

# The Environment and Planning Review Tribunal

## Principles of Good Administrative Behaviour

ROBERT MUSUMECI

*Dr Robert Musumeci is a warranted advocate and a perit. He also holds a Masters Degree in Conservation Technology in Masonry Buildings.*

*He is the founding partner of the architectural firm RMPERITI and prior to being admitted to the Maltese Bar in 2016, he had practiced as a perit since 1998. He is a former chairperson of the Building Industry Consultative Council (BICC) and presently holds the post of advisor within the office of the Prime Minister of Malta. Dr Musumeci was directly involved in the reforms which led to Malta Environment and Planning Authority's demerger and the establishment of the new Lands Authority in 2016.*

*Dr Musumeci has published several academic articles related to planning legislation. He was selected by the Faculty of Laws (University of Malta) for the prize of Best Doctor of Laws Thesis Award 2016 for his thesis entitled 'The Development Planning Act 2016 - A critical Appraisal'*

---

## 1 Overview

The Environment and Planning Review Tribunal Act, 2016 introduced a set of rules styled as principles of good administrative behaviour, which the Tribunal *'shall adhere to and apply.'*<sup>1</sup> Although no express provision was ever made in any of the previous planning legislations, it is acknowledged that these principles were long known to our justice system.<sup>2</sup> In Parliament, the Hon. Dr. Michael Falzon maintained that the incorporation of the principles of good administrative behaviour in the new planning legislation reinforce such requirement:<sup>3</sup>

---

<sup>1</sup>Article 9(1) and (2) of the Environment and Planning Review Tribunal Act, 2016.

<sup>2</sup>For example: Article 39(2) of our Constitution and Article 6(1) of the European Convention of Human Rights and Freedoms.

<sup>3</sup>Parliamentary Sitting No. 292 held on 17<sup>th</sup> July 2015 – Parliament of Malta.

*“Ħarisna ‘l bogħod fejn mhux biss qed naraw li jkollna entrenched u speċifikat fil-liġi li jridu jiġu segwiti r-regoli legali ta’ ġustizzja naturali, talli qed naraw li rridu mmorru lejn amminstrazzjoni tajba. Huwa obbigat ukoll bil-liġi li ż-żewġ partijiet ikollhom l-istess mezzi proċedurali. Huwa veru li dawn huma prinċipji diġà stabbiliti, imma għall-ewwel darba għandna liġi ad hoc li qed tagħmel obbligi speċifiċi fuq l-istess tribunal u jien nemmen li dik hija xi ħaġa pożittiva immens.”*

Professor Kevin Aquilina<sup>4</sup> questioned whether *“there is a need to list these principles in the Tribunal’s law when these are already listed elsewhere”*, referring of course to Article 2 of the Administrative Justice Act (AJA).<sup>5</sup> At face value, this assertion appears well founded since Schedule One of the AJA already provides that these principles should be respected by the Planning Appeals Board, now the EPRT. Nevertheless, decision makers with no legal background are not necessarily familiar with such fundamental concepts. For example, a former chairman of the EPRT, who is a perit by profession, argued recently that *“the role of the EPRT is not to deliver ‘justice’ to one side or the other (the courts do that) but to decide on the planning merits of a case in the public interest based on a final technical interpretation of existing plans and policies”*.<sup>6</sup> This assertion came when least expected, considering that the person concerned was responsible himself for the conduct of quasi-judicial proceedings. This only goes to show that the principles of natural justice warrant wider recognition. At the same time, one could argue that such cases should be dealt with administrative courts presided by members of the judiciary who after all benefit too from a security of tenure.

## **1.1 The first principle of good administrative behavior – fair hearing**

The first principle of good administrative behaviour refers to the long established notions that *‘a man may not be a judge in his own cause and that a man’s defense must always*

---

<sup>4</sup>Kevin Aquilina: *Twenty reasons against MEPA’s demerger*. Article published on maltatoday.com.mt. - 29th July 2015.

<sup>5</sup>Chapter 490 of the Laws of Malta – Administrative Justice Act.

<sup>6</sup>Chris Falzon: *True Planning reform*. Article published on the Times of Malta - 8th September 2015.

be fairly heard<sup>7</sup>. Indeed, the first principle of good administrative behaviour reads as follows:

*“The Tribunal shall respect the parties’ right to a fair hearing, including the principles of natural justice, namely: (i) nemo judex in causa sua, and (ii) audi et alteram partem”.*

In the past, the principle of ‘audi alteram partem’, or ‘right to be heard’, was raised time and again before the Tribunal by appellants who alleged that this right was being infringed. In **Nicholas Cutajar kontra L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar**,<sup>8</sup> the appellant made specific reference to the principle of ‘audi alteram partem’ and requested the Tribunal to summon the enforcement officer Brian Borg who had issued an enforcement notice in relation to works which the latter himself had allegedly authorized during a site inspection. Appellant made a written application to the following effect:

*“Minghajr pregudizzju ghal dak li ntqal mill-Awtorita’, l-appellant jissottometti illi dawn il-proceduri jridu l-ewwel jigu ezawriti u dan in omagg ghall-principju tal-audi alteram partem u ghaldaqstant l-appellant qed jitlob illi huwa jipproduci zewg xhieda kif del resto talab fir-rikors promotorju u cioe’ l-enforcement officer Brain Borg li kien hu li hareg l-avviz u kif ukoll Denis Cutajar illi kien prezenti fuq is-sit diversi drabi meta l-istess enforcement officer acceda fuq il-post, liema xhieda qed jintalbu senjatament biex l-esponenti ikun jista’ jirribatti dak li inter alia ntqal fir-risposta tal-istess Awtorita’ datata 19 ta’ Settembru 2013”.*

The Tribunal nonetheless turned down appellant’s request, maintaining that there was no need for the witness to be heard, notwithstanding the principle of ‘audi alteram partem’:

*“Bir-rispett kollu dovut lill-Appellanti u r-riferenzi ghall-massimu legali audi alteram partem, kliem il-ligi huma cari.....inutili li tigi milqugha t-*

---

<sup>7</sup>H.W.R. Wade: *Administrative Law* (Clarendon Press, Oxford, 1982, Fifth Edition) - page 414.

<sup>8</sup>Nicholas Cutajar vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 15<sup>th</sup> May 2014 by the Environment and Planning Review Tribunal - [Ap. No. 200/13E. ECF 231/13.].

*talba tal-Appellanti li tinstema x-xhieda ta' Brian Borg."*

Clearly, the appellant was in this case *'denied what he regarded as an adequate opportunity to put to the administration in the appropriate way facts, opinions, arguments, etc. which he thought were necessary for the protection of his interest'*.<sup>9</sup> In my view, the Tribunal was under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties *'without prejudice to its assessments of whether they are relevant to its decision'*.<sup>10</sup>

Unfortunately, this case was not pursued further since no appeal was lodged before the Court of Appeal. Thus, it remains unclear whether the Court would have reasoned out that appellant was in this particular case denied the opportunity of a fair hearing.

For certain, the current Environment and Planning Review Tribunal Act, 2016 specifically provides that all parties may produce witnesses as evidence provided their details and the facts they intend to establish through their evidence are stated in the appeal or in the reply to the appeal.<sup>11</sup> At least, the Tribunal is now fully aware that the legislator wanted to give any party to the appeal *'the opportunity he desires to influence the decision-maker'*<sup>12</sup> and such opportunity may not be denied arbitrarily.

In the meantime, there were other instances where the Court has ruled that the Tribunal acted in breach of the *'audi alteram partem'* principle, although no express reference was made to such principle in previous planning legislation. In **George Attard vs L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar**,<sup>13</sup> the Court held that appellant was denied the right

---

<sup>9</sup>[Pieter Van Dijk](#), [Fried van Hoof](#), [Arjen van Rijn](#), [Leo Zwaak](#): *Theory and Practice of the European Convention on Human Rights* (Intersentia, 2006, Second Edition).

<sup>10</sup>[Pieter Van Dijk](#), [Fried van Hoof](#), [Arjen van Rijn](#), [Leo Zwaak](#): *Theory and Practice of the European Convention on Human Rights* (Intersentia, 2006, Second Edition).

<sup>11</sup>Article 7(1) of the Environment and Planning Review Tribunal Act, 2016.

<sup>12</sup>David Foulkes: *Administrative Law* (London, Butterworths, 1990, Seventh Edition).

<sup>13</sup>*George Attard vs L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* decided on 26<sup>th</sup> June 2012 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 51/2011].

of fair hearing since he was not duly notified of the sitting and notwithstanding that both his architect and lawyer were present during the sitting.

The principle of *'nemo iudex causa sua'* is, on the other hand, to ensure that Tribunal members do not have any conflicting interest which might lead someone to suppose that there is bias involved or that the Tribunal would have otherwise acted differently. Article 40(3) of the Environment and Development Planning Act already provided that *'a member of the Tribunal shall be disqualified from hearing an appeal in such circumstances as would disqualify a judge in a civil suit'*. This principle has been reaffirmed in Article 4(6) of the EPRT Act, which expressly provides that *'a member of the Tribunal shall be disqualified from hearing an appeal in terms of Article 734 of the Code of Organization and Civil Procedure'*. The difference is that specific reference to the relative Code of Organization and Civil Procedure article regulating disqualification of judges in hearing a suit is now being made.

But who shall decide that a member of the Tribunal should be disqualified? The Environment and Planning Review Tribunal Act, 2016 is silent on this particular point and one would therefore need to rely on the Code of Organization and Civil Procedure for guidance. Consequently, it follows that it is the member himself who should *'decide on the ground of challenge'* and *'where there is any reason to doubt as to whether an alleged ground of abstention is a good ground or otherwise all the judges (in the case of the EPRT, members), including the judge (the EPRT member) alleging such ground, shall decide on such ground.'*

The Environment and Planning Review Tribunal Act, 2016 is also silent as to how a challenge is made. Before a Court of Law, any objection raised by the parties must be made in *'open court'* and supported with reasons, which need to be proved where necessary.

---

Furthermore, it is pertinent to ask: At which stage can a member be challenged by a party to the appeal? Once again, the Environment and Planning Review Tribunal Act, 2016 is silent on this matter. Article 739 of the Code of Organization and Civil Procedure however provides that both the plaintiff and defendant may file a challenge only at preliminary stage *‘unless the ground of challenge shall have arisen subsequently, or unless the party raising the objection, or his advocate, shall declare upon oath that he was not aware of such ground, or that it did not occur to him at the time.’* Having said that, a member of the Tribunal *‘shall be disqualified’* in contrast with judges who, on the other hand, *‘may be challenged’*. The words *‘shall be disqualified’* are unequivocal and tantamount to a matter of public order. It follows that a plea of challenge before the EPRT may thus be raised at any stage during proceedings as well as before the Court of Appeal (Inferior Jurisdiction) in terms of Article 39 of the EPRT Act.

## **1.2 The second principle of good administrative behaviour – timely decisions**

The second principle of good administrative behaviour reads as follows:

*“The time within which the Tribunal shall take its decisions shall be reasonable depending on the circumstances of each case. The decision shall be delivered as soon as possible and for this purpose the tribunal shall deliver a single decision about all matters involved in an appeal before it whether they are of a preliminary, substantive or procedural nature”.*

Time considerations have been always an issue in so far as planning applications are concerned. Apart from financial stakes, applicants often do encounter a situation where the pertinent planning policies are changed by the time their application is determined. In **Michael Axisa ghas-socjeta Lay Lay Co. Ltd vs L-Awtorita’ ta’ Malta dwar l-Ambjent u**

**I-lppjanar**<sup>14</sup> the Court dismissed appellant's arguments that the Tribunal was bound to apply the policies which were applicable at the onset of the application process once the Authority and the Tribunal took a long time long to process his application. In fact, the Court reiterated the principle that planning decisions must be taken in line with the applicable policies at the time of the decision. Consequently, processing time is of essence, all the more since policies can change to one's detriment during the course of an application process.

Indeed, the Environment and Planning Review Tribunal Act, 2016 has introduced various provisions with a view to avoid delaying tactics together with strict time frames within which the Tribunal is bound to decide. In fact, the Tribunal shall now hold its first hearing within two months from the lodging of the appeal application whereas under the previous legislation, the first hearing was held within three months from receipt of the appeal. As shall be seen hereunder, if an appeal is accompanied by a request for suspension of the execution of a permission, the *primo appuntamento* shall be held within a shorter time frame, namely a month.

Moreover, the idea is that both the appellant and the Authority are required to have made their respective preliminary submissions before the first sitting. In fact, the Authority is made aware of the appeal application and the ancillary documentation within 5 working days from when the date for the first sitting is set and the Authority is in turn obliged to formally reply within 20 days. This will make sure that appellant is made aware of the Authority's defence prior to the first hearing. In previous years, the Authority's submissions were rarely communicated to appellant before the first sitting even though, strictly speaking, *'a copy of the appeal and the ancillary documentation was to be communicated to the Authority before the appeal is heard'*.<sup>15</sup>

---

<sup>14</sup>Michael Axisa ghas-socjeta' Lay Lay Co. Ltd vs L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar, decided on 14<sup>th</sup> January 2015 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 44/2013].

<sup>15</sup>Article 20 of the Environment and Planning Review Tribunal Act, 2016.

What would happen if the Authority fails to make a reply within 20 days? The Act fails to provide a definite answer. Nonetheless, in the absence of an express provision in the EPRT Act, the Tribunal may not pronounce a state of *contumacia*, in which case the Authority would be unable to produce evidence in its favour, be unable to file pleas and be unable to cross-examine evidence brought by appellant. On the other hand, the Tribunal may once again choose to examine whether the defendant Authority had a justification not to file a statement of defence, in which case, an extension of time could be granted.

In any case, appeals against decisions of the Planning Authority will now be decided within a stipulated time frame, depending of the nature of appeal. Appeals against planning decisions and enforcement notices shall in fact be determined within a year from the date of the first hearing, which period may be extended by a further 6 months '*in exceptional cases, in the interests of justice*' but '*no evidence or submissions shall be lodged during the extension period*'.<sup>16</sup> There is no clear cut definition for the term '*interests of justice*' in the law. It is my opinion that this was purposely done so that the interpretation to be given should not be a restrictive one but extensive in its applicability.

In the case of summary applications and DNOs, an appealed decision needs to be determined within three months from the first hearing of the appeal and no provision is made whereby the said three month period may be extended '*in the interests of justice*'.<sup>17</sup>

But what if the said time frames are not adhered to? The Act provides a practical solution '*in the event that a final decision is not granted within the time-frames above indicated*'. In that case, '*the appeal shall be assigned by the Secretary to another panel*'.<sup>18</sup> In fact, a similar provision already exists in the Code of Organization and Civil Procedure, notably Article 195(5)(a) which provides that any party to the case may present an application to

---

<sup>16</sup>Article 35(a) of the Environment and Planning Review Tribunal Act, 2016.

<sup>17</sup>Article 35(c) of the Environment and Planning Review Tribunal Act, 2016.

<sup>18</sup>Article 35 of the Environment and Planning Review Tribunal Act, 2016.

the Chief Justice, asking for the case to be assigned to another member of the judiciary *'where a cause has been pending before a particular court for three or more years or where a cause has been pending for judgment before a particular court for eighteen months or more'*. In the case of the EPRT, the appeal would be however assigned *ex lege* to another panel, without the need of any of the parties making the relative request. However it is to be noted that in such circumstances there is no time frame within which the new panel shall then determine the case. Therefore, it is not clear whether shifting the caseload before another panel would necessarily result in more timely decisions.

When a request for suspension is made concurrently with the appeal application, the Tribunal must now hold the first hearing within 30 days from the receipt of the application and state whether the works should remain suspended depending whether *'the prejudice that would be caused would be disproportionate when compared with the prejudice caused by the staying of the actual execution of the permit'* and *'the development may not be easily removed or reversed.'*<sup>19</sup> In any event, the time frame within which the Tribunal must then deliver its final decision is equivalent to a maximum of three months, regardless of the type of application.

More so, *'an application subjected to an Environmental Impact Assessment and, or to an IPPC permit, which in the opinion of the Minister responsible for the Planning Authority is of strategic significance or of national interest, related to any obligation ensuing from a European Union Act, affects national security or affects the interests of the Government and, or of other governments'* needs to be determined within one month.<sup>20</sup>

It is interesting to note that in the case of appeals accompanied by a request for suspension, no such provision is made to allow for an extension *'in the interest of justice'*. Moreover, there is neither a provision to suggest that the appeal shall be assigned *ex lege*

---

<sup>19</sup>Article 33(3) of the Environment and Planning Review Tribunal Act, 2016.

<sup>20</sup>Article 35(1) of the Environment and Planning Review Tribunal Act, 2016.

to another panel in case of non adherence with the above time frame, although a suspension order lapses *ipso jure* after three months.

Finally, witnesses who are duly notified and yet fail to appear before the Tribunal '*without just cause*' still risk being fined between two hundred euro (€200) and five thousand euro (€5,000).<sup>21</sup> Moreover, the Tribunal is now empowered to consider an appeal as abandoned if the appellant shows no interest in the appeal by failing to appear before the Tribunal on two consecutive sittings without good cause.<sup>22</sup> Of course, both measures are aimed to do away with deliberate delaying tactics. Furthermore, the Act now provides that the Tribunal must hold its first hearing within shorter time frames while decisions shall, for the first time, be delivered within stipulated frames.

### **1.3 The third principle of good administrative behavior – procedural equality**

The third principle of good administrative behaviour is the following:

*“Each party shall be given an opportunity to present its case, whether in writing, or orally, or both, without being placed at a disadvantage.”*

Essentially, one's right to present his case without being placed at a disadvantage also reflects the general principle of the '*right to a fair hearing*'.

### **1.4 The fourth principle of good administrative behavior – availability of information**

The fourth principle of good administrative behaviour is as follows:

*“The Tribunal shall ensure that the Planning Authority makes available to the parties to the proceedings, the documents and information relevant to the appeal.”*

---

<sup>21</sup>Previously, the same provision was found in Article 4 of Second Schedule of the Environment and Development Planning Act.

<sup>22</sup>Article 42 of the Environment and Planning Review Tribunal Act, 2016.

The *'documents and information relevant to the appeal'* may include documents or information contained in the file and which the public is otherwise not entitled to view if no appeal procedures were initiated. Oddly enough, Article 33(2) of the Development Planning Act, 2016 limits public access to 'that part of the file' containing the application report, the decision and reasons for such grant or refusal together with the relative plans and document, environmental impact statements, environmental planning statements, traffic impact statements and all alternative site assessments and cost-benefit analysis. In appeal proceedings, a party may, by contrast, request the Tribunal to have access to any other recorded information that would have been exchanged between officers of the Authority during the actual application process. Nevertheless, a practical difficulty could arise if a party to the appeal proceedings insists on seeing a professional legal advice given to the Planning Authority due to the fact that such advice would have been given under professional secrecy unless the Authority decides to waive same.

Once the entire file is accessible to the appellant after the first sitting held by the Tribunal,<sup>23</sup> the scope of limiting access to the public of the same file at an earlier stage as provided in Article 33 of the Development Planning Act, 2016 finds little solace.

### **1.5 The fifth principle of good administrative behavior – evidence admitted to be available**

The fifth principle of good administrative behaviour provides the following:

*"Proceedings before the Tribunal shall be adversarial in nature. All evidence admitted to the tribunal shall, in principle, be made available to the parties with a view to adversarial argument."*

Once again, the right of the parties to have full access to all evidence admitted during proceedings is in keeping with the general principle of the *'right to a fair hearing'*.

---

<sup>23</sup>Article 19 of the Environment and Planning Review Tribunal Act, 2016.

## **1.6 The sixth principle of good administrative behavior – Tribunal in a position to examine all factual and legal issues**

The sixth principle of good administrative behaviour is the following:

*“The Tribunal shall be in a position to examine all of the factual and legal issues relevant to the appeal presented by the parties in terms of the applicable law.”*

This article makes express reference to ‘*applicable law*’. The term ‘*applicable law*’ may be construed that the Tribunal is bound by the laws which are applicable at the time of the decision in line with the general principle that ‘*il-ligijiet procedurali ma ghandhomx jigu applikati retroattivament.*’<sup>24</sup>

## **1.7 The seventh principle of good administrative behavior – deliberations open to the public**

The seventh principle of good administrative behaviour reads as follows:

*“Save as otherwise provided by law, the proceedings before the Tribunal shall be open to the public”*

Although giving an impression that there are circumstances where the Tribunal may conduct proceedings behind closed doors, the Environment and Planning Review Tribunal

---

<sup>24</sup>Carmel Pullicino vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar, decided on 31<sup>st</sup> May 2012 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 6/2011].

Act, 2016 provides for no such situations. In fact, the said Act states further on that ‘*all decisions of the Tribunal*’ shall be delivered also in public.<sup>25</sup>

## **1.8 The eighth principle of good administrative behavior – duty to give reasons**

The eighth principle of good administrative behaviour relates to the ‘duty to give reasons’ and states the following:

*“The Tribunal shall indicate, with sufficient clarity, the grounds on which it basis its decisions. It shall not be necessary for the tribunal to deal with every plea raised, provided that where a plea would, if accepted, be decisive for the outcome of the appeal, such a plea shall require a specific and express consideration.”*

It is acknowledged that the majority of Tribunal decisions which have been annulled by the Court were found to violate this same said principle. In **June Laferla vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar**,<sup>26</sup> the Court of Appeal (Inferior Jurisdiction) ruled that the Tribunal, although dealing with each and every plea, failed to support its reasoning with sufficient motivation.

In **Reverendu Joseph Tabone vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar**,<sup>27</sup> the Court ruled on the same lines. Here, the Court found that the Tribunal cited a number of planning policies in support of its conclusions and yet failed to state how such policies interact with the aggravations of the appellant. For this reason, the Court concluded that the Tribunal’s decision was not adequately ‘motivated’ as required by law.

---

<sup>25</sup>Article 38(2) of the Environment and Planning Review Tribunal Act, 2016.

<sup>26</sup>June Laferla vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 26<sup>th</sup> March 2014 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 36/2013].

<sup>27</sup>Reverendu Joseph Tabone vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar, decided on 26<sup>th</sup> June 2012 by the Court of Appeal (Inferior Jurisdiction) - [Ap. 58/2011].