



PRO BONO AND HUMAN RIGHTS

A guide to the judicial review of decisions
made during the asylum adjudication
process

TABLE OF CONTENTS

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1. Introduction	3
2. What is judicial review?	3
3. Law governing judicial review	3
4. Administrative action subject to judicial review in terms of paja	3
5. Procedural issues that need to be taken into account before instituting review proceedings	4
6. One hundred and eighty day period	4
7. Exhaustion of internal remedies	4
8. Grounds for judicial review in terms of paja	4
9. Circumstances in which the need for judicial review will arise in refugee cases	5
10. Procedure for judicial review as set out in the uniform rules of the high court	6
11. Rules regarding set down of applications for judicial review	6
12. Summary of timeframes relevant to instituting a high court review application	7
13. Proceedings against the state	7
14. Concluding remarks	7

1. INTRODUCTION

- 1.1 The purpose of this Guide is twofold. First, to provide a general overview of:
 - 1.1.1 The law applicable to judicial review;
 - 1.1.2 The substantive grounds of review (with emphasis on those most commonly invoked in the review of decisions made by decision makers in the asylum adjudication process); and
 - 1.1.3 Procedural issues that need to be taken into account when launching/considering launching review proceedings.
- 1.2 Second, to provide some practical advice which should be useful to all new practitioners entering the field of asylum seeker adjudication.

2. WHAT IS JUDICIAL REVIEW?

- 2.1 Judicial review refers to the power of a court to consider and set-aside administrative decisions or delegated legislation. The idea that administrative decision-makers cannot exercise powers beyond those conferred on them in law is a fundamental feature of South Africa's Constitutional democracy. Similarly, public and private bodies that exercise public powers and functions ought to be regulated in terms of law. Not surprisingly, judicial review 'remains the most significant remedy for maladministration'.¹

3. LAW GOVERNING JUDICIAL REVIEW

- 3.1 Section 33(1) of the Constitution of the Republic of South Africa (the Constitution) provides that 'everyone has the right to administrative action that is lawful, reasonable and procedurally fair'. The right to administrative justice is accordingly entrenched in the Constitution.
- 3.2 Section 33(3) goes on to provide that:

'National legislation must be enacted to give effect to these rights, and must:

 - (a) Provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

- (b) Impose a duty on the state to give effect to the rights in subsections (1) and (2); and

Promote an efficient administration.'

- 3.3 In 2000, the Promotion of Administrative Justice Act² (PAJA) was adopted by Parliament in accordance with section 33(3) of the Constitution. Judicial review of administrative action is now primarily governed by PAJA³ which not only regulates the procedural fairness requirements that need to be met by administrators but also sets forward substantive grounds for judicial review and regulates the procedure for judicial review as well the remedies available in judicial review proceedings.
- 3.4 Ordinarily, anyone who wishes to review administrative action must now base their cause of action in PAJA.⁴ While the Constitutional Court has carved out another exclusively constitutional basis for reviewing any exercise of public power (including administrative action) – that being review for non-compliance with the rule of law/principle of legality (legality review) – according to a recent decision of the Supreme Court of Appeal,⁵ this ground of review is only available when PAJA does not apply. Thus where any conduct/decision sought to be reviewed by a litigant constitutes administrative action (as per the definition contained in PAJA) the review proceedings must be brought in terms of PAJA. In terms of this decision, it is only if the conduct/exercise of power falls beyond the ambit of administrative action that legality review can be invoked.

4. ADMINISTRATIVE ACTION SUBJECT TO JUDICIAL REVIEW IN TERMS OF PAJA

- 4.1 Administrative action is defined in section 1 of PAJA to include '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' [Emphasis Added].

¹ Hoexter, C. Administrative Law in South Africa. Juta & Co, Cape Town, 2013, p. 108.

² Act 3 of 2000.

³ Prior to the adoption of the interim and 1996 Constitutions, judicial review of administrative action was largely governed by the common law and the grounds of review were (predominantly) common law grounds. This is no longer the case and the common law grounds are no longer directly applicable in so far as the review of administrative acts by public officials is concerned. See Hoexter, C. 'Just Administrative Action' in Currie, I. De Waal, J. The Bill of Rights Handbook (6th ed), Juta & Co, Cape Town, 2013, p. 647.

⁴ Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism 2004 (4) SA 490 (CC) at Paragraph 25.

⁵ State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd (641 / 2015) [2016] ZASCA 143 (30 September 2016); 2017(2) SA 63 (SCA).

- 4.2 When making decisions concerning asylum seekers' rights to asylum (or related matters), Refugee Status Determination Officers (RSDOs), the Refugee Appeal Board (RAB) and the Standing Committee for Refugee Affairs (SCRA) all exercise a public power in terms of the Refugees Act, No 130 of 1998 (the Refugees Act). To the extent that their decisions adversely affect the rights of asylum seekers and have a 'direct external legal effect' their decisions constitute administrative action for the purposes of PAJA and are reviewable in accordance with PAJA.⁶

5 PROCEDURAL ISSUES THAT NEED TO BE TAKEN INTO ACCOUNT BEFORE INSTITUTING REVIEW PROCEEDINGS

- 5.1 There are certain procedural issues that one needs to be aware of and comply with in order to successfully institute review proceedings in terms of PAJA. The two most important are:
- 5.1.1 Proceedings must be instituted within a reasonable period of time/within 180 days; and
- 5.1.2 Internal remedies provided for by other laws must be exhausted.

6 ONE HUNDRED AND EIGHTY DAY PERIOD

- 6.1 In terms of section 7(1) of PAJA, any proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after:
- 6.1.1 Any internal remedies invoked in respect of the decision were concluded; or
- 6.1.2 In an instance where no such remedy exists, the date when the person concerned was informed of the administrative action, became aware of it and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.⁷

- 6.2 Section 9(1)(b) goes on to provide that the 180 day period may be extended by agreement between the parties, or failing such agreement, by a court or tribunal on application by the person or administrator concerned. In terms of section 9(2) the Court or Tribunal may grant such application if 'the interests of justice so require'. This will involve a factual enquiry in which the Court will have to consider the particular facts and circumstances of the case. Factors that will be taken into account by a court in determining whether the interests of justice test has been met in a particular instance include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue raised and prospects of success.⁸ A full and reasonable explanation for the delay must also be provided.⁹

7 EXHAUSTION OF INTERNAL REMEDIES

- 7.1 In terms of section 7(2)(a) and (b) of PAJA an applicant for judicial review must exhaust internal remedies 'provided for by any other law' before instituting judicial review proceedings. According to Currie¹⁰ this provision is confined to remedies specifically provided for in the legislation with which the case is concerned, in this instance the Refugees Act. Internal remedies provided for in the Refugees Act include:
- 7.1.1 An appeal against a decision of an RSDO to the RAB (if the RSDO dismissed an application for asylum as unfounded);¹¹
- 7.1.2 An automatic review of a decision of an RSDO to reject an application for asylum by the SCRA (if the RSDO dismissed the application as manifestly unfounded, abusive or fraudulent).¹²

⁶ Effectively these requirements mean that the decision in question must be final and impact the asylum seeker 'directly and immediately'. See *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works & Others* 2005 (6) SA 313 (SCA) at Paragraph 23. As is discussed below, because of the internal appeal/review procedure provided for in the Refugees Act, it may be argued that a decision of an RSDO rejecting an application for asylum is not final and/or does not have a 'direct external effect' until the internal remedies provided for in the Refugees Act have been exhausted. As is also discussed below, section 7(2) in any event requires that the internal remedies provided for in the Refugees Act must be exhausted before any review of an RSDO's decision can be brought.

⁷ Once the 180 day limit prescribed by section 7 has been exceeded, it is regarded as unreasonable per se and an application for condonation in terms of section 9 will have to be brought. See *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* [2013] 4 All SA 639 (SCA).

⁸ *Price Waterhouse Coopers Inc v Van Vollenhoven NO and Ano* [2010] 2 All SA 256 (SCA).

⁹ *State Information Technology Agency Soc Ltd v Gijima Holdings* supra at Paragraph 25.

¹⁰ Currie, I. *The Promotion of Administrative Justice Act: A Commentary* (2nd Ed.). Siber Ink, Cape Town, 2007, pp. 184-185.

¹¹ Section 26 provides asylum seekers with a right to appeal a decision by an RSDO rejecting his or her application for asylum as unfounded.

¹² Section 25(1) read with section 11(e) requires the SCRA to automatically review a decision of an RSDO that an application for asylum is manifestly unfounded, abusive or fraudulent.

7.2 Ordinarily therefore, an asylum seeker whose application for refugee status is dismissed by an RSDO would first have to appeal to the RAB (if the application was held to be unfounded) and/or wait for the SCRA to review the RSDO's decision (if the decision was found to be manifestly unfounded, abusive or fraudulent) and exhaust that process before instituting review proceedings. In the event of an adverse decision by the RAB/SCRA the applicant would then be entitled to bring proceedings to review the decision of the RAB/SCRA and also that of the RSDO.¹³

7.3 Section 7(2)(c) does provide that a court or tribunal may in exceptional circumstances on application, exempt a person from the obligation to exhaust any internal remedy if it deems it in the interests of justice to do so. It is up to an applicant to satisfy the court that (a) exceptional circumstances exist which would require the immediate intervention of the Court and (b) that it would be in the interests of justice for the Court to intervene notwithstanding that the internal remedy has not been exhausted. In determining whether or not exceptional circumstances exist the Court will be required to consider the facts and circumstances of the case as well as the nature of the administrative action in issue, and the availability, effectiveness and adequacy of the existing internal remedies.¹⁴ An example of such an exceptional circumstance would be that the internal remedy is likely to be ineffective or incapable of granting effective redress to the applicant/complainant.¹⁵

8 GROUNDS FOR JUDICIAL REVIEW IN TERMS OF PAJA

8.1 Section 6(2) of PAJA lists the grounds upon which a court or tribunal may review administrative action and provides that a court or tribunal may judicially review administrative action if:

'(a) The administrator who took it:

- (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;

- (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
- (c) the action was procedurally unfair;
- (d) the action was materially influenced by an error of law;
- (e) the action was taken:
 - (i) for a reason not authorised by the empowering provision;
 - (ii) for an ulterior purpose or motive;
 - (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
 - (iv) because of the unauthorised or unwarranted dictates of another person or body;
 - (v) in bad faith; or
 - (vi) arbitrarily or capriciously;
- (f) the action itself:
 - (i) contravenes a law or is not authorised by the empowering provision; or
 - (ii) is not rationally connected to:
 - (aa) the purpose for which it was taken;
 - (bb) the purpose of the empowering provision;
 - (cc) the information before the administrator; or
 - (dd) the reasons given for it by the administrator;
- (g) the action concerned consists of a failure to take a decision;
- (h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or
- (i) the action is otherwise unconstitutional or unlawful.'

¹³ Ordinarily one would seek to review both the decision of the RSDO and that of the RAB/ SCRA.

¹⁴ *Koyabe and Others v Minister of Home Affairs and Others* (Lawyers for Human Rights as Amicus Curiae) 2010 (4) SA 327 (CC).

¹⁵ *Nichol v Registrar of Pension Funds* 2008 (1) SA 383 (SCA) at Paragraph 18.

9 CIRCUMSTANCES IN WHICH THE NEED FOR JUDICIAL REVIEW WILL ARISE IN REFUGEE MATTERS

- 9.1 As listed above, there are a number of grounds upon which decisions made, or not made, by an RSDO, the RAB or the SCRA may be reviewed.
- 9.2 The typical grounds upon which a decision may be judicially reviewed can be split into two categories; procedural and substantive. Section 6(2)(c) of PAJA makes reference to procedural unfairness as a ground of review. Such a ground of review will most often arise in conjunction with the provision of section 6(2)(b) of PAJA which confirms that non-compliance with statutory or regulatory requirements is reviewable.
- 9.3 Grounds for review often arise during the asylum adjudication process as a result of the following procedural irregularities:
 - 9.3.1 Asylum seekers are not assisted in completing an Eligibility Determination Form (EDF);¹⁶
 - 9.3.2 Asylum seekers are not informed that they are entitled to have interpreters present and/or interpreters are not present during their interview with an RSDO or during their RAB hearing;¹⁷
 - 9.3.3 The procedure, the associated rights and obligations of asylum seekers and the evidence are not explained to them prior to the commencement of their first interviews in order to ensure that they understand the process fully;
 - 9.3.4 Failure to afford a formal hearing before an RSDO in accordance with the procedure prescribed by Regulation 10; and
 - 9.3.5 The RAB that heard the appeal only comprised of one member and accordingly was improperly constituted.¹⁸
- 9.4 Similarly, substantive errors often occur giving rise to grounds of review described in sections 6(2)(d) and (e) of PAJA and include situations where:

- 9.4.1 A decision made by an RSDO and/or members of the RAB is not rationally connected to the facts presented to them;
 - 9.4.2 The decision taken by the RSDO and/or members of the RAB are not rationally connected to the reasons given for such decisions;
 - 9.4.3 The RSDO and/or RAB rely on outdated or incorrect country-conditions when making their decisions;
 - 9.4.4 In making their decisions, the RSDO and/or the RAB take into account facts which are irrelevant or fail to take into account relevant facts; or
 - 9.4.5 Relevant legislative, judicial and/or academic interpretations of the law are not taken into account, for example:
 - 9.4.5.1 'Real risk' instead of a 'reasonable possibility of risk' is applied as the test to determine whether or not an asylum seeker has been persecuted for the purposes of section 3(a) of the Refugees Act;¹⁹ and
 - 9.4.5.2 Failure to take into account factors such as the political significance of a political change (as well as the effectiveness and durability of such change). According to Hathaway and Foster these factors are essential to determining whether or not there is a real change in country conditions.²⁰
- 9.5 Another common occurrence in practice is the absolute failure of the RAB or the SCRA to make a decision at all which is itself reviewable in terms of section 6(2)(g).

¹⁶ Refugee Reception Officers (RROs) have a duty where necessary to provide such assistance. See section 21(b) of the Refugees Act.

¹⁷ An asylum seeker's right to interpretation services is governed by Regulation 5 of the Regulations published under GN R366 in GG 21075 of 6 April 2000 (the Regulations). See also *M v Minister of Home Affairs and Others* (6871/2013) [2014] ZAGPPHC 649; *Bolanga v Refugee Status Determination Officer and Others* (5027/2012) [2015] ZAKZDHC 13 (24 February 2015); *Katshingu v Chairperson of Standing Committee for Refugee Affairs & Others* [2011] ZAWCHC 480 and *Akanakimana v Chairperson of Standing Committee for Refugee Affairs & Others* [2015] ZAWCHC 17.

¹⁸ *Harerimana v Chairperson of the Refugee Appeal Board and Others* 2014 (5) SA 550.

¹⁹ This interpretation of the test for persecution was confirmed in *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T) at Paragraph 97.

²⁰ Hathaway, J.C. and Foster, M. *The Law of Refugee Status*, 2nd Ed, Cambridge University Press, Cambridge, 2014.

10 PROCEDURE FOR JUDICIAL REVIEW AS SET OUT IN THE UNIFORM RULES OF THE HIGH COURT

- 10.1 Rule 53 of the Uniform Rules of the High Court sets out the procedure to be followed in reviewing decisions taken by inferior courts, tribunals, boards or officers performing judicial, quasi-judicial and administrative action.
- 10.2 Reviews of decisions made by an RSDO, the RAB and/ or the SCRA should be brought in terms of this Rule.²¹
- 10.3 Rule 53 review proceedings must be brought by way of a notice of motion which should be directed and delivered to the RAB / SCRA or RSDO in question as well as any other affected party.²²
- 10.4 The notice of motion must set out the decision or proceedings sought to be reviewed²³ and must call upon the relevant presiding officer / chairperson or officer:
 - 10.4.1 to show cause why such decision or proceedings should not be reviewed and corrected or set aside;²⁴ and
 - 10.4.2 to despatch, within 15 days after receipt of the notice of motion, to the Registrar of the relevant court, the record of the proceedings sought to be corrected or set aside, together with such reasons as he or she is by law required or desires to give or make, and to notify the applicant that she or he has done so.²⁵
- 10.5 The notice of motion must be supported by an affidavit setting out the grounds and the facts and circumstances upon which the applicant relies to have the decision or proceedings set aside or corrected.²⁶

- 10.6 Should any of the cited respondents wish to oppose the application, they will be required to file a notice of intention to oppose within 15 days of receiving the notice of motion and founding affidavit.²⁷
- 10.7 Once the applicant receives a copy of the record from the Registrar, the applicant must furnish the Registrar and the other parties with copies of those portions of the record necessary for the purposes of the review.²⁸
- 10.8 Within 10 days of receiving the record, the applicant may amend, add to or vary its notice of motion or founding affidavit by way of notice and an accompanying affidavit.²⁹ Should any of the respondents have elected to oppose the application, they will be required to produce an answering affidavit within 30 days of the expiry of this period.³⁰
- 10.9 The applicant will then be entitled to file a replying affidavit in terms of Rule 6 within 10 days of receiving the answering affidavit.³¹

11 RULES REGARDING SET DOWN OF APPLICATIONS FOR JUDICIAL REVIEW

- 11.1 The rules regarding the set down of applications as they are set out in Rule 6 'shall mutatis mutandis apply to the set down of review proceedings'³² as follows:
 - 11.1.1 Should none of the respondents have elected to oppose the applicant's application in terms of the procedure described in paragraph 10.6 above, the applicant may set the matter down for hearing 'by giving the registrar notice of set down before noon on the court day but 1 preceding the day upon which the same is to be heard';³³

²¹ Rule 53 reviews are essentially application proceedings adapted to better facilitate reviews.

²² Rule 53(1). In the instance of the RAB / SCRA the practice is to cite the Chairperson in his / her official / representative capacity. Other interested parties in these cases would usually include the Minister of the Department of Home Affairs and the Director-General of the Department of Home Affairs.

²³ Rule 53(2).

²⁴ Rule 53(1)(a).

²⁵ Rule 53(1)(b). The purpose of requiring that a copy of the record be furnished is to enable the applicant and the Court to fully assess the lawfulness or otherwise of the decision making process. See Erasmus Superior Court Practice (2nd edition) Juta & Co, Cape Town, 2015, at D1-700.

²⁶ Rule 53(2).

²⁷ Rule 53(5)(a).

²⁸ Rule 53(3). The record will provide the applicant with a copy of evidence concerning the decision / proceedings that s/he would ordinarily not have at his or her disposal. Erasmus, Superior Court Practice (supra) at D1-708. Having obtained a copy of all the evidence the applicant is then afforded an opportunity to supplement her or his application papers.

²⁹ Rule 53(4).

³⁰ Rule 53(5)(b).

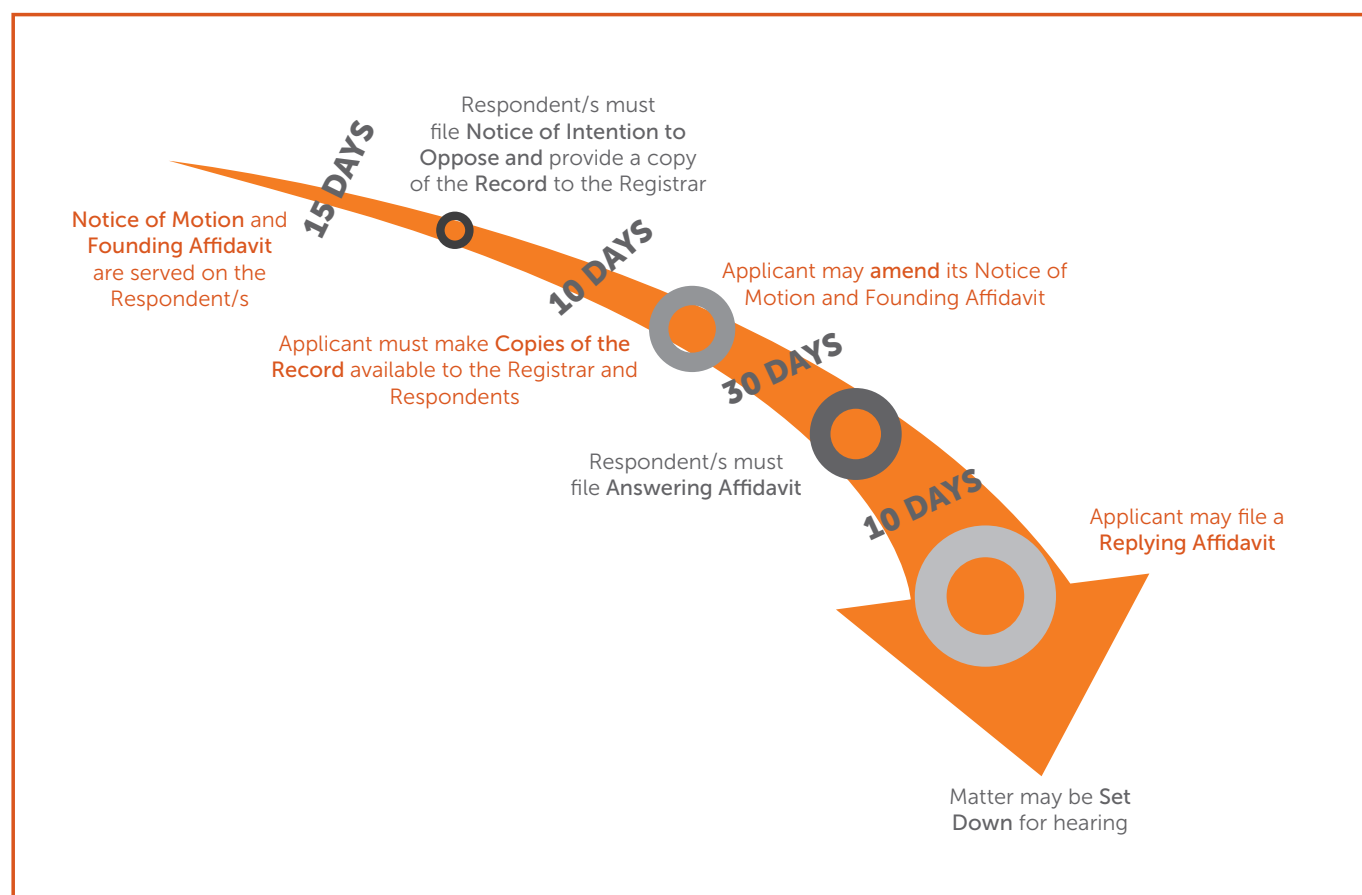
³¹ Rule 53(6).

³² Rule 53(7).

³³ Rule 6(5)(c).

- 11.1.2 Should the respondents who elected to oppose the application not deliver their answering affidavits in terms of the procedure described in paragraph 10.8 above, the applicant may apply to the Registrar within 5 days of the date on which the answering affidavit was due for the allocation of a hearing date;³⁴
- 11.1.3 Should the respondents who elected to oppose the application deliver their answering affidavits in terms of the procedure described in paragraph 10.8 above and the applicant elects not to file a replying affidavit, the applicant may set the matter down for hearing within 15 days of receiving the answering affidavit; and
- 11.1.4 Should the respondents who elected to oppose the application deliver their answering affidavits in terms of the procedure described in paragraph 10.8 and should the applicant elect to deliver a replying affidavit within 10 days of receiving the answering affidavit, the applicant may set down the matter for hearing within 5 days of delivering his replying affidavit.
- 11.2 If the applicant fails to apply for a hearing date in any of the circumstances listed above, the respondent may do so provided that the necessary time frames for filing pleadings have been complied with.³⁵ Whichever party applies for a hearing date is required to inform the opposing party in writing of the date allocated by the Registrar.³⁶
- 11.3 It is good practice to always consult the Practice Manual of the relevant High Court where proceedings were instituted as it will provide you with clarity on various procedural issues that need to be taken into account, including the time frames relating to the filing of heads of argument, and a practice note. Always ensure that both your Rules of Court and your Practice Manual are up to date and contain the most recent amendments.

12 SUMMARY OF TIMEFRAMES RELEVANT TO INSTITUTING A HIGH COURT REVIEW APPLICATION



³⁴ Rule 6(5)(f).

³⁵ Rule 6(5)(f).

³⁶ Loc cit.

13 PROCEEDINGS AGAINST THE STATE

- 13.1 As noted above, the judicial review of decisions made during the asylum seeker adjudication process will likely involve members of the State as respondents. It should be noted that if matters arise out of decisions made by the RAB or SCRA, the Minister of Home Affairs is cited care of the State Attorney, Pretoria.
- 13.2 Similarly, certain extended timeframes apply to legal proceedings against the State. Proceedings against the State would include an application for judicial review in which any Minister, Deputy Minister, Administrator, Officer or Servant of the State is involved.
- 13.3 In terms of Rule 6(13) of the Uniform Rules of Court, the minimum period allowed for a respondent to deliver its notice of intention to defend is extended from the usual 5 to 15 days should proceedings be conducted against the State. Not surprisingly, the application of this timeframe is extended by Rule 53(5)(a) to all judicial review proceedings which typically involve the State.

14 CONCLUDING REMARKS

- 14.1 Although the asylum seeker adjudication process is fraught with a number of procedural and substantive irregularities, asylum seekers are not without recourse and this Guide has set out briefly the most likely grounds of review as well as the procedure to be taken in respect of judicial review.
- 14.2 This Guide is, however, by no means exhaustive of the many situations that may arise during the asylum seeker adjudication process and that may give rise to judicial review. As with any matter subject to judicial review, facts will be case-specific and attorneys dealing with asylum seekers should take care to interrogate the experiences of their clients carefully in order to develop as strong a case as possible.

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