

FEDERAL APPEALS PANEL

In the matter of an application by

BENJAMIN SIMS

(on behalf of the London Region Executive)

-against-

APPEALS PANEL FOR ENGLAND

RULING ON PERMISSION TO PROCEED

DAVID GRAHAM

Chair of the Federal Appeals Panel

5 April 2021

Ruling

Permission to proceed is refused pursuant to rule 3.5(a) of the Published Procedures, as the Federal Appeals Panel (FAP) does not have jurisdiction.

Observations

1. By this application, the Applicant challenges a decision of the Appeals Panel for England ('APE') on 25 February 2021 to overturn the election for Chair of the London Region ('the Appeal Decision'), on behalf of the London Region Executive. The putative winner has separately contested this decision. She was elected with 1,147 votes, after having been found to have broken one of the applicable regulations (reg.4) by the Returning Officer who considered the margin of victory so large that the irregularity would not in his view have affected the outcome. A defeated candidate had appealed to the APE against that ruling.
2. The putative winner alleges that she was never at any point notified that an appeal had been launched, nor given an opportunity to defend the Returning Officer's ruling. She also alleged that the power to 'unseat [a candidate] if declared elected' applied only to regulations 2 and 5, such that it was not available in cases where regulation 4 had been breached. She contends that the APE unfairly did not apply the regulations pertaining at the time of the infraction, but retrospectively made up its own rules.
3. The London Region Executive complains in this application that it was not informed about the appeal against the Returning Officer's decision and given an opportunity to participate, nor applied the rules but sought to 'have the rules rewritten'. There is a further complaint about the APE's delay in issuing its decision, and apparent inconsistencies in the reasoning insofar as the Returning Officer's decision is described as having been correct but also overturned.

4. If proved, the putative winner's treatment would amount to a clear breach of natural justice. It would have been unfair to fail to give her, as an interested party most obviously affected by the decision whether the election should be re-run, a fair hearing. It is also at least arguable that the London Region Executive would have a sufficient interest to be heard given that it bears the expense of re-running the election. If proved, it would also be quite unfair, and beyond the remit of an adjudicative body, to retrospectively penalise conduct without any power to do so in the rules pertaining to the election in question.
5. Unfortunately, the FAP does not have jurisdiction to correct these alleged errors by the APE.
6. The jurisdiction of the FAP is set out in article 22.3 of the Federal Party Constitution ('FPC'). Its jurisdiction includes so far as is material 'any claim that the rights under this [i.e. Federal] Constitution of a member or of an organ of the Federal Party or of an AO or SAO recognised by the Federal Party have been infringed', 'any matter expressly so provided by this [Federal] Constitution or by rules made thereunder', 'any dispute or issue which shall be referred to it by a State Appeals Panel', and 'any appeal from a like body in a State Party relating to an issue under this [i.e. Federal] Constitution'.
7. The Party is a federation of the State Parties (article 2.1 of the FPC). The FPC provides at article 2.2 that whilst it and any rules made thereunder bind the State Parties, in all other regards a State Party shall be sovereign and entitled to exercise any power not reserved to the Federal Party (which are set out at article 2.3). See also article 6 which provides, '*Subject to the provisions of this Constitution, the Conference shall be the sovereign representative body of the Party*'. The constitutions of the State Parties must yield to any provision in the FPC, but they are not made 'under' the FPC in the sense that they are not subordinate or delegated rules deriving their authority from the Federal Party, at least where they do not purport to implement provisions of the FPC.
8. Currently, there is no general right of appeal from the APE to the FAP where there is no point arising under the FPC. The FPC does not contain a general 'bill of rights', nor any provisions governing how State Party appeals panels must function. It does not prescribe the procedure for regional or local elections within the State Parties.
9. There is a power under article 23.3 of the FPC for the Federal Board to prescribe procedures for the handling of complaints, but the current procedures do not directly address unfairness by the APE. There is also potential (currently not exercised) for the Federal Board to make a rule pursuant to articles 22.3(e) and 9.6(e) of the FPC conferring a review function on the FAP to correct errors by State Appeals Panels. It may be that consideration should be given to conferring jurisdiction on the FAP to right wrongs such as those alleged in this case.

10. It will be an implied term of the English Party's own constitution and of the APE's rules that it must act fairly and give affected parties a right to make representations.
11. Article 9.6 of the English State Party's constitution provides that any decision of the APE 'shall, subject to any right of appeal under the Federal Constitution, be final and binding on all concerned'. Such a clause is designed to put an end to disputes between the parties to a decision (the principle known as *res judicata*). In the recent case of *Prue Bray v FAP*, I ruled that where an application was made, long out of time, to set aside a 'final and binding' decision of the FAP by a party who had participated but suffered some unfairness that had not been objected to during the proceedings, article 22.7 of the FPC did not permit the ruling to be re-opened. It would appear to be arguable that a decision made without *any opportunity at all* for participation by a directly affected person is not binding on them and may be set aside, though that would be a matter for the APE to adjudicate if an application is made to it under article 9.3(b) of the English State Party constitution. I suggest that the Applicant do so without delay. The other candidates in the disputed election and the Returning Officer would be interested parties in such an application who would be entitled to expect to be able to defend the APE's Appeal Decision.
12. This case raises the question whether the English State Party's appeals arrangements are sufficiently robust, transparent and timely. Ultimately where a matter is the responsibility of a sovereign State Party, they must be accountable to the members in their constituent nation of the United Kingdom.