The Advisory Panel of Experts on Candidates for Election to the European Court of Human Rights

The overall success of the Convention system depends on confidence in the judicial authority of the Court.\(^1\)

1 Introductory Remarks

Under the terms of Article 22(1) of the European Convention on Human Rights (Convention), the Judges of the European Court of Human Rights (Court) are elected by the Parliamentary Assembly of the Council of Europe (PACE) from lists of three candidates submitted by the contracting states. Although the Advisory Panel of Experts on Candidates for Election to the European Court of Human Rights (Panel) is not itself a body created by or under the Convention, in the 12 or so years of its existence it has come to serve an important, albeit largely invisible, function in helping to filter out ineligible candidates for the post of Judge on the Court.

The present guest editorial provides a simplified account of the role of the Panel in the process of appointing Judges to the Court, together with a short stocktaking.\(^2\) The underlying intention is to illustrate how, by collaborating first with the governments of the contracting states and then with the PACE, the Panel in effect establishes a link between the two institutional actors holding the responsibility for selecting the candidates and, at the end of the process, electing the Judges.

The opening descriptive sections of the editorial deal with the Panel’s composition, the advisory tasks performed by it (which include reviewing not only the candidates’ eligibility for office but also the fairness and transparency of the national selection procedure), the procedure followed before the Panel,

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2 The descriptive material in the article is largely taken from the Panel’s 5th Activity Report (n 1) and the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights, ‘A Short Guide on the Panel’s Role and the Minimum.
and the criteria developed by it for discharging its tasks. The stocktaking takes the form of a selective list of statistics, followed by an analysis of those statistics, the identification of some possible areas of improvement in the process of appointing Judges, and a conclusion as to the added value that the Panel has brought to the appointment process.

2 The Panel’s Composition and Terms of Reference

2.1 Composition
The Panel is an independent, seven-member body set up by the Committee of Ministers of the Council of Europe in 2010 in response to a request emanating from the Court. The aim of the initiative was to strengthen the appointment process by adding an element of independent, essentially judicial, expertise. The Panel’s members are thus usually serving or past members of the highest national courts or former Judges of the Court.

2.2 Terms of Reference
Article 21(1) of the Convention stipulates that Judges on the Court must ‘be of high moral character’ and either ‘possess the qualifications for appointment to high judicial office’ or be ‘jurisconsults of recognised competence’.

The formal mission assigned to the Panel is to advise governments whether the persons whom they wish to propose to the PACE as candidates for election to the Court meet these treaty-based conditions, as well as the further requirements specified in the Guidelines on the Selection of Candidates for the Post of Judge at the Court, adopted by the Committee of Ministers (CM Guidelines).3 The latter requirements include proficiency in regard to the Court’s two official languages (English and French), knowledge of the national legal system and public international law, and the ‘general rule’ of gender balance of the lists of candidates. In addition, since 2019, a practice has developed whereby the Panel’s final views on the list will, where appropriate, draw attention to aspects


of the selection procedure followed at national level, specifically as concerns compliance with the basic principles of fairness and transparency. Although no such power of review is expressly conferred by the texts, the Panel deduced that it implicitly flowed from the obligation on governments to provide information on the national selection procedure when submitting the candidates’ curricula vitae.

The Panel has no power of veto. Neither does it pronounce on the comparative merits of the candidates. The contracting states remain free not to follow the Panel’s advice when transmitting their lists to the PACE. The PACE will, however, reject a list if a government has not ‘duly consulted’ the Panel.

In practice, the Panel also has a consultative role in assisting the PACE Committee in examining the preliminary issue of what one might call the admissibility of the lists and the candidatures. Not only must the PACE Committee be informed in writing of the Panel’s final views, but, by decision of the PACE, the chairperson of the Panel is invited to explain to the Committee the reasons for the Panel’s assessments, at an oral briefing session before interview of the candidates.

3 Procedure Before the Panel

The procedure before the Panel is written, meaning that most of the communication between its members and with the governments is conducted in writing and that there are no interviews of the candidates. All of these exchanges are strictly confidential. The confidentiality of the proceedings does not, however, prevent a government from informing national selection bodies of the contents of the Panel’s final views, notably in instances where a negative opinion has been expressed. A member of the Panel is obliged to withdraw from the discussion and vote when the list concerns their country of origin or where there is a conflict of interest, in particular by reason of their having a close relationship, whether professional or personal, with one or more of the candidates on the list under consideration.

The Panel’s opinion is based on the candidates’ curricula vitae, the government’s description of the national selection procedure, any further information supplied by the government in response to a request from the Panel, and any relevant publicly available information, as for example documented in PACE resolutions or in judgments of the Court. The Panel also receives unsolicited representations from various sources, such as non-governmental organisations, unsuccessful applicants in the national selection procedure,
and other individuals. Such unsolicited representations, although never as such relied on, may prompt the Panel to seek further clarification from the government.

The Panel adopts its opinions by consensus or, in the absence of consensus, by a qualified majority of five votes out of seven. It has thus occurred that the Panel was not in a position to express any final views on a list because the voting had disclosed only a simple majority of four votes to three.

Where the Panel concludes that a candidate is suitably qualified, its terms of reference require it to so inform the government without further comment; in contrast, when a candidate is not considered to be eligible, reasons must be given in the Panel’s final views. At the subsequent briefing session before the PACE Committee, the Panel’s chairperson will lift the veil on positive opinions by also elaborating, albeit succinctly in most cases, on the reasons for this conclusion.

4 Criteria for Evaluating Candidates’ Eligibility for Office

The eligibility conditions stipulated in the Convention are formulated in rather vague terms. Over the years the Panel has therefore needed to develop criteria for interpreting and applying these conditions in the concrete contexts of the varied range of candidatures that come before it. In so doing, it has had regard to the cm Guidelines and the Explanatory Memorandum to the Guidelines.

4.1 ‘High Moral Character’

The ‘high moral character’ of candidates normally has to be presumed. This is because a candidate’s character, a personal attribute, is hardly ever capable of being assessed on the basis of the material in the Panel’s file. Issues under this head have therefore rarely arisen. The one notable exception is an instance in which the Panel was satisfied on the basis of manifest objective evidence that serious doubts existed as to the independence and impartiality of candidates vis-à-vis the Government nominating them.

4.2 Professional Eligibility

The condition of professional eligibility has been understood by the Panel as requiring, under both its heads, relevant experience of long duration, including at a high level. In this connection the Panel has stressed the need to ensure the authority of the Court and confidence in the quality of its Judges.
4.2.1 ‘Possess[ing] the Qualifications for Appointment to High Judicial Office’

This expression in principle covers judges who hold or have held office in national supreme or constitutional courts. It is also capable of applying to judges who sit on courts, such as appeal courts, just below the country’s ‘high’ courts, provided that overall they have a strong enough curriculum vitae. At the other end of the scale, it would appear to exclude judges of first-instance courts. Persons who have not previously served as a judge, such as practising advocates or senior officials in the civil service, may also qualify under this head, for example if they come from countries where appointment of such legal professionals to high judicial office is possible.

4.2.2 ‘Jurisconsults of Recognised Competence’

A ‘jurisconsult’ is a legal scholar. The qualifying phrase ‘of recognised competence’ shows that something over and above expertise in the law is meant. According to the test used by the Panel:

– to be a jurist of recognised competence requires extensive experience in the practice or teaching of the law;
– extensive teaching of the law generally entails the publication of important academic works;
– another objective indicator of extensive teaching experience is the occupation of a professorial chair for many years at a university of standing – as a tenured and full, and not an assistant or associate, professor;
– the selection of legal professionals other than academics, such as practising advocates, prosecutors, ombudspersons, diplomats and legal advisors of governmental departments, non-governmental organisations and international organisations, is also possible.

Some candidates found by the Panel to fall short of the above-described level could be described as excellent academics or experts learned in Convention law. The reason for the negative assessment in such cases was usually that, being at the mid-stage of their career, these candidates could not yet be regarded as having acquired the necessary length or depth of professional experience to have the authority for exercising a high judicial function on the international plane.

5 Gender Balance of the Lists

In the absence of candidates of the under-represented sex (at present the female sex) on the list, it must be established that all necessary and appropriate
steps were taken by the competent national authorities to ensure that the list included candidates of both sexes who possess the requisite minimum professional and personal qualifications. In assessing whether any derogation from the general rule of gender balance is justified, the Panel will have regard to factors such as whether:

- specific efforts were made to encourage members of the under-represented sex to apply;
- the call for candidates was republished and, if so, in what manner;
- any members of the under-represented sex figured on a reserve list.

6 Review of the National Selection Procedure

The framework for the Panel's examination of the fairness and transparency of the national selection procedure is provided by the standards (binding and non-binding) set out in the cm Guidelines and the examples of good practice given in the accompanying Explanatory Memorandum. The dozen or so aspects of the national selection procedure that the Panel has so far looked at have included:

- whether the national selection body had a balanced composition, in the sense that it was pluralistic, representing a variety of backgrounds and extending beyond governmental representatives and government-appointed officials and persons;
- the content of the call for candidates and whether the publicity given to it was sufficiently wide;
- how brief or generous was the time-limit for responding to the call for candidates;
- generally, what were the efforts made by the national authorities to ensure that a sufficient number of good candidates of both sexes presented themselves.

7 Stocktaking

7.1 A Few Statistics

In the period covered by the Panel's most recent activity report (May 2019 – July 2022):

- the 23 lists examined (concerning 14 countries and including replacement lists) were composed of approximately 41% judges, 26% university law
professors, 18% practising lawyers and 15% others (for example, senior civil servants with a legal background);

– while the Panel provided its first response within the prescribed time-limit (four weeks), six governments were late, often by many months, in submitting their lists;

– in respect of five lists, the Panel considered all three candidates to be suitably qualified without requesting further information; regarding the other 18 lists, the Panel put questions to the government concerned;

– in respect of 13 lists, the Panel came to the final conclusion that the proposed candidates met the eligibility requirements;

– in respect of the remaining 10 lists, the Panel expressed a negative opinion on 15 candidates;

– four of these candidates were replaced by the government, one withdrew (but the replacement candidate was likewise considered to be unqualified) and one was in the process of being replaced;

– three of the 14 contracting states concerned transmitted to the Panel a list which had previously been negatively assessed in whole or in part by the Panel;

– in two of these cases the Panel rejected the lists and in one case the list was accepted.

7.2 Behind the Statistics

7.2.1 Delays

Significant delays by governments in submitting initial or replacement lists have resulted in sitting Judges being obliged to remain on the Court after the expiry of their term of office, on one occasion for more than three years.

7.2.2 Further Information

With the Panel’s ever-accumulating experience has come a greater awareness of where further information could be useful, even crucial. In addition, the greater frequency of requests for further information is in part attributable to the development of the practice of reviewing the national selection procedure. The Panel has also been prompted to be more inquisitive because it now finds itself called on at PACE briefing sessions to explain its final views.

7.2.3 Negative Opinions

One noteworthy statistic is the proportion of candidates (15 out of 54, that is 28%) whom the Panel judged to be unqualified. This carefulness in evaluating the qualifications and experience of candidates is, and has been from the outset of the Panel’s existence, attributable to a concern not to place at risk the
necessary confidence in the Court, rather than to a tendency to over-strictness. For this reason, the Panel has expressed its disappointment that governments are continuing to propose more than just a few persons lacking the requisite mature professional experience, including at a high level: mid-career academics, not established full professors of law; judges from mid-level or lower courts; or practising lawyers with no particular experience of the kind of issues that come before the Court.

7.2.4 Governments Not Following the Panel's Advice
Three Governments (out of 14) transmitted a list to the PACE despite the Panel's having expressed a negative opinion in regard to one or more of the candidates. It is not necessarily worrisome that this should occur once in a while in regard to negatively assessed candidates considered to be on the borderline of eligibility, given that the interview with the PACE Committee may enable such candidates to demonstrate that they fall on the right side of the line. The system will be weakened if the transmission of a list despite a negative opinion happens too often and, especially, in relation to candidates assessed to be clearly unqualified and not at all on the borderline.

7.3 Possible Areas of Improvement from the Panel's Perspective
To begin at home, the Panel is aware of the constant need to find ways of bettering its own working methods. It also emerges from the Panel's experience that areas of conceivable improvement exist elsewhere in the system of appointment of Judges to the Court:

- Generally, as regards the national selection procedure, the standards and good practices set out in the cm Guidelines are not yet being satisfactorily implemented in all or even a majority of countries.
- The relatively low professional level of more than a few candidates would seem to show that insufficient account of the Panel’s published guidance on eligibility criteria is being taken by some national selection bodies. After expressing concern at the still considerable number of candidates lacking mature judicial experience, the Panel has urged governments to encourage a greater number of senior judges from the highest national courts to make themselves available as candidates.
- Some sort of mechanism to discourage the significant delays by governments in submitting lists has been described as desirable.
- Usually, the only basis for assessing linguistic proficiency is the self-evaluation figuring in the candidate’s curriculum vitae. In cases of doubt, governments have been asked how language-requirements were taken into account at national level and whether, and how, any language-test was carried out.
The thinking behind such questions is that a greater guarantee of linguistic proficiency would be assured if all national selection procedures, without exception, included a reliable language-test.

– Interviewing candidates would evidently give the Panel a more solid basis for assessment. On the other side of the coin, there is the downside of a third tier of interviews being added between the national level and the PACE Committee, thereby entailing an even more daunting and drawn-out selection process.

– A truly pluralistic national selection body not dominated by government-appointees could provide a visible safeguard capable of countering doubts as to the independence and impartiality of candidates vis-à-vis the government nominating them. This is something that is recommended in the CM Guidelines but not yet the case for many countries.

8 Concluding Remarks

Of course, the responsibility under the Convention for selecting the candidates remains, as it has always been, with the governments, with the prerogative for electing the Judges being vested in the PACE. That said, although the Panel is only a small body which functions with limited advisory competence behind a wall of confidentiality, the perception is that on the whole the quality of the Judges is higher now than it was before the Panel’s creation. If nothing else, the required passage before the Panel has persuaded governments to focus on the quality of candidates in a way that perhaps some of them did not do so previously. If, however, the ultimate objective is consistently to have lists with three top-level, very highly qualified candidates with mature legal experience, to the exclusion of candidates who do no more than meet the minimum eligibility requirements, there is still some way to go.

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