

GoodLucca – ADL 2601 Exam Spot Questions

Exam questions collated from 4 years' exams

Question 1

Define an Administrative relationship – up to 10 marks

An administrative relationship exists between **two parties** in an **unequal relationship**. **One** of the subjects is a person or body **clothed in state authority** who is **able to exercise that authority** over a person or body in a **subordinate position** whose **rights are affected** by the action.

In an **individual** relationship the **rules apply personally and specifically between the parties**. The relationship is **created by individual administrative decisions**.

(5)

In a **general** administrative-law relationship the **legal rules** governing the relationship between the parties **apply to all the subjects** in a **particular group**. It is **created by, changed and terminated by legislation**.

+ apply to situation

Question 2

Define Administrative Action according to PAJ A – even if they say section 3 – this is a section 1 question!

Section 1 of PAJ A defines "administrative action" as any **decision taken**, or any **failure to take a decision**, by -

(a) **an organ of state**, when-

(i) **exercising a power in terms of the Constitution** or a provincial constitution; or (ii) **exercising a public power** or performing a public function in **terms of any legislation**; or

(b) a **natural or juristic person**, other than an organ of state, when exercising a **public power** or performing a public function in terms of an **empowering provision**,

which **adversely affects the rights** of any person and which has a **direct, external legal effect**.

There are **exceptions** to the definition. (List a few or whole list if asked)

1. ***Executive powers and functions*** (*President, ministers, provincial and municipal*)

a. *Calling referendum*

- b. *Receiving diplomats*
- c. *Conferring honors*
- d. *Appointing commission of enquiry*
- e. *Signing an act (Pharmaceutical case)*
- 2. ***Legislative functions of parliament***
- 3. ***Judicial functions of judicial officer of a court***
- 4. ***Decisions under PAIA 2000***
- 5. ***Decisions under PAJA section 4(1)***
- a. *Choosing a procedure to follow that affects the public*

+ apply

eg The awarding of the fishing rights amounts to administrative action because it

complies with the definition in that it involves a decision by an organ of state (the Department of the Environment or MCM) **in terms of legislation**, which **has adversely affected the rights of a person** (Food-for-all (Pty) Ltd) and which appears to have had a **direct external legal effect**.

Question 3

Define an organ of state

In terms of **section 239 of the Constitution** an 'organ of state' means-

(a) **any department of state or administration**

in the **national, provincial or local sphere of government**; or

(b) any other **functionary or institution**:

(i) **exercising a power or performing a function** in terms of the **Constitution** or a provincial constitution; or

(ii) exercising a **public power or performing a public function** in terms of any **legislation**,

but **does not include a court or a judicial officer**.

+ Apply example

MCM is an organ of state because **it falls within the definition of organ of state** in that it is part of the Department of the Environment or in that it is exercising a public power or performing a public function in terms of the Marine Living Resources Act.

The answer (that MCM is an organ of state) is important because an **organ of state is one of the primary bodies whose decisions may amount to administrative action in terms of section 1 of PAJA**.

Question 4

List sources of law (5)

1. The Constitution
2. Legislation
3. Case law
4. Common law
5. Administrative practice
6. International law

Question 5

Functus Officio (10 for all, 5 for valid)

Administrative acts table

Invalid acts	May be altered or withdrawn	Not if questioned in court / tribunal or if person acquired rights
Valid Onerous (places duty / prevents him from doing something eg licence)	May be altered	Eg if too harsh, the department can correct its mistake
Valid Beneficial acts	Only where power is expressly conferred or by necessary implication	
Status	If it affects the status of an individual it may not be changed eg adoption – the administrator is assumed to be <i>functus officio</i>	

If Keep to onerous/burdensome...

An administrator is said to be *functus officio* (roughly translated it means “**having completed the task/ duty; no longer functioning**”) when the administrator **cannot amend, repeal/ revoke or vary its decision**.

The state organ has discharged its duty and it cannot be repealed

With regard to **valid onerous/burdensome** administrative acts, these acts may be altered by the administrator. **Onerous/burdensome administrative acts** place a **duty** on the individual, or prohibit an individual from doing something or refuse to grant him or her something such as a licence. If the official decides that the decision, though valid, may be a bit harsh, or if policy changes, and so on, **the decision may be changed at any stage**. The reason

for this rule is that **the administration must be given an opportunity of correcting its own mistakes.**

Valid beneficial administrative acts may be altered by the authority **only where the power to do so has been conferred expressly or by necessary implication.** For example, if a licence has been issued, it cannot simply be revoked by the licensing officer.

Invalid administrative action may be **altered/rectified** by the administrator **at any time** unless it has been **challenged before a court or higher tribunal**, or if the affected individual **has acquired rights or privileges** as a result of the action.

Application of invalid

In this case the **action is invalid** since the committee is invalid and the **committee would be able to change its decision.** If the **correct committee had made the same decision**, it would be an **onerous action** and the committee would also **be able to change its decision.**

Question 6

Briefly explain Discretionary power & apply to facts

Discretion is a **choice** between **two or more valid options.** In the set of facts a discretion is exercised by the committee who had to choose between promoting or not promoting Mr Warden.

Diskresie is die bevoegdheid om 'n keuse uit te oefen tussen twee regmatige geldige opsies of moontlike optrede. Indien die Direkteur-generaal die besluit geneem het, sou dit geldig gewees het, aangesien hy/sy die administrateur was aan wie die bevoegdheid kragtens die regulasies toegewys is.

Question 7 – only in 2007 & 2009 – 10-15 marks

*Explain Delegation with reference to **delegatus delegare non potest** rule*

The rule **delegatus delegare non potest** means that if the action entails the exercise of a **discretion**, **no delegation** may take place unless **authorised** by the relevant **legislation.**

In other words, if a power is conferred on an administrator because of specific **qualifications**, expertise or **knowledge**, this function **may not be delegated** to another functionary.

The key judgment is ***Shidiack v Union Government*** (1912 AD).

Delegation is, however, **permissible** in terms of section **238 of the Constitution** if it is **consistent** with the **legislation** in terms of which the power is exercised or the function is performed; or if the power is exercised **for another executive organ of state** on an

agency or delegation basis.

A **subordinate** may, however be **instructed** to **implement** a **decision**.

An **administrator** may **not** put itself in the position of having to accept **directions** or orders from **another** body.

The administrator **may** appoint a **fact-finding body** to assist it, providing the **final** discretion is exercised by the **proper authority**.

Apply:

In the light of the above, the Director of Legal Advisory Services did not perform in terms of an authorised delegation since the statute makes provision for the function to be performed by the Minister of Home Affairs who may delegate this power only to the Director-General of the department. Only the latter action was therefore authorised delegation.

It was curious to discover how many students thought that the Director of Legal Advisory Services was not a Home Affairs official. If not absolutely clear from the set of facts, you can assume that it is an official in the same department. Many departments incorporate some form of legal services.

Question 8 15 NBNBNB

Discuss whether procedurally fair according to PAJ A

Section 3!

1. Administrative action which **materially** and **adversely** affects the **right** or **legitimate expectations** of any **person** must be **procedurally fair**. (S 3(1) of PAJ A).

Briefly, **legitimate expectation** means that the rules of fair procedure are extended to those cases where no vested right exists, but **only a “legitimate expectation” of a benefit that may be granted or a benefit that will not be withdrawn before a hearing has occurred.**

This expectation is not merely a hope or wish, but **based on** something more concrete, such as **an express promise, or a regular practice which can reasonably be expected to continue.** It does not mean that the person is guaranteed success, but only that he **should receive a hearing.**

J ENKINS VS GOVERNMENT OF RSA legitimate expectation is part of **common law** – **state official can continue to use vehicle**

2. **Fair** administrative practice **depends** on the **circumstances** of each **case**. (s 3(2)(a) of PAJA)

Mandatory requirements: (s 3(2)(b) of PAJ A)

Before the action:

- **Adequate notice** of the **nature** and **purpose** of proposed **action**
- **Reasonable** opportunity to make **representations** (Earthlife Africa case)
- **Clear statement** of administrative action

After the action:

- **Adequate notice** of **right of review** or **internal appeal**
- **Adequate notice** of **right to request reasons**
Van Huyssteen-saak – die reg moet ’n ruim interpretasie geniet, maw om gevalle wat nie in die wet gedek word nie, in te sluit.

3. **Discretionary** requirements: (s 3(3) of PAJ A)

- Opportunity to **obtain assistance**, even legal assistance in complex cases
- Opportunity to **present and dispute information** and arguments
- Opportunity to **appear in person**

(Make sure you know the meaning of “mandatory” and “discretionary”.)

4. **S 3(4) of PAJ A states that the requirements in s 3(2) of PAJ A may be departed from only if reasonable and justifiable.**

This is determined by taking all relevant factors into account, which include:

- The **objects** of the **empowering provision**
- The **nature** and purpose of and need for the **action**
- The likely **effect** of the administrative **action**
- The **urgency** of the matter
- The need to promote **efficient administration** and good governance. (s 3(4)(b))

Extra mark or two if above included.

5. Section 3(5) of PAJ A states that the administrator may also follow a **different** but **fair** procedure if the **empowering** provision **authorises** this.

a. Must conform to section 36 of constitution

Example of application

Mr Warden was not given adequate notice of the action. There is no indication that he was given notice of his right to review or the right to reasons. There seems to be no reason that it could be reasonable and justifiable to depart from these requirements. As a further reason, the wrong people conducted the interview (no proper delegation). Therefore several requirements for a procedurally fair action were infringed.

Question 9 – tip only, not asked – do not discuss if specifically asked for

section 3 of PAJ A

Natural justice concepts

1. Audi alteram partem rule (to **hear the other side** before decision)
 - a. Proper **notice** of intended action
 - b. **Reasonable** and **timely** notice
 - c. Personal **appearance**
 - d. Legal **representation**
 - e. **Evidence**/cross examination
 - f. **Public** hearing
2. Nemo iudex in sua causa rule (no one should judge in his or her **own cause** – rule against prejudice)
 - a. Pecuniary (financial interest)
 - b. Personal interest

In text

Procedurally fair administrative action includes the rules of natural justice. The constitutional right is however not limited to and is more comprehensive than the common-law rules. The rules of natural justice comprise the *audi alteram partem* rule and the *nemo iudex in sua propria causa* rule.

The *audi*-rule consists of: the opportunity to be heard, including proper notice of the intended action reasonable and timeous notice personal appearance/written representations legal representation if warranted the right to lead evidence and to cross-examine not inherent - proper opportunity to put one's case is the criterion public hearing.

to be informed of considerations which count against the person reasons must be given for the decision.

The *nemo iudex*-rule means that one may not be a judge in one's own cause, ie the decision-maker must be impartial and not biased (usually no personal or pecuniary interest).

**When can someone take a matter to review? Or Does review apply?)
(followed by above rules if needed) (10)**

Section 6(1) of PAJ A states that **any person** may institute proceedings in a court or a tribunal for the **judicial review** of an **administrative action**.

In terms of **section 6(2)(a)** of PAJ A, a **court** or tribunal has the power to judicially review an administrative action if, inter alia, the **administrator** who **took the decision** –

- (i) was **not authorised** to do so by the **empowering provision**;
- (ii) acted under a **delegation** of power which was **not authorised** by the **empowering provision**; or
- (iii) was **biased** or **reasonably suspected** of bias;

Question 10

Right to reasons questions?

(10)

Kragtens artikel 33(2) van die Grondwet is mnr Sikh geregtig op redes aangesien sy **regte nadelig geraak** is deur die kansellarie van die pensioen. Hierdie vereiste bied beskerming teen enige **arbitrêre of onredelike besluitneming**. Currie en Klaaren stel voor dat die hoofdoel van die vereiste om redes is om **administratiewe optrede te regverdig**. Dit bevorder regverdigheiden korrekte administratiewe optrede aangesien **slegte redes** of geen redes aanleiding kan gee tot **hersiëning**. Dit verseker ook **openheid, verantwoordbaarheid en deursigtigheid** in publieke administrasie en reflekteer die waardes van "n oop en demokratiese samelewing.

Artikel 5 van PAJ A bepaal dat redes aan **enigeen** wat daarvoor aansoek doen, en wie se **regte nadelig** en wes bepaal ook dat "n **hof** ook die optrede kan hersien as die optrede nie rasioneel aansluit by die redes wat gegee is nie.

Die belangrikheid van redes lê daarin dat dit aandui hoe die administratiewe liggaam gefunksioneer het toe die besluit geneem is -- of dit **regmatig** of **onwettig, rationeel** of **arbitrêr, redelik** of **onredelik** opgetree het.

As geen redes verskaf is nie, is mnr Sikh in "n uiters ongunstige posisie om die optrede aan te val. Indien geen inligting aan hom bekend is nie, sou dit baie moeilik wees om kwessies soos die versuim van die administrateur om die saak deeglik te **oorweeg (apply his mind), ongemagtigde doel, mala fides**, ensovoorts te bewys en om gronde vir appèl of hersiening te staaf.

(5)

Were the reasons adequate?

In terms of *Moletsane v The Premier of the Free State* adequate reasons mean that the **administrative action must be justifiable in relation to the reasons** given for it. "

"The **more drastic the action taken, the more detailed the reasons** which are advanced should be.""
they should **"fit" the action**.

The reasons (or lack thereof) given to Mr Warden **do not satisfy any of these requirements**.

Question 11

Just administrative actions requirements list: Section 33 of constitution (5)

1. Lawfulness
2. Fair procedure
3. Reasonableness

4. Written reasons where rights have been adversely affected.

LFRW

Question 12

Who has **locus standi** – examples/list (5) **Section 38**

1. anyone acting in their **own interest**;
2. anyone acting **on behalf** of another who **cannot act** in their own name;
3. anyone acting as a **member** of, or in the **interest** of, a **group** or **class** of persons;
4. anyone acting in the **public interest**;
5. an **association** acting in the interest of its **members**.

OBMPA

Question 13

Exceptions to internal remedies first (7-10)

1. The case has been **pre-judged by the administrator**. (This does not mean that the administrator has heard the matter already, but that he/she has a preconceived notion of the outcome.)
2. The decision was made in **bad faith, fraudulently or illegally**, or **not made at all**.
3. The aggrieved party has an **option to approach court directly**.
4. There has been an **error of law**. Eg person made decision outside of law
5. There has been **agreement between the parties**.
6. The administrative body has **no authority** to rectify the problem.
7. The internal remedy does **not provide the same protection** as judicial review.

Question 14

Name remedies and apply (15) or List (5)

1. Statutory appeal
2. Judicial review
3. Interdict
4. Mandamus
5. Declaratory order
6. Defence in criminal proceedings

Statutory appeal

None of the **higher courts** have inherent appeal jurisdiction - appeals are therefore **only available** when the **relevant legislation** makes **provision** for it. **Subordinate** legislation may only make such provision if **authorised** by the **enabling** legislation.

Appeals lie only against **final decisions**.

The court is **restricted** to the **record**, but **rehears** the **merits** of the decision.

Review

All higher courts have **inherent** review jurisdiction in terms of the **common law**. **Ouster clauses** are no longer constitutional in terms of **s34** of the Constitution. Review may take place in terms of the **Constitution, PAJ A, specific statutes, Supreme Court Act** (if review of lower courts' decisions). The **grounds** of review must be stated and **broadly** rests on an infringement of a **fundamental right** or challenges the **validity** of administrative action. It only decides on the **validity** of the decision, but may go **beyond** the **record**.

Interdict

An interdict is aimed at **preventing unlawful administrative action** which will **prejudice** the rights of the affected party.

There must be a clear **legal interest** which is being threatened;

No alternative satisfactory remedy available;

The party will suffer **irreparable damage** or prejudice if the interdict is not granted.

Mandamus

This remedy is used to **compel** an **administrator** to perform a statutory duty. It **cannot** however stipulate **how** the power should be exercised.

PAJ A, eg provides that "**failure to make a decision**" is a ground for review.

The court can, however be approached to grant a mandamus in the event of a **long delay** to make a decision.

It is the **flip side of an interdict** - unauthorised action is prevented by means of an interdict and compliance with a statutory duty is enforced by way of mandamus.

Declaratory order

This remedy is applied for where there is a **clear dispute** or uncertainty about the **validity or effect of administrative action**, even where other remedies may also be relied on.

The court will give a **definitive answer** to the question of what the **legal position** is regarding any particular person or a given state of affairs.

It clarifies the "**status**" of a matter.

Defence in criminal proceedings

If a person is **charged** with a criminal offence created by legislation (failing to comply with empowering legislation) the charge may be **defended** by challenging the **validity** of the **administrative decision** that is the subject of the dispute.

Application eg

Mr Warden should apply for **an interdict to stop the appointment of the Commissioner's nephew until the matter has been reviewed**, since the matter is **urgent**, he has a **clear legal interest**, there is **no other satisfactory remedy** and he will suffer **irreparable prejudice if the interdict is not granted**. An appeal may only be lodged if the particular legislation provides for it. The High Court has inherent review jurisdiction. In a review the **court will consider the procedural fairness** of the appointment. It will be permitted to go **outside the record of the proceedings** and will usually **refer the matter back** to the administrator to rectify the procedure.

OR

Me Sukolova moet vir 'n **interdik** aansoek doen om die **onttrekking van haar verblyfpermit te verhoed totdat die saak hersien is**, aangesien die saak **dringend** is, sy 'n **duidelike regsbelang** het, daar **geen ander bevredigende remedie** is nie en sy **onherstelbare skade** sou lei as die **interdik nie toegestaan** word nie. Mens kan slegs appèl aanteken as die relevante wetgewing daarvoor voorsiening maak. Die Hoë Hof het inherente hersieningsbevoegdheid. By hersiening sal die **hof die prosedurele billikheid** van die onttrekking oorweeg en toegelaat word om buite die rekord van die saak te gaan.

Question 15

Why should internal remedies be addressed first? (7)

Internal remedies should first be exhausted because this is generally

1. **less expensive,**
2. **less cumbersome,**
3. **less time-consuming,**
4. **simpler and**
5. **does not clog the courts** with matters that are more efficiently dealt with internally and where **appeal boards** can go **beyond the facts** of the decision and look at **policy** and the **efficacy** of the **decision**.
6. It is also a **requirement of section 7(2)(a) of PAJ A.**

Dit is gewoonlik goedkoper, makliker, minder tydrowend en verhoed dat die

howe oorlaai word met sake wat doeltreffender binne die administrasie hanteer kan word. Appèlrade kan gewoonlik omringende omstandighede in ag neem en die beleid en doeltreffendheid van die beslissing ondersoek. Dit is ook 'n vereiste ingevolge a 7(2)(a) van PAJ A.

Question 16

Pre-conditions to turning to judicial control

- Internal remedies must be exhausted
- Locus standi

Question 17

Basic principles around public administration: Values of S 195

- (a) the promotion and maintenance of a high standard of **professional ethics**;
- (b) the promotion of **efficient, economic and effective** use of **resources**;
- (c) a **development-oriented** public administration;
- (d) the provision of **services impartially, fairly, equitably** and without bias
- (e) a **responsiveness** to people's needs and the encouragement of the **public** to **participate in policy-making**;
- (f) an **accountable** public administration;
- (g) the fostering of **transparency** by providing the public with **timely, accessible and accurate** information;
- (h) the cultivation of good **human-resource management** and career-development practices, to maximize human potential;
- (i) a public administration which is **broadly representative** of the South African people, with employment and personnel management practices based on **ability, objectivity, fairness**, and the need to **redress** the imbalances of the past to achieve such broad representation.

Question 18

Proportionality – explain & apply (10)

The proportionality principle means that the **harm to the individual** should not be **disproportionate** to the **benefit to the community**. The principle of proportionality has three elements:

- **Suitability**: this requires the administrator taking the decision to use the most appropriate means available for achieving the purpose - a **rational connection** between the **means** and the **end**.
- **Necessity**: the administrator may take only those steps that are indispensable to achieve the purpose if it involves harm to the individual. In

other words, choose the option that will cause the **least prejudice**.

- **Weighing up the advantages and disadvantages** (also known as "**narrow proportionality**"): this is self-explanatory and demands that the means must not be out of proportion to the end in balancing the outcome against possible harm caused.

You must then test the decision against these 3 elements to decide for yourself whether it was reasonable (apart from other defects it may have). Any 'reasonable' conclusion gains a mark.