

Administrative Law

(NOTE: Questions are in BOLD)

Mr. Con Swindle is a student at the Peoples' University. At the start of the year-end examination in Administrative Law the invigilator draws the students' attention to the dire consequences of cheating in the examination. During the examination the invigilator catches Mr. Con Swindle copying answer from notes smuggled into the venue. The invigilator reports the student to the relevant lecturer who summarily expels Mr. Con Swindle from the university. She informs him that she has no interest in students who waste her time.

The Higher Education Act makes provisions for the steps that should be taken in such a case, *inter alia* the Principle is authorized to expel the student after a disciplinary hearing. The Principle, in terms of the legislation, delegates the disciplinary proceedings to be conducted by a designated committee consisting of the Dean of Students Affairs, the legal advisor and the Registrar. A student can only be expelled if the committee has conducted a disciplinary hearing and recommended expulsion to the Principle.

Answer the following questions. Give reasons for all your answers - a bare "yes" or "no" or reference to case or provision is NOT enough.

Question 1

1a) Define an administrative-law relationship, including the concepts of general and individual administrative-law relationships. Explain whether Mr. Con Swindle is subject of general or individual-administrative relationship in his dealings with the university authorities.

- An administrative-law relationship is where one of the legal subjects is an authoritative person or body who exercises power.
- He must have the power to prescribe, restrain or allow other individuals or jurists person to act in a certain way.
- The position of power must be held by a person or body clothed with state authority, and who is able to exercise that authority

- The exercise of such power may affect the rights and interests of the person in the relationship leaving such person in a subservient or subordinate position.
- In general administrative-law relationship the legal rules governing the relationship between the parties apply to all the subjects within a particular group.
- These rules thus apply impersonally, that is generally and objectively and non-specifically and not to a particular identifiable legal subject
- In an individual administrative-law relationship legal rules apply personally and specifically between parties.
- The legal rules apply to specifically identifiable legal subjects.
- Individual relationships are created by individual administrative decisions
- Mr. Con Swindle according to the scenario is subject to both general and individual administrative-law relationships:
 - The lecturer summarily expelling Mr. Con Swindle from the university is an individual administrative-law relationship
 - The procedural steps set up by The Higher Education Act is general or objective relationship

1b) Define administrative action in terms of section 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). ***

Administrative Action means any decision taken or any failure to take a decision by:

- An organ of State when:
 - Exercising a power in terms of the Constitution of a provincial Constitution or
 - Exercising a public power or performing a public function in terms of any legislation or
- 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,
- When adversity affects the rights of any person and which has a direct, external legal effect but does not include
- The executive person or functions of the National Executive
- The executive powers or functions of the Provincial executive

- The executive powers or functions of the municipal council
- The legislative function of Parliament, a Provincial legislature or a municipal council
- The decision to instate or continue a prosecution
- Any decision taken or failure to take a decision in terms of Section 4 (1) [of PAJA]
- Any decision taken or failure to take a decision in terms of any provision if the promotion of Access to Information Act 2000

1c) Indicate in each case whether the following is administrative action. Substantiate your answer.

- i) The decision of Mr. Swindle to appeal to the Principle against the summary expulsion. (2)**
 - No, appealing is one of the remedies available to him and Mr. Swindle is not an organ of state since administrative action can only be exercised by an organ of state
- ii) The local prosecutor's decision to change and prosecute Mr. Swindle. (1)**
 - This does not amount to administrative action
 - the decision to institute or continue a prosecution according to PAJA does not contribute to administrative action.
- iii) The Principal's decision to institute disciplinary proceedings. (2)**
 - This amounts to administrative action since the Principal is acting in accordance to the Higher Education Act,
 - The principal is exercising a public power in accordance to legislation (Higher Education Act)

Question 2

2a) What is an organ of state as defined by the Constitution Of Republic of South Africa 1996? Is the university (including its employees) an organ state? Why? (10)

- organ of state means any department of state or administration in the national, provincial or
- local sphere of government; or
- any other functionary or institution

- exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
- exercising a public power or performing a public function in terms of any legislation,
- But does not include a court or a judicial officer.
- The University is an organ of state because organ of state includes any functionary or
- institution that is not part of the public administration, but which either exercises
- power or performs functions in terms of the Constitution or a provincial constitution
- Or exercises public power or performs public functions in terms of any legislation.
- The employees of the university are not organs of state because while a private person or entity can be an "administrator" ... what is important is the public nature of the power exercised,
- Rather than the person or entity exercising it.

2b) Discuss the concept of *delegare delegatus non potest* (the rule against delegation). Mention the various kinds of delegation and indicate whether the rule is correctly applied in the set of facts. (10)

- This rule expresses the idea that the administrator who has authority to take administrative action must exercise that authority himself or herself.
- The general rule is that where a discretionary power has been granted to a particular functionary because of his or her specific qualifications, knowledge or expertise, the exercise of this discretion cannot be delegated to another functionary or institution.
- The original administrator must perform the function personally.
- The key judgment dealing with delegation is the case of *Shidiack v Union Government* 1912 AD 642.
- However an executive organ of state in any sphere of government may delegate any power or function that is to be exercised or performed in terms of legislation, to any other executive organ of state,
- provided the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed;

- an executive organ of state in any sphere of government may also exercise any power or perform any function for any other executive organ of state on an agency or delegation basis.
- There are different kinds of delegation: mandate, deconcentration and decentralization.
- Deconcentration of activities is a type of delegation which takes place within departments of state.
- Decentralisation of administrative power is characterised by the senior functionary transferring certain powers and activities to an independent organ or body "which carries out these powers and functions entirely in its own name".
- The simplest form of delegation occurs in the form of a mandate that is an instruction or command. The senior administrator makes a decision and then hands it over to another administrator to implement or execute.
- The rule of delegation is applied correctly, in the scenario we witness decentralization of administrative power by the principal to the disciplinary committee, the delegation was also in accordance with legislation (Higher Education Act)

2c) Suppose the lecturer decided to reconsider the expulsion, would she have been *functus officio* (unable to deal with the matter because it had been finally dealt with)? (5)

- NO, she would not have been *functus officio*,
- The actions of the lecturer falls under purely administrative actions,
- 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
- 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.

Question 3

3a) Discuss fully the requirements that should be met in terms of section 3 PAJA for the decision to comply with fair procedure. (Please confine yourself to the legislative requirements) (15)

- PAJA specifically states that a fair administrative procedure depends on the circumstances of each case.
- The administrator must give the affected person referred to in subsection (1)(PAJA) : adequate notice of the nature and purpose of the proposed administrative action
- reasonable opportunity to make representations
- a clear statement of the administrative action
- adequate notice of any right of review or internal appeal
- adequate notice of the right to request reasons in terms of section 5
- it is important to remember that the aim of the mandatory elements is to provide the affected person with adequate notice and a reasonable opportunity to make representations before a decision is taken.
- Note further that the use of the words "adequate" and "reasonable" leave the administrator with some flexibility to decide on the precise content of the notice and the opportunity given to make representations.
- At the very least though affected persons must be provided with sufficient information in order for them to "know the case they have to meet and so that their opportunity to make representations is a meaningful one"
- "a clear statement of the administrative action" must be given to the affected person, relates in all probability to administrative action that already has been taken.
- In other words, "after a course of action has been decided on"
- The affected person should "at least be able to tell from the statement what has been decided, when, by whom, and on what legal and factual basis"

3b) Why was Mr. Swindle entitled to reasons for his expulsion? Discuss fully.(10)

- According to Constitutional law everyone whose rights have been adversely affected by administrative action has the right to be given written reasons for the decision.
- the need to give reasons is part of the common law *audi alteram partem rule* under certain circumstances
- Reasons show how the administrative body functioned when it took the decision and in particular how the body performed the action and whether that body acted lawfully or unlawfully, rationally or arbitrarily, reasonably or unreasonably.
- Requiring the administrator to give reasons for his decision is a safeguard against any arbitrary or unreasonable administrative decision making.
- the Constitution insists that only a person whose rights have been ``adversely affected'' by administrative action has a right to written reasons and in this case it is Mr Swindle

Question 4

4a) Would the following persons have *locus standi* in terms of section 38 of the Constitution? Substantiate your answer. (6)

i) Mr. Con Swindle

- Yes, Mr. Con Swindle has *locus standi* according sec 38 (a)

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ii) The Students' Representative Council

- Yes, The Students' Representative Council has *locus standi* according to sec 38 (e)

iii) Mr. Con Swindle' neighbor

- No, since Mr. Con Swindle can act in his own name (sec 38 (b))

4b) Why should Mr. Swindle first exhaust internal remedies and what are the steps he should take? (8)

- The basic rule is that all internal channels should be used before a court of law is approached.

- He should exhaust the internal remedies because:

- It is unreasonable for a person to rush to court before his or her internal remedies have been exhausted.
- The internal remedies are usually cheaper and more expedient/easier to use.
- It helps to prevent the courts being overloaded with cases that may be more efficiently dealt with by the administration itself.

4c) What is the difference between statutory appeal and judicial law review? (6)

STATUTORY APPEAL :

- the courts may hear appeals only where this is provided for by statute/legislation.
- An appeal may be lodged only against a final decision or final order, not against a provisional or interlocutory order
- The provisions governing the power of the courts to examine administrative action on appeal, the requirements for appeal, the time within which the appeal must be noted, and so on, are laid down in the empowering statute.

JUDICIAL REVIEW:

- A review scrutinises the legality/validity of the decision and whether it was defective and therefore not conforming to the requirements for validity/legality.
- a review may go beyond the record to establish whether any irregularities were present, but may NOT go into the merits
- A review scrutinises the process of decision making ± whether the correct process/procedure was followed or whether any irregularity or excess of power was present.

4d) Assuming all internal remedies' have been exhausted, which judicial remedy(ies) would you advise Mr. Swindle to pursue? Explain. (5)

- I would advise Mr. Swindle to pursue judicial review.
- ALL administrative decisions are subject to judicial review and The grounds of review of the legality of administrative action are :
- the infringement or threatened infringement of a fundamental right listed in the Bill of Rights or
- any challenge to the validity of administrative action, that is failure to

comply with any of the requirements for valid administrative action which is evident in the set of facts through the lecturer expelling Mr. Swindle without following the procedures of the expulsion of a student.

- A review scrutinises the legality/validity of the decision, whether it was defective and therefore not conforming to the requirements for validity or legality. Therefore in the set of facts review would look at how the decision to expel Mr. Swindle was reached.
- Through review the process of decision making is looked at.

ADL 2601

Mr. JL Bird is a prisoner serving a sentence of six years imprisonment for dealing in drugs. Assume that he qualifies for parole and that he has applied for parole. However, his application of parole is summarily dismissed without any explanation. Vinnie Vengeance, a member of the parole board that considered Mr. Bird's application, carries a longstanding grudge against Mr. Bird because he (Mr. Bird) assaulted Vengeance's sister years ago.

Mr. JL Bird contacts you, Advise him on the following and **give well substantiated reasons for all your answers.**

Question 1

1a) Discuss whether bias is in evidence in the set of facts. (10)

- The position on bias is dealt with under the *nemo iudex in sua causa* (literally: "no one may be a judge in his or her own cause").
- In other words, the decision-maker must be, and must be reasonably perceived to be, impartial or unbiased. This is known as the rule against bias.
- Every person who undertakes to administer justice, whether he is a legal official or is only for the occasion engaged in the work of deciding the rights

of others, is disqualified if he has a bias which interferes with his impartiality;

- or if there are circumstances affecting him that might reasonably create the suspicion that he is not impartial.
- The test to determine bias was in BTR Industries case
- The most common examples of bias are:
- the presence of pecuniary/financial interest and the presence of personal interest of which in our set of facts there was bias through the presence of personal interest.
- one is not required to show that there was in fact no bias or partiality in the process,
- the criterion is that no reasonable person would have had a perception or suspicion/apprehension of bias.
- In other words, the affected individual merely has to prove an appearance of bias or partiality rather than the existence of actual bias.

1b) Does the decision to refuse Mr. Bird's application constitute procedurally fair administrative action in terms of PAJA? (15)

- NO, this does not constitute procedurally fair administrative action because in order to give effect to the right to procedurally fair administrative action,
- an administrator, subject to subsection (4), must give a person referred to in subsection (1)
- adequate notice of the nature and purpose of the proposed administrative action;
- a reasonable opportunity to make representations;
- a clear statement of the administrative action;
- adequate notice of any right of review or internal appeal, where
- applicable; and
- adequate notice of the right to request reasons in terms of section 5
- 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.(as developed by our common law)
- The first South African case in which the doctrine of legitimate expectation was raised was *Everett v Minister of the Interior* 1981 2 SA 453 (C)

- You must remember that a legitimate expectation gives you a right to a hearing but NOT necessarily to succeed in the application.
- Nevertheless, it is important to remember that the aim of the mandatory elements is to provide the affected person with adequate notice and a reasonable opportunity to make representations before a decision is taken.
- At the very least though affected persons must be provided
- with sufficient information in order for them to ``know the case they have to meet and so that their opportunity to make representations is a meaningful one"
- `a clear statement of the administrative action" must be given to the affected person, relates in all probability to administrative
- action that already has been taken.
- In other words, ``after a course of action has been decided on"
- The affected person should ``at least be able to tell from the statement what has been decided, when, by whom, and on what legal and factual basis"

Question 2

2a) Was Mr. Bird entitled to reasons? Discuss fully with reference to PAJA, including whether reasons are important and why. (15)

- Yes he was entitled to written reasons
- Section 5(1) requires the provision of written reasons at the request of any person whose rights have been materially and adversely affected by any administrative action and who has not been given reasons for the action.
- The Act does not provide a right to reasons, it provides the right to request
- reasons.
- Once such a request has been received the administrator is obliged to (he or she must) furnish the reasons within ninety days.
- The reasons must be adequate.
- The reasons must be in writing.

2b) Suppose the reasons given for the refusal of Mr. JL Bird's application are that he has refused to make his bed for six weeks. Discuss whether this would be considered "adequate" reasons. (5)

- What will constitute adequate reasons will depend on the circumstances of each and every case.
- The reasons given should provide sufficient information for any disappointed applicant to prepare an appeal.
- In *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd*, the court found that it is apparent that reasons are not really reasons unless they are properly informative. They must explain why action was taken or not taken, otherwise they are better described as findings or other information.
- reasons should educate the beneficiary concerned about what to address specifically in an appeal or a new application.
- The reasons should instill confidence in the process, and they should improve the rational quality of the decisions arrived at.
- The more drastic the action taken, the more detailed the reasons which are advanced should be.
- The degree of seriousness of the administrative act should therefore determine the particularity of the reasons furnished.
- It would therefore be safe to say that the reasons given to Mr. JL BIRD are not adequate reasons.

3a) Briefly discuss the elements of the principle of proportionality as it relates to reasonableness (5)

- A decision may be unreasonable when there is no evidence of an even balance or proportionality, between the outcome the decision-maker wants to achieve and the means he or she uses to achieve the result

Question 4

4a) Who has *locus standi* in terms of section 38 of the Constitution? (5)

- anyone acting in their own interest;
- anyone acting on behalf of another person who cannot act in their own name;
- anyone acting as a member of, or in the interest of, a group or class of persons;

- anyone acting in the public interest; and
- An association acting in the interest of its members.

4b) Under which circumstances may Mr. Bird approach the court directly? (7)

- the case has already been prejudged by the administrator
- the decision has been made in bad faith (mala fide), fraudulently or illegally, or has in effect not been made at all
- the aggrieved party has an option whether to use the extrajudicial remedy or to proceed direct to judicial review (Jockey Club of SA v Feldman 1942 AD 340)
- the administrative authority has come to an unacceptable decision as a result of an error of law (eg when the administrator by reason of "mistake of law" presumes that he or she has the authority to take action)
- the administrative body concerned has agreed that judicial review proceedings may start immediately
- the administrative body concerned has no authority to rectify the particular irregularity complained of
- the internal remedy cannot provide the same protection as judicial review (For example, in Msomi v Abrahams 1981 (2) SA 256 (N) this was held to be a strong indication that internal remedies need not be exhausted.)

4c) What are the orders a court may make in terms of section 8 of PAJA should Mr. Bird be successful in his application review? (7)

-In terms of section 8(1) of PAJA, the court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable.

-In terms of section 8(1)(b) the court may make an order prohibiting the administrator from acting in a particular manner, this therefore makes for a prohibitory interdict.

-In terms of 8(1) (c) the court may grant orders setting aside decisions of the administrator.

-The court or tribunal, in proceedings for judicial review in terms of section

-6(1), may grant any order that is just and equitable, including orders

-setting aside the administrative action and,

-remitting the matter for reconsideration by the administrator, with or without directions; or in exceptional cases :

-substituting or varying the administrative action or correcting a defect resulting from the administrative action, or directing the administrator or any other party to the proceedings to pay compensation.

ADL 2601

(NOTE: Questions are in BOLD)

Mr. J Warden is employee of the Department of Correctional Services; He has applied for a promotion in the department and meets all the minimum requirements. The relevant legislation prescribes that appointments and promotions in the department are made after applicants have attended a selection committee meeting. The selection committee should consist of the Commissioner of Correctional Services, the Head of the Human Resources division, and the Head of division where the appointment/promotion is to made Mr. Warden is notified to attend the meeting the day before it is to take place, he is interviewed by The Commissioner, a clerk in the Human Resources Division, and the senior administration clerk in the local prison. Two weeks later he is informed that he has not been successful. The Commissioner's nephew (far less qualified) has been appointed to the post. He requests reasons for the decision, and is informed that his lack of success is regretted, but nothing more.

Answer the following questions, Give reasons for all your answers a bare "yes" or "no" or reference to a case or provisions is NOT enough.

Question 1

1a) Define administrative action does the decision not to promote Mr. Warden amount to administrative action? Substantiate your answer (10)

- Administrative Action means any decision taken or any failure to take a decision by:
- An organ of State when:
- Exercising a power in terms of the Constitution of a provincial Constitution or
- Exercising a public power or performing a public function in terms of any legislation or
- 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,

- The decision not to promote Mr. Warden is not an administrative action.

1b) Name five (5) legally binding sources of administrative law (5)

- The Constitution of the Republic of South Africa, 1996
- Legislation
- Case law/judicial precedent
- Common law
- Administrative practice (custom or usage)
- International law

Question 2

2a) Do the following actions constitute administrative actions? Explain your answers

- i) The power of the President to appoint a commission of enquiry (2)**
 - No, it is not an administrative action
- ii) A request by Mr. Warden for reasons for his failure (2)**
 - No, Mr Warden has a right to the reasons and he is also not an organ of state
- iii) Parliament's new Correctional Services legislation (2)**
 - No, administrative action does not include the legislative functions of Parliament, a provincial legislature or a municipal council
- iv) The decision of the local municipality to increase rates (2)**
 - No, since this is the executive functions of the municipal council.

2b) Briefly explain the concept of discretionary power is there any evidence of the exercise of a discretion in the set of facts? (5)

- Administrative action is usually directly related to the exercise of a discretionary power by the administrator.
- In instances where an administrator has a discretionary power where he or she exercises a choice between two options .
- we should ask whether the exercise of this discretion was reasonable or not.

- There is evidence of discretionary power in the set of facts, through the commissioner appointing his nephew for the position.
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Question 3

3a) Explain whether the selection process of Mr. Warden was procedurally fair in terms of section 3 of PAJA? Include all aspects (15)

- In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)
 - adequate notice of the nature and purpose of the proposed administrative action;
 - a reasonable opportunity to make representations;
 - a clear statement of the administrative action;
 - adequate notice of any right of review or internal appeal, where applicable; and
 - adequate notice of the right to request reasons in terms of section 5
- The administrator should make sure that the affected person :
 - Obtain assistance and legal representation in serious or complex cases. Leaving the administrator with a discretionary power either to allow legal representation or not is in line with the common law. At common law it is generally accepted that no general right to legal representation . However, it is also accepted that such assistance is essential where the matter involves complex legal issues.
- Present and dispute information and arguments
 - This discretionary requirement for procedural fairness (to present and dispute information and arguments) is closely and logically linked to the mandatory requirement that an affected person must be granted the reasonable opportunity to make representations.
 - the common law equivalent of presenting and disputing information and arguments in the requirement to lead or present evidence and to challenge evidence against the case (ie, to cross-examine). Baxter (1984:553) calls this opportunity to present evidence, and to contradict or challenge evidence which is brought against the affected person, "the essence of a fair hearing". Note further that the discretionary requirement of an

opportunity to present and dispute information and arguments also shows a close relationship to the ability to reply to/counter a particular allegation on the part of the administrator.

- Personal appearance
- At common law personal appearance was not a requirement, unless the empowering statute made express provision for this. The reason for this is a one: written hearings (hearings on paper) are theoretically, at least,

Question 4

4a) i) Does Mr. Warden have *locus standi* to take the matter to court (2)

- Yes since he can act in his own capacity

ii) Does Mr. Warden's wife have *locus standi* to the matter to court? (2)

- No, Mr Warden can represent himself in his own case.

iv) Would the Correctional Services Union have *locus standi* to act on behalf of Mr. Warden?

- Yes because its an association acting in the interest of its members.

4b) What are the exceptions to the general rule that internal remedies should first be exhausted? (7)

- The case has already been prejudged by the administrator
- The decision has been made in bad faith (*mala fide*), fraudulently or illegally, or has in effect not been made at all
- The aggrieved party has an option whether to use the extrajudicial remedy or to proceed direct to judicial review
- The administrative authority has come to an unacceptable decision as a result of an error of law (e.g. when the administrator by reason "mistake of law" presumes that he or she has the authority to take action)
- The administrative body concerned has agreed that judicial review proceedings may start immediately
- The administrative body concerned has no authority to rectify the particular irregularity complained of

- The internal remedy cannot provide the same protection as judicial review.

4c) Name the judicial remedies which are available to an aggrieved person and explain which remedy(ies) you would advise Mr. Warden to pursue (12)

- statutory appeal
- judicial review
- interdict

- mandamus
- declaratory order
- defence in criminal proceedings
- I would advise Mr. Warden to use statutory appeal to remedy the administrative action.
- An appeal may be lodged only against a final decision or final order, not against a provisional or interlocutory order (the last-mentioned is a provisional order issued in the course of proceedings).
- An appeal is a rehearing of the matter which is restricted to the record of the proceedings.
- It may examine the merit of the decision, asking whether the administrative decision was right or wrong.
- The provisions governing the power of the courts to examine administrative action on appeal, the requirements for appeal, the time within which the appeal must be noted, and so on, are laid down in the empowering statute.
- The enabling statute will also determine the nature and extent of the appeal, in other words,
- whether it is an appeal on the facts,
- an appeal on questions of law,
- or whether an appeal may be lodged against both the facts and questions of law.

ADL 2601

(NOTE: Questions are in BOLD)

Ms. Sukolova, a Bulgarian citizen and water affairs expert, has been granted a temporary residence permit in South Africa in terms of the Immigration Act 13 of 2002. The permit is valid until 31 October 2010. In terms of the legislation the Minister of Home Affairs has delegated the task of granting and withdrawing these permits to the Director-General of Home Affairs. The regulations in terms of the Act provide that all application for (and withdrawals of) such permits be considered by a committee consisting of the Chief Director for immigration, an official with specialized knowledge of scarce skills in the country and a senior member of the South African Police Force nominated by the Minister of Safety and Security. The committee makes a recommendation to the Director-General. On the 15 August 2010 Ms. Sukolova receives a letter signed by the Head of the regional office of the Department of Home Affairs in Johannesburg, stating that he has withdrawn her residence permit with immediate effect. No reasons are given for the action.

Answer the following questions. Give answer for all your answer – a bare “yes” or “no” or reference to a case or provision is NOT enough

Question 1

1a) The set of facts reflects an individual administrative law relationship. Briefly define it. (5)

- In an individual administrative-law relationship legal rules apply personally and specifically between the parties.
- In other words, the legal rules apply to specifically identifiable legal subjects.
- Individual relationships are created by individual administrative decisions
- individual relationships are not affected by new general legislative provisions, unless the amending Act specifically states that it affects the relationship.
- The presumption is that an existing individual relationship is not affected by amending legislation

1b) Does the decision to grant the temporary residence permit amount to administrative action? Substantiate your answer (10)

- Yes this this does constitute administrative action since the Director General and the Committee are organs of state that are exercising a public power in terms of legislation.
- administrative action' means any decision taken, or any failure to take a decision, by an organ of state, when
- exercising a power in terms of the Constitution or a provincial constitution; or
- exercising a public power or performing a public function in terms of any legislation; or
- 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, but does not include
- the executive powers or functions of the National Executive,
- the executive powers or functions of the Provincial Executive,

1c) What is an organ of state in terms section 239 of the Constitution of 1996? Name the organs of state in the set of facts (10)

``organ of state'' means:

- any department of state or administration in the national, provincial or local sphere of government; or
- any other functionary or institution: exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
- exercising a public power or performing a public function in terms of any legislation,
- but does not include a court or a judicial officer.
- The organs of state in the set of facts are : Minister of Home Affairs,
- Minister of Safety and Security,
- South African Police Force,
- Department of Home Affairs.

Question 2

2a) Do the following actions constitute administrative action? Explain your answer

- i) The power the President to appoint the Minister of Home Affairs (2)**
 - No, because he is acting his executive powers and functions of the executive in the national sphere
- ii) A request by Ms. Sukolova for reasons for the withdrawal (2)**
 - No, it is not an administrative action, because she is not an organ of state
- iii) The regulations published by the Minister of Home Affairs in terms of Immigration Act.(2)**
 - No, it is not an administrative action, it is a legislative action.
- iv) Ms. Sukolova's decision to take the matter on appeal to the Director-General (2)**
 - No, It is not an administrative action, she is not an organ of state
- v) The refusal by the Head of regional office to supply Ms. Sukolova with the information she requested in terms of the Promotion of Access to information Act (2)**
 - Yes, this is an administrative action

2b) Was the withdrawal of Ms. Sukolova's permit in terms of a valid delegation of powers? Discuss fully with reference to the maxim *delegatus delegare non potest* (15)

- This rule expresses the idea that the administrator who has authority to take administrative action must exercise that authority himself or herself.
- The general rule is that where a discretionary power has been granted to a particular functionary because of his or her specific qualifications, knowledge or expertise, the exercise of this discretion cannot be delegated to another functionary or institution.
- The original administrator must perform the function personally.
- Where the legislature places upon any official the responsibility of exercising a discretion which the nature of the subject matter and the language of the section show can only be properly exercised in a judicial spirit, then that responsibility cannot be vicariously discharged.
- The key judgment dealing with delegation is the case of *Shidiack v Union*

- Government 1912 AD 642.
- However an executive organ of state in any sphere of government may delegate any power or function that is to be exercised or performed in terms of legislation, to any other executive organ of state,
- provided the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed;
- an executive organ of state in any sphere of government may also exercise any power or perform any function for any other executive organ of state on an agency or delegation basis.
- There are different kinds of delegation: mandate, deconcentration and decentralization.
- Deconcentration of activities is a type of delegation which takes place within departments of state.
- Decentralisation of administrative power is characterised by the senior functionary transferring certain powers and activities to an independent organ or body ``which carries out these powers and functions entirely in its own name".
- The simplest form of delegation occurs in the form of a mandate that is an instruction or command. The senior administrator makes a decision and then hands it over to another administrator to implement or execute.
- According to the facts the Director General can withdraw a permit after being advised by the committee, therefore the Head of the JHB office cannot act outside of the stated procedures hence the delegation of her permit is not in terms of a valid delegation.

Question 3

3a) Explain the concept of proportionality with reference to the reasonableness of the decision to withdrawal the residence permit (10)

- Administrative action is usually directly related to the exercise of a discretionary power by the administrator. In instances where an administrator has a discretionary power where he or she exercises a choice between two options we should ask whether the exercise of this discretion was reasonable or not.
- It has been argued that this reasonableness relates to the merits or substance of the decision, an area in which the courts should not intervene.

When reviewing administrative action on the basis of unreasonableness, so the argument goes, the courts are required to act as super-administrative organs, and to substitute their opinions for those of the administration.

- In other words, to review administrative action on the ground of unreasonableness would be as good as interference with the decisions of the administration, an action which is in conflict with the separation of powers.
- On the other hand, however, the courts must ensure that the decisions of the administration are in line with the requirements of basic fairness .
- It was not reasonable to withdraw the residence permit without giving her adequate reasons

Question 4

4a) What are the two important preconditions that must be met before the legal remedies that control administrative action may be used? (2)

- One of the preconditions set before an affected person may take administrative action on judicial review is that he or she has to exhaust internal remedies as required by section 7(2) of PAJA
- The affected person should have *locus standi*

4B ii) Does Ms. Sukolova have *locus standi* to take the matter to court (2)

- Yes, Ms. Sukolova *has locus standi* according sec 38 (a)

v) Would Ms. Sukolova's landlord be able to act on her behalf? (2)

- No, Ms. Sukolova can act on her own behalf, according to *locus standi* sec 38 (b)

4c) Why should internal remedies first be exhausted? (5)

- The basic rule is that all internal channels should be used before a court of law is approached.
- He should exhaust the internal remedies because:
- It is unreasonable for a person to rush to court before his or her internal remedies have been exhausted.

- The internal remedies are usually cheaper and more expedient/easier to use.
- It helps to prevent the courts being overloaded with cases that may be more efficiently dealt with by the administration itself

d) Name the judicial remedies which are available to an aggrieved person and explain which remedy(ies) you would advise Ms. Sukolova to pursue (9)

- statutory appeal
- judicial review
- interdict
- mandamus
- declaratory order
- defence in criminal proceedings

Administrative Law

ADL 2601

(NOTE: Questions are in BOLD)

The MEC for Roads and Transport, the appointed representative in control of the Departments of Roads and Transport in the Gauteng Province decides to close all taxi routes and the portion of the taxi ranks operated by the Witwatersrand African Taxi Owners Association (WATA). The MEC plans to introduce a new bus services system, which has commonly known as the Bus Rapid System (BRT). The purpose of the BRT is to improve public transport in Gauteng Province. WATA is aggrieved by the decision of the MEC and point out that the BRT can implemented on other routes whether no form of transport is available and furthermore that the consequence would that its 1200 members would be without job. WATA has persistently tried to make these representations to the MEC. The MEC has refused to receive their representations and has made no attempt to give reasons for the decision to close all taxi routes and the portion of the taxi ranks operated by WATA.

WATA contacts you. Advise WATA on the following and **give well substantiated reasons for all your answers.**

Question 1

1a) Briefly explain what an administrative law relationship is. Do you think WATA is subject to an administrative law relationship (7)

- An administrative-law relationship is where one of the legal subjects is an authoritative person or body who exercises power.
- He must have the power to prescribe, restrain or allow other individuals or jurists person to act in a certain way.
- The position of power must be held by a person or body clothed with state authority, and who is able to exercise that authority
- The exercise of such power may affect the rights and interests of the person in the relationship leaving such person in a subservient or subordinate position.
- In general administrative-law relationship the legal rules governing the relationship between the purities apply to all the subjects within a particular group.
- These rules thus apply impersonally, that is generally and objectively and non-specifically and not to a particular identifiable legal subject
- In an individual administrative-law relationship legal rules apply personally and specifically between parties.
- The legal rules apply to specifically identifiable legal subjects.
- Individual relationships we created by individual administrative decisions
- WATA is subject to an administrative law relationship since the MEC is an organ of state and the relationship between the MEC and WATA is a vertical one, one were WATA is in a subservient position.

1b) Identify the administrative action in the set of facts in your answer you should give full definition of the concepts “administrative action” with reference to the provision of the Promotion of Administrative Justice Act (PAJA) 3 of 2000? (13)

- Administrative Action means any decision taken or any failure to take a decision by:

- An organ of State when:
- Exercising a power in terms of the Constitution of a provincial Constitution or
- Exercising a public power or performing a public function in terms of any legislation or
- 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,
- organ of state means any department of state or administration in the national, provincial or
- local sphere of government; or
- any other functionary or institution
- exercising a power or performing a function in terms of the
- Constitution or a provincial constitution; or
- exercising a public power or performing a public function in terms of
- any legislation,
- But does not include a court or a judicial officer.
- The University is an organ of state because organ of state includes any functionary or
- institution that is not part of the public administration, but which either exercises
- power or performs functions in terms of the Constitution or a provincial constitution
- Or exercises public power or performs public functions in terms of any legislation.
- The employees of the university are not organs of state because while a private person or entity can be an "administrator" ... what is important is the public nature of the power exercised,
- Rather than the person or entity exercising it.
- The closing down of the routes and a portion of the taxi ranks by the MEC is an administrative action.

1c) Identify the organs of state in the set of facts and substantiate your answer with reference to the definition of "organ of state" as provided in the constitution (5)

- The MEC and the Department Of Transport are organs of state.

- Section 239 of the Constitution states: "organ of state" means
- any department of state or administration in the national, provincial or local sphere of government; or
- any other functionary or institution exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
- exercising a public power or performing a public function in terms of any legislation,
- but does not include a court or a judicial officer.

Question 2

2a) Does the decision to close all taxi routes and the portion of the taxi ranks operated by WATA constitute procedurally fair administrative action in terms of PAJA (15)

- In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)
 - adequate notice of the nature and purpose of the proposed administrative action;
 - a reasonable opportunity to make representations;
 - a clear statement of the administrative action;
 - adequate notice of any right of review or internal appeal, where applicable; and
 - adequate notice of the right to request reasons in terms of section 5
- In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to
 - obtain assistance and, in serious or complex cases, legal representation;
 - Leaving the administrator with a discretionary power either to allow legal representation or not is in line with the common law. At common law it is generally accepted that no general right to legal representation exists (see above). However, it is also accepted that such assistance is essential where the matter involves complex legal issues. In short, whether assistance or legal representation is required will depend on the circumstances of each case and the consideration of all the relevant facts.

- present and dispute information and arguments; and
 - This discretionary requirement for procedural fairness (to present and dispute information and arguments) is closely and logically linked to the mandatory requirement that an affected person must be granted the reasonable opportunity to make representations. We find the common law equivalent of presenting and disputing information and arguments in the requirement to lead or present evidence and to challenge evidence against the case (ie, to cross-examine). Baxter (1984:553) calls this opportunity to present evidence, and to contradict or challenge evidence which is brought against the affected person, "the essence of a fair hearing". Note further that the discretionary requirement of an opportunity to present and dispute information and arguments also shows a close relationship to the ability to reply to/counter a particular allegation on the part of the administrator
- appear in person.
 - At common law personal appearance was not a requirement, unless the empowering statute made express provision for this. The reason for this is a practical one: written hearings (hearings on paper) are theoretically, at least, 166 quicker and may be dealt with immediately.

2b) Explain the concept of proportionality with reference to reasonableness of the decision to close all taxi routes and the portion of the taxi ranks operated by WATA (10)

- Administrative action is usually directly related to the exercise of a discretionary power by the administrator. In instances where an administrator has a discretionary power where he or she exercises a choice between two options we should ask whether the exercise of this discretion was reasonable or not.
- It has been argued that this reasonableness relates to the merits or substance of the decision, an area in which the courts should not intervene. When reviewing administrative action on the basis of unreasonableness, so the argument goes, the courts are required to act as super-administrative organs, and to substitute their opinions for those of the administration.

- In other words, to review administrative action on the ground of unreasonableness would be as good as interference with the decisions of the administration, an action which is in conflict with the separation of powers.
- On the other hand, however, the courts must ensure that the decisions of the administration are in line with the requirements of basic fairness .
- It is not reasonable because 1200 people will lose their jobs as a result of the taxi rank and portion of routes being closed when another option is available.

Question 3

3b) When will the decision by the MEC take effect. (3)

- Within 90 days according to PAJA

3c) Would the MEC be able to change his or her decision? Discuss with regard to the rules of principle of *functus officio* (the task having being completed) (7)

- The legal force of administrative action is ended by repeal/revocation, amendment, lapse of time, withdrawal of one of the subjects to the relationship, or by court order.
- When the administrator/organ of state cannot amend, repeal/revoke or vary its decision, it is said to be *functus officio*.
- 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.
- 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.
- Therefore yes, the MEC would be able to change his decision.

Question 4

4a) List the forms of internal control and briefly outline the advantages. (7)

- control by superior/senior administrators or specially constituted bodies/institutions
- parliamentary control
- control by public bodies and commissions, such as the public protector and the auditor-general
- The advantages of internal control are that: Administrative decisions are thoroughly re-evaluated through internal control.
- It is also possible to bring inefficient administrators to book.
- Through internal control such administrators can be reprimanded or required to give an explanation of their decisions.
- Internal control is also less expensive, less cumbersome and less time-consuming than judicial control.

4b) Does WATA have *locus standi* and why? (3)

- Yes, WATA has *locus standi* because they are acting as a member of, or in the interest of, a group or class of persons.(Sec 38 of the Constitution)

4c) Name which remedy(ies) you would advise WATA to pursue and give reason for your answer? (8)

- I would advise WATA to use statutory appeal to remedy th administrative action.
- An appeal may be lodged only against a final decision or final order, not
- against a provisional or interlocutory order (the last-mentioned is provisional order issued in the course of proceedings).
- An appeal is a rehearing of the matter which is restricted to the record of the proceedings.
- It may examine the merit of the decision, asking whether the administrative decision was right or wrong.
- The provisions governing the power of the courts to examine administrative action on appeal, the requirements for appeal, the time within which the

- appeal must be noted, and so on, are laid down in the empowering statute.
- The enabling statute will also determine the nature and extent of the appeal, in other words,
- whether it is an appeal on the facts,
- an appeal on questions of law,
- or whether an appeal may be lodged against both the facts and questions of law.

4d) List the orders that a court may make in terms of section 8 of PAJA (7)

- In terms of section 8(1) of PAJA, the court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable.
- In terms of section 8(1)(b) the court may make an order prohibiting the administrator from acting in a particular manner, this therefore makes for a prohibitory interdict.
- In terms of 8(1) (c) the court may grant orders setting aside decisions of the administrator.
- The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders
- setting aside the administrative action and,
- remitting the matter for reconsideration by the administrator, with or without directions; or in exceptional cases :
- substituting or varying the administrative action or correcting a defect resulting from the administrative action, or directing the administrator or any other party to the proceedings to pay compensation.

Question 5

5a) Briefly explain the three forms of internal control (6)

- Control by supervisor/senior administrators or specially constituted bodies/institutions (a higher body/more senior person in the same department/office)
- Parliamentary control (general administrative policy and matters of public concern may be questioned in Parliament)
- Control by public bodies and commissions, such as the public protector and the auditor-general (Constitution has created a number of extrajudicial bodies/institutions that can assist in the creation of such awareness and knowledge and, therefore, in controlling state authority as well)

5b) What are the powers of senior administrator when exercising internal control? (4)

- The senior functionary or institution has the power to reconsider or re-examine – to “review” the decision and then to confirm it, set it aside or vary the decision. When a decision is varied the decision is substituted by another.
- The senior functionary or institution may consider the validity, desirability or efficacy of the administrative action in question. The controlling body may also take policy into consideration.
- Formal control is also exercised by examining the manner in which the decision was reached.
- Internal control, in the form of an internal appeal, does not give rise to final and binding decision. As a result, the same may be raised again within the same departmental hierarchy.

5c) Why should internal remedies first be exhausted before approaching a court law? (2)

- It is unreasonable for a person to rush to court before his or her internal remedies have been exhausted
- The internal remedies are usually cheaper and more expedient/easier to use.
- It helps to prevent the courts being overloaded with cases that may be more efficiently dealt with by the administration itself

5d) When would internal control not be the proper remedy? (7)

- The case has already been prejudged by the administrator
- The decision has been made in bad faith (*mala fide*), fraudulently or illegally, or has in effect not been made at all
- The aggrieved party has an option whether to use the extrajudicial remedy or to proceed direct to judicial review
- The administrative authority has come to an unacceptable decision as a result of an error of law (e.g. when the administrator by reason "mistake of law" presumes that he or she has the authority to take action)
- The administrative body concerned has agreed that judicial review proceedings may start immediately
- The administrative body concerned has no authority to rectify the particular irregularity complained of
- The internal remedy cannot provide the same protection as judicial review.