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Tribunal Established by Sleight of Hand

Unlawful Judicial Appointments at the Kúria

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András Zs Varga, the President of the Kúria, Hungary's supreme court, unlawfully appointed several judges to the bench in 2021. The National Judicial Council, the self-governing body of judges, noticed the unlawful practice during its examination of the President's appointments in July 2022. The Hungarian Helsinki Committee obtained the summary of the application procedures that had preceded these appointments through a freedom of information request.

This is the story of how President András Zs Varga appointed a number of judges to the bench unlawfully.

As Kúria President, András Zs Varga is obliged by law to report on the appointments to judicial leadership positions and the selection of judges to the National Judicial Council, which consists of judges elected by their peers. Among others, it has a mandate to annually review and assess the Kúria President's practices of appointing judges to the Kúria. As András Zs Varga took office in January 2021, this year was the first time that his appointment practices had come under scrutiny.

What the Judicial Council's examination found is appalling. It established by a unanimous opinion that judicial appointments in 2021 failed to meet the legal standards.

The Hungarian Helsinki Committee submitted a freedom of information request to obtain the [detailed report](#) of the Kúria President presented to the National Judicial Council. The information sheds further light on what had happened and how the President had breached the law.

The transmission belt runs amok

András Zs Varga has held the position of President of the Kúria since 1 January 2021. His election caused [serious concerns](#) among the main actors of the Hungarian judicial system and at [the international level](#), not only because he had never served as a judge until then, but also because his election required changes to several laws. The National Judicial Council [voted against](#) the election of András Zs Varga as the Kúria President with 13 votes against and 1 vote in favour for the same reasons.

Despite all this, the Fidesz-KDNP supermajority in Parliament went ahead with Varga's election in October 2020. The Hungarian Helsinki Committee has already warned in November 2020 that in case András Zs Varga as Kúria President would be unable to ensure his independence from the powers that had elected him, he could easily become the [transmission belt of the executive](#) within the judiciary.

The Kúria's President is one of the five high public office holders in Hungary, and represents one of the three branches of power, a person at the top of the judicial organisational system, who both performs important judicial and administrative leadership tasks. This position of power requires the President to bear the independence and impartiality of the Hungarian judiciary in mind throughout his tenure and actions. Regardless of the political circumstances of his election, the legal framework allows Kúria President András Zs Varga to exercise the judicial power vested in him free from political influence, independently and impartially.

There have been warning signs since the start of his tenure as President that András Zs Varga does not consider protecting the independence of the judiciary as his primary duty. One such occasion was, for

example, when in May 2022, he turned to the Constitutional Court to challenge the [code of ethics](#) adopted by the National Judicial Council to limit judges' freedom of expression.

The Kúria President's practice of appointing judges and judicial leaders raises serious concerns that he may be willing to circumvent even legal provisions in order to appoint individuals to key judicial posts who are close to the very same political power that had put him into his current position.

The role of the President of the Kúria in judicial appointments

It could seem as if the President has a central role in taking decisions on applications to vacant judicial posts at the Kúria, since all the administrative powers that generally the President of the National Judicial Council exercises when it comes to deciding on applications for judicial and judicial leadership positions are conferred to the Kúria President for appointments at the Kúria. However, a closer look at the President's powers, as defined by law, clearly shows that in the course of assessing applications, the President only has an administrative and technical role related to the application process while all substantive decisions should be taken by judicial councils.

Applications for judicial positions at the Kúria have to be submitted to its President. If needed, the President can order the applicant to submit additional information and may also interview the applicant. However, the President may only reject an application on its merits if the applicant had failed to supply the required supplementary information. Within 15 days from the end of the application deadline, a panel of judges (judicial council) interviews all the applicants and sets up a points-based ranking based on objective criteria established by law.

The ranking is divine

The President can decide on an application based on the established ranking in the following ways.

1. The President will agree that the candidate who had been ranked by the relevant judicial council in the first place should be appointed to the vacant post. Then no further consultations are needed, and the President can appoint or transfer the first-ranked candidate to the vacant position.
2. In the event that the President does not wish to appoint the first-ranked candidate for some reason, he may deviate from the ranking established by the judicial council and may recommend appointing the candidate who had been ranked in second or third place. In such cases, the President is obliged to turn to the National Judicial Council by submitting the first three candidates' application files together with a written proposal indicating the candidate proposed for an appointment and the President's reasons for deviating from the ranking. The National Judicial Council has to take a decision on the President's recommendation within 15 days. If it does not agree with the President's recommendation, the first-ranked candidate has to be appointed or transferred to the vacant post.

Hence, in the course of assessing applications, the President either has to appoint the candidate who had been ranked first by the judicial council or may exceptionally recommend appointing the second or third-ranked candidate and seek to secure the consent of the National Judicial Council to do so.

Simply put, only candidates who have been ranked among the first three applicants can be appointed to a post, and the second or third-ranked candidate can only be appointed with the consent of the National Judicial Council.

Decisions that circumvent the right of consent are arbitrary

These rules are clear, unambiguous and leave no doubt about the interpretation of the law. However, in the case of several judicial posts, András Zs Varga decided on the applications in a way that violated the rules. In 5 cases out of the 11 vacancies announced in 2021, he did not initiate the appointment (or

transfer) of the first-ranked judge, nor did he reach out to the National Judicial Council in order to obtain its consent (that is, approval) to deviate from the ranking. In the case of one position, he declared the fourth-ranked applicant the winner, which is not allowed under the law even with the National Judicial Council's consent.

The National Judicial Council's right of consent is one of its supervisory powers that provide it real control over judicial appointments. Failure to obtain it in cases where it is required paves the way for arbitrary appointments, as it would allow the President to deviate from the ranking that is based on objective criteria without further ado. In effect, the National Judicial Council's right of consent constitutes a right to veto, since without its consent, the President cannot overrule the ranking established by the judicial panel, nor can he appoint the judge who had been ranked in second or third place.

Ignoring the right of consent is a serious breach of law in itself. However, there is an additional problem, which, if possible, led to an even more serious violation. András Zs Varga also included an unforeseen element during the evaluation of the applications, due to which certain applications were not decided on the basis of objective, transparent criteria, but on the basis of criteria arbitrarily set up by the Kúria President.

From supporting role to kingmaker

This practice of judicial appointments, which is a multiple violation of the law, was made possible by a series of interlinked administrative measures.

#1 Waiting with announcing calls for applications until multiple posts become vacant

First of all, since spring 2020, vacant posts at the Kúria have not been filled through an open application procedure but through large-scale secondments from other courts. As a result, in 2020, judges who had not been appointed to the Kúria through an application procedure had been adjudicating cases there at a higher rate than ever before. According to publicly available data, 38 percent of Kúria judges were transferred judges, appointed for a fixed term. The posts could thus remain vacant without the vacancies resulting in an actual disruption of the court's day-to-day work.

Under the law, announcing calls for application for vacant judicial posts or their postponement is the duty of the National Office of the Judiciary. However, the decision is made at the initiative of the Kúria President; therefore, the publication date of a call for applications for a vacant judicial post also depends on the Kúria President. As members of the National Judicial Council have [highlighted](#), among the posts affected by the unlawful appointments, "4 positions became vacant on 1 June 2020, 1 in November 2020, 1 in December 2020, and only one became vacant on 1 February 2021; nonetheless, all of these posts were announced [only] in March 2021."

Waiting with the announcement of the calls for application for all these vacant judicial posts allowed for publishing these calls in one large batch.

#2 Publishing calls for applications in a package

Second, in the case of all of the posts that had been filled in an unlawful manner, the calls for application were published simultaneously, at the same time, for essentially the same judicial posts. In 2021, calls for application were announced for a total of eleven judicial posts at the Kúria, two of which were for criminal law posts and nine for administrative law posts. For seven of these administrative law posts, the calls had been announced on the same day, with an identical submission and evaluation deadline.

When several calls for application are published at the same time, judges can submit applications to several posts in parallel, especially if the posts are at the same court and cover the same area of expertise and the same level of judicial experience is required. This happened also in the case of the

applications for the posts that were later filled unlawfully. The calls for application for the seven administrative law posts were published at the same time in the [2021/2 Court Gazette](#). Four of the calls were announced with absolutely identical requirements. More than fifteen judges submitted applications to the posts and in the case of the four identical calls, exactly the same judges applied for these positions.

#3 The unusual desirable requirements for Position no. 76

The range of possible applicants can be significantly narrowed or filtered in the case of any call for application by determining special requirements for prospective applicants. The law permits that the call specifies “the special expertise required for the job”. Taking advantage of this opportunity, in three of the seven simultaneously advertised positions, the announcement included special conditions. However, the special conditions determined in one of the calls, unusually, did not specifically require prior judicial practice or judicial experience. The call for Position no. 76 stated that “high-level knowledge of the laws on assembly, experience with procedures and regulations related to freedom of assembly” was considered an advantage for prospective applicants. For all other positions, judicial practice or appellate level experience were key requirements. Because of the possibility to include a special expertise requirement for the post, only seven applicants applied for Position no. 76. This stands in contrast to the four administration law posts to which more than fifteen individuals had applied.

#4 No need to withdraw multiple applications

Regarding the applications received for the simultaneously announced posts, the judicial council established the rankings for each post, in accordance with the legal requirements. In the case of four, including Position no. 76, the panel ranked the same applicant for first place. In such situations, applicants can withdraw some of their applications, thereby clarifying which specific position they would like to fill. In relation to this, András Zs. Varga [stated the following](#) at the National Judicial Council’s July 2022 session: “I owe a confession, I made a mistake. In the case of one of the posts, the applicant I interviewed, because I only interviewed each applicant once, and I said that I approve their application to one of the posts, then the applicant asked whether they should withdraw their application. I said: why would you withdraw it? [...] This thing, this was really a mistake, that when the applicants offered to withdraw their applications after I announced that their application is accepted for one of the posts they applied for, they did not know which one, that then I did not tell them to do this [to withdraw applications].”

This admitted mistake had serious and in no way negligible consequences. Had judges clarified which application they wished to withdraw, they could have also indicated the post they wanted to fill, leaving no room for manoeuvre for András Zs Varga to cherry-pick which judge would fill which particular post.

In the absence of withdrawals, the opportunity presented itself for András Zs Varga to determine in which order he would decide on the simultaneously published calls for applications and thus, indirectly, on which lower-ranked judge moves up in the rankings and which judge gets to drop out of the application process.

#5 Setting the order in which decisions are taken

The above-described series of decisions, seemingly administrative in nature, allowed András Zs Varga to be able to freely decide the order in which he would evaluate the seven applications. The evaluation order of the calls for applications that are announced at the same time is not regulated by any legal provision — in effect, this is a legal loophole. Alas, this loophole affects the substance of the applications’ evaluation.

As one member of the National Judicial Council put it, “since there is no regulation about it, the arbitrarily determined evaluation order will clearly influence who might benefit from the opportunity to obtain a judicial appointment, and who might be excluded from it simply based on the evaluation order, since if

another order was applied, they could have become judges. It is obvious that this has nothing to do with the scoring system that would otherwise guarantee an objective evaluation, as it is possible that applicants with very high scores would be excluded from the opportunity to be appointed to a post, while applicants with lower scores may also become winning candidates, even for the same legal area or panel at the very same court.”

The loophole allowing an arbitrary determination of the order in which applications are evaluated is actually artificially manufactured. The opportunity provided by the loophole only arises in the very unrealistic scenario where several calls for applications for identical positions are announced at the same time with the same evaluation deadline at the same court, and candidates do not withdraw their applications.

So, for the loophole to be activated, all the above, seemingly administrative steps and errors had to be realised – it was only thus that András Zs Varga could freely determine in which order he would evaluate the applications.

The only way to appoint former state secretary Barnabás Hajas

That the order in which applications are evaluated bears consequences is clear in the case of how former state secretary Barnabás Hajas got appointed as a judge to the Kúria, which has received widespread attention.

Even at first glance, the judicial appointment of Mr Hajas to the Kúria is extraordinary in every respect. First of all, unlike thousands of his fellow judges, he did not start his career at a district court but was immediately appointed to the top of the court ladder. Second, unlike all other judges who receive a permanent, indefinite appointment only after a three-year trial period, Hajas’s initial appointment as a Kúria judge was made immediately for an indefinite period upon the recommendation of András Zs Varga. All this is in spite of the fact that Hajas, just like András Zs Varga, had no prior experience in any judicial role nor any courtroom experience. On the other hand, until his appointment to the Kúria, he had been a high-ranking government official for many years, including serving as state secretary at the Ministry of Justice until March 2021, where his immediate supervisor was Minister Judit Varga.

The seven simultaneously announced calls for applications were published on 2 March 2021. The submission deadline was 29 March 2021. Mr Hajas resigned from his position as state secretary on 15 March 2021 and went on to apply for one of the seven judicial posts. He happened to apply for Position no. 76, where the range of potential applicants was narrowed down by the special requirements, and where the call, at the initiative of András Zs Varga, required applicants to have “high-level knowledge of the laws on assembly, experience with procedures and regulations related to freedom of assembly,” while adjudication experience was not determined as a desirable criterion.

It is almost as if this call for applications for Position no. 76 was custom-made for Barnabás Hajas, as during his time at the Ministry of Justice, he had participated in drafting the new Act on the Right of Assembly that entered into force in 2018. He also drafted the commentary on the new law and authored [several studies and articles](#) on the freedom of assembly. Thus, the call for application favoured Hajas in every possible way.

At the same time, due to his previous governmental position, it was highly likely that if the judicial panel would rank him lower than in the first place, the National Judicial Council would not give its consent to the appointment. Nevertheless, the judicial council eventually ranked Mr Hajas, despite applying for such a favourably defined position, in second place (together with another judge). In other words, at least one other applicant was ahead of him.

Had András Zs Varga evaluated the applications in the order in which the calls had been published, he would have had to first evaluate the applications for the post for which Hajas had applied. In terms of its serial number, this was the first in the series of applications published as it was announced by the [order of the President of the National Judicial Office no. 48.E/2021. \(III.2.\)](#). Had András Zs Varga

evaluated the applications in the order of their announcement, he would have appointed the judge that came in first in the ranking for Position no. 76., and Mr Hajas, who ranked second for this post and had not applied for any other posts, would have lost his chance to become a judge this time.

Instead, András Zs Varga set aside the evaluation of applications for Position no. 76 and started the evaluation by deciding first on other applications. For one of the subsequent posts, he appointed the judge who ranked first for Position no. 76, then in the case of yet another post, he appointed the judge sharing the second rank with Hajas for Position no. 76. By the time the Kúria President returned to evaluating the applications for Position no. 76., all the judges who were ranked ahead of Hajas had already been appointed to a post, or, to quote András Zs Varga, "flopped ahead". This is how the President of the Kúria appointed Barnabás Hajas, without seeking the consent of the National Judicial Council.

A sleight of hand

The procedure that the Kúria President followed is deeply flawed for several reasons.

First of all, the order in which applications were assessed was determined by András Zs Varga himself. This also means that applicants had not "flopped out" of the order on their own accord but by the President's decision. It was only the Kúria President who could decide which applicant would flop out and which could remain in the pool. As he himself stated, "let's just say that whenever the legislator does not write something into the law, then it is presumed to be permitted". The only problem here is that with the liberty he vindicated for himself, he included an element into the applications which had not been known to the applicants themselves, and which failed to meet the requirements of objectiveness and transparency. Nevertheless, as can be seen above, this substantially determined the fate of the applications.

Second, as one member of the National Judicial Council warned, as long as applicants themselves do not withdraw their applications, "flopping out" of the ranking cannot be understood. The ranking is set by the judicial council and "will be established in the moment when the objective and subjective scores have been added up [...] there is no such thing as deleting someone from the ranking because they had filled another vacancy [...]".

Ultimately, even if it could be accepted that certain applicants can "flop out" or "be flopped out" of the ranking order, the legal provision clearly states that if the Kúria President does not want to appoint the first-ranked candidate to the post, he needs to obtain consent from the NJC. Hence, as it was put in the debate by a NJC member, "this is a fully clear rule set forth by a cardinal law, which does not provide a solution to the scenario when in the case of 7 calls for applications the very same applicants are ranked in the very same order. However, in my view, this should not be resolved in a way that is a result of a *contra legem* [against the law] interpretation."

Hence, despite all his administrative powers to take certain decisions, András Zs Varga should have turned to the National Judicial Council for the appointment of Barnabás Hajas to comply with the law. However, he made the appointment decision by circumventing the NJC and setting up an arbitrary evaluation order.

The consequences of appointments made in breach of the law

The President's unlawful appointment practice cannot be considered merely a formal transgression. Rules on judicial appointments are essential elements of the fundamental safeguards for judicial independence and the right to a lawful judge. Judicial appointments that are made in severe breach of these safeguards may constitute a breach of the right to a tribunal established by law.

In the case of [Ástráðsson v. Iceland](#), the European Court of Human Rights (ECtHR) developed criteria under which, considered together, the breach of the safeguards will result in the judicial panel where a judge who had been appointed in a procedure in breach of the law and who is a member of the panel

to be no longer considered to have been “established by law”, hence its judicial decision cannot be considered as lawful. This provides a basis for challenging the decision at the European Court of Human Rights, and if the ECtHR finds a violation, the decision will have to be reviewed in Hungary.

The circumstances that the ECtHR had to assess in the Icelandic case were strikingly similar to those concerning the appointment of judges at the Kúria. In Iceland, the minister of justice had unlawfully deviated from a list of fifteen judges that had been composed by a committee of experts and recommended appointing four judges who had not been part of the original ranking. Applying a three-tier test, the ECtHR looked at (i) whether there was a manifest breach of domestic law, and if yes, (ii) whether the breaches of the domestic law pertained to a fundamental rule of the procedure for appointing judges, finally (iii) whether the allegations regarding the right to a “tribunal established by law” were effectively reviewed and remedied by the domestic courts.

As regards the second question, the ECtHR found in the *Ástráðsson* case that the minister’s intervention had cast the shadow of undue influence on the appointment procedure, which called into question the entire procedure’s legitimacy. Given that all three criteria of the Court’s test were established, the ECtHR found that a judges panel where unlawfully appointed judges had participated in the judicial proceedings cannot be considered as a tribunal established by law.