

File no.3-22/23

2-23046459-01-3-29032023

D E C I S I O N

In the name of the Law

SUPREME COURT OF JUSTICE

01 August 2023

mun. Chisinau

The special panel of judges, established within the Supreme Court of Justice, to examine appeals against the decisions of the Independent Commission for Assessing the Integrity of Candidates for the Position of Member of the Self-Administration Bodies of Judges and Prosecutors,

comprising:

President, Judge

Tamara Chisca-Doneva

Judges

Mariana Pitic

Ion Guzun

Registrar

Alexandru Ciorba

With the participation of:

applicant Angela Popil

of the defendant's representative, lawyer  
Cernei, having

Valeriu

examined in public hearing, in the administrative litigation procedure, the appeal filed by Angela Popil against the Independent Commission for Assessing the Integrity of Candidates for the Position of Member of the Self-Administration

Bodies of Judges and Prosecutors regarding the annulment of the decision and the order to resume the candidate's evaluation procedure,

F o u n d:

**Arguments of participants in the trial.**

On 29 March 2023, Angela Popil filed an application to challenge the decision of the Independent Commission for Assessing the Integrity of Candidates for the position of Member of Self-Administration Bodies of Judges and Prosecutors No. 27 of 21 March 2023 on the candidacy of Angela Popil, candidate for the position of member of the Superior Council of Magistracy, requesting the annulment of the contested decision and ordering the re-evaluation of the candidate.

In the grounds of the action, Angela Popil stated that by Decision no. CJ-06 43 of March 24, 2022, the Legal Commission, Appointments and Immunities of the Parliament of the Republic of Moldova initiated the competition for the selection of candidates for the position of member of the Superior Council of Magistracy.

On June 1, 2022, she submitted to the Legal Commission, Appointments and Immunities of the Parliament of the Republic of Moldova an application for the admission of the undersigned to the contest launched on March 24, 2022 for the selection of candidates for the position of member of the Superior Council of Magistracy.

The undersigned's file with all related documents was sent to the Independent Commission for Assessing the Integrity of Candidates for the position of Member of Self-Administration Bodies of Judges and Prosecutors for initiating and conducting the evaluation procedure.

On 27 July 2022, the Independent Evaluation Commission requested the completion of the Ethics Integrity Questionnaire with its submission by 10 August 2022.

The completed questionnaire has been sent to the email address of the Independent Evaluation Commission on 01 August 2022.

Subsequently, on December 27, 2022, the Independent Evaluation Commission sent to the undersigned a request inviting her to send the Declaration of assets and personal interests for the last 5 years in accordance with the provisions of art. 9 para. (1) of Law no. 26 of 10 March 2022 on certain measures related to the selection of

candidates for the position of member of the self-administration bodies of judges and prosecutors, which has been sent to the Independent Evaluation Commission, together with the declarations of assets and personal interests for the period 2017 – 2020, on 03 January 2023.

On 03 February 2023, the Independent Evaluation Commission sent to the undersigned the first round of questions consisting of 13 questions, 38 sub-questions and requests for documents, the answer to the questions formulated with the requested documents being sent to the Evaluation Commission within the deadline set, on 07 February 2023.

On 13 February 2023, the Independent Evaluation Commission sent to the undersigned the second round of questions, which contained 7 questions with 16 sub-questions and requests for additional documents. The answers to the questions raised and the requested documents have been sent to the Independent Evaluation Commission on 16 February 2022.

In view of the invitation of the Independent Evaluation Commission of 22 February 2023, on 03 March 2023, the candidate participated in the public hearings conducted by the Evaluation Commission under Art. 12 of Law no. 26 of 10 March 2022 on certain measures related to the selection of candidates for the position of member of the self-administration bodies of judges and prosecutors.

The applicant informed that on 24 March 2023, at 5.25 pm, she had received, by electronic mail, Decision No. 27 of March 21, 2023 on the candidacy of Angela Popil, candidate for the position of member of the Superior Council of Magistracy, issued by the Independent Commission for Assessing the Integrity of Candidates for the position of Member of the Self-Administration Bodies of Judges and Prosecutors, in accordance with which the Independent Evaluation Commission decided that the undersigned had not passed the evaluation.

In motivating the decision of non-promotion of the evaluation, the Independent Evaluation Commission noted that there are serious doubts that would cause the lack of ethical and financial integrity in the case of the undersigned because she participated in the conclusion of 2 sale-purchase transactions of real estate (in 2007 and 2012), accepting the indication in the sale-purchase contracts of the value of the respective assets determined by the Agency for Land Relations and Cadastre and indicated in the real estate register.

In the applicant's view, the contested decision lacks legal argumentation, is unfounded and is to be annulled by ordering reassessment of the undersigned.

She reported that the Independent Evaluation Commission concluded in Decision No. 27 of March 21, 2023 on the lack of ethical and financial integrity, retaining only one argument, namely Angela Popil's participation in concluding and signing two transactions for the sale-purchase of real estate in XXXX in 2007 (sale) and 2012 (purchase), with the acceptance of the indication in the sale-purchase contracts of the diminished value of real estate, objects of those transactions. In the opinion of the Independent Evaluation Commission, this fact led to the evasion of income tax for the eventual capital increase, as well as the voluntary assistance by the undersigned of the seller from the transaction concluded in 2012 in evading the last one paying income tax for the eventual capital increase. The Independent Evaluation Commission did not invoke any other justifications in support of the conclusion of non-promotion of the evaluation by the undersigned.

She noted that, from the content of the unfavorable illegal administrative act challenged, it follows that the undersigned's assessment was carried out by applying the deontological and ethical principles specific to judges enshrined in the Bangalore Principles and the Code of Ethics of the judge, approved by Decision no. 366/155 of 29.11.2007 of the Superior Council of Magistracy.

In the applicant's opinion, the Independent Evaluation Commission, when assessing in the light of ethical and financial integrity criteria in accordance with art. 8 of Law no. 26 of 10 March 2022 on certain measures related to the selection of candidates for the position of member of the self-administration bodies of judges and prosecutors, violated the principle of proportionality governing the administrative report with the formulation of the application dated 01 June 2022 by which it accepted participation in the competition for occupying the position of member of the Superior Council of Magistracy and implicitly generated initiation of the administrative procedure for external evaluation.

The applicant pointed out that, in accordance with the provisions of Art. 10 para. (1) of the Administrative Code, Decision No. 27 of March 21, 2023 is an administrative act, and in light of the provisions of art. 11 para. (1) letter a) of the Administrative Code, is an unfavorable administrative act, because it affects the right of the undersigned to participate in the competition for the position of member of the Superior Council of Magistracy, under the conditions provided by art. 3 para. (3) and para. (31) of Law no. 947 of 19 July 1996 on the Superior Council of Magistracy.

Successively, she noted that the Independent Evaluation Commission, under the Administrative Code, acts as a public authority that issues favorable and/or unfavorable administrative acts.

In the case, the applicant stated that the arguments and conclusions of the Evaluation Commission in Decision No. 27 of March 21, 2023, are not circumscribed to the principles provided by art. 21 and Art. 29 of the Administrative Code. However, in accordance with

The provisions of Article 16 of the Administrative Code, the discretionary right of the public authority represents its possibility to choose between several possible solutions corresponding to the purpose of the law when applying a legal provision. The exercise of discretion does not allow arbitrary administrative activity to take place.

She also noted that, from Law no. 26 of 10 March 2022 on certain measures related to the selection of candidates for the position of member of the self-administration bodies of judges and prosecutors, corroborated with the provisions of art. 3 of Law no. 947 of 19 July 1996 on the Superior Council of Magistracy, it follows that the promotion of the evaluation is a mandatory administrative act for candidates for the position of member of the Superior Council of Magistracy, and the cumulative meeting of the conditions provided by Article 8 para. (2) and (4) of Law no. 26 of 10 March 2022 on certain measures related to the selection of candidates for the position of member of the self-administration bodies of judges and prosecutors, obliges the Independent Evaluation Commission to issue a favorable administrative act for the candidate's promotion of the ethical and financial integrity test.

Thus, according to the applicant, the Independent Evaluation Commission has only procedural discretion, which refers to the investigation and clarification of the facts ex officio, which does not imply the attribution of the individual administrative act to the discretionary one.

In this context, the applicant explained that the essence of the action brought is limited to determining whether or not the undersigned satisfies the conditions of ethical and financial integrity and to what extent the serious doubts retained by the Independent Evaluation Commission in motivating the decision of non-promotion fall within the limits of the procedural discretion available to the Independent Evaluation Commission during the evaluation procedure.

She reiterated that the Evaluation Commission considered as serious doubts of lack of ethical and financial integrity the participation of the undersigned in the signing and conclusion of the sale-purchase transaction in 2007 which had as object the real estate in XXXX, the only real estate property of the undersigned family at that time, this being also the basic dwelling, indicating in the contract the value determined for tax purposes, which was qualified by the Evaluation Commission as an evasion of income tax for possible capital increase.

With regard to this transaction, the applicant pointed out that the Evaluation Commission had failed to take into account the provisions of Art. 37 para. (4) and (5) of the Tax Code (in force on 10.08.2007), as in order to apply the provisions of art. 41 para.

(2) of the Tax Code, in the part of recognizing the capital increase, it was necessary to verify that the provisions of art. 37 para. (4) of the Tax Code are met in the present case, in the part referring to the value basis of the alienated property in relation to the assessed market price. And only after clarifying this aspect, the Independent Evaluation Commission was to conclude with reference to the existence of a capital increase, which could be recognized with taking into account the provisions of Art. 37 para. (7) and Art. 41 para. (3) of the Tax Code .

Moreover, the applicant noted that during the question rounds and at the hearing on March 3 , 2023, she explained and communicated to the independent Evaluation Commission sufficient documentation to show with certainty that, in fact, the price for the dwelling house in XXXX was paid in mixed form: monetary and non-monetary.

Therefore, in the applicant's view, in the absence of conclusions from which it is clear that the 2007 transaction resulted in a capital increase which was to be recognised and in respect of which income tax was due, it cannot be said that there are serious doubts justifying a lack of ethical and financial integrity.

She considers that the Independent Evaluation Commission failed to clarify the relevance of applying the provisions of Art. 50 para. (4) of Law 1453 of 08 November 2022 on notaries (as amended in 2007), if it has not ascertained that the undersigned has committed acts giving rise to liability under this legal norm.

In this context, she informed that neither in the case of the 2007 transaction nor in the case of the 2012 transaction were presented false or erroneous documents and information that could lead to the annulment of legal acts, as well as the

communication by the owner of the unreal price of the good – object of the transaction has not been found.

Thus, with reference to the transactions of 2007 and 2012, the applicant concluded that it did not constitute a violation of the provisions of Art. 50 para. (4) of Law 1453 of 08 November 2022 on notaries (as amended in 2007) and consequently cannot be qualified as lack of ethical integrity.

She also considered that the conclusion of the Independent Evaluation Commission regarding the lack of ethical and financial integrity of the undersigned following the acceptance of the inclusion in the sale-purchase contract of 20 January 2012 of the estimated value for tax purposes, has no basis in the legal provisions.

According to the applicant, the expression 'has not seriously infringed' in Art. 8 of Law no. 26 of 10 March 2022 on some measures related to the selection of candidates for the position of member of the self-administration bodies of judges and prosecutors, implies the promotion of evaluation even if there is a violation of the rules of ethics and professional conduct.

In this regard, she considers that the Independent Evaluation Commission failed to substantiate or justify the seriousness of the facts found and the impact in terms of seriousness on ethical and financial integrity.

She concluded that the Independent Evaluation Commission did not find that the wealth acquired in the last 15 years did not correspond to the declared income, thus it did not argue on what grounds the explanations and documentation communicated would not be sufficient to dispel any suspicions, especially taking into consideration the fact that the Independent Evaluation Commission didn't multilaterally verify in all aspects the facts set out, in order to establish the difference of the alleged capital increase, what is the amount of unpaid income tax or the existence of this obligation at the date of valuation, etc.

On April 4, 2023, Angela Popil submitted a concretized application to challenge the Decision of the Independent Commission for Assessing the Integrity of Candidates for the Position of Member of the Self-Administration Bodies of Judges and Prosecutors No. 27 of 21 March 2023 on the candidacy of Angela Popil, candidate for the position of member of the Superior Council of Magistracy, seeking annulment of the decision and ordering the resumption of the candidate's evaluation procedure by the Independent Commission for Assessing the Integrity of Candidates for Membership in the Self-Administration Bodies of Judges and Prosecutors.

In substantiating her concretized application, the applicant supplemented the legal bases relied on in the basic application.

She noted that the Evaluation Commission had an unfair and differentiated treatment of identical situations identified, thus denying the provisions of Article 137 of the Administrative Code.

According to the applicant, Law no. 26 of 10 March 2022 on certain measures related to the selection of candidates for the position of member of the self-administration bodies of judges and prosecutors does not define the notion of serious doubts, reasons for which the Evaluation Commission has a wide margin of appreciation of factual situations to classify in its decisions as serious doubts or not regarding the integrity criteria of a candidate.

However, she considers that the margin of appreciation of the Evaluation Commission cannot be absolute and is limited by the provisions of Articles 16 and 137 of the Administrative Code, which provide imperatively that the discretion or margin of appreciation of the authorities may not be arbitrary and shall be exercised in good faith and in accordance with the law.

As a consequence, although the Evaluation Commission had the obligation to treat identical situations identically, the Evaluation Commission, contrary to the provisions of art. 137 para. (3) and (4) of the Administrative Code acted differently and considered that the violations found with respect to other candidates were not sufficiently serious to consider that these candidates do not meet ethical and financial integrity .

On April 4, 2023, the Independent Commission for Assessing the Integrity of Candidates for the Position of Member of the Self-Administration Bodies of Judges and Prosecutors, represented by Vitalie Miron, submitted a reference, requesting the rejection of Angela Popil's appeal request.

In the grounds of the reference, it essentially stated that Angela Popil's application for challenge was unfounded, and Decision No. 27 of 21 March 2023 is legal and does not violate the applicant's legal rights and interests.

At the hearing, the applicant Angela Popil supported the application for appeal against Decision no. 27 of 21 March 2023, requesting that it be upheld, on the factual and legal grounds relied on in the application.



At the court hearing, the representative of the Independent Commission for Assessing the Integrity of Candidates for the Position of Member of the Self-Administration Bodies of Judges and Prosecutors, lawyer Valeriu Cernei, supported the arguments invoked in the submitted reference, requesting the dismissal of the action as unfounded.

### **Assessment of the court.**

Having heard the parties, and their representatives, examined the documents of the administrative and judicial file, the Special Panel of the Supreme Court of Justice finds that the action is admissible and well founded, for the following reasons.

According to Art. 14 para. (7) of Law no. 26 of March 10, 2022, by derogation from the provisions of art. 195 of the Administrative Code .no. 116/2018, the request to appeal the decision of the Evaluation Commission is examined within 10 days.

### **Time limit for consideration of the action.**

By the order of March 30, 2023 of the Reporting Judge, member of the Special Panel of the Supreme Court of Justice, the present application for challenge was accepted for consideration in the administrative proceedings, and the copy of the defendant's application was ordered to be sent with the deadline until April 04, 2023 at 16.00 for the submission of the candidate's file, reference and opinions on the circumstances, existence/non-existence of grounds of inadmissibility, accompanied by evidence (F.D. 49-51).

The hearing for consideration of the case has been scheduled for 05 April 2023 at 09.00 (f.d. 51).

On April 4, 2023, Angela Popil submitted a concretized application to challenge the Decision of the Independent Commission for Assessing the Integrity of Candidates for the Position of Member of the Self-Administration Bodies of Judges and Prosecutors No. 27 of March 21, 2023 on the candidacy of Angela Popil, candidate for the position of member of the Superior Council of Magistracy, requesting the annulment of the contested decision and ordering the resumption of the evaluation procedure of the candidate by the Independent Commission for Assessing the Integrity of Candidates for the Position of Member of the Self-Administration Bodies of Judges and Prosecutors (F.D. 55-59), being sent to the defendant for information, via electronic mail (F.D. 60).

On April 4, 2023, the Independent Commission for Assessing the Integrity of Candidates for the Position of Member of the Self-Administration Bodies of Judges and Prosecutors, represented by Vitalie Miron, submitted a reference, requesting dismissal of the objection filed by Angela Popil (f.d. 62-75), being sent to the applicant for information, via e-mail. (F.D. 85).

The panel reiterates that, for April 5, 2023, at 09:00, the court hearing was set to examine the appeal filed by Angela Popil against the Independent Commission for Assessing the Integrity of Candidates for the position of Member of the Self-Administration Bodies of Judges and Prosecutors, on the annulment of Decision no. 27 of 21 March 2023 on Angela Popil's candidacy, candidate for the position of member of the Superior Council of Magistracy and ordering the resumption of the candidate's evaluation procedure.

In view of the honourable resignation of the Judge-Rapporteur, this case was reassigned to the specially constituted Panel by order of the Acting President of the Supreme Court of Justice dated 10 May 2023 (f.d. 102-122 ).

On 11 April 2023, the Independent Commission for Assessing the Integrity of Candidates for Membership in the Self-Administration Bodies of Judges and Prosecutors, submitted a request for recusal to a judge of the Panel (f.d. 124-124 verso).

According to Art. 14 para. (4) of Law no. 26 of March 10, 2022, in case of abstention or objection of the member of the Special Panel, the examination of that request shall be made by the other members of the Special Panel, with the substitution of the member whose abstention or objection is discussed by the alternate member. If the request for objection or abstention is admitted, the case shall be examined in the substitute of the judge concerned by the alternate.

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

Following the order by decision of the Superior Council of Magistracy no. 142/8 of 02 May 2023, of the temporary transfer, for a period of 6 months, starting with 10 May 2023 to the position of judge of the Supreme Court of Justice, of certain judges, by order no. 69 of 04 May 2023 of the Acting President of the Supreme Court of Justice, in force since May 10, 2023, an alternate member of the Special Panel of the Supreme Court of Justice has been appointed, and it was possible to examine the request for recusal submitted to the recused judge.

On May 21, 2023, via email, Angela Popil sent her opinion on the request for recusal (f.d. 143-145 verso).

The court hearing to examine the request for recusal of the judge from the Panel submitted by the Independent Commission for Assessing the Integrity of Candidates for the Position of Members of the Self-Administration Bodies of Judges and Prosecutors was scheduled for May 23, 2023, at 10.40.

By the order of May 25, 2023, the Supreme Court of Justice dismissed the request for recusal submitted to the judge of the Panel by the Independent Commission for Assessing the Integrity of Candidates for the Position of Members in the Self-Administration Bodies of Judges and Prosecutors (f.d. 154-158).

The participants in the proceedings were summoned to the next hearing on the case on 19 June 2023, at 10.00.

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.

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

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

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

More specifically, the legal provisions regarding the definition and conditions under which the ethical/financial integrity is to be assessed are, by their nature, rules of substantive administrative law, which form the legal basis as per Article 21(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.

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

The Law No 180 of 7 June 2023 reinforced the understanding that the Commission is a public authority specific in its own way, i.e. it is not a legal entity of public law, although Article 7 of the Administrative Code – which has a universal meaning – includes and defines the concept of public authority both in the sense interpreted by the Parliament of the Republic of Moldova, i.e. functionally and organizationally, and in the sense of a legal entity of public law, as the case may be or require. This conclusion also follows from the indefinite pronoun “any organizational structure” in Article 7 of the Administrative Code. A public authority – in addition to the element of any organizational structure or body, established by law or other regulatory act to pursue public interests – also falls in the purview of public regime, which establishes the tasks and remits, which gives the right to impose legal force on people with whom the public authority engages in legal relations. A different interpretation and application would mean that the work of the Commission and its decisions are not binding as individual administrative acts, but represent legal acts under private law. The Special Panel points out that a natural person can also be a public authority if they are delegated by law the tasks pertaining to public authorities and the corresponding powers to carry them out. Furthermore, according to Article 72(6) of the Law No 100 of 22 December 2017, the interpretation law does not have retroactive effect, except in cases where the interpretation of the sanctioning rules leads to a more favorable situation.

The Special Panel emphasizes that the Commission’s tasks do not pertain to the private, but to the public areas of activity, which is why it was vested, by Law No 26/2022, with powers that allow it to have a legally binding effect over those evaluated under Article 8 of the Administrative Code. The Special Panel notes, as a matter of principle, that the concept of public authority cannot be mistaken – from a

functional and organizational point of view – for that of a legal entity governed by public law, for otherwise the Commission decisions would not fall within the concept of an individual administrative act.

At the same time, it holds that there was no in-depth understanding of Article 2(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.

Furthermore, the Special Panel highlights that during the court hearing the defendant's representatives invoked the cases *Țurcan v. the Pre-Vetting Commission*

and Clevadi v. the Pre-Vetting Commission, where the court established with the force of res judicata that the provisions of Book I and II of the Administrative Code are not applicable to the cases filed against the Pre-Vetting Commission.

Thus, based on the aforementioned, the Special Panel mentions that the cases to which the Pre-Vetting Commission's representatives referred, initiated upon the applications of Anatolie Turcanu (No 3-5/23) and Natalia Clevadi (No 3- 13/23) do not form unitary case-law. 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.

As a matter of principle, jurisprudence must be stable, but this should not obstruct the evolution of the law. That is why the Strasbourg Court stated that there is no right to an established jurisprudence, so that the change in the jurisprudence imposed by a dynamic and progressive approach is admissible and does not violate the principle of legal certainty (ECHR, Unedic v. France, 2008, §74; Legrand v. France, 2011), however two conditions must be met: the new approach has to be consistent at the level of that jurisdiction and the court that ruled on the change must provide a detailed explanation of the reasons for which it decided so (ECHR, Atanasovski v. Macedonia, 2010, §38).

Under these circumstances, the Special Panel rejects the argument invoked by the Commission that when issuing a solution on a case the court must reason its opinion and issue the solution based on mentioned considerations and judicial practice examples.

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

### **Application admissibility**

According to Article 207(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, by her action, the applicant Angela Popil claims the violation of a right through administrative activity, according to art. 189 para. (1) of the Administrative Code, namely that by decision no. 27 of March 21, 2023, the Evaluation Commission violated her right to be elected as a member of the Superior Council of Magistracy, the fundamental right to administration (Article 39 of the Constitution of the Republic of Moldova), the right to a favorable evaluation decision for the candidate Angela Popil.

By derogation from Article 209 of the Administrative Code, Article 14(1) and (2) of the Law on certain 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 regulated a special time frame for filing the administrative lawsuit application. Thus, the decision of the Pre-Vetting Commission may be appealed by the evaluated candidate within 5 days from the date of receiving the reasoned decision, without following the preliminary procedure

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

appointed by the President of the Supreme Court of Justice and confirmed by the decree of the President of the Republic of Moldova.

In this context, it is noted that the decision of the Independent Commission for Assessing the Integrity of Candidates for the Position of Member in the Self-Administration Bodies of Judges and Prosecutors no. 27 of 21 March 2023 was received by Angela Popil on 24 March 2023, which was confirmed by the statement from the e-mail attached to the case materials (f.d. 11).

The special panel concludes that Angela Popil's appeal is admissible, as the applicant complied with the legal provisions of Art. 14 para. (1) of the Law on certain measures related to the selection of candidates for membership in the self-administration bodies of judges and prosecutors no. 26 of 10 March 2022, being filed on 29 March 2023, within the deadline provided by law, with the Supreme Court of Justice.

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 merits of the action in administrative litigation.**

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 Angela Popil passing the evaluation.

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

The Commission's decision is unfounded 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, according to Decision no. 27 of 21 March 2023 on the candidacy of Angela Popil, candidate for the position of member of the Superior Council of Magistracy, the latter did not pass the evaluation pursuant to art. 8 para. (1), (2) (a),



(4) lit. b), (5) (a) and (c) and Art. 13 para. (5) of Law no. 26 of 10 March 2022, on the grounds that she does not meet the integrity criteria, as the Commission found serious doubts about compliance with ethical and financial integrity criteria.

In accordance with Art. 8 para. (1) of Law no. 26 of March 10, 2022, for the purposes of this law, the assessment of the integrity of candidates consists of verifying their ethical integrity and financial integrity.

According to Art. 8 para. (2) letter a) of Law no. 26 of March 10, 2022, a candidate is considered to meet the criterion of ethical integrity if, he has not seriously violated the rules of ethics and professional conduct of judges, prosecutors or, as the case may be, of other professions, as well as has not admitted, in his activity, reprehensible actions or inactions, which would be inexplicable from the point of view of a legal professional and an impartial observer.

According to Art. 8 para. (4) letter b) of Law no. 26 of March 10, 2022, a candidate is considered to meet the criterion of financial integrity if, the Evaluation Commission finds that the wealth acquired by the candidate in the last 15 years corresponds to the declared income.

Paragraph (5) letters a) and c) of the same article provides that in order to assess the financial integrity of the candidate, the Evaluation Commission shall verify the candidate's compliance with the tax regime in terms of payment of taxes on the use of funds and income resulting from the property owned, as well as taxable income, and in terms of payment of import duties and export duties.

Whether or not there are loan, credit, leasing, insurance or other contracts that can provide financial benefits, in which the candidate, the person specified in Article 2 paragraph (2) or the legal person in which they are beneficial owners is a contracting party.

According to art. 13 para. (5) of Law no. 26 of March 10, 2022, a candidate is considered not to meet the integrity criteria if it has been found that there are serious doubts regarding the candidate's compliance with the requirements set out in Article 8, which have not been removed by the evaluated person.

At the same time, in accordance with art. 5 para. (1) of the Evaluation Regulation of the Independent Commission for Assessing the Integrity of Candidates for the Position of Member in the Self-Administration Bodies of Judges and Prosecutors, adopted at the meeting of the Independent Evaluation Commission on 02 May 2022 pursuant to Law no. 26 of 10 March 2022, only if a candidate fully meets all

indicators as defined in art. 8 para. (2)-(5) of Law no. 26 of 10 March 2022, he is considered to meet the criteria of ethical and financial integrity.

In this context, the Special Court Panel notes that, according to the above-mentioned legal provisions, the Evaluation Commission is required to ascertain whether or not there are serious doubts regarding the candidate's compliance with the legal integrity criteria. The Evaluation Commission does not ascertain whether or not a candidate meets the integrity criteria and/or the existence of which candidates have breached.

The decision to promote or not to promote a candidate constitutes an assessment of the Commission, with the exercise of the legal margin of discretion, depending on whether it finds the existence or absence of serious doubts regarding the candidate's compliance with the requirements set out in art. 8 of Law no. 26 of 10 March 2022, which have not been removed by the candidate.

If the Evaluation Commission finds that there are serious doubts regarding the candidate's non-compliance with the criteria of ethical and financial integrity, it shall give the candidate the opportunity to dispel these doubts by giving explanations to the questions raised and presenting evidence in support of his/her position.

In the case, Decision No. 27 of March 21, 2023 is a finding of serious doubts about Angela Popil's compliance with ethical and financial integrity criteria.

Having analyzed Decision No. 27 of March 21, 2023, the Special Panel notes that with regard to the candidate Angela Popil, the Independent Evaluation Commission found serious doubts about the candidate's compliance with the financial integrity criterion pursuant to Art. 8 para. (4) letters b) and para. (5) letters a) and c), as well as with the criterion of ethical integrity pursuant to art. 8 para. (2) letter a) of Law no. 26 of March 10, 2022, with reference to the undervaluation of real estate in order to avoid or assist others to avoid paying capital increase taxes, facts that have been acknowledged and doubts that have not been removed by the candidate.

In this regard, the Independent Evaluation Commission for assessing the candidate's financial integrity verified whether the wealth acquired by the candidate in the last 15 years corresponded to the declared income and whether the candidate complied with the tax regime.

The Commission also checked whether the candidate complied with the rules of ethics and professional conduct of lawyers.

Thus, candidate Angela Popil was asked about the financial and ethical aspects of two underestimated real estate.

Here the Special Panel observes that the Commission gave the candidate the opportunity to dispel any doubts through data and information, thus asking her questions of specification.

In this context, the Evaluation Commission noted that in 1999, the candidate and her husband purchased a plot of land for construction of 0.06 ha, located in XXXX (hereinafter "real estate in XXXX 2007"). In 2005, an individual house of 99.1 sq. m. was registered on this plot of land. On October 11, 2007, the candidate and her husband sold these properties for a price of 557,960 MDL (33,632 EUR), according to the sale-purchase agreement.

In her answers, the candidate informed that these properties were sold in 2007 for the real price of 70,000 EUR (1,161,300 MDL).

During the written rounds of clarification questions on the above-mentioned issue, the candidate mentioned that the price of EUR 70 000 was not paid in full in cash by the buyer. In fact, the buyer paid the candidate and her husband 50,000 EUR (829,500 MDL) in cash, and the rest of the amount was paid in the form of transfer of ownership of a car "Mercedes 270 CDI", m/y 2003, owned by the buyer.

According to the declaration of assets and personal interests of the candidate for 2017 (hereinafter referred to as the "annual declaration"), provided to the Commission, the declared value of this car is EUR 23,000 (MDL 381,571). Since the buyer was credited with EUR 20 000 of the value of the car as payment for the immovable property, the applicant informed the Commission that she and her husband had paid the buyer EUR 3 000 (MDL 47 770) as the remaining difference between the price of the immovable property, the price of the car and the cash payment.

The applicant also informed the Commission that, in order to ensure the transfer of ownership of the car, a loan agreement had been concluded between the applicant, her husband and the purchaser of the immovable property on the same day, on 11 October 2007, when the contract for the sale and purchase of the immovable property was concluded.

At the same time, the Evaluation Commission also noted that, on January 20, 2012, the candidate and her husband purchased a plot of land for construction of 0.029 ha

and a house of 87.3 sq. m. located on it, in XXXX (hereinafter "real estate in XXXX 2012").

According to the sale-purchase contract, the real estate was purchased at the price of 863,893 MDL (55,905 EUR).

However, the applicant informed the Commission that the price actually paid for these immovable properties was EUR 65 000.

Also, in this case, the Evaluation Commission offered the candidate the opportunity to remove any doubt, through data and information, thus asking her questions of clarification.

When asked about the difference between the price actually paid and the contract price, in her answers, the candidate stated that "the value of the contract is the value of the property determined for taxation purposes, as indicated by the seller when concluding the contract".

The Commission appreciated the candidate's openness to answer the Commission's questions on this issue. However, this did not eliminate the fact that the candidate twice participated in real estate sale-purchase transactions, whereby the parties deliberately agreed to underestimate the immovable property and create a difference between the declared contract price and the actual price paid.

During the public hearing, the candidate could not provide additional information on the initiator of the inclusion of an underestimated price in the sale contract on immovable property XXXX in 2007. Moreover, Angela Popil confirmed that the buyer of the real estate did not have sufficient financial means to pay the full purchase price and that the transfer of ownership of the Mercedes car was an agreed part of the transaction.

The evaluation Commission noted that Angela Popil admitted that following the sale of the property, she was obliged under Article 41 of the Tax Code, to pay capital increase tax from the profit made through alienation, also admitted that she did not do so at the time and that this was unethical.

With regard to the purchase of immovable property XXXX in 2012, a difference between the contract price and the actual price paid was again agreed.

In the case, according to the candidate, the initiative to create this difference came from the seller of the real estate XXXX in 2012.

During the public hearing, the candidate explained that the seller insisted on the contract price and that the seller was the one who controlled what was to be included in the contract. Angela Popil also confirmed that she did not agree to this arrangement.

The evaluation Commission finally concluded that Angela Popil twice voluntarily participated in real estate transactions in which the parties agreed to underestimate the value of the assets and agreed to include a contract price that the parties knew was lower.

In the sale-purchase contract of the immovable property in XXXX 2007, a provision is included, which stipulates that "we, the contracting parties, declare that the mentioned price, being the essential clause of the contract, is the real one, and we have been informed by the notary of the provisions of art. 50-51 of the Law on Notaries and we assume all responsibility arising from the communication of the unreal price".

Thus, by including an incorrect price when selling the immovable property XXXX in 2007, the applicant avoided paying capital increase tax based on the price actually paid for this property, while when purchasing the immovable property XXXX in 2012, the candidate, therefore, assisted the seller of the property in avoiding the payment of such a tax.

In view of the factual circumstances, the Evaluation Commission concluded that from the point of view of a legal professional and an impartial observer, the candidate's actions in accepting actions that were incorrect and concealed the true value of the immovable property in The purpose of tax avoidance would be inexplicable. Failure to comply with the law calls into question the candidate's compliance with the criterion of ethical integrity.

The special panel points out that the circumstances set out by the Evaluation Commission in Decision no. 27 of March 21, 2023 and its analysis of the candidate's compliance with the tax regime was carried out in light of the candidate's compliance with the rules of conduct and professional ethics as a lawyer.

In essence, in her application for a summons, the applicant criticized Decision No. 27 of 21 March 2023, claiming that it does not contain circumstances denoting a serious breach of the rules of ethics and professional conduct by the candidate.

Angela Popil invoked that the Evaluation Commission did not find that the wealth acquired in the last 15 years would not correspond to the declared income, thus did

not argue from which considerations the explanations and documentation communicated would not be sufficient to remove possible suspicions, especially if the Evaluation Commission did not multilateral verify in all aspects the facts exposed, for the purpose of ascertaining the difference of the alleged capital increase, what is the amount of unpaid income tax or the existence of this obligation at the date of valuation, etc.

The applicant also claimed that the Independent Evaluation Commission had taken a different approach to similar circumstances, with the result that some candidates with the same actions had passed the assessment.

Having analyzed the materials of the case and the administrative file of the candidate, as well as those invoked at the court hearing, it is relevant to mention that the Independent Evaluation Commission in its decision established the non-promotion of candidate Angela Popil due to the difference between the use of cadastral value in sale-purchase contracts and the actual price received, the reference period 2007 and 2012.

In this regard, the court notes that the candidate provided detailed explanations regarding the indication of the cadastral value in the sale-purchase contracts of 2007 and 2012, respectively. She explained that it was customary for the reference period to indicate the cadastral value for the expense of the actual price received when concluding sale-purchase contracts.

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 points out that the concepts of "serious", "reprehensible" and "unexplained" in Article 8 para. (2) letter a) of Law no. 26 of 10 March 2022 constitutes by their legal nature undefined legal concepts (vague legal norm), which do not provide discretion to the Evaluation Commission, but oblige a complex and rigorous interpretation of the rule in the light .of facts of serious violation of the rules of ethics and professional conduct, whereas, as the case may be, The Commission held virtually that the candidate's actions could be considered negligent conduct.

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

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

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

It is not clear from the contested decision and the acts provided by the defendant which of those aims are pursued by the decision of non-promotion of the assessment. Any of these purposes would be legitimate, but none of them are analyzed, and at the hearing, the defendant's representatives did not provide an answer to this question.

It should be noted, however, that the Commission is fundamentally free to choose its legitimate aims, but this must be clear from the content of the decision and confirmed from the acts of the administrative file.

According to art. 29 para. (2) letter a) of the Administrative Code, a measure is proportionate if it is appropriate to achieve the purpose pursued by virtue of the power of attorney conferred by law. Thus, the exclusion and not only the limitation of the right to be elected to the bodies listed in Law no. 26 of 10 March 2022, even for alleged insignificant infringements retained by the Commission, is not, in the case, an appropriate measure to achieve the aims set out in the law. Given the pressing problem in the proper functioning of the judicial self-administration bodies at the time of the decision, the failure to evaluate the candidate not only does not fall within the grounds for non-evaluation, but constitutes an unnecessary and therefore illegal violation of the rights of the applicant.

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 groundless, 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. In the case, the circumstances underlying the decision of non-promotion of the evaluation of candidate Angela Popil took place in 2007 and 2012, i.e. 15 years and 10 years ago respectively.

According to Article 29(2)(c)-(3) of the Administrative Code, a measure undertaken by public authorities is deemed proportionate if it is reasonable. A measure undertaken by public authorities is reasonable if the interference it causes is not disproportionate compared to its purpose. This requirement involves a balancing of the legally protected values. The more damage is caused to a right, the more it is required for the advantage resulting from the interference to be superior. Note that excluding the right of a judge to be a candidate for membership in the Superior Council of Magistracy involves not just an interference, but rather an improper annulment of the right to be elected into this position. Such a solution cannot be accepted under the rule of law, as it is incompatible with the dignity of a human being and of a judge. The goal of trust in the justice system can be achieved by complex means, but in no way can it be done by reducing to nothing the idea of free, transparent, and competitive election for the membership of the Superior Council of Magistracy and its bodies. The special panel notes that the purpose of Law No. 26 of 10 March 2022 is, among other things, to increase confidence in justice, but not to transform justice in an inefficient branch of state power and over which interferences / dependencies on political power would hang.

In summary of this aspect of legality, the Special Panel finds that the decision of the Evaluation Commission is also contrary to the principle of proportionality.

The special panel notes that the text of "serious doubts" in Article 13 para. (5) of Law no. 26 of 10 March 2022 establishes a derogation from the standard of proof stipulated in Art. 93 of the Administrative Code, this very article paves the way for



such a derogation, including under the conditions of Art. 2 para. (2) of the Administrative Code.

At the same time, the court points out that the text of "serious doubts" is not compatible with formalism and subjectivity of the public authority. This standard depends on the outcome of the evaluation of the evidence so that a factual circumstance with a high level of probability other than the standard beyond doubt can be considered established. Thus, if the candidate under evaluation presents logical arguments and explanations to the Commission, truthful with the socio-economic context of the Republic of Moldova, then the probability that a fact happened in one way or another balances, and any doubt must be treated in favor of the candidate, and this is a principle rooted in the idea of the rule of law.

The special panel points out that the applicant has put forward sufficient and logical arguments that the facts occurred in that manner and that the Commission erroneously failed to accept these arguments.

On the basis of the above, the special panel of the Supreme Court of Justice concludes that, given the specific circumstances of this case, the incident does not reach the level of seriousness that would constitute a failure to comply with the ethical and financial integrity criteria set out in Art. 8 of Law no. 26 of 10 March 2022. The Independent Evaluation Commission had to take into account the fact that the candidate's involvement in the purchase and sale transactions for the listed immovable property constituted an isolated event that took place 15 and 10 years ago respectively, and that the applicant had been transparent in this regard during the evaluation.

Apart from the above, the trial court considers the applicant's arguments concerning equal treatment of candidates in front of the Independent Evaluation Commission to be well founded.

The general principle of equality is one of the fundamental constitutional principles of the constitution and grants a subjective right. It prohibits treating the same facts unequally or unequal things in the same way, unless a different approach would be objectively justified. This traditional formulation also defines the controversial basic structure and therefore the sequence of examination. The basic question is always justification, i.e. whether the weight of (un)equal treatment is offset by the relevant factual reasons. The degree of justification required varies according to the material severity of the unequal treatment and can range from a simple arbitrary test to a proportionality test.

In this consistency, the special panel notes that the Commission's decision does not show any facts to indicate why candidate Angela Popil was assessed as a candidate who lacks integrity in relation to the candidates who passed the evaluation, if the state of affairs is similar.

In this regard, whether two subjects are initially treated equally or unequally, they are assessed on the basis of a comparison of legal consequences (on factual equality).

The comparability elements refer specifically to those referred to in Article 8 para. (2) and (4) of Law no. 26 of 10 March 2022, which does not differ significantly in the case of the unpromoted applicant compared to the candidates who passed the assessment.

The court finds that the Commission did not carry out an assessment by comparison method, at least as follows from the content of the decision and the documents of the judicial file, and the administrative file submitted by the Commission.

The principle of equality prohibits treating essentially the same things unequally, but it obviously sees this formulation as synonymous with the usual formula according to which the principle of equality is violated if it is reasonable, resulting from the nature that no objectively plausible problem or reason for legal differentiation or equal treatment can be found.

Thus, the facts of the case reveal circumstances that would have led to the favorable assessment of the candidate, and consequently to the illegality of the contested decision, because it is contrary to the provisions of Article 23 of the Administrative Code. However, the Commission has not provided any evidence of incomparability, which merely includes the assessment that two objects are so different that from the outset there can be no arguments for equal treatment.

Both the judge, the prosecutor and the lawyer live in the same socio-economic context as the rest of the civil servants and citizens, and the state authorities cannot accept different standards for past situations.

Furthermore, the Special Panel reiterates that the so-called violations of financial and ethical integrity had been assessed by the Commission in a subjective way and isolated from the historical-social background, which affects the security of legal relationships. Generally, the legal systems accepts the retroactive effect of the law if it favors the legal situation of a person, but this effect cannot be projected by way of legal interpretation.

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

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

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

The special panel notes that the defendant did not submit evidence that the documents and acts submitted by the candidate were translated into the language known by the foreign members of the Evaluation Commission, appointed by the development partners, which amounts to the lack of hearing of the candidates by 3 members of the Evaluation Commission. This is contrary to Art. 10 para. (9) of Law no. 26 of 10 March 2022, but also the provisions of art.art. 22 and 92 of the Administrative Code.

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

The Special Panel 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 applicant demonstrated to the Special Panel of the Supreme Court of Justice the plausibility of the evidence put forward in her challenge, including the correctness of the financial transactions carried out in the management, sale and purchase of movable and immovable property, as well as compliance with the rules of ethics and deontology.

The special panel notes that the circumstances found indicate a right of the applicant to a decision of the Evaluation Commission other than that challenged, since they are of such a nature that could lead to the promotion of the evaluation by the candidate Angela Popil.

At the same time, the Special Panel notes that the Venice Commission recommended that the final decision on the assessment be taken by the competent court, however the Parliament of the Republic of Moldova opted for a different policy of law on this subject. Despite this, the Special Panel stresses that, for reasons of effective protection of rights, it is in law and obliged to carry out a full judicial review of legality on questions of fact and law.

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, the evaluation after the resumption of proceedings should not turn into a vicious circular argument and activity, which is contrary to the standard of effective protection of rights, separation of branches of state power, legal certainty and binding effect of final court decisions.

The special panel notes that the circumstances adopted by the Evaluation Commission do not fall within the grounds for not promoting the evaluation of candidate Angela Popil from a proportionality perspective. It did not carry out an analysis and statement of reasons for the legitimate aim.

Thus, the exclusion and not only the limitation of the right of candidate Angela Popil to participate and be elected as a member of the Superior Council of Magistracy for minor acts retained by the Evaluation Commission is not an appropriate measure to achieve the goals set out in the law, but not materialized in the contested decision. Given the problem of the proper functioning of the judicial self-administration bodies at the time of issuing the decision and the failure to promote the candidate for minor acts, not only does it not fall within the grounds for non-promotion, but constitutes an unnecessary and illegal violation of the stated 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, the exclusion of the applicant's right to be a candidate for membership of the Superior Council of Magistracy entails not only interference but an improper annulment of the right to be elected to that office. Such a solution cannot be accepted in a state governed by the rule of law, as it is incompatible with human dignity.

For those reasons, the Special Panel points out that, in the present case, there are legal grounds to annul the decision of the Independent Commission for Assessing the Integrity of Candidates for the position of Member of the Self-Administration Bodies of Judges and Prosecutors no. 27 of 21 March 2023 on Angela Popil's candidacy.

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 accordance with the provisions of art. Art. 224 para. (1) letter b), 195 Administrative Code, art. 238-241 of the Code of Civil Procedure, Art. 14 para. (6), para. (8) letter b), para. (9) of the Law on certain measures related to the selection of candidates for the position of member of the self-administration bodies of judges and prosecutors no. 26 of 10 March 2022, the special panel, established within the Supreme Court of Justice, to examine appeals against the decisions of the Independent Commission for Assessing the Integrity of Candidates for the position of Member of Self-Administration Bodies of Judges and Prosecutors

d e c i d e s:

To admit the appeal filed by Angela Popil against the Independent Commission for Assessing the Integrity of Candidates for the Position of Member in the Self-Administration Bodies of Judges and Prosecutors on the annulment of the Decision of the Independent Commission for Assessing the Integrity of Candidates for the Position of Member of the Self-Administration Bodies of Judges and prosecutors no. 27 of 21 March 2023 on the candidacy of Angela Popil and ordering the resumption of the procedure for evaluating the candidate.

To annul the Decision of the Independent Commission for Assessing the Integrity of Candidates for the Position of Member of the Self-Administration Bodies of Judges and Prosecutors No. 27 of March 21, 2023 on Angela Popil's candidacy.

To order the resumption of the evaluation by the independent commission for assessing the integrity of candidates for membership in the self-administration bodies of judges and prosecutors of candidate Angela Popil.

The decision is irrevocable.

President  
Judge

Tamara Chisca-Doneva

Judges

Mariana Pitic  
Ion Guzun

