**Duress**

*R* v. *Hasan* [2005] UKHL 22, [2005] 2 AC 467, [2005] 2 WLR 709.

In *Hasan*, the House of Lords has revisited and, to some extent, reconfigured more narrowly the law of duress, in the process casting doubt on a number of Court of Appeal decisions. The case involved a conviction for aggravated burglary after D, armed with a knife, had forced his way into a house intending to steal the contents of a safe that was known to be inside. At trial, D had raised the defence of duress, claiming that one Sullivan, not a criminal lawyer at all but a drug dealer with a reputation for violence, had threatened to harm D and his family unless D carried out the burglary. D had an existing association with Sullivan, in that he worked as driver and minder for a woman who ran an escort agency and was involved in prostitution, while Sullivan was also involved in the business as the boyfriend of his employer.

At trial, the judge put four questions to the jury concerning the duress defence (para. 14):

> (1) "Was the defendant driven or forced to act as he did by threats which, rightly or wrongly, he genuinely believed that if he did not burgle [the] house, his family would be seriously harmed or killed?"
>
> (2) "Would a reasonable person of the defendant's age and background have been driven or forced to act as the defendant did?"
>
> (3) "Could the defendant have avoided acting as he did without harm coming to his family?"
>
> (4) "Did the defendant voluntarily put himself in the position in which he knew he was likely to be subjected to threats?"

The jury were directed that duress would be available only if the answers to these questions were, respectively, Yes, Yes, No, and No. The jury convicted. On appeal, D argued that the trial judge had misdirected on duress and that he had also erred on an issue of evidence (which will not be considered here). The Court of Appeal upheld the appeal on both grounds, concluding in particular that the judge had misdirected the jury on questions (3) and (4): [2003] EWCA Crim 191, [2003] 1 WLR 1489. On question (4), the Court of Appeal certified, under section 33(2) of the Criminal Appeal Act 1968, that a point of law of general public importance was involved in the decision:

> "Whether the defence of duress is excluded when as a result of the accused's voluntary association with others:
> (a) he foresaw (or possibly should have foreseen) the risk of being subjected to any compulsion by threats of violence; or
> (b) only when he foresaw (or should have foreseen) the risk of being subjected to compulsion to commit criminal offences; and, if the latter;
> (c) only if the offences foreseen (or which should have been foreseen) were of the same type (or possibly of the same type and gravity) as that ultimately committed."

The Court of Appeal, in other words, flagged up the boundaries of the *voluntary exposure* exception to duress [S&S § 20.1(i)(g)], seen in cases such as *Fitzpatrick* [1977] NI 20 (CCA), *Sharp* [1987] QB 853 (CA), and *Shepherd* (1987) 86 Cr App R 47 (CA). When, precisely, is D's right to the defence lost on this ground? How much, if anything, must he know?

*Voluntary exposure to duress*

The House of Lords restored D's conviction. Overruling earlier authority, Lord Bingham, with whom Lords Steyn, Rodger, and Brown agreed, ruled that the defence is lost if D "voluntarily becomes or

remains associated with others engaged in criminal activity in a situation where he knows or ought reasonably to know that he may be the subject of compulsion by them or their associates" (paras. 38, 39). Their Lordships thus preferred an objective version of option (a) above. There is now no requirement (rejecting *Baker and Ward* [1999] 2 Cr App R 335, CA) that the anticipated coercion be to commit *crimes*, let alone crimes of the *type* ultimately committed. In gist, D loses the defence because he voluntarily associates himself with generally violent and coercive people.

On the facts of the case, the decision is seemingly *obiter* on the question of foreseeability versus actual foresight, but a ruling on this point was sought by the question certified and it, too, should be regarded as binding—if unfortunate. The rationale for the voluntary exposure exception is that the defendant *volunteers* for the risk; but this cannot be said for someone who joins a violent organisation unaware of the risk. The merely negligent do not "buy into", or "court", their fate. "The policy of the law must be to discourage association with known criminals," asserts Lord Bingham: but that is tantamount to legalising a status of *pariah*, or outcast or outlaw, and the mere taint of criminality should not be spread so easily from one person to another, especially to another who is not on notice of the propensity to violence.

One point is left open (para. 38). While agreeing with her brethren that D need not foresee coercion to commit crimes of the very type that are ultimately committed (albeit herself preferring option (b)), Baroness Hale suggests that the defence should not be lost where one's act of volunteering is done with lawful or reasonable excuse (para. 78), for example when an undercover policeman infiltrates a criminal gang and is then required to perform illegal acts. This possibility remains to be tested, although the prospects for a law-enforcement exception must be doubtful in the light of *Yip Chiu-cheung* [1995] 1 AC 111 (PC) [S&S § 22.2(ii)].

*Other elements of the duress defence*

Lord Bingham did not stop there, but went on to consider the rest of the trial judge's direction and the requirements of duress more generally. In a welcome clarification, his Lordship reaffirms the rule, laid down in *Graham* [1982] 1 All ER 801, 806 (CA) and approved in *Howe* [1987] AC 417, that a mistaken belief by D that he is being threatened must be *reasonable*. The doubt that had been cast by the decision in *Martin (David)* [2000] 2 Cr App R 42 [S&S § 20.1(iii)] is therefore now resolved. Correspondingly, the trial judge's question (1) for the jury in *Hasan*, set out earlier, was unduly favourable to the defendant.

More controversial, perhaps, are two further rulings:

1. The threat must be directed against D or someone close to him, including someone for whose safety D would reasonably regard himself as responsible. Apart from citing *Conway* [1989] QB 290 and *Wright* [2000] Crim LR 510, no reasons are given for this *obiter* restriction. Presumably, if the defence operates (as his Lordship asserts) as an excuse, the thinking must be that reasonable and sober people are not sufficiently concerned for the safety of other human beings that they are impelled to act by threats to those others. It is, to say the least, a surprising restriction.

2. D must have had *no opportunity to avoid* the threat, save by complying with it. The decision in *Hudson and Taylor* [1971] 2 QB 202 is disapproved. In that case, two girls aged 17 and 19 were convicted of perjury after they lied as prosecution witnesses in an earlier trial. They claimed that they had been threatened with violence if they told the truth at the trial, a threat buttressed by the fact that their threatener had been present in the public gallery when they arrived at court. Their appeal was allowed on the basis that these facts were capable of supporting a defence of duress notwithstanding that execution of the threat was *imminent* rather than immediate, and on the basis that effective police protection may not have been available. But Lord Bingham demurs (para. 27):

> "I cannot, consistently with principle, accept that a witness testifying in the Crown Court at Manchester has no opportunity to avoid complying with a threat incapable of execution then or

there."

His Lordship here presents this restriction as one of *avoidability* rather than *immediacy*. In his analysis, there is not as such a requirement that the threat must be immediately at hand but, rather, that the defendant have no alternative available of taking evasive action. The importance of immediacy is therefore practical, in that it helps to establish D's lack of alternatives (para. 28):

> "if the [threat] is not such as he reasonably expects to follow immediately or almost immediately on his failure to comply with the threat, there may be little if any room for doubt that he could have taken evasive action, whether by going to the police or in some other way, to avoid committing the crime with which he is charged."

But what sort of avoidability is this? Suppose that T threatens to murder my family unless I today commit a burglary. I have a day or two to comply. Of course I can go to the police; so I can avoid *compliance*, which is the test that Lord Bingham states. Yet if the safety of my family cannot be guaranteed, how does this evade the *threat*? There is a serious analytical error here. Lord Bingham points out that "he could have taken evasive action ... to avoid committing the crime". But one can always avoid committing the crime, even if the threat is immediate—it's just that the consequences are rather severe. That isn't the test. What counts is whether one can avoid the *threat* save *by* committing the crime. Lord Bingham's argument therefore contains a non-sequitur. It cannot be too hard to imagine, as the Court of Appeal was willing to conjecture, that effective witness protection would not have been available to the defendants in *Hudson* and *Taylor*. Surely, if that is true, the rationale behind the duress defence extends to such cases?

*Conclusion*

Strictly speaking, on questions other than the voluntary exposure exception, their Lordships' views are *obiter dicta*. But they are part of a considered attempt to restate the law of duress, and *Hasan* represents the most important pronouncement on the topic since *Howe*.

The clear intention of their Lordships is to increase the rigour of the defence and to restrict its growing use and availability. As such, the decision in *Hasan* is motivated primarily by the perception that one should not readily exonerate those who choose to harm innocent victims (paras. 18-19). Clearly, in the tug-of-war between those who instigate crimes and those who are their victims, the House (with the exception of Baroness Hale) sees itself as pulling on the side of the victims. What it does not seem to recognise is the possibility that D, a victim too, may be caught in the middle.

That having been said, the decision should be understood as the product of a world in which pleas of duress are now much more common than at the time of *Hudson and Taylor*, especially in the context of the drugs trade and other organised crime. Stephen long ago queried why the state coercion of the criminal law should give way to the private coercion that is duress. That rather hard-nosed attitude is an informing consideration in *Hasan*, where the House is clearly concerned by the intertwined growth of the duress defence and the modern prevalence of organised crime. Their Lordships' view, it seems, is that if a person mixes and profits from association with criminals, he cannot expect the courts to side with him when he harms victims untainted by such association.