



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF TOMASZ KWIATKOWSKI v. POLAND

(Application no. 24254/05)

JUDGMENT

STRASBOURG

19 April 2011

FINAL

19/07/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Tomasz Kwiatkowski v. Poland,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Nicolas Bratza, *President*,

Lech Garlicki,

Ljiljana Mijović,

Sverre Erik Jebens,

Päivi Hirvelä,

Ledi Bianku,

Zdravka Kalaydjieva, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 29 March 2011,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 24254/05) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Polish national, Mr Tomasz Kwiatkowski (“the applicant”), on 24 June 2005.

2. The Polish Government (“the Government”) were represented by their Agent, Mr J. Wołosiewicz of the Ministry of Foreign Affairs.

3. The applicant alleged, *inter alia*, that the lustration proceedings in his case had been unfair, in violation of Article 6 of the Convention.

4. On 8 October 2008 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1948 and lives in Konstancin-Jeziorna.

6. On 11 April 1997 the parliament passed the Law on disclosing work for or service in the State’s security services or collaboration with them between 1944 and 1990 by persons exercising public functions (*ustawa o ujawnieniu pracy lub służby w organach bezpieczeństwa państwa lub współpracy z nimi w latach 1944-1990 osób pełniących funkcje publiczne*; “the 1997 Lustration Act”). It entered into force on 3 August 1997. Persons

falling under the provisions of the 1997 Lustration Act, i.e. candidates or holders of public office such as ministers and members of parliament, were required to declare whether or not they had worked for or collaborated with the security services during the communist regime. The provisions of the Act extended to, *inter alia*, judges, prosecutors and advocates.

7. On an unspecified date the applicant, who was an advocate, declared that he had not collaborated with the communist-era secret services.

8. On an unspecified date in 2000 the Warsaw Court of Appeal (*Sąd Apelacyjny*) decided to institute lustration proceedings against the applicant following a request made by the Commissioner of the Public Interest (*Rzecznik Interesu Publicznego*) on the grounds that the applicant had lied in his lustration declaration by denying that he had co-operated with the secret services.

9. On 27 June 2002 the Warsaw Court of Appeal, acting as the first-instance lustration court, found that the applicant had submitted an untrue lustration declaration. The operative part of the judgment was served on the applicant. However, the reasoning was considered “secret” and, in accordance with Article 100 § 5 of the Code of Criminal Procedure, could only be consulted in the secret registry of that court.

10. The applicant lodged an appeal in which he maintained, in particular, that his rights had been breached because he could not freely consult the reasoning of the judgment.

11. On 16 May 2003 the Warsaw Court of Appeal, acting as the second-instance lustration court, upheld the impugned judgment.

12. The applicant lodged a cassation appeal against the judgment.

13. On 9 December 2004 the Supreme Court (*Sąd Najwyższy*) dismissed the applicant’s cassation appeal as being manifestly ill-founded. The applicant was removed from the Bar Association with the result that he is unable to practise as an advocate for a period of ten years in application of the 1997 Lustration Act.

14. The judgment was notified to the applicant’s representative on 17 January 2005.

II. RELEVANT DOMESTIC LAW AND PRACTICE

15. The relevant law and practice concerning lustration proceedings in Poland are set out in the Court’s judgment in the case of *Matyjek v. Poland*, no. 38184/03, § 27-39, ECHR 2007-V.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION REGARDING UNFAIRNESS OF THE PROCEEDINGS

16. The applicant complained about the unfairness of the lustration proceedings, the infringement of his right of defence and the lack of equality of arms. He invoked Article 6 of the Convention which, in so far as relevant, reads:

“1. In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing ...by [a] ... tribunal...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(b) to have adequate time and facilities for the preparation of his defence;

...”

17. The Government contested that argument.

A. Admissibility

18. The Government claimed that the applicant had not exhausted relevant domestic remedies. They argued that a constitutional complaint should be considered an adequate domestic remedy in the applicant’s case.

19. The applicant disagreed.

20. The Court notes that the arguments raised by the Government are similar to those already examined and rejected by the Court in previous cases against Poland (see, *Matyjek v. Poland*, no. 38184/03, § 64, ECHR 2007-V; *Luboch v. Poland*, no. 37469/05, §§ 69-72, 15 January 2008; *Rasmussen v. Poland*, no. 38886/05, §§ 52-55, 28 April 2009; *Górny v. Poland*, no. 50399/07, § 22, 8 June 2010) and the Government have not submitted any new arguments which would lead the Court to depart from its previous findings. For these reasons, the Government’s plea of inadmissibility on the ground of non-exhaustion of domestic remedies must be dismissed.

21. The Court further observes that it has already found that Article 6 of the Convention under its criminal head applied to lustration proceedings (see, *Matyjek v. Poland* (dec.), no. 38184/03, ECHR 2006-VII).

22. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

23. The applicant argued that the proceedings in his case had been unfair. In particular, he alleged that the material in his case had been classified as confidential, which had limited his right of access to it. Before the institution of the proceedings he had had no access to the case file prepared by the Commissioner of the Public Interest. After the lustration proceedings had been instituted by the Warsaw Court of Appeal the applicant could consult the documents only in the secret registry of the lustration court. Moreover, the reasoning of the first-instance court's judgment was also confidential and the rules applicable to the consultation of the file in the secret registry made it difficult for him to prepare his appeal. The limitations on access were not applicable to the Commissioner of the Public Interest. Thus, the applicant was placed at a significant disadvantage vis-à-vis the Commissioner who had unlimited access to the file in his secret registry.

24. The Government submitted that the applicant had access to all evidence and all decisions given in the case. The only limitations which applied to him were a consequence of the fact that part of the evidence was considered as secret. The applicant could consult the case file in the secret registry but could not use his notes based on the file outside the secret registry. The same restrictions applied to the Commissioner of Public Interest and the judges examining the case.

25. The Government observed that the applicant had benefited from an examination of his case at two instances by ordinary courts with full jurisdiction to assess the relevant facts and law. He further availed himself of an extraordinary appeal to the Supreme Court. For the Government there had been no appearance of a violation of the applicant's right to a fair trial in the impugned proceedings.

26. The Government concluded that there had been no breach of Article 6 § 1 in the present case.

2. The Court's assessment

27. The Court reiterates that the procedural guarantees of Article 6 of the Convention under its criminal head apply to lustration proceedings (see paragraph 21 above). The Court had already dealt with the issue of lustration proceedings in *Turek v. Slovakia* (no. 57986/00, § 115, ECHR 2006-II (extracts)) and in several cases against Poland (see, *Matyjek*, § 56; *Luboch*, § 61; *Rasmussen*, § 43, all cited above). In the latter cases it considered it appropriate to examine the applicant's complaints under Article 6 §§ 1 and 3 taken together. The relevant case-law concerning the principle of equality of arms is stated in the above-cited judgments.

28. Turning to the instant case, the Court observes firstly that the Government have admitted that part of the evidence had been secret. In the previous cases concerning lustration proceedings in Poland the Court observed that under the series of successive laws the communist-era security services' materials continued to be regarded as a State secret. The confidential status of such materials had been upheld by the State Security Bureau. Thus, at least part of the documents relating to the applicant's lustration case had been classified as "top secret". The Head of the State Security Bureau was empowered to lift the confidentiality rating. However, the Court recalls that it has considered the existence of a similar power of a State security agency inconsistent with the fairness of lustration proceedings, including with the principle of equality of arms (see, *Turek*, § 115; *Matyjek*, § 57; *Luboch*, § 62; *Rasmussen*, § 44, all cited above).

29. Secondly, the Court notes that, at the pre-trial stage, the Commissioner of Public Interest had a right of access, in the secret registry of his office or of the Institute of National Remembrance, to all materials relating to the lustrated person created by the former security services. After the institution of the lustration proceeding, the applicant could also access his court file. However, pursuant to Article 156 of the Code of Criminal Procedure and section 52 (2) of the 1999 Protection of Classified Information Act, no copies could be made of materials contained in the court file and confidential documents could be consulted only in the secret registry of the lustration court. Moreover, the written reasons of the first-instance judgment, albeit prepared, could only be consulted in the secret registry of the court.

30. Furthermore, it has not been disputed by the parties that, when consulting his case file, the applicant had been authorised to make notes. However, any notes he took could be made only in special notebooks that were subsequently sealed and deposited in the secret registry. The notebooks could not be removed from this registry and could be opened only by the person who had made them.

31. The Court reiterates that the accused's effective participation in his criminal trial must equally include the right to compile notes in order to facilitate the conduct of his defence, irrespective of whether or not he is represented by counsel (see, *Pullicino v. Malta* (dec.), no 45441/99, 15 June 2000 and *Matyjek*, cited above, § 59). The fact that the applicant could not remove his own notes, taken in the secret registry, in order to show them to an expert or to use them for any other purpose, effectively prevented him from using the information contained in them as he had to rely solely on his memory. Regard being had to what was at stake for the applicant in the lustration proceedings - not only his good name but also his right to practise as an advocate – the Court considers that it was important for him to have unrestricted access to those files and unrestricted use of any

notes he made, including, if necessary, the possibility of obtaining copies of relevant documents (see, *Górny*, cited above, § 37).

32. Thirdly, the Court is not persuaded by the Government's argument that at the trial stage the same limitations as regards access to confidential documents applied to the Commissioner of Public Interest. Under the domestic law, the Commissioner, who was a public body, had been vested with powers identical to those of a public prosecutor. Under section 17(e) of the 1997 Lustration Act, the Commissioner of Public Interest had a right of access to full documentation relating to the lustrated person created by, *inter alia*, the former security services. If necessary, he could hear witnesses and order expert opinions. The Commissioner also had at his disposal a secret registry with staff who obtained official clearance allowing them access to documents considered to be State secrets and were employed to analyse lustration declarations in the light of the existing documents and to prepare the case file for the lustration trial.

33. The Court has held that lustration measures are by their nature temporary and the necessity to continue such proceedings diminishes with time. It has recognised that at the end of the 1990s the State had an interest in conducting lustration proceedings in respect of persons holding the most important public functions. However, it reiterates that if a State is to adopt lustration measures, it must ensure that the persons affected thereby enjoy all procedural guarantees under the Convention in respect of any proceedings relating to the application of such measures (see, *Turek*, § 115 and *Matyjek*, § 62, both cited above).

34. The Court accepts that there may be a situation in which there is a compelling State interest in maintaining the secrecy of some documents, even those produced under the former regime. Nevertheless, such a situation will only arise exceptionally given the considerable time that has elapsed since the documents were created. It is for the Government to prove the existence of such an interest in the particular case because what is accepted as an exception must not become a norm. The Court considers that a system under which the outcome of lustration trials depended to a considerable extent on the reconstruction of the actions of the former secret services, while most of the relevant materials remained classified as secret and the decision to maintain the confidentiality was left within the powers of the current secret services, created a situation in which the lustrated person's position was put at a clear disadvantage (see, *Matyjek*, § 62; *Luboch*, § 67; *Rasmussen*, § 50, *Górny* § 40, all cited above).

35. In the light of the above, the Court considers that due to the confidentiality of the documents and the limitations on access to the case file by the lustrated person, as well as the privileged position of the Commissioner of the Public Interest in the lustration proceedings, the applicant's ability to prove that the contacts he had had with the communist-era secret services did not amount to "intentional and secret

collaboration” within the meaning of the 1997 Lustration Act were severely curtailed. Regard being had to the particular context of the lustration proceedings, and to the cumulative application of those rules, the Court considers that they placed an unrealistic burden on the applicant in practice and did not respect the principle of equality of arms (see, *Matyjek*, cited above, § 63).

36. Having regard to the foregoing, the Court concludes that the lustration proceedings against the applicant, taken as a whole, cannot be considered to have been fair within the meaning of Article 6 § 1 of the Convention taken together with Article 6 § 3. There has accordingly been a breach of those provisions.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

37. The applicant further complained that the proceedings were unfair as the lustration courts wrongly assessed the evidence and the case had been examined at two instances by the Warsaw Court of Appeal. The applicant also complained about the principle underlying lustration, claiming that the 1997 Lustration Act had been incompatible with the rule of law and breached Resolution 1096 (1996) of the Parliamentary Assembly of the Council of Europe. He maintained that lustration of persons exercising public functions after 31 December 1999 should have been forbidden.

38. The Court reiterates that, in accordance with Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. Moreover, while Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national court (see, *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I, with further references).

In so far as the applicant contests the principle underlying lustration proceedings, the Court recalls that it has examined and declared inadmissible as manifestly ill-founded similar allegations raised in the case of *Chodyncki v. Poland* ((dec.), no. 17625/05, 2 September 2008).

39. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

40. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

41. The applicant claimed in total over 1,000,000 Polish zlotys (PLN) in respect of pecuniary damage. This sum corresponded, *inter alia*, to the loss of his earnings related to his participation in the lustration hearings. The applicant submitted no claim in respect of non-pecuniary damage.

42. The Government submitted that there was no causal link between the alleged violation and the claim for pecuniary damage.

43. The Court does not discern any causal link between the violation found and the pecuniary damage alleged. It therefore rejects this claim (see, *Matyjek*, § 69; *Luboch*, § 83, *Górny* § 49, all cited above).

B. Costs and expenses

44. The applicant did not claim reimbursement of costs and expenses.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 6 of the Convention regarding the unfairness of the proceedings admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention taken in conjunction with Article 6 § 3;
3. *Dismisses* the applicant’s claim for just satisfaction.

Done in English, and notified in writing on 19 April 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President