1941 *Present : de Kretser J.*

FERNANDO *v.* THE COMMISSIONER OF MOTOR TRANSPORT.

In re CASE STATED UNDER SECTION 4 OF THE MOTOR CAR ORDINANCE.

Omnibus—Application for licence for bus along a proposed route—Right of Commissioner to refuse licence—Route previously plied by same bus—Congestion of traffic—Power of licensing authority—Motor Car Ordinance, No. 45 of 1938, ss. 45 (2), 46 (2), and 47.

The commissioner of Motor Transport may not on the ground of congestion of traffic refuse a licence to an omnibus on a proposed route if it is a route along which the applicant has previously plied the same omnibus.

The licensing authority may not refuse to renew a licence except on the grounds mentioned in section 45 (2) of the Motor Car Ordinance.

The discretion of the Commissioner is expressly limited to a consideration of the matters set out in section 47.

[1] *40 N. L. R. 235.*

THIS was a case stated in the Supreme Court by the Tribunal of Appeal under Section 4 of the Motor Car Ordinance.

H. V. Perera, K.C. (with him *L. A. Rajapakse*), for the applicant.

H. H. Basnayake, C.C., for Commissioner of Motor Transport.

Cur. adv. vult.

June 24, 1941. DE KRETSER J.—

Section 4 of the Motor Car Ordinance, No. 45 of 1938, provides for Tribunals of Appeal and sub-section 6 thereof makes the decision of a Tribunal final but provides for a case being stated on a question of law for the opinion of the Supreme Court. It is enacted that the stated case shall set forth the facts and the decision of the Tribunal, and the Supreme Court is authorised to hear and determine any question of law arising on any stated case and to remit its opinion to the Tribunal. It will be noted that this Court is required to determine not the question of law stated but any question of law arising on a stated case, and that it is not only the bare question of law which is transmitted but the stated case must set forth the facts and the decision of the Tribunal.

A statement of fact should include the decision given by the Commissioner from whose order the appeal had been taken. In the case before me, the Commissioner's decision was not transmitted but it was available and was handed up to me and I gathered from it that the Commissioner had refused to allow the motor omnibus in question to use the section of the route from Peradeniya into Kandy on the ground of congestion of traffic.

The case stated is as follows :

" Whether the Commissioner or the Appeal Tribunal is precluded from refusing to licence any omnibus which admittedly had a licence and plied for a number of years on the route applied for on the ground, urged on the appellant's behalf, that such an omnibus does not fall within the category of " additional omnibus traffic " in Section 45 (2) (*c*) of Ordinance No. 45 of 1938." Stated in this bare form it was conceded by appellant's counsel that the answer must be in the negative. But it is clear that what was intended was to raise the question whether in the circumstances of this case the Commissioner or the Appeal Tribunal was precluded from refusing to licence the omnibus. This Court is empowered by Section 4 (*d*) to cause a stated case to be sent back for amendment by the Tribunal, but I do not think such action is called for except where the case stated is confusing or unintelligible.

Now, the facts are as follows: The omnibus in question had had a licence issued for it at the end of 1939 for the year 1940. At the end of 1940 a renewal of the same licence was applied for. There is no express provision for renewing a licence and every application is in form an application for a fresh licence. But the circumstance that it is not being applied for for the first time is given consideration in the relevant sections of the Ordinance. Section 43 requires the applicant to specify in his application, among other things, particulars of the route or routes on which it is proposed to provide a service under the licence. The general sections with regard to licensing are to be found in the sections beginning with Section 29. The application for a licence must be

made to the licensing authority of the place in which the motor car will usually be kept during the period for which the licence is required. Section 45 requires the licensing authority to forward to the Commissioner every application so received together with a recommendation that the licence be allowed or refused. The discretion of the licensing authority is not unlimited, for Section 45 (2) expressly requires that he shall not recommend a refusal except upon one or more of the grounds stated therein, one of them being " (c) that any proposed route is generally so congested by traffic that additional omnibus traffic cannot, with due regard to the safety and convenience of the public, be allowed thereon". It is *additional omnibus traffic* with regard to which he is given the right to recommend refusal of a licence. "Additional omnibus traffic" is not traffic in addition to that which existed when the Ordinance came into operation nor the applications which come in after a certain number of applications have been received and favourably recommended, but clearly apply to omnibuses which are seeking a licence on the proposed route for the very first time. Here we have a recognition by the Legislature that existing vested interests should not be interfered with on the ground of congestion of traffic. That congestion of traffic may arise from circumstances over which the applicant for a licence had no control and he should not be penalized on that account.

As far as I can judge, this position is not doubted by the Commissioner or the Tribunal of Appeal. But it is important to remember it, for it may be the key to the solution of the question of law which arises. The licensing authority is required to forward the applications to the Commissioner, who thereupon is required to cause one or more of such lists to be published in the *Gazette* and to cause a copy of the list or notice to be affixed in a conspicuous position at the office of every licensing authority and at such other places as the Commissioner may consider necessary. The proposed route may take the omnibus through areas governed by many licensing authorities, and any such licensing authority may make objection against the issue of the licence. So may any person who is the holder of a valid licence or who is himself an applicant for a licence.

Any intermediate licensing authority would not be in a position to make an adverse recommendation if application had been made to him in the first instance except on the grounds specified in Section 45 (2). With reference to congestion of traffic, he would only be able to object to additional omnibus traffic. It seems to me that he must guide himself by the same rule when making objections.

The other class of persons may make any reasonable objection but, in considering the objection, the Commissioner ought to take into account whether the application is for an entirely fresh licence or one with reference to an existing service. Only in this way can the various sections of the Ordinance be made consistent with one another.

Section 47 prescribed what matters the Commissioner shall have regard to in deciding whether an application for a licence should be granted or refused, and among such matters is the recommendation of a licensing authority and the adequacy and suitability of all existing transport facilities. If the licensing authority had contravened the requirements of the Ordinance, then the Commissioner would clearly be entitled to

disregard his recommendation. The requirement that he should consider the adequacy and suitability of all existing transport facilities seems to me to be on the same lines as the rule enacted for the guidance of the licensing authority. An omnibus which had been previously licensed would come within the term "existing transport facilities". These may be more than adequate, in which case additions may rightly be refused. But it seems to me that the Commissioner cannot decide to refuse a licence to omnibuses already in service on a particular route on the ground of congestion of traffic.

Many of these points would have been made clearer if the Ordinance had more plainly distinguished between applications made for the first time and applications which are in reality applications for renewals of licences. It seems to me that when the Ordinance prohibited a licensing authority from recommending adversely against existing services on the ground of congestion, thereby indicating that he should issue the licence if his power had been unfettered, it would be strange if it intended that the Commissioner could overrule the recommendation which had been made in accordance with the Ordinance. If the Legislature intended to give the Commissioner unfettered discretion then it was hardly necessary to prescribe rules for the guidance of the licensing authority.

The Commissioner's discretion is expressly limited to consideration of the matters set out in Section 47. If there is nothing wrong with the recommendation of the licensing authority it should not be disregarded. If no objections had been raised by those qualified to make objection, that fact cannot be ignored. And if existing transport facilities are adequate and suitable, that fact again cannot be ignored. The result is that the Commissioner cannot, on the ground of congestion, refuse a licence along a proposed route if it is a route along which the applicant has previously plied the same omnibus. He may, of course, have other reasons such as, for example, that the omnibus is unfit for service.

This opinion answers the question raised by the case stated. Both the Commissioner and the Tribunal of Appeal would be precluded from denying a licence in the circumstances disclosed in this case.

Crown Counsel did not meet the arguments advanced in appeal but fell back on Section 48 and attempted to draw a distinction between a decision to issue a licence and the determination of the route. He claimed that with regard to the latter the Commissioner had absolute powers. He seemed rather taken back to find himself forced into the position that in such a case there should be no appeal and no occasion for a case to be stated. These proceedings have gone on the footing that an appeal would lie and that a case may be stated. But I may say at once that this contention is unsound. The section does not empower the Commissioner to decide that a licence should issue but that the licence should issue ; *i.e.*, the licence applied for. By reason of valid objections he may have to alter the route or curtail it. For example, if the deviation into Kandy was being applied for the very first time he might well refuse such a deviation, and to that extent the proposed route could be altered. All that Section 48 requires is that the Commissioner should make his order, of which he would then give notice as required by Section 49, eventually forwarding his decision to the licensing authority, who would then issue his

licence specifying thereon the matters required to be specified by Section 54.

The fallacy of the argument lies separating the proposed route from the licence. The applicant is expressly required to state the proposed route, the licensing authority is required to consider matters regarding the proposed route.

All motor cars must be licensed. No applicant can possibly object to paying the duty imposed, nor will any licensing authority be unwilling to receive the duty. Any possible objection centres round the route and it is regarding the route that an appeal would lie.

The opinion expressed by me will now be remitted by the Registrar to the Tribunal. The same opinion will apply to Case No. 2,234 (S. C. No. 184) and to Case No. 2,292 (S. C. No. 185).

If there is a prescribed fee and this has been paid, the appellant will be entitled to a refund of the same.

I have consulted Counsel on the matter of costs in these cases and they all agree that there should be no order as to costs