

*Introductory Note by Francis Bennion*

The following article discusses a case on whether the Real IRA is a proscribed organisation. After the article was published the decision was reversed on appeal, in a way corresponding to the view expressed in the article. See the further article [2004.020](#)

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**Is the Real IRA a Proscribed Organization?**

**FRANCIS BENNION\***

**A Surprise Ruling**

Real IRA held not to be terrorists! Thus the headlines (inaccurate as always, but true in substance), on the morrow of Mr Justice Girvan's ruling that the Real IRA is not included in Schedule 2 to the Terrorism Act 2000, and therefore is not a "proscribed organization". Charges against four men of being members of the Real IRA were promptly dropped.

Reuters reported on 28 May 2004 that Girvan J's surprise ruling was an embarrassment for the Government, which had assumed that the Real IRA, a breakaway faction of the mainstream Irish Republican Army, was among the Northern Irish armed groups banned under anti-terrorism laws. The Reuters report continued-

"Clearing four men of charges of Real IRA membership, Girvan said that because the organization was not specifically named in a list of proscribed groups in the Terrorism Act 2000 it was not illegal. He rejected the prosecution argument that the mainstream IRA's listing applied equally to its dissident off-shoots.

"The Real IRA split from the mainstream IRA after the latter called a ceasefire in 1997. In August 1998, the Real IRA killed 29 people when it detonated a car bomb in the market town of Omagh, the bloodiest attack in three decades of violence in the province.

"The name 'Real IRA' was coined by the media to distinguish the group from both the mainstream IRA and another dissident faction, the Continuity IRA, and has been widely adopted in political and security circles. The small band of militants who make up the group usually call themselves 'Oglaigh na hEireann', the Irish name literally meaning 'army of Ireland' also used by the mainstream IRA."

**The DUP View**

On 2 June 2004 the Democratic Unionist Party issued the following statement-

"The Secretary of State must act to clear up the mess which has been exposed by the ruling that the Real IRA is not an illegal organization. The decision by Mr Justice [Start of page 473.]

Girvan that the Real IRA is not proscribed as a terrorist group under the Terrorism Act 2000 has highlighted a major flaw in the present anti-terrorism legislation. It has allowed those believed to be involved with the organization to evade conviction of the offence of membership of a proscribed organization on what is clearly a technicality. It is essential that the Secretary of State comes to the House of Commons to explain how this situation came about, to explain what went wrong and to take the necessary steps to

prevent this situation reoccurring. Indeed this very issue was raised during the course of the passage of the Bill in Standing Committee D on Tuesday 25 January 2000.

**“Mr. Simon Hughes:** I wish to test two points that follow on from what the Minister said. As of now, would proved members of Continuity IRA be covered by the schedule? In other words, in a court case, is the advice to Ministers that a member of Continuity IRA would be caught by the list?

**“Mr. Ingram:** On the question of Continuity IRA, I draw the hon. Gentleman's attention to the fact that the provisional IRA is not listed because the Irish Republican Army covers the whole gambit. We have had the best legal advice on that and the Real IRA, Oglagh na hEireann, as it calls itself—its use of the IRA name—is that that would be covered by the blanket name Irish Republican Army, although I cannot say what a court would decide.

“It is clear that the Government’s view on this issue in Parliament was misleading and as a result possible convictions have fallen through. Adam Ingram admitted at the time ‘it is not clear what a court would decide’ yet the Government proceeded to legislate on this basis rather than to cover any possible loophole. This was a reckless approach to take resulting in the decision of the Judge.

“It was bad judgement that this grouping was not specifically proscribed in the Schedule to the Act. Indeed only ‘The Irish Republican Army’ is mentioned without any particular mention of the Provisional IRA, the Continuity IRA, or the Real IRA. It is vital that immediate steps are taken to ensure that all of these groups are brought within the remit of the provisions of the Terrorism Act before anyone else escapes conviction on these grounds.”

## **A Problem for NESSSI**

Mr Justice Girvan’s ruling sets up a nice problem in statutory interpretation. Let’s see if we can work out, with NESSSI’s help, how the appeal should result. We can achieve a confident forecast here if we know what we are about. This is a matter for scientific exploration of precision drafting. There should not be any doubt at all.

I decided to give the name NESSSI, short for New Scientific System of Statutory Interpretation, to the method set out in my textbook *Statutory Interpretation* (4<sup>th</sup> edn, 2002), to which I shall refer in this article as “SI”<sup>1</sup>. The method I am calling NESSI shows you that a problem like this needs to be tackled step by step, scientifically. The first step is always to find out and set down the exact wording of the doubtful enactment, stripping it of unnecessary words.

An enactment is a legal proposition laid down in an Act or other legislative text with the effect that, when the facts fall within an indicated area called the factual outline, specified legal consequences called the legal thrust are called forth.<sup>2</sup>

Here the doubtful enactment is made up of the following words in the Terrorism Act 2000 section 3(1): “For the purposes of this Act an organization is proscribed if it is listed in Schedule 2 or it operates under the same name as an organization listed in that Schedule” coupled with the following words in Schedule 2: “The Irish Republican Army”. For convenience of discussion this can all be set out in the following formula (“the disputed formula”), which uses the statutory words but is clearer in form-

(1) For the purposes of this Act an organization is proscribed if

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<sup>1</sup> The method is not really new, but presents a novel rationalization of existing rules, principles, presumptions and linguistic canons.

<sup>2</sup> SI section 138.

- (2) it is listed in Schedule 2, or
- (3) it operates under the same name as an organization listed in Schedule 2.

*Schedule 2*

\* \* \*

The Irish Republican Army

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The doubt is whether or not the factual outline thus engendered embraces the Real IRA, or in other words whether that body is comprised in the description “The Irish Republican Army”. The opposing constructions<sup>3</sup> are:

- A. The Real IRA is comprised in the formula “The Irish Republican Army”.
- B. The Real IRA is not comprised in the formula “The Irish Republican Army”.

NESSSI says what we should do next is conduct a careful examination of the wording of the doubtful enactment, and its surrounding words in the Terrorism Act 2000, in order to pick up clues.

### **The Legal Thrust**

We must never neglect the nature of the legal thrust, says NESSI. That tells us the significance of the opposing constructions. So what here is the legal thrust, that is the precise legal effect of an organization’s being labelled a proscribed organization?

Sections 11 to 13 of the Terrorism Act 2000, headed “Offences”, deal with membership, support and uniform. A person commits an offence if he belongs or professes to belong to a proscribed organization, does a specified act in support of a proscribed organization, or wears the uniform of a proscribed organization. So that is the legal thrust.

Next we should ask what is meant by the word “organization”. A body cannot be a proscribed organization unless it is an “organization” to start with. Section 121 of the Terrorism Act 2000 says that “organization” includes any association

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or combination of persons. So what association or combination of persons is intended to be denoted by the words “The Irish Republican Army”?

Use of the definite article suggests that only one “organization” is intended to be referred to here. Section 6(c) of the Interpretation Act 1978 says that, unless the contrary intention appears, words in the singular include the plural. The contrary intention does appear here. The use of specific language and capital initials indicates that one distinct body only is picked out: the body known as the Irish Republican Army.<sup>4</sup> The difficulty is that there are at least three bodies that might be intended, as the DUP statement points out: the Provisional IRA, the Continuity IRA and the Real IRA. It seems that none of them actually uses the name Irish Republican Army. Reuters, as mentioned above, say that the small band of militants who make up the Real IRA usually call themselves ‘Oglaigh na hEireann’, the Irish name literally meaning ‘army of Ireland’ also used by the mainstream IRA. As we have seen, the same was said by a Government Minister Mr Ingram in relation to the continuity IRA.

So the question which Irish Republican body is meant to be labelled a proscribed organization is what is usually called a dog’s dinner. Can NESSI help further? Here one should run through the various rules, principles, presumptions and linguistic canons that make up the

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<sup>3</sup> For the opposing constructions see SI section 149.

<sup>4</sup> A body which operated under the same name as The Irish Republican Army would also be included (see above).

interpretative criteria.<sup>5</sup> Prominent among them is the principle against penalisation under a doubtful law.<sup>6</sup> This runs as follows, and is alone sufficient to justify the ruling by Brennan J-

It is a principle of legal policy that a person should not be penalised except under clear law (the principle against doubtful penalisation). The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. It should therefore strive to avoid adopting a construction which penalises a person where the legislator's intention to do so is doubtful, or penalises him or her in a way which was not made clear.

### ***Pepper v Hart***

The disputed formula is obviously ambiguous or obscure, which allows us to apply the rule in *Pepper v Hart*.<sup>7</sup> Under this, reports of the parliamentary proceedings relating to the passage of the Bill which became the Terrorism Act 2000 may be consulted. I mentioned above that Adam Ingram MP, the Armed Forces Minister, said in Standing Committee during the passage of the Bill that:

“ . . . the Provisional IRA is not listed because the Irish Republican Army covers the whole gambit. We have had the best legal advice on that and the Real IRA, Oglai na hEireann, as it calls itself—its use of the IRA name—is that that would be covered by the blanket name Irish Republican Army”.

This clearly indicates that it was the Government's intention when drafting the Bill for the Terrorism Act 2000 that the term “Irish Republican Army” in Schedule 2 should include the Real IRA. Does that decide the matter?

### **Conclusion**

The parliamentary materials may show that the Government intended the Real IRA to be a proscribed organization. However the test is not what the Government intended, but what Parliament is to be taken to have intended.<sup>8</sup> In a penal matter, a person can be validly convicted only if he has contravened a provision of which the legal meaning is clear beyond reasonable doubt. That is not the case here, so the appeal court should uphold Mr Justice Girvan's ruling.

*Note* See 2004.020. The House of Lords decided against the view expressed in these two articles: see *R v Z* [2005] UKHL 35, [2005] 3 All ER 95.

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<sup>5</sup> See SI section 180.

<sup>6</sup> SI section 271.

<sup>7</sup> SI section 217.

<sup>8</sup> SI section 163.