

Case file No 3-25/23
2-23082817-01-3-09062023

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

SUPREME COURT OF
JUSTICE

01 august 2023

Chişinău

The Special Panel of Judges, established within the Supreme Court of Justice to consider 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

consisting of:

Hearing Chairperson, Judge
Judges

Tamara Chişca-Doneva
Mariana Pitic
Ion Guzun

Clerk

Oxana Gîscă

with the participation of:

Plaintiff
the plaintiff's representative, counsel
Zama the defendant's representatives, counsels
Gladei

Vitalie Codreanu
Vitalie
Roger

Valeriu Cernei

having examined in a public court session the administrative proceeding action of Vitalie Codreanu against 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 cancel the Decision No 33 of 15 May 2023 on the candidacy of Vitalie Codreanu, ordering the resumption of the candidate evaluation procedure,

i t e s t a b l i s h e d :

The arguments of the participants in the proceedings:

On 9 June 2023, Vitalie Codreanu, represented by counsel Vitalie Zama, filed an appeal against the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors (hereinafter referred to as the Pre-Vetting Commission), requesting that the appeal be accepted for examination, that the Commission's Decision No 33 of 15 May 2023 be annulled, that the procedure for the evaluation of Vitalie Codreanu's candidacy be resumed and that an individual favorable administrative act be issued.

In the grounds of appeal, Vitalie Codreanu noted that, as a prosecutor, he had submitted his application file to compete for election to the Superior Council of Prosecutors.

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 (hereinafter referred to as Law No 26/2022) introduced new provisions concerning the mandatory stage of the process of selecting candidates and electing or appointing them to office.

By the decision of the Pre-Vetting Commission No 33 of 15 May 2023 on the candidacy of Vitalie Codreanu, it was decided that the candidate does not meet the integrity criteria as serious doubts were found as to the candidate's compliance with the ethical and financial integrity criteria and thus fails the evaluation.

The plaintiff submits that the decision of the Pre-Vetting Commission is erroneous, unfounded, unlawful and, therefore, null and void.

The plaintiff, referring to the provisions of Article 137 of the Administrative Code, pointed out that Law No 26/2022 uses only in Article 13(5) the expression 'serious doubts' regarding the candidate's compliance with the requirements of Article 8, which have not been resolved by the evaluated person. The law does not define the substance of this concept, which is new for the national legal system. Therefore, the Commission has a wide margin of appraisal of the factual situations which it can classify in its decisions as 'serious doubts' regarding the integrity criteria of a candidate.

However, the plaintiff is of the view that the Commission's margin of appraisal cannot be absolute, and it is limited by Articles 16 and 137(1) of the Administrative

Code, that provide imperatively that the discretion or margin of appraisal of the authorities cannot be arbitrary and is to be exercised in good faith.

Thus, other decisions taken by the Pre-Vetting Commission in relation to other candidates noted financial aspects that may have been questionable, for example: 1) failure to declare a loan; 2) failure to declare two bank accounts as required by law; 3) failure to declare the correct price in the sale of three plots of land; 4) receipt of an amount other than the value of the contract; and 5) failure to provide evidence of the parents' legitimate receipt of income from abroad. Strangely enough, the Commission did not have serious doubts about any aspect of the candidate's ethical integrity under Article 8(1) and (2) of Law 26/2022.

Therefore, being obliged to treat identical situations (failure to declare) in the same way, the Pre-Vetting Commission exercised its discretion differently, thus violating Article 137 of the Administrative Code.

Regarding the excessive statute of limitations, the plaintiff noted that Article 8(2)(a) of Law No 26/2022 does not provide for any time limit within which a candidate's acts may be deemed non-compliant, thus allowing the Pre-Vetting Commission to consider prior issues without any time limitation.

The complainant submits that the European Court of Human Rights found in *XHOXHAJ v. Albania* No 15227/19 that the absence of a time limit and emphasis on facts of the distant past (7-8 years) indicate a violation of the security of legal relations.

And in *Oleksandr Volkov v. Ukraine*, the Strasbourg Court held that in the plaintiff's case the facts considered by the Superior Council of Magistracy in 2010 related to the years 2003-2006 (§§ 17, 18). The plaintiff found himself in a difficult situation because he had to build his defense in a way that took into account distant past occurrences. It follows from the High Court's judgment that national law does not provide for any statute of limitations for the removal of a judge for 'breach of oath'. Although the ECtHR does not consider it necessary to specify what the duration of the prescriptive period should be, it considers that such a limited approach to disciplinary measures against members of the judiciary seriously jeopardizes the security of legal relations. In these circumstances, the ECtHR found that there had been a violation of Article 6(1) of the European Convention on Human Rights in this respect.

In this case, the Pre-Vetting Commission focused and based its decision on some alleged acts that occurred 10 years ago.

The plaintiff alleged a violation of the right to respect for private life, pointing out that the contested decision of the Pre-Vetting Commission had affected a number of personal and professional relationships – an interference that does not meet the requirements of legality, legitimate aim and proportionality. According to the case-law of the ECtHR, the dismissal or failure to promote a person to an administrative position constitutes an interference with that person's exercise of the right to respect for private life within the meaning of Article 8 of the Convention, namely from the perspective that private life includes the individual's right to establish and develop relations with other persons, including relations of a professional or business nature (see *Volkov v. Ukraine*, No 21722/11, paras. 165-167, 9 January 2013; *Ozpinar v. Turkey*, No 20999/04, paras. 43-48, 19 October 2010; *C. v. Belgium*, 7 August 1996, para. 25, Reports 1996-111).

As regards the insufficiency of judicial review, the plaintiff, referring to the reasoning of the Strasbourg Court in the case of *Oleksandr Volkov v. Ukraine*, noted that the limited competence of the Supreme Court of Justice in this category of cases and the absence of rules for the subsequent re-evaluation procedure contributed to a substantial level of uncertainty as to the real legal consequences of such judicial decisions, which includes the one to be adopted in the plaintiff's case.

As to the absence of a double degree of jurisdiction, the plaintiff argued that Article 14(9) of Law No 26/2022 is contrary to Article 119 of the Constitution of the Republic of Moldova. Considering that access to justice is an inherent element of the right to a fair trial, closely linked to the principle of the rule of law, and that the latter is inconceivable without the possibility of access to justice through the court, the plaintiff considers it appropriate and justified to adopt the practice of the Constitutional Court of Romania, namely the decision of the Constitutional Court of Romania No 500 of 15 May 2012, since the constitutional provisions identical to those of Article 119 of the Constitution of the Republic of Moldova extended the right to a 'double degree of jurisdiction' to civil cases as well.

The plaintiff also alleged that the Pre-Vetting Commission was not independent and impartial, since out of sixteen members of the Superior Council of Magistracy present at the hearing, only three were judges. Thus, the judges constituted a small minority of the members of the Superior Council of Magistracy hearing the plaintiff's case.

The plaintiff argues that the individual administrative act issued is not justified under Article 31 of the Administrative Code and that, due to the adverse nature of the administrative act, the defendant authority was obliged to provide additional information and a summary of the procedure underlying its decision, including investigations, evidence, hearings, etc.

Moreover, the justification of an administrative decision issued by the respondent authority cannot be limited to a mere reference to legal provisions, but must contain precise legal and factual elements that, on the one hand, allow the addressee to recognize and evaluate the grounds for the decision and, on the other hand, enable the verification of legality.

Thus, by virtue of the above provision, the failure or, as the case may be, compliance by the issuing authority with the mandatory condition of full justification of an individual administrative act directly conditions its legality. Thus, in the absence of a justification in accordance with the requirements of the legislation, the contested decision is unlawful and, therefore, is subject to revocation.

In addition, he pointed out that the failure to state in an adverse administrative act the grounds on which it was issued constitutes, in the light of the ECHR's case-law, an arbitrary exercise of state power (see *Lupşa v. Romania*; complaint No 10.337/04, § 31-34).

The plaintiff stated that the present action constitutes a claim of obligation because it seeks to set aside the adverse individual administrative act that rejected the plaintiff's request administratively and to order the public authority to issue the requested positive individual administrative act in accordance with the provisions of Articles 206(1)(b) and 224(1)(b) of the Administrative Code.

As a matter of law, the plaintiff based his action on Articles 31, 118(1) to (3), 189(1), 206(1)(a) and (b), 208(1), 209(1)(a), 211-212, 224(1)(a) and (b) of the Administrative Code.

On June 19, 2023, the Pre-Vetting Commission submitted a response to the statement of claim requesting that the appeal filed by Vitalie Codreanu be dismissed.

In support of the response, the Pre-Vetting Commission argued that it had diligently and in good faith fulfilled all its obligations under Law No 26/2022. In the evaluation process, the burden of proof shifts to the candidate, but as uncertainties arise and in order to clarify them, the Pre-Vetting Commission gives the candidate the opportunity to provide additional data and information.

The Commission noted that the integrity evaluation process and the decision taken do not affect the candidate's professional status. The legal effect of the decisions of the Pre-Vetting Commission is expressly and exhaustively established by law, and the candidate can refuse the publication of the decision of the Commission. He exercised this right, and the decision was not published. Furthermore, the decision is a finding of serious doubts as to the applicant's compliance with the criteria of ethical and financial integrity and is not a finding of non-compliance with those criteria. The legality of the decision cannot be the subject of judicial review.

As to plaintiff's allegations regarding the alleged lack of independence and impartiality of the Pre-Vetting Commission, the defendant finds them irrelevant to the disposition of the present case, as these allegations cannot constitute serious procedural errors affecting the fairness of plaintiff's evaluation procedure, nor circumstances that could have led to the plaintiff's passing the evaluation.

It also submitted that the legislation in force clearly defines how the appointment process of the Commissioners is carried out and the plaintiff's criticisms of the Commission's alleged lack of independence and impartiality are irrelevant, including on the grounds that Parliament has done nothing other than implement Law No 26/2022. In addition, the irrelevance of these issues is also confirmed by the fact that they are not the subject of the contested decision and, therefore, should not be taken into account by the Court in the examination of the present case.

Furthermore, the plaintiff in his claim merely referred to certain excerpts from the case-law of the European Court of Human Rights without, however, explaining how they are applicable in the present case. Moreover, some of these excerpts refer to the Superior Council of Magistracy and the fact that at one point only 3 of its 16 members were judges. However, it is not clear what connection exists between this finding and the allegations of the Commission's alleged lack of independence and impartiality.

The Pre-Vetting Commission operates on the basis of Law No 26/2022 and the Rules of Organization and Operation approved by it, and not in accordance with the Administrative Code, and appeals against the decisions of the Commission shall be considered in accordance with the procedure established in Book III of the Administrative Code. Therefore, the provisions of the other books of the Administrative Code are not applicable, and the Pre-Vetting Commission was not bound by these legal provisions when evaluating the candidates. Therefore, it finds

that the plaintiff's objections that the Pre-Vetting Commission should have considered the provisions of Article 31 of the Administrative Code are without merit.

The Pre-Vetting Commission emphasized that the decision rendered was properly justified, stating the factual circumstances, the applicable legal provisions and the Commission's findings regarding the absence or existence of serious doubts as to the plaintiff's compliance with the integrity criteria.

In addition, the Pre-Vetting Commission submitted that although the plaintiff alleged a violation of the right to respect for privacy, he did not explain how that right had been violated, limiting himself to a mere declaratory statement that a number of personal and professional relationships had been affected by the impugned decision of the Pre-Vetting Commission and that such interference did not meet the requirements of legality, legitimate aim and proportionality.

The Pre-Vetting Commission holds that, in the absence of evidence to show that the decision was unlawful, the plaintiff resorts to criticizing the applicable law. Thus, the plaintiff is of the opinion that Law No 26/2022 provides for an excessively long statute of limitations, regulates insufficient judicial review and does not contain provisions on the existence of a double degree of jurisdiction.

In the defendant's view, all these criticisms of the applicable law are irrelevant for the purposes of verifying the legality of the contested decision, since, in the context of the criteria established by Constitutional Court Decision No 5 of 14 February 2023, the criticisms of the legislation do not constitute either serious procedural errors (committed by the Pre-Vetting Commission) affecting the fairness of the evaluation procedure or circumstances that could lead to the plaintiff's passing the evaluation;; and the objections concerning the quality of the legislation are to be resolved by another means, such as a review of the constitutionality of such legislation by the Constitutional Court.

In this regard, it noted that by decision No 42 of 6 April 2023, the Constitutional Court had already considered the criticisms of Law No 26/2022 made by the plaintiff.

The Pre-Vetting Commission emphasized that it did not exercise its discretion otherwise, as erroneously alleged by the plaintiff, because in the other cases cited by the plaintiff, the candidates admitted to the irregularities/errors and the Commission found that those candidates did not benefit from those irregularities/errors.

However, in the present case, the plaintiff did benefit from a housing program used contrary to its legitimate purpose and from the acquisition of service housing; he indicated that he did not believe he had done anything unethical (with regard to para. III.1 of the decision); he did not feel any ethical problem (with regard to para. III.2 of the decision). Thus, the factual situations in the present case and the other cases cited by the plaintiff are different, so the decisions of the Pre-Vetting Commission in those cases do not constitute a different exercise of discretion.

At the court hearing, the plaintiff Vitalie Codreanu and his representative, counsel Vitalie Zama, supported the arguments set forth in the appeal, requested that the appeal be accepted as formulated, with the annulment of the decision of the Pre-Vetting Commission No 33 of 15 May 2023, ‘On the candidacy of Vitalie Codreanu, candidate for the position of member of the Superior Council of Prosecutors’, and the resumption of the procedure of evaluation of the candidate by the Commission.

The representatives of the Independent Pre-Vetting Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, counsels Roger Gladei and Valeriu Cernei, supported the arguments set forth in the submitted response and requested that the claim be dismissed as unfounded.

In addition to those referred to in the submitted response, the representatives argued that the Pre-Vetting Commission had complied with all the rights under Article 12(4) of Law No 26/2022.

Assessment by the court:

Having heard the parties and their representatives, and having studied the documents in the administrative and judicial case files, the Special Panel established within the Supreme Court of Justice to consider 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 finds the claim admissible and well-founded for the following reasons.

Time limit for consideration of the claim:

Pursuant to Article 14(7) of Law No 26/2022, by way of derogation from the provisions of Article 195 of the [Administrative Code No 116/2018](#), the application for appeal against a decision of the Pre-Vetting Commission shall be considered

within 10 days. It should be noted that the appeal filed by Vitalie Codreanu was registered with the Supreme Court of Justice on 9 June 2023 (file page 23, vol. I).

By the decision of 12 June 2023 of the Special Panel of the Supreme Court of Justice, the appeal of Vitalie Codreanu against the decision of the Pre-Vetting Commission was accepted for examination as an administrative dispute, and the participants in the trial were summoned to a hearing scheduled for 26 June 2023, at 3 p.m., in room No 4 of the Supreme Court of Justice, located at 18 Petru Rareș Street, Chișinău (file page 25-27, vol. I).

On 19 June 2023, within the deadline set by the court, the Pre-Vetting Commission submitted a response to Vitalie Codreanu's appeal to annul Decision No 33 of 15 May 2023 and the administrative case file (file page 33-52, vol. I).

Due to the failure of the technical system for recording the trial 'SRS Femida' and the impossibility of audio recording of the trial scheduled for 26 June 2023 at 3 p.m., the trial was postponed and, with the consent of the parties, the next trial was scheduled for 30 June 2023 at 2.30 p.m. (file page 66, 67, vol. I).

According to the hearing transcript dated June 30, 2023, the plaintiff requested that the hearing be adjourned and that the Pre-Vetting Commission be required to produce the candidate's case file because the pages of the originally submitted file were renumbered and the cover page did not match the contents of the documents in the case file. The request was granted and the hearing was adjourned to 6 July 2023 at 2.30 p.m. (file page 71-72, vol. II).

Similarly, the hearing of 6 July 2023 was adjourned at the request of the plaintiff to 7 July 2023, at 4.00 p.m., and the Pre-Vetting Commission was required to provide information on the requests to the Intelligence and Security Service, the National Center for Personal Data Protection, the National Integrity Authority, the Ministry of Justice, the State Tax Service and the answers received regarding the plaintiff Vitalie Codreanu.

At the hearing on 7 July 2023, the plaintiff submitted a request to invite and hear as a witness the head of the Prosecutors' Inspection, as well as a request to raise the objection of unconstitutionality, and the hearing was adjourned to 28 July 2023, at 2 p.m.

At the hearing on 28 July 2023, the plaintiff withdrew the request for an objection of unconstitutionality and for the hearing of the witness, and Vitalie Codreanu's appeal against the decision of the Pre-Vetting Commission was heard on the merits.

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 19 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.

As a matter of principle, it should be noted that the application of the Administrative Code and its limits 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(1) of the Administrative Code for the issuance of the individual administrative act by the Commission. Accordingly, the provisions of Article 8(1)-(4) of the Law 26/2022 are rules of substantive administrative law.

According to Articles 9(2) and 69(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(1) of the Law No 26/2022. Pursuant to Article 189(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(1) of the Law No 26/2022 is, by its nature, a specific field of activity within the meaning of Article 2(2) of the Administrative Code.

Although the Administrative Code establishes uniform administrative and administrative litigation proceedings, its Article 2(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(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(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(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(4) of the Administrative Code, the validity, binding force and res judicata of the Commission decision under Articles 139(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(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 Pre-Vetting Commission do not belong to the private but to the public sphere of activity, which is why it has been vested by Law 26/2022 with powers enabling it to impose itself with legal force in relation to those evaluated under Article 8 of the Administrative Code.

As a matter of principle, the Special Panel of the Supreme Court of Justice notes that the concept of a public authority cannot be confounded, from a functional and organizational point of view, with that of a legal entity governed by public law, otherwise the decision of the Pre-Vetting 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 emphasizes that a private person may also be a public authority if he or she has been delegated by law the tasks of public authorities and the corresponding powers to carry them out.

Moreover, according to Article 72(6) of Law No 100 of 22 December 2017, an interpretative regulatory act shall not have retroactive effect, except when the interpretation of a regulation providing for liability creates a more favorable situation.

At the same time, it holds that there was no in-depth understanding of Article 2(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(2) of the Administrative Code and for the purposes of Law No 26/2022.

According to Article 10(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(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(3)(a)-(c) of the Administrative Code.

According to Article 10(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(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(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.

On established jurisprudence on appeals against decisions of the Pre-Vetting Commission, (namely, Case file Nos. 3-5/2023 and 3-13/2023), where the court established with the force of *res judicata* that the provisions of Book I and II of the Administrative Code, the Special Panel of the Supreme Court of Justice notes that the cases in question do not form a uniform 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.

Admissibility of the claim:

According to Article 207(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(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(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 the plaintiff Vitalie Codreanu is claiming infringement of a right as a result of administrative activity under article 189(1) of the Administrative Code, namely that by Decision No 33 of 15 May 2023 the Pre-Vetting Commission violated his right to be elected as a member of the Superior Council of Prosecutors and the right to self-governance of the Prosecutor's Office (Article 65, Article 69 of the Law on Prosecution No 3 of 25 February 2016).

In derogation of the provisions of Article 209 of the Administrative Code, Article 14(1) and (2) of Law No 26/2022 provides for a specific time limit for filing an administrative action.

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, it should be noted that the decision of the Pre-Vetting Commission No 33 of 15 May 2023 was received by Vitalie Codreanu on 5 June 2023, which is confirmed by the e-mail excerpt attached to the case file. Thus, the cited regulatory framework unambiguously indicates the grounds for admissibility of an administrative claim, namely: the presence of an adverse individual administrative act, brought to the addressee with a refusal to satisfy the application; material and territorial jurisdiction of the court to consider an administrative claim and compliance with the deadline for filing a claim.

The Special Panel of the Supreme Court of Justice concludes that the appeal filed by Vitalie Codreanu is admissible, as the plaintiff complied with the legal provisions of Article 14(1) of Law No 26/2022 by filing the present application with the Supreme Court on 9 June 2023, within the legal time limit.

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 (1)(b) and 224(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(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(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(1) of the Administrative Code. Thus, neither the Administrative Code nor Article 14(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(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(2) of the Administrative Code.

The substance of the administrative dispute:

According to Article 6(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(1) and (2) 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(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(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(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(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(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(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(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 Vitalie Codreanu passing the evaluation.

The decision of the Pre-Vetting Commission is unlawful 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.

Therefore, by the Decision No 33 of 15 May 2023 on the candidacy of Vitalie Codreanu, candidate to the Superior Council of Prosecutors, based on Article 8 para. (1), (2) (a) and (c), para. (4) (a) and (b), para. (5) (b), (c), (d), Article 13 para.

(5) of Law No 26/2022, the Pre-Vetting Commission decided that the candidate does not meet the integrity criteria as serious doubts have been found as to the candidate's compliance with the criteria of ethical and financial integrity, and thus fails the evaluation (file page 13-21, vol. I).

Relevant here are the provisions of Article 8 para. (1), (2) (a) and (c), para. (4) (a) and (b), para. (5) (b), (c), (d), (e) and (g) of the Law No 26/2022, according to which, for the purposes of this Law, the evaluation of the integrity of candidates consists in verifying their ethical and financial integrity.

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

- a) he or she has not committed serious violations of the rules of ethics and professional conduct of judges, prosecutors or, as the case may be, members of other professions, nor has he or she committed reprehensible acts or omissions in his or her work that would be inexplicable from the point of view of a legal professional and an impartial observer;
- c) he or she has not violated the legal regime of declaration of assets and personal interests, of conflicts of interest, incompatibility, restrictions and/or prohibitions.

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

- a) all of the candidate's assets are declared in the manner prescribed by law;
- b) the Pre-Vetting Commission finds that his/her assets acquired in the last 15 years correspond to the declared income.

To assess the financial integrity of a candidate, the Pre-Vetting Commission shall verify:

- a) The candidate's compliance with the declaration of assets and personal interests;
- b) the manner in which the goods were acquired into the ownership or possession of the candidate or the persons specified in Article 2(2), as well as the expenses related to the maintenance of these goods;

A candidate shall be deemed not to meet the integrity criteria if it has been established that there are serious doubts as to the candidate's compliance with the requirements laid down in Article 8, which have not been resolved by the person evaluated.

Returning to the circumstances of the present case, the Special Panel of the Supreme Court of Justice notes that in Decision No 33 of 15 May 2023, in Section III,

‘Evaluation of the candidate’, the Pre-Vetting Commission found that there were serious doubts about Vitalie Codreanu, candidate for the position of member of the Superior Council of Prosecutors, with regard to the criteria of financial and ethical integrity, namely:

1. Utilizing the preferential housing program for prosecutors to assist a family member in purchasing real estate;
2. The manner of acquiring a 49.1 square meter apartment as service housing and privatization of this apartment.

Analyzing the conclusions of the Pre-Vetting Commission on this circumstance in connection with the evaluation criteria, the Special Panel considers that the appeal filed by Vitalie Codreanu is well founded.

The Special Panel of the Supreme Court of Justice notes that when the Pre-Vetting Commission has to decide on the integrity of a candidate, it has to determine whether or not there is serious doubt that the candidate fulfills the criteria of ethical and financial integrity set out in Article 8 of the Law.

It should be noted that the law obliges the Pre-Vetting Commission to issue a reasoned decision, which must contain the relevant facts, reasons and the Commission's conclusion on passing or failing the evaluation.

Effective judicial review involves checking all aspects of procedural and substantive legality, in particular, equal treatment, proportionality, legal certainty, reasonableness, correctness of ex officio fact-finding, impartiality, misinterpretation of legally undefined concepts, etc. Only in this way can the standard of effective protection enshrined in Article 53 of the Constitution of the Republic of Moldova be achieved.

In the issued decision, the Pre-Vetting Commission found that the candidate Vitalie Codreanu did not resolve the serious doubts regarding the compliance with the criteria of ethical and financial integrity established in Article 8 of Law No 26/2022, regarding the use of the preferential housing program for prosecutors to assist a family member in the purchase of real estate, as well as regarding the manner of acquiring an apartment of 49.1 sq. m. as a service housing and the privatization of this apartment.

The Special Panel concludes that the plaintiff's arguments before the court demonstrate the existence of circumstances that could have led to his passing the

evaluation before the Pre-Vetting Commission and that justify the reopening of the candidate's evaluation procedure.

Regarding the first non-compliance with the criterion of financial integrity relating to the use of the preferential housing program for prosecutors to assist a family member in purchasing real estate, the Panel notes the following.

The Pre-Vetting Commission stated that doubts arose because the plaintiff participated in two state housing programs for prosecutors in 2008-2009.

The first program to which the candidate applied was a preferential housing program for prosecutors, through which the candidate became the owner of a 65.3 sq. m. apartment in Chişinău. Contrary to the purpose of the program – to provide housing for prosecutors – the candidate's apartment was purchased by his parents for his sister. The candidate acknowledged that the program was for prosecutors in need of housing and that his sister was neither a prosecutor nor an employee of the prosecutor's office. The purchase agreement and real estate registration were in the candidate's name, not his sister's, because only prosecutors and prosecutors' employees could take advantage of the program. The candidate's sister was not eligible to participate in the program, and his parents were able to purchase the above apartment at a reduced price only because the candidate was an applicant for the program. The candidate has never lived in the apartment and allegedly had no involvement with the property.

Also, the Pre-Vetting Commission argued that using the position of prosecutor to take advantage of a housing program for prosecutors for the benefit of a family member was contrary to the standard of impeccable conduct expected of prosecutors in their non-professional activities and in the performance of their official duties. Since the candidate was eligible for the program, he saw no problem using it for the benefit of a family member, who was otherwise ineligible for the program, leading him to act in ways that would be inexplicable from the perspective of a legal professional and an impartial observer. The situation is exacerbated by his reasoning as to why he did not inform the Prosecutor General's Office, namely that he actually applied for an apartment not for himself but for a member of his family. His suggestion that it does not matter to the Prosecutor General's Office how the program is used – or misused – is indicative of an attitude toward the administration of benefits under state programs that inevitably causes citizens to distrust public officials.

The Pre-Vetting Commission also noted that the candidate failed to indicate the 65.3 sq.m. apartment in his 2012 annual declaration. In response to questions from the Commission, he initially stated that he did not declare the apartment in 2012 because he was not using it. In response to further questions, the candidate stated that he did not declare the apartment because at that time, in 2012, he believed that he would only declare the property acquired in 2012. However, during the hearing, the candidate admitted that on his 2012 annual declaration, he declared two additional properties purchased in 2010.

The sale and purchase agreement under which he allegedly sold the apartment to his sister in 2013 added to doubts about the entire transaction. The sale and purchase agreement signed by the candidate stated that the sale price of the apartment was MDL 408,671 and that the price was paid in full before signing the contract, which is not true as no money was exchanged when the apartment was transferred to the candidate's sister. This approach is acceptable to the candidate because he claims that this was done on the recommendation of the notary and that he did not deceive anyone or infringe on anyone's rights.

Thus, the Special Panel notes that, according to the attached documents, at the time of Vitalie Codreanu's application for participation in the program for improvement of housing conditions of prosecutor's office employees in 2008, the plaintiff requested the Superior Council of Prosecutors to include him in the list of applicants for allocation of housing.

Thus, at the time the application was filed with the Superior Council of Prosecutors, no circumstances existed that could serve as a basis for rejecting the plaintiff's request to purchase an apartment at a preferential price.

The Pre-Vetting Commission unjustifiably held that the objective of the program to improve the housing conditions of the plaintiff was not achieved by providing the apartment at a preferential price, which is contrary to the facts submitted by the plaintiff.

The findings of the Pre-Vetting Commission that it doubted whether the candidate would have got the apartment at a preferential price if he had fully disclosed all relevant information, namely, that he was assisting a family member in acquiring property, the Special Panel finds unjustified.

According to Article 6(c) of Law No 26/2022, in order to carry out its functions, the Pre-Vetting Commission must collect and verify any data relevant to the evaluation of candidates.

Accordingly, it is reasonable to conclude that the plaintiff, in the situation of 2008, when he applied to the Commission for the selection of applicants for inclusion in the list of judicial branch employees in need of better housing conditions, was eligible to participate in the preferential housing program.

The purpose of purchasing an apartment at a preferential price was not a prerequisite for selection, which had to remain after the apartment was purchased, so the acquisition of real estate with its subsequent sale cannot be considered as a failure of the candidate to meet the criteria of financial and ethical integrity.

The Special Panel emphasizes that the findings of the Pre-Vetting Commission that it had serious doubts about the use of the preferential housing program for prosecutors to assist a family member to purchase a 65.3 sq.m. property in Chişinău, which were not resolved by the candidate, cannot be considered as a genuine breach of financial integrity, otherwise in this case the rule of protection of legitimate confidence in the activity of public bodies of the state with tasks and powers to act would have been violated.

It should also be noted that although the Pre-Vetting Commission insists that the program was intended for prosecutors in need of housing, and his sister was neither a prosecutor nor an employee of the Prosecutor's Office, i.e. the candidate's sister was not entitled to participate in the program, it follows from the attached documents that both the contract on capital investment in the construction of residential premises was concluded on 15 May 2008 by Vitalie Codreanu and the 65.3 sq.m. apartment purchased at a preferential price in 2010, was also transferred to the plaintiff (file page 244-247, 248 of the administrative case file).

Only later in 2013, Vitalie Codreanu alienated the 65.3 sq.m. property to his sister Irina Codreanu (file page 250-251 of the administrative case file).

Taking into account the above circumstances, the fact that candidate Vitalie Codreanu took advantage of a preferential price apartment in 2008 and sold it in 2013, does not constitute a violation that raises serious doubts under Article 13(5) of Law No 26/2022 regarding the candidate's compliance with the criterion of ethical integrity and the criterion of financial integrity under Article 8(2)(a), (4)(b) and

(5)(c) of Law No 26/2022, i.e. the decision of the Pre-Vetting Commission is manifestly unfounded.

Furthermore, the fact that the plaintiff had never lived in the apartment in question and that his parents had contributed financially to the purchase of the said apartment at a reduced price only because the candidate was an applicant for this program, the Special Panel holds as per Article 22(2) of the Administrative Code, it is a known fact and an element of national culture for parents to help their children and, in their turn, for children to help their parents. This is an expression of the principle of solidarity among family members, which is deeply rooted in the national traditions and culture. The elements of tradition and culture define the political-legal concept of a people (nation) as an element of the state and, consequently, the national sovereignty the people are entitled to.

The Special Panel highlights that state's failure to fulfil the constitutional task of taking measures so that every person would have decent living, which would ensure their and their family's health and wellbeing, including food, clothing, accommodation, medical care, as well as necessary social services, does not exclude the possibility of economic, financial and material solidarity among people based on family, friendship and other similar relationships.

At the same time, according to Article 10(9) of Law No 26/2022, the Pre-Vetting Commission was supposed to assess the gathered materials about candidate Vitalie Codreanu based on a multi-faceted, comprehensive and objective review of the information and to rely the serious doubts only on pertinent direct evidence, not on abstract hypotheses taken out of the social-economic context of the Republic of Moldova.

However, it is found in this case that the Pre-Vetting Commission did not preserve evidence such as the explanations given by the candidate in support of his position.

Subsequently, the Special Panel noticed that Chapter III, section 1 of the Decision of the Pre-Vetting Commission No 33 of 15 May 2023 does not include a serious and logical reasoning with respect to the use of a preferential housing program for prosecutors to assist a family member in acquiring real property, so that the Pre-Vetting Commission could qualify it as 'non-compliance with the financial integrity criterion'.

Accordingly, the Special Panel concludes that the Pre-Vetting Commission failed to comply with procedural and substantive legality, in particular when it comes to the

correctness of the multi-faceted investigation of its own motion of the factual situation, the reasoning of its decision, and it misinterpreted the legal concepts of ‘non-compliance with the financial integrity criterion’ and ‘serious doubts’ regarding the use of a preferential housing program for prosecutors to assist a family member in acquiring real property.

The Special Panel highlights as a matter of jurisprudential principle that the wording “serious doubts” in Article 13(5) of Law No 26/2022 establishes a derogation from the standard of proof laid down in Article 93 of the Administrative Code, even this article opens the way towards such a derogation, including under Article 2(2) of the Administrative Code.

At the same time, the phrase “serious doubts” is not compatible with the formalism and subjectivism of the defendant public authority. This standard relates to the result of evidence assessment in order for it to be deemed as a highly likely factual circumstance, different from the beyond-any-doubt standard. Thus, should the evaluated candidate submit logical arguments and explanations to the Commission, which are true to the social-economic context of the Republic of Moldova, then the likelihood of a fact being in a way or another should be weighed and any doubt has to be treated in favor of the candidate and this is a cornerstone principle of the rule of law.

The Special Panel holds that the plaintiff provided sufficient logical arguments and that the fact happened in the way he stated and the Commission wrongly failed to consider these arguments as relevant.

Regarding the finding of the Pre-Vetting Commission that the candidate did not declare the 65.3 sq.m. apartment in his 2012 annual declaration, the plaintiff submitted that he did not declare it because at that time, in 2012, he thought that he would declare only the property he had acquired in 2012.

In the present case, the Special Panel considers that the applicant's failure to declare the 65.3 sq. m. apartment in his 2012 annual declaration was motivated by him as a mechanical error, as the applicant thought that he would declare only the real estate he had purchased in 2012.

The Special Panel notes that social realism itself includes legal realism, and imputing to the candidate violations that have been tolerated, and sometimes even accepted and administered by government agencies, are not such as to suggest that the plaintiff prosecutor lacks financial or ethical integrity.

The Special Panel points out that the so-called violations of financial and ethical integrity were assessed by the Pre-Vetting Commission subjectively and in isolation from the historical and social context, which affects the security of legal relationships. Generally, the legal systems accepts the retroactive effect of the law if it favours the legal situation of a person, but this effect cannot be projected by way of legal interpretation.

Thus, the violations noted by the Pre-Vetting Commission do not meet the criterion that would allow the Commission to decide not to pass the candidate for violations of the rules of ethics and professional conduct of a high severity.

Moreover, it cannot be overlooked that, in the context of the principle of equal treatment, in the case of the other candidate prosecutor evaluated, the Pre-Vetting Commission concluded that, given the specific circumstances of the case, the irregularities found did not reach a level of severity so as to consider the candidate as failing to meet the criteria of ethical and financial integrity.

From this perspective, the Special Panel is to determine whether peers, judges and prosecutors running for self-government positions have been treated equally or unequally in terms of the practices formed by the Commission from the beginning of the evaluation process to the present.

In this respect, without going into the quality and legality of the decisions of the Pre-Vetting Commission with regard to other candidates, the special court will comparatively examine, from the perspective of equal treatment, both the evaluation decisions taken before Vitalie Codreanu's case, in order to establish whether or not there is different treatment in similar situations, and the evaluation decisions taken after 15 May 2023, in order to establish whether the Commission has decided to change its practice in the future, in accordance with Article 137(4) of the Administrative Code.

As a result of this activity, the Special Panel identified cases in the practice of the Pre-Vetting Commission, both before and after the evaluation of Vitalie Codreanu, when it found violations of the legal regime of asset declaration in relation to other candidates, violations expressed in non-declaration of assets, differences in prices of immovable/movable property, but accepted the explanations of the candidates, considering that they made technical omissions, without any intention to circumvent the legal regime of asset declaration.

Despite these facts, the Pre-Vetting Commission did not cite any facts in its Decision No 33 of 15 May 2023 regarding candidate Vitalie Codreanu indicating that he is not considered to have integrity compared to other candidates in a similar situation. Thus, unlike other identical cases before 15 May 2023 but also after that date, the Pre-Vetting Commission has not taken into consideration the explanation of the plaintiff regarding non-declaration of the 65.3 sq.m. apartment in his 2012 annual declaration, showing selective and unreasonable treatment as compared to similar situations. The Special Panel of the Supreme Court of Justice notes that the State has vested the Pre-Vetting Commission with the prerogative to be guided by certain standards to select the candidates with the highest integrity, who could ensure the proper functioning of the judicial system as a whole, including through the implementation of coherent policies in line with generally accepted standards.

It should be noted that the Pre-Vetting Commission is only responsible for the selection of candidates for the Superior Council of Prosecutors and is not authorized to make qualifications or conclusions regarding the plaintiff's status as a prosecutor.

Thus, in the opinion of the Special Panel, the plaintiff justified the necessity and consistency of his actions to acquire at a preferential price the 65.3 sq.m. apartment, given that the plaintiff had previously met the criteria necessary for its acquisition.

Further, analyzing Decision No 33 dated 15 May 2023, the Special Panel finds that the Pre-Vetting Commission found unjustified serious doubts about the manner in which the 49.1 sq.m. apartment was acquired as a service apartment and the privatization of the same.

In this regard, according to the documents attached to the materials of the administrative case file, the Special Panel notes the following.

The plaintiff submitted that on 3 March 2009 he applied to the Chişinău City Hall with a request to be provided with a living space on the basis of Article 38(1) of the Law on Prosecution No 118-XV of 14 March 2003.

By reply No C-718/09 of 13 March 2009, the application was denied on the grounds that the process of privatization of housing had significantly reduced the possibility of maintaining the public housing stock, which effectively made it impossible to enforce the provisions of the housing legislation in force.

Not agreeing with the received answer, Vitalie Codreanu filed a lawsuit to oblige the Municipal Council of Chişinău to provide him with housing in accordance with

Article 38(1) of the Law on Prosecution No 118-XV of 14 March 2003 (file page 279-280 of the administrative case file).

By decision of the Chişinău Court of Appeal of 9 April 2009, Chişinău Municipal Council was obliged to provide him with living space. This decision was not challenged by appealing to the Supreme Court of Justice, entered into force and was enforced by the Chişinău Municipal Council (file page 281-287 of the administrative case file).

Given that the decision of the Chişinău Court of Appeal of 9 April 2009 was not enforced by the Chişinău Municipal Council until 2014, due to the lack of vacant housing space in the public housing stock, on 25 October 2013, Vitalie Codreanu filed a lawsuit against the Chişinău State Tax Inspectorate, TSO Rîşcani and the Chişinău Municipal Council for recognizing the property as unoccupied inheritance and ordering the issuance of an occupancy order (file page 282- 295 of the administrative case file).

By the judgment of 31 July 2014 of Chişinău Court, Rîşcani Branch, the application was accepted, the apartment No xxx, located at xxxx street, xxxx, was declared as vacant escheated property and transferred to state ownership, ordering the Chişinău Municipal Council to issue Vitalie Codreanu with an order of occupancy for the apartment No xxxx, located at xxxx street, xxxx (file page 288-291 of the administrative case file).

The judgment of 31 July 2014 of Chişinău Court, Rîşcani Branch, challenged by the Chişinău Municipal Council and the Chişinău State Tax Inspectorate, by the decision of 5 February 2014 of the Chişinău Court of Appeal was left unchanged (file page 283-287 of the administrative case file).

By decision of the Supreme Court of Justice of 27 May 2015, the appeal filed by the Chişinău Municipal Council against the decision of the Chişinău Court of Appeal of 5 February 2015 was declared inadmissible (file page 296-299 of the administrative case file). On 19 December 2016, Railean Olga, Railean Anatolie and Railean Alexandru filed an application for reconsideration of the case, requesting its acceptance, complete reversal of the judgment of 31 July 2014 of the Chişinău Court, Rîşcani Branch, retrial on the merits with the participation of the defendants.

By ruling of the Supreme Court of 8 November 2017, the application of Railean Olga, Railean Anatolia and Railean Alexandru for reconsideration of the Supreme Court's judgment of 27 May 2015 was rejected as inadmissible.

On 7 December 2015, on the basis of court decisions, Chişinău City Hall issued to Vitalie Codrean an occupancy order No 014805 (file page 309 of the administrative case file).

According to the sale and purchase agreement concluded between the Chişinău Municipal Council and Vitalie Codreanu, the latter was given the ownership of apartment No xxx, located in xxxx, on xxxx street.

At the same time, it was found that the apartment No xxx, located in xxxx, on xxxx street was inhabited by citizen Oleg Țugui. Therefore, on 13 April 2016, Vitalie Codreanu and his wife Elena Codreanu filed a lawsuit against Oleg Țugui with the Chişinău Court, Rîşcani Branch, for eviction of him, his family members and all persons living in the premises.

By decision dated June 15, 2016, the Chişinău Court, Rîşcani Branch, fully satisfied the appeal.

After the initiation of enforcement proceedings under the above decision, on 23 August 2016, Railean Olga, Railean Alexandru and Railean Anatolie filed an application for reconsideration of the decision of 15 June 2016 of the Chişinău Court, Rîşcani Branch, which was rejected by the ruling of the Chişinău Court, Rîşcani Branch, of 6 February 2017.

Thus, it follows that all the above judgments are final and irrevocable.

It also follows from the documents of the administrative case file that on 1 February 2017, Railean Olga, Railean Alexandru and Railean Anatolie filed a lawsuit for recognition of ownership, annulment of the occupancy order, annulment of the contract of sale and purchase, transfer-receipt of the apartment in private ownership (dated 16 March 2016) to the prosecutor Vitalie Codreanu. By judgment of 2 December 2022 of the Chişinău Court, Centru Branch, the claim was dismissed as unfounded (file page 339-355 of the administrative case file).

The Special Panel also notes that as a result of an independent inquiry of 22 March 2018 based on the publication placed on the internet portal www.crime.moldova.md entitled 'How an anti-corruption prosecutor took possession of the apartment of a criminal authority', the Prosecutors' Inspection of the Prosecutor General's Office, by a decision of 30 March 2018, issued a decision to terminate the disciplinary proceedings against prosecutor Vitalie Codreanu due to the absence of grounds for disciplinary liability (file page 357-361 of the administrative case file), noting that the inspection did not establish that prosecutor Vitalie Codreanu, contrary to his

work duties under Article 6(3)(g) of the Law on Prosecution No 3 of 25 February 2016 and Article 54(c) of the previous Law on Prosecution No 294 of 25 December 2008, failed to submit the declaration of assets and personal interests as prescribed by law.

In addition, the Special Panel holds that, according to Article 8(6) of Law No 26/2022, in assessing the criteria set out in para. (2) to (5) and in making decisions on them, the Pre-Vetting Commission does not depend on the findings of other bodies with competence in the respective field.

Here, the Special Panel emphasizes that the legislature authorized the Pre-Vetting Commission to draw its own conclusions when assessing the integrity criteria and passing the decisions. Moreover, the text ‘other bodies with competence in the respective field’ refers to public bodies with competence in the field of ethical and financial integrity review.

In principle, the Special Panel does not deny this right of the Pre-Vetting Commission, but in this case it is necessary to take into account the considerations of the Constitutional Court as reflected in Decision No 92 of 25 July 2023, where the Constitutional Court held that since the courts do not have primary jurisdiction to review ethical and financial integrity, but can only exercise judicial review of the decisions of the relevant authorities, the Court considers that this text does not apply to irreversible decisions of the courts (CCD No 92 of 25 July 2023, §26).

In practice, it was of utmost importance for the Pre-Vetting Commission to take into account, when assessing the criteria of financial and ethical integrity and in deciding the case, the above court decisions insofar as they relate to the manner in which the 49.1 sq. m. apartment was acquired as a service apartment and the privatization of that apartment, which are final and irrevocable.

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.

From the text of the decision subject to judicial review, the Special Panel notes that the Pre-Vetting Commission, with regard to the second non-compliance, concluded that it had serious doubts (Article 13(5) of Law No 26/2022) about the candidate's compliance with the criterion of ethical integrity, pursuant to Article 8(2)(a) and (c)

of Law No 26/2022, due to the candidate's acquisition of an apartment at a preferential price and its non-disclosure in his 2012 annual declaration, which were not resolved by the candidate, as well as, pursuant to Article 8(2)(a) of the Law No 26/2022, due to the manner in which the candidate acquired an apartment of 49.1 sq.m. in Chişinău and the privatization of this apartment, which were not resolved by the candidate.

In this regard, the reasoning of the Constitutional Court reflected in section 120 of the decision No 42 of 6 April 2023 is indispensable, where it was found that by using the word ‘seriously’, the legislator limited the discretion of the Pre-Vetting Commission to evaluating the ethical integrity of candidates. This criterion allows the Pre-Vetting Commission to decide not to pass a candidate only if it has found serious violations of the rules of ethics and professional conduct. This means that the candidate can discuss the seriousness of violations found by the Commission before the Special Panel of the Supreme Court of Justice, which could ultimately appreciate the ‘serious’ nature of the found deviation, depending on the specific circumstances of the case.

At the same time, the Joint Opinion of the Venice Commission and the Directorate General for Human Rights and the Rule of Law of the Council of Europe at the 134th plenary session, held on 10-11 March 2023, noted that Assessment Commissions may examine certain conduct which has been the subject of other proceedings or which has not yet been examined in other fora, the reports of Assessment Commissions should not prejudice the authority of final judicial decisions and respect the principle of *res judicata* as decided in criminal or disciplinary proceedings. The Pre-Vetting Commission may not disregard an earlier decision that has entered into force, such as a decision to acquit a judge/prosecutor of a corruption offense or to cancel a disciplinary sanction imposed on him/her.

In this case, the Pre-Vetting Commission raised serious doubts about the acquisition of an apartment at a preferential price, the privatization of another apartment – actions that took place in 2008-2009, when the candidate predominantly worked in the prosecutor's office. Although the plaintiff applied for the two real property programs in 2008-2009, as he testified during the hearings and judicial proceedings, he was not certain that the applications would be accepted. Title to the two properties was obtained in 2010 and 2016.

Apart from the aspect of legality in the case of obtaining two properties, the Special Panel notes that Vitalie Codreanu was ethically questioned as to why he used such

state programs twice, but the candidate answered only that he took advantage of the legal provisions in force at the time, i.e. it was a guarantee for civil servants.

According to section 6(a) of the Prosecutor's Code of Ethics (in force since 2007), a prosecutor must have impeccable behavior that preserves and strengthens public confidence in the impartiality and prestige of the work of public authorities. Prosecutors who use the law for personal gain exhibit questionable behavior and undermine public confidence in their work and the title of prosecutor.

At the same time, according to Article 71 of the Law on Prosecution (in the version in force at the time of consideration of the case), if a prosecutor does not own housing, he/she is entitled to a service housing.

The Special Panel notes that ethical conduct is determined by the contemporary realities of democratic societies.

Thus, the Prosecutors' Code of Ethics provides addressees with rules of conduct in specific situations that will help them to fulfill their duties within the institution, as well as outside the exercise of their functions, in order to contribute to maintaining public confidence in the justice system. These rules supplement the legal responsibilities of professionals and are designed to increase their responsibility in the performance of their duties.

Furthermore, it should be noted that the Prosecutors' Code of Ethics states that the principles it enshrines are intended to set standards of ethical conduct for judges, which are based on the premise that judges are accountable for their conduct to the institutions specifically established to enforce judicial standards, which are themselves independent and impartial, and on the premise that these principles have been established in addition to the existing legal and ethical standards to which prosecutors are subject, and not to replace them.

Thus, the established circumstances show that the plaintiff Vitalie Codreanu, pursuing the legitimate aim of improving his housing conditions, submitted two applications in 2008-2009, namely under the Law on Prosecution and under the preferential housing program for prosecutor's office employees, and it was not up to the plaintiff whether any of these applications would be accepted.

Obviously, it was also beyond the control of the plaintiff as to the period within which the said applications would have been disposed of, favorably or unfavorably.

Taking into account the facts established regarding the ethical standards of conduct for prosecutors, the Special Panel refutes the serious doubts that the Commission had regarding the candidate's compliance with the criterion of ethical integrity under Article 8(2)(a) and (c) of Law No 26/2022 in relation to the acquisition of an apartment at a preferential price, the acquisition of an apartment in the context of privatization, doubts that have been resolved by the candidate.

The Special Panel notes that the decision of the Pre-Vetting Commission No 33 of 15 May 2023 does not contain a serious and logical justification for the second non-compliance, 'non-compliance with the ethical integrity criterion'.

Applying the reasoning of the Constitutional Court to the circumstances of the present case, the Special Panel considers that the court recognized the validity of the legislator's decision to establish an extended period for verifying the financial integrity of candidates, referring in this respect to the case-law of the European Court of Human Rights, namely *Xhoxhaj v. Albania* of 9 February 2021, §§ 348-349, but not an extended period for verifying the ethical integrity of candidates.

Thus, the violations noted by the Pre-Vetting Commission do not meet the criterion that would allow it to decide not to pass the candidate for violations of the rules of ethics and professional conduct of a high severity.

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.

The Special Panel deems well founded the plaintiff's argument that the time the Commission granted for submitting information was insufficient and limited, thus making it impossible to gather evidence in order to mitigate entirely the potential "serious doubts" of the Pre-Vetting Commission.

In this respect, the Special Panel emphasizes that, according to Article 82 of the Administrative Code, 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. 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.

When included in the file, a document is referenced with continuous page numbers. 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. 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, the public authority holding the administrative procedure shall grant, to the participants, access to the administrative case file. Participants shall not have access to draft individual administrative acts before the completion of the procedure. 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. 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. 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 Vitalie Codrenau, 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(5) and Article 12(4)(c) of Law No 26/2022 and Article 2(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.

The Special Panel finds that during the court hearing the Special Panel accepted the request of the plaintiff and obliged the Pre-Vetting Commission to submit the entire case file of the candidate, certified and formatted in line with the applicable legal provisions. Thus, as a result of implementing the protocolary conclusion of the Supreme Court of Justice, the Commission's representatives submitted to the court and to the plaintiff the case file to which the candidate did not have access at least 3 days prior to the hearing, as provided by Article 12(4)(c) of Law No 26/2022.

Moreover, during the consideration of this administrative case, the Commission's representatives admitted that candidate Vitalie Codreanu did not receive and the case file of candidate Vitalie Codreanu did not include all materials gathered by the Pre-Vetting Commission, but only the records that the Pre-Vetting Commission deemed to be relevant.

These circumstances prove that the Pre-Vetting Commission violated candidate Vitalie Codreanu's right to defense, as it did not provide him full 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(5), 12(4)(c) of Law No 26/2022 and Article 2(1)(g) of the Evaluation Rules under Law No 26/2022, thus violating the right to effective participation in the administrative evaluation procedure.

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(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.

In the opinion of the Special Panel of the Supreme Court in this case, although the Evaluation Commission's decision to fail the candidate does not prevent him from continuing to work as a prosecutor or in another previously held legal position, it may affect the candidate's professional reputation – protected by the right to privacy – because it contains findings that the candidate lacks ethical and financial integrity (Denisov v. Ukraine [MC], 25 September 2018, §§ 107-109 and 115-116).

Of fundamental importance in this context is the plaintiff's observation that the assessment of integrity involves interference with the candidate's right to a professional reputation, which is protected, inter alia, by Article 8 of the European Convention on Human Rights.

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 word, implying the right to 'private social life', i.e. the possibility for an individual to develop his or her social identity.

In this respect, this right enshrines the possibility of forming and developing relationships with other human beings (see, in this respect, *Campagnano v. Italy*, No 77955/01, para. 53, ECHR 2006-V, and *Bigaeva v. Greece*, No 26713/05, para. 22, May 28, 2009).

The European Court confirmed that there is no basis in principle for holding that 'private life' excludes professional activities. Some restrictions imposed in the area of professional activities may contravene Article 8 when they affect how individuals form their social identity by developing relationships with other human beings. It should be noted here that it is at work that most people most often have opportunities to reconnect with the outside world (Niemetz, cited above, para. 29).

In those circumstances, the European Court considered that the inspector's inquiry into the plaintiff's professional and private life, in the course of which witnesses were questioned about various aspects of the plaintiff's life, and the removal from administrative office resulting from that inquiry, which was motivated mainly by the conclusions drawn from her actions, could be regarded as an interference with her right to respect for private life (see, mutatis mutandis, the judgments in the *Vogt*

case, cited above, para. 44, and *Smith and Grady v United Kingdom*, Nos 33985/96 and 33986/96, para. 71, ECHR 1999-VI).

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(2)(a) of Law No 26/2022 are, in their nature, undefined legal notions (vague legal provision) 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 briefly that the candidate's actions were a serious violation of the rules of ethics and professional conduct of prosecutors.

In the same respect, the Special Panel highlights that given its constitutional function to deliver justice, the court had the ultimate competence to interpret a vague legal notion in a concrete case.

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 Prosecutors and its specialized bodies, as well as the society's trust in the activity of the self-administration bodies of prosecutors and overall in the justice system.

It is not clear from the appealed decision and the documents submitted by the defendant which of those goals are pursued by the decision to fail the evaluation. Any of these goals would be legitimate, however none of them is analyzed and the defendant's representatives did not provide a plausible answer to this question during the court hearing. 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(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 unlawful, violation of the plaintiff's rights.

At the same time, according to Article 29(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 Prosecutors 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(2)(b)-(3) of the Administrative Code, a measure is undertaken by public authorities is proportionate if it reasonable. The measure undertaken by the public authority is reasonable only if the interference caused by it is not disproportionate in relation to its purpose. This requirement involves a balancing of values protected by law. The bigger the damage caused to the right, the more it is required for the advantage resulting from interference to be superior. It is worth mentioning that excluding the right of a prosecutor to be a candidate for membership in the Superior Council of Prosecutors 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 prosecutor. 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 Prosecutors and its bodies. The prosecutor, holding such a position, is presumed to have integrity and, should the opposite be proven, than

he/she shall be dismissed respectively 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 boost the trust in justice, but not to transform justice into an inefficient branch of the power exposed to interference from/dependence on the political power.

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.

The Special Panel finds that only these isolated violations of administrative procedure guarantees are severe procedural errors, which have affected the fairness of the administrative assessment procedure and, as a consequence, the existence of some procedural circumstances that would have led to the candidate passing the evaluation.

The Special Panel notes that the State has vested the Pre-Vetting Commission with the prerogative to be guided by certain standards in order to select the candidates with highest integrity for membership, inter alia, in the Superior Council of Magistracy, who in turn could ensure the proper functioning of the judicial system as a whole, including through the implementation of coherent policies in line with generally accepted standards.

The plaintiff proved to the Special Panel of the Supreme Court of Justice the plausible nature of the elements invoked in his appeal, including the correctness of the financial transactions carried out in the management, sale and purchase of movable and immovable property, as well as the observance of ethical and professional conduct rules.

The Special Panel holds that the found circumstances reveal the candidate's right to a different evaluation decision from the Pre-Vetting Commission than the appealed one, because their nature could lead to candidate Vitalie Codreanu passing the evaluation.

Also, the Special Panel notes that Venice Commission recommended for the final decision on assessment to be made by the competent court, but the Parliament of the Republic of Moldova chose a different legal policy in relation to this topic. 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 Vitalie Codreanu failing the evaluation. The Commission did not provide an analysis and reasoning of the legitimate purpose.

In the preamble to Law No 26/2022, the legislator provided expressly that it has adopted the mentioned law in order to increase the integrity of future members of the Superior Council of Magistracy, Superior Council of Prosecutors and their 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 clear from the appealed decision and the documents submitted by the defendant which of those goals are pursued by the decision to fail the evaluation of candidate Vitalie Codreanu. Any of these goals would be legitimate, however none of them were analyzed by the Pre-Vetting Commission and the defendant's representatives did not provide a plausible answer to this question during the court hearing.

Therefore, the exclusion, not just limitation, of candidate Vitalie Codreanu's right to take part and be elected as a member of the Superior Council of Prosecutors 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, not clarified in the appealed decision. 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 an unnecessary and unlawful 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. 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 prosecutor.

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 6 of 9 December 2022 regarding the candidacy of Vitalie Codreanu.

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(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(1)(b) and Article 195 of the Administrative Code, Articles 238-241 of the Civil Procedure Code, Article 14(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 brought by Vitalie Codreanu against the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, seeking that decision No 33 of 15 May 2023 on the candidacy of Vitalie Codreanu be annulled, and that the candidate evaluation procedure be resumed.

To annul 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 No 33 of 15 May 2023 on the candidacy of Vitalie Codreanu.

To order the re-evaluation of candidate Vitalie Codreanu 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.

Hearing chaired by
Judge

Tamara Chișca-Doneva

Judges

Mariana Pitic

Ion Guzun

