



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

FOURTH SECTION

CASE OF MOCZULSKI v. POLAND

(Application no. 49974/08)

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 Moczulski 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. 49974/08) 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 Robert Leszek Moczulski (“the applicant”), on 9 October 2008.

2. The applicant was represented by Mr P. Rybiński, a lawyer practising in Warsaw. 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 15 December 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 1930 and lives in Warsaw.

6. On 4 June 1992 the Minister of Internal Affairs, Mr Antoni Macierewicz, submitted to Parliament and made public a “list of secret collaborators with the security services between 1945 and 1990”. The list, unofficially called “the Macierewicz list”, contained names of public officials who appeared in the archives of the Ministry and included

the President and many Members of Parliament. The publication of the list sparked uproar in the Sejm, a Chamber of the Polish Parliament, which led to the fall of the government of Jan Olszewski a couple of hours later.

7. The applicant, who had been a Member of Parliament, appeared on the list.

8. 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.

9. On 26 March 1999 the applicant applied to the court to institute the so-called "auto-lustration" proceedings under section 18a § 3 of the Lustration Act. He submitted his lustration declaration, in which he stated that he had not been an intentional and secret collaborator with the secret services.

10. The applicant was the first of many persons from the Macierewicz list who applied for auto-lustration claiming that they had not been secret collaborators with the communist-era secret services. In some cases the lustration courts agreed and cleared the name of the person concerned.

11. On 6 May 1999 the Warsaw Court of Appeal (*Sąd Apelacyjny*) decided to institute lustration proceedings in the applicant's case.

12. On 6 November 2001 the Court of Appeal gave a judgment in which it found that his lustration declaration had been truthful and that the applicant had not been an intentional and secret collaborator with the secret services. The panel of the court was composed of three judges.

13. The Commissioner of the Public Interest (*Rzecznik Interesu Publicznego*) appealed against the judgment.

14. On 30 July 2002 the Warsaw Court of Appeal, acting as the second-instance lustration court allowed the appeal and remitted the case. The court was constituted of a panel of three judges which included judge R.K.

15. On 6 April 2005 the Warsaw Court of Appeal acting as the first-instance lustration court, found that the applicant had been an intentional and secret collaborator with the security services between 1969 and 1977.

16. The applicant appealed against the judgment.

17. On 12 September 2006 the Warsaw Court of Appeal dismissed the appeal and upheld the judgment. The court was constituted of a panel of three judges which again included Judge R.K.

18. The applicant lodged a cassation appeal complaining *inter alia* about the lack of impartiality of Judge R.K. The applicant submitted that this judge had participated in the preparation of his lustration proceedings and was a member of a lustration court between 1999 and 2000. The latter panel was later dissolved; nevertheless, these factors cast doubt on the judge's impartiality particularly as he was a member of the panels giving judgment at the second-instance.

19. The applicant's cassation appeal was dismissed on 17 April 2008 by the Supreme Court (*Sąd Najwyższy*). The Supreme Court examined *inter alia* the applicant's complaint that Judge R.K. had participated in his trial at the first and, on two occasions, the second instance. It dismissed the argument that such participation had given rise to doubts regarding his impartiality, finding that the judge in question had not been a member of the panel that had given a decision at first instance. As regards the applicant's complaint that Judge R.K. had been a member of the panel of the second-instance court twice, the court noted that, according to the domestic law, such judge was not *ex lege* excluded from dealing with the case. It was however open to the party having doubts as to the lack of impartiality of the judge to challenge him or her during the proceedings; the applicant had failed to do that. Since the applicant accepted the composition of the second-instance court which gave the judgment on 12 September 2006, he cannot effectively raise doubts as to the lack of impartiality of one of the judges at the cassation appeal stage.

20. The applicant was barred from being a Member of Parliament for a period of ten years in application of the 1997 Lustration Act.

21. The judgment was notified to the applicant's representative in June 2008.

II. RELEVANT DOMESTIC LAW AND PRACTICE

22. 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

23. 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;

...”

24. The Government contested that argument.

A. Admissibility

25. The Government claimed that the applicant had not exhausted relevant domestic remedies. First, he had never raised before the domestic courts allegations regarding the unfairness of the proceedings as presented in his subsequent application to the Court. Secondly, a constitutional complaint should be considered an adequate domestic remedy in the applicant's case.

26. The applicant disagreed.

27. The Court recalls that it has already considered the question of whether the applicant could effectively challenge the set of legal rules governing access to the case file and setting out the features of the lustration proceedings. 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) 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.

28. 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).

29. 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*

30. 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. 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.

31. 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.

32. 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.

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

2. *The Court's assessment*

34. The Court reiterates that the procedural guarantees of Article 6 of the Convention under its criminal head apply to lustration proceedings (see paragraph 28 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 and *Rasmussen*, § 43, all cited above). In the latter cases it considered it appropriate to examine the applicants' 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.

35. 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).

36. 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.

37. Furthermore, it appears that, at least at the first stage of the proceedings, 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.

38. 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 Court has held that the fact that, when consulting his case file, 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 (see *Matyjek*, cited above, § 58). Regard being had to what was at stake for the applicant in the lustration proceedings – not only his good name but also a possible ten-year bar on holding public functions – 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 v. Poland*, no. 50399/07, § 37, 8 June 2010).

39. 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.

40. 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; *Chodyncki v. Poland* (dec.), no. 17625/05, 2 September 2008).

41. 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).

42. 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).

43. 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

44. The applicant raised several other complains under Article 6 of the Convention. He alleged that the lustration courts had not been impartial and had wrongly assessed the evidence, and that the proceedings lasted an unreasonably long time.

A. The lack of impartiality of a judge

45. The applicant complained that he had not had a fair trial because Judge R.K. had been involved in his trial on three occasions, including at the pre-trial stage. He submitted that he had learned about his prior involvement only at the appellate stage of the proceedings and thus could only raise this objection in his cassation appeal. The Government contested this allegation. They argued that the applicant had never challenged Judge R.K. and that there had been no evidence of any lack of impartiality of the judge in question.

46. The Court notes that Judge R.K. did not sit in any of the panels which gave first-instance judgments in this case. It is also not disputed that Judge R.K. had participated in the preparation of the case at the pre-trial stage as he was a member of a first-instance panel of judges; however, this panel was subsequently dissolved and had not issued a decision in the applicant's lustration trial. The Court has held on many occasions that the mere fact that a trial judge has made previous decisions concerning the same offence cannot of itself justify fears as to his impartiality (see *Schwarzenberger v. Germany*, no. 75737/01, § 42, 10 August 2006 with further references; and *Jasiński v. Poland*, no. 30865/96, §§ 55-56, 20 December 2005).

47. Admittedly, Judge R.K. had sat in both second-instance courts in the applicant's case. However, this fact is not in itself capable of giving rise to legitimate doubts as to the impartiality of this judge. In the first of these judgments the court quashed the first-instance judgment and remitted the case. Thus, it cannot be said that by deciding the first case Judge R.K.

necessarily prejudged the outcome of the second (see *Gillow v. the United Kingdom*, 24 November 1986, § 73, Series A no. 109; and *Aleksey Petrov v. Bulgaria* (dec.), no. 27103/04, 2 November 2010).

Moreover, since this situation did not call for the *ex lege* exclusion of Judge R.K. according to the domestic law, it was for the applicant to challenge or raise an objection to the participation of Judge R.K. in the appellate proceedings (see paragraph 19 above). The Court considers that by failing to do so the applicant deprived the domestic courts of the opportunity to examine whether Judge R.K.'s participation in the proceedings cast doubts on his impartiality.

48. Regard being had to the above, and regardless of other possible grounds of inadmissibility, the Court finds 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.

B. The unreasonable length of the proceedings

49. The applicant alleged a breach of his right to trial within a reasonable time in violation of Article 6 § 1 of the Convention.

The Court observes that after the entry into force, on 17 September 2004, of the Law of 17 June 2004 on complaints about a breach of the right to a trial within a reasonable time (*Ustawa o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki* – “the 2004 Act”) it was open to persons involved in judicial proceedings to lodge a complaint about their unreasonable length with the relevant domestic court.

50. The Court notes that the Government submitted that it had been open to the applicant to lodge a complaint under the 2004 Act and that by failing to do so he had not exhausted domestic remedies. The applicant submitted that the complaint would have been ineffective in his case.

51. The Court has already examined that remedy for the purposes of Article 35 § 1 of the Convention and found it to be effective in respect of complaints about the excessive length of judicial proceedings in Poland. In particular, it has considered that that remedy is capable both of preventing the alleged violation of the right to a hearing within a reasonable time or its continuation, and of providing adequate redress for any violation that has already occurred (see *Charzyński v. Poland* (dec.), no. 15212/03, §§ 36-42, ECHR 2005-V). The applicability of this remedy to the lustration proceedings has not been contested by the parties.

52. It follows that this part of the application must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

C. Other allegations under Article 6 of the Convention

53. As regards the applicant's complaint about assessment of evidence, 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 courts (see, *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I, with further references).

54. 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

55. 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

56. The applicant claimed 1,000,000 Polish zlotys (PLN) in respect of non-pecuniary damage.

57. The Government invited the Court to rule that the finding of a violation constituted in itself sufficient just satisfaction.

58. The Court considers that in the particular circumstances of the case the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage which may have been sustained by the applicant (see, *Matyjek*, § 69; *Luboch*, § 83, both cited above).

B. Costs and expenses

59. The applicant claimed 6,100 Polish zlotys (approximately EUR 1,500) for the costs and expenses incurred in connection with the proceedings before the Court. The applicant's lawyer submitted an invoice to that effect.

60. The Government contested the amount of the claim.

61. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,500 for the proceedings before the Court.

C. Default interest

62. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints 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. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable, in respect of costs and expenses, to be converted into Polish zlotys at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of 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