

8. INTERNAL APPEAL

Exhausting internal remedies when reasons are not enough

Internal appeal is the step **before taking an administrative action to court**. It is designed to resolve conflicts over administrative decisions outside of the courts, saving expense and relieving pressure on the court's time. You may begin an internal appeal under the following conditions:

- When a decision has been taken by the administration that negatively affects your rights, and you are **not satisfied with the reasons** you have been given for that decision; or
- When a **decision has not been taken**.

Before you can ask a court to review an administrative action, the rule in Section 7 (2) of the AJA must be complied with – the rule of **exhaustion of internal remedies**. This means that, where a department of the administration, and the laws and regulations governing it, have procedures allowing someone to appeal a decision of the administration internally, these must be used up before an affected person can approach a court. A person can therefore only ask for **judicial review as a last resort**.

Internal remedies are ways of correcting or reviewing administrative decisions by the administration itself.

EXAMPLE

Agnes fled the civil war in the Democratic Republic of the Congo. She came to South Africa and applied for asylum. She attended a hearing before a Refugee Status Determination Officer who rejected her application as unfounded in terms of the Refugees Act 130 of 1998. She believes that this decision is unreasonable and wants to challenge it.

In terms of Section 26(1) of Act 130 of 1998, asylum seekers who are unhappy with such decisions can appeal to the Refugees Appeal Board. This is a



BY THE END OF THIS SECTION

You will be able to:

- Describe what 'exhaustion of internal remedies' means;
- Know how, when and why to begin an internal appeal.



SECTION 7 (2) OF THE AJA

- Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
- Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.
- A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.

three-member board appointed by the Minister that can confirm, set aside or substitute any decision taken by a Refugee Status Determination Officer.

This procedure is an internal remedy. So Agnes can only ask a court to review this decision if the Appeal Board also finds against her.

This law does allow this procedure to be left out in 'exceptional circumstances' and if it is 'in the interest of justice'. If she wants to leave out this internal remedy, Agnes will have to show the court why her circumstances are exceptional and why it is in the interests of justice to do so.

1. Why is internal appeal important?

There are two reasons why you should follow the internal appeal route:

1. The AJA requires that you **exhaust internal remedies before you start judicial review**. If you begin a judicial review, the court will ask if you have gone through the departmental processes, and if not, you will be sent back to complete them. You are only allowed to bring the an administrative action to court after the internal appeal has been completed and you are still not satisfied with the decision.
2. Internal appeal is **cost effective** compared to a court process, can be **quicker**, can be done in a **less formal** manner. Most importantly, it is **less complicated** and applicants may **do it themselves** without assistance from lawyers.

2. Conducting an internal appeal

An internal appeal is your cost-effective, quick attempt to have a decision that goes against you reversed. Taking a mater on review can be *alienating* – you will lose control of the process to lawyers, judges and the courts. So how do you begin one?

a. Who can start an internal appeal?

Anyone who is not happy with the decision of the administrator may start an internal appeal process. If you have not yet requested reasons for the administrative decision, you must do that first. NGOs can assist citizens in starting the internal appeal, or they may start the process on behalf of applicants.

It is not a legal precondition to request reasons before starting an internal appeal, but it is recommended, to ensure that the person has all the relevant facts before them in order to make an informed decision about whether or not to initiate an appeal.

b. How do you start an internal appeal?

The second notice should tell you exactly how to go about starting an internal appeal process. If it does not, you can request that information from the administrator, and ask them why they have not supplied it to you in the first place.

The letter should tell you:

- **To whom** the appeal should be made;
- **When** the appeal should be made;
- **Where** the appeal should be made;
- **How** to make the appeal; and
- **What** form the appeal should be in (in writing or by using a special form).

In some departments you might have to complete forms – these forms should be included with the second notice, or you can request them from the administrator.

In other departments you might have to come back for a hearing – with the original administrator, with their supervisors, or with a panel of people from the department.

c. When should you start an internal appeal?

After a decision has been made. The notice should tell you what the time deadline is for bringing an appeal.



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The second notice from the administrator should tell you everything you need to begin an internal appeal.

If that information is not there, you should:

- Go back to the original administrator who dealt with your application and request information on internal appeals; or
- Ask another administrator or information office in that department; or
- Look in the phone book for the information officer for that department, and ask them directly how to initiate an appeal.

d. What if there's no internal appeal?

Not every department will have the option of internal appeal – in fact, many don't. This option is thus only available if there is one. If not, you will have to use judicial review, or one of the alternative ideas proposed at the end of the next chapter.

3. A role for NGOs

NGOs have a key role to play in regard to internal appeals, in the following ways:

- Offer **emotional support and encouragement**. Many people are intimidated by having to engage with “the authorities” and do not have the confidence to assert their rights.
- **Inform the person of their rights** – tell them how the AJA protects their rights, and where the internal appeal fits into the progression from first notice to second notice to appeal to judicial review.
- Assist the person to **request reasons** before launching an appeal.
- Assist the person to **initiate an appeal**. If the information on how to start an appeal is included in the second notice, help them to complete the forms. If not contact the administrator and find out how to begin the appeal.
- Help the person **prepare for the internal appeal**. You can even represent the person, or attend the appeal as a support and resource with the person.
- Should the internal appeal fail, **advise the person of the benefits and risks of taking the matter on judicial review**. Help them prepare the information for their case and secure legal assistance.