WIRELESS OFFICER v LOMBARD and others

Court of Appeal
Forbes, P., Bourke, J.A. and Hurley, Ag. J.A.
2 March 1976

Wireless — licence to operate walkie-talkie system — whether issue of licence discretionary — Wireless Telegraphy Ordinance, s. 3.
Licence — whether power to grant includes power to withhold.

The Wireless Officer has a discretion whether to grant or refuse a licence under s. 3 of the Wireless Telegraphy Ordinance (Cap. 162, 1965-69 Ed.).

Cases referred to in the judgments.

Congreve v Home Office, [1976] 2 W.L.R. 291.
R. v Metropolitan Police Commissioner, ex p. Parker [1953] 2 All E.R. 717.
R. v Metropolitan Police Commissioner, ex p. Holloway [1911] 2 K.B. 1131.
Holmes v Bradfield R.D.C., [1949] 1 All E.R. 381.
Trimble v Hill, (1879) 5 App. Cas. 342.

Appeal

This was an appeal against an order of mandamus granted out of the Supreme Court to compel the Wireless Officer to issue licences for the operation of a walkie-talkie system for a fleet of taxis.

The Attorney General (J.K Havers, Q.C.) and E. Thistlethwaite for the appellant.
S. Benady, Q.C., and D. Faria for the respondent.

23 March 1976: The following judgments were read—

Forbes, P.: The respondents made application to the Wireless Officer appointed under the Wireless Telegraphy Ordinance for the issue to each of them under s. 3 of the Ordinance of a wireless telegraphy licence to operate a walkie–talkie system in connection with their taxi–cabs. The Wireless Officer refused to issue such licences, and the respondents applied for an order of mandamus against the Wireless Officer to compel him to issue the licences. On 12 January 1976, the application was granted by the learned Chief Justice, and an order of mandamus issued against the Wireless Officer. The Wireless Officer now appeals against the issue of the order, leave to appeal having been granted by the Chief Justice on 12 January 1976.

At the hearing before this court the appellant was represented by the Attorney General, Mr. J.K. Havers Q.C., and Mr. E. Thistlethwaite, Crown Counsel. The respondents were represented by Mr. S. Benady Q.C. and Mr. D. Faria.

The application to the Supreme Court was contested solely on the issue whether or not the Wireless Officer has a discretion to grant or refuse a licence under s. 3 of the Ordinance, and that is the sole issue before this court. The ground of appeal set out in the memorandum of appeal is that:—

"The said order of mandamus was wrong in law in that the grant of a licence (other than a broadcasting licence) under s. 3 of the Wireless Telegraphy Ordinance is not mandatory in the sense that the Wireless Officer has a duty to issue a licence on an application being made and the appropriate fee being tendered by the applicant but is in fact discretionary"

In the recent English case of *Congreve v Home Office*[1] (which related to the revocation of television licences under s. 1 of the Wireless Telegraphy Act, 1949, which section corresponds with s. 3 of the Ordinance) the English Court of Appeal held that though the Home Secretary had an undoubted discretion to revoke a licence under the section, that discretion must not be exercised arbitrarily or improperly. In the instant case the Wireless Officer gave no reasons for his refusal to issue the walkie–talkie licences, but the question whether a discretion, if it did exist, had been arbitrarily and improperly exercised was not argued in the court below and is not before this court. It may be added that an incomplete report in The Times newspaper was the only report of *Congreve's* case available when the application for the order of mandamus was made and heard.

The facts leading up to the application for the order of mandamus were that in June 1974, the first respondent, Mrs. Leonor Lombard, obtained from the Wireless Officer a licence to operate a walkie–talkie system in respect of ten taxi cabs.

It may be mentioned that the form of licence used was that prescribed by the regulations made under the Ordinance for a radio controlled model, the only adaptation made being the striking out of the heading "Radio Controlled Model licence." The regulations did not prescribe a form of licence for the use of a walkie–talkie system, but the form used was hardly appropriate for it. However, nothing turns on this.

The licence obtained by Mrs. Lombard expired on 30 September 1974, and was renewed by the Wireless Officer on 15 October 1974. A private prosecution brought in September 1975, resulted in the stipendiary magistrate expressing the opinion that an individual licence was necessary for each driver operating the walkie–talkie system, and application was therefore made for renewal of the licence issued to Mrs. Lombard, and for the grant of individual licences to each of the taxi drivers using the system. This application was refused by the Wireless Officer by letter dated 28 October 1975, and it is this refusal which was the subject of the application for mandamus.

Section 3 of the Ordinance, as it stands today, reads as follows:–

"3. (1) No person shall establish or use any station for wireless telegraphy or keep, or instal or use apparatus for wireless telegraphy or any apparatus that can be readily made usable for such purpose except under the authority of a licence in that behalf granted by the Wireless Officer:

Licensing of wireless telegraphy. (12 & 13 Geo. 6, c. 54 s. 1).

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1 [1976] 2 W.L.R. 291

Provided that the Governor in Council may by regulations exempt from the provisions of this subsection the keeping, establishment, installation or use of stations for wireless telegraphy or wireless telegraphy apparatus of such classes or descriptions as may be specified in the regulations, either absolutely or subject to such terms, provisions and limitation as may be so specified:

And provided further that nothing in this subsection shall apply to the use of any wireless telegraphy station or the keeping, installation or use of any wireless telegraphy apparatus on board any ship or aircraft which is registered in any place outside Gibraltar.

(2) A licence granted under this section may be issued subject to such terms, provisions and limitations as the Wireless Officer may think fit, including in particular in the case of a licence to establish a station, limitations as to the position and nature of the station, the purposes for which, the circumstances in which, and the persons by whom the station may be used, and the apparatus which may be installed or used therein, and, in the case of any other licence, limitations as to the apparatus which may be kept installed or used, and the places where, the purposes for which, the circumstances in which, and the persons by whom the apparatus may be kept or used.

(3) A wireless telegraphy licence shall, unless previously revoked by the Wireless Officer, continue in force until the 30th September next following the date of its issue.

(4) A wireless telegraphy licence may be revoked, or the terms, provisions or limitations thereof varied, by a notice in writing served on the holder of the licence or by a general notice applicable to licences of the class to which the licence in question belongs published in the Gazette.

(5) Any person who establishes or uses any wireless telegraphy station or keeps, instals or uses any wireless telegraphy apparatus except under and in accordance with a licence granted under this section shall be guilty of an offence and liable on summary conviction to imprisonment for six months or to a fine of £100 and the court before whom such person is convicted may in addition to any other penalty order that all or any of the apparatus of the wireless telegraphy station or of the wireless telegraphy apparatus in connection with which the offence was committed shall be forfeited to the Crown.

(6) Without prejudice to the right to bring separate proceedings for contraventions of this Ordinance taking place on separate occasions, a person who is convicted of an offence under this Ordinance consisting in the use of any station or the keeping or use of any apparatus, shall, where the keeping or use continues after the conviction, be deemed to commit a separate offence in respect of every day on which the keeping or use so continues.

(7) For the avoidance of doubt it is hereby declared that the Wireless Officer may issue under this section an exclusive licence for the establishment and use of a wireless telegraphy broadcasting station."

The history of the Ordinance is relevant, and was considered by the Chief Justice in the court below. It is as follows:–

As originally enacted by Ord. No. 18 of 1951, ss. 3 and 6 read:–

"3. (1) It shall not be lawful for any person to keep, use or establish any apparatus or installation for wireless telegraphy or any apparatus that can readily be made usable for such purpose, without first obtaining a licence in that behalf, to be granted to him under the provisions of this Ordinance and on payment of such amount and on such terms and conditions as the Governor may prescribe and subject to such regulations as the Governor may from time to time make in that behalf:

Provided that:–

(a) this subsection shall not apply to wireless apparatus on board ships or aircraft other than ships or aircraft registered in Gibraltar; and

(b) licences granted under the provisions of the Summary Conviction Ordinance shall remain valid under this Ordinance until they expire.

(2) Any person contravening the provisions of this section, shall be liable on summary conviction to a fine not exceeding £100 or to imprisonment for a term not exceeding six months, and the apparatus and installation in respect of which a conviction is obtained may by order of the court, be forfeited to the Crown."

"6. (1) It shall not be lawful for any person to sell or deal in wireless apparatus without first obtaining a licence in that behalf to be granted to him under the provisions of this Ordinance, and on payment of such amount as the Governor may prescribe—

Provided that:—

(a) it shall be lawful for any person to export any wireless apparatus imported into Gibraltar and kept in bond without having a licence; and

(b) licences granted under the provisions of the Summary Conviction Ordinance shall remain valid under this Ordinance until they expire.

(2) Every licence to deal in wireless apparatus shall be in such form as shall be prescribed by the Governor and shall contain the name and description of the licensee, a description of the premises in respect of which the licence is granted, and the date on which the licence is issued. Such licence shall not be transferable.

(3) Every person who sells or deals in wireless apparatus without having in force a licence for the purpose, or who sells or deals in wireless apparatus upon any premises other than those specified in his licence, shall be liable on summary conviction to a fine not exceeding £50."

Section 3 was replaced by Ord. No. 13 of 1958. The new s. 3 contained the first five subsections of the present s. 3 as set out above except that the date for the expiration of a licence in subsection (3) was then 31 March. The first four of these subsections were virtually identical with s. 1 of the English Wireless Telegraphy Act, 1949, as, indeed, is indicated in the present marginal note.

The present subs. (7) of s. 3 was added by Ord. No. 7 of 1963. That Ordinance also amended s. 6 by deleting the words "to be granted to him" in subs. (1) and replacing subs. (3) with the following:—

"(3) The Wireless Officer may in his discretion grant a licence to deal in wireless apparatus or refuse to grant such a licence, and every licence so granted under this section may be issued subject to such terms, provisions and limitations as the Wireless Officer may think fit and may be revoked at any time.

(4) Every person who sells, offers for sale or deals in wireless apparatus except under and in accordance with a licence granted under this section shall be guilty of an offence and liable on summary conviction to a fine of £50."

Mention may also be made of s. 12 which, as originally enacted in 1951 read;—

"13. (1) Licences under this Ordinance shall be granted by the Wireless Officer who shall keep a register in which he shall enter the particulars of every licence granted by him.

(2) Every licence granted under this Ordinance shall expire on the 31st March following the date of issue."

By Ord. No. 13 of 1958 s. 13 of the original Ordinance was repealed and replaced by the following, which is now s. 12.

"13. The Wireless Officer shall maintain a register in which he shall enter the particulars of all licences granted by him under the provisions of this Ordinance."

Until the amendment of s. 6 in 1963 by the addition of subs. (3), the 1958 amendment resulted in there being no express authority between 1958 and 1963 for the Wireless Officer to issue a dealer's licence.

The Chief Justice reached his conclusion as follows:—

"I have given much thought to the submission that a power to revoke implies that the grant is discretionary. The only authority cited to me on this point (and I have been unable to find any other) is *R. v Metropolitan Police Commissioner, ex p. Parker*[1] where Lord Goddard was clearly of the view that a power of revocation does not necessarily mean that a grant is discretionary. In these circumstances I have reached the conclusion that the power to revoke or impose conditions does not necessarily imply that the power to grant a licence is discretionary.

I have also considered *Congreve's* case. It dealt with the question of revocation and Lord Denning's comments in so far as they refer to the grant of the licence, are, of course, obiter. Furthermore, I would not be prepared on the only report at present available to hold that Lord Denning went so far as to say that the power to grant a licence was discretionary for reasons other than those which are set out in the footnote to the volume of Halsbury to which reference has already been made.

I turn now to consider the submissions of counsel relating to the proviso to s. 3 (1) and the removal of doubts provisions in s. 3 (7). I do not construe the

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1 [1953] 2 All E.R. 717.

proviso to s. 3 (1) as implying that the substantive part of the section is discretionary, and, in my view, the removal of doubts provisions in s. 3 (7) do not assist. In my view special provisions for an exclusive licence would be necessary whether the section is mandatory or discretionary. If mandatory, special provisions would be necessary as otherwise the Wireless Officer would have to grant further applications. If discretionary, special powers would also be necessary as otherwise the Wireless Officer in granting an exclusive licence would fetter the future exercise of his discretion and indeed dispose altogether for the future of the exercise of the discretion which the legislation has given to him in respect of broadcasting licences. This he could not do without statutory authority.

In the circumstances of this case, I think that the English legislation and authorities are helpful and relevant only to the extent that I have mentioned. The issue must, in my view, depend very largely on the wording and history of the particular provisions in the Gibraltar legislation.

After considering the provisions of the Gibraltar Wireless Telegraphy Ordinance in the light of the matters referred to above and the submissions of learned counsel I have reached the conclusion that the grant of a licence under s. 3 of the Wireless Telegraphy Ordinance (except in the case of a broad—casting licence for which special provision is made) is mandatory in the sense that the Wireless Officer has a duty to issue a licence on an application being made and the appropriate fee being tendered by the applicant. The reasons which have led me to this conclusion are these:—

(1) Section 3, as originally enacted was, in my view, mandatory as it contained the words "to be granted to him";

(2) Ordinance No. 13 of 1958 replaced s. 3 and gave the Wireless Officer a discretion to impose conditions on the issue of a licence but it did not give him any discretion to refuse a licence. Furthermore, one would have expected any discretionary power to be in clear terms as it would have taken away the right of the subject to obtain a licence in accordance with the provisions of the Ordinance as originally enacted;

(3) The section deals with all types of licences (other than dealers licences) and it is difficult to believe that the legislature intended to give the Wireless Officer a discretion to refuse an ordinary television licence to a person who tendered the appropriate fee.

(4) Ordinance No. 7 of 1963 amended s. 6 of the Ordinance so as to give the Wireless Officer a discretion to grant or refuse a dealers licence but made no similar amendment in the case of s. 3 which related to other licences;

(5) The difference in wording between ss. 3 and 6 of the Ordinance as at present enacted is overwhelmingly in support of an implication that s. 6 is discretionary and s. 3 mandatory."

Apart from *Congreve's* case, to which I will refer later, I would agree with the Chief Justice that the English authorities do not provide a great deal of assistance. I would, however, respectfully disagree with his interpretation of Lord Goddard's words in *R. v Metropolitan Police Commissioner, ex p. Parker,* where he says that Lord Goddard was clearly of the view that a

power of revocation does not necessarily mean that a grant is discretionary. The passage in Lord Goddard's judgment which appears to support the Chief Justice's comment referred to the decision in *R. v Metropolitan Police Commissioner, ex p. Holloway*[1], where it was decided that the discretion of the Commissioner of Police to refuse to issue a cab licence under an Order made in December 1907, under the Metropolitan Public Carriage Act, 1869, was limited to the grounds specified in the Order. In the course of his judgment in that case Cozens-Hardy, M.R., said:

> "Now the Commissioner of Police has a limited authority given to him by the Secretary of State. He is told that in one case, namely (a) he must not grant a licence; and in certain other cases, (b), he may at his discretion refuse. The maxim "Expressio unius" seems to apply. A wide general discretion to refuse is really inconsistent with and negatived by sub-clause (b)".

Farwell, L.J., and Kennedy, L.J., came to similar conclusions. It is clear that the decision in *Holloway's* case turned on the specific provision of the Order which was being considered, which by its terms showed that the Commissioner of Police had not got an unfettered discretion. Lord Goddard in *Parker's* case was doing no more than refer to the conclusion in the particular circumstances of *Holloway's* case. In fact, Lord Goddard goes on to say in the course of his judgment in *Parker's* case:—

> "Indeed, leaving out of account irrevocable licences granted under seal and possibly licences coupled with an interest, the very fact that a licence is granted to a person would seem to imply that the person granting the licence can also revoke it. A licence is nothing but a permission, and, if a man is given permission to do something, it is natural that the person who gives the permission will be able to withdraw the permission."

Parker's case related to the revocation of a licence, and Lord Goddard was directing his attention to the power of revocation, but it seems implicit in the passage cited that the fact that a licence can be granted would seem to imply that it can be refused. If anything, therefore, the words used by Lord Goddard would seem to me to support the proposition that the grant of authority to issue licences, in the absence of any other indication, implies a discretion to refuse the issue of a licence.

I agree with the Chief Justice, however, that the issue must depend very largely on the wording and history of the particular provisions in the Gibraltar legislation.

For the respondents, Mr. Benady argued that the whole of the Ordinance must be looked at and that s. 3 must not be considered in isolation. I agree, but I consider, as, indeed, did the Chief Justice, that it is important also to have regard to the history of the Ordinance.

I turn to the reasons as summarised by the Chief Justice for his conclusion that s. 3 of the Ordinance is mandatory in the sense that the Wireless Officer

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[1] [1911] 2 K.B. 1131.

has a duty to issue a licence on an application being made and the appropriate fee being tendered.

(1) The Chief Justice took the view that s. 3 of the Ordinance as originally enacted was mandatory as it contained the words "to be granted to him." I understand that this had been conceded in the court below, but before us the Attorney General expressed doubt whether this really was the case. He did not, however, argue this matter at any length and, for the purpose of this decision, I assume that the original section was mandatory.

(2) The Chief Justice refers to the discretion given to the Wireless Officer by the new s. 3 of 1958 to impose conditions, while not giving a discretion to refuse a licence. With respect, I would qualify this by saying that the 1958 section did not give an express discretion to refuse a licence. It did also, by subs. (4), give an express discretion to revoke a licence, either individually or generally. It was argued strongly by the Attorney General that absurd results would follow if the Wireless Officer was bound to issue a licence upon application but could thereupon revoke it. I think that there is force in this contention. "The mere fact that the results of a statute may be unjust or absurd does not entitle this court to refuse to give it effect, but if there are two different interpretations of the words in an Act, the Court will adopt that which is just, reasonable and sensible rather than that which is none of these things". *Holmes v Bradfield R.D.C.* [1]. I refer to the passage from Lord Goddard's judgment in *Parker's* case which I have set out above. If a licence is but a permission, it is natural that the person who gives the permission is entitled to withhold it. More especially so where the person giving the permission can revoke it. It would be manifestly absurd that the Wireless Officer, having revoked a licence, should be bound to issue a new licence on application to the holder of the revoked licence. And the absurdity would be even more marked if there were to be a general revocation of a particular type of licence, but the Wireless Officer remained under the obligation to issue a licence of that type to a new applicant immediately after the revocation. The absence of express provision leaves the section ambiguous, but the more reasonable interpretation is that the power to grant includes the power to withhold.

(3) The Chief Justice points out that s. 3 deals with all types of licence and continues that it is difficult to believe that the legislature intended to give the Wireless Officer a discretion to refuse an ordinary television licence to a person who tendered the appropriate fee. With respect, I think that this is putting the matter the wrong way round. The section covers licences as important as broadcasting licences, and the provision for an exclusive broadcasting licence was only introduced in 1963. In the meantime the issue of a broadcasting licence was governed by the general provisions of s. 3. I consider that it can be argued with great force that it is difficult to believe that the legislature intended that the Wireless Officer should have

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[1] [1949] 1 All E.R. 381 at p. 384.

no discretion to refuse a broadcasting licence. The introduction of an exclusive broadcasting licence by subs. (7) in 1963 confirms the importance attached to such a licence.

Some argument was founded on subs. (7) and its introductory words "for the avoidance of doubt", but I would respectfully agree with the Chief Justice, for the reasons which he gives, that the provisions of subs. (7) of s. 3 do not assist.

(4) In (1), the Chief Justice relied on the words "to be granted to him" in the original s. 3 to establish that the section was then mandatory. S. 6 contained a similar phrase. The 1958 amendment resulted in the removal of the phrase from s. 3, but left it in s. 6. On this interpretation of the words "to be granted to him", it may well have been thought that while a discretion had been introduced in 1958 into the grant of all types of licences under s. 3, there still remained no discretion to refuse the grant of a dealers licence under s. 6. There was also no express provision left for an authority competent to issue dealers' licences. This would account for the introduction in 1963 of authority for the Wireless Officer to grant a dealer's licence and of an express discretion for him to refuse a licence, and, for that matter, to attach conditions and revoke a licence. Whether this be so or not, I do not consider that the amendment of s. 6 in 1963 could operate to alter the interpretation to be put on s. 3. It could, it is true, give an indication of the meaning which the legislature attached to s. 3, but it did not purport to amend s. 3, and I consider that the meaning of s. 3 is to be ascertained at the time it was enacted. This can be better ascertained by reference to the situation at that time, than from any implication to be drawn from the later amendment.

(5) As I have already indicated, I do not consider that the Ordinance in its present form can be considered in isolation. The history of the amendments introduced must be considered. In the circumstances affecting the Ordinance, I do not, with respect, consider that a significant inference in relation to s. 3 can be drawn from s. 6 in its present form. The comparison must be made with s. 6 as it stood in 1958, and at that time it contained words which suggested that it was mandatory. It would be a legitimate inference that the removal of the corresponding words from s. 3 were intended to make s. 3 discretionary.

In the result I do not find any convincing argument, based on the Ordinance itself and its history, to show that the legislature did not intend that the Wireless Officer should have a discretion as to the issue of a licence under s. 3. On the other hand, the removal from the section of the words "to be granted to him" by the 1958 amendment, and, more particularly, the giving by that amendment of an unlimited discretion to revoke, to my mind indicates that it was accepted by the legislature that the power to grant a licence in s. 3 included a power to refuse the grant.

I draw support for this view from *Congreve's* case (supra.) As stated above, s. 3 of the Ordinance as introduced in 1958 is a reproduction (with

minor alterations which are not relevant) of s. 1 of the English Wireless Telegraphy Act, 1949. It is true that the issue before the court in *Congreve's* case was one of revocation of a television licence under s. 1, so that comments on the discretion to grant a licence were obiter. Nevertheless considerable reference was made to the discretion to grant a licence, and it was clearly accepted without question that the section gave a discretion to refuse a licence. At p. 305 of the Report Lord Denning said, in reference to s. 1 of the Wireless Telegraphy Act, 1949:—

> "Undoubtedly those statutory provisions give the Minister a discretion as to the issue and revocation of licences."

And at p. 316 Geoffrey Lane, L.J. said:—

> "The Minister is by s. 1 of the Wireless Telegraphy Act, 1949 given discretion: (1) whether to grant a licence or not (2) on what terms and for what period to grant it if he does (3) to revoke it or vary it".

In Halsbury's Laws of England (3rd Ed.) Vol. 36 at p. 704 it is stated, in reference to s. 1 of the English Act, that "The Postmaster General has discretion to refuse to grant or renew a licence", and a footnote adds that this arises by implication from s. 4 of the Act. The Ordinance does not contain any provision corresponding to s. 4 of the English Act (which gives special privileges to experimental licences in that in general the Postmaster General is precluded from refusing to grant or renew and from revoking such licences); and it was argued that in the absence of a corresponding section in the Ordinance s. 3 must be construed as mandatory. The learned author does not cite any authority for the statement in the footnote, and the learned judges in *Congreve's* case did not refer to s. 4 of the Act. I would, however, respectfully agree that s. 4 of the Act makes it plain that the legislature intended s. 1 of the Act to confer power to withhold the issue of a licence. S. 4 does not add to the powers granted by s. 1 in relation to licences other than experimental licences, but puts beyond doubt the interpretation the legislature intended should be placed on the provisions in s. 1, which might otherwise be considered ambiguous. It appears to me to be a legitimate inference that, when the Gibraltar legislature adopted the English section it intended the same interpretation to be put on the section as it carried in England, even though it did not also adopt the English s. 4. Further, by not adopting the English s. 4, the legislature in Gibraltar left experimental licences to be dealt with under the general provisions of s. 3 of the Ordinance, and, in fact, a form of experimental licence is prescribed in the regulations made under the Ordinance. Although the English s. 4 restricts the powers of the Postmaster General to refuse to grant, or to revoke, experimental licences, in subss. (3) and (4) it preserves the powers to refuse to grant and to revoke in certain important contingencies. Subs. (4) in particular preserves those powers in case of the existence of a national emergency. Can it be supposed that, because it did not see fit to give experimental licences a special status, the Gibraltar legislature did not intend the safeguards to apply? Surely the inference must be that the

legislature considered that s. 3 already contained the necessary safeguards.

In view of all these considerations, I have come to the conclusion that the power to grant a licence contained in s. 3 of the Ordinance includes a discretion to refuse the grant of a licence. I would therefore allow the appeal with costs and set aside the order of mandamus.

I would, however, add the warning that, in my view, the decision in *Congreve's* case establishes that the discretion under s. 3 of the Ordinance, whether it be in relation to revocation or to refusal to grant or renew, is fettered to the extent that the courts would intervene if it were exercised arbitrarily or improperly.

Bourke, J.A.: The sole question arising is whether the granting of a licence under s. 3 of the Wireless Telegraphy Ordinance is discretionary or not. The Wireless Officer refused to grant the licences sought by the respondents. He did not give any reasons for the refusal but there is no suggestion in these proceedings that he did not act upon legitimate grounds. The case made throughout for the respondents is that the licensing authority, that is, the Wireless Officer, had no option: once an application for a licence was made and the requisite fee proffered, it was obligatory for him to grant the licence and he had no power to refuse such grant.

If that is the law, as was put forward by the Attorney-General, a strange state of affairs could arise having regard to the provisions of the section. The Wireless Officer is empowered to grant a licence subject to such terms, provisions and limitations as he may think fit (s. 3 (2)); he may also revoke a licence or vary the terms, provisions or limitations thereof. If there be no discretion in the matter of granting a licence then, as is contended, a situation could arise in which a licence is revoked for good reasons and the licensee could nevertheless immediately obtain a fresh valid licence which would, no doubt, be revoked again on the same good grounds — one could have a continuing process of this nature, which would be absurd and tend to render legislative control ineffective. A construction, it is said, resulting in anything so incongruous should not be accorded to the section and would not reflect the intention of the Legislature as expressed through all its provisions.

The case of *Congreve v Home Office* recently decided by the Court of Appeal in England has been of much assistance. In that case s. 1 of the Wireless Telegraphy Act, 1949, was considered and it, as everyone recognises, is equivalent to s. 3 of the Ordinance. It was a decision in which the proper exercise of the power of revocation of a licence was in issue and, as it seems to me, not directly whether the grant of a licence was discretionary or mandatory — a question that, as far as one can gather from the report, was not the subject of argument. Since that is the way I see it, I do not think

that, as has been submitted, *Trimble v Hill*[1] falls to be applied. But clearly it was the view of the court that the grant of a licence under s. 1 was discretionary having regard to the provisions of that section: there was no reference to s. 4 (which does not occur in the Ordinance) which the learned editors of Halsbury, 3rd Ed. Vol. 36 p. 704 para. 1117 and note (k) opine is the basis by implication for regarding the grant of a licence as being at the discretion.

The Chief Justice and counsel engaged below were at a disadvantage in that they did not have the benefit of the full report of the *Congreve* case for reference. If they had, learned counsel for the respondents would surely not have felt able to maintain his submission that there was anything "ambiguous" or contradictory in what was said by the Master of the Rolls; and it would have been apparent to all concerned that it was not the view expressed in Halsbury with reference to s. 4 that served as the foundation for the conclusion that the Minister was given a discretion as to the issue of licences. What Lord Denning, M.R., did say was that "those provisions", which was a reference to s. 1 of the English Act, gave a discretion as to the issue and revocation of licences: the judge went on to say that as to a first licence an applicant would be entitled to its issue because the Home Secretary could not possibly refuse him as there would be no legitimate ground on which he could exercise his discretion to refuse. There is the clearest distinction between those two propositions.

Mr. Benady for the respondents has argued that one should construe s. 3 of the Ordinance by looking at the whole of the enactment and also by taking into account the history of the legislation: it is the Gibraltar provision with which we are concerned and not those under the English Act. There is nothing equivalent to s. 4 of the English Act in the Ordinance and there is s.6 which the court below accepted was strongly in support of an implication that s. 3 was mandatory.

The original Ordinance was the Wireless Telegraphy Ordinance, 1951, (No. 18 of 1951). Section 3 of that statute was concerned with the granting of wireless licences and s. 6 with the granting of licences to dealers in wireless apparatus. It was apparently not in contest below that the terms of these two sections made the granting of licences mandatory, though the Attorney General now suggests that there is some doubt about it, at all events in regard to s. 3. The latter section does provide that the licence be granted on such terms and conditions as the Governor may prescribe. There is no such provision under s. 6. Neither section provides for a revocation of the licence. I think that the granting of licences under those early sections could properly be held to be mandatory.

Then there came the Wireless Telegraphy (Amendment) Ordinance, 1958, (No. 13 of 1958). Thereunder s. 19 of the English Act of 1949 (concerning interpretation) was adopted as s. 2 and, mutatis mutandis, s. 1

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1 (1879) 5 App. Cas. 342.

of that Act as s. 3. A further amending Ordinance, the Wireless Telegraphy (Amendment) Ordinance, 1963, (No. 7 of 1963) added by s. 2 a subsection to s. 3 of the Ordinance and altered s. 6 of the Ordinance by expressly making the grant of dealers' licences discretionary and empowering the Wireless Officer to issue such licences subject to such terms, provisions and limitations as he may think fit and also enabling him to revoke such a licence. We have, then, s. 3 corresponding to s. 1 of the English Act and s. 6 providing in terms for a discretionary power. Between 1958 and 1963 there was s. 3 in its present form governing the licensing of wireless telegraphy and s. 6 excluding the exercise of a discretion in respect of another kind of licence. Because s. 6 was amended to provide for a discretionary power in 1963, I fail to appreciate how the effect could be to alter by implication the character of s. 3 assuming that it did provide for the granting of licences at the discretion of the appropriate authority.

The reason for regarding the equivalent s. 1 of the English Act as giving a discretion is not spelt out in *Congreve's* case: it hardly needed to be, for surely the reason is that where the licensing authority is given power to grant a licence subject to such conditions and limitations as he may think fit and to revoke a licence or vary the conditions and limitations either particularly or generally in respect of licences of a class, it would be incongruous, to say the least, to ascribe to the Legislature the intention to leave no discretion with the Wireless Officer as to the granting of licences. I do not consider that the words of the Ordinance reflect any such intention which could result in the ridiculous situation of fluctuating control that has been observed.

As to the absence of anything equivalent to s. 4 of the English Act in the Ordinance, it is no doubt for the good reason that it was not necessary to include such provision in the law of Gibraltar. In relation to the question arising for decision, the absence of such a provision concerning experimental research in wireless telegraphy is surely neither here nor there.

In my opinion the grant of licences under s. 3 of the Ordinance is discretionary.

I would allow the appeal with costs.

Hurley, J.A.: In 1974 the first respondent applied for a licence to operate a walkie-talkie system in respect of 10 taxi-cabs, and in June 1974 the Wireless Officer issued a licence under s. 3 of the Wireless Telegraphy Ordinance to the first respondent which, it seems was intended and accepted as, and which is now agreed to have been, the licence requested. Licences granted under the Ordinance are annual licences in force until 30 September, and the licence granted in June 1974 was renewed in October 1974. On 8 July 1975 the Wireless Officer asked the first respondent to state the registration numbers of the 10 taxis which operated walkie-talkies and the names of their drivers. The first respondent supplied the information on 7 August, naming the other 10 respondents. On 23 October in a private prosecution in the magistrates' court against the 10 drivers it was held that

an individual licence was necessary for each driver, and on the same day the first respondent wrote to the Wireless Officer requesting "the renewal of (her) licence and the issue of individual licences for" the other 10 respondents. The Wireless Officer replied on 28 October saying he did not propose to grant the application, and the respondents applied for an order of mandamus, directing the Wireless Officer to issue to each of them a licence under s. 3 of the Ordinance to operate a walkie-talkie system in connection with their taxi-cabs, on the ground that the Wireless Officer had no power under s. 3 to refuse such a licence. The application was granted, and the Wireless Officer now appeals against the decision, on the ground that the order of mandamus was wrong in law in that the grant of a licence (other than a broadcasting licence) under s. 3 is not mandatory in the sense that the Wireless Officer has a duty to issue a licence on an application being made and the appropriate fee being tendered by the applicant, but is discretionary.

I do not think that by this ground it is suggested that the grant of a broadcasting licence is mandatory; broadcasting licences form a special class, in that the Wireless Officer may grant an exclusive broadcasting licence under s. 3 (7) of the Ordinance from which it follows that he may, by granting such an exclusive licence, preclude himself from exercising the discretion in regard to future applications for broadcasting licences.

The question then is whether by the terms of the Ordinance the grant by the Wireless Officer of a licence of the kind in question in this case, which is not a broadcasting licence in the popular sense but is a licence for the transmission of wireless messages as well as their reception, is mandatory or discretionary.

There is considerable force in the observation of the Attorney General that the word "licence" in itself connotes permission granted at the will and discretion of the grantor. In *R. v Metropolitan Police Commissioner, ex p. Parker*, Lord Goddard said "a licence is nothing but a permission", and went on to draw attention to the discretionary character of the power of revocation naturally implied in the grant of a licence. But licences granted under statutory powers of licensing, licences required by law, are in most cases permissions to do what the subject would have been at liberty to do but for the enactment of the statute prohibiting him from doing it without a licence. Where the relevant statute is ambiguous, therefore, it is proper to consider whether on a true construction of the statute the granting of the licence to an applicant who satisfies the prescribed conditions is not mandatory, rather than discretionary, and, in an appropriate case, how wide the discretion is, in what respects it is fettered, and on what principles it should be exercised.

Statutory licences are prescribed in respect of a number of different activities, in some cases for the main purpose of regulating the activities, but in others mainly for fiscal or revenue purposes. Examples of the first sort are liquor licences and licences under the Explosives Ordinance; examples of the second sort are motor vehicle licences (in England formerly known as Road Fund licences), at any rate for private cars, and television licences in

England, by means of which the British Broadcasting Corporation is financed. In proportion as the purpose of a system of statutory licensing is regulatory, its effective operation requires the licensing power to be discretionary, vice versa; and where the purpose is mainly fiscal the external considerations for not construing as mandatory a licensing power expressed in ambiguous terms may well be slight.

The licences which may be granted under the Wireless Telegraphy Ordinance, however, are of both sorts, some mainly regulatory, some mainly fiscal. The licensing of wireless broadcasting stations is necessary for regulatory purposes, as anyone who has listened in on the medium wavelengths in Europe after dark can appreciate, and much the same will be true of wireless transmission stations which are not broadcasting stations in the narrow sense, such as the walkie-talkie in this case; the licensing of wireless receivers, on the other hand, appears to have a mainly fiscal purpose. But s. 3 of the Ordinance, in providing for the licensing of wireless telegraphy, defined in s. 2 so as to include both transmitting and receiving by wireless, is so expressed as to apply without distinction and with equal force and effect to both sorts of wireless telegraphy, and the power of granting wireless telegraphy licences which is implied by it relates to wireless telegraphy licences of every kind. It does not seem that the granting of licences can have been intended to be mandatory in the case of one sort of licence and discretionary in the case of another. If that had been the intention, the legislature could have used express words to state its intention in regard to each kind of licence, as it has done in s. 6 (3) in regard to licences to deal in wireless apparatus which, incidentally, are something quite different from wireless telegraphy licences. The court cannot legislate by introducing distinctions which the legislature itself has not made. On the other hand, the court, when the question is before it, can say whether there has been a lawful and proper exercise of a discretion in relation to the grant of any particular sort of licence in any particular case. Upon those considerations, and adapting the words of Cozens-Hardy, M.R., in *R. v Metropolitan Police Commissioner, ex p. Holloway,* to suppose that the legislature intended to remove it entirely from the discretion of the Wireless Officer to refuse a licence of any particular kind is, to say the least, rather startling.

Thus if the Ordinance is ambiguous as to whether the granting of licences is mandatory or discretionary, external considerations point to a construction which will give effect to a necessary intention of making the grant discretionary. I think the conclusion that it is discretionary also follows from an examination of the relevant provisions of the Ordinance as they were first enacted and subsequently amended to their present form. Section 3 as it now stands is ambiguous. By subs. (1), the licence which is required is one granted by the Wireless Officer. This tells us that the Wireless Officer is the authority who grants the licence, but it does not tell us whether he may grant it in his discretion or must grant it. But s. 3 first appeared in its present form in 1958; as it was first enacted, in 1951, it provided in subs. (1)

for a licence "to be granted...under the provisions of this Ordinance and on payment of such amount...as the Governor may prescribe". This too was ambiguous; did "to be granted" mean "which shall be granted" or "which will be granted"? Nevertheless, the 1951 subsection had a mandatory colour; it savoured more of shall than of will. The change to the comparative neutrality of the subsection as it is now expresed is indicative of an intention to exclude the suggestion that the grant of licences is mandatory.

Even more significant is the amendment of s. 13 (as it then was; it is now s. 12) effected by the same amending Ordinance of 1958. As enacted in 1951, s. 13 read:

> "(1) Licences under this Ordinance shall be granted by the Wireless Officer who shall keep a register in which he shall enter the particulars of every licence granted by him.
>
> (2) Every licence granted under this Ordinance shall expire on the 31st March following the date of issue".

Here again there can be seen an ambiguity; does subs. (1) mean that the Wireless Officer must grant licences, or merely that he is to be the authority who will grant them and to whom application should be made? In 1958 the section was amended to read simply "The Wireless Officer shall maintain a register in which he shall enter the particulars of all licences granted by him under the provisions of this Ordinance", and subs. (2) was replaced by subs. (3) of the new s. 3, which reads "A Wireless Telegraphy licence shall, unless previously revoked by the Wireless Officer, continue in force until the 31st March next following the date of issue" and is followed by provision in subs. (4) for the revocation of licences. The intention to exclude a construction which would make the granting of licences mandatory is fully apparent.

The amendment of s. 13 left the Ordinance silent as to the authority who was to grant dealers' licences under s. 6, which provided in subs. (1):

> "It shall not be lawful for any person to sell or deal in wireless apparatus without first obtaining a licence in that behalf to be granted to him under the provisions of this Ordinance, and on payment of such amount as the Governor may prescribe".

In 1963 the section was amended by adding subs. (3), which stated that "the Wireless Officer may in his discretion grant a licence to deal in wireless apparatus or refuse to grant such a licence". At the same time subs. (1) was amended by deleting the words "to be granted to him". This supports the view that the expression "to be granted" in ss. 3 (1) and 6 (1) as originally enacted was considered at least to have a mandatory complexion, so that if allowed to remain in subs. (1) of s. 6 it might make the subsection conflict with the new subs. (3) of that section. It is submitted on behalf of the respondent that the omission in 1963 to amend s. 3 (1) by expressly giving the Wireless Officer a discretion in regard to the grant and revocation of wireless telegraphy licences, in terms similar to those used in regard to

dealers' licences in the new subs. (3) of s. 6, shows that even after 1958 the grant of wireless telegraphy licences was intended to be mandatory. Against that, it may be said that s. 3 (1) was left unamended in 1963 because it already, as substituted in 1958, expressed an intention that the grant should be discretionary, so that no amendment was necessary. I do not think that this is one of those cases in which subsequent legislation (the 1963 Ordinance) can be used to establish the legislature's intention in an earlier enactment (the 1958 Ordinance), but if the omission to amend s. 3 (1) in 1963 is to have any significance, it will not necessarily be that the grant of licences was intended to be mandatory.

The Ordinance is in pari materia with the Wireless Telegraphy Act, 1949 of the United Kingdom, and subss. (1) — (4) of s. 3, which deal with the grant and revocation of licences, are in substantially the same terms as subss. (1) — (4) of s. 1 of the Act. In *Congreve v Home Office*, the question was whether a television receiving licence had been lawfully revoked, and the Court of Appeal had the provisions of s. 1 (1) — (4) of the Act under consideration. For the Home Office it was contended, inter alia, that the Secretary of State had an unfettered discretion to grant or withhold a licence unless, as was conceded, the refusal was wholly arbitrary, and none of the learned judges of the Court of Appeal disagreed with this submission to the extent of saying that the grant of a licence was mandatory. Lord Denning, M.R., said [1] : "Undoubtedly those statutory provisions give the Minister a discretion as to the issue and revocation of a licence. But it is a discretion which must be exercised in accordance with the law ..." Roskill, L.J., after discussing a hypothetical case which he had raised during the argument of the appeal, said [2] : "...I wish to make it clear that for my part I am not without further argument accepting that the Secretary of State in such a case has such an unfettered discretion ..." And Geoffrey Lane, L.J., said [3] : "The Minister is by s. 1 of the Wireless Telegraphy Act 1949 given a discretion: (1) whether to grant a licence or not..."

Allowing that these dicta were all obiter, nevertheless they lend very strong support to the view which I feel bound to take, that the granting of wireless telegraphy licences under the Wireless Telegraphy Ordinance lies in the discretion of the Wireless Officer, and is not mandatory.

It is true that in Halsbury's Laws of England (3rd Ed.), Vol. 36 para. 1117, the statement at page 704 that "the Postmaster-General has discretion to refuse to grant or renew a licence" is supported by a footnote which says that this arises by implication from s. 4 of the Act, and s. 4 of the Act, which provides that the Postmaster-General (now the Minister) shall not refuse to grant, renew or revoke certain experimental licences, has not been introduced into the Ordinance. Relying on the footnote, the respondents contend that the granting of licences under the Ordinance is

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1 At p. 305.
2 At p. 313.
3 At p. 316.

mandatory because the Ordinance does not contain the provisions in which Halsbury finds the implication that the grant is discretionary. But the implication does not arise because s. 4 has the effect of making the powers conferred by s. 1 of the Act discretionary; it arises because the fact that s. 4 had to be enacted to make special provision for experimental licences shows that the powers conferred by s. 1 are discretionary by virtue of s. 1 itself. And s. 3 of the Ordinance is, with immaterial exceptions, in the same terms as s. 1 of the Act. Nor was s. 4 of the Act noticed at all in *Congreve v Home Office* as supporting what was there the general opinion that the grant was discretionary.

For these reasons, it is my opinion that the appeal should be allowed with costs.