

HUMAN RIGHTS/BILL OF RIGHTS SSA EXAM JANUARY 2020

HRE0021/HRT41B0

MEMORANDUM

SECTION A:

QUESTION 1:

1.1) (Rautenbach/Venter p 256)

	Interpretation of the provision:	Application to the particular case:
1.	Who are the bearers of the right to freedom and security of the person? – Natural persons. (1)	... and whether children are such persons; they are natural persons and are therefore bearers of the right. (1)
2.	Which conduct and interests are protected by the right to freedom and security of the person? -Bearers of the right are protected from physical and psychological harm and should be protected from violence by public and private sources. (1)	...and whether such conduct and interests of children were affected in the particular case; the right protects bearers against physical and psychological harm and violence. The right of children to be protected from violence is therefore infringed by parents' common law defence against assault. (1)
3.	Which persons or institutions are bound by the right to freedom and security of the person and what are their duties? – the state and other natural & juristic persons are bound by the right, and the state has the duty to respect, protect and promote and fulfil the right. (1)	... and whether the state is such an institution and has fulfilled its duties ; the state is bound by this right; the state has not complied with its duties to protect and promote the right to freedom and security of children by allowing the common law defence of parents' to moderate and reasonable chastisement of their children to continue as a defence against assault on children. (1)
4.	What are the requirements for the limitation of the right to freedom and security of the person? – the requirements for limitation may be found in sec 36. (1)	... and whether the limitation of children's rights complied with these requirements ; Yes/No + reason. Example: on the face of it, the limitation did not comply with requirements for the limitation of the right because it fails to promote the best interests of children and affects children's dignity and bodily and psychological integrity in a serious way. (1)

[8]

1.2) [Half a mark for naming the factor and half a mark for explaining the factor in one sentence; one mark for the application of the factor to the facts. Students may argue that the

limitation was justifiable or that the limitation is unconstitutional – as long as the answer is motivated and the argument makes sense.]

- **Nature of the right:** here it must be determined what is protected by the right, how important the right is and the way it is exercised in a democratic society. (1)
Application: (1)
- **Importance of the purpose of the limitation:** here is determined what the purpose of the limitation is and how important that purpose is. (1)
Application: (1)
- **Nature and extent of the limitation:** here is determined what method is used to limit the right and how the limitation affects the conduct and interests. (1)
Application: (1)
- **Relation between the limitation and its purpose:** here is determined whether the limitation can promote the purpose and, if so, to what extent. (1)
Application: (1)
- **Less restrictive means to achieve the purpose:** here one determines if there are any other measures that are more or less equally effective in reaching the goal, but less restrictive. (1)
Application: (1) **(Rautenbach/Venter p 317-323)** **[10]**

1.3) – Declaratory order: the court could give an order confirming that the right to freedom and security of the person is or is not unjustifiably limited by the legislative provisions.

- Order of unconstitutionality/constitutionality of the provisions (if this corresponds with the student's argument in question 1.1 and 1.2) **[2]**

1.4) The court could use the following interpretive tools in order to avoid declaring a provision invalid:

- Deciding the case on other grounds (rather than constitutional grounds);
- Reading down (also known as reading in conformity with the Constitution), which means that if there is another reasonable interpretation of the provision that does not conflict with the Constitution, then that interpretation should be followed. **[2]**

TOTAL SECTION A: **[22]**