

D E C I S I O N  
In the name of the Law

SUPREME COURT OF JUSTICE

01 August 2023

Chisinau

The Special Panel, established at the Supreme Court of Justice to examine the appeals against the decisions of the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors

comprising:

President of the hearing, Judge  
Judges

Tamara Chisca-Doneva  
Mariana Pitic  
Ion Guzun

Registrars Natalia Arapu  
Alexandru Toma  
Silvia Calaraş

With the participation of: applicant  
representative of the applicant, lawyer  
representatives of the defendant, lawyers

Ion Chirtoaca  
Eugeniu Musteaţă  
Roger Gladei  
Irina Sugoneaco  
Valeriu Cernei

Having examined in a public court hearing, the administrative action filed by Ion Chirtoaca against the Independent Commission for Assessing the Integrity of Candidates for the Position of Member of Self-Administration Bodies of Judges and Prosecutors on the annulment of decision no. 19 of 20 January 2023 on the candidacy of Ion Chirtoaca and ordering the resumption of the candidate's evaluation procedure,

F o u n d:

**Arguments of the participants in the process:**

On February 10, 2023, Ion Chirtoaca filed a request for appeal, subsequently completed, against the Independent Commission for Assessing the Integrity of Candidates for the Position of Member of the Self-Administration Bodies of Judges and Prosecutors, requesting the annulment of the decision of the Independent Commission for Assessing the Integrity of Candidates for the Position of Member of the Self-Administration Bodies of judges and prosecutors no. 19 of 20 January 2023"on the candidacy of Chirtoaca Ion , candidate for the position of member of the Superior Council of Magistracy" and ordering the resumption of the evaluation procedure of candidate Ion Chirtoaca by the independent commission for assessing

the integrity of candidates for membership in self-administration bodies of judges and prosecutors.

In motivating the action, he invoked that, as judge, he was appointed on March 17, 2016, further, working at the Chisinau Court, Buiucani Office, he ran for the position of member of the Superior Council of Magistracy and submitted an application in this regard on October 29, 2021 to the Superior Council of Magistracy. Thus, he was subject to the evaluation procedure, established by the Law on some measures related to the selection of candidates for the position of member of the self-administration bodies of judges and prosecutors no. 26 of 10 March 2022, (hereinafter Law no. 26/2022), carried out by the Independent Commission for assessing the Integrity of Candidates for the position of member of the self-administration bodies of judges and prosecutors, given that he did not withdraw from the competition.

During his activity, he had no disciplinary sanctions and enjoys an impeccable reputation, not being targeted in journalistic investigations or situations in which his image as judge is affected and during his activity as judge. The National Integrity Authority did not find that he violated the legal regime of conflicts of interest, incompatibilities, restrictions and limitations, declaration and control of assets and personal interests.

The applicant specified that the evaluation procedure against him began on April 6, 2022, when the Superior Council of Magistracy sent to the Evaluation Commission the list of candidates for the position of member of the Superior Council of Magistracy. Along the way, questionnaires were sent to him by the Evaluation Commission, following four rounds of questions, to which he answered within the deadline. Thus, on December 7, 2022, he was informed that, on December 15, 2022 at 10:00, he would be heard by the Evaluation Commission, which was done, and at the end of these hearings he was announced that the decision would be published within 30 days. On 21 December 2022, after the public hearing, the Evaluation Commission sent the fifth round of questions to him and he replied within the indicated deadline. On February 07, 2023, at 11:49, he received the decision of the Evaluation Commission no. 19 of 20 January 2023 on his candidacy at his e-mail address.

At the same time, on February 7, 2023, information appeared in the media that, together with 3 other magistrates, he did not promote the evaluation, but the Commission did not make any mention on the official website about the existence of a separate opinion.

According to Decision No. 19 of January 20, 2023, the Evaluation Commission decided that: "He does not meet the integrity criteria because serious doubts have been found about the candidate's compliance with ethical and financial integrity criteria and therefore does not promote evaluation." From the separate opinion of the member of the Evaluation Commission, Vitalie Miron, follows the disagreement with the fact that there would be a serious doubt regarding the observance of the financial integrity criterion, found in art. 8 of Law no. 26/2022, as well as disagreement with the Commission's assessment of the complainant's conduct in relation to the issue of ethical integrity.

The complainant stated that Decision No. 19 of January 20, 2023 on his candidacy for the position of member of the Superior Council of Magistracy, is an unfavorable, illegal individual administrative act, in the context being cited the legal provisions of the Administrative Code, applicable to the contested unfavorable individual administrative act.

He also stated that the promotion of the assessment constitutes a mandatory but not discretionary individual administrative act. The cumulative fulfilment of the conditions of Article 8 para. (2) and (4) of Law no. 26/2022 generates the obligation of the Evaluation Commission to issue a favorable decision to promote the candidate for the position of member of the Superior Council of Magistracy, in terms of compliance with the criteria of financial integrity and ethics. The evaluation Commission has only a procedural discretion, which refers to the investigation and clarification of the state of affairs ex officio, a circumstance that does not imply the attribution of the individual administrative act to the discretionary one. The arguments made on this point relate to the sense of procedural discretion.

The application of regulations in his case shows the groundlessness of the reasons and conclusions of the Evaluation Commission regarding the non-declaration of the bank account and transfers from his parents in the manner established by the legislation.

The applicant noted that, Law no. 26/2022 only in art. 13 para. (5) provides the phrase "serious doubts" regarding the candidate's compliance with the requirements set out in Article 8, which have not been removed by the evaluated person, but does not define the content of this concept significantly new for the national legal system. From this point of view, the Evaluation Commission has a wide margin of appreciation of the factual situations, which should classify them in its decisions as "serious doubts". However, the margin of appreciation of the Evaluation Commission cannot be absolute and is limited by the provisions of Art. 16, Art. 137 para. (1) of the Administrative Code.

The court should take into account that there is no evidence that he intended to conceal any bank account. The conduct before becoming a judge denotes rather an unintentional ignorance of an obligation imposed by the legislation in force at that time. The nature of this bank account, which was intended for parents to be able to transfer money in the country, the absence of suspicious transactions, attests that there was no malice or any reason not to disclose this bank account in the annual declarations while he was employed as a young specialist in the Ministry of Internal Affairs. Since his appointment as judge, he has begun to declare all bank accounts and financial interests. The failure to declare the account concerned, in essence, does not constitute a serious doubt that would allow his disqualification on this ground. During the reference period, in the institution where he worked, there was an internal practice, according to which accounts that did not contain funds were not to be reflected in annual declarations. Since 2016, the legislator has excluded the need to reflect accounts, which contained no funds.

The evaluation Commission noted that the funds transferred by his parents during 2012-2014 were substantially higher than the income declared during this period, but the evaluation commission was also to take into account the objective fact that his parents had a series of unnatural tasks. At the same time, although the Evaluation Commission noted that his father also worked in Italy, it did not take into account his income, although he indicated that his parents were willing to be heard in front of the Commission.

The applicant took the view that it was an exaggeration to attribute to him, with a negative effect on his career as a magistrate, the fact that, for a period of time, his parents had worked unofficially in Italy and transferred money to the country. The evidence and information provided on the annual amounts of money transferred to the country by his parents are not dubious.

The evaluation Commission admits that his parents worked informally and had undeclared income, but negatively assesses the fact that he did not submit "supporting documents regarding the source of income for transfers that exceeded the declared income" of his parents. The evaluation Commission breached its obligation of full official investigation by conducting an insufficient and biased investigation of the facts, providing a bad faith assessment of the facts, which constitutes a procedural defect. At the same time, the circumstances that could lead to another solution from the Evaluation Commission are set out in the reasoned opinion of the member of the Commission.

As regards the "serious doubts" about the acquisition of the 68,4 sqm apartment, at a preferential price in 2022, which have not been removed, the applicant indicated that, in assessing this aspect, the Evaluation Commission neglected its own Evaluation Regulation, which in art. 5 para. 2 provides that, when assessing compliance with the criterion of ethical integrity, the Commission may take into account the seriousness or severity, adjacent context and premeditation associated with any incident of ethical integrity and, in the case of minor incidents, whether there has been a sufficient period of time without subsequent incidents. In this context, the applicant informed that, on 21 June 2017, he submitted an application to the Superior Council of Magistracy, requesting his inclusion in the list of persons who would benefit from the apartment at a preferential price in order to improve living conditions, based on Regulation No. 3 of 06 September 2013 on the selection of applicants included in the list of employees in the judicial system requiring improvement of living conditions. The phrase "in order to improve living conditions", found in the content of the submitted application, implies and denotes in itself the existence of a dwelling space, the conditions of which were to be improved at the candidate's request. It was established that he sold his apartment with an area of 38.4 square meters, and the money obtained from this transaction was invested in the apartment purchased at a preferential price. Therefore, he did not admit any conduct that was contrary to the principles of professional ethics and deontology.

The amendments occurred to the eligibility rules for improving living conditions, approved by Decision No. 5/4 of December 12, 2017 of the Superior Council of Magistracy, according to which applicants did not have to own another living space in Chisinau, were not communicated to him, nor was he asked to submit information in this regard. In assessing this aspect, the Evaluation Commission exercised administrative discretion contrary to the provisions of art. 137 para. (3), (4) of the Administrative Code. In the case of other candidates positively evaluated by the Evaluation Commission, it avoided finding that they obtained apartments at preferential prices, although they did not meet the established eligibility requirements. The evaluation Commission did not indicate any objective reasons for different behavior in the exercise of discretion.

On 20 February 2023, the Independent Commission for assessing the Integrity of Candidates for Membership in Self-Administration Bodies of Judges and Prosecutors registered a reference to the appeal application, requesting the rejection of the appeal as unfounded.

In motivating the reference, the defendant invoked that it had diligently and in good faith executed all its obligations, provided by Law No. 26/2022. In particular, when it found some uncertainties, the Evaluation Commission gave the complainant the opportunity to elucidate them by submitting additional data and information, by

providing sufficient time, however, the burden of proof shifts to the candidate during the evaluation process. The integrity assessment process and decision do not affect the candidate's professional status. The evaluation Commission shall not replace or assume the functions of any public body. The assessment of the integrity of the applicant, carried out in accordance with Law no. 26/2022, finalized by the contested decision, did not violate his legal rights and interests and, contrary to the applicant's opinion, is not able to have a "negative effect on his career as a magistrate".

The solution offered by the Commission, through the decision to declare whether or not to pass the evaluation, represents an assessment according to its intimate conviction, of whether or not there are serious doubts regarding the candidate's compliance with the criteria of ethical and financial integrity. The decision is a finding of serious doubts about the complainant's compliance with ethical and financial integrity criteria. Similarly, the conclusion, expressed in the decision, that there are serious doubts as to whether the applicant complies with the criteria of ethical and financial integrity is related to the appropriateness of the decision, and the appropriateness of the decision cannot be subject to judicial review.

The Commission acted in accordance with the rigors described, assessing on the basis of the compliance criteria established by Law no. 26/2022, in relation to the factual circumstances resulting from the accumulated data and information, including with the applicant's concurrence, whether or not there are serious doubts regarding the applicant's compliance with the integrity ethical and financial criteria. The decision issued in this regard represents the realization of this discretionary power which cannot be subject to judicial review. The exception to the rule can only be extraordinary in nature and would refer to cases of particularly arbitrary and inopportune actions by the issuer, leading to illegality. The so-called opportunity that can be subject to court review refers to situations where the state of inopportunity is so flagrant that it may lead to illegality, namely the issuance of the act by misappropriation of power or in violation of jurisdiction.

The court is bound to exercise review of the legality of the decision, but is not entitled to carry out the opportunity review. In particular, the court would be entitled to uphold the applicant's action and order the resumption of the assessment only if it finds that serious procedural errors affecting the fairness of the assessment procedure and the existence of circumstances have been admitted by the Commission during the evaluation procedure, which could lead to the promotion of the evaluation by the candidate, situations which are missing in the present case.

Contrary to the applicant's claims, the defendant stated that the provisions of the Administrative Code, with the exception of Book Three, are not applicable to the evaluation process carried out under Law No. 26/2022. Therefore, the complainant's objections that the evaluation Commission was to investigate the facts ex-officio and apply to the applicant the same conclusions that were issued with regard to other candidates who passed the evaluation are unfounded.

Contrary to the applicant's allegation, the Evaluation Commission is not obliged to issue a favorable decision to promote the candidate, but it has a certain margin of discretion, which it duly respected.

The defendant indicated that the Constitutional Court had established a double test to be met for the candidate's action against a decision to be admitted, namely: there should be serious procedural errors admitted by the evaluation Commission

and these errors affect the fairness of the evaluation procedure; at the same time, there are circumstances that could lead to the promotion of the evaluation by the candidate.

According to the decision, the Evaluation Commission found the existence of serious doubts regarding the applicant's compliance with the requirements set out in Article 8 of Law no. 26/2022, in connection with the following circumstances: failure to declare the bank account and transfers from parents and purchase of an apartment at a preferential price - eligibility and improvement of living conditions.

The defendant pointed out that the court would dismiss the applicant's allegations in the action. With regard to the complainant's arguments related to the non-declaration of the bank account and transfers from parents, it noted that the serious doubts of the Evaluation Commission did not arise exclusively due to the failure to declare the bank account, but in relation to the additional circumstances related to this bank account and Namely: during the period when the bank account was not declared, the years 2012 to 2015, the applicant obtained from his parents an amount of EUR 74 660 through this bank account, and the amounts of money received were withdrawn in cash by the applicant. Although the complainant actually withdrew EUR 74 660 between 2012 and 2015, he declared only EUR 30 667 in his 2014 annual declaration. The applicant was required to declare any income obtained, and the law did not differentiate whether the funds were merely managed or officially owned by the subject of the declaration. At the same time, the evaluation Commission was not provided with documents confirming the source of these amounts of money, which further fuelled doubts. There was nothing to prevent the applicant from collecting statements or other documents proving, at least indirectly, that part of the parents' income was not declared.

With regard to the purchase of an apartment at a preferential price, it indicated that the applicant had not informed the Superior Council of Magistracy that he owned an apartment in Chisinau. The Evaluation Commission considered that this type of conduct is likely to affect the integrity of the complainant and is serious enough to raise public doubts as to the irreproachability of the complainant's conduct. Although, the applicant initially claimed that his eligibility was determined by the fact that the apartment in Chisinau had been bought by his parents, the facts that followed were contrary to what was initially stated. The complainant confirmed to the Commission that he had kept for himself all the income from the sale of the apartment in Chisinau, acknowledging that ownership of this property belonged to the applicant. The divergence of the applicant's explanations continued regarding the reason for eligibility, which was initially for "improving living conditions", and at the hearing stage - "other conditions".

Contrary to the complainant's allegations, it is up to the Commission to assess whether or not certain circumstances are sufficient to establish the existence or absence of serious doubts as to compliance. It is precisely this issue that concerns the appropriateness of the decision, which cannot be subject to judicial review.

By application submitted on March 20, 2023, during the court hearing, the applicant Ion Chirtoaca requested removal of the exception of unconstitutionality of some texts of Law no. 26/2022, formulating the request in writing, the application being admitted by the order of March 20, 2023 of the Supreme Court of Justice (Vol.I, f.d.214- 221).

By e-mail, on April 07, 2023, he received the decision no. 42 of 06 April 2023 of the Constitutional Court of inadmissibility, including the complaint filed by the applicant Ion Chirtoaca regarding the exception of unconstitutionality (Vol.II, page 5-32).

At the hearing, the representative of the applicant Ion Chirtoaca, lawyer Eugeniu Musteață, supported the application for challenge on factual and legal grounds, requesting its admission in the sense formulated. He further indicated that, from the contested decision, the Commission noted that serious doubts can arise about bank accounts if they are not declared when they involve considerable activity. The mere fact of not declaring the account does not in itself imply a serious violation, or a serious doubt, or a serious doubt about non-compliance. The Evaluation Commission held that the applicant failed to declare an account on which 74,660 EUR had been received, of which 10,533 EUR could not be substantiated by documents as to its origin. The applicant, at the hearing stage, mentioned that these transfers are from the income earned by his mother and father, who worked abroad. The Commission noted this fact, reflected in the contested decision, but in its conclusion on parents' income, it does not make this distinction, having regard to the documents presented. The Commission operated with the notion of parents' income and presented a table on all transfers made during this period and the income obtained, declared, indicating that the amount of 10 thousand was not justified, which, in fact, represented the father's exclusive income. The complainant had no interest in concealing this account also because part of the amount was deposited on a deposit account and was reflected in the declaration. In his view, the Commission evaluated these circumstances in a discriminatory way compared with other candidates.

In terms of ethical integrity, the Evaluation Commission pointed out that the applicant had not been honest with the Commission for determining the right to improve living conditions, because he owned an apartment in Chisinau of 38 sq.m. The Commission applied the practice of double standards. Attached to the case materials was the evaluation decision of another candidate, who owned a house in Chisinau at the stage of submitting the application to the commission - Chisinau, Grătiești. The Commission did not even verify these circumstances in its decision. At the stage when the application for improvement of living conditions was submitted, one of the conditions was not to own property in Chisinau a dwelling space or, if owning it, to be insufficient and requiring improvement of living conditions. The Evaluation Commission interpreted these circumstances to the detriment of the complainant.

The Evaluation Commission violated the applicant's right to a trial, to a fair assessment. There were four rounds with different questions, but it did not concern the supporting documents of the 10,000 EUR in the aspect that was presented in the decision. At the stage after the public hearings, when the

complainant has the right to inspect that administrative file or those documents accumulated in the course of the evaluation, the Commission did not come up with a preliminary position on its conclusions, in order to understand the doubts created and not dispelled by the acts presented. At the request to be submitted the original administrative file, it was submitted in electronic format and it was communicated that, by law, they are not obliged to submit the administrative file on paper, which creates confusion as to what documents were presented to the applicant at the stage of familiarization, at the end of the evaluation.

The applicant Ion Chirtoaca supported the appeal with the factual and legal grounds formulated, as well as the position of his lawyer, requesting the admission of annulment of the Commission's decision, ordering the resumption of the evaluation procedure, explaining that, during the rounds of questions with the Commission, he showed the willingness of the parents to be heard, which was not accepted by the Commission. At the same time, he said that he proved that his father worked in Italy during that period. He confirmed this through the documents presented. Regarding the apartment, when submitting the application in June 2017, the condition was to have worked for at least half a year, and he met the conditions for improving living conditions, as indicated in the application. At the same time, at the Superior Council of Magistracy there were two declarations for 2016, 2017.

The representative of the independent commission for assessing the integrity of candidates for membership in the self-administration bodies of judges and prosecutors, lawyer Irina Sugoneaco, requested the rejection of the appeal request according to the reasons set out in the reference. At the same time, she mentioned that the problem started, first of all, from the fact that there was a double behavior regarding the amounts on these bank accounts. Sometimes these amounts were declared, especially after the candidate became a judge, sometimes he did not declare anything, and other cases were declared only certain amounts that were received as a donation. After it was found that certain bank accounts were not declared, the question arose as to what is the source of income of these sums of money. In all cases, both in the first round of questions, in the second round of questions, the candidate mentioned that it is about the income of parents from abroad. This declaration was accepted by the Commission, the income of both parents and not just one of them was taken into account/. The candidate's replies indicated that the transfer was made by his mother. It was only in the hearing, however, with regard to the father's income, that due diligence was exercised on the part of the applicant to demonstrate, at least, the allegation that his parent had worked informally, and It can be confirmed by evidence, being demonstrated only at the trial stage, although it could have done at the evaluation stage, given that the question about the source of the money was raised several times. Regarding the double standards claimed by the applicant side in relation to other candidates, she mentioned that, if at the



first stage, the account was not declared, in all cases the circumstances are similar, but at the second stage, there are essential differences, in some declarations, the candidates declared the amounts, but in other chapters and They did not declare bank accounts. In other cases, there were simply zero turnover on bank accounts.

Regarding the second criterion, the Evaluation Commission has not only once detected this problem in the case of candidates for membership in the Superior Council of Magistracy, being addressed to candidates, namely whether they informed the Superior Council of Magistracy that the potential candidate holds an apartment or building within whose territorial area the apartment is requested at a preferential price. In this case, it is generally not clear whether the applicant informed the Superior Council of Magistracy about the fact that he owned an apartment in Chisinau. There is a vagueness, at least, regarding the conditions for obtaining the apartment at a preferential price. These circumstances were taken together, as well as the lack of diligence of the complainant, who had the opportunity to submit additional documents to the Commission in order to eliminate the doubts raised, including after the hearing stage.

With regard to the procedural defects that have been alleged, with regard to the members of the secretariat, she indicated that, in the context of legal provisions, the secretariat has only a role Of helping, assistance in translating, collecting information from public sources, has no decisive role, only and exclusively the members of the commission are entitled to give questions, to decide on the admission or rejection of the candidate for the position of member of the Superior Council of Magistracy.

The representative of the Independent Commission for assessing the Integrity of Candidates for the Position of Members of the Self-Administration Bodies of Judges and Prosecutors, lawyer Roger Gladei, stated that, Law no. 26/2022 does not allow the application of the provisions of art. 1 and 2 of the Administrative Code, for the simple reason that, pursuant to Art. 14 of Law no. 26/2022, examination of appeals is done by the provisions of the Administrative Code. Therefore, only on the judging side do the provisions of administrative litigation apply, i.e. book three of the Administrative Code, this being detailed in the reference. The procedural rules are provided by law, insofar as there are technical norms, they are also in the provisions of the Regulation. The Secretariat shall not advise the Commission. It is an attempt to mislead, an attempt by the complainant's representative to mislead about the role of the secretariat in the decision-making process. According to art. 18 of the Regulation, the secretariat provides support and assistance. He tries to induce a thesis from which to conclude that the procedure has been distorted, i.e., he is trying to invoke what the Constitutional Court found, that if there was a serious procedural error, which violated the fairness of the trial, then it can be annulled.

The candidate does not deny that there were irregularities, but his explanation could not be accepted by the Commission for the purpose of dismantling doubts. It was emphasized in the decision and reference that not only the very fact of non-declaration of the account represented grounds for serious doubts, but the facts that took place in this account, the transactions. Likewise, it was the diligence of the applicant-candidate, in the case of the pre-vetting process, to disclose all the circumstances related to the need to improve housing conditions.

### **The Determination of the Court**

Having heard the parties and their representatives, having examined the documents in the administrative and judicial files, the Special Panel of the Supreme Court finds that the appeal is admissible and well founded, for the following reasons.

#### **Time limit for examination of the action:**

The special panel reveals that failure to comply with the 10-day deadline established by art. 14 para. (7) of Law no. 26/2022 is due to circumstances that did not depend on the will of the court and cannot be imputed to it.

In this context, the following aspects should be emphasized.

The appeal filed by Ion Chirtoaca against the independent commission for assessing the integrity of candidates for membership in the self-administration bodies of judges and prosecutors was registered on February 10, 2023 and assigned on February 10, 2023 to the special panel of judges of the Supreme Court of Justice consisting of judges: Vladimir Timofti, president, Svetlana Filincova and Ala Cobăneanu, rapporteur (Vol.I, f.d.1).

By the order of 14 February 2023 of the Judge-Rapporteur, member of the special panel of the Supreme Court of Justice, the present application for challenge was accepted for examination in the administrative proceedings, and the copy of the defendant's application was ordered to be sent with the grant of deadline until February 20, 2023 at 17:00, for submitting the reference and opinions on the circumstances, existence / non-existence of grounds of inadmissibility, accompanied by evidence (Vol.I, f.d.40-42).

The hearing for consideration of the case has been appointed for February 24, 2023 at 09:30 (Vol.I, f.d.44).

On February 20, 2023, the Independent Commission for assessing the Integrity of Candidates for Members of Self-Administration Bodies of Judges and Prosecutors, registered the reference with annexes (Vol.I, f.d.49-75), which was sent to the applicant for familiarization via electronic mail (Vol.I, f.d.76).

At the court hearing on February 24, 2023, the applicant Ion Chirtoaca submitted a request to postpone the examination of the case, in order to use the services of a lawyer specialized in administrative litigation, the request for postponement being admitted and the next court hearing set for March 10, 2023

(Vol.I, f.d.84, 86-88).

Having regard to the honorable resignation on March 1, 2023 of judges Ala Cobăneanu and Svetlana Filincova, members of the special panel, accepted by the decisions of the Superior Council of Magistracy no. 23/2 and no. 27/2 of 14 February 2023, pursuant to the order of 02 March 2023 of the Acting President of the Supreme Court of Justice (Vol.I, f.d.90-92), this case was redistributed to the special panel of judges constituted, by order of the interim president of the Supreme Court of Justice no.34 of March 2, 2023, of the judges: Vladimir Timofti, president, Tamara Chisca-Doneva, rapporteur and Dumitru Mardari (Vol.I, f.d.93).

By the application submitted on March 10, 2023, during the court hearing by the applicant Ion Chirtoaca, represented by lawyer Eugeniu Musteață, the factual and legal grounds of the appeal application were completed (Vol.I, f.d.97- 99).

By application submitted on March 20, 2023, during the court hearing, the applicant Ion Chirtoaca requested the removal of the exception of unconstitutionality of some texts of Law no. 26/2022, formulating the request in writing, being admitted by the order of 20 March 2023 of the Supreme Court of Justice (Vol.I, F.D.214-221). At the same time, it was ordered to postpone the examination of the case until the Constitutional Court pronounces its solution.

By e-mail, on April 07, 2023, has been sent the decision no. 42 of 06 April 2023 of the Constitutional Court of inadmissibility, including the complaint filed by the applicant Ion Chirtoaca regarding the exception of unconstitutionality (Vol.II, f.d.5-32).

Taking into account the resignation of judge Dumitru Mardari on March 20, 2023, as well as the resignation of judge Vladimir Timofti on March 27, 2023, accepted by the decisions of the Superior Council of Magistracy, changes occurred in the composition of the panel. Finally, the panel consisted of the following magistrates: Tamara Chisca-Doneva, Mariana Pitic and Ion Guzun, with judge Maria Ghervas as alternate.

At the same time, the Special Court Panel notes that, on April 6, 2023, Law No. 64 of March 30, 2023 on the Supreme Court of Justice entered into force , as well as Law No. 65 of 30 March 2023 on the external evaluation of judges and candidates for the position of judge of the Supreme Court of Justice.

According to the provisions of art. 8 of Law no. 64/2023, the Plenum of the Supreme Court of Justice is composed of all judges of the Supreme Court of Justice and has, among other things, the power to determine, annually, the composition of the panels of judges.

At the court hearing on April 7, 2023, the Independent Commission for Assessing the Integrity of Candidates for Members of the Self-Administration Bodies of Judges and Prosecutors, through lawyer Roger Gladei, submitted a

request for recusal of Judge Mariana Pitic (Vol.II, f.d.40-42).

According to art. 14 para. (4) of Law no. 26/2022, in case of abstention or objection of the member of the special panel, the examination of that request shall be made by the other members of the special panel, with the substitution of the member whose abstention or objection is discussed by the alternate member. If the request for objection or abstention is admitted, the case shall be examined in the substitute of the judge concerned by the alternate.

By decision no. 33/2 of February 14, 2023, the Superior Council of Magistracy accepted the resignation of judge Maria Ghervas on March 31, 2023, but by order of the Commission for Emergency Situations of the Republic of Moldova no. 64 of March 31, 2023, the administrative procedure of resignation was suspended, as a temporary measure, during the state of emergency, subsequently being repealed by order no.66 of April 10, 2023 of the Commission for Emergency Situations of the Republic of Moldova.

Subsequently, in view of the resignations of the judges, it was impossible for the Supreme Court of Justice to set up a panel to examine the application for recusal.

By Law no. 89 of April 27, 2023, in force from May 02, 2023, the transitional provisions of Law no. 64/2023 on the Supreme Court of Justice, have been amended in order to establish the moment of commencement of the activity of the Supreme Court of Justice in the new composition, including the Plenum, giving as effect powers to form panels of judges according to the previous rule – by the President of the Supreme Court of Justice.

Following the order by decision of the Superior Council of Magistracy no. 142/8 of 02 May 2023, of the temporary transfer, for a period of 6 months, starting with 10 May 2023 in the position of judge of the Supreme Court of Justice, of certain judges, by order no. 69 of 04 May 2023 of the Acting President of the Supreme Court of Justice, effective from 10 May 2023, was appointed alternate member of the special panel of judges of Supreme Court of Justice, judge Ion Malanciuc, being possible to examine the request for recusal submitted to judge Mariana Pitic.

By the order of May 25, 2023 of the Supreme Court of Justice, the request for recusal submitted to Judge Mariana Pitic by the Independent Commission for assessing the Integrity of Candidates for the position of Member of the Self-Administration Bodies of Judges and Prosecutors was rejected (Vol.II, f.d.61-65).

Thus, for June 12, 2023, at 13:00, the court hearing was set for the examination of the appeal application.

In this context and in the light of the above, the Special Panel notes that the failure to meet the 10-day time limit for the examination of the appeal was due to the complexity of the case, the conduct of the parties to the proceedings,

including that of the defendant authority, the difficulty of the debate, the mass resignation at the Supreme Court of Justice, and to the impossibility to form a Special Panel to hear the appeal.

What is more, the length of time the case was pending was conditioned, *inter alia*, by the need to ensure respect for the rights of the participants in the proceedings, which cannot be regarded as a delay in the examination of the case, because the purpose of examining the appeal was to ensure observance of the parties' guaranteed right to a fair trial, which is enshrined in Article 38 of the Administrative Code and in Article 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

At the hearing on 12 June 2023, the case was examined on the merits, the parties' explanations were heard, the evidence was examined, the pleadings were heard and, in accordance with Article 14(9) of the Law No 26/2022 – the issuance and placement of the decision on the website of the Supreme Court of Justice was announced.

### **Applicability of the Administrative Code**

The Special Panel notes that, during the judicial proceedings, the representatives of the Commission raised the non-application of Books I and II of the Administrative Code to the examination of cases pending before the Supreme Court of Justice, an argument that cannot be accepted in the light of the following considerations.

The Special Panel notes that the application of the Administrative Code and the limits of its application are a matter of interpretation and application of the law over which the Supreme Court of Justice has jurisdiction as a court with jurisdiction to examine administrative disputes (DCC No 163 of 1 December 2022, § 24, DCC No 2 of 18 January 2022, § 19).

It is first of all necessary to explain why the Administrative Code is applicable not only to the evaluation procedure but also to the administrative dispute procedure.

In terms of regulatory content, the Law No 26/2022 contains rules pertaining to substantive public law, procedural law and administrative dispute.

More specifically, the legal provisions regarding the definition and conditions under which the ethical/financial integrity is to be assessed are, by their nature, rules of substantive administrative law, which form the legal basis as per Article 21 para. (1) of the Administrative Code for the issuance of the individual administrative act by the Commission. Accordingly, the provisions of Article 8 para. (1)-(4) of the Law 26/2022 are rules of substantive administrative law.

According to Articles 9 para. (2) and 69 para. (1) of the Administrative Code, the initiation of the evaluation procedure is the initiation of an

administrative procedure, at the request of the candidate, for one of the positions of member of the bodies listed in Article 2 para. (1) of the Law No 26/2022. Pursuant to Article 189 para. (1) of the Administrative Code, the initiation of administrative dispute proceedings is conditioned on a plaintiff's claim that a right has been infringed by administrative activity.

The Special Panel thus notes that the decision of the Commission is an individual administrative act within the meaning of Article 10(1) of the Administrative Code. The individual administrative act is the final output of the administrative procedure.

The pass or fail decision adopted by the Commission completes the administrative procedure under Article 78 of the Administrative Code.

Furthermore, the authors of the law noted in the explanatory note to Law No 26/2022 the following: "as a result of its work, the Commission will issue a decision. Given that such decision is an administrative act, it may be appealed in accordance with the provisions of the Administrative Code No 116/2018 with the explicit exceptions set out in this draft."

It is the lawmaker itself that called the decision of the Commission an individual administrative act that may be challenged in an administrative proceeding.

Accordingly, the rules of the Administrative Code on administrative proceedings and the concept of the individual administrative act are applicable to the evaluation procedure, subject to the exceptions provided for by Law No 26/2022.

The Special Panel points out that the evaluation of candidates for the positions of member of the bodies listed in Article 2 para. (1) of the Law No 26/2022 is, by its nature, a specific field of activity within the meaning of Article 2 para. (2) of the Administrative Code.

Although the Administrative Code establishes uniform administrative and administrative litigation proceedings, its Article 2 para. (2) provides that certain aspects may be governed by special legislative rules as long as they are not at odds with the principles of the Administrative Code.

The special rules of the Law No 26/2022 do not preclude the application of Books I and II, with the exception of certain aspects, such as, in particular, the initiation of administrative proceedings, clarification of facts on own motion, quorum and majority, the right of the candidate to be heard, and others. The wording "certain aspects" in Article 2 para. (2) of the Administrative Code does not mean that the Administrative Code shall not apply.

Therefore, in the circumstances of this case, it is impossible not to apply Books I and II in their entirety because of the central role and the organic link of the Administrative Code with the areas/sub-areas of administrative law.

According to Article 14 para. (6) of Law No 26/2022, an appeal against

the decision of the Commission shall be heard and determined in accordance with the procedure laid down in the Administrative Code, subject to the exceptions laid down in this Law, and shall not have a suspensive effect on the Commission decisions, elections or competition in which the candidate concerned participates.

The principles governing the administrative dispute proceedings are set out in Book I of the Administrative Code, in particular Articles 21-27 and Articles 36-43. There is an organic and substantive link between Books I and II, and III, which governs the administrative dispute proceedings, which cannot be denied or excluded under no circumstances.

Judicial review is a control of legality, which includes checking the legality of the grounds underpinning the form of administrative procedures; whether vague legal concepts were interpreted correctly; the proportionality of equal treatment, impartiality, legal certainty, reasoning; the exercise of discretionary right; whether the authority is allowed to exercise such right; the protection of legitimate expectation etc.

For the considerations stated above, the Special Panel rejects as unfounded the contention of the representatives of the Commission that Books I and II of the Administrative Code are not applicable. If this were the case, it would be tantamount to a denial of the principles of legality, own-initiative investigation, equal treatment, security of legal relationships, proportionality, impartiality of the Commission, good faith etc.

The application of the rules of administrative dispute is conditioned on the application of the same rules that refer to the administrative procedure, such as the collection of evidence under Articles 220 para. (1), 87-93 of the Administrative Code, referrals under Articles 223, 97-114 of the Administrative Code, impartiality under Article 25 of the Administrative Code, recusals under Articles 202, 49-50 of the Administrative Code, forms of administrative activity under Articles 5, 10-15 and 189 of the Administrative Code, the concept of party in an administrative dispute under Articles 204 and 7 of the Administrative Code, legal effects of an individual administrative act, *e.g.* the enforceable nature of the Commission decision as an individual administrative act under Article 171 para. (4) of the Administrative Code, the validity, binding force and *res judicata* of the Commission decision under Articles 139 para. (2)-(4) and 140 of the Administrative Code etc.

The non-application of Books I and II of the Administrative Code would be virtually the same as disqualifying the Commission decision as an individual administrative act and, consequently – the same as denying access to effective judicial review.

In this context, the Special Panel thus emphasizes that the decision of the Commission is an individual administrative act within the meaning of Article 10

para. (1) of the Administrative Code, because: 1) it is issued by a public authority; 2) it is a decision, order or other official output; 3) it falls within the field of public law; 4) it is a regulation; 5) it relates to an individual case; 6) it has direct legal effects.

Functionally and organizationally, the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors is a “public authority” within the meaning of Articles 7, 10, 203(a) and 204 of the Administrative Code, because it was established by law, it has public law tasks by virtue of its mandate as defined in Article 8 of the Law No 26/2022, and pursues a public interest.

At the same time, it should be emphasized that the tasks of the Evaluation Commission do not represent private fields of activity, but public, which is why it was mandated by Law no. 26/2022 with powers that allow it to impose itself with legal force in relation to things assessed according to art. 8 of the Administrative Code.

As a matter of principle, the special panel of judges set up within the Supreme Court of Justice notes that the concept of public authority cannot be confused from a functional and organisational point of view with that of a legal person governed by public law, otherwise the decision of the Evaluation Commission would be excluded from the concept of an individual administrative act.

The Special Panel also emphasizes that the administrative procedure of evaluation has a clarifying and guiding purpose owing to the procedural nature of the formal action of evaluating candidates for the position of member of the Superior Council of Magistracy. Respect for the basic principles, safeguards and rules of administrative procedure is therefore a requirement directly rooted in the concept of the rule of law stipulated in Article 1(3) of the Constitution of the Republic of Moldova.

The Law No 180 of 7 June 2023 reinforced the understanding that the Commission is a public authority specific in its own way, i.e. it is not a legal entity of public law, although Article 7 of the Administrative Code – which has a universal meaning – includes and defines the concept of public authority both in the sense interpreted by the Parliament of the Republic of Moldova, i.e. functionally and organizationally, and in the sense of a legal entity of public law, as the case may be or require. This conclusion also follows from the indefinite pronoun “any organizational structure” in Article 7 of the Administrative Code. A public authority – in addition to the element of any organizational structure or body, established by law or other regulatory act to pursue public interests – also falls in the purview of public regime, which establishes the tasks and remits, which gives the right to impose legal force on people with whom the public authority engages in legal relations. A different interpretation and application would mean that the work of the Commission and its decisions are not binding



as individual administrative acts, but represent legal acts under private law. The Special Panel points out that a natural person can also be a public authority if they are delegated by law the tasks pertaining to public authorities and the corresponding powers to carry them out. Furthermore, according to Article 72 para. (6) of the Law No 100 of 22 December 2017, the interpretation law does not have retroactive effect, except in cases where the interpretation of the sanctioning rules leads to a more favorable situation.

The Special Panel emphasizes that the Commission's tasks do not pertain to the private, but to the public areas of activity, which is why it was vested, by Law No 26/2022, with powers that allow it to have a legally binding effect over those evaluated under Article 8 of the Administrative Code. The Special Panel notes, as a matter of principle, that the concept of public authority cannot be mistaken – from a functional and organizational point of view – for that of a legal entity governed by public law, for otherwise the Commission decisions would not fall within the concept of an individual administrative act.

At the same time, it holds that there was no in-depth understanding of Article 2 para. (2) of the Administrative Code, which regulates conditions of derogation by legal provisions from the uniform nature of the Administrative Code for “certain aspects” of administrative activity. Accepting the argument that the Commission is not a public authority would mean denying the legal reality that it carries out administrative activity of public law through administrative procedure and that its decision is an individual administrative act subject to judicial review under administrative litigation procedure. Thus, the public authority concept is not limited to the concept of legal entity of public law, but has its own functional meaning under Article 7 and Article 2 para. (2) of the Administrative Code and for the purposes of Law No 26/2022.

According to Article 10 para. (1) of the Administrative Code, the Commission's decision is related to the trait of “*any decree, decision or other official measure*” as a defining element of the individual administrative act. This reveals that the Commission does not perform legislative or judicial activity, but that it has a law implementation activity.

According to Article 10 para. (1) of the Administrative Code, the Commission's decision fits within the concept of “*public law domain*.” According to Article 5 of the Administrative Code, the individual administrative act is one of the forms of administrative activity by means of which the law is applied. The Commission's decision applied Law No 26/2022, which regulates the substantiation of the decision, and this normative regulation falls, in its legal nature, under the substantive public law. Due to this trait, the Commission's decision is exempt of private, criminal, contraventional, and constitutional disputes to which public authorities can be party as per Article 2 para. (3)(a)-(c) of the Administrative Code.

According to Article 10 para. (1) of the Administrative Code, the

Commission's decision is a "*regulation*" by means of which the defendant exercises unilaterally its substantive competence in line with Article 6 of Law No 26/2022.

The Court emphasizes that this element of the individual administrative act delimits it from other forms of administrative activity, such as the real act and the administrative contract.

According to Article 10 para. (1) of the Administrative Code, the Commission's decision relates to "*an individual case*", which consists of the concrete situation of plaintiff's evaluation. This trait of the individual administrative act has the function to delimit it from the normative administrative act, which is an abstract regulation as per Article 12 of the Administrative Code.

According to Article 10 para. (1) of the Administrative Code, the Commission's decision meets the criterion of "*with the purpose to produce direct legal effects*", which means to create, alter or terminate legal relationships under the public law. The Special Panel holds that the Commission's decision produces direct legal effects in the legal sphere of the plaintiff, in her capacity of a judge that applied for the position of member in the Superior Council of Magistracy. This criterion has the function to differentiate the individual administrative act from a simple administrative operation carried out under an administrative procedure of assessing the candidate's financial and ethical integrity.

The Special Panel thus notes that the decision of the Commission is an individual administrative act whereby the administrative procedure is completed. The concepts of administrative procedure defined in Article 6 of the Administrative Code and of public authority defined in Article 7 of the Administrative Code have a universal nature, being applicable to any area/sub-area of public law. These are the reasons why the Commission had and has the obligation to apply the provisions of the Administrative Code and the procedural rules laid down in Law No 26/2022 in the part related to derogations from the uniform nature of the Code.

It is therefore unacceptable that the defendant's representatives argue that the evaluation procedure is not an administrative procedure governed by the rules of the Administrative Code, such as the principle of legality (Article 21), the principle of investigation of own motion (Article 22), the principle of equal treatment (Article 23), the principle of good faith (Article 24), the principle of impartiality (Article 25), the principle of procedural language and reasonableness (Article 26, Article 27), the principle of efficiency (Article 28), the principle of proportionality (Article 29), legal certainty (Article 30), the principle of motivation of administrative acts and administrative operations (Article 31), the principle of comprehensibility (Article 32), the principle of protection of legitimate expectations and others.

**Regarding the existing judicial practice on the appeals filed against the Evaluation Commission (files no. 3-5/2023 and no. 3-13/2023),** where the court established with the force of *res judicata* that the provisions of Books I and II of the Administrative Code are not applicable to cases brought against the Evaluation Commission, the special panel established within the Supreme Court of Justice mentions that these cases do not form a unitary judicial practice. The role of case-law is to interpret and apply the law to specific cases. Respectively, not every decision that differs from another decision represents a case-law divergence.

The *res judicata* principle does not force the national courts to follow precedents in similar cases, as implementing legal coherence requires time and periods of case-law conflicts can, therefore, be tolerated without undermining legal certainty.

In these circumstances, the Special Panel states that a judge, according to the judicial organization rules, is not, generally, bound by the decision issued by another judge and not even by his/her prior decisions, because he/she pronounces a decision on the particular case brought before court.

#### **Application admissibility.**

According to Article 207 para. (1) of the Administrative Code, the court shall check of its own motion if admissibility requirements for an administrative dispute application are met.

Pursuant to Article 189 para. (1) of the Administrative Code, every person that claims that their right has been infringed by administrative activity may file an application for administrative dispute.

According to Article 5 of the Administrative Code, the administrative activity under the public law of public authorities includes the individual administrative act as the main form of administrative action of the authorities.

The Special Panel reasoned in the section of applicability of the Administrative Code why the Commission's decision is an individual administrative act. Therefore, in terms of application admissibility, it is emphasized that the Commission's decision is an unfavorable individual administrative act.

According to Article 11 para. (1)(a) of the Administrative Code, individual administrative acts can be unfavorable acts – acts which impose obligations, sanctions, and burdens on their addressees or affect the legitimate rights/interests of persons or which refuse, in whole or in part, to grant the requested benefit.

According to Article 17 of the Administrative Code, the prejudiced right is any right or freedom established by law that is infringed by an administrative activity. The special panel notes that, through the action filed, the applicant Ion

Chirtoaca claims the violation of a right through administrative activity, according to art. 189 para. (1) of the Administrative Code, namely that by decision no. 19 of January 20, 2023, the Evaluation Commission violated his right to be elected as a member of the Superior Council of Magistracy (Article 14 of the Law on the Status of Judge no. 544/1995), the right to judicial self-administration (Article 23<sup>1</sup> of the Law on judicial organization no. 514/1995), the right to dignity and professional reputation of judges, the fundamental right to independence and irremovability of judges (Article 16 of the Constitution of the Republic of Moldova), but also the fundamental right to administration (Article 39 of the Constitution of the Republic of Moldova), the right to a decision on a favorable evaluation of candidate Ion Chirtoaca.

By derogation from Article 209 of the Administrative Code, Article 14 para. (1) and (2) of the Law No. 26/2022 regulated a special time frame for filing the administrative lawsuit application. Thus, the decision of the Pre-Vetting Commission may be appealed by the evaluated candidate within 5 days from the date of receiving the reasoned decision, without following the preliminary procedure.

The evaluated candidate may appeal the unfavorable decision of the Evaluation Commission before the Supreme Court of Justice, which shall form a special panel consisting of 3 judges and a substitute judge. Judges and substitute judge shall be appointed by the President of the Supreme Court of Justice and confirmed by the decree of the President of the Republic of Moldova.

In this context, note that the decision of the Independent Evaluation Commission for assessing the integrity of the candidates for the position of member in the self-governing bodies of judges and prosecutors No 19 of 20 January 2023 was submitted by e-mail to the plaintiff, Ion Chirtoaca, on 7 February 2023, which is confirmed by an abstract from the e-mail, attached to case materials (administrative case, page 507).

The Special Panel concludes that the appeal application filed by Ion Chirtoaca is admissible because the plaintiff complied with Article 14 para. (1) of Law No 26/2022, being filed to the Supreme Court of Justice on 10 February 2023, within the time frame laid down in the law.

With respect to the type of application for administrative litigation, the Special Panel holds the filed application as an action for injunction of a specific nature. By means of a regular action for injunction, the plaintiff, according to Articles 206 para. (1)(b) and 224 para. (1)(b) of the Administrative Code, aims at the annulment of the individual administrative act rejecting his/her request for obtaining a legal advantage of any kind and at obliging the public authority to issue the rejected individual administrative act. At the same time, the specificity of the filed action is about annulling the Commission's decision on failing the candidate and ruling for a resumption of the evaluation.

The Special Panel, in line with Article 219 para. (3) of the Administrative Code, is not bound by the wording of the motions submitted by the parties to the

proceeding, thus the appropriateness argument expressed in the statement of defense by the defendant will be appreciated in terms of admissibility. Effective judicial review involves a full check of factual and legal matters, however it excludes the checking of appropriateness as per Article 225 para. (1) of the Administrative Code and limits the review regarding the discretionary individual administrative act when the law provides for such a reason for issuance. Appropriateness is a matter of admissibility, not a matter of substance in an administrative litigation. The defendant's argument in the submitted statement of defense that the application has to be rejected for the reason of appropriateness is unsubstantiated, as the plaintiff based the application on legality matters, not on appropriateness. The statement of defense and the appropriateness aspects highlighted by the defendant therein deny the right to file the application for an administrative litigation in line with Articles 39 and 189 para. (1) of the Administrative Code. Thus, neither the Administrative Code nor Article 14 para. (8) of Law No 26/2022 exclude the candidate's right to file an application to court. Accepting the solution suggested by the defendant is legally unsubstantiated and contrary to the rule of law. The Special Panel notes that provisions of Article 225 para. (1) of the Administrative Code are clear and cannot be confused, as they regulate, in functional unity with Articles 36, 39, 189, 190, and 207 of the Administrative Code, only aspects related to excluding or limiting the judicial review.

The Special Panel deems the Commission's decisions issued based on Article 8 of Law No 26/2022 as a mandatory administrative act, i.e. it is not issued based on discretionary right. The Commission is obliged to issue the decision regardless of whether it is favorable or not. In case of discretionary decisions, the public authority has even the right not to act and when it decides to act under administrative law, then it has the possibility to select the legal consequences, except for the situation when discretion is reduced to zero, as per Article 137 para. (2) of the Administrative Code.

### **The substance of the action in administrative litigation**

According to Article 6 para. (1) of the European Convention on Human Rights, in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

For the purposes of Article 13 of the European Convention on Human Rights, everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

According to Article 20 of the Constitution of the Republic of Moldova, any individual is entitled to effective satisfaction from the part of competent courts of law against actions infringing upon his/her legitimate rights, freedoms

and interests. No law may restrict the access to justice.

According to Article 53 para. (1) of the Constitution of the Republic of Moldova, any person prejudiced in any of his/her rights by a public authority by way of an administrative act or failure to solve a complaint within the legal term, is entitled to obtain acknowledgement of the declared right, cancellation of the act and payment of damages.

According to Article 114 of the Constitution of the Republic of Moldova, justice shall be administered in the name of the law only by the courts of law; they shall have the entire range of procedural mechanisms for a fair solution of a case, without unjustified limitation in actions to be carried out, so that, upon the fulfilment of the ultimate goal, the judicial decision would not become illusory.

Effective legal protection against administrative actions of public authorities implies a full judicial review of legality, which covers both factual and legal issues, as regulated by Articles 194 para. (1), 219, 22, 36, and 21 of the Administrative Code.

Density of judicial review means clarifying the content of judicial review over the decisions of the Commission, which applies not only to the depth, but also to the scope of the review. This relates both to enforcement of the law and to establishment of the facts that are relevant for a legal and founded judicial decision.

Effective judicial review involves checking all aspects of procedural and substantive legality, particularly fairness, proportionality, legal security, reasoning, correctness of factual investigation of own motion, impartiality, misinterpretation of undefined legal notions, and others. This is the only way to reach the standard of effective protection embedded in Article 53 of the Constitution of the Republic of Moldova. To this end, Article 194 para. (1) of the Administrative Code provides that during first-level court procedure, appeal procedure, and procedure of examining challenges against judicial decisions, the factual and legal issues shall be solved of own motion.

The court's review of the work of an administrative authority of public law requires an independent determination of relevant facts, an interpretation of relevant provisions, and their subordination. Such an administrative legality review obviously excludes, as a matter of principle, a binding of justice to factual or legal findings and determinations made by other powers with respect to what is legal in the given case.

In accordance with Article 14 para. (8) of Law No 26 of 10 March 2022, when examining the appeal against a decision of the Evaluation Commission, the Special Panel of the Supreme Court of Justice may adopt one of the following decisions: a) reject the appeal; b) accept the appeal, if there are circumstances that could have led to candidate's passing the evaluation, and order to resume the evaluation of the candidate by the Pre-Vetting Commission (the constitutionality of this provision was checked by Decision of the Constitutional

Court No 5 of 14 February 2023 on unconstitutionality exceptions of some provisions of Law No 26 of 10 March 2022 on measures related to the selection of candidates for the positions of members in the self-administration bodies of judges and prosecutors (competence of the Supreme Court of Justice in case of examining appeals filed against the decisions of the Pre-Vetting Commission)).

The Constitutional Court held that the explanatory note to the draft law does not include any argument regarding the needs to limit the judicial review of Pre-Vetting Commission's decisions. Still, based on the opinion submitted by the authorities and the content of the challenged text, the Constitutional Court deduced that the legislator intended to avoid situations where the Pre-Vetting Commission decisions are annulled for some insignificant procedural irregularities and, on the other hand, it wanted to ensure the celerity of solving appeals, in order to have sooner an operational Superior Council of Magistracy. The Constitutional Court held that these legitimate goals can fit under the overall objectives of public order and guarantee of justice authority and impartiality, as provided for in Article 54 para. (2) of the Constitution (DCC No 5 of 14 February 2023, §78).

Thus, the Constitutional Court has ruled that, until the law is amended in accordance with the reasoning of this decision, the Special Panel of the Supreme Court of Justice, when examining appeals, may order the reevaluation of failed candidates if it finds (a) that the Pre-Vetting Commission made serious procedural errors during the evaluation procedure, affecting the fairness of evaluation, and (b) that circumstances exist which could have led to the candidate passing the evaluation (DCC No 5 of 14 February 2023, §88).

Consequently, the Special Panel of Judges found that the Constitutional Court has established a double test that has to be met for the candidate's appeal against the decision of the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors to be accepted, namely: 1) the Pre-Vetting Commission made serious procedural errors during the evaluation procedure, affecting the fairness of evaluation, and 2) circumstances exist which could have led to the candidate passing the evaluation.

Law No 147 of 9 June 2023, in force as of 21 June 2023, amended Article 14 para. (8) of Law No 26 of 10 March 2022 as follows: When examining the appeal against a decision of the Evaluation Commission, the Special Panel of the Supreme Court of Justice may adopt one of the following decisions: a) reject the appeal; b) accept the appeal and order a re-evaluation of the candidates that failed the evaluation if it finds that during the evaluation procedure the Pre-Vetting Commission committed severe procedural errors that affect the fairness of the evaluation procedure and that there are circumstances that could have led to candidate's passing the evaluation.

The Special Panel highlights that Article 14 para. (8) of Law No 26 of 10 March 2022 amended by Law No 147 of 9 June 2023 design an effective

judicial review, which involves the legality of the evaluation procedure and the substantive legality of the decision to fail the evaluation.

The review of the procedural legality of the Decision will be limited to whether or not the Pre-Vetting Commission committed serious procedural errors that could affect the fairness of the evaluation procedure. The review of the substantive legality of the Decision will be limited to whether there are circumstances that could have led to the candidate Ion Chirtoaca passing the evaluation.

The Special Panel of the Supreme Court of Justice notes that the Administrative Code regulates the concept of serious errors and particularly serious errors. In case of particularly serious errors, as per Article 141 para. (1) of the Administrative Code, the individual administrative act shall be null and, consequently, it shall not produce legal effects since the moment of issuance. On the other hand, in case of serious errors, the individual administrative act is unfounded and produces legal effects until its final annulment. So, when an issue of procedural legality is invoked, it has to be analyzed through the lens of both particularly serious error and serious error.

The Commission's decision is illegal and the plaintiff would have the right to a favorable decision, because the appealed decision is vitiated, especially from the perspective of proportionality, misinterpretation of undefined legal notions and fair treatment. The Commission is bound to follow proportionality and fair treatment when issuing decisions on the evaluation of candidates for Superior Council of Magistracy membership. Denying this would put under question not just the rule of law, but the purpose for which Law No 26/2022 was passed. The serious doubts of the Commission have to be analyzed/evaluated both in terms of proportionality and fair treatment.

By Decision No. 19 of 20 January 2023 on the candidacy of Ion Chirtoaca, candidate for the position of member of the Superior Council of Magistracy, based on art. 8 para. (1), para. (2) letters a) and c), para. (4) letters a) and b), para. (5) letters b), c), d) and art. 13 para. (5) of Law no. 26 of 10 March 2022 on certain measures related to the selection of candidates for the position of member of the self-administration bodies of judges and prosecutors, the Independent Commission for assessing the Integrity of Candidates for the Position of Member of the Self-Administration Bodies of Judges and Prosecutors decided that the candidate does not meet integrity criteria, as serious doubts have been found about the candidate's compliance with ethical and financial integrity criteria and therefore do not promote evaluation (Vol.I, f.d.17-31).

At the same time, a member of the commission formulated a separate opinion on decision no. 19, expressing his disagreement with the proposed decision and supported by the majority of commission members, voting against the approved decision and considered that Ion Chirtoaca, candidate for the position of member of the Superior Council of Magistracy, meets The integrity



criteria found in art. 8 of Law no. 26/2022, as a consequence, was to promote the evaluation (Vol.I, f.d.33-37).

Following the communication of the decision of the Independent Commission for assessing the Integrity of Candidates for the Position of Member of the Self-Administration Bodies of Judges and Prosecutors no. 19 of January 20, 2023, on February 07, 2023, which was confirmed by the statement from the e-mail attached to the case materials (F.D.507, administrative file), the applicant, on February 10, 2023, filed an appeal application, subsequently completed, requesting the annulment of the nominated decision and ordering the evaluation of the candidate (Vol.I, f.d.2-15, 97-99).

According to art. 219 para. (1) - (3) of the Administrative Code, the court is obliged to investigate the facts ex officio on the basis of all legally admissible evidence, being bound neither by the statements made nor by the requests for evidence submitted by the participants. The court makes efforts to remove formal errors, explain unclear applications, correctly submit applications, fill in incomplete data and submit all statements necessary to ascertain and assess the state of affairs. The court shall indicate on the factual and legal aspects of the dispute that have not been discussed by the participants in the trial. The court does not have the right to exceed the limits of the claims in the action, but, at the same time, it is not bound by the text of the claims made by the participants in the trial.

Effective legal protection against administrative action by public authorities implies a full judicial review of legality, covering both questions of fact and law, in the context of the regulations of Art. 194 para. (1), Art. 219, Art. 22, Art. 36, Art. 21 of the Administrative Code.

The special panel considers it necessary to point out that it will not formulate a detailed answer to every argument of the appeal filed against decision no. 19 of January 20, 2023, but will analyze only the decisive reasons related to the verification of the existence of circumstances, serious procedural errors that would be admitted by the evaluation Commission and would have affected the fairness of the evaluation procedure, which could have led to the promotion of the evaluation by the candidate Ion Chirtoaca.

The special panel reiterates that, according to the decision of the Independent Commission for Assessing the Integrity of Candidates for the Position of Member of Self-administration bodies of judges and prosecutors no. 19 of January 20, 2023, the candidate for the position of member of the Superior Council of Magistracy, Ion Chirtoaca, did not pass the evaluation based on art. 8 para. (1), para. (2) (a) a) and c), para. (4) letters a) and b), para. (5) letters b), c), d) and art. 13 para. (5) of Law no. 26/2022, on the grounds that the candidate does not meet the integrity criteria, because serious doubts have been found regarding the candidate's compliance with the ethical and financial integrity criteria.

According to art. 8 para. (1), para. (2) letters a) and c), para. (4) letters a)

and b), para. (5) (a) b), c), d) of Law no. 26/2022, for the purposes of this Law, the assessment of the integrity of candidates consists in verifying their ethical integrity and financial integrity.

A candidate shall be deemed to meet the criterion of ethical integrity if:

a) has not seriously violated the rules of ethics and professional conduct of judges, prosecutors or, as the case may be, of other professions, as well as has not admitted, in his activity, reprehensible actions or inactions that would be inexplicable from the point of view of a legal professional and an impartial observer;

c) has not violated the legal regime of declaring assets and personal interests, conflicts of interest, incompatibilities, restrictions and/or limitations.

A candidate shall be deemed to meet the financial integrity criterion if:

a) the candidate's assets were declared in the manner established by the legislation;

b) The evaluation Commission finds that the wealth acquired by the candidate in the last 15 years corresponds to the declared income.

In order to assess the financial integrity of the candidate, the Evaluation Commission shall verify:

b) compliance by the candidate with the legal regime of declaring assets and personal interests;

c) the manner of acquiring the property owned or possessed by the candidate or persons specified in Article 2 para. (2) as well as expenditure relating to the maintenance of such property;

d) sources of income of the candidate and, where appropriate, of the persons specified in Article 2 paragraph (2).

In accordance with the provisions of art. 2 para. (2) of Law no. 26/2022, in the context of the evaluation of the candidates mentioned in para. (1) the assets of persons close to candidates, as defined in Law no. 133/2016 on the declaration of assets and personal interests, as well as of persons referred to in Article 33 paragraph (4) and (5) of Law no. 132/2016 on the National Integrity Authority.

By virtue of Article 33 para. (4) and (5) of the Law on the National Integrity Authority no. 132 of 17 June 2016, (hereinafter Law no. 132/2016), the control of wealth and personal interests extends to family members, parents/in-laws and adult children of the person subject to control. If the person subject to control is in cohabitation with another person, the verification will also extend to the property of this person. If there is an appearance that the property of the inspected person has been entered in the names of other persons, control shall extend to such property and persons. If the subject of the declaration has indicated income and goods obtained from donations or holds goods under bailment contracts, control shall extend to the bailor and bailee. They may be asked to clarify the origin of the income used for the acquisition and maintenance of such property. In order to clarify these aspects, the integrity inspector may request relevant information from any natural or legal person.

In the case, the Special Panel states that in its decision no. 19 of January 20, 2023, in compartment III, "Evaluation of the candidate", the Evaluation Commission found the existence of serious doubts regarding Ion Chirtoaca, candidate for the position of member of the Superior Council of Magistracy, regarding the criteria of financial integrity and ethics, taking into account the following circumstances:

1. failure to declare the bank account and transfers from his parents in the manner established by the legislation;
2. purchase of an apartment at preferential price – eligibility and improvement of living conditions.

Having analyzed the conclusions of the Evaluation Commission on these circumstances in relation to the evaluation criteria, the Special Court Panel holds that the action filed by Ion Chirtoaca is well founded.

The special panel established within the Supreme Court of Justice notes that when the Evaluation Commission has to decide on the integrity of a candidate, it must ascertain whether or not there are serious doubts as to whether or not the candidate complies with the criteria of ethical and financial integrity established by Article 8 of the Law.

It should be noted that the law obliges the Evaluation Commission to issue a reasoned decision, which must include the relevant facts, reasons and conclusion of the commission regarding the promotion or non-promotion of the evaluation.

The special panel notes that in its decision no. 19 of January 20, 2023, issued regarding the candidate Ion Chirtoaca, in the section "Evaluation of the candidate", the Evaluation Commission indicated the existence of serious doubts regarding the candidate's compliance with the ethical integrity criterion and the financial integrity criterion under art. 8 para. (2) letter c), paragraph (4) letters a) and b) and para. (5) letters b), c), d) of Law no. 26/2022, referring to (1) failure to declare the bank account in EUR and transfers of funds to this account and (2) the origin of funds for these transfers, made during 2012-2014, which were not removed by the candidate (Vol.I, f.d.26).

Another aspect outlined by the Evaluation Commission is the existence of serious doubts regarding the candidate's compliance with the ethical integrity criterion under Article 8 paragraph (2) letter a) of Law no. 26/2022, in connection with the method of acquiring the apartment of 68.4 sqm, at a preferential price in 2022, which were not removed by the candidate (Vol.I, f.d.31).

By virtue of the provisions of art. 10 of Law no. 26/2022, the Special Court Panel reveals that Ion Chirtoaca, during the written questions stage, was requested information and documents to be submitted to the Evaluation Commission.

Art. 7 of the Evaluation Regulation of the Independent Commission for assessing the Integrity of Candidates for the Position of Member of the Self-

Administration Bodies of Judges and Prosecutors, pursuant to Law no. 26/2022, provides that the cooperation or non-cooperation of a candidate during the evaluation process may be taken into account by the Commission to determine whether the candidate has removed serious doubts about compliance with the criteria of ethical and financial integrity set out in Article 8 of Law no. 26/2022.

In this context, the Special Court Panel notes that on June 21, 2022, a questionnaire on ethical integrity was sent to the candidate Ion Chirtoaca to be completed voluntarily and returned to the Commission by July 5, 2022, being submitted by the candidate within the established deadline. And according to the request of the Evaluation Commission, sent on July 8, 2022, the candidate was to complete and submit by July 15, 2022, the declaration of assets and personal interests for the last 5 years, in accordance with the provisions of art. 9 para. (2) of Law no. 26/2022, being completed by the candidate within the indicated deadline.

On August 15, 2022, the Commission sent a request to the candidate for clarification of some information, which included twelve questions, including twenty-three sub-questions and six requests for additional documents, the candidate responded within the requested deadline, providing most of the documents. Additionally, he sent information on September 26, 2022. This was followed by a second round of twelve-twelve questions and two requests for additional documentation, sent on November 15, 2022, to which the candidate responded within the deadline, also submitting most of the requested documents. In the third round of questions with three questions, seven sub-questions and eight requests for additional documents, sent to the candidate on November 29, 2022, the last one answered within the requested deadline, as well as provided most of the documents. On December 5, 2022, the fourth round of questions was sent, containing four questions and eight sub-questions, including three requests for additional documents, to which the candidate responded within the requested deadline by providing all documents.

On December 15, 2022, the public hearing of the candidate has been conducted by the Evaluation Commission.

Subsequently, on December 21, 2022, the candidate was sent a fifth round of questions, containing one question and three sub-questions, including two requests for additional documents, to elucidate some aspects that arose during the evaluation, to which he responded within the requested deadline and provided some requested documents.

As a result, on January 20, 2023, the decision of the Evaluation Commission was issued in the sense previously ordered, communicated to the complainant via electronic mail, as detailed above. At the same time, a member of the Evaluation Commission drew up a separate opinion on the issued decision.

In the present case, the rights at issue resume to the following: the right to administration under Art. 39 para. (2) of the Constitution of the Republic of Moldova, the right to a favorable evaluation decision, the right to be elected to

judicial self-administration bodies, as the case may be in the Superior Council of Magistracy, the right to dignity of the judge, the right to trust in justice.

The right to be elected is achieved through the possibility of the judge to participate in elections by inclusion in the competition as a candidate for the position of member of the Superior Council of Magistracy and possibly election by the General Assembly of Judges for this judicial administrative position.

The special panel reiterates that effective judicial review involves checking all aspects of procedural and substantive legality, in particular, equal treatment, proportionality, legal certainty, reasoning, correctness of ex officio factual investigation, impartiality, misinterpretation of undefined legal notions and others. Only in this way can the standard of effective protection enshrined in Art. 53 of the Constitution of the Republic of Moldova be achieved.

The special panel notes that, in the context of the administrative activity, prior to the issuance of the administrative act challenged by the present application, the applicant fully and unreservedly ensured the execution of the requirements for the submission of the defendant's documents and requests, within the deadline, lacking certain objections from the Evaluation Commission to the completeness of documents submitted, which could have been removed by the applicant.

In the course of the prior verification, the Evaluation Commission did not object or specify which documents or information had not been submitted by the complainant, limiting itself to the wording of the contested administrative act – '... the candidate answered all questions and provided most of the documents requested...".

The special panel concludes that, from the applicant's arguments, presented in front of the court, it is found that there are circumstances that could lead to the promotion of his evaluation by the Commission and which would justify the resumption of the evaluation procedure of the candidate, if the serious doubts formulated by the Evaluation Commission regarding the compliance by Ion Chirtoaca with the ethical and financial integrity criteria established by art. 8 of Law no. 26/2022, regarding the failure to declare the bank account and transfers from his parents in the manner established by the legislation and the purchase of an apartment at a preferential price - eligibility and improvement of living conditions have not been removed.

**With reference to failure to declare bank account and transfers from parents in the manner established by legislation.**

The special panel reiterates that, in the context of the provisions of Art. 8 para. (2) letter c) of Law no. 26/2022, retained by the Evaluation Commission, the candidate is considered to meet the ethical integrity criterion if: c) has not violated the legal regime of declaring assets and personal interests, conflicts of interest, incompatibilities, restrictions and /or limitations, and for the purposes of paragraph 4, a candidate shall be deemed to meet the financial integrity

criterion if: a) the candidate's wealth has been declared in the manner established by legislation; b) The evaluation Commission finds that the wealth acquired by the candidate in the last 15 years corresponds to the declared income.

According to the provisions of art. 4 of the Law on declaration and control of income and property of persons with positions of public dignity, judges, prosecutors, civil servants and some persons with leading positions no. 1264 of 19 July 2002 (in force until 01 August 2016), the persons referred to in art. 3 declares: a) income obtained together with family members during the declaration period; b) movable and immovable property of all types, owned, with the right of usufruct, use, habitation, superficies or in the possession of the declarant or his family members based on mandate, commission, fiduciary administration contracts, as well as translative contracts of possession and use (lease, leasing, bailment) at the date of submission of the income and property declaration; c) goods made through persons interposed or transferred for consideration to ascendants, descendants, brothers, sisters and affinities of the same degree, as well as those transmitted free of charge to any person; d) financial assets, i.e. bank accounts, investment funds, equivalent forms of savings; and Investment, investments, bonds, cheques, bills of exchange, loan certificates, other documents incorporating property rights of the declarant or his family members, direct investments in national or foreign currency made by him or members of his family, as well as other financial assets; e) share in the share capital of the companies of the declarant and his family members; f) debts in the form of debts (including unpaid taxes), mortgages, guarantees issued for the benefit of third parties, loans and credits.

Further, the provisions of art. 5 para. (1) of the Evaluation Regulation of the Independent Commission for assessing the Integrity of Candidates for the Position of Member of Self-Administration Bodies of Judges and Prosecutors, pursuant to Law no. 26/2022, according to which, only if a candidate fully meets all indicators as defined in art. 8, para. (2) - (5) of Law no. 26/2022, he/she satisfies the criterion of "ethical and financial integrity" and paragraph 2 provides that when assessing compliance with the ethical integrity criterion, the Commission may take into account the seriousness or severity, adjacent context and premeditation associated with any incident of ethical integrity and, in the case of minor incidents, whether there was a sufficient period of time without subsequent incidents. In determining severity, the Commission will take into account all circumstances, including, but not limited to, the following: a. whether the incident was a one-off event; b. absence of damage or insignificant damage to private or public interests (including public confidence) – such as an ordinary traffic violation; c. or which is not perceived by an objective observer as disrespectful attitude towards social order arising from non-compliance with rules and regulations.

In the Joint Opinion of the Venice Commission and the Directorate-General for Human Rights and the Rule of Law of the Council of Europe, it was

indicated that clearer indications on the evaluation criteria are needed; Minor breaches of professional conduct should not provide a valid reason for rejecting a candidate.

According to art. 12 para. (4) letter d) of Law no. 26/2022, the candidate has the right to submit, in written form, additional data and information that he/she considers necessary to remove suspicions regarding his/her integrity, if he/she was unable to submit them previously.

Likewise, by virtue of art. 3 para. (4) of the Evaluation Regulations of the Independent Commission for assessing the Integrity of Candidates for the Position of Member of the Self-Administration Bodies of Judges and Prosecutors, pursuant to Law no. 26/2022, a candidate may not provide information, documents or other materials during the hearing if the Commission has previously requested them and the candidate has not provided them within the specified deadline. If deemed justified, the Commission may allow exceptions.

Starting also from the legal regulations cited, the Special Court notes that, when examining whether the candidate meets the criterion of ethical integrity and financial integrity, the Evaluation Commission, having analyzed the documents submitted by the applicant, essentially noted the failure to declare an active bank account (EUR), opened on October 12, 2010 and closed on January 19, 2022, in the declaration on income and property for 2012-2015, as well as the fact that bank transfers made by the candidate's parents during the reference period to the undeclared bank account were higher than the income accumulated during the same time frame and that there would be doubts about the sources of funds transferred by the candidate's parents between 2012 and 2014, which were not removed by the candidate.

It should also be noted that it is not the competence of national authorities to verify/analyze the income obtained by the citizen of the Republic of Moldova in a foreign state, without an appropriate procedure, given that the states have their authorities with competences and duties in this regard.

Moreover, it cannot be ignored that money transfers were made through banking institutions, which additionally demonstrates the transparency of banking operations.

Further, the Special Panel notes that, along with the fact that the applicant submitted documents justifying the income earned by his parents, in particular the applicant's mother, abroad during the reference period and pointed out that, for a period of time, his parents had worked, not being employed Officially, earning income including his father, the Evaluation Commission ignored these explanations of the complainant.

Although the complainant in the evaluation process indicated about the parents' willingness to be heard on the income obtained and the transfers made, in order to elucidate the information, as the case may be, the Evaluation Commission left without an assessment the given circumstance.

The evaluation Commission realised that both of the applicant's parents had worked abroad and obtained income, operating in its decision with the notion of income of 'parents', but referring to transfers made between 2012 and 2014 totalling 74,660 EUR, it limited itself to documents submitted by the foreign tax authorities, which, in fact, certifies the income of the applicant's mother in the amount of 64,127 EUR, ignoring the fact that the difference of 10,533 EUR could constitute the income of the applicant's father. However, the applicant explained to the Evaluation Commission that his father had worked unofficially and also earned income.

In this regard, mention should be made of the documents submitted by the applicant when examining the case, in the form of statements by natural persons from the Republic of Italy, dated 23 March 2023 and 03 April 2023, from which it appears that the applicant's father worked for these persons between 2012 and 2014, earning a monthly income of 200 EUR at a workplace, in three years he earned an income of 7200 euros (Vol.II, f.d.70-71), and at another job, during this period, he was paid weekly 70 EUR or 80 EUR for services rendered (Vol.II, f.d.72-73).

In this context, the allegations of the defendant's representative that the documents given were to be presented in the evaluation process cannot be held to be relevant, if the applicant in the evaluation process, from the Commission's position, did not infer that the defendant had certain ambiguities about the source of income, and no question was identified from the questions raised to remove any ambiguities of the source of income for a certain concrete amount, in order to clarify doubts about the source of funds transferred by the candidate's parents in 2012-2014 through a bank account (EUR) opened in 2010 in the Republic of Moldova in the name of Ion Chirtoaca.

At the same time, in *Xhoxhaj v. Albania*, no. 15227/19, §352, 31 May 2021, the European Court stated that "it is not per se arbitrary within the meaning of the right to a "civil" fair trial under Article 6 § 1 of the Convention, that the burden of proof should fall on the applicant in the integrity check procedure after the ICC (Independent Qualification Commission) has provided the preliminary findings resulting from the conclusion of the investigation and given access to the evidence in the case file."

In this context, the Special Panel considers relevant the applicant's reasoning that the burden of proof would have been transferred in the absence of advance communication of the results of the Evaluation Commission, given that once uncertainties arise and in order to elucidate them, the Commission offers the candidate the opportunity to submit data and additional information.

Moreover, returning to the applicant's position regarding the willingness of parents to be heard in the evaluation process on transfers made from earned income, it cannot be ignored that, although the Evaluation Commission indicated this circumstance in its decision, it left it without an assessment.

In this context, the Special Panel of Judges points out that the candidate's



explanations given in front of the Evaluation Commission correlated with the circumstances of the case, moreover, additionally confirmed by the above-mentioned documents, are capable of removing doubts regarding the source of income obtained by both parents.

In this regard, the separate opinion of the member of the Evaluation Commission should be noted, according to which: "the "illegal" work and/or over the predetermined schedule, performed by moldovans in the country where the candidate's parents worked, is a notorious fact and cannot be vehemently ignored. The answers and information provided by the candidate regarding the annual amounts of money transferred in the country by his parents do not seem to be dubious, taking into account the level of salaries in the European Union, as well as the fact that both parents at that stage were abroad."

It is also important that the amounts were officially transferred through banking institutions, which further proves that the applicant did not intend to hide the existence of the bank account, nor the source of the amounts entered into the bank account, but that the bank account was not declared, being rather an unintentional ignorance of the legislation in force, as well as the internal practice existing during the period when he worked within the Ministry of Internal Affairs not to declare accounts in which there were no funds.

Subsequently, the applicant's arguments that the nature of this bank account through which his parents made money transfers in the country shows that there were no reasons or malice not to declare this bank account while he was employed by the Ministry of Internal Affairs, especially that later, when he became a judge in 2016, The complainant began to declare all bank accounts and financial interests in accordance with the legislation in force, should be taken into account.

At the same time, during the examination of the case, the representative of the Evaluation Commission argued that not the failure to declare the bank account raised doubts of the Commission, but the operations in this bank account, incoming, outgoing operations, this being an active bank account.

Moreover, in the contested decision, the Evaluation Commission indicated that serious doubts may arise with bank accounts if they are not declared, where they involve considerable activity, referring in this regard to the fact that between 2012 and 2015, 27 transfers were made to the account, the amount of funds transferred each year being substantial, but the Evaluation Commission did not mention what the serious doubts consisted of, given that the amounts were transferred through banking institutions by parents to their son, who was the only family member in the country. Accordingly, the applicant's position that the amounts received were used for family interests, including for the applicant's studies, will be noted.

Moreover, the special panel of judges holds, according to art. 22 para. (2) of the Administrative Code, as a notorious fact and national cultural element that parents help their children and children, in turn, help their parents. This is

an expression of the principle of solidarity between family members, deeply rooted in national tradition and culture. The elements of tradition and culture define the political-legal concept of people (nation) as an element of the state and, consequently, national sovereignty of which the people are the holder.

The special panel emphasizes that the failure of the state to honour its constitutional duty to ensure that every person has a decent standard of living which ensures their health and well-being, including food, clothing, housing, medical care, and necessary social services, does not exclude the possibility of economic, financial and material solidarity between people based on family, friendship and similar relationships.

Also, the Evaluation Commission pointed out in its decision that, in the 2014 declaration of assets and interests, the candidate declared, as deposit, the amount of 30,667 euros out of the amount of 74,660 EUR.

The observance of the legal regime of the declaration of assets and personal interests by the subjects of the declaration, including judges, aims to prevent unjustified and illicit enrichment and to avoid conflicts of interest in their activity, as well as to be held accountable for such acts.

As a result, even if, under the law, failure to declare the bank account constitutes a formal violation of the legal regime, it cannot be considered as a serious doubt that would lead to the candidate's disqualification, given that the source of income from which transfers were made through this bank account was also confirmed/justified.

Pursuant to Art. 10 para. (9) of Law no. 26/2022, the Evaluation Commission appreciates the materials accumulated according to its intimate conviction, formed as a result of multiaspectual, complete and objective research of the information. None of the submitted materials has a predetermined probative force without its assessment by the Evaluation Commission.

Thus, the Evaluation Commission had to investigate multiaspectually, completely and objectively the information accumulated regarding the candidate Ion Chirtoaca and to base serious doubts only pertinent direct evidence, but not abstract hypotheses and disconnected from the socio-economic context of the Republic of Moldova. However, in the case, the Evaluation Commission did not accept evidence such as the candidate's explanations, the documents submitted by him to support his position, as well as the availability of the applicant's parents to be heard in the evaluation process.

Thus, the special panel finds that these circumstances effectively remove any serious doubt as to the source of funds, and the information, explanations presented by the candidate allowed the Evaluation Commission as a result of multifaceted and objective research to remove suspicions about the integrity of the candidate.

The special panel points out, as a jurisprudential principle, that the text of

"serious doubts" in Article 13 para. (5) of Law no. 26/2022 establishes a derogation from the standard of proof stipulated in art. 93 of the Administrative Code, this very article paves the way for such a derogation, including under the conditions of Art. 2 para. (2) of the Administrative Code.

At the same time, the wording of 'serious doubt' is not compatible with formalism and subjectivity from the defendant. This standard depends on the outcome of the evaluation of the evidence so that a factual circumstance with a high level of probability other than the standard beyond doubt can be considered established. Thus, if the candidate subject to evaluation presents arguments and logical explanations to the Evaluation Commission, truthful of the socio-economic context of the Republic of Moldova, then the probability that a fact happened in one way or another balances, and any doubt must be treated in favor of the candidate, and this is a principle rooted in the idea of the rule of law. Moreover, starting from the essence of the principle of equality and non-discrimination, which implies equal treatment of persons in similar situations, and any difference in treatment must be objectively justified, which was essentially ignored by the Evaluation Commission, the Special Panel notes that the defendant applied double standards. In the case of another candidate judge who passed the assessment, on the issue of non-declaration of bank accounts, the Evaluation Commission concluded that: 'it found no advantage for the candidate not to declare the two bank accounts ...'. Similarly, in the case of another candidate-judge who passed the evaluation, the Evaluation Commission also concluded that: "No suspicious transactions took place in any of the three accounts. The Commission also takes into account that the applicant acknowledged that failure to declare these bank accounts was an omission from him and a breach of law. Moreover, the Commission found no benefit to the applicant from the non-disclosure of this bank account [...]. Although bank accounts should have been disclosed, the candidate's failure to do so in these circumstances does not cast serious doubt on the candidate's financial integrity."

However, in the case of candidate Ion Chirtoaca, the Evaluation Commission did not examine from the perspective of advantages or benefits that Ion Chirtoaca would have had by not declaring his bank account while working in the Ministry of Internal Affairs, especially that he didn't even hold the position of judge.

Although the Evaluation Commission was obliged to deal with identical situations identically, the defendant exercised its discretion differently.

Pursuant to Art. 137 para. (3), (4) of the Administrative Code, essentially identical facts are treated identically. A non-identical treatment of two identical facts is permissible only if there is an objective reason. If in one case the public authority has exercised its discretionary right in a certain way, then in similar cases it is obliged to exercise its discretionary right in the same way. This rule does not apply if the public authority intends to change its practice of exercising discretion in similar cases in the future.

**With reference to the purchase of an apartment at a preferential price - eligibility and improvement of living conditions.**

With regard to the finding of the Evaluation Commission on the existence of serious doubts regarding the candidate's compliance with the criterion of ethical integrity pursuant to Article 8 paragraph (2) letter a) of Law no. 26/2022, in connection with the method of acquiring the apartment of 68,4 sqm, at a preferential price in 2022, the special panel reiterates that the Evaluation Commission held that, essentially, the candidate omitted important information in his application, which was an integral part of the selection process, about the ownership of the 38.4 sqm apartment, conduct which, in the view of the Evaluation Commission, is likely to affect the integrity of the applicant and is sufficiently serious to raise public doubts as to the irreproachability of the applicant's conduct.

In this context, the applicant's allegations brought in this chapter that his request of 21 June 2017, addressed to the Superior Council of Magistracy, to the Commission created within it, according to the Regulation for the selection of applicants included in the list of employees in the judicial system who need to improve the living conditions, approved by Decision no. Law no. 3 of September 6, 2013, in force on the date of filing the application, aimed at improving living conditions, which presupposes the existence of a real estate property, as well as the existence at the Superior Council of Magistracy of two declarations of assets and interests, reflecting the immovable property owned.

In this context, the Special Court Panel provides that, under item 4 letter a) of the mentioned Regulation, judges of the courts of Chisinau have the status of applicants under the terms of this Regulation, who do not have housing space or have insufficient housing space, within Chisinau, and the phrase "in order to improve living conditions" in the applicant's application to the Superior Council of Magistracy, denotes the existence of a dwelling space, but conditions are to be improved.

At the same time, the Special Court Panel points out that the applicant sold the apartment with an area of 38,4 sq.m., and the money obtained from this transaction was invested in the apartment purchased at a preferential price with an area of 68,4 sq.m.. Moreover, a point supported by the defendant as well.

Moreover, the Evaluation Commission in its decision, as well as its representative, at the court hearing, reiterated the position of the Evaluation Commission in the decision, according to which: "The Commission has no reason to doubt that the candidate, who owned a smaller apartment and intended To create a family - which he has created in 2022 - was to benefit from a larger apartment. Nor are there any indications that the candidate, who currently lives in his parents' apartment bought in 2015, does not intend to live in the preferentially priced apartment when it is completed."

The allegation of the representative of the Evaluation Commission that the

applicant was celibate at the time of submission of the application and raised doubts as to whether he would have been granted an apartment at a preferential price if he had fully declared the relevant information to the Commission which verified the eligibility of candidates for that programme cannot be accepted.

Although amendments to the Regulation for the selection of applicants included in the list of employees in the judicial system who need to improve living conditions, were made by the SCM decision no. 5/4 of December 12, 2017, which provided for one of the conditions, the lack of housing space in Chisinau municipality, however, when the applicant submitted the application, on 21 June 2017, the provisions of the Regulation for the selection of applicants included in the list of employees in the judicial system requiring improvement of living conditions, approved by Decision no. 3 of 06 September 2013, were in force.

The special panel reiterates that, although, under Art. 8 para. (6) of Law no. 26/2022, in assessing the criteria set out in para. (2) – (5) and in making decisions on them, the Evaluation Commission does not depend on the findings of other bodies competent in the respective field, but it is important that the Evaluation Commission in its findings, when assessing certain circumstances, takes into account the legal provisions in force.

The normative framework indicated by the Evaluation Commission on the aspect of compliance of the ethical integrity criterion regarding the purchase of an apartment at a preferential price – eligibility and improvement of living conditions, profiles the provisions of art. 5 of the 2015 Code of Ethics and Professional Conduct of the Judge:

(1) The judge shall observe the highest standards of integrity and accountability, in order to ensure society's confidence in the courts. He/she is aware of the risks of corruption and will not admit or create the appearance of corrupt behavior in his/her activity; he/she will not request, accept or receive gifts, favors or benefits for fulfilling or failing to fulfill his/her functional duties or by virtue of his/her position. (5) The judge shall conclude transactions concerning personal property in a manner that does not cause doubt, or affect his/her independence and impartiality or cause conflicts of interest.

Similarly, the Evaluation Commission mentioned Article 6 para. (2) of the same Code, which provides that the judge must refrain from any conduct, action or manifestation that could prejudice public confidence in the judicial system, as well as referred to the Bangalore Principles of Judicial Conduct 2002, according to which 'The judge shall ensure that in the eyes of a reasonable observer his conduct is beyond reproach' (Principle 3.1) and 'The attitude and conduct of a judge shall reaffirm public confidence in the integrity of the judiciary. Justice must not only be done, it must be seen that justice has been done.' (Principle 3.2)

The special panel notes that deontological behavior is determined by contemporary realities of democratic societies.

The judge's Code of Ethics provides addressees with rules on conduct in certain concrete situations, to help them perform their functions in the institution, but also outside the exercise of their duties, in order to contribute to maintaining public confidence in the justice system. These rules supplement the legal obligations of professionals and are intended to increase their responsibility in the exercise of their function.

In this regard, the reasoning of the Constitutional Court is indispensable, reflected in point (b). 120 of Decision No 120. 42 of 06 April 2023, where it was found that, through the text "serious", the legislator limited the discretion of the Evaluation Commission to assessing the ethical integrity of candidates. The criterion allows the Evaluation Commission to decide not to promote the candidate only if it has found serious breaches of the rules of ethics and professional conduct. This implies that the candidate may question the seriousness of the infringements found by the Evaluation Commission in front of the special panel of judges set up within the Supreme Court of Justice, which can finally assess the 'serious' nature of the irregularity found in the light of the particular circumstances of the case.

On another note, according to art. 1 para. (1) of the Law on Housing no. 75 of 30 April 2015, the right to housing constitutes a fundamental right, which is part of the right to decent life of the person or family.

In this context, it should be noted that Ion Chirtoaca requested the improvement of living conditions, taking into account the program implemented by the Superior Council of Magistracy to improve the living conditions of employees of the judiciary, registering in this regard a request on June 21, 2017, to benefit from an apartment at a preferential price, being formed a commission that decided on the conditions eligibility.

Thus, it is the legal obligation of the state to contribute to the protection and realization of the fundamental rights of its own citizens.

At the same time, for the purposes of art. 16 para. (2) of the Constitution of the Republic of Moldova, all citizens of the Republic of Moldova are equal before the law and public authorities, without distinction of race, nationality, ethnic origin, language, religion, sex, opinion, political affiliation, wealth or social origin.

Moreover, the principle of equality prohibits treating essentially the same things unequally, but it obviously sees this formulation as synonymous with the usual formula, according to which the principle of equality is violated if it is reasonable, resulting from the nature that no objectively plausible problem or reason can be found for legal differentiation or equality of treatment. Thus, the facts of the case also show from this perspective circumstances that would have led to the favorable evaluation of the candidate and, consequently, to the illegality of the contested decision, contrary to the provisions of art. 23 of the Administrative Code.

The special panel notes that, in the case of another candidate-judge who

passed the evaluation, the Commission, in essence, recognizing the candidate's eligibility for enrolment in the program for improvement of living conditions and to benefit from apartments at preferential prices, accepted the candidate's arguments that, when submitting the application for improvement of conditions The Superior Council of Magistracy knew about the fact that he owned a house in another city, but not in the case of Ion Chirtoaca, being found that he did not meet the criterion of ethical integrity, given the submission of his application in June 2017 for the improvement of living conditions, based on the same program, in the situation in which he had a dwelling space of only 38,4 sq.m., although this circumstance was reflected in the declarations of interests and assets existing at the Superior Council of Magistracy.

Similarly, in the case of another candidate-judge, who passed the evaluation, this aspect was not even verified, although he also benefited from an apartment at a preferential price, appearing as the owner of another real estate.

In this context, the applicant's arguments that the Evaluation Commission ignored the provisions of Article 5 para. (2) of the Evaluation Regulation of the Independent Commission for assessing the Integrity of Candidates for the Position of Member of the Self-Administration Bodies of Judges and Prosecutors, pursuant to Law no. 26/2022, although the Evaluation Commission cites these provisions, but does not motivate why the retained violations allow the Commission to decide not to promote the candidate for violations of the rules of ethics and professional conduct of high seriousness.

Moreover, under Article 8 para. (2)(a) of Law No 26/2022, the candidate shall be deemed to meet the criterion of ethical integrity if he/she has not seriously violated the rules of ethics and professional conduct of judges, prosecutors or, where applicable, other professions, and has not committed, in his/her activity, any wrongful actions or inactions, which would be inexplicable from the point of view of a legal professional and an impartial observer.

The special panel points out that the so-called violations of financial and ethical integrity were assessed by the Commission in isolation from the socio-economic context of the Republic of Moldova, which affects the security of legal relations regarding candidate Ion Chirtoaca. In general, the legal system allows the retroactive effect of law if it favours the legal position of the person, but this effect cannot be projected by way of legal interpretation unfavourable to the person.

Moreover, submitting the application to run also implies the voluntary agreement to undergo integrity assessment, as well as the candidate's conviction that he has complied with the integrity criteria during this period, based precisely on the reasons of legal certainty and the social context in which he lived and related to the public authorities. Thus, the circumstances retained by the Evaluation Commission, are not considered by the Panel of Judges as a genuine violation of ethical and financial integrity, because otherwise the rule of protecting legitimate expectations in the activity of the authorities would defeat

public authorities of the state, which had tasks and powers to react, but also the principle of legal certainty in all its complexity.

The interference with subjective rights is not contrary to the rule of law, but it must be proportionate. It should be underlined that the principle of proportionality requires that any impairment of rights by a measure taken by public authorities must serve a legitimate aim, be appropriate, necessary and reasonable as a means to that end. Any measure taken affecting the rights or freedoms laid down by law must comply with the principle of proportionality.

Taking into account the aforementioned circumstances, the Special Panel concludes that the decision issued by the Pre-Vetting Commission contrary to Article 21 of the Administrative Code does not meet the requirements of procedural and substantive legality and that the found circumstances reveal the candidate's right to a favorable evaluation decision from this point of view.

The Special Panel highlights that the terms "seriously", "wrongful", and "inexplicable" from Article 8 para. (2)(a) of Law No 26/2022 are, in their nature, undefined legal notions (vague legal notions) that do not grant discretion to the Pre-Vetting Commission, but rather oblige it to conduct a complex and rigorous interpretation of the provision in the context of serious violations of rules of ethics and professional conduct, while in this case, the Commission noted essentially virtually that the candidate's actions could be considered negligent conduct.

In the same vein, the Special Panel points out that, by virtue of its constitutional function of justice, the court has final jurisdiction to interpret a vague legal concept in a specific case.

Thus, the violations found by the Evaluation Commission do not satisfy the criterion that would allow it to decide not to promote the candidate for violations of the rules of ethics and professional conduct of high seriousness.

The Special Panel finds that the Pre-Vetting Commission did not analyze and reason the legitimate purpose of the issued decision. The preamble of Law No 26/2022 provides that the purpose of the Law is to increase the integrity of future members of the Superior Council of Magistracy and its specialized bodies, as well as the society's trust in the activity of the self-administration bodies of judges and overall in the justice system.

It is not apparent from the contested decision and the acts produced by the defendant which of those aims are pursued by the decision not to promote the assessment. Any of these purposes would be legitimate, but none of them is analyzed, and at the hearing, the defendant's representatives did not provide a plausible answer to this question.

However, it is worth mentioning that the Commission is fundamentally free to choose its legitimate goal or goals, but this has to result from the content of the decision and be confirmed by the administrative case file documents.

According to Article 29 para. (2)(a) of the Administrative Code, a measure is proportionate if it is suitable for achieving the established purpose based on



the powers laid down in the law. Therefore, the exclusion, not just limitation of the right to be elected as a member of the bodies listed in Law No 26/2022 for the minor acts held by the Pre-Vetting Commission is in no way an adequate measure for the fulfilment of the purposes laid down in the law. Given the urgent issue of proper operation of the judicial self-administration bodies at the moment when the decision was issued, not evaluating the candidate [translator's note: they probably mean failing] does not only fail to fit the reasons of not passing the evaluation, but it is also an unnecessary, thus groundless, violation of the plaintiff's rights.

At the same time, according to Article 29 para. (2)(b) of the Administrative Code, a measure is proportionate if it is necessary for achieving the established purpose. This element of proportionality means that the official measure must be the mildest means of reaching the regulatory purpose. The Pre-Vetting Commission did not carry out such an analysis in relation to this case. Thus, the Pre-Vetting Commission failed to analyze the regulatory alternatives of the individual case, which would have achieved the regulatory purpose in the same way. The disadvantages that other regulatory options have must be considered and are characterized as being a milder means. A milder means for the achievement of the desired purpose would have been the participation of the candidate in the election for membership in the Superior Council of Magistracy while making public some of the minor issues that were found and which are part of the social reality of the Republic of Moldova, also based on the constant amendment of the domestic legislation.

According to Article 29 para. (2)(c)-(3) of the Administrative Code, a measure undertaken by public authorities is deemed proportionate if it is reasonable. A measure undertaken by public authorities is reasonable if the interference it causes is not disproportionate compared to its purpose. This requirement involves a balancing of the legally protected values. The more damage is caused to a right, the more it is required for the advantage resulting from the interference to be superior. Note that excluding the right of a judge to be a candidate for membership in the Superior Council of Magistracy involves not just an interference, but rather an improper annulment of the right to be elected into this position. Such a solution cannot be accepted under the rule of law, as it is incompatible with the dignity of a human being and of a judge. The goal of trust in the justice system can be achieved by complex means, but in no way can it be done by reducing to nothing the idea of free, transparent, and competitive election for the membership of the Superior Council of Magistracy and its bodies. The judge, holding such a position, is presumed to have integrity and, should the opposite be proven, than he/she shall be dismissed from the judiciary by means of a disciplinary procedure or another procedure that would take into account the guarantees of his/her independence. The special panel notes that the purpose of Law No. 26/2022 is, among other things, to increase confidence in justice, but not to transform justice into an inefficient branch of

state power, over which interferences/dependencies on political power would hang.

Thus, the exclusion and not only the limitation of the right of candidate Ion Chirtoaca to participate and be elected as a member of the Superior Council of Magistracy for minor acts retained by the Evaluation Commission is not an appropriate measure to achieve the goals set out in the law, but not materialized in the contested decision. Given the problem of the proper functioning of the judicial self-administration bodies at the time of issuing the decision and the failure to promote the candidate for minor acts, not only does not fall within the grounds for non-promotion, but it constitutes an unnecessary and illegal violation of the stated rights.

The special panel states that the measure taken by the defendant public authority is reasonable if the interference caused by it is not disproportionate to the aim pursued. This requirement of the legislator implies a balancing of legally protected values, a weighting of the interests at stake. The more the right is harmed, the more the advantage over integrity is required to be superior.

Therefore, the exclusion of the judge's right to be a candidate for the position of member of the Superior Council of Magistracy entails not only interference, but an improper annulment of the right to be elected to that office. Such a solution cannot be accepted in a state governed by the rule of law, as it is incompatible with human dignity and that of judge.

To conclude on this legality aspect, the Special Panel finds that the decision of the Pre-Vetting Commission is also contrary to the proportionality principle.

With respect to the plaintiff's argument that the Pre-Vetting Commission made severe procedural errors during the evaluation procedure in terms of violating the language of the evaluation process, expressed in lack of translation to English of documents and statements submitted by the candidate at the stage when Commission members were collecting and checking data, given that the Commission members Herman von Hebel, Victoria Henley, Nona Tsotsoria, who are English speakers and for whom the Commission Secretariat did not ensure a translation to English, the Special Panel holds the following.

As per Article 10 para. (9) of Law No 26/2022, the Commission shall assess the gathered materials using its own judgement, formed as a result of multi-faceted, comprehensive and objective review of the information. None of the submitted materials has a predetermined probative value without being assessed by the Commission.

This provision leads to the rule of direct research of evidence, freedom of evidence and direct assessment of evidence by the Commission members.

The Special Panel finds that the plaintiff's representatives in the court hearing confirmed that there was no written translation of documents into the language known by the foreign member of the Pre-Vetting Commission, designated by the development partners, which contradicts Article 10(9) of Law

No 26/2022, as well as Article 22 and Article 92 of the Administrative Code.

In the same context, the Special Panel finds that the Commission failed to ensure candidate's right to have effective access to the content of the administrative case file, which gives the candidate the right to become familiar with and make copies of any document and information related to him/her as a participant in an assessment administrative procedure. Obstructing the access to the administrative case file led to violation of another guarantee, i.e. the candidate's right to defense before the Pre-Vetting Commission.

In this respect, the Special Panel emphasizes that, according to Article 82 of the Administrative Code, (1) if the administrative procedure is to be carried out in writing as per Article 28 or is carried out in writing, the public authority, when starting the procedure, shall create a digital or hard copy folder that would include all documents and records regarding the said procedure. The digital folder shall include, as appropriate, scanned copies of paper-based documents and the authenticity of these copies shall be confirmed by the electronic signature applied by the responsible person within that public authority, electronic documents, other relevant records and information in digital format. (1<sup>1</sup>) Scanned digital copies of official documents issued on paper and digital records on which the electronic signature was not applied are used without restriction in the relationship with the public authority and may be included in the administrative case file, unless the regulatory acts require expressly the signature to be applied on these copies/records or the observance of requirements towards electronic documents. (2) When included in the file, a document is referenced with continuous page numbers. (3) Should documents be retrieved from the file for a certain period, a mention shall be made in this respect, which must include: a) name of the retrieved document; b) number of retrieved pages; c) reason for retrieving the document; d) name of the person that ordered the retrieval of the document; e) date when the document is retrieved. This mention shall be included in the file instead of the retrieved document. (4) Administrative case files shall be kept until the expiry of their term of storage, which results from the applicable legal provisions in force.

In line with Article 83 of the Administrative Code, (1) the public authority holding the administrative procedure shall grant, to the participants, access to the administrative case file. (2) Participants shall not have access to draft individual administrative acts before the completion of the procedure. (3) No access to the administrative case file is allowed if that would affect the appropriate performance of duties by the public authority or if it is necessary to maintain a secret protected by law or if it is necessary to protect the rights of participants to the administrative procedure or of third parties. (4) Should it be justified, the public authority holding the administrative procedure may also allow, upon request, access to the file on the premises of another public authority or a diplomatic or consular mission of the Republic of Moldova overseas. (5) When accessing the case file, participants are allowed to take notes or make

copies of the file. The cost of copies shall be incurred by every participant individually, which is 0.02 conventional units per page. Electronic copies of the case file, as well as electronic documents and copies thereof shall be provided free of charge.

Furthermore, the Special Panel notes that the Pre-Vetting Commission had the obligation to submit to the court, as per Articles 221 and 82 of the Administrative Code, the entire administrative case file of candidate Ion Chirtoaca, so that the court could fulfil its constitutional task of effective judicial review of factual and legal matters.

Similarly, the special provisions under Article 10 para. (5) and Article 12 para. (4)(c) of Law No 26/2022 and Article 2 para. (1)(g) of the Evaluation Rules pursuant to Law No 26/2022, adopted at the meeting of the Pre-Vetting Commission of 2 May 2022, guarantee the candidate's right to access the materials gathered by the Pre-Vetting Commission and its Secretariat for the purpose of candidate's evaluation.

During the examination of the present administrative case, the defendant's representatives admitted that not all the materials administered by the Evaluation Commission were attached and sent to the candidate Ion Chirtoaca and the administrative file of candidate Ion Chirtoaca, but only the documents that the Evaluation Commission considered, in its opinion, relevant.

These circumstances prove that the Pre-Vetting Commission violated candidate Ion Chirtoaca's right to defense, as it did not ensure her access to the administrative case file, which is supposed to include all materials gathered by the Pre-Vetting Commission, with at least 3 days before the hearing, in line with Article 82 and 83 of the Administrative Code, in corroboration with Article 10 para. (5), 12 para. (4)(c) of Law No 26/2022 and Article 2 para. (1)(g) of the Evaluation Rules under Law No 26/2022.

Therefore, the Pre-Vetting Commission did not exercise entirely its competence to investigate the situation of its own motion, which is provided for by Article 6 para. (f) of Law No 26/2022, which stipulates that in order to exercise its powers, the Pre-Vetting Commission shall request information from individuals or legal entities of public or private law, and gather any information relevant to the fulfilment of its mandate.

Therefore, the legislator has given the Pre-Vetting Commission a wide range of tools and levers to gather all the necessary information. Therefore, failure to fulfil the obligation to inquire of its own motion led to the Commission passing an erroneous decision and, respectively, violation of the candidate's right to defense.

Moreover, the inclusion of an element in the category of relevant documents must be accompanied by the necessary guarantees for respect for fundamental rights and freedoms, and in the absence of a clear and coherent legislative framework on the given issue, the right to a fair trial, guaranteed by Article 6 § 1 ECHR, is violated, since the lack of clarity and The predictability

of the incident normative framework in the field of challenging the legality resulting from the activities specific to the collection of information, determines, in fact, the performance of a formal and ineffective control, which consequently leads to the violation of the fundamental rights and freedoms of the applicant.

The Special Panel holds that the established circumstances reveal a violation of the guarantees of the administrative assessment procedure, such as the right to a full examination of the facts, the right to a reasoned and impartial decision, the right to an effective hearing, the right of access to the administrative file, the right to be effectively involved in the assessment procedure, the right to effective cooperation in clarifying the facts and the right to a decision without discretionary errors in the assessment of the evidence.

The special panel considers that, also taking into account the applicant's position in this regard, although the decision of the Evaluation Commission on not passing the evaluation does not prevent the candidate from continuing his activity as a judge, or in another position in the field of law previously held, it may affect the candidate's professional reputation – protected by the right to privacy, since it contains findings on the candidate's lack of ethical and financial integrity (*Denisov v. Ukraine* [MC], 25 September 2018, §§ 107-109 and 115-116).

The European Court of Human Rights, in *Özpinar v. Turkey* (judgment of 19 October 2010, §§ 45, 46, 48), held that Article 8 thus guarantees "private life" in the broad sense of the expression, by which is meant the right to have a "private social life", i.e. the possibility of the individual to develop his social identity. In this respect, that right enshrines the possibility of reaching out to others in order to establish and develop relationships with others (see, to that effect, *Campagnano v. Italy*, no. 77955/01, paragraph 53, ECHR 2006-V, and *Bigaeva v. Greece*, no. 26713/05, paragraph 22, 28 May 2009).

The European Court reaffirmed that there is no reason in principle to consider that "private life" excludes professional activities. Some restrictions imposed on professional life may conflict with Article 8 when they have repercussions in the way in which the individual creates his social identity by developing relationships with his peers. It is necessary to note at this point that, it is precisely in the professional activity that most people carry out that opportunities arise most often to reconnect with the outside world (*Niemetz*, mentioned above, paragraph 29).

In those circumstances, the European Court is of the opinion that the inquiry into the applicant's professional and private life, conducted by the inspector, during which the witnesses were questioned about various aspects of the applicant's life, and the administrative dismissal resulting from that investigation, motivated principally by conclusions drawn from the actions may be regarded as interferences with his right to respect for private life (see, *mutatis mutandis*, *Vogt*, cited above, paragraph 44, and *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, paragraph 71, ECHR 1999-VI.)

The special panel finds that only these isolated breaches of guarantees in the administrative procedure constitute serious procedural errors, which affected the fairness of the administrative evaluation procedure and, consequently, the existence of procedural circumstances, which would have led to the promotion of the evaluation by the candidate.

The special panel notes that the State has empowered the Evaluation Commission with the prerogative to be guided by certain standards in order to select the most upright candidates for the position of members, *inter alia* of the Superior Council of Magistracy, which, in turn, could ensure the correctness of the functioning of the judicial system as a whole, including by applying coherent policies and in line with generally accepted standards.

The special panel notes that the applicant has demonstrated the plausibility of the elements put forward in his application, as well as compliance with the rules of ethics and deontology, including the consistency of its actions in the circumstances of the present case.

The special panel notes that the circumstances found show a right of the applicant to a different decision from the Evaluation Commission than the contested one, as they are likely to lead to the promotion of the evaluation by the candidate Ion Chirtoaca.

At the same time, the Special Panel notes that the Venice Commission recommended that the final decision on the assessment be taken by the competent court, however the Parliament of the Republic of Moldova opted for a different policy of law on this subject. Despite that, the Special Panel highlights that, for the reason of effective protection of the rights, it has the right and the obligation to conduct a full judicial legality review of the factual and legal matters.

Even though the Special Panel of the Supreme Court of Justice is limited in adopting a final decision, still its arguments, conclusions and findings are mandatory and enforceable for the Pre-Vetting Commission. This conclusion results directly from Article 120 of the Constitution of the Republic of Moldova, which regulates the mandatory nature of the final sentences and other judicial decisions.

The Special Panel also relies its argument on the case-law of the Constitutional Court, which stated that, even though the Special Panel of Judges of the Supreme Court of Justice cannot oblige the Pre-Vetting Commission to pass the evaluated candidate, the arguments and conclusions made by this court when examining the appeals stay mandatory for the Commission (DCC No 42 of 6 April 2023 §143).

The Special Panel notes that, for reasons of effective judicial review, as well as of the quality of the law, the Commission is not obliged, after it is ruled to resume the evaluation procedure, to inquire other circumstances than the ones underlying the acceptance of the plaintiff's appeal. Thus, evaluation after resumption of procedure should not transform into a vicious circular argument

and activity, which is contrary to the standard of effective protection of rights, legal certainty, and mandatory effect of the final judicial decisions.

The Special Panel notes that the circumstances held by the Pre-Vetting Commission do not fit, from a proportionality perspective, the reasons of candidate Ion Chirtoaca failing the evaluation.

Therefore, the exclusion, not just limitation, of candidate Ion Chirtoaca's right to take part and be elected as a member of the Superior Council of Magistracy for the minor acts held by the Pre-Vetting Commission is in no way an adequate measure for the fulfilment of the purposes laid down in the law. Given the issue of proper operation of the judicial self-administration bodies at the moment when the decision was issued and failing the candidate for minor acts, that does not only fail to fit the reasons of not passing the evaluation, but it is also a violation of the mentioned rights.

The Special Panel reiterates that the measure undertaken by the defendant public authority is reasonable only if the interference caused by it is not disproportionate in relation to its purpose. This requirement of the legislator involves a balancing of values protected by law, a weighing of the interests at stake. The bigger the damage caused to the right, the more it is required for the advantage resulting from integrity to be superior.

Therefore, excluding the right of a judge to be a candidate for membership in the Superior Council of Magistracy involves not just an interference, but also rather an improper annulment of the right to be elected into this position.

Taking into account the aforementioned, the Special Panel finds that in this case there are legal grounds for annulling the decision of the Independent Evaluation Commission for assessing the integrity of the candidates for the position of member in the self-governing bodies of judges and prosecutors No. 19 of 20 January 2023 regarding the candidacy of Ion Chirtoaca.

The Special Panel holds that illegality of the appealed decision leads to the annulment of the decision and ruling of a re-evaluation of the candidate. Ruling a re-evaluation is the final and implicit results that includes a loss of validity for the decision, as per Article 139 para. (1) and (2) of the Administrative Code (see DCC No 42 of 6 April 2023 § 143; Ramos Nunes de Carvalho e Sá v. Portugal [MC], 6 November 2018, §184 and the case-law quoted therein).

In line with Article 224 para. (1)(b) and Article 195 of the Administrative Code, Articles 238-241 of the Civil Procedure Code, Article 14 para. (6), (8)(b), (9) of the Law on measures related to the selection of candidates for the positions of members in the self-administration bodies of judges and prosecutors No 26 of 10 March 2022, the Special Panel established within the Supreme Court of Justice to examine the appeals against the decisions issued by the Independent Evaluation Commission for assessing the integrity of the candidates for the position of member in the self-governing bodies of judges and prosecutors

**d e c i d e s :**

To accept the administrative lawsuit application filed by Judge Ion Chirtoaca against the Independent Evaluation Commission for assessing the integrity of the candidates for the position of member in the self-governing bodies of judges and prosecutors regarding the annulment of Decision No. 19 of 20 January 2023 regarding the candidacy of Ion Chirtoaca, candidate for the Superior Council of Magistracy, and to order the resumption of candidate evaluation procedure.

To annul the Decision No. 19 of 20 January 2023 regarding the candidacy of Ion Chirtoaca, candidate for the Superior Council of Magistracy.

To order the re-evaluation of candidate Ion Chirtoaca by the Independent Evaluation Commission for assessing the integrity of the candidates for the position of member in the self-governing bodies of judges and prosecutors.

This decision is irrevocable.

Chairman of the sitting,  
Judge  
Doneva

Tamara Chisca-

Judges

Mariana Pitic

Ion Guzun