

Introductory Note by Francis Bennion

The following article disagrees with the decision on appeal in a case on whether the Real IRA is a proscribed organisation. The article contains a detailed example of the working out of a statutory interpretation exercise according to the NESSSI method.

After the article was published the decision was upheld by the House of Lords (see *R v Z* [2005] UKHL 35, [2005] 3 All ER 95), contrary to the view expressed in the article.

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The Real IRA Is Proscribed After All

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Another Surprise Ruling

In an article earlier this year¹ I argued that Girvan J was right to hold, in what might have seemed a surprise ruling until you looked at the law, that the Real IRA is not a proscribed organisation under the Terrorism Act 2000. Now I have to report that he has been surprisingly reversed by the Northern Ireland Court of Appeal (NICA).² I am informed by Mr Kevin Winters, solicitor for the appellant Mr Kevin Murphy, that the NICA have given leave for an appeal from their decision to the House of Lords, and that it is intended that this appeal will go ahead.

The reversal by the NICA is surprising because there are strong arguments in favour of the original decision, which are set out in my previous article. In the present article I describe the NICA decision and assess its correctness. First I need to state the problem.

A Statement of the Problem

Following the ruling by Girvan J, a number of defendants who had been charged under the Terrorism Act 2000 with belonging to the Real IRA, described as a proscribed organisation, were acquitted on the ground that it is not that. The Terrorism Act 2000 says-

- 3(1). For the purposes of this Act an organisation is proscribed if
- (a) it is listed in Schedule 2, or
 - (b) it operates under the same name as an organisation listed in that Schedule.

Schedule 2

The Irish Republican Army

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¹ 168 JP (19 June 2004) 472.

² *R. v Z*. [2004] NICA 23. In the Matter of a Reference under Section 15 of the Criminal Appeal (Northern Ireland) Act 1980, ref. KERC5003. Judgment delivered 30 June 2004.

A body cannot be a proscribed organisation unless it is an “organisation” within the meaning of the 2000 Act. Section 121 of the Act says that “organisation” includes any association or combination of persons.

What association or combination of persons is intended to be denoted by the words “The Irish Republican Army” in Schedule 2? Use of the definite article indicates that only one “organisation” is intended to be referred to. Similarly with the phrase “the same name” in section 3(1)(b). The latter also indicates that the description in Schedule 2 is the “name” of the organisation in question.

In other words the listed (and therefore proscribed) organisation has the name “The Irish Republican Army”. The difficulty with this is that there is no such body, as indicated by the following passage from the single judgment of the NICA-

“Judicial notice can be taken of the fact that until 1969 an organisation calling itself the Irish Republican Army existed as a cohesive unit . . . In or about 1969 a major split in the ranks of the IRA occurred. Some members of the organisation, claiming to be true inheritors of the mantle of the IRA, in effect declared a ceasefire in 1972. This group became known as the Official IRA. Other members of the organisation continued to assert the right to and signalled their intention to continue to use violence to achieve the reunification of Ireland. This group became known as the Provisional IRA. The two organisations existed independently of each other thereafter . . . Dissident groups within PIRA opposed [certain] moves. In late 1997 one group dissociated itself from the Provisional leadership and styling itself the “Real” IRA declared that the ceasefire was over. It has since claimed responsibility for a number of violent incidents, most notoriously the bombing of Omagh in August 1998 which killed 29 people and two unborn children.”³

This indicates that when the Terrorism Act 2000 was passed there was no organisation in existence with the name “The Irish Republican Army”. That body had earlier split into two distinct bodies, the Official IRA and the Provisional IRA. In turn some members of the latter had broken away, calling themselves the Real IRA.

So the 2000 Act, which is penal in nature, is purporting to proscribe a body which was well known to be no longer in existence when the Act was passed. This poses a problem which brings to bear conflicting interpretative criteria.

Applying NESSSI

In the previous article I mentioned my system known as NESSSI, short for New Scientific System of Statutory Interpretation, based on the method set out in my textbook *Statutory Interpretation* (4th edn, 2002), to which I shall refer in this article as “SI”. Under the NESSSI system, which relates of course to the established methods of statutory interpretation but treats them more scientifically, it is first necessary to identify all relevant interpretative criteria.

The interpretative criteria derive from statutory and other rules, principles of legal policy, presumptions arising from the nature of legislation, and linguistic canons of construction. Having identified those that are relevant it is then necessary to arrive at what they have to say concerning the immediate problem, consider the weight each one has in that regard, and then carry out a balancing exercise.

The precise problem in the present case was posed to the NICA by the Attorney General for

³ NICA judgment, paras. [28]-[30].

Northern Ireland as follows-

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“Does a person commit an offence contrary to section 11(1) of the Terrorism Act 2000 if he belongs or professes to belong to the ‘Real’ Irish Republican Army?”⁴

The answer turns entirely on whether the Real IRA is a proscribed organisation, so I turn to consider the arguments for and against. My book *Statutory Interpretation* consists of a code with numbered sections followed in each case by a detailed commentary. I will now set out the relevant sections of the book, and follow each one with brief comments.⁵ I begin with the sections favouring the view that the Real IRA is proscribed.

Arguments indicating that the Real IRA is proscribed

The following are placed in order of relevance, rather than in numerical order.

316. The court seeks to avoid a construction that produces a futile or pointless result, since this is unlikely to have been intended by Parliament.

There is a maxim that Parliament does nothing in vain, a principle also expressed as *lex nil frustra facit* (the law does nothing in vain). It would be in vain to specify The Irish Republican Army if this phrase were held to have no meaning.

374. Where the legislator makes use of a meaningless term, the court must do its best to arrive at the meaning most likely to have been intended.

As the IRA as such had ceased to exist before the passing of the Terrorism Act 2000 the reference to it in Schedule 2 could be said to be meaningless, but the court must do its best to find a meaning.

289. Parliament intends that an enactment shall remedy a particular mischief. It is presumed therefore that Parliament intends the court, in construing the enactment, to endeavour to apply the remedy provided by it in such a way as to suppress that mischief.

The mischief here was the existence of terrorist organisations. The Real IRA is undoubtedly a terrorist organisation, and therefore within the scope of the mischief aimed at by the Act. However Parliament does not always legislate for the whole width of a given mischief.

319. It is the duty of a court to further the legislator’s aim of providing a remedy for the mischief against which the enactment is directed. Accordingly the court will prefer a construction which advances this object rather than one which attempts to find some way of circumventing it.

This states the courts’ desire to prevent evasion of an Act. It could be said to advance the object of the 2000 Act, and prevent evasion, to treat the Real IRA as included in Schedule 2.

⁴ NICA judgment, para. [3]. 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 organisation, does a specified act in support of a proscribed organisation, or wears the uniform of a proscribed organisation.

⁵ The detailed commentary to each section as printed in SI gives the authority for the section, but there is not space to reproduce that here.

303. Parliament is presumed to intend that in construing an Act the court, by advancing the remedy which is indicated by the words of the Act for the mischief being dealt with, and the implications arising from those words, should aim to further every aspect of the legislative purpose. A construction which promotes the remedy Parliament has provided to cure a particular mischief is now known as a purposive construction.

Purposive construction is very popular with the courts. It would arguably be a purposive construction of the 2000 Act to treat the Real IRA as a proscribed organisation.

198. It is a rule of law that the legislator intends the interpreter of an enactment to observe the maxim *ut res magis valeat quam pereat* (it is better for a thing to have effect than to be made void); so that he must construe the enactment in such a way as to implement, rather than defeat, the legislative purpose.

This requires the court to find some meaning in the reference to the IRA in Schedule 2. The question is what should this meaning be?

377. The courts use as aids to interpretation specific linguistic canons of construction developed over the centuries to throw light on meaning generally, and not just in a legal context. These canons have the effect of elaborating the literal meaning of a word or phrase, usually by taking the elaborated meaning as having been implied by the author.

The question here is what elaborated meaning should be taken as having been implied? It can only be that the reference to the IRA was meant to refer to the organisations into which the IRA had split by 2000. Are these just the Official IRA and the Provisional IRA, or should the Real IRA also be taken as included?

287. It is presumed that the legislator intends the court to apply a construction which rectifies any error in the drafting of the enactment, where it is required in order to give effect to the legislator's intention. This may be referred to as a rectifying construction.

It seems that it may have been a mistake not to specify the Real IRA in Schedule 2, because as we shall see it was the Government's intention that they should be covered.⁶

363. The starting point in statutory interpretation is to consider the ordinary meaning of the word or phrase in question, that is its proper and most known signification. If there is more than one ordinary meaning, the most common and well-established is preferred (other things being equal).

The NICA said that if it had been necessary to do so they would have held that the "Real" Irish Republican Army was the *same name* as "The Irish Republican Army" for the purposes of section 3(1) of the 2000 Act.⁷ They cited the dictum

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of Owen J that "The word 'same' has two meanings. One is 'corresponding to', but the other is 'similar to'".⁸ However the latter is not "the most common and well-established" meaning.

208. The informed interpretation rule requires that, in the construction of an enactment, due attention should be paid to relevant aspects of the state of the law before the Act was passed, the history of its passing, and the events subsequent to its passing.

The NICA considered at some length the history of proscription in Northern Ireland.⁹ They pointed out that the 2000 Act goes wider than the previous Northern Ireland legislation in

⁶ See the reference below to SI section 217.

⁷ NICA judgement, para. [41].

⁸ See the Australian case of *Kingsbury v Martin* (1901) 1 SR (NSW) 272 at 278.

⁹ NICA judgment, paras. [4]-[6]. See below.

extending to the whole of the United Kingdom and covering all forms of terrorism, including international terrorism.¹⁰

217. In arriving at the legal meaning of an enactment which is ambiguous or obscure, or where its literal meaning leads to an absurdity, the court may have regard to any statement of a Minister, as set out in the Official Report of Debates ('Hansard') on the Bill for the Act.¹¹

Adam Ingram MP, the Armed Forces Minister, said in Standing Committee during the passage of the Bill for the 2000 Act-

“ . . . 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, Oglaihn 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”.¹²

This clearly indicates that it was the Government’s intention when drafting the Bill that the term “Irish Republican Army” in Schedule 2 should be taken to include the Real IRA.

Arguments indicating that the Real IRA should not be taken as proscribed

I now set out the sections of the code in my book *Statutory Interpretation*, each followed by brief comments, which favour the view that the Real IRA is not to be treated as a proscribed organisation.

285. Prima facie, the meaning of an enactment which was intended by the legislator (in other words its legal meaning) is taken to be that which corresponds to the literal meaning.

The Real IRA is not expressly mentioned in Schedule 2, so the literal meaning of section 3(1), combined with Schedule 2, is that it is not a proscribed organisation.

208. The informed interpretation rule requires that, in the construction of an enactment, due attention should be paid to relevant aspects of the state of the law before the Act was passed, the history of its passing, and the events subsequent to its passing.

This section of the SI Code is mentioned above. Another aspect of relevant legislative history here is that under an Act passed in 1998 dealing with Irish republican terrorism the Real IRA was specified as such, as indicated by the following extract from the NICA judgment-

“The Northern Ireland (Sentences) Act 1998 was passed to give effect in Northern Ireland to the agreement to introduce the accelerated release scheme. In order to be eligible to apply for a declaration of eligibility for release a prisoner had to satisfy a number of conditions one of which was that he was not a member of a specified organisation – section 3(4). A specified organisation was defined in section 3(8) which provides:-

‘(8) A specified organisation is an organisation specified by order of the Secretary of State; and he shall specify any organisation which he believes-

(a) is concerned in terrorism connected with the affairs of Northern Ireland, or in promoting or encouraging it, and

(b) has not maintained or is not maintaining a complete and unequivocal ceasefire.’

The latest order made by the Secretary of State under section 3(8) is the Northern Ireland

¹⁰ NICA judgment, paras. [8], [9].

¹¹ This is a summary of section 217.

¹² HC Standing Committee D, 25 January 2000.

(Sentences) Act 1998 (Specified Organisations) Order 2001 on 12 October 2001. The “Real” IRA is among the organisations specified . . .”¹³

271. It is a principle of legal policy that a person should not be penalised except under clear law (in this Code called 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.

This principle is also applied by Article 7 of the European Convention on Human Rights. The NICA cite a judgment of the European Court of Human Rights holding that this means that an offence “must be clearly defined in law”.¹⁴

266. It is a principle of legal policy that law should be certain, and therefore predictable. 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 reach a construction which was reasonably foreseeable by the parties concerned.

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For a person who looked up Schedule 2 and found that it specified “The Irish Republican Army” it was not reasonably foreseeable that a court would hold that this meant that the Real IRA was proscribed.

265. It is a principle of legal policy that law should be just, and that court decisions should further the ends of justice. 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. The court should therefore strive to avoid adopting a construction that leads to injustice.

It would surely be unjust to hold a person guilty of a criminal offence when the law is in such an uncertain state.

The NICA judgment

I have set out fifteen different interpretative criteria bearing on the decision in this case, eleven favouring a finding that the Real IRA is a proscribed organisation and five favouring the opposite.¹⁵ The matter cannot be settled numerically, for the criteria are not of equal weight. How does the NICA judgment deal with these criteria?

The judgment begins by examining the history of proscription in Northern Ireland, going back to 1922. Invariably, with one exception, the successive enactments relied on the description “The Irish Republican Army”, not thinking it necessary to specify separately any body into which the IRA had split. The exception is the case mentioned above where an order made under the Northern Ireland (Sentences) Act 1998 mentioned the Real IRA.¹⁶ The NICA

¹³ NICA judgment, paras. [13]-[15].

¹⁴ NICA judgment, para. [50].

¹⁵ These do not add up to fifteen because one appears twice.

¹⁶ See the reference on page 5 above to SI section 208.

explained this by the fact that it was there necessary to distinguish bodies that were observing the ceasefire from those that were not.¹⁷

After examining the arguments, the NICA declared that it was “inconceivable that the legislature did not intend that the ‘Real’ IRA should be proscribed”, and proceeded to find that as its “primary conclusion”.¹⁸ Its alternative secondary conclusion was that the Real IRA is proscribed because “it operates under the same name as an organisation listed in Schedule 2” within the meaning of section 3(1)(b) of the 2000 Act. The judgment says-

“Whilst it is true that the Secretary of State may . . . add an organisation to Schedule 2, in practical terms this may not always be possible with the promptness that is required to deal with swiftly changing regroupings. We consider that the purpose of section 3(1)(b) is to ensure that organisations that grow up as a result of schism within a named organisation and operate under a broadly similar name should be proscribed.”¹⁹

Finally the NICA dismissed the argument, mentioned above, that Article 7 of the European Convention on Human Rights was contravened because the offence was not “clear in law” with the bald statement that it was clear enough, i.e. “sufficiently defined”. They added-

“Given the manner in which the various groupings of the IRA had been proscribed historically, we consider that it should have been apparent to any member of the ‘Real’ IRA that he was guilty of an offence under these provisions if he continued his membership or professed it.”²⁰

With a penal enactment it is submitted that these arguments are wholly insufficient, and that the NICA were wrong to reverse Girvan J’s decision. The NICA judgment fails to mention eleven of the interpretative criteria mentioned above, namely those based on the following SI sections: 198, 217, 265, 285, 287, 289, 303, 316, 319, 374 and 377.

The balancing process

SI section 186 says that where upon investigating an ambiguous enactment it does not appear that the interpretative factors all point in favour of one of the opposing constructions and against the other, it is necessary for the interpreter to assess the respective weights of the relevant interpretative factors and determine which of the opposing constructions they favour on balance. The NICA did not carry out this exercise, so let us attempt it using the interpretative criteria mentioned above.

The eleven criteria favouring the finding that the Real IRA is a proscribed organisation add up to the following-

The court must not say that the term “The Irish Republican Army” in Schedule 2 is meaningless: it must be given some meaning even though the IRA had in fact ceased to exist. The court should apply a purposive construction so as to further suppression of the mischief aimed at by the legislation, which was the existence of terrorist organisations. The Real IRA is a terrorist organisation, and therefore within the scope of the mischief. A rectifying construction is needed. What elaborated meaning should be taken as having been implied? It can only be that the reference to the IRA was meant to refer to the organisations into which the IRA had split by 2000. Are these just the

¹⁷ NICA judgment, para. 35.

¹⁸ NICA judgment, paras. [32], [36].

¹⁹ NICA judgment, para. [38].

²⁰ NICA judgment, paras. [51], [52].

Official IRA and the Provisional IRA, or should the Real IRA also be taken as included? The Real IRA may be said to be the “same name” as the IRA. It is clear from Hansard that it was the Government’s intention that the term “Irish Republican Army” in Schedule 2 should be taken to include the Real IRA.

The five criteria favouring the finding that the Real IRA is not a proscribed organisation add up to the following-

The literal meaning of the legislation is that it does not include the Real IRA, so prima facie they are excluded. The Real IRA were mentioned in the Northern Ireland (Sentences) Act 1998 (Specified Organisations) Order 2001 so they could equally well have been specified in Schedule 2 to the Terrorism Act 2000 if that had been intended. It is a principle of legal policy that a person

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should not be penalised except under clear law, and this law is not clear. It is also a principle of legal policy that law should be certain and therefore predictable, and this law is not certain. It is furthermore a principle of legal policy that law should be just. It would be unjust to convict the defendants here.

Conclusion

What is the result of this balancing exercise? It is submitted that the factors against holding that the Real IRA is a proscribed organisation must prevail. Justice is the paramount consideration, as shown by the judicial oath.

Here are two final points.

First, what is the answer to the question posed above when it is said that the reference in Schedule 2 to the IRA must be taken to refer to the organisations into which the IRA had split by 2000. Are these just the Official IRA and the Provisional IRA, or should the Real IRA also be taken as included? The Official IRA and the Provisional IRA must be taken to be referred to or the provision would be ineffective. They are the two limbs into which the original tree split. However the Real IRA broke away much later from one only of those limbs. It is at least doubtful whether they were included too, and the doubt should be resolved in favour of the defence.

The second point concerns the statement that it is clear from Hansard that it was the Government’s intention that the term “Irish Republican Army” in Schedule 2 should be taken to include the Real IRA. This does not mean that it must be taken to have been Parliament’s intention also. “In all cases”, said Lord Blackburn in a famous judgment, “the object is to see what is the intention *expressed by the words used*.”²¹ He meant the words of the enactment, not the words of Ministers promoting the measure in Parliament. Under the rule in *Pepper v Hart* the latter may now be considered, but their weight is far from overriding.

²¹ *River Wear Comrs v Adamson* (1877) 2 App Cas 743 at 763 (emphasis added).