

**IN THE MATTER OF AN APPLICATION BETWEEN:**

**WHITE**

**Applicant**

**AND**

**FEDERAL APPEALS PANEL**

**First Respondent**

**& SJ**

**Second Respondent**

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**PRELIMINARY RULING**

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1. I am a member of the Federal Appeals Panel.
2. I was appointed Case Manager on 02.03.23 under r 3.3 of the FAP Rules of Procedure ("The Procedure Rules") with regards to FAP Case 55.
3. The main function role of the Case Manager is set out in r 3.4 of the Procedure Rules and is to grant or refuse permission to proceed with the application(s) in accordance with r 4.
4. Furthermore under r 3.4(a) and (b) of the Procedure Rules, the Case Manager may, amongst other things, seek further information from the Applicant; determine the appropriate Respondent(s), and request information or invite submissions from them.
5. In addition, r 4.7 provides that "The Permission Stage is intended solely to sieve out and swiftly determine cases that do not merit a full Case Panel hearing."
6. By virtue of r 4.8, a determination by the Case Manager at the Permission Stage is final and binding; it is not subject to a further appeal. It must be accompanied by reasons, which may be brief.
7. On receipt of the papers I checked that I do not have a personal connection to any of the relevant individuals.
8. I have and continue to perform my role entirely on the basis of the materials supplied:
  - a) By the Standards Office, which comprised the case files for the FAP Case 55 (including submissions by the Applicant and Second Respondent as per my Case Directions of 08.03.23 and the recusal of the Case Manager in Case 35 dated 01.11.22); and

- b) From the Federal Party Website (Constitution, the Procedure Rules, highlighted FAP decisions).

## Background

9. Case 55 is an appeal against the outcome of FAP Case 35 (a decision pursuant to r 7.4 of the Procedure Rules), and a number of connected procedural applications.
10. On 01.11.22, the Case Manager in Case 35 recused himself from considering the purported further appeal against his ruling, FAP Case 55.
11. I was appointed Case Manager on 02.03.23 with regards to FAP Case 55.
12. On 7 March 2023, after reviewing the materials on file, I issued Case Management Directions to:
- a) Confirm which procedural applications the Applicant still considered “live”;
  - b) Add the Appellant in Case 35 (“SJ”) as Second Respondent to Case 55 (and made further directions around redactions in this regard); and
  - c) To invite both the Applicant and the Second Respondent to make submissions on the “permissions tests” that I must undertake as Case Manager.
13. The Applicant confirmed a) above on 08.03.23 and made submissions on c) above on 15.03.23. The Second Respondent made a general comment on the proceedings on 13.03.23. I find that the comments made by the Second Respondent did not raise any matters relevant to r 4.7 of the Procedure Rules requiring me to give the Applicant an opportunity to comment on them. Similarly, given the extensive nature of the Applicant’s application and submissions in response to Case Management Directions, I find that the comments of the Case Manager in Case 35 made on 01.11.22 did not raise any matters relevant to r 4.7 of the Procedure Rules.
14. The Applicant seeks the following order from the Federal Appeals Panel:
- *Via Form 1B* - 11 specific rulings, broadly summarised as findings that the decision in Case 35 was ultra vires and invalid;
  - *Via Form 3* –
    - I. *That proceedings be served directly on parties, so contact details are not shared;*
    - II. *That SJ (the Second Respondent) be asked not to contact other parties in the proceedings directly, unless requested;*
    - III. *That FAP follow the Procedure Rules and the rules of natural justice by allowing the parties to make a submission;*
    - IV. *That the Case Manager in Case 35 not act as Case Manager in Case 55;*
    - V. *That pending the outcome of Case 55, the implementation of Case 35 be suspended having the impact of reinstating the suspension of the Second Respondent from the Party on the terms established by the Complaints Panel.*
  - By his submission of 08.03.23 the Applicant confirms he considers procedural applications I-III, V “live”.

## Preliminary Ruling

15. As a Case Manager exercising the powers under r 3.4(c) to determine whether the appeal is within jurisdiction and should be granted permission to proceed I am asked to consider a number of matters under r 4. With regards to these I find the following:
- a) The appeal is outside the jurisdiction conferred on the FAP by the Federal Party (rr 4.1, 4.2, 4.5(a)(i)); and
  - b) It is arguable that there are alternative remedies available (r 4.3, 4.5(a)(iii)).
16. In the light of the above, and given the overriding objective in r 1.1 and the powers in r 1.4 of the Procedural Rules, **I therefore refuse permission for the application to be heard by a full Case Panel**, for the reasons I set out in paras 19 et seq below.

### **Applicable rules**

17. The jurisdiction of the FAP is set out at article 22 of the Federal Party constitution, which provides (so far as is relevant):

*“22.3 The [Federal Appeals] Panel shall adjudicate upon:*

*A. any dispute over the interpretation of this Constitution;*

*B. any claim that the rights under this Constitution of a member ... have been infringed  
....*

*22.5 The Panel shall decide whether or not a dispute or matter for adjudication falls within the jurisdiction conferred on it by Article 22.*

*22.6 The Panel shall determine and publish its own procedures (provided that the same are not inconsistent with this Constitution and subject to confirmation by conference)...*

*22.7 Any decision of the Panel shall be final and binding upon all those concerned.”*

18. The Procedural Rules provide (so far as is relevant):

*“1.1 The overriding objective of the FAP in the application of its procedures and in the interpretation of its procedural rules shall be the resolution of disputes justly, fairly and proportionately...*

*1.4 The FAP shall actively manage cases so as to further the overriding objective. It may in particular, upon the application of the parties or on its own initiative:...*

*(j) adapt, vary or waive compliance with any of its own time limits or procedures if and to the extent necessary in the interests of fairness or justice in a particular case.*

*1.5 The FAP cannot vary any procedure or non-extensible time-limit which is fixed by the Federal Constitution. Nor can it extend any time limit for appealing to it which is contained in a rule compatible with and duly made under the Federal Constitution, which confers jurisdiction upon it in a particular case...*

*2.2 If the request for a ruling impugns a particular act, omission/default, ruling or decision by a person or body, the application form must be lodged within 6 weeks of the act,*

*omission, ruling or decision that is challenged. The Case Manager may extend this time limit in exceptional circumstances...*

*3.1 ... If the Application appears to be out of time and this has not been addressed, the Registrar may so inform the Applicant who may be permitted a further 14 days if they wish to make representations as to why time should be extended.*

*3.4 The Case Manager may:*

- a) seek further information from the Applicant;*
- b) determine the appropriate Respondent(s), request the Registrar to notify them of the application and request information or invite submissions from them;*
- c) grant or refuse permission to proceed with the Application in accordance with rule 4; and*
- d) determine the procedures to be used, and the issues to be adjudicated, by any Case Panel appointed to determine the case...*

*4.2 The FAP only has the jurisdiction conferred on it by the Federal Party Constitution. It is in most areas of its jurisdiction a tribunal of last resort. It will be careful not to hear disputes which are outside its jurisdiction, including where another remedy exists that has not been exhausted, such as an appeal to a State Party body.*

*4.3 The FAP will not grant permission to proceed with any Application that is untimely, vexatious, frivolous or insubstantial, not properly arguable on the evidence with a realistic prospect of success, academic, or is made when alternative remedies elsewhere have not been exhausted....*

*4.7 The Permission Stage is intended solely to sieve out and swiftly determine cases that do not merit a full Case Panel hearing. Respondents will be notified that an application has been lodged, but shall not be required or expected to make any representations at the permission stage. The FAP may however have regard to any representations that are made from Respondents addressing the Permission Stage tests and, where those raise issues that the Applicant has not had an opportunity to comment on, will invite comments from the Applicant where necessary in the interests of fairness.*

*4.8 A determination by the Case Manager at the Permission Stage is final and binding; it is not subject to a further appeal. It must be accompanied by reasons, which may be brief...*

*7.4 The Case Manager may determine that a case may be dealt with by the FAP in writing, where all the parties agree or where there are no significant factual disputes. If an Application is not contested, or there is no real prospect of its being successfully defended, the Case Manager may finally determine the matter themselves without convening a Case Panel.*

*...*

*7.6 The FAP shall ensure that the procedures adopted to hear a case are fair, and in particular:*

*...*

*(b) it shall ensure that parties are treated fairly as between each other;*

(c) it shall ensure that all parties have an opportunity to respond to relevant points made by opposing parties; and

(d) if it is minded to find against a party by reference to a factual matter not already squarely in issue in the case, or by reference to an argument not previously canvassed, it shall provide the party with a fair opportunity to address it on that point....

9.4 ... Final determinations by the Case Manager and/or Case Panel on the substance of the case are binding and are not subject to further appeal or rehearing, so any party prejudiced by an alleged unfairness must raise this as soon as possible and state what they propose as the remedy...

11.3 The parties shall have an opportunity to make submissions as to the form in which the determination shall be published. They may also make representations as to any obvious errata, such as errors of names, facts or dates not in dispute, or typographical errors. Save for corrections of errata, the determination shall be final...

14.1 A final determination of the FAP is final and binding upon all members of the Party concerned, pursuant to Article 22.7 of the Federal Party Constitution. This means in particular that the FAP cannot re-open a particular decision once a final ruling has been issued...

14.4 The FAP shall not be bound by points of interpretation determined in its previous rulings, and a party in a subsequent case may argue that a previous case was wrongly decided; however the FAP will follow its own previous rulings of which it is aware, unless it is satisfied that they were wrong.

## Analysis

19. I am grateful to the Applicant for his detailed submissions.

20. I am not dealing with a situation where the Constitution is silent. Decisions of the FAP are final and binding by virtue of article 22.7 of the Federal Constitution, and rr 4.2, 4.8, 9.4, 11.3, 14.1 of the Procedure Rules (which themselves are confirmed by Federal conference, see article 22.6 of the Federal Constitution). There is no jurisdiction for FAP to re-open/revisit a decision it has made, and this presents a significant hurdle to any Case Manager seeking to grant permission to proceed to a Case Panel under rr 3.4(c), 4.2 of the Procedure Rules. The important principle underlying this approach is that there should be finality to disputes.

21. As identified, there are previous FAP decisions that examine the ability of FAP to re-open its previous decisions (*Bray*) or considering similar *res judicata* clauses (*Glaze*, *Sims*). I am further invited to consider FAP decisions on the 'reading down' of seemingly absolute constitutional provisions. Considering these in the light of r 14.4 of the Procedure Rules I find as below at paras 22-26:

22. The Applicant highlights comments in *Glaze / Sims* in support of the principle that decisions of FAP are not final in certain limited circumstances linked to a party's ability to participate in the proceedings. However, I find these comments are *obiter* in that they are incidental to the decision made by the FAP - FAP is simply commenting on the possible ability of the APE to re-open its own decisions. And even on their own terms they are phrased as *obiter* – for example, para 10 of *Glaze* "It would appear to be arguable ... though that would be a matter for the APE to adjudicate" (emphasis added).

23. Even if one does not consider the comments in *Glaze / Sims obiter*, they are limited to instances where “a decision is made *without any opportunity at all for participation by a directly affected person*” (emphasis supplied). It is not clear to me that it would be right to say that the Applicant was without any opportunity at all for participation in Case 35 given his submissions and participation in Case 650, which are on the file and were available to the Case Manager. Further, the right of a Respondent to make submissions under r 4.7 of the Procedure Rules is limited. I am not sure one can even go as far as to say that an original complainant in this procedural context would automatically be considered a “directly affected person”, given it is the Case Manager duty to determine appropriate Respondents under r 3.4(d) of the Procedure Rules, although I make no particular finding on this in this case.
24. Turning to *Bray*, it rightly highlights that there is no internal procedure for FAP to reopen its own decisions where they are vitiated by serious procedural failings (para 9), nor a requirement for party disputes to be handled internally as opposed to through the courts (para 10). In both instances, it is noted that Federal Conference could make the necessary amendments to the Federal Constitution if it was so minded.
25. Whilst there is discussion of the failure by the Applicant in *Bray* to challenge procedural impropriety “at the time” – which might be felt to support the idea advanced by the Applicant that a lack of an opportunity to challenge procedural failings is significant – this is clearly *obiter*. As para 12 of *Bray* states, “*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*” (emphasis added).
26. I am invited to find that FAP has a power to read-down “seemingly absolute constitutional provisions” to imply words into the Federal Constitution. A number of decisions are put forward to support this submission. I believe that *Hayes v Federal Board* (2020) is distinguishable. Para 1.18 thereof provides “we are in unique situation [the Covid lockdown] where the “exceptional circumstances” clearly justify a suspension or postponement of the leadership election; and two, the Constitution and Regulations are silent as to what do to in this situation”. As I have noted already, in this case the Constitution is not silent. Further, with regards to arguments to “exceptional circumstances”, paragraph 1.22 of *Hayes* goes on to state “It will be for the Board to justify that such “exceptional circumstances exist” and in my view, in normal times this will be a very high hurdle to overcome”. The situation in the present case is not comparable to the practical and legal issues of trying to hold a leadership election during a national lockdown during a global pandemic. *Lock* and *Senior Adjudicator’s Team* are both similarly cited, and yet these are decisions on manifestly excessive sanctions, and the reading down of the Guidance to the Complaints Procedure – not the Federal Constitution – in that context.
27. As such the appeal is outside the jurisdiction conferred on the FAP by the Federal Party (r 4.2, 4.5(a)(i)).
28. The Applicant submits that jurisdiction rests on the fact that his “*constitutional rights as a member [have been infringed] by not notifying him of the existence of Case No. 35, despite being listed as a party at the Complaints Panel and on the initial application*”, thereby bringing this application within the ambit of art 23(B) of the Federal Constitution. Yet it is clear from r 3.4 of the Procedure Rules that the Case Manager must, as an initial decision, determine any appropriate Respondents. As such, even were there no clear constitutional rule that decisions of FAP are final and binding, it is not obvious to me that a *potential* Respondent can be said to have an automatic constitutional right to be notified of a case under art 23(B).

29. A stronger argument might be that members have a constitutional right to fair and effective adjudication of disputes, and that the Applicant has locus standi in this regard whether determined as an appropriate Respondent or not/or where he should have been determined as an appropriate Respondent (see *Bray*, para 3). But the challenge for an Applicant there would be that, irrespective of any identified procedural failing, *res judicata* is a key part of the fair and effective adjudication of disputes and therefore a significant hurdle to such an application. Nonetheless, it would be open to the Applicant to make such an application and would, in my opinion, have a strong argument as to an extension of the time limit to bring that case.
30. If FAP were to consider such an application on grounds that identified procedural failings had breached any such constitutional right, they would have to do so in the light of the overriding objective. Both the Case Manager and FAP generally have wide powers to vary procedures – see for example rr 1.4 (particularly 1.4(j)), 2.2, 3.4(d), 4.3, 7.6 of the Procedure Rules, which may be considered mitigation against procedural failing, the rules of procedure are not rigid.
31. Whilst the Case Manager submits that he had not considered the matter of time limits, it is clear to me that under r 1.4(j) and/or 2.2 he would have had been able to extend the time limit and consider Case 35 as brought within time had he been so minded. Furthermore, the Applicant in Case 35 (Second Respondent in this case) (SJ) did include a reason for making an application out of time on his form.
32. It does not seem completely unreasonable that in a rare case where the Case Manager is moved to make a finding that “there is no real prospect of [the application] being successfully defended” under r 7.4 of the Procedure Rules that such may meet the requirements of rr 1.4(j) and/or 2.2 to allow an application out of time.
33. (As an aside, it is my view that a natural interpretation of the elements of r 7.4 of the Procedure Rules is that it describes two separate powers of the Case Manager.)
34. It seems to me that a declaration would be an appropriate outcome to any such application were it to be successful, rather than a re-opening of the impugned dispute (otherwise it is simply a different procedural way round art 22.7 of the Federal Constitution).
35. Finally, 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, which may be a further alternative.
36. As such it is arguable that there are alternative remedies available (rr 4.3, 4.5(a)(iii)).

### **Disposal of procedural applications**

37. By my Case Management Directions of 07.03.23, para 11 I have impliedly granted or otherwise disposed of procedural applications I, and II.
38. By my Case Management Directions of 07.03.23, para 10 I have impliedly granted or otherwise disposed of procedural application III, in so far as it was relevant.
39. I refuse procedural application V.

### **Further Directions**

40. Under para 3.4(b) of the Procedural Rules I further direct:

- a) The Registrar/Standards Officer to add this decision to the records for this appeal, and to inform the Applicant and Second Respondent of my decision; and
- b) The Applicant, Second Respondent and Case Manager in Case 35 shall have 7 days to make submissions as to the form of publication of both this ruling and the decision in Case 35 on the FAP's website and in the Report to Autumn Conference. The default presumption would be publication in full.
- c) That the Applicant and Second Respondent consider r 11.3 of the Procedure Rules in any submissions made.
- d) I recommend that the Registrar/Standards Officer should inform any designated Case Manager of issues relating to time limits when administering any particular application.

Anthony Fairclough  
29 March 2023