



SUBMISSION: JSC CRITERIA AND GUIDELINES FOR JUDICIAL APPOINTMENT

BACKGROUND

1. This submission is made by Freedom Under Law (“FUL”) in response to the JSC’s call for public comment on the “summary and explanation of the criteria and guidelines used by the Judicial Service Commission when considering candidates for judicial appointment” (hereafter referred to as the “JSC summary”).
2. FUL is a not-for-profit organisation,¹ promoting democracy, the advancement of the rule of law and the principle of legality, which we understand to be foundational for a functional constitutional democracy.
3. The lack of criteria beyond the Constitutional requirements in sections 174(1) and (2) has often been cited as the reason for shortcomings in the JSC’s role in the judicial appointments process. A rational selection process and greater accountability are key. The purpose underlying the publication of the guidelines and criteria is described as “to enhance the public’s understanding of the JSC’s selection of judicial officers and to ensure openness and transparency.”² FUL therefore broadly welcomes the JSC’s publication of supplementary guidelines and criteria.
4. The JSC summary deals with three core areas. It further articulates the JSC’s understanding of the criteria found in the constitution; it expressly identifies independence as a criterion for appointment; and it deals with the approach to be taken during the interview process. Our understanding of the JSC summary is that it specifically identifies criteria as those found in the Constitution, and then provides guidelines on how these are to be understood and applied. For the avoidance of

¹ <https://www.freedomunderlaw.org/about-us/how-we-work/>

² JSC summary, para. 3.

confusion, especially considering the increasing frequency of litigation regarding appointments, we think it advisable that the summary explain exactly which are viewed as criteria, which are viewed as guidelines, and then the authoritative status of each.

5. The discussion regarding the approach to the interview process seems to be a guideline of very different character to the rest of the document. For the reasons set out later, we are of the view that this remains an important section of the summary, which should be maintained.

THE CONSTITUTIONAL CRITERIA

6. The JSC summary discusses the core constitutional requirements of sections 174(1) and (2) and adds the establishment of judicial independence found in section 165(2). The latter requirement is captured as questioning whether a candidate “would be independent”.³ The acknowledgement of the role of judicial independence as a criterion for appointment is commendable. As always, the real question lies in the manner in which these criteria are to be interpreted.

“appropriately qualified”

7. We support the interpretation of this criterion as encompassing technical competence, legal knowledge, skill and experience.⁴ In our view it is clear that the Constitution requires appropriate qualification. All other criteria flow from this primary requirement.
8. This is the minimum threshold requirement for anyone to be appointed to judicial office.
9. We welcome the JSC’s acknowledgement of the importance of acting experience, which has hitherto been an unarticulated but (almost inevitably?) necessary condition for appointment, certainly at high court level. We note the comment that acting experience “must not be elevated to an essential requirement.”⁵ This comment is especially welcome, given that acting appointments are effectively in the

³ JSC summary, para 7.4.

⁴ JSC summary, para 9.

⁵ JSC summary, para 11.

gift of the relevant head of court, with Ministerial approval routinely given: this reality detracts strongly from the general approach to judicial appointments which is prescribed both in the Constitution as well as the JSC Act of 1994. Observers of the JSC process over the years have come to regard acting as indeed constituting an essential requirement (certainly for candidates appointed at the high court level), and considering this past practice, it may be necessary for the JSC to give further thought to the circumstances under which acting experience will not be considered essential.

10. The acknowledgment that candidates will be evaluated on their ability to run a courtroom and their procedural knowledge,⁶ and that the particular needs as regards specialist-area expertise (e g tax or mining or maritime or intellectual property law) of individual courts are to be considered,⁷ is welcomed.

“fit and proper”

11. A wide range of factors make up a “holistic assessment” of whether a candidate meets this criterion, and FUL supports their inclusion. Requirements that candidates have a good judicial temperament, and have the necessary diligence, work ethic, and ability to deliver judgments timeously,⁸ are also to be welcomed. We would argue that demonstrated capacity to work collegially, to be part of a judicial team, forms part of a good judicial temperament. Applying these principles will hopefully necessitate a careful examination of a candidate’s track record.

“reflection of racial and gender composition”

12. The JSC’s application of section 174(2) has been the source of ongoing controversy. That the JSC summary devotes significant attention to articulating the JSC’s position in relation to considerations of “representativity” is to be welcomed.
13. The JSC summary notes that the racial and gender composition of the judiciary must be taken into account when selecting judges and understands this “as reflecting that

⁶ JSC summary, para 11.

⁷ JSC summary, para 12.

⁸ JSC summary, paras 18 – 19.

the [c]ourts, to do justice, must have the capacity to understand and relate to the experiences of all South Africans.” The injunction is further seen as being concerned with the effectiveness of the courts and based on the understanding that the judiciary “must be constituted from a broad enough spectrum of South African society to be able to understand the experience of all South Africans and empathise with their needs.” The JSC summary further takes the position that “the ability to understand the experience of a race and gender and empathise with its needs” is generally present to a far greater degree in those who have actually lived that experience.⁹

14. The JSC summary further explains that race and gender representivity is not to be assessed rigidly, in exact proportion to the national population. The summary understands diversity not as an independent requirement “superimposed upon the constitutional requirement of competence”, but as a “component of competence”, in that the judiciary “will not be competent to do justice unless, as a collegial whole, it can relate fully to the experience of all who seek its protection.” Therefore, if the courts do not meet the constitutional injunction contained in section 174(2), it is said that the courts will lack legitimacy.¹⁰
15. Whilst the representivity of the bench is crucial, it is our view that it remains only one factor that provides the judiciary with legitimacy. A judiciary that is precisely representative of a country’s demographics is not inevitably strong, independent, diverse, or even legitimate. Ultimately, it is the judiciary’s fulfilment of its constitutional mandate which is the ultimate guarantor of its legitimacy.
16. Furthermore, while race and gender are expressly mentioned in section 174(2), we believe it is also true that representivity is made up of other factors which include socio-economic class, geographic origin, language, religion, age, age and so on. While the JSC summary correctly focuses on the factors listed in section 174(2), it is important that some acknowledgement is given that, since representivity is such a clearly articulated goal of the appointment process, it goes beyond race and gender.

⁹ JSC summary, para 21.

¹⁰ JSC summary, para. 22.

17. The JSC summary suggests further that a capacity to have empathy for and appreciate the needs of the community also flows from the constitutional requirement for judicial diversity.¹¹ This serves to highlight that diversity may have to be understood more broadly than race and gender if it is to play such a central role in the appointments process. The “needs of the community” are surely likely to extend beyond those triggered by considerations of race and gender. The JSC summary attempts to give direction in instances where a candidate who will not advance race or gender representivity however is “better qualified in an important respect.” Factors to be weighed in such a situation include the overall needs of the judiciary, and the performance and needs of the relevant court.¹²
18. We have commented on the difficulty in assessing how the JSC reconciles the provisions of sections 174(1) and (2) in instances where they are in tension, so the effort to tackle this issue is welcomed. FUL’s position is that the application of section 174(1) provides the JSC with an objective basis on which to determine whether candidates are suitably competent and qualified. Once it is determined that candidates meet these requirements, the considerations introduced by section 174(2) must be considered. We agree that considerations must be given to the needs of the judiciary overall and note that the requirements of section 174(2) are not static, but will change over time.
19. Beyond the language of diversity or representivity in terms of race and gender is the more amorphous concept, often raised by the JSC in its interviews, of transformation. We suggest that there is no shared understanding of what the concept of transformation entails, and what candidates are required to show in order to demonstrate their contribution to transformation. We would argue that whilst the concept of transformation must entail something more than a candidate’s race or gender, transformation has often unhelpfully been conflated with a candidate’s race or gender during JSC interviews, which has then led to the uneven questioning of candidates.

¹¹ JSC summary, para. 23.

¹² JSC summary, para 24.

20. In our view, transformation, and a candidate's commitment to it, must be found in a candidate's firm and demonstrable commitment to the transformative constitutional project and its underlying values. Whilst the JSC summary does provide assistance, we think that there is merit in the JSC expressly articulating what it understands by transformation, as distinct from racial and gender representivity, a distinction that does not appear from the summary as it currently stands. As the summary is currently written, the danger of conflation between demographic representation and other forms of transformation still seems to be present.

21. INDEPENDENCE

22. The JSC summary identifies various qualities under this criterion, including courage, fairness and good judgment;¹³ an ability to make a decision independently of pressure and coercion, and the absence of loyalty or affiliation to others.¹⁴ A candidate must thus have the courage and integrity to resist pressure, and candidates may be questioned on any connections to a secret society, or close political affiliations.¹⁵

23. The summary recognises that judges are not expected to "be free of personal convictions", but are expected to be open to persuasion.¹⁶ Judges are also required to be people of courage and integrity, and "hypocrisy, dishonesty, opportunism or expediency" are identified as disqualifying characteristics.¹⁷

24. The identification of independence as a criterion for appointment is strongly supported, as it is grounded in the Constitution, and is an integral quality for any judicial officer. A failure to act independently by a judicial officer fundamentally undermines the rule of law and the legitimacy of the judiciary. The JSC has in the past been criticised for lines of questioning which do not give sufficient weight to the constitutional requirement of judicial independence.

¹³ JSC summary, para 27.

¹⁴ JSC summary, para 28.

¹⁵ JSC summary, para 29 – 30.

¹⁶ JSC summary, para 31.

¹⁷ JSC summary, para 32.

25. APPROACH TO INTERVIEWS

26. The JSC summary requires that questions must be relevant to the criteria and places a duty on the chair to enforce these. The chair is granted a discretion in doing so.¹⁸ The summary precludes questions which would require candidates to commit to how they would decide matters before them in court.¹⁹ We believe this is a sensible approach.

27. We strongly support the emphasis placed on the role of the chair in ensuring that questions are relevant to the criteria. This is crucial to ensure that interviews are consistent, and that candidates are dealt with even-handedly. The unequal treatment of candidates has been a major ground of criticism of the JSC's practice (as illustrated by the litigation brought by CASAC which led to the April 2021 Constitutional Court interviews being re-run). We therefore submit it is important that a requirement of fairness and substantively equal treatment of candidates as part of the interview process, and the chair's responsibilities in that regard, are also expressly captured in the JSC summary.

28. The selection process is said to be "a search for positive qualifications, not disqualifications."²⁰ The summary does however deal with the process to be followed in dealing with "serious disqualifying allegations." These are: that the allegation could render the candidate not a fit and proper person; "sufficient substantiation" is required for the allegation to be raised with the candidate during the interview; the candidate must be given "adequate opportunity to consider and address" the allegation before any questions are put; and input is to be received from an objection committee.²¹

29. The JSC's handling of adverse comments against candidates has previously been raised as a concern. It is therefore appropriate for the guidelines to deal with this issue.

¹⁸ JSC summary, para 33.

¹⁹ JSC summary, para 34.

²⁰ JSC summary, para 35.

²¹ JSC summary, para 36.

30. It may be necessary to elaborate on what will be considered “sufficient substantiation.” We suggest that a more specific definition would be desirable.
31. Concerns have previously been raised about candidates having to deal with potentially damaging allegations on short notice. The JSC does not seem to have applied a consistent standard to determine the extent of notice required. “Adequate opportunity” may need to be more precisely defined, in order to ensure consistency and fairness to candidates.
32. We note that this section of the summary is the first time the objection committee is mentioned. It is not clear what specific role is entailed. For example, who will serve on this committee? who will choose its members? what is the nature of the “input” this committee will give? Is it envisioned that the committee will conduct an independent investigation of the allegations? If so, on the basis of what powers and authority? Or will it merely form a prima facie view of the objection? We suggest that it is desirable for the composition, role and functions of this committee are set out in far greater detail.
33. One issue which is not covered in the JSC summary is the shortlisting of candidates. There is a lack of clarity about the composition and mandate of the JSC’s sifting committee, the criteria employed in shortlisting candidates, and a general lack of transparency regarding this aspect of the process. We recommend that the JSC expand the summary to ensure that this, potentially crucial, aspect of the process is also dealt with, and that greater transparency about the shortlisting process is thereby provided. If these provisions exist already in some manner, they should be integrated with this new set of criteria and guidelines, to ensure accessibility and consistency.
34. Following some especially contentious recent interviews, there have been calls for the development of a code of conduct to regulate the behaviour of JSC commissioners during interviews. FUL supports these calls, and recommends the establishment of such a code of conduct which would set the standard for behaviour by commissioners during interviews. It is possible that the development of such a code is being undertaken independently of the work captured in this JSC summary,

but we think it is important both for a code to be developed, and for it to be cross-referenced with the criteria and guidelines, since it would form a key component of the JSC's approach to interviews.

35. In addition, we would argue that newly-appointed members of the JSC should undergo mandatory induction to acquaint themselves with the criteria and guidelines, once agreed on.

36. We welcome the JSC's acknowledgment that these guidelines are not exhaustive.

CONCLUSION

Whilst we have identified areas in which we think further development of the guidelines is necessary, we support this initiative as a necessary aspect of ensuring that the JSC is able to fulfil its vital constitutional mandate in respect of judicial appointments. These guidelines are a positive start, and we hope that they will be developed further in light of the considerations raised in this submission, and by other stakeholders.

NOVEMBER 2022