

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

**THE SUPREME COURT OF
JUSTICE**

1 August 2023
Municipality

Chişinău

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

consisting of:

Hearing Chairperson, Judge
Judges

Tamara Chişca-Doneva
Ion Guzun
Mariana Pitic

Clerks

Natalia Arapu
Tatiana Braga

With the participation of:
plaintiff's representative, counsel

Ghenadie Bambuleac

representatives of the defendant, counsels

Roger Gladei, Irina Sugoneaco
and Valeriu Cernei

in the absence of plaintiff

Nicoale Şova

having examined in public court session the administrative appeal lodged by Nicolae Şova against the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, seeking that Decision No. 16 of 13 January 2023 on the Candidacy of Nicolae Şova, Candidate for the Superior Council of Magistracy – be annulled, and that the candidate evaluation procedure be resumed,

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

Submissions of the Participants in the Proceedings

On 6 February 2023, Nicolae Şova, represented by counsel Ghenadie Bambuleac, filed an appeal against the Decision on the Candidacy of Nicolae Şova No 16 of 13 January 2023 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, seeking that it be annulled, and that the resumption of evaluation be ruled.

The plaintiff stated in the reasoning of the appeal that on 17 June 2005 he was appointed as a judge in Botanica Court, Chişinău Municipality, for a 5-year term, and that on 30 June 2010 he was appointed as a judge until retirement age.

On 1 January 2017, he was appointed as a judge of the Chişinău Court, and on 11 December 2018, he was appointed as insolvency judge at the Chişinău Court, Central Office.

As of 2 November 2021, the plaintiff was appointed to the position of Acting Deputy President of the Chişinău Court, Central Office, and Acting President of the Chişinău Court.

The plaintiff stated that throughout his career as a judge, he was never subject to any investigation or verification of professional integrity or ethics, he was never imposed a disciplinary sanction as a result of an investigation or verification of professional integrity or ethics, and that therefore he had an impeccable reputation and an untarnished professional image.

Neither were the plaintiff's family members sanctioned for not observing the tax law or for violations of the legal framework on the declaration of assets, as he filed in due time the declarations of assets and personal interests with the National Integrity Authority.

Throughout his career as a judge, the National Integrity Authority had never established that the plaintiff violated the legal regime of conflicts of interest, incompatibilities, restrictions and limitations, declaration and control of assets and personal interests.

The plaintiff mentioned that he had registered for the competition and applied for the position of member of the Superior Council of Magistracy on the basis of his profession, and that as a result of that – he underwent an integrity assessment by the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors.

Once the list of candidates to the position of member of the Superior Council of Magistracy, published on 29 March 2022, was sent to the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors on 6 April 2022, the Commission initiated the evaluation of the candidate's integrity.

On 21 June 2022 the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors sent an ethics questionnaire to the candidate to be filled in voluntarily and returned to the Commission by 5 July 2022. The candidate accepted, completed questionnaire and submitted it to the Commission on 5 July 2022.

Following a request from the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors of 8 July 2022, the plaintiff submitted a completed 5-year declaration of assets and personal interests on 15 July 2022.

On 24 August 2022, the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors sent the plaintiff a request for clarifying information, containing 13 questions, including 33 sub-questions and 14 requests for further documentation, to be answered by 29 August 2022.

On 27 September 2022, the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors sent the plaintiff a second round of 12 questions, including 32 sub-questions and nine requests for further documentation, to clarify some issues that came out during the evaluation. The plaintiff answered all the questions within the requested time period, on 30 September 2022, and provided most of the requested documents, though the defendant did not specify which documents were not submitted by the plaintiff that were requested earlier.

On 21 November 2022, the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors sent the plaintiff a third round of three questions, including six sub-questions and two requests for further documentation, to clarify some issues that came out during the evaluation. The plaintiff answered all questions within the requested time period, on 23 November 2022, and provided additional information.

The plaintiff stated that in the written communication between the parties, there were no objections and that all the answers, clarifications of answers or documentation deemed to be necessary by the defendant were provided by the plaintiff. Looking at the timeline and completeness of information and documentation submitted by the plaintiff – the defendant didn't ask for additions or clarifications, having regarded what had been sent as sufficient for the evaluation process and for moving on to the public hearing as the next stage of the evaluation.

The plaintiff claimed that throughout the entire period of administrative activity before the appealed administrative act was issued, he fully and unreservedly complied with the defendant's requests to produce documents and information in due time and with no objections from the Commission as to completeness, which the plaintiff could have otherwise addressed. However, during the preliminary verification, the defendant did not object and did not mention which documents or information had not been submitted by the plaintiff, and did no more than state the following in the appealed administrative act – "...the candidate answered all questions and provided most of the requested documents...".

The plaintiff disagrees with the Decision No. 16 of 13 January 2023 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, and claims that it violates Article 13 para. (2) of the 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, which provides that the decision of the decision of the Commission shall list the relevant facts, reasons and conclusion of the Commission for passing or failing the evaluation.

What is more, that decision is an unlawful unfavorable individual administrative act because it is based on skewed conclusions and assumptions that are essentially inconsistent with the information submitted by the plaintiff.

He also mentioned that the decision was based on the following financial and ethical aspects: purchase of an apartment for a preferential price in Chişinău Municipality, the source of funds for the purchase of that apartment and the source of the candidate's funds to purchase foreign currency, the understatement of the value of two properties, and the failure to pay the capital gain tax as required by law.

As regards the purchase of an apartment for a preferential price in Chişinău Municipality, the plaintiff explained that the defendant took it to mean that Nicolae Şova and his family members – up to eight people, to be specific – lived only in the 51.4 sq.m. apartment and that over 2014-2020 they neither lived, nor used the apartment bought for a preferential price. If the candidate revealed that he in and his wife owned together a 51.4 sq.m. apartment and that he had started building a house, then the Superior Council of Magistracy would have turned down his application to buy an apartment for a preferential price.

The plaintiff believes that in order to support such conclusions, the defendant said nothing of the fact that when the apartment was purchased, he was not living only with his wife and children, who are his family members. The defendant said nothing in its conclusions about the fact that the apartment was bought for a preferential price to improve living conditions because there wasn't enough room for himself and his family members.

The defendant did not disprove/refute the explanations of the plaintiff that his family members, who did not have enough room in the 51.4 sq.m. apartment, lived in the apartment bought for a preferential price between 2014 and 2020. Furthermore, in 2014, the house that was still under construction, was unfit for habitation and could not be regarded as improvement of the living conditions of the plaintiff and his family of four.

The plaintiff stated that the defendant said nothing of the eligibility criterion that allowed him to purchase the apartment for a preferential price for the purpose of improving living conditions and because there wasn't enough living space for him and his family members.

It is the opinion of the plaintiff that the rationale of the defendant that in 2020 he had sold to his own child the apartment bought for a preferential price is not pertinent or relevant for assessing the ethical criteria, because as at the date that the apartment was bought for a preferential price, the plaintiff was eligible for that, which is why the Superior Council of Magistracy granted his application.

What is more, the conclusions of the defendant were based on unsubstantiated assumptions and allegations, and they unwarrantedly call into question legal matters already settled following inquiries into the need and the requirements that the plaintiff was expected to meet in order to have the right to improve his and his family members' living conditions.

By groundless conclusions such as those referred to above, the defendant arrogated to itself the powers of an investigative body, putting the burden of proof on the plaintiff without having substantiated though its assumptions and conclusions.

The declarative certainty of the defendant's conclusions is contradictory, as the defendant stated that even if the plaintiff really needed improved living conditions for himself and his family members by the date that the apartment was bought on, and even if the Commission accepted that argument – it still did not explain why the candidate and his family did not use the 72.2 sq.m. apartment, but continued to live in the 51.4 sq.m. apartment.

As regards this conclusion – which the plaintiff believes to be contradictory – the plaintiff explained that his family members – who didn't have enough living space in the apartment that the plaintiff continues to live in – lived in that apartment over 2014-2020, and to this day. The defendant also stated baselessly that the purpose of the program – which was to improve the living conditions of the candidate – was not achieved, but this declarative conclusion is inconsistent with the situation described/explained by the plaintiff, i.e. that the right to improved living conditions covered him and his family members together.

Consequently, the unsubstantiated circumstances retained by the defendant and its accusatory allegations concerning the improper exercise or lack of the right, in 2014, to improve his and his family members' living conditions cannot be regarded as "serious doubts" as to the candidate's compliance with the ethical and financial integrity criteria.

The candidate criticized the finding of the Commission regarding his eligibility for an apartment for a preferential price as a judge, deeming this finding illogical, unsubstantiated and inconsistent with the documentation submitted by the plaintiff.

The plaintiff also stated that in order to address in all respects the subjective exercise of discretion by the defendant in relation to the plaintiff, it is important to understand the exercise of discretion by the defendant in relation to other candidates, by looking at the anonymized decisions of the defendant published on the defendant's website at www.vetting.md/decizii.

In this regard, the plaintiff referred to the decisions adopted by the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors concerning candidates Ioana Chironeț and Vasile Șchiopu, and clarified that, although it was established that these candidates committed violations in terms of the different legal regimes of declaration in similar situations, the Commission took a selective and groundless attitude to similar situations apparently established in the case of other candidates. Although Article 137(3) and (4) of the Administrative Code provides that essentially identical facts shall be treated identically. A differentiated treatment of two identical factual situations may be allowed only if there is an objective reason. If in one case a public authority has exercised its discretion in a certain way, then in similar cases it has the obligation to exercise its discretion in the same way.

As regards the source of funds to purchase the apartment and the source of funds for the candidate to buy foreign currency, the plaintiff claimed that he submitted information on the source of funds that, unquestionably, could not give rise to any doubts, including serious doubts, about the source of funds at issue.

The plaintiff stated that although he submitted to the defendant documentation evidencing the sale of the apartment and of his personal car which together represented a source of proceeds that were declared to the relevant authorities in compliance with the declaration framework, without any objections being raised, the defendant nevertheless established that “...the Commission’s serious doubts about the source of funds for purchasing foreign currency of 25,495 EUR have not been mitigated by the candidate.”

The plaintiff claimed that the defendant took into account neither the submitted supporting documentation, nor the legal documentation on the transactions that served as a source of funds for the plaintiff. This conclusion is arrived at because although the plaintiff was not a party to the loan agreement, that agreement gave rise to doubts about the justification of how the funds that the buyer paid were obtained, i.e. that the daughter of the plaintiff paid to the plaintiff, and about what funds were received via bank transfer following the sale of the apartment on the basis of a sale and purchase agreement that shows clearly what payments were made and to whom.

The defendant did not even analyze this aspect, which makes it necessary to underscore that reviewing the documents of the candidate is a mandatory part of financial integrity evaluation. What is more, the defendant did not take into account the fact that the funds, irrespective of whether they were converted into euro or another currency, were reported in the tax returns.

The plaintiff also believes that the defendant disregarded his explanation that he intended to purchase the car after the conclusion of the transactions, to obtain the proceeds and to use them specifically to buy another car.

The defendant did not reflect on the plaintiff’s explanation that he intended to purchase the car, but was not certain where he was going to purchase it in the Republic of Moldova or abroad, which led to converting the national currency obtained as a result of the transactions into euros.

As regards the understatement of the value of two real estate properties and the failure to pay capital gain tax as required by law – the plaintiff claimed that the defendant had unjustifiably drawn the conclusion that the indicated selling price had been established by the plaintiff in order to understate the values of the assets with the intention to avoid paying the capital gain tax, a conclusion that arises from the rationale explained below.

The plaintiff stated that he was not a signatory to the transaction of purchasing the land plot in Truşeni township, which is why the reasoning of the defendant that the plaintiff had indicated a smaller price of the purchased asset is not clear. The plaintiff does not deny that he is co-owner of the asset, as he acquired such status in compliance with the legal regime on property owned jointly by the spouses, by acceptance of ownership. Therefore, the unsubstantiated conclusions of the Commission that “... the candidate obtained the right of property over this property under a fictitious purchase

price, which raises serious questions regarding the method of acquiring this property and the financial integrity of the candidate” are not relevant.

In the opinion of the candidate, the Commission has intentionally arrogated to itself the remit of a court by claiming and calling this transaction a fictitious and illegal transaction (because of a fictitious price) and, as a consequence, such an approach led to the Commission’s unsubstantiated conclusions.

What is more, although the defendant stated that it had serious doubts about whether the selling prices of the assets was true, it did not mention what it believed the real prices should have been and did not grant the plaintiff the right to respond with regards to the actual prices that should have been indicated. A simple statement, such as that the price was fictitious and understated by the candidate without having evidence to support it, cannot be retained as justificatory for reinforcing the conclusion of “serious doubts”.

In the plaintiff’s view, the term “serious doubts” appears in the 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 only in Article 13 para. (5) regarding in relation to the candidate’s compliance with the requirements laid down in Article 8, which have not been mitigated by the evaluated person. The law does not provide a definition of this significant new concept for the national legal system. Therefore, the Commission has a wide margin of appraisal of the facts which it can rate, in its decisions, as “serious doubts” about the compliance of the candidate with the integrity criteria. Still, the Commission’s margin of appraisal cannot be absolute, and it is limited by Articles 16 and 137 para. (1) of the Administrative Code, that provide imperatively that the discretion or margin of appraisal of the authorities cannot be arbitrary and is to be exercised in good faith.

Therefore, considering the failure to substantiate the rejection of the arguments and evidence submitted by the plaintiff in the course of the evaluation, it follows that the discretion and margin of appraisal of the Commission in assessing the existence of serious doubts about the compliance of the candidate with the requirements set out in Article 8, which have not been mitigated by the evaluated person, were exercised in bad faith and arbitrarily, which is contrary to Articles 16 and 137 para. (1) of the Administrative Code.

On 27 February 2023, Nicolae Şova – represented by counsel Ghenadie Bambuleac – filed an addendum to the appeal where it reiterated the issues raised in the main appeal.

The plaintiff also brought to notice the fact that three members of the Commission – Herman von Hebel, Victoria Henley and Nona Tsotsoria spoke English and didn’t speak Romanian.

The plaintiff claimed that the preliminary evaluation work carried out by Commission members Herman von Hebel, Victoria Henley, Nona Tsotsoria was flawed and unlawful because the Secretariat of the Commission did not make available to them the translated English versions of the documentation submitted by the candidate in Romanian, in compliance with the law, meant to support his position on ethical and financial integrity.

Having looked at the administrative file of candidate Nicolae Şova, put together by the defendant, that culminated in the appealed administrative act – it consists of a large number of documents (including declarations, agreements, banking information, accounting information etc. starting with page 74 to page 346), submitted by the candidate, and that was not translated by the Secretariat of the Commission into English, which is the working language of the Commission as per Article 4 para. (1) of the Rules of Procedure 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 of 22 April 2022.

The procedural flaw of not translating the documentation that is relevant and necessary for the evaluation of the candidate in terms of his compliance with the ethical and financial integrity criteria is indicative of a flawed process of evaluation and consideration of documentation by Commission members Herman von Hebel, Victoria Henley, Nona Tsotsoria. These members were deprived of the possibility to check the information submitted by the candidate meant to support the evaluation of his candidacy, as they were only formally and groundlessly limited to verbally communicated information (potentially), and might have not even been informed of the substance of the documents submitted by the candidate.

Therefore, the evaluation procedure was affected by serious procedural errors made by the Commission concerning the language that the evaluation work was conducted in, manifesting themselves in that the documents and declarations submitted by the candidate at the stage at which the Commission was collecting and examining data were not translated into English, by derogation from Article 4 para. (1) of the Rules of Procedure 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 of 22 April 2022 and from Article 6 letter (c) of the 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.

The plaintiff noted that had the legal requirements to translate the documents into English – which is the working language of the Commission – been fulfilled, then the Commission members who didn't speak Romanian might have voted differently, maybe even in favor of the plaintiff. The documents submitted by the plaintiff in the preliminary procedure were such as to remove any “doubts” or “serious doubts” about the plaintiff's compliance with the ethical and financial integrity criteria, and had there been a genuine verification of the information submitted instead of the simulation that was allowed to happen, then the conclusions and the outcome of the vote would have been different, even in favor of passing the candidate.

It proves to be the case that the defendant had intentionally left certain things out of consideration, which is regarded as a material error violating the right of the plaintiff to fair treatment by the defendant, because the omission (error) of not translating the information submitted by the plaintiff put the latter at a disadvantage, as can be seen in the declarative conclusions laid down in the appealed administrative act.

The plaintiff also stated that the appealed decision was affected by serious procedural flaws, which contradict the facts of the case, as well as the documents in the administrative file of candidate Nicolae Şova, by derogation from Articles 6 and 10 of Law No. 26/2022.

Thus, the plaintiff believes that all the conclusions or findings in favor of failing the candidate on the basis of ethical integrity issues, as set out by the defendant on page 8 of the appealed decision, are completely erroneous, declarative and lacking in evidential or factual support, and inconsistent with the information in the administrative file.

The plaintiff also mentioned that before voting on the examined issues (including on decisions on candidates according to Article 13 of the Law 26/2022 (preliminary, partial, or final evaluation findings, according to Article 8 para. (1)(e) of the Rules of Procedure 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), the Chair of the Commission was to share, by e-mail, the draft minutes to all members of the Commission as soon as possible and within three working days at the latest, on the decision to be adopted regarding candidate Nicolae Şova at the Commission meeting of 13 January 2023.

The administrative file doesn't contain the proof of the fact that the Chair of the Commission sent the draft minutes regarding the decision to be adopted on candidate Nicolae Şova at the Commission meeting of 13 January 2023 by e-mail to all the members of the Commission (within three business days). The fact that the Chair of the Commission didn't send the draft minutes to all Commission members (within three working days), before the date of the meeting, i.e. 13 January 2023 – is indicative of the fact that the Commission members did not deliberate about the reasoning in the draft decision that was supposed to have been annexed to the minutes of the meeting No. 34 of 13 January 2023.

On 14 February 2023, the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors filed a defense statement requiring that the appeal filed by Nicolae Şova be rejected.

The defendant claimed in the reasoning of the defense statement that the Decision No. 16 of 13 January 2023 was lawful and well-founded, and that the plaintiff's allegations were unfounded and unsupported by evidence.

The Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors claimed that it fulfilled diligently and in good faith all its obligations set out in the 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, and that when it came across uncertainties, it gave the plaintiff the possibility to explain by submitting additional information and data within sufficient time.

The defendant believes that the arguments of the plaintiff that the Commission "...did not object and did not mention which documents or information had not been

submitted by the plaintiff...” are irrelevant. In fact, the plaintiff knows what documents exactly were not submitted by him at the request of the Commission (e.g. – the copy of the application filed with the Superior Council of Magistracy with respect to living space, or a bank statements of a B.C. “Victoriabank” S.A. account. Their absence in the file is not mentioned in the decision although it must have been.

What is more, the role of the Commission is not to “object” to information or documents, but to collect documentation and information, including from the candidates, and the candidates are to exercise their utmost diligence to substantiate their statements in the answers given to the Commission, which ensues from the rule “... the shifting of the burden of proof to the candidate”.

The defendant mentioned that the evaluation of the plaintiff’s integrity, carried out in compliance with the Law No. 26/2022 and that ended in the appealed decision, did not infringe his legal rights and interests and did not impact his professional status. The decision of the Commission to pass or fail the candidate is a determination, in its sole discretion, as to whether or not there are serious doubts about the candidate’s compliance with the criteria of financial and ethical integrity.

The defendant emphasized that the conclusion of the Commission in its decision regarding the existence of serious doubts as to the plaintiff’s compliance with the ethical and financial integrity criteria is a matter of appropriateness and that the court is to perform a legality review of the decision and that it is not in a position to perform an appropriateness review. The court may only order a re-evaluation if it finds that there were circumstances that could have led to the candidate passing the evaluation, which is not the case in this instance.

The defendant explained that – contrary to the plaintiff’s objections in the appeal – by no means did the Commission state that the reason for failing the plaintiff was that he hadn’t been eligible to buy the apartment in Chişinău Municipality for a preferential price and that the transactions involving real property had been fictitious and unlawful. The grounds for failing the plaintiff were the serious doubts as to his compliance with the integrity requirements, specifically meaning the alleged violations of the law.

As regards the arguments of the plaintiff about the procurement of the apartment for a preferential price in Chişinău Municipality and about the source of funds to buy the apartment and the source of candidate’s funds to buy foreign currency, the defendant believes that the allegations aren’t such as to result in the candidate passing the evaluation.

The defendant also claimed that the Commission follows its own Rules of procedure, that it approved, not the Administrative Code; and the examination of appeals against Commission decisions follows the procedure in Book III of the Administrative Code.

Therefore, the provisions of the other Books of the Administrative Code are not applicable, as the Commission was not bound by those legal provisions at the time of the evaluation of candidates.

The defendant therefore regards as unfounded the plaintiff's objections that the Commission acted in violation of Article 137 of the Administrative Code because it did not reportedly explain how it arrived at different conclusions in allegedly similar cases; in violation of Articles 32, 92 and 94 of the Administrative Code; and in violation of Article 93 of the Administrative Code, which places the burden of proof on the public authority.

The plaintiff Nicolae Şova did not appear at the hearing, but his representative, counsel Ghenadie Bambuleac, was at the hearing and supported the appeal against Decision No. 16 of 13 January 2023 on the candidacy of Nicolae Şova, and requested that it be allowed.

The representatives 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, counsels Roger Gladei and Irina Sugoneaco, sustained the arguments put forward in the defense statement, and moved for the dismissal of the action as unfounded.

In addition to their arguments in the submitted defense statement, the representatives of the Commission stated that the Commission observed all the rights provided for in Article 12 para. (4) of Law No. 26 of 10 March 2022.

As regards the fact that the Commission did allegedly not ask the candidate to submit the documents regarding the purchase of the apartment for a preferential price filed with the SCM, the Commission representatives claimed that it was not true, as in the first round of questions the candidate was asked to submit the documents regarding the purchase of the 72 sq.m. apartment.

The candidate did not exercise due diligence with regard to the issue of purchasing an apartment for a preferential price.

As regards the source of funds for buying foreign currency and the car, there is a legal issue of inconsistency in the statements made by the candidate both during the evaluation and at the hearing.

As regards the purchase of the apartment for a preferential price, the candidate did not give sufficient explanations and did not provide all the supporting evidence, not in the first round, nor in the second round of questions, and the comparison to candidate Şchiopu's file is not justified, as the circumstances are different.

The issue of the purchase of an apartment for a preferential price was not explained by the plaintiff, because he did not submit all the documents requested by the Commission, owing to the plaintiff not understanding his duty to exercise diligence under Law No. 26.

At the court hearing, the representative of Nicolae Şova, counsel Ghenadie Bambuleac, sought that Decision No. 16 of 13 January 2023 on the candidacy of Nicolae Şova, candidate for the Superior Council of Magistracy – be annulled, and that the candidate evaluation procedure be resumed.

The representatives of the defendant, counsels Roger Gladei, Irina Sugoneaco and Valeriu Cernei requested that the appeal be dismissed as unfounded.

The Determination of the Court

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

Case Examination Period

According to Article 14 para. (7) of the Law No. 26/2022, by derogation from the provisions of Article 195 of the Administrative Code No. 116/2018, the appeal against the decision of the Commission shall be examined within 10 days.

The Special Panel notes that in the course of the examination of this case, the need to change the members of the panel has arisen several times because the letters of resignation of judges who used to be on the panel had been approved. In addition to this, several recusals were also filed by participants in the examination of this case.

On 6 February 2023, this case was distributed randomly via the Integrated Case Management Program to be reviewed in first instance by Judge-Rapporteur Ala Cobăneanu.

On 7 February 2023, judge Ala Cobăneanu filed a recusal from examining the appeal lodged by Nicolae Şova.

The recusal of Judge-Rapporteur Ala Cobăneanu was approved by Ruling of the Supreme Court of Justice of 7 February 2023.

On 7 February 2023, this case was distributed randomly via the Integrated Case Management Program to be reviewed in first instance by Judge-Rapporteur Dumitru Mardari, with the composition of the Special Panel being the following: hearing chairperson Vladimir Timofti, and judges Svetlana Filincova and Dumitru Mardari.

The case was admitted by Ruling of the Supreme Court of Justice of 8 February 2023, a hearing being scheduled for 16 February 2023, 14:00.

The hearing of 16 February 2023 was adjourned until 2 March 2023.

The resignations of Supreme Court of Justice judges Ala Cobăneanu and Svetlana Filincova were approved by Decisions of the Superior Council of Magistracy No. 23/2 and 27/2 of 14 February 2023, effective on 1 March 2023, which prompted the need to change the composition of the Special Panel of the Supreme Court of Justice.

By Order of the Acting President of the Supreme Court of Justice No. 33 of 2 March 2023 Amending Orders No. 29 of 29 March 2022 and No. 35 of 14 April 2022, the composition of the Special Panel – provided for in Item 1 of the Order of the Acting President of the Supreme Court of Justice No. 29 of 29 March 2022 Establishing the Special Panel, as amended by Order of the Acting President of the Supreme Court of Justice No. 35 of 14 April 2022 – was a changed and a new composition of the Special Panel for the examination of appeals against the decisions of the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors:

Vladimir Timofti – chairperson, judges – Dumitru Mardari, Mariana Pitic, substitute judge – Galina Stratulat.

By Order No. 34 of 2 March 2023 Amending Order No. 33 of 2 March 2023, the composition of the Special Panel – provided for in Item 1 of the Order of the Acting Chief Justice of the Supreme Court of Justice No. 33 of 2 March 2023 was changed, and a new composition of the Special Panel tasked with the examination of appeals against the decisions of the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, was established as follows: Vladimir Timofti – chairperson, judges – Tamara Chișca-Doneva, Dumitru Mardari, substitute judge – Ion Guzun.

On 2 March 2023, judge Tamara Chișca-Doneva filed a recusal from examining the appeal lodged by Nicolae Șova.

The recusal of Judge-Rapporteur Tamara Chișca-Doneva was approved by Ruling of the Supreme Court of Justice of 3 March 2023.

A court hearing was scheduled for 9 March 2023 and, according to Article 14 para. (9) of Law No. 26 of 10 March 2022, the issuance of the decision was set for 16 March 2023.

By Decision of the Superior Council of Magistracy No. 103/4 of 16 March 2023 – the decision of the Superior Council of Magistracy No 68/3 of 23 February 2023 was amended by changing the date of release of Judge Dumitru Mardari from the position of judge of the Supreme Court of Justice from 18 April 2023 to 20 March 2023. In order to fit within the restricted period established by law for the examination of appeals, it was necessary to change a member of the Special Panel of the Supreme Court of Justice.

By the Decision of the Acting President of the Supreme Court of Justice No. 39 of 20 March 2023 Amending Decision No 34 of 2 March 2023, the composition of the Special Panel was changed as follows Vladimir Timofti – Chair, Judges – Tamara Chișca-Doneva, Mariana Pitic, all the other the provisions of Decision No 34 of 2 March 2023 Amending Decision No 33 of 2 March 2023 were maintained.

As a result of the reassignment of files, on 21 March 2023 – the administrative dispute case concerning the appeal filed by Nicolae Șova against the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors seeking that its decision be annulled and that the resumption of evaluation be ordered – was reassigned via the Integrated Case Management Program to Judge-Rapporteur Mariana Pitic.

By ruling of 28 March 2023, the Special Panel of the Supreme Court of Justice resumed the examination of the case.

Since the Superior Council of Magistracy accepted the resignation of Vladimir Timofti, Judge at the Supreme Court of Justice, in its Decision No. 66/3 of 23 February 2023 and decided that he was going to leave the position on 27 March 2023, the Acting Chief Justice of the Supreme Court of Justice, Aliona Miron, through the Order No. 46 of 28 March 2023, changed the composition of the Special Panel, provided for in Item 1 of the Order of the Acting Chief Justice of the Supreme Court of Justice No. 39 of 20

March 2023 was changed, and a new composition of the Special Panel tasked with the examination of appeals against the decisions of the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, was established as follows: Tamara Chișca- Doneva – chair, Mariana Pitic Maria Ghervas – judges, and the other provisions of Order of the Acting Chief Justice of the Supreme Court of Justice No. 39 of 20 March 2023 Amending Order No. 34 of 2 March 2023 stay in effect.

On 28 March 2023, counsel Ghenadie Bambuleac, representing the interests of Nicolae Șova, filed an application to raise the unconstitutionality exception.

By its conclusion of 28 March 2023, the Supreme Court of Justice accepted for examination the application to raise the unconstitutionality exception filed by counsel Ghenadie Bambuleac, representing the interests of Nicolae Șova, and submitted it for examination to the Constitutional Court.

The Special Panel of the Supreme Court of Justice noted that the Law No. 64 of 30 March 2023 on the Supreme Court of Justice and the Law No. 65 of 30 March 2023 on the External Assessment of Judges and Candidates for the Position of Judge of the Supreme Court of Justice entered into force on 6 April 2023.

According to Article 8 of the Law No. 64/2023, the Plenary of the Supreme Court of Justice is formed by all the judges of the Supreme Court of Justice and has, inter alia, the task to establish, on an annual basis, the composition of court panels.

Having regard for the legal provisions referred to above and for the fact that during the period March-April 2023 the majority of the Supreme Court of Justice judges resigned, the Special Panel notes the impossibility of the Plenary of the Supreme Court of Justice, which is not currently deliberative, to form panels.

The transitional provisions of Law No. 64/2023 on the Supreme Court of Justice, however, were amended by Law No. 89 of 27 April 2023, in force since 2 May 2023, to establish when the new composition of the Supreme Court of Justice, including the Plenary, would start its work, with the effect that the Chief Justice of the Supreme Court of Justice would have the power to form the panels as was previously the case.

In accordance with Article 12 para. (8) of the Law No. 65/2023, the Superior Council of Magistracy announced – by Decision No. 120/6 of 10 April 2023 – a competition for filling, by temporary transfer, the judicial vacancies at the Supreme Court of Justice, and by Decision of the Superior Council of Magistracy No. 142/8 of 2 May 2023, it was decided to temporarily transfer 7 judges from national courts to the Supreme Court of Justice, for a period of 6 months, starting on 10 May 2023. The Special Panel noted that the operation of the Supreme Court of Justice was halted from 30 March 2023 to 10 May 2023, which was a period of time when both the factual and legal examination of pending cases was not possible.

On 10 April 2023, the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors moved to recuse Judge Mariana Pitic.

By ruling of 25 May 2023, the Special Panel established at the Supreme Court of Justice rejected as unfounded the motion filed by 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 disqualify Judge Mariana Pitic

from examining the administrative litigation started upon the appeal filed by Nicolae Şova.

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 examine the appeals.

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 23 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 para. (9) of the Law No. 26/2022, the issuance and placement of the decision on the website of the Supreme Court of Justice was announced.

Applicability of the Administrative Code

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

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

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

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

More specifically, the legal provisions regarding the definition and conditions under which the ethical/financial integrity is to be assessed are, by their nature, rules of substantive administrative law, which form the legal basis as per Article 21 para. (1) of the Administrative Code for the issuance of the individual administrative act by the Commission. Accordingly, the provisions of Article 8 para. (1)-(4) of the Law No. 26/2022 are rules of substantive administrative law.

According to Articles 9 para. (2) and 69 para. (1) of the Administrative Code, the initiation of the evaluation procedure is the initiation of an administrative procedure, at the request of the candidate, for one of the positions of member of the bodies listed in Article 2 para. (1) of the Law No. 26/2022. Pursuant to Article 189 para. (1) of the

Administrative Code, the initiation of administrative dispute proceedings is conditioned on a plaintiff's claim that a right has been infringed by administrative activity.

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

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

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

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

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

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

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

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

Therefore, in the circumstances of this case, not applying Books I and II at all is impossible because of the central role and the organic link of the Administrative Code with the areas/sub-areas of administrative law.

According to Article 14 para. (6) of the 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 any circumstances.

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

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

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

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

In this context, the Special Panel thus emphasizes that the decision of the Commission is an individual administrative act within the meaning of Article 10 para. (1) of the Administrative Code, because: 1) it is issued by a public authority; 2) it is a decision, order or other official output; 3) it falls within the field of public law; 4) it is a regulation; 5) it relates to an individual case; 6) it has direct legal effects.

Functionally and organizationally, the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors is a “public authority” within the meaning of Articles 7, 10, 203 para. (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 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, the representatives of the defendant did not acquire an in-depth understanding of Article 2(2) of the Administrative Code, which sets out the conditions of derogation by legal provisions from the uniform nature of the Administrative Code for “certain aspects” of administrative activity. Accepting the argument that the Commission is not a public authority would mean denying the legal reality that it carries out administrative activity of public law through administrative procedure and that its decision is an individual administrative act subject to judicial review under administrative litigation procedure.

Thus, the public authority concept is not limited to the concept of legal entity of public law, but has its own functional meaning under Article 7 and Article 2 para. (2) of the Administrative Code and for the purposes of Law No. 26/2022.

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

According to Article 10 para. (1) of the Administrative Code, the Commission’s decision fits within the concept of “*public law domain.*” According to Article 5 of the

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

According to Article 10 para. (1) of the Administrative Code, the Commission's decision is a "regulation" by means of which the defendant exercises unilaterally its substantive competence in line with Article 6 of Law No. 26/2022.

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

According to Article 10 para. (1) of the Administrative Code, the Commission's decision relates to "an individual case", which consists of the concrete situation of plaintiff's evaluation.

This trait of the individual administrative act has the function to delimit it from the normative administrative act, which is an abstract regulation as per Article 12 of the Administrative Code.

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

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

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

the principle of protection of legitimate expectations and others.

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

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

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

The Special Panel reasoned in the section of applicability of the Administrative Code why the Commission's decision is an individual administrative act. Therefore, in

terms of application admissibility, it is emphasized that the Commission's decision is an unfavorable individual administrative act.

According to Article 11 para. (1)(a) of the Administrative Code, individual administrative acts can be unfavorable acts – acts which impose obligations, sanctions, 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 means of the filed appeal, plaintiff Nicolae Şova is claiming an infringement of a right by administrative activity, according to Article 189 para. (1) of the Administrative Code, namely that by issuing Decision No. 16 of 13 January 2023, the Commission violated his right to be elected to the position of member in the Superior Council of Magistracy (Article 14 of the Law on the status of judges No 544/1995), the right to self-administration of judges (Article 231 of the Law on Judiciary Organization No. 514/1995), the right to judge's professional dignity and reputation, the fundamental right to judge's independence and irremovability (Article 16 of the Constitution of the Republic of Moldova), but also the fundamental right to administration (Article 39 of the Constitution of the Republic of Moldova), the right to a favorable decision on the evaluation of candidate Nicolae Şova.

By derogation from Article 209 of the Administrative Code, Article 14 para. (1) and (2) of the Law on measures related to the selection of candidates for the positions of members in the self-administration bodies of judges and prosecutors No. 26 of 10 March 2022 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 Commission before the Supreme Court of Justice, which shall form a special panel consisting of 3 judges and a substitute judge. Judges and the substitute judge shall be appointed by the President of the Supreme Court of Justice.

In this context, note that the decision of the Independent Evaluation Commission for assessing the integrity of the candidates for the position of member in the self-governing bodies of judges and prosecutors No. 16 of 13 January 2023 was received by Nicolae Şova on 31 January 2023, which is confirmed by an abstract from the e-mail, attached to case materials (case file page 357).

The Special Panel concludes that the appeal application filed by Nicolae Şova is admissible because the plaintiff complied with Article 14 para. (1) of Law on measures related to the selection of candidates for the positions of members in the self-administration bodies of judges and prosecutors No. 26 of 10 March 2022, being filed to the Supreme Court of Justice on 6 February 2023, within the time frame laid down in the law.

With respect to the type of application for administrative litigation, the Special Panel holds the filed application as an request for a writ of mandamus of a specific nature. By means of a regular request for mandamus, the plaintiff, according to Articles 206 para. (1)(b) and 224 para. (1)(b) of the Administrative Code, aims at the annulment

of the individual administrative act rejecting his/her request for obtaining a legal advantage of any kind and at obliging the public authority to issue the rejected individual administrative act. At the same time, the specificity of the filed action is about annulling the Commission's decision on failing the candidate and ruling for a resumption of the evaluation.

The Special Panel, in line with Article 219 para. (3) of the Administrative Code, is not bound by the wording of the motions submitted by the parties to the proceeding, thus the appropriateness argument expressed in the statement of defense by the defendant will be appreciated in terms of admissibility. Effective judicial review involves a full check of factual and legal matters, however it excludes the checking of appropriateness as per Article 225 para. (1) of the Administrative Code and limits the review regarding the discretionary individual administrative act when the law provides for such a reason for issuance. Appropriateness is a matter of admissibility, not a matter of substance in an administrative litigation.

The defendant's argument in the submitted statement of defense that the application has to be rejected for the reason of appropriateness is unsubstantiated, as the plaintiff based the application on legality matters, not on appropriateness.

The statement of defense and the appropriateness aspects highlighted by the defendant therein deny the right to file the application for an administrative litigation in line with Articles 39 and 189 para. (1) of the Administrative Code.

Thus, neither the Administrative Code nor Article 14 para. (8) of Law No. 26/2022 exclude the candidate's right to file an application to court. Accepting the solution suggested by the defendant is legally unsubstantiated and contrary to the rule of law. The Special Panel notes that provisions of Article 225 para. (1) of the Administrative Code are clear and cannot be confused, as they regulate, in functional unity with Articles 36, 39, 189, 190, and 207 of the Administrative Code, only aspects related to excluding or limiting the judicial review.

The Special Panel deems the Commission's decision 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, and then it has the possibility to select the legal consequences, except for the situation when discretion is reduced to zero, as per Article 137 para. (2) of the Administrative Code.

With respect to the merits of the case, the Special Panel holds the following factual and legal situation.

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

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

According to Article 20 para. (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 para. (1) of the Constitution of the Republic of Moldova, any person prejudiced in any of his/her rights by a public authority by way of an administrative act or failure to solve a complaint within the legal term, is entitled to obtain acknowledgement of the declared right, cancellation of the act and payment of damages.

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

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

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

Effective judicial review involves checking all aspects of procedural and substantive legality, particularly fairness, proportionality, legal security, reasoning, correctness of factual investigation of own motion, impartiality, misinterpretation of undefined legal notions, and others. This is the only way to reach the standard of effective protection embedded in Article 53 of the Constitution of the Republic of Moldova.

To this end, Article 194 para. (1) of the Administrative Code provides that during first-level court procedure, appeal procedure, and procedure of examining challenges against judicial decisions, the factual and legal issues shall be solved of own motion.

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

In accordance with Article 14 para. (8) of Law No. 26 of 10 March 2022, when examining the appeal against a decision of the Evaluation Commission, the Special Panel of the Supreme Court of Justice may adopt one of the following decisions: a) reject the appeal; b) accept the appeal, if there are circumstances that could have led to candidate's passing the evaluation, and order to resume the evaluation of the candidate by the Pre-Vetting Commission (the constitutionality of this provision was checked by Decision of the Constitutional Court No. 5 of 14 February 2023 on unconstitutionality exceptions of some provisions of Law No. 26 of 10 March 2022 on measures related to the selection of candidates for the positions of members in the self-administration bodies of judges and prosecutors (competence of the Supreme Court of Justice in case

of examining appeals filed against the decisions of the Pre-Vetting Commission)).

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

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

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

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

The Special Panel highlights that Article 14 para. (8) of Law No. 26 of 10 March 2022 amended by Law No. 147 of 9 June 2023 designs 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 Nicolae Şova passing the evaluation.

The Special Panel of the Supreme Court of Justice notes that the Administrative

Code regulates the concept of serious errors and particularly serious errors. In case of particularly serious errors, as per Article 141 para. (1) of the Administrative Code, the individual administrative act shall be null and, consequently, it shall not produce legal effects since the moment of issuance. On the other hand, in case of serious errors, the individual administrative act is unlawful 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 unlawful and the plaintiff would have the right to a favorable decision, because the appealed decision is vitiated, especially from the perspective of proportionality, misinterpretation of undefined legal notions and fair treatment.

The Special Panel holds that in Decision No. 16 of 13 January 2023 on the Candidacy of Nicolae Şova, Candidate for the Superior Council of Magistracy, on the basis of Article 8 para. (1), (2)(a), (4)(a) and (b), and (5)(b), (c), (d), (e) and Article 13 para. (5) 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, the Commission decided that the candidate does not meet the integrity criteria as serious doubts have been found as to the candidate's compliance with the ethical and financial integrity criteria and thus fails the evaluation.

On 6 February 2023, Nicolae Şova, represented by counsel Ghenadie Bambuleac, filed an appeal against the Decision on the Candidacy of Nicolae Şova No. 16 of 13 January 2023 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, seeking that it be annulled, and that the resumption of evaluation be ruled.

The Special Panel mentions that in its Decision No. 16 of 13 January 2023, in chapter III "Evaluation of the candidate", the Pre-Vetting Commission found serious doubts related to Nicolae Şova, candidate for the Superior Council of Magistracy, in terms of the ethical and financial integrity criteria, based on the following circumstances:

1. The purchase of an apartment at preferential price in Chişinău municipality;
2. Sources of funds for the purchase of the candidate's apartment and of the candidate to buy foreign currency;
3. Sub-evaluation of two properties and failure to pay capital increase tax in the manner prescribed by law.

Having analyzed the Commission's conclusions on these circumstances in relation to the evaluation criteria, the Special Panel finds that the lawsuit application lodged by Nicolae Şova is justified for the reasons below.

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.

The Special Panel hold that the plaintiff claimed that throughout the entire period

of administrative activity before the appealed administrative act was issued, he fully and unreservedly complied with the defendant's requests to produce documents and information in due time and with no objections from the Commission as to completeness, which the plaintiff could have otherwise addressed.

However, during the preliminary verification, the Pre-Vetting Commission did not raise any issues and did not mention which documents or information had not been submitted by the plaintiff, and did no more than state the following in the appealed administrative act – „...the candidate answered all questions and provided most of the requested documents...”.

By means of the decision it issued, the Pre-Vetting Commission found that candidate Nicolae Şova has not mitigated the serious doubts about the compliance of the candidate with the criteria of ethical and financial integrity as per Article 8 of the Law on measures related to the selection of candidates for the positions of members in the self-administration bodies of judges and prosecutors No. 26 of 10 March 2022 with respect to the procurement of an apartment at a preferential price in Chişinău municipality and candidate's source of funds to buy foreign currency; sub-evaluation of two properties and failure to pay capital gain tax in the manner prescribed by law.

Having researched the factual situation, the Special Panel found that, based on the arguments of the plaintiff before the court, there are circumstances that could justify the resumption of candidate evaluation and could have led to him passing the evaluation.

Regarding the circumstances of purchasing an apartment at a preferential price in Chişinău municipality, the Special Panel holds the following.

The Pre-Vetting Commission pointed out that its doubts resulted from the fact that the plaintiff failed to communicate to the Superior Council of Magistracy about all real estates he owned at the moment of filing the application for improvement of living conditions.

On the date of the application to the Superior Council of Magistracy, the plaintiff asked to be awarded a 3-room apartment and informed the SCM that he owned three land plots, two of them in Stăuceni township, Chişinău municipality and one in Truşeni township, Chişinău municipality.

According to information from State-Owned Entity “Cadastru”, no inhabitable constructions existed on these land plots on 19 March 2013.

Respectively, when filing the application to the Superior Council of Magistracy, the candidate did not own real estate that would meet his living needs and which, as an effect, could have led to rejecting the applicant's request to benefit of purchasing the apartment at a preferential price.

The Commission held, unfoundedly so, that the purpose of the program for improving the candidate's living conditions was not reached by awarding him the apartment at a preferential price, as this finding contradicts the factual situation presented by the plaintiff.

At the moment of filing the application with the Superior Council of Magistracy, the plaintiff had a family consisting of four members, the spouses and two children, and in 2017 his daughter got married and continued to live with her husband in the parents' apartment.

Therefore, the Special Panel deems unfounded the Commission's findings that it has doubts that the apartment would have been awarded to the candidate at a preferential price had he disclosed all relevant information about his real estate.

According to Article 6 letter (c) of the Law on measures related to the selection of candidates for the positions of members in the self-administration bodies of judges and prosecutors No. 26 of 10 March 2022, in order to fulfil its functions, the Commission shall collect and check any data that is relevant for the evaluation of candidates.

In this case, the Special Panel concludes that the Commission did not check all factual circumstances and did not give a correct appraisal to the records submitted by the candidate, because at the time of filing the application for an apartment the plaintiff did not have sufficient accommodation for all his family members and the contract on capital investment in the construction of accommodation was concluded on 5 August 2014, but the apartment purchased at preferential price was transferred into use only in 2017.

Given the aforementioned circumstances, the fact that candidate Nicolae Şova benefited of an apartment at a preferential price in 2014 and sold it in 2020 is not a violation that would raise serious doubts as provided for by Article 13 para. (5) of Law No. 26/2022 with respect to the compliance of the candidate with the ethical integrity criterion under Article 8 para. (2)(a), (4)(b), and (5)(c) of Law No. 26/2022, therefore the decision of the Pre-Vetting Commission is erroneous.

The Special Panel highlights that the so-called violations of financial and ethical integrity had been assessed by the Commission in isolation from the historical-social background of the Republic of Moldova, which affects the security of legal relationships. Generally, the legal system 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.

The Constitutional Court mentioned in its decision of 6 April 2023 that Law No 26 does not define the meaning of “seriously”, “wrongful”, and “inexplicable” in Article 8 para. (2)(a), the Court must consider the principle of coherent regulatory system. A systemic interpretation would allow the clarification of these qualifiers. For instance, the interpreter applying Article 8 para. (2)(a) may analyze it in corroboration with Articles 4, 4¹, and 6 of the Law on disciplinary liability of judges, which represent the common law for the assessment of all candidates for the position of members in the Superior Council of Magistracy.

The Court found that by means of the phrase “seriously”, the legislator limited the discretionary margin of the Pre-Vetting Commission when assessing the ethical integrity of the candidates. This criterion allows the Commission to decide on failure of the candidate only if it finds violations of ethics and professional conduct that are of a high severity. This means that the candidate can discuss the seriousness of violations found by the Commission before the Special Panel of the Supreme Court of Justice, which could ultimately appreciate the “serious” nature of the found deviation, depending on the specific circumstances of the case. This rationale is applicable, *mutatis mutandis*, in case of the words “wrongful”, and “inexplicable” in Article 8 para. (2)(a) of the Law.

Regarding the candidate's source of funds for the purchase of currency.

According to Article 33 para. (4) and (5) of Law No. 132 of 17 June 2016 on the National Integrity Authority, the control of assets and personal interests shall cover family members, parents/parents-in-law, and adult children of the person subject to control. If the person subject to control cohabitates with another person, then the control shall cover the assets of that person, too.

If it appears that the property of the person subject to control has been registered in the name of other persons, the control will extend to such property and persons. If the subject of the declaration reported income and assets obtained from donations or holds assets on bailment, the control will also extend to the donor and the bailor. They may be requested to provide explanations about the origin of funds used to purchase and maintain the goods in question. In order to clarify these matters, the integrity inspector may request relevant information from any natural or legal person.

According to Article 4 para. (1)(b) and (d) of Law No. 133 of 17 June 2016 on the declaration of assets and personal interests, in force in the version of the adoption date, subjects falling under the provisions of Article 3 para. (1) shall declare:

b) movable and immovable goods, including any incomplete ones, owned with right of usufruct, of use, habitation, superficies by the subject of the declaration, including as beneficial owner or by his/her family members or by his/her cohabitant or in their possession based on mandate, commission or trust agreements, as well as based on translative agreements of possession and of use;

d) the financial assets held by the subject of the declaration and his/her family members, his/her cohabitant, including as beneficial owners, namely the cash amount in the national currency or a foreign currency which exceeds the value of 15 average national salaries and which does not represent the object of a deposit in a financial institution. Bank accounts, creation units in investment funds, equivalent forms of investments and savings, investments, bonds, checks, bills of exchange, loan certificates, other documents that include personal patrimonial rights held by the subject of declaration, of his/her family members or of his/her cohabitant, including as beneficial owners, direct investments in national currency or in a foreign currency, made by him/her or by his/her family members or his/her cohabitant, including as beneficial owners, as well as other financial assets, if their combined value exceeds 15 average national salaries.

The Special Panel finds that the candidate explained to the Commission during the hearing what were his sources for the purchase of the apartment and of the currency, funds that were declared according to the legal manner and regime of declaration, therefore these facts cannot be viewed as serious doubts related to his compliance with the financial integrity criterion under Article 8 para. (4)(b) and (5)(c), (d), and (e) of Law No. 26/2022.

This conclusion is also based on the fact that the funds the candidate referred to, which were included in the income declarations, have not been subject to a control of assets and personal interests by the National Integrity Authority.

As well, according to Article 4 para. (1) of the Law concerning the declaration and control of income and assets of state dignitaries, judges, prosecutors, civil servants and some persons in leading positions No. 1264-XV of 19 July 2002 (the version in force until 1 August 2016), the persons referred to in Article 3 shall declare:

a) income obtained jointly with the family members during the declaration period;

b) movable and immovable assets of all types, owned, with right of usufruct, use, habitation, superficies, or in the possession of the declarant or members of his/her family based on contracts of mandate, commission, fiduciary administration, as well as of transferable ownership and use contracts (lease, rent, leasing, loan) on the date of submission of the declaration regarding income and property.

c) property acquired through an intermediary or transferred for valuable consideration to ascendants, descendants, brothers, sisters and in-laws of the same kinship degree, as well as property transferred free of charge to any person;

d) financial assets, meaning bank accounts, investment funds, equivalent forms of investments and savings, investments, bonds, checks, bills of exchange, loan certificates, other documents that include personal patrimonial rights held by the subject of declaration, of his/her family members, direct investments in national currency or in a foreign currency, made by him/her or by his/her family members, as well as other financial assets;

e) declarant's and his/her family members' stock in the share capital of companies;

f) debts in the form of debit (including unpaid taxes), mortgages, guarantees issued to third parties, loans and credits.

The Special Panel points out that the Commission's findings that it has serious doubts about the loan agreement of 530,000 MDL, which have not been mitigated by the candidate, cannot be regarded as a true violation of financial integrity, or this would be an infringement of the rule of protecting the legitimate expectation towards the activity of public authorities of the state, who have tasks and powers to act.

Also, during the court hearing, the candidate proved that after selling the apartment he transmitted funds for safe-keeping to a close acquaintance of Şova family and in April 2011 this money was refunded in foreign currency, in euros, and then he performed currency exchange operations in order to pay for a car purchased from the authorized dealer of Toyota, and the payment was made in MDL at the US dollar exchange rate and these arguments were mitigated by submitting a notary-authenticated declaration.

Therefore, the Pre-Vetting Commission was supposed to take into account the obligations under Article 10 para. (7) of Law No. 26/2022 and assess the plaintiff's explanations through the lens of these provisions, as he explained that he intended to purchase the car, but was not certain where he was going to purchase it, in the Republic of Moldova or abroad, which led to converting into euros the national currency obtained as a result of the transactions.

Under these circumstances, the Special Panel holds that the plaintiff's answers on this topic did not reveal his intent to hide the source of funds, which means that this circumstance cannot be perceived as a reason to fail the candidate.

Regarding the understated value of two real estates and non-payment of the capital gain tax, we hold the following.

The Special Panel will reject, for the reasons listed below, the Commission's

conclusion that candidate Nicolae Şova understated the value of the real estate sold (land plot of 0.06 ha and an unfinished house in Stăuceni township, Chişinău municipality) and that with respect to this transaction the plaintiff failed to pay the capital gain tax, which led to serious doubts about his financial integrity.

Provisions of the Tax Code in the version in force in 2011, under article 15 (amended and supplemented by Law No. 177-XVI of 20 July 2007 amending and supplementing some legal acts), stipulate that the total amount of the income tax is determined for individuals, except for peasant farms and individual entrepreneurs, as 7% of the annual taxable income that does not exceed the amount of 25,200 MDL and 18% of the annual taxable income that exceeds the amount of 25,200 MDL.

According to Article 37 para. (7) of the Tax Code, version in force in 2011, the amount of capital gain in a fiscal year equals 50% of the excess amount of capital gain recognized over the level of any capital losses incurred during the fiscal year.

With respect to the purchase of the real estate in Truşeni township, Chişinău municipality and sale of the real estate in Stăuceni township, Chişinău municipality, the plaintiff submitted the contracts that confirm the value of the performed transactions.

By means of the sale-purchase contract regarding the real estate in Stăuceni township, Chişinău municipality, the plaintiff showed the transaction price and these transactions could not be viewed as a circumstance raising serious doubts about the financial integrity, in terms of Article 8 para. (1) and (2) of Law No 26.

During both candidate's evaluation and case examination by the court, the Commission failed to prove that the sale-purchase contract did not stipulate the actual price. Therefore, the conclusion that the real estate price was diminished is erroneous, especially since according to the transactions made, Nicolae Şova was not even a signatory to the transaction of purchasing the land plot in Truşeni township.

Under these circumstances, the Special Panel finds that the plaintiff's answers on this topic did not reveal his intent to avoid paying taxes provided for by the law, but rather his firm conviction that there was no capital gain/taxable income as a result of selling the mentioned real estates.

The Special Panel does not perceive the circumstances held by the Commission as a true violation of financial integrity, because otherwise this would be an infringement of the rule of protecting the legitimate expectation towards the activity of public authorities of the state, who had tasks and powers to respond if the subject of evaluation were to commit legal offences, but also of the principle of legal certainty in its complexity.

The Special Panel notes that social realism encompasses the legal one and imputing to the candidate some violations that were tolerated, sometimes even accepted and administered by state authorities, such as accepting the discrepancy in the declared price agreed on in legal documents on real estate or means of transport, are not of such a magnitude as to consider that the plaintiff judge is lacking financial or ethical integrity.

Consequently, the Special Panel highlights that Commission's conclusions regarding the existence of serious doubts related to the plaintiff's ethical and financial integrity are unfounded.

The Pre-Vetting Commission did not make a correlation between the legal ground

and the factual circumstances related to the candidate's ethical and financial integrity, which proves a lack of reasoning. The Special Panel emphasizes that the reasoning of the individual administrative act is a prerogative of the right to good governance that every citizen has when interacting with public authority and is a condition of its validity as per Article 31 and Article 118 para. (1)-(3) of the Administrative Code; the reasoning is not limited to retrieving abstracts from regulatory acts and listing the facts, it must also be a detailed, convincing and comparable analysis and involve the entire dimension of legality of the individual administrative act.

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.

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

Thus, the violations held by the Pre-Vetting Commission do not meet the high severity criterion that would allow it to decide on failing the candidate.

Moreover, 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 appealed decision and the documents submitted by the defendant which of those goals are pursued by the decision to fail the evaluation. Any of these goals would be legitimate, however none of them were analyzed.

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

The Special Panel finds that the Pre-Vetting Commission did not analyze and reason the legitimate purpose of the issued decision. According to Article 29 para. (2)(a) of the Administrative Code, a measure is proportionate if it is suitable for achieving the established purpose based on the powers laid down in the law. Therefore, the exclusion, not just limitation of the right to be elected as a member of the bodies listed in Law No. 26/2022 for the minor acts held by the Pre-Vetting Commission is in no way an adequate measure for the fulfilment of the purposes laid down in the law.

Given the urgent issue of proper operation of the judicial self-administration bodies at the moment when the decision was issued, not evaluating the candidate [translator's note: they probably mean failing] does not only fail to fit the reasons of not passing the evaluation, but it is also a violation of the plaintiff's rights.

At the same time, according to Article 29 para. (2)(b) of the Administrative Code, a measure is proportionate if it is necessary for achieving the established purpose. This element of proportionality means that the official measure must be the mildest means of reaching the regulatory purpose. The Pre-Vetting Commission did not carry out such an analysis in relation to this case.

Thus, the Pre-Vetting Commission failed to analyze the regulatory alternatives of

the individual case, which would have achieved the regulatory purpose in the same way. The disadvantages that other regulatory options have must be considered and are characterized as being a milder means. A milder means for the achievement of the desired purpose would have been the participation of the candidate in the election for membership in the Superior Council of Magistracy while making public some of the minor issues that were found and which are part of the social reality of the Republic of Moldova, also based on the constant amendment of the domestic legislation.

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

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

Furthermore, the Special Panel reiterates that the violations of financial and ethical integrity had been assessed by the Commission in isolation from the historical-social background, which affects the security of legal relationships. Generally, the legal system 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 para. (9) of Law No. 26/2022, the Commission shall assess the gathered materials using its own judgement, formed as a result of multi-faceted, comprehensive and objective review of the information. None of the submitted

materials has a predetermined probative value without being assessed by the Commission.

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

The Special Panel finds that the plaintiff's representatives in the court hearing confirmed that there was no written translation of documents into the language known by the foreign member of the Pre-Vetting Commission, designated by the development partners. This is contrary to Article 10 para. (9) of Law No. 26/2022 and Articles 22 and 92 of the Administrative Code.

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

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

In this respect, the Special Panel emphasizes that, according to Article 82 of the Administrative Code, (1) if the administrative procedure is to be carried out in writing as per Article 28 or is carried out in writing, the public authority, when starting the procedure, shall create a digital or hard copy folder that would include all documents and records regarding the said procedure. The digital folder shall include, as appropriate, scanned copies of paper-based documents and the authenticity of these copies shall be confirmed by the electronic signature applied by the responsible person within that public authority, electronic documents, other relevant records and information in digital format. (1¹) Scanned digital copies of official documents issued on paper and digital records on which the electronic signature was not applied are used without restriction in the relationship with the public authority and may be included in the administrative case file, unless the regulatory acts require expressly the signature to be applied on these copies/records or the observance of requirements towards electronic documents. (2) When included in the file, a document is referenced with continuous page numbers. (3) Should documents be retrieved from the file for a certain period, a mention shall be made in this respect, which must include: a) name of the retrieved document; b) number of retrieved pages; c) reason for retrieving the document; d) name of the person that ordered the retrieval of the document; e) date when the document is retrieved. This mention shall be included in the file instead of the retrieved document. (4) Administrative case files shall be kept until the expiry of their term of storage, which results from the applicable legal provisions in force.

In line with Article 83 of the Administrative Code, (1) the public authority holding the administrative procedure shall grant, to the participants, access to the administrative case file. (2) Participants shall not have access to draft individual administrative acts before the completion of the procedure. (3) No access to the

administrative case file is allowed if that would affect the appropriate performance of duties by the public authority or if it is necessary to maintain a secret protected by law or if it is necessary to protect the rights of participants to the administrative procedure or of third parties. (4) Should it be justified, the public authority holding the administrative procedure may also allow, upon request, access to the file on the premises of another public authority or an overseas diplomatic or consular mission of the Republic of Moldova. (5) When accessing the case file, participants are allowed to take notes or make copies of the file. The cost of copies shall be incurred by every participant individually, which is 0.02 conventional units per page. Electronic copies of the case file, as well as electronic documents and copies thereof shall be provided free of charge.

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

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

Moreover, during the consideration of this administrative case, the defendant's representatives admitted that not all materials gathered by the Pre-Vetting Commission were submitted to candidate Nicolae Şova and included into the administrative case file of candidate Nicolae Şova, but only the records that the Pre-Vetting Commission deemed to be relevant.

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

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

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

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 evaluation 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.

Also, the Special Panel notes that Venice Commission recommended for the final decision on assessment to be made by the competent court, but the Parliament of the Republic of Moldova chose a different legal policy in relation to this topic. Despite that, the Special Panel highlights that, for the reason of effective protection of the rights, it has the right and the obligation to conduct a full judicial legality review of the factual and legal matters.

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

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

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

Thus, evaluation after resumption of procedure should not transform into a vicious circular argument and activity, which is contrary to the standard of effective protection of rights, separation of powers, legal certainty, and mandatory effect of the final judicial decisions.

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

Therefore, the exclusion, not just limitation, of candidate Nicolae Şova's right to take part and be elected as a member of the Superior Council of Magistracy for the minor acts held by the Pre-Vetting Commission is in no way an adequate measure for the fulfilment of the purposes laid down in the law. Given the issue of proper operation

of the judicial self-administration bodies at the moment when the decision was issued and failing the candidate for minor acts, that does not only fail to fit the reasons of not passing the evaluation, but it is also an unnecessary and unlawful violation of the mentioned rights.

The Special Panel reiterates that the measure undertaken by the defendant public authority is reasonable only if the interference caused by it is not disproportionate in relation to its purpose. This requirement of the legislator involves a balancing of values protected by law, a weighing of the interests at stake. The bigger the damage caused to the right, the more it is required for the advantage resulting from integrity to be superior [translator's note: in some decisions they say interference instead of integrity. I just thought you should know that there are two different versions].

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

Taking into account the aforementioned, the Special Panel finds that in this case there are legal grounds for annulling the decision of the Independent Evaluation Commission for assessing the integrity of the candidates for the position of member in the self-governing bodies of judges and prosecutors No. 16 of 13 January 2023 regarding the candidacy of Nicolae Şova.

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 result that includes a loss of validity for the decision, as per Article 139 para. (1) and (2) of the Administrative Code (see DCC No 42 of 6 April 2023 § 143; Ramos Nunes de Carvalho e Sá v. Portugal [MC], 6 November 2018, §184 and the case-law quoted therein).

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

d e c i d e s :

To accept the administrative lawsuit brought by Nicolae Şova against the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, seeking that decision No. 16 of 13 January 2023 on the candidacy of Nicolae Şova be annulled, and that the candidate evaluation procedure be resumed.

To annul the Decision of the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies

of judges and prosecutors No. 16 of 13 January 2023 on the candidacy of Nicolae Şova.

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

This decision is irrevocable.

**Hearing chaired by
Judge**

Tamara Chişca-Doneva

Judges

Ion Guzun

Mariana Pitic