. In tendering his advice to the sovereign the Home Secretary is doing something that is often cited as the

exemplar of a purely discretionary act as contrasted with the exercise of a quasi-judicial function."

11 This was cited by way of analogy only. I accept that there is an analogy between the remission of punishment and the remission of tax but I do not think it is sufficiently close to justify relying on it. Apart from any other considerations, the former is, as Mr. Triay, who appeared for the respondent, pointed out, based on ancient prerogative and the latter on a modern statute.

12 On the other hand, *De Verteuil* v. *Knaggs* (4), a case cited by Mr. Triay, concerned the exercise of a statutory discretion by the acting Governor of Trinidad. On the question of jurisdiction, the Judicial Committee said ([1918] A.C. at 559):

"The case of the appellant, as stated in the indorsement of his writ of summons, is that the order was not made under the proper and statutory exercise of the discretion vested in the acting Governor by s.203 of the Ordinance, and is consequently null and of no effect. It is clearly within the power and jurisdiction of the municipal Courts to entertain this question, and to determine whether the acting Governor, in making the order, which the appellant impugns, acted within the limits of the powers conferred on him by a municipal Ordinance."

13 Again, in *Eleko* v. *Officer Administering Government of Nigeria (No. 2)* (6), another decision of the Judicial Committee, where it had been suggested that the Officer Administering the Government, in conducting inquiries, had been acting judicially, it was said ([1931] A.C. at 670):

"The Governor acting under the Ordinance acts solely under executive powers, and in no sense as a Court. As the executive he can only act in pursuance of the powers given to him by law. In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive."

14 I think, with respect, that the Attorney-General's first proposition cannot be sustained and that the fact that Governor was acting as Governor is not enough to take the exercise of his discretion outside the scrutiny of the courts. I do not think it necessary or desirable to go further. As Lord Parker said in *R.* v. *Criminal Injuries Compensation Bd., ex p. Lain* (10) ([1967] Q.B. at 882), "the exact limits of the ancient remedy have never been and ought not to be specifically defined."

15 The Attorney-General's second submission contains two elements. First, there is the question whether the respondent is entitled to claim the remedy. Certiorari was originally available where the rights of subjects had been injuriously affected by subordinate courts. In recent years, it has been made available against administrative bodies and individuals and in respect of interests less than legal rights. In the *Criminal Injuries* case, Diplock, L.J. said (*ibid.*, at 884–885):

> "It is plain on the authorities that the tribunal need not be one whose determinations give rise directly to any legally enforceable right or liability. Its determination may be subject to certiorari notwithstanding that it is merely one step in a process which may have the result of altering the legal rights or liabilities of a person to whom it relates . . . Is there any reason in principle why certiorari should not lie in respect of a determination, where the subsequent condition which must be satisfied before it can affect any legal rights or liabilities of a person to whom it relates is the exercise in favour of that person of an executive discretion, as distinct from a discretion which is required to be exercised judicially?"

16 The applicant there had a stronger case than the respondent in the present proceedings, because although the compensation she sought would have been *ex gratia*, there was a scheme approved by Parliament that laid down how the distribution of compensation was to be carried out. Here, the Ordinance gives no indication of the factors that justify remission. Nevertheless, I think the respondent had a sufficient interest and that the *dicta* of Diplock, L.J. are wide enough to cover it. I think this ground of appeal fails.

17 The second part of the submission challenges the Chief Justice's finding that the Governor was under a duty to act judicially. I do not propose to examine the numerous authorities on this duty, because there is none to my knowledge based on facts similar to those of the present appeal. Lord Wilberforce, in *Education & Science Secy.* v. *Tameside Metrop. B.C.* (5), observed that "there is no universal rule as to the principles on which the exercise of a discretion may be reviewed: each statute or type of statute must be individually looked at." I turn therefore to an examination of the relevant parts of the Income Tax Ordinance.

18 Every person chargeable with tax must make a return of his income (s.41). The Commissioner of Income Tax then makes his assessment, either on the basis of the taxpayer's return, if he accepts it, or on his own determination of the taxpayer's income, if he does not accept the return or if no return has been delivered (s.49). If the taxpayer disputes the assessment, he may give notice in writing of his objection s.53(2). The assessment may be revised by agreement between the taxpayer and the Commissioner but if they cannot agree, the former has a right of

appeal to the Supreme Court (s.55). If still dissatisfied, he may appeal to this court under s.7A of the Gibraltar Court of Appeal Ordinance and, in an appropriate case, there is a final appeal to the Judicial Committee of the Privy Council under s.62 of the Constitution.

19 Section 64 of the Ordinance, with which we are presently concerned, 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. For this purpose tax includes any penalty imposed under section 60."

The section clearly creates a discretion and I do not think it would present any problem if it were not for the words "just and equitable." The Chief Justice interpreted these words (1980–87 Gib LR 11, at para. 20) as meaning 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."

20 With respect, the respondent had already put his case in his petition, which took the form of a letter addressed to the Deputy Governor, and I cannot see that there is anyone with a right to intervene. So far as the Commissioner is concerned, his assessment is final and he has no interest in or right to be heard on the question of remission. The Governor is, of course, entitled to make such enquiries and seek such advice as he may deem necessary to enable him to decide whether to exercise his power of remission, and may well call for a report by the Commissioner for that purpose. If an allegation of fact unfavourable to the petitioner and relevant to the petition should emerge, I have no doubt that the Governor would ordinarily give the petitioner an opportunity to rebut or explain it, but the fact that the Governor might on some occasion fail to do so is not in itself enough to justify the court assuming the right to probe into every case.

21 It may be convenient at this point to dispose of an argument which Mr. Triay advanced at one point but which did not form part of his main submission. He said that he was arguing on the hypothesis that there is on the face of the proceedings an error of law concerning income tax law. The letter to the Deputy Governor alleged that the Commissioner had acted arbitrarily and outside his statutory authority.

22 Assuming that to have been the case, I think these proceedings were misconceived: they should not have been brought against the Governor in respect of the *ex gratia* remission he has made but against the Commissioner for his alleged arbitrary and unlawful act.

23 The Attorney-General argued that s.64 can and should be treated separately from the rest of the Ordinance. He submitted that the words "just and equitable" are no more than a guideline to the Governor that he should exercise his discretion fairly. He went on to suggest that they operate against a petitioner, because it is only after he is satisfied that it would be just and equitable to do so that the Governor can exercise his discretion and authorize a remission: in other words that they are a fetter on his discretion. Mr. Triay criticized this argument, submitting that justice and equity are always neutral. I think that is correct.

24 Mr. Triay argued that "just and equitable" is to be contrasted with "expedient" which is the test contained in the Constitution for the prerogative of mercy. He went on to develop a further argument. He submitted that the Income Tax Ordinance is inherently just and equitable (a view which is not universally held) providing for everyone to pay a fair share of the expenses of Government and that s.64, far from being separate and apart, is an essential part of the system, affording a final "just and equitable" relief to anyone who has inadvertently become liable to pay more than his due. With respect, I cannot accept that as a correct reading of the Ordinance.

25 There is nothing in s.64 to link it with the system of judicial relief available, a system which is complete in itself. The Governor is empowered to remit tax to any taxpayer. He may do so of his own motion when there has been no application. An application for remission may be made by a person who accepts that his assessment is correct but who claims that the law operates unfairly in his case or that the payment will occasion undue hardship. An application may be made by a person who has appealed unsuccessfully up to the Judicial Committee. Every issue of law or equity will have been exhausted but it is still open to the Governor to consider hardship. I cannot see that the position is any different if, as in the present case, the taxpayer has been assessed after failing to render returns and has allowed his right of appeal to go by default.

26 It is not the function of the Governor to investigate the amount of a taxpayer's income or to assess his liability to tax. He has no machinery for investigation, no power to summon witnesses and no power to commit for contempt a recalcitrant witness who refuses to answer a question. He has no power to amend or set aside an assessment made by the Commissioner: the assessment stands, even though the tax be remitted. The notional tax that would have been payable had the taxpayer rendered returns and had those returns been accepted by the Commissioner is irrelevant.

27 "Just" and "equitable" are not words of art, as Mr. Triay conceded, and I respectfully agree with the Attorney-General that they can only have been intended in the most general way to indicate to the Governor that the exercise of his discretion should not be capricious. I would equate them

with right and proper. It is important to bear in mind that no decision of the Governor under s.64 can deprive anyone of any right and cannot leave any petitioner worse off than he was, and any remission that he grants is an act of bounty. It is for this reason, I think, that the discretion was vested in the Governor, who, although the head of the executive, is above the day-to-day affairs of Government. It may be argued that compassion and generosity are wholly different from justice but I think it is inconceivable that the legislature, having set up a complete system of judicial appeals, should then have given the Governor an overriding discretion governed by the same principles as those applied by the courts.

28 If, as I think, the principal object of s.64 is to relieve hardship, the question of "fairness" will not ordinarily arise. Everyone who has a discretion in a public matter is expected to act fairly but that does not necessarily involve affording a hearing (see *Board of Education* v. *Rice* (2)). Mr. Triay argued, if I understood him correctly, that where there is a duty to be fair, there is a duty to act quasi-judicially and consequently that there will necessarily be inferred a right in the court to interfere. I think that is going too far.

29 Megarry, V.-C., in *McInnes* v. *Onslow-Fane* (8) said ([1978] 1 W.L.R. at 1535): "The concepts of natural justice and the duty to be fair must not be allowed to discredit themselves by making unreasonable requirements and imposing undue burdens."

30 In answer to a question from the court, Mr. Triay said that he was not suggesting any particular procedure that the Governor should follow: he suggested, on the contrary, that what was necessary was to discover what had been done and then see if there had been any breach of natural justice. With respect, I think this is a wrong approach. There is, in my opinion, a presumption that the Governor's conduct has been correct and it is only where there is some indication to the contrary that the court should interfere.

31 This brings me to a matter of procedure. The application was heard entirely without reference to the facts of the case and we were invited to consider the appeal in the same way. I think, with respect, that this is wrong. The courts do not consider abstract questions of law or hypothetical questions. In considering preliminary points of law, the practice is to assume for the purpose of the question that the facts alleged in the statement of claim are correct. The latest of a long line of authorities referring to this practice is *Allen* v. *Gulf Oil Refining Ltd.* (1). In the present proceedings, the statement supporting the application is equivalent to a statement of claim.

32 I think it was this approach that led the Chief justice into posing and answering too general a question. He said that he was not satisfied that certiorari would never lie in relation to the exercise of the Governor's

power under s.64. As a general proposition, I think that is correct, but it is not necessary to decide it now. With respect, the proper question was whether certiorari might lie in the circumstances of the present case.

33 Since he allowed a remission of tax, the Governor clearly considered the petition, so the court was not concerned with what would be the position if the Governor were to refuse to consider a petition. There was no suggestion that the Governor acted otherwise than in good faith, so that the court was not concerned with its jurisdiction in cases of alleged bad faith, which must in any case be expressly pleaded. The Governor is not required by s.64 to give reasons for his decisions and he did not do so in the present case, so the court was not concerned with the question whether, where a Governor gives reasons, the court may consider their propriety.

34 Once these extraneous matters are cleared away, I think the matter is much simpler. The Ordinance gives the Governor power to make *ex gratia* grants by way of remission of tax. It contains no yardstick by which such bounty is to be regulated. I do not consider that the words "just and equitable" read in the Ordinance as a whole require the Governor to act judicially: indeed, such an approach will ordinarily be inappropriate. In my opinion, he has a discretion the exercise of which cannot be challenged by judicial review, where he gives no reason for his decision and where there is no question of bad faith. I would therefore allow the appeal, set aside the judgment of the Chief Justice and dismiss the application.

Appeal allowed.
