

Making Judicial Appointments Reform Work



How the National Judicial Council Can Improve Implementation of its Judicial Appointments Guidelines

Joseph Otteh





Access to Justice

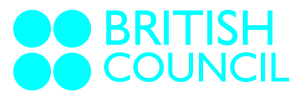
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**RULE OF
LAW AND
ANTI-CORRUPTION**



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Access to Justice (A2Justice) defends rights of equal and non-discriminatory access to courts of law, works to expand access by marginalised people to equal and impartial justice, attacks corruption in justice administration, and supports legal struggles for human dignity. Operating under three mutually reinforcing programmes - The Judicial Integrity and Independence Programme (JIIP), the Legal Access Programme (LAP) and the Legal Resources Programme (LRP) – all of its work address critical problems in justice administration and human rights, serve important public needs and target important achievements in democratic reform.

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Making Judicial Appointments Reform Work

How the National Judicial Council Can Improve Implementation of its Judicial Appointments Guidelines¹

"The quality of justice depends more on the quality of the men who administer the law than on the content of the law they administer. Unless those appointed to the bench are competent and upright and free to judge without fear or favour, a judicial system, however sound its structure may be on paper, is bound to perform poorly in practice". - Schwartz

INTRODUCTION

On the 3rd of November 2014, the National Judicial Council ("NJC") made new rules governing the process for appointing judges of superior courts of Nigeria titled: The Extant Revised NJC Guidelines & Procedural Rules for The Appointment of Judicial Officers of All Superior Courts of Record in Nigeria ("The Guidelines"). The Guidelines are made up of six Rules. These Guidelines are required to be followed by Judicial Service Commissions whenever appointments into superior court positions are to be made.

Overview of The Guidelines

Rule 1 Obligates compliance with The Guidelines by the respective Judicial Service Commissions/Committee. Rule 2 establishes the preliminary protocols that heads of these Commissions should follow to initiate procedures for recruiting superior courts judges. The protocols consist of notification requirements to the head of the executive branch alongside the Chairman of the National Judicial Council (who is also the Chief Justice of Nigeria).

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²The Federal Judicial Service Commission, State Judicial Service Commission and the Judicial Service Committee of the Federal Capital



Rule 3 Establishes a detailed set of rules for advertising the judicial vacancies sought to be filled and inviting nominations for the available positions. The Rule provides, in summary, that the relevant Judicial Service Commission/Committee shall call for expression of interest "by way of public notice" placed on websites of the respective Judicial Service Commission, the notice boards of the courts and those of the Nigerian Bar Association Branches. The rule requires that the JSC writes to to "every other head of Superior Courts of Record in Nigeria and to every Judicial officer of the Court concerned asking for nomination of suitable candidates for the proposed judicial appointment". In the case of appointments to the Court of Appeal and the Supreme Court, Rule 3 requires that the President of the Court of Appeal/the Chief Justice of Nigeria as the case may be, "write to Heads of Courts, serving Justices of Court of Appeal/Supreme Court of Nigeria and President of the Nigerian Bar Association asking for nomination of suitable Judicial Officers/Legal Practitioners for appointment as Justice of Court of Appeal/Supreme Court of Nigeria".

"UNDER THE FORMER GUIDELINES, JUDICIAL APPOINTMENTS INTO SUPERIOR COURTS WERE BASED ON A "NOMINATION" SYSTEM WHERE JUDGES (INCLUDING RETIRED ONES) EXCLUSIVELY NOMINATED CANDIDATES FOR SUCH OFFICES, SO THAT PERSONS WHO DID NOT GET SO NOMINATED WERE EXCLUDED FROM CONSIDERATION AND EFFECTIVELY BLOCKED FROM ACCESSING JUDICIAL OFFICE"

Given the critique that will follow shortly, it is expedient to narrate what the Guidelines stipulate should follow next. It provides that soon after the expiration of the deadline for receiving nominations and applications, "the Chairman of the Judicial Service Commission/Committee concerned shall make a provisional shortlist on the merits consisting of not less than twice the number of Judicial Officers intended to be appointed at the particular time

-
- (i) among all serving and retired Judicial Officers of the Court to which an appointment of a Judicial Officer, other than the Head of a Court, is proposed to be made;
 - (i) among all serving and retired Heads of the relevant State or Federal Court, including retired Chief Justices of Nigeria and retired Presidents of the Court of Appeal, in the case of appointment of a Head of Court;
 - (ii) among the Nigerian Bar Association branches in the State concerned where the appointment is to a State Court; provided that where the appointment is to a Federal Court the shortlist shall only be sent to the President of the Nigerian Bar Association; and
 - (iii) Among every Member of the Judicial Service Commission/Committee concerned



and circulate the provisional shortlist together with a request for comments on the suitability or otherwise of any of the short listed candidates" to a number of serving and retired judicial officers and NBA officials.

As soon as the JSC approves the provisional shortlist, it becomes the final shortlist. The shortlisted candidates are then given and required to fill the NJC Form A, which is returned to the respective JSC Chairman. The Chairman of the JSC concerned thereafter collates all the information received for each candidate and, through a Memorandum, re-presents to the JSC the information and feedback received on each of the Candidates. These feedbacks include comments made on the candidates by all those to whom the shortlists were circulated, petitions received against a candidate and the candidate's response, detailed medical certificate of fitness and a report issued by the Department of State Security. The JSC is, nevertheless, entitled to "make such further enquiries about the candidate from reputable sources as to the suitability of the candidate as it deems fit." In considering the candidates, the JSC is expected to pay attention to a number of personal and professional factors that reflect on the candidates' competence, suitability and character, and these will be explored in more detail below.

Thereafter, the Chairman of the JSC is required to "advise, or as the case may be, recommend to, the National Judicial Council by a memorandum which shall conclude with a clear declaration that the NJC Guidelines and Procedural Rules have been complied with strictly and fully." This memorandum shall clarify whether the candidate had earlier been presented to the National Judicial Council ("the Council") as a candidate, and the Council is expected to include the Memorandum on its business agenda if it is sent at least 30 clear days before its next scheduled meeting.

'when appointment of men and women to the bench is premised on extraneous considerations such as god-fatherism, political connections, religious leanings, "federal character" (without any regard for merit and competence) and monetary inducements, the ultimate victim is JUSTICE. The society is bound to suffer and bear the brunt of the consequences of having incompetent judges on the Bench
Chief Afe Babalola (SAN)



The Memorandum shall justify the number of judicial officers sought to be appointed, and must be accompanied by; (1) minutes of JSC meetings where decisions were taken on the nomination of candidates, (2) materials and documentation in relation to each candidate placed before the JSC (3) proof that the court has been established by legislation (4) proof of adequate Capital vote provision in the approved budget for the Court (5) proof of availability of suitable Court hall, Judge's residence, Car and Library, among others. The memorandum should also be accompanied by a "chart which shall show at a glance, as much as possible, the essential particulars of the candidates shortlisted."

The candidates will each then undergo an interview conducted by the NJC to "...ascertain his or her suitability for the judicial office sought" but the mode of the interview is determined by the Council⁸ and the results of the interview "...shall form a major part of the decision on the candidate's suitability for the judicial office for which he or she has been interviewed."

The Major Changes Introduced by the Guidelines

Prior to the time when the Guidelines came into force, judicial appointments into superior courts were based on a "*nomination*" system where judges (including retired ones) exclusively nominated candidates for such offices, so that persons who did not get so nominated were excluded from consideration and effectively alienated from accessing judicial office. The current Guidelines have opened opportunities for every qualified person to seek judicial office in a way that is far more consistent with the spirit of constitutional democracy.

The previous system was also characterized by a high degree of opacity, because, even among those nominated for consideration, there was no transparent way of determining how the final candidates would be selected, and whether the successful candidates would be chosen through an assessment system that was objective and relied principally on the meritorious standing of each individual candidate, or whether the choices

⁴Rule 4(1) and (2).

⁵Rule 4(3)

⁶Rule 5(1) -(4).

⁷Rule 6(1).



made would follow a preponderantly subjective path. Given the selection and appointments of many people who had very little law practice, or prior academic or judicial experience, it is inevitable that considerable subjective influence was exerted on appointments under that system. Also, given the competitive strengths of those selected using those procedures under that system, many knowledgeable people often accused the Judiciary of professing one thing and doing another.

On the surface, the Guidelines are a major breakthrough in bringing the system of judicial appointments up to speed with contemporary global standards for appointing (high court) judges. The new Guidelines comply with the Latimer House Principles, and United Nations Principles on the Independence of Judges

The Many Slips Twixt Cup and Lip: How Have the 2014 Guidelines Worked in Practice?

On the surface, the Guidelines are a major breakthrough in bringing the system of judicial appointments up to speed with contemporary global standards for appointing (high court) judges. The Guidelines, on its face, comply with the Latimer House Principles, and the United Nations Principles on the Independence of Judges. So, what could possibly go wrong with using the Guidelines to achieve more egalitarian, transparent and objective outcomes in selecting applicants for judicial offices? A lot apparently!

Using three monitored instances as case studies, some major faultlines of the Guidelines can be outlined at this time, and these will show why its lofty aspirations will remain pies in the sky notwithstanding its professedly good intentions. Therefore, while the reform of Nigeria's (superior court) judicial appointment system represents a major step forward, and while, indeed, the Guidelines can potentially deliver good results where they are applied in their true spirit, there are very significant - in fact, critical - gaps for "mischief" capable of derailing the achievement of their goals, and these spaces must be plugged now, rather than later.

⁸Rule 6(2).

⁹Rule 6(3).



It is important to keep in mind that the 2014 judicial appointment reforms sought to change course from the old order of things, that is, the system of judicial selection prior to that time. The old order promoted a patronage judicial selection system, where appointments were largely due to "who you knew" and influenced by the Judiciary's elite. The 2014 Guidelines therefore, offered a point of departure from the continued enjoyment of influence and privilege by a few, against the collective interest of the whole.

Given that it was the Judiciary itself (or at least, its core leadership) that instated what was intended to be a more transparent and objective system of judicial recruitment, it would have been expected that the newly fashioned Guidelines would be implemented to the letter. It has not been so. Apparently, not everyone in the Judiciary bought into those changes, or is prepared to let the reforms succeed.

"... while the reform of Nigeria's judicial appointment system represents major progress, and while, indeed, the Guidelines can potentially deliver good results where they are applied in their true spirit, we are dealing with changes that, because of what they seek to do, and the spectrum of entrenched privileges they seek to curtail, will be resisted. It would be unsafe, therefore, to assume that the reforms will be applied in their true spirit"

CASE STUDY 1

The Federal High Court Appointments Case (2015)

In 2015 the Federal High Court ("FHC") initiated procedures to appoint 25 new judges. The process was apparently initiated by the Chief Judge of the FHC at the time, Hon. Justice Ibrahimauta now retired. Regarding the recruitment, it should be noted that, first, there was no call for expression of interest made in breach of Rule 3 of the Guidelines and no advertisement of such a call. All that was placed on the website of the FHC that gave some indication of a recruitment exercise was not an advertisement but the reproduction of a letter written to some office holders, specifically, the Attorney General of the Federation and the President of the Nigeria Bar Association inviting them to make recommendations of suitable persons for consideration.

¹⁰The request was made by Access to Justice.



In response to a Freedom of Information Request directed to the Federal Judicial Service Commission, requesting information of the **"details of the modes and avenues used in publicizing/advertising the available vacancies"** the incumbent Chief Judge at that time responded saying: *"That*

"[In Lagos State (2017)]
"... there was no call or public notice whatsoever requesting an expression of interest from suitable candidates advertised on the Lagos State Judiciary's website, on the notice boards of the High Court divisions, or on the notice boards of the NBA at Lagos Island, Ikeja, Ikorodu and Badagry."

the mode of and avenues in [sic] publicizing the vacancies are as stated in the Rules 3(1)(a)(i)(ii)(iii) of the 2014 Revised National Judicial Council Guidelines & Procedural Rules for the Appointment of Judicial Officers of All Superior Courts of Record in Nigeria." The Chief Judge did not state how he or any other body complied with those Guidelines and Rules. If the Chief Judge meant that he or the Federal Judicial Service Commission complied with the stated mode of advertising the vacancies as prescribed in the Guidelines he referenced, this was inaccurate!

The NJC did not cancel the recruitment exercise of the Federal High Court in spite of these violations of the Guidelines and representations made by Access to Justice to that effect.

The list of possible contraventions of the Guidelines by that exercise are noted below. It may be noted that, according to the Federal High Court Chief Judge at the time, the "total number of candidates whose recommendations were received by the Federal High Court as at the close of nominations was 613". According to the Chief Judge: *"Most of the recommendations were received by post while others were either submitted by the candidates themselves or their representatives which the court ordinarily did not feel it was necessary to enquire of the identity of the person(s) submitting the recommendations."*

The Lagos State Recruitment Exercise (2017)

In 2017, the Lagos State government appointed three new Judges into its High Court. Access to Justice inquired into the question whether the appointments were made in compliance with the new Guidelines. Concluding that it did not, A2Justice stated that:



"Our research showed that the Lagos State JSC failed to publicise the judicial vacancies on notice boards of both the High Courts and the NBA branches, and, on its website..."

"In addition, there was no call or public notice whatsoever requesting an expression of interest from suitable candidates advertised on the Lagos State Judiciary's website, on the notice boards of the High Court divisions, or on the notice boards of the NBA at Lagos Island, Ikeja, Ikorodu and Badagry."

"Besides verifying this from the notice boards, we interviewed the NBA officials in the aforesaid branches who confirmed this information."

A2Justice further stated:

"The Lagos State Judiciary also failed to send a provisional list of applicants and nominees to the respective NBA branches for comments."

"Although at the Ikorodu branch of the NBA, we confirmed that a shortlist of nominees was sent with requests for comments and suggestions on the suitability and eligibility of the candidates."

"This was, however, done a week before the judges were officially appointed suggesting that the notification was merely a formality and could not have altered the outcome."

The NJC did not respond to these allegations, although the Lagos State Judiciary "insisted the government did no wrong in the appointment of the new judges". According to Premium Times newspaper, a staff of the Lagos JSC responded that: "The Lagos State Judicial Service Commission does not approve judges' appointment, it is the NJC" "So, if there is anything, it is the NJC that should be accused of not following its own guidelines." The NJC, said the newspaper "did not immediately respond to requests for comments".

The Nomination of Supreme Court Justices 2019

In June 2019, the Chief Justice of Nigeria and the Federal Judicial Service Commission, after a publicized request to appoint additional Justices for the



Supreme Court was made by President Muhammadu Buhari, commenced the process for the recruitment and appointment of more Supreme Court Justices. The process culminated in the NJC recommending four Justices of the Court of Appeal to the President for appointment and confirmation as Justices of the Supreme Court.¹³

In July 2019, Access to Justice made a Freedom of Information application to the Federal Judicial Service Commission requesting details of the advertisement of the Call for Expression of Interest as well as information indicating whether the Nigerian Bar Association had been consulted, as required by the Guidelines, in the recruitment process. Yet again, the Commission did not respond to the FOI Request.

In a suit filed against the FJSC, the National Judicial Council ("NJC") and others, Access to Justice asked the Federal High Court to quash the list of candidates submitted by the NJC to the President of Nigeria on the ground that there had been a failure of the FJSC and the NJC to abide by the provisions of the Judicial Appointment Guidelines. The Organization averred in the lawsuit that it had monitored the website of the 1st Respondent to observe its compliance with the Appointment Guidelines requiring the publication of the call for expression of interest on the Commission's website, but had noted the absence of such a call for expression of interest on the website.

THE NJC HAS MISSED
I M P O R T A N T
O P P O R T U N I T I E S
T O
S T A N D U N F L I N C H I N G L Y
R E S O L U T E I N I N S I S T I N G
T H A T T H E P R O V I S I O N S O F
T H E G U I D E L I N E S B E
F O L L O W E D I N L E T T E R
A N D S P I R I T, L E A V I N G
S T A T E A N D F E D E R A L
J U D I C I A R I E S T O E X P L O I T
W H A T C O U L D P A S S A S T H E
N J C ' S S O F T " L I V E A N D L E T
L I V E " A P P R O A C H T O
I M P L E M E N T I N G T H E
G U I D E L I N E S

Only one of the respondents in the suit - the Chief Justice of Nigeria - specifically

¹¹See <https://www.premiumtimesng.com/regional/ssouth-west/227889-group-accuses-lagos-govt-breaching-njc-guidelines-judges-appointment.html>, accessed on 6/6/2018.

¹²Some of the information included in this section is taken from

¹³They are: i) Hon. Justice Adamu Jauro, JCA (North-East Zone) ii) Hon. Justice Emmanuel A. Agim, JCA (South-South Zone) iii) Hon. Justice C. Oseji, JCA (South-South Zone) iv) Hon. Justice Helen M. Ogunwumiju, JCA (South-West Zone).



asserted in a direct, definitive manner that the requirements of the Appointment Guidelines with regard to advertising the call for expression of interest and informing the Nigerian Bar Association were complied with. Notwithstanding this claim, no independent physical proof was offered in its support. No copies of website pages, no screenshots, and no copy of the letter to the NBA was produced. The high court however ruled that Access to Justice did not have locus standi to institute the action.¹⁴

So Far, Not So Well: An Appraisal of the Implementation of Appointment Guidelines

Given the case instances cited, there is little doubt that the implementation of the Appointments Guidelines has been below par and gives cause for concern; in fact, the charge can be made that the Judiciary itself is subverting rigorous adherence to them. The NJC has missed important opportunities to stand unflinchingly resolute in insisting that the provisions of the Guidelines be followed in letter and spirit, leaving State and Federal Judiciaries to exploit what could pass as the NJC's soft "live and let live" approach to implementing the Guidelines.

We see important gaps in the following areas;

1. Lack of compliance with Procedures on Announcement and Publicity of Vacancies
2. Lack of Transparency in the Short-listing Phase of the Selection Process
3. Lack of Objective Standards Applied to Determining Merits of Individual Candidates

1. Lack of Compliance with Procedures on Announcement and Publicity of Vacancies

In all the three instances cited in this report, and beyond the feeble attempts by the respective judicial commissions, i.e. the Judicial Service Commissions of the named States and the Federal Judicial Service Commission to shy away from the question, it is unarguable that the three institutions did not comply with the requirement to publicly announce judicial vacancies to the public in

¹⁴Access to Justice has appealed the Judgment.



the way required by the Appointment Guidelines. The Appointment Guidelines provide that the relevant Judicial Service Commission/Committee shall call for expression of interest "by way of public notice" placed on their websites, the notice boards of the courts and those of the Nigerian Bar Association Branches.

This is a recurring procedural faux pas by judicial commissions. All the three judicial service commissions that managed the recruitment processes cited above have websites and were able to effectively comply with the Appointment Guidelines and meet the minimum thresholds of public and professional association notification and publicity requirements established by the Guidelines. They simply chose not to.

It appears, however, that the heads of the respective courts play a key role in choosing the form by which judicial vacancies are announced if at all; In Lagos State, there were no notices given publicly at all, even to the NBA branches there as found by investigations by Access to Justice. In the FCT, only copies of letters written to persons of high judicial or political offices - Justices of the Supreme Court, Attorney General of the Federation - were displayed on the website of the Federal High Court, which was simply not the way to comply with the publicity requirements of the Guidelines.

There is probably more to the failure to comply with publicity requirements in announcing judicial vacancies and disseminating that information to the Bar in the prescribed manner. That factor, possibly the elephant in the room, could possibly be linked to what Nigeria's Chief Justice said during an interview, is the reluctance to broaden professional participation in the nomination process. The Chief Justice of Nigeria said that he does not share the view that appellate judicial positions should be occupied by persons picked directly from the Bar! He said he didn't belong to that school of thought, given, in his opinion, that career lines have been chosen by people who opted for legal practice over judicial vocations, and that it would be unfair to those who had chosen the judicial path to have people from legal practice now take up the kinds of opportunities they were already lined up for. Could this explain why the Judiciary has generally downplayed the observance of these notification requirements? Possibly! Institutional



resistance to the idea of a level playing field for "**all comers**" seeking judicial office is likely a big factor in it. Opinions expressed a few years ago shortly after the Appointment Guidelines came into effect at a rare instance when the NBA was invited to submit names for consideration for Supreme Court appointments, showed a certain amount of disquiet in the Judiciary, (i.e. among retired/serving Judges), over moves to appoint persons from the Bar into appellate judicial positions, and the arguments professed by the Judges who reacted to the moves reflect precisely the sentiments of the Chief Justice of Nigeria outlined above.

Indeed, since the Appointment Guidelines came into effect in 2014, no person has been selected from the Bar into any appellate judicial office. In 2018, for example, the Court of Appeal announced the appointment of twelve new Justices to fill vacancies on the appellate bench and all the new appointees were already judicial officers, who were chosen from the High Courts. None was picked from the Bar, Academia or other public service. In fact, it is telling that Hon. Justice Zainab Bulkachuwa, the President of the Court of Appeal at the time of the appointments, said that "quality of judgements" delivered by the appointees was the determining factor for their appointment. If this was the criteria used, then it follows naturally that no person who had not held judicial office and delivered judgments could have stood a chance of being appointed into the court.

THE GUIDELINES OFFER NO GUIDANCE, AND THIS LEAVES THE HEAD OF THE JSC OR FJSC WITH THE SOLE POWER TO DETERMINE WHOSE "MERITS" ARE GREATER THAN ANOTHER.

2. Lack of Transparency in the Short-listing Phase of the Selection Process

The Appointment Guidelines provide that after the expiration of the deadline for receiving nominations and applications following a call for expression of interest, "the Chairman of the Judicial Service Commission/Committee concerned shall make a provisional shortlist on the merits consisting of not less than twice the number of Judicial Officers intended to be appointed at the particular time and circulate the provisional shortlist together with a



request for comments on the suitability or otherwise of any of the short listed candidates" to a number of serving and retired judicial officers and NBA officials.

It is clear in the Guidelines that the provisional shortlist to be drawn from the expressions of interest is required to be on the merits; however, the Guidelines do not explain the meaning of that term within that context. The Guidelines do not disclose, also, the procedure to be adopted by the heads of the JSCs in order that the shortlists reflect "on the merits" selections, or how, in fact, this may be verified in practice. It is important to keep in mind, that, at this stage of the process, what has been submitted to the JSCs (or its federal counterpart the FJSC) are nominations, i.e. recommendations received from several sources, individual expressions of Interest, and Resumes of the candidates who have expressed interest in the offices.

What might "on the merits" mean in this context? As between, for example, a Chief Magistrate who has been on the Bench for twenty years, and a practicing lawyer who has practiced law for the same period? As between a law teacher who has authored a number of publications and a Ministry of Justice prosecutor who has prosecuted a certain number of cases?

The Guidelines, read and applied literally provide no more than a hollow rite of passage as far as ensuring a merit-based criterion governs the selection.

The Guidelines offer no guidance, and this leaves the head of the JSC or FJSC with the sole power to determine whose "merits" are greater than the other. So, from the outset, the head of the JSC/FJSC is in a vantage position to influence who gets shortlisted, and who does not. It is, therefore, clearly unfortunate that the Guidelines chose to use labels and catch-phrases that underline the idea of an objective assessment of competing credentials, when, in actual fact, what it offers is clearly a vast power of subjective determination to sole individuals.

Furthermore, given that the power to make the initial assessment of the credentials of candidates is given to one official, there is nothing in the

¹⁵ Well before the tenure of the current Chief Justice of Nigeria and his predecessor



Guidelines that provide a means of verifiability showing that the shortlisting was actually done "on the merits". A literal reading of the Guidelines may even suggest that JSCs/FJSC even as the recognized organs with constitutional responsibilities over judicial appointments may not, on a literal reading of the Guidelines be able to scrutinize the shortlisting process. But a literal reading of the Guidelines may not be the most constructive reading or interpretation of the constitutional provisions.

The phase at which a "merit-based" shortlisting of candidates interested in judicial offices occurs is a pivotal aspect of the judicial selection process, and deserves to be managed with utmost care and diligence. Should the process buckle at this point, the quality of the outcomes is jeopardized and the bottom knocked off the bucket.

On a literal reading, the Guidelines miscarry the whole intent. Rather than expound the steps for achieving the merit-based process, the Guidelines ironically minimizes the standards applicable in this regard, placing the "merits-based" determination function in the hands of a single official involved in the process but who is not made accountable for the decisions or determinations reached to the JSC as a body.

So, from the outset, the head of the JSC/FJSC is in a vantage position to influence who gets shortlisted, and who does not. It is clearly unfortunate that the Guidelines chose to use labels and catch-phrases that underline the idea of an objective assessment of competing credentials, when, in actual fact, what it offers is clearly a vast power of subjective determination to sole individuals.

In this respect, the Guidelines come up very short and need to be considerably revised and re-articulated in order to de-monopolize control over the shortlisting process from one individual, and make the shortlisting function a much more participatory, transparent and accountable one. The Guidelines indeed provide that the provisional shortlist shall be approved by the JSC/FJSC, and while it is possible that the judicial commissions as separate entities of their own may withhold approval of the shortlist, this is not likely for a number of reasons that have to do with the independence of the JSCs/FJSC.



The NJC should do two things here: first, it should amend the Guidelines with supplementary provisions plugging the gaps in this aspect of the guidelines' second, it should, in order to make the process more transparent and less amenable to political or institutional influence, provide that a neutral, independent body should conduct the short-listing of the applications/nominations received. That neutral body should consist of persons who have the requisite professional and reputational qualifications alongside experience; it may be an academic body - such as the Nigerian Institute of Advanced Legal Studies - or an ad-hoc body specifically constituted for the purpose. This body will be tasked with undertaking the assessments that will lead to the shortlisting of the candidates who have applied for the judicial offices.

3. Lack of Objective Standards Applied to Determining Merits of Individual Candidates

This head of critique is, in some way, related to the preceding one and contributes to resolving the problem of ensuring a merit-based shortlisting process.

The Guidelines provide that:

" In carrying out the provisional short listing exercise, the Chairman of the Judicial Service Commission /Committee shall take into consideration as much as possible, (i) professional expertise and competence, including in the case of appointment of Judges from the High Court to the Court of Appeal and Justices of the Court of Appeal/Chief Judges/Legal Practitioners/academicians to the Supreme Court, the quality of judgments and performance and demonstration of judicial skills of the Judge; and in the case of appointment from the Bar, evidence of 6 contested cases in the last 5 years; (ii) sound knowledge of law, (iii) seniority at the Bar and or the Bench, (iv) Federal character or geographical spread and where necessary and possible, without compromising the independence of the Judiciary or allowing politics to permeate or influence the appointment"

One of the difficulties a shortlisting function will encounter with these stipulations is that, first, for appointments into the high courts, the bar is not



very finely or ambitiously set for candidates seeking, or nominated for this position, and though there are other thresholds - six contested cases, sound knowledge of law, seniority at the bar - these are quite softly calibrated. Given the number of people desirous of judicial offices, many candidates will readily meet those criteria and the problem will then quickly turn on how to create a shortlist from such a crowded field of eligible candidates.

It is now time to call time on the Appointment Guidelines 2014, and begin efforts to produce something new - something better and tighter in terms of the way it sets out to realize the important goals of making the judicial selection process more merit-based, competitive, and transparent accountable

Therefore, if a majority of candidates meet the shortlisting criteria, the next question would be: whose "equities" will be preferred to another and on what basis? Nearly the same dilemma is seen with respect to appointments into appellate court positions. The Guidelines stipulate that the quality of judgments and performance and demonstration of judicial skills of the Judge are key considerations. Who evaluates this? The President of the Court of Appeal or Chief Justice of Nigeria? Through what means is this judged or appraised? Without any real scrutiny over the determinations reached, the head of the JSC or FJSC make arbitrary or biased choices, and give preference to favoured candidates. This is

why it is all so very important to have an independent body evaluate the strengths of candidates and make the shortlists.

Some argument may be advanced contrariwise: that, first, the candidates shortlisted by the relevant JSC/FJSC would be subjected to a written test by the NJC and that this subsequent evaluation will offer a more **"level-playing field"** opportunity for all shortlisted candidates to be assessed more objectively, thus providing an additional layer of filtration to promote the goal of a merit-driven recruitment process.

While this is probable, what the argument misses is that the preceding shortlisting process is so poorly stringed such that even more qualified candidates can be passed over at this preliminary stage, thereby upending any chances of their names making the shortlist forwarded to the NJC. When



proper account is taken of these gaps, it is seen that the system is really wired to produce results that are far from optimum.

The situation is actually more interesting with appellate appointments. With appointments to the Court of Appeal and the Supreme Court, the Federal Judicial Service Commission (FJSC), headed by the Chief Justice of Nigeria ("CJN") is the relevant Commission charged with recruitments into the Court of Appeal and Supreme Court. It is therefore the CJN who, as the head of the Commission, will determine the shortlist, after applications/nominations are received following a call for expression of interest.

After this shortlist is approved by the FJSC, it is then sent to the NJC - which is also chaired by the CJN - for review/consideration. If the CJN is not entirely dispassionate and unbiased in his or her assessment of the merits of individual candidates or nominees, the shortlisting process will invariably be skewed. Even then, a CJN's institutional or ideological biases can also be a hugely important factor in the shortlisting of candidates. If a CJN is disposed to recruiting appellate Justices from only a particular vocational constituency, for instance, from the bench and not the bar, this bias will negatively affect the consideration "on the merits" of candidates who are not of that vocation or persuasion.

This prospect is real, and probably counting already. In 2019, the current Chief Justice of Nigeria, speaking to senior lawyers who had approached him on the issue of including candidates from the Bar in appellate judicial appointments, stated expressly that he was not in favour of appointing Supreme Court Justices from outside of the Judiciary. Stating that he belongs to the school of thought that sees high judicial appointments as something coveted by every judicial officer, he opined that to offer the opportunities to outsiders, i.e. to persons from the Bar as against those Justices already in the Court of Appeal would be unfair.

As was noted above, the position taken by CJN Tanko Muhammad (CFR) is shared by many in the upper echelon of Nigeria's judiciary and although counter-vailing arguments can be canvassed against that narrow point of view, this would digress from the subject under consideration. What is



important to note at this point is that CJN Tanko Muhammad's personal convictions are at odds with the clear provisions of the Judicial Appointment Guidelines. The Appointment Guidelines has a richer, broader vision of ensuring the Nigerian Judiciary puts its best foot forward in recruiting its Judges and makes that goal the overarching consideration of the selection process. The Nigerian Judiciary does have a responsibility to implement the policies it has set, which have not been rescinded, notwithstanding that the idiosyncrasies of its leadership at any point in time do not align with those policies.



CONCLUSION

The Judicial Appointments Guidelines were supposed to address the many weaknesses in the previous system applied in appointing Judges and Justices of courts of record in Nigeria. The previous system offered quite very poor standards, by modern yardsticks, for recruiting well-skilled, upright and unblemished persons for judicial offices. Yet, for all its promise, the 2014 Judicial Appointment Guidelines fails to live up to its billing and the loopholes within it have been exploited so much that the Guidelines are now virtually ineffective in turning the judicial selection system around. The Guidelines have clearly not achieved the high promise of its creation. Its impact has been a whimper, not the bang needed.

The 2014 Guidelines have clearly lofty goals, but the loose, almost self-immolating procedures they establish to pursue those goals are their major drawbacks.

Maybe it is now time to call time on the Appointment Guidelines 2014, and to begin efforts to produce something that is much better in practice, alongside plugging the significant gaps in this instrument. Something that can both reinforce the goals of the present Guidelines as well as articulate practical measures for realizing them. The 2014 Guidelines have clearly lofty goals, but the porous nature of the fabric it has stitched together to pursue those goals are its major drawbacks. Until the time the NJC is ready to remake or revise the Judicial Appointment Guidelines, the following recommendations are advanced while the current Guidelines are in force, to improve its implementation and the achievement of its goals.

RECOMMENDATIONS

1. Implementing the "Call for Expression of Interest" Requirement

The NJC must now require that JSCs/FJSC submit to it, actual evidence that the call for expression of interests with respect to announced vacancies was published and advertised in the required manner. It should now request to see the announcements as they were issued and placed on websites of JSCs/FJSC, and request that the links to the websites as well as the dates on which the



announcements were placed and remained on them be furnished to the Council.

Additionally, it should request that copies of acknowledged letters written to the relevant branch/headquarters of the Nigerian Bar Association be sent along with the documentation to the Council. Responses to the letters to the NBA must also be shown to the NJC. The NJC should also request evidence that the relevant notices were indeed placed on the notice boards of the NBA as required under the Guidelines.

2. Ensuring that Shortlists of Applicants/Nominees were Selected "On The Merits"

The NJC needs to add further stipulations regarding the short-listing component of the Guidelines to insure that the process actually meets the merit-based criteria. First, it should require the Chief Judge/head of court undertaking the shortlisting function to proceed on the basis of criteria which the NJC should facilitate in developing immediately. This could be based on a points system, where specific points are awarded to candidates based on verifiable proof of the work they have done, quite apart from - or in addition to - satisfying the basic threshold for appointment.

Second, the short-listing process should itself be demonstrated to be transparent and objectively pursued. In order to be so, it is suggested that a third neutral party be asked to undertake the evaluation of the credentials submitted by the candidates. Thereafter, the NJC should require that all applications/nominations receive an actual evaluation and a record of this overall appraisal for all the candidates be drawn up in a composite form and submitted along with the documentation to be sent to the NJC.

3. Establishing an NJC Verification Department

On its own part, the NJC must establish a Unit within its Secretariat that will be dedicated to verifying and vetting that all required protocols and procedures were followed by the JSCs/FJSC in the course of publicizing vacancies, and conducting a credible short-listing programme. Where stipulated procedures were not strictly followed, the JSC/FJSC involved will be communicated and requested to revisit the procedures and ensure due observance of each requirement.

