

REFUGEE LAW EXAM – PROBLEM QUESTION TEMPLATE

***USE THE FACTS ***

MUST DISCUSS COMPLEMENTARY PROTECTION

OPENING PARAGRAPH

*[Applicant] will argue that pursuant to s 36(2)(a) of the **Migration Act ('MA')** s/he is a non-citizen in Australia in respect of whom the Minister ought to be satisfied Australia has protection obligations under the 1951 **Refugee Convention ('the RC')**.*

*S 36(2)(a) of the Act no longer expressly incorporates Australia's obligations under the RC. Nonetheless, as Australia remains a signatory of the RC, it is necessary to consider whether **[Applicant]** is protected under s 36(2)(a) in light of Article 1A(2) of the RC and s 5H(1) MA.*

*As per Article 1A(2) RC, **the term refugee** shall apply to any person who owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such a fear, is unwilling to avail himself of the protection of that country.*

The elements are discussed below.

TOPIC 3: THE REFUGEE DEFINITION

Article 1A(2) defines “refugee” as a person who:

Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

S 36(2)(a) Migration Act

(2) A criterion for a protection visa is that the applicant for the visa is:

*(a) A non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a **refugee****

S 5H(1) Migration Act: Meaning of refugee

*(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a **refugee** if the person:*

*(a) In a case where the person has a nationality—is **outside the country** of his or her nationality and, **owing to a well-founded fear of persecution**, is **unable or unwilling** to avail himself or herself of the **protection of that country**; or*

*(b) In a case where the person does not have a nationality—is **outside the country of his or her former habitual residence** and **owing to a well-founded fear of persecution**, is **unable or unwilling to return to it**.*

ELEMENTS

- A. Outside their country of nationality
- B. Fear 'persecution'
- C. For one of the five listed reasons: race, religion, nationality, membership of a particular social group or political opinion
- D. Fear of persecution must be well-founded
- E. No state protection
- F. Limitations on Convention

A. OUTSIDE COUNTRY OF NATIONALITY

1. Is the Applicant outside his/her country of nationality?

- *[Applicant] has fled this country of nationality, [country], on [date] and come to Australia. This has triggered responsibility under the Convention for other states to protect [Applicant] (Art 1A(2) UNHCR Handbook para 74).*
- *How did [Applicant] get into Australia? (If via visa/plane – we know that his passport would have indicated he is a X citizen)*
 - o The act of fleeing engages the responsibility of other states to protect that person
 - o Nationality refers to citizenship
 - o Refer to identification documents if applicant has any
 - o Linguistic testing has been applied to determine what country the applicant comes from

2. Dual nationality

Art 1A(2) Refugee Convention

'In the case of a person who has more than one nationality, the term "the country of nationality" means each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed (taken advantage) himself of the protection of ONE of the countries of which he is a national.

B. PERSECUTION

1. Persecution under Australian legislation

- It must first be determined that [Applicant] fears persecution.
- This is not defined in the RC, however **S 5J (4) MA** tells us that persecution must involve:
 - o (a) serious harm and;
 - o (b) systematic and discriminatory conduct
- **S 5J MA** must be interpreted in light of the common law on persecution (Ex Memo to 5J)

(a) Serious harm

Serious harm is defined in s 5J(5). The most relevant here is:

- A threat to the person's life or liberty (freedom);**
 - o Eg: if not free to practice a religion and will be punished for doing so if he/she returns
 - o **Chan**: the denial of his fundamental freedom to practice a religion of choosing can be serious harm.
 - o Eg: Q fears for his life upon return to Syria, as he has been told that by Militia that they would 'slaughter and kill' him while he was in church. As per s 5J, this clearly constitutes persecution as it is a threat to his life and he has been physically harassed already and verbally abused (refer to discussion on past persecution later).
- Significant physical harassment of the person;**
- Significant physical ill-treatment of the person;**
- Significant economic hardship that threatens the person's capacity to subsist;**
 - o Eg: If X loses his **job** – a pay cut would not effect X's capacity to subsist
- Denial of access to basic services, where the denial threatens the person's capacity to subsist;**
- Denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.**

OR can be something else – s 5J(5) is not limited

Not mental harm

Threshold:

- [X] would be the threshold of serious harm as he faces '**serious punishment penalty/significant detriment**' (**Chan** per **Mason CJ**) upon returning to [country of origin]
 - o Includes 'threat of harm'
- A **single act** of oppression is enough to constitute persecution. **Not necessary** for there to be a **series of acts** (**Chan** per **McHugh J**)
 - o But can also be from an accumulation of measures
- Discrimination, which involves **interrogation, detention** or **exile** to a remote place under **penalty of imprisonment for escape**, amounts prima facie to persecution (**Chan**)
- Must be directed against the person as an individual or as a member of a class

- Persecution constitutes an interference with basic human rights or dignity that the country authorises or does not stop, which is so oppressive or likely to be maintained that the person cannot be expected to tolerate it (*Chan* per McHugh J)