Case 2021/1

FEDERAL APPEALS PANEL

IN THE MATTER OF AN APPLICATION BY
PRUE BRAY

Applicant

-AGAINST-
THE FEDERAL APPEALS PANEL

Respondent

RULING ON PERMISSION TO PROCEED

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3 February 2021

DAVID GRAHAM (Chair of the Federal Appeals Panel):

Introduction

1. In a letter of complaint dated 7 January 2021, Ms Bray requested that the Federal Appeals Panel ('FAP') set aside an appeal decision dated 24 July 2020 ('the Decision') and re-hear the appeal in question, on the grounds that the procedure adopted was unfair and contrary to natural justice. In particular, she alleged that as representative of the English Candidates Committee, the respondent in the appeal, she had not been provided with a copy of the appellant's grounds. Accordingly, she was prejudiced in her ability to submit all relevant material in support of the Committee's action. She also complains that she was not invited to speak at the Case Panel's hearing which considered the appellant's grounds of appeal.

2. Since the Decision and with effect from 1 January 2021, the personnel of the FAP largely changed over (members being elected for a 5 year term).

3. On 15 January 2021, I designated myself Case Manager. I did not request that the Registrar send a copy of the complaint to the panellists who conducted the appeal, or the original appellant Ms Hayes. That was because there was an important preliminary question whether the FAP has jurisdiction to re-open one of its rulings on the substantive merits of an appeal, assuming in Ms Bray's favour that the breaches

of natural justice were found proved. There was also an alternative route for redress for Ms Bray which would be proceedings against the FAP itself under article 22.3(b) of the Federal Constitution in order to obtain a finding that her rights were infringed, subject to a 6 week time limit under paragraph 3.1 of the Published Procedures (as updated in 2020).

4. I indicated in a fully reasoned ruling why I was minded to dismiss the application, and directed that Ms Bray be afforded the opportunity to make submissions addressing those reasons, as to:

> (a) whether the application for the Decision to be set aside and re-opened was within jurisdiction and should proceed to a hearing; and
>
> (b) whether she wished to apply for her letter of complaint to be treated as a claim under Article 22.3(b) of the Federal Party Constitution and if so, why time should be extended.

I am grateful to Ms Bray for the thorough submissions received on these points.

Jurisdiction to re-open previous rulings on the merits

5. Ms Bray submits that the Constitution did not appear to have envisaged a situation arising where the FAP suffered from an unfair, defective process and 'the Constitution is silent on how to deal with such situations' so that the FAP 'has some leeway to make a determination as to what should happen'. She submits that fairness is a principle at the heart of the Constitution. She submits that if the FAP were found to have made an unlawful decision, the decision could not stand, and that it would not be right to leave persons complaining of a flawed FAP decision with no internal remedy and having to resort to external legal challenges in such a case.

6. The FAP is not a court of common law; it exists as a 'domestic tribunal' within the Party (an unincorporated private members' association) to resolve disputes relating to rights and duties under the Constitution, and its remit is set out in the Constitution.

7. Article 22.7 of the Federal Constitution expressly provides that any decision of the FAP shall be final and binding upon all those concerned. We are not dealing with a situation where the Constitution is silent. There is an important principle underlying this approach, which is that there should be finality to disputes. The FAP was accordingly *functus officio* after its decision had been made. There is no jurisdiction conferred on the FAP, which is the final tribunal of appeal within the Party, to re-open appeals. It is an unfortunate reality that errors are occasionally made by tribunals of final appeal, but their decisions are not on that account subject to further appeal.

8. It might be thought unfortunate that there is no internal power or procedure for the FAP to re-open its own decisions where vitiated by serious procedural failings, but that is a matter for Federal Conference to determine.

9. The Federal Party Constitution currently does not require all disputes about Party business to be handled internally rather than through the courts. Again, whether to amend it is a matter for Federal Conference.

10. In English and Welsh law, the High Court exercises a supervisory judicial review jurisdiction over domestic tribunals of private associations but only where these perform a public administrative function or monopolistic control over the exercise of a profession or vocation, not where their authority derives purely from the consensual agreement of parties concerned.[1] Ordinarily, one would expect decisions of the Liberal Democrats not to be subject to judicial review insofar as it is a voluntary members' organisation and prospective candidates for office may run as independents or as members of another party. Even where a tribunal is subject to judicial review, its purported previous decision falls to be treated as valid until and unless quashed by a court of competent jurisdiction.[2]

11. It is in theory possible for aggrieved members to bring common law proceedings against the Party in the courts if they can demonstrate a breach of contractual rights

[1] E.g. *R v Panel on Take-overs and Mergers ex parte Datafin plc* [1987] QB 815; *R v Chief Rabbi, ex parte Wachmann* [1992] 1 WLR 1036; *R (Mullins) v Appeal Board of the Jockey Club* [2005] EWHC 2197 (Admin).
[2] See e.g. Lady Justice Simler in *Beadle v HMRC* [2020] EWCA Civ 562 at paragraph 4.

set out in the Constitution. The remedy for any breach of contract would be damages or (in rare cases where damages were an inadequate remedy and there would not be counter-balancing prejudice to others) an injunction. It would not be re-opening a historic concluded internal appeal, with prejudice to the other parties to the dispute. There are separate statutory provisions for contractual arbitrators' awards to be re-opened on grounds of impropriety (see below) but the arbitrators themselves will not normally have jurisdiction to re-open their own decisions without such a court order, this being a matter for the contract between the parties.

Not a suitable case to re-open the merits even if there were power to do so

12. If I had power to set aside the Decision and re-open the appeal, which I do not, I would not be minded to exercise it in these circumstances.

13. Crucially, Ms Bray did not challenge the procedural impropriety at the time and apply for copies of the appeal documents, for an oral hearing, or to speak at such an oral hearing. The Decision notes that neither party requested an oral hearing, although Ms Bray was aware of the hearing date. In analogous cases where the High Court has power to interfere with an arbitrator's award made under contractual arbitration agreements, the Arbitration Act 1996 at section 73 provides that unless an objection is made forthwith, a party who continues to participate in tribunal proceedings loses the right to object to the procedure unless they could not with reasonable diligence have discovered the grounds for the objection. In this instance, the failure to conduct an oral hearing would have been apparent at the time.

14. Ms Bray in her submissions states that she was not aware of the new grounds of appeal as she had not received a copy of these. She does however state that she received a copy of the Decision on 14 August 2020. At that point, she would have been aware of the grounds on which the Case Panel had found in the appellant's favour, and accordingly must have realised that she had not been provided with the case against the Committee. The application to set aside the appeal was made almost 5 months after that. Again, by analogy High Court challenges to contractual

arbitrators' decisions may only be made up to 28 days after the decision (section 70(3) of the 1996 Act).

15. Re-opening the appeal would prejudice the successful appellant, and would entail substantial additional work for Party staff and FAP volunteers. The underlying dispute concerned selections for European elections which, following Brexit, shall not be repeated. If and insofar as the FAP proceeded in ignorance of certain relevant selection procedures (as Ms Bray alleges), which may still have any application in selections for other elections, those may be referred to in any future FAP proceedings. No findings of misconduct were made against Ms Bray personally in the Decision, and the Decision was made against the Party rather than her personally, so she is not defamed or prejudiced personally thereby.

Alternative remedy: application out of time under article 22.3(b) of the Constitution

16. The alternative route to jurisdiction is a complaint pursuant to article 22.3(b) of the Federal Constitution by Ms Bray that her rights as a member were infringed by the way the FAP process was conducted. Ms Bray confirmed that she did wish her letter to be treated as an FAP application. This would not have the effect of overturning the Decision, but would require the Panel to make factual findings about the alleged procedural failings in its handling of the case and might accordingly offer moral vindication for Ms Bray. The normal time limit for bringing such a complaint would be 6 weeks subject to extension in exceptional circumstances (FAP procedures, paragraph 3.1).

17. I have considered whether Ms Bray's submissions amount to good reason to extend the time limit by nearly 5 months from the notification of the Decision to her, as a matter of discretion. At her paragraph 23 she states:

> 'There are a number of reasons why I did not raise this before 7th January. They are

a. Having read Article 22.7, I thought the decision was binding inside the party and that therefore there was nothing that I could do.

b. Having come to the conclusion that what had happened was unfair and that the procedures themselves needed to be corrected so that no-one else had the same experience, it took me some time to think of how to raise that in a way that would not be dismissed simply as someone challenging a decision they did not like.

c. Having had such a poor experience of the Federal Appeals Panel on this occasion I thought there was little point in trying to do something about it, because I did not have faith that anyone would act on it or take it seriously

d. I found the decision extremely upsetting and difficult and had doubts about my ability to cope with what was likely to be a long and difficult process of trying to do something to correct unfairness and injustice, particularly given Article 22.7

e. I did not think that proposing altering our internal processes so that in some cases decisions of the Federal Appeals Panel could be over-turned was something that should be undertaken lightly, given that it could expose the party to the risk of additional appeals and challenges if not strictly controlled.'

18. Subjective misgivings or doubt as to whether a complaint would be taken seriously, or would lead to an effective remedy, cannot in themselves be a good reason for extending the time limit for an application by so many months.

19. Delay in raising this point means that personnel changes and lapse of time will impede an investigation of what went wrong. Time spent investigating this matter will inevitably detract from time spent administering future appeals. The remedy that could be offered would simply be an acknowledgement of failure to follow a fair process. I am assuming in this ruling, and for the purpose of ongoing reform, that the alleged failings would be proved. Accordingly there would be no real benefit in allowing a further formal case to run, out of time, and as a matter of discretion I am not prepared to extend time.

Post-script

20. I hope Ms Bray will be reassured that thorough reform and systematisation of the FAP's processes is not dependent on such a historical investigation and has already been begun under my chairmanship. The FAP has published new guidance on the Party website (currently at https://www.libdems.org.uk/guidance_about_the_fap) which makes explicitly clear that all parties are entitled to expect a fair procedure, what that entails, and how to object to the procedure adopted on an appeal. I know that the Federal Executive is looking at how the FAP process can be supported in terms of staffing and case management procedures. I am determined to ensure that breaches of natural justice do not occur in future. The FAP will consult later this year on further changes to processes and published procedures, as set out in my forthcoming report to Spring Conference, with a view to time being allocated for debate on reforms at Autumn Conference.

Rulings

21. Accordingly, I rule as follows:

(a) Permission to apply out of time under article 22.3(b) is refused and this application is dismissed.

(b) Ms Bray shall have 7 days (until 4pm on Thursday 11 February 2021) to make submissions as to the form of publication of this ruling on the FAP's website and in my Report to Autumn Conference. The default presumption would be publication in full.