



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

FOURTH SECTION

CASE OF ZAWISZA v. POLAND

(Application no. 37293/09)

JUDGMENT

STRASBOURG

31 May 2011

FINAL

31/08/2011

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

In the case of Zawisza 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 10 May 2011,

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

PROCEDURE

1. The case originated in an application (no. 37293/09) 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 Jerzy Zawisza (“the applicant”), on 10 July 2009.

2. The applicant was represented by Ms M. Gąsiorowska, 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 that the lustration proceedings in his case had been unfair.

4. On 10 May 2010 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 1943 and lives in Warsaw. He is a retired professional soldier.

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.

7. In 2002 the applicant became involved in politics. In 2004 he intended to stand as a candidate in the elections for the European Parliament on behalf of the Self-defence party. However, the party withdrew its support for the applicant after he informed it that during his military service he had collaborated with the counter-intelligence agency.

8. At the end of 2004 the Institute of National Remembrance drew up a list of officials, collaborators and candidates for collaborators of the communist security services. In November 2004 the list was published on the Internet and unofficially named "the Wildstein list" after a journalist who had allegedly removed it from the Institute. The name "Jerzy Zawisza" was on the list and the applicant asked the Institute whether it concerned him. The Institute informed the applicant that it did not concern him.

9. The applicant was elected a Member of Parliament in the elections held in September 2005.

10. On 9 October 2005 the applicant in his lustration declaration stated that he had not collaborated, served or worked for the communist-era security services. On 12 October 2005 he informed the Speaker of the *Sejm* that he had had contacts with the military counter-intelligence.

11. On an unspecified date the Commissioner of Public Interest (*Rzecznik Interesu Publicznego*) informed the applicant that he had doubts as to the truthfulness of his lustration declaration and invited him for an interview on 10 October 2006. At the next interview the applicant was invited to read the records concerning his alleged collaboration.

12. On 21 December 2006 the Commissioner applied to the Warsaw Court of Appeal to institute lustration proceedings against the applicant on the grounds that he had lied in his lustration declaration by denying that he had collaborated with the secret services.

13. On 28 December 2006 the Warsaw Court of Appeal decided to allow the Commissioner's request and instituted lustration proceedings against the applicant.

14. On 17 and 24 January 2007 the applicant's lawyers consulted the classified part of the case file in the secret registry of the court. On both occasions the lawyers were entitled to take notes in the special notebook kept by the Head of the secret registry. However, they did not avail themselves of that possibility.

15. On 7 March 2007 the Warsaw Court of Appeal, acting as the first-instance lustration court, found that between 1964 and 1975 the applicant had been an intentional and secret collaborator of the military counter-intelligence service and had therefore submitted an untrue lustration declaration. One judge from the panel of three expressed a dissenting opinion. The judgment was served on the Commissioner of Public Interest, the applicant and his lawyer.

16. The applicant lodged an appeal in which he maintained, in particular, that as a member of the armed forces he had been ordered to collaborate with the military counter-intelligence agency and that, therefore, his collaboration did not fall within the ambit of the Lustration Act. Alternatively, he argued that when submitting his declaration he had made a justifiable error. According to the Government, the applicant's appeal did not concern the issue of restrictions on access to the case file.

17. On 19 September 2007 the Katowice Court of Appeal, acting as the second-instance lustration court, upheld the impugned judgment.

18. The applicant lodged a cassation appeal against the judgment. The Government submitted that the applicant had not invoked the issue of restrictions on access to the case file in his cassation appeal.

19. On 1 December 2008 the Supreme Court dismissed the cassation appeal as manifestly ill-founded. The decision was served on the applicant on 19 February 2009.

20. The applicant is prevented from standing in elections and from holding other public functions for a period of 10 years.

21. According to the Government, in the course of the proceedings before the Katowice Court of Appeal and the Supreme Court neither the applicant nor his lawyer availed themselves of the possibility to consult the case file or to take notes of it.

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 proceedings, the infringement of his defence rights and the lack of equality of arms. He alleged that he had not been given sufficient access to the case file and had been prohibited from taking and retaining his notes. Further, he could not make use of his notes during hearings or outside them. The applicant invoked Article 6 of the Convention which, in so far as relevant, provides:

“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;”

A. Admissibility

24. The Government claimed that the applicant had not exhausted relevant domestic remedies. Firstly, he had never raised before the domestic courts the issue of restrictions on access to the case file and had not alleged that his defence rights had been infringed. Secondly, the applicant had not lodged a constitutional complaint, challenging the constitutionality of the provisions of the Protection of Classified Information Act which had been applied in his case.

25. The applicant disagreed. He argued that in his appeals he had challenged the fairness of the proceedings but to no avail. Moreover, the appellate courts could examine *ex officio* the issue of unfairness in the proceedings (Article 440 of the Code of Criminal Procedure). As regards the constitutional complaint, the applicant argued that the Government had failed to demonstrate that it would have been an effective remedy in his case.

26. 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 *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.

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

28. 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 applicant's submissions

29. The applicant admitted that his lawyer had consulted the case file. However, the access to the case file had been limited and insufficient to ensure the rights of the defence. The applicant and his lawyer were allowed to consult the case file only in the secret registry of the court. They were prohibited from taking any notes they made outside the secret registry and from using them during the hearings. Furthermore, they were not permitted to make copies or to show the file to any independent expert. In conclusion, the rights of the defence were unduly restricted.

2. The Government's submissions

30. The Government submitted that the classified character of part of the evidence in the case had obviously influenced the proceedings. Nonetheless, the rights of the applicant had been fully guaranteed as the domestic courts had proceeded in accordance with the law. According to section 52 § 2 of the Protection of Classified Information Act the classified evidence in the case could be consulted by the applicant and other parties to the proceedings (the Commissioner) only in the secret registry of the court. The applicant as well as the Commissioner could take notes from the classified material only in the special notebooks that could not be taken outside the court building (secret registry or the court room). In the Government's view, the said rules had enabled the applicant to actively participate in the hearings. They stressed that the notes taken by the applicant in the secret registry or during the hearing could be consulted only by the applicant. That arrangement was aimed at the protection of the applicant's rights.

31. The manner of proceeding described above was applicable to all proceedings where the issue of the protection of State secrets arose. The relevant rules were applied to both parties to the proceedings as well as the judges adjudicating the case.

32. The Government noted that during the whole proceedings at issue the applicant had had full access to the case file. They underlined that during the proceedings before the second-instance court and the Supreme Court, neither the applicant nor his lawyer had availed themselves of the possibility to consult the case file or to take notes of it. In the proceedings before the Warsaw Court of Appeal (first-instance) the applicant's lawyers had not taken any notes from the case file.

33. The Government referred to the Court's case-law which recognised that the need to protect the public interest may justify withholding certain evidence from the defence in criminal proceedings (amongst others, *Edwards and Lewis v. the United Kingdom*, nos. 39647/98 and 40461/98, § 53, 22 July 2003). In this respect, they underlined that in the instant case all evidence had been disclosed to the applicant. The only difficulty for the applicant had been related to the fact that part of the evidence had been classified. However, the rules applied by the domestic courts regarding arrangements on access to the case file had respected the principle of equality of arms.

34. 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. They stressed that, when challenging the judgments in the case, the applicant had not referred to the issue of restrictions on access to the case file. Neither had he alleged that the rights of the defence had been infringed on account of the procedure applied by the courts. The Government concluded that there had been no breach of Article 6 § 1 in the present case.

3. *The Court's assessment*

35. The Court recalls that the procedural guarantees of Article 6 of the Convention under its criminal head apply to lustration proceedings (see paragraph 27 above). In several cases against Poland concerning fairness of those proceedings (see, *inter alia*, *Matyjek*, § 56; *Luboch*, § 61; *Rasmussen*, § 43; *Górny*, § 31, all cited above) 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.

36. The Court has already dealt with the issue of lustration proceedings in *Turek v. Slovakia* (no. 57986/00, § 115, ECHR 2006-... (extracts)) and in *Ādamsons v. Latvia* (no. 3669/03, 24 June 2008). In *Ādamsons* the Court has underlined that if a State is to adopt lustration measures, they must fulfil certain conditions in order to be compatible with the Convention. Firstly, the lustration law should be accessible to the person concerned and foreseeable as to its effects, such conditions being inherent in the expression “in accordance with the law” within the meaning of the Convention. Secondly, lustration should not exclusively serve the purpose of retribution or revenge, as the punishment of offenders should be limited to the criminal law sphere. Thirdly, if domestic law allows restrictions on the rights guaranteed under the Convention, it must be precise enough to allow for the individualisation of the responsibility of each person affected thereby and contain adequate procedural safeguards. Finally, the national authorities should keep in mind that lustration measures are by their nature temporary and that the objective need to restrict individual rights as a result of such proceedings diminishes over time (see *Ādamsons*, cited above, § 116). The Court confirms that the above principles are also applicable to the Polish lustration laws.

37. In the *Turek* judgment the Court held that, unless the contrary is shown on the facts of a specific case, it cannot be assumed that there remains a continuing and actual public interest in imposing limitations on access to materials classified as confidential under former regimes. This is because lustration proceedings are, by their very nature, oriented towards the establishment of facts dating back to the communist era and are not directly linked to the current functions and operations of the security services. Lustration proceedings inevitably depend on the examination of documents relating to the operations of the former communist security agencies. If the party to whom the classified materials relate is denied access to all or most of the materials in question, his or her possibilities of contradicting the security agency’s version of the facts will be severely curtailed. Those considerations remain relevant to the instant case despite some differences with the lustration proceedings in Poland (see, *Matyjek*, § 56; *Luboch*, § 61; *Rasmussen*, § 43; *Górny*, § 33, all cited above).

38. In the present 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; *Górny*, § 34, all cited above).

39. 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 proceedings, 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 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.

40. Furthermore, it has not been disputed by the parties that, when consulting his case file, the applicant had been authorised to take 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. The same restrictions applied to the applicant's lawyers.

41. 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 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*, cited above, § 37).

42. 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 that 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.

43. The Court has held that lustration measures are by their nature temporary and the necessity to continue such proceedings diminishes with time (see, *Adamsons*, cited above, § 116). It has recognised that at the end of the 1990s the State had an interest in carrying out lustration 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).

44. The Court accepts that there may be a situation in which there is a compelling State interest in maintaining 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 was put at a clear disadvantage (see, *Matyjek*, § 62; *Luboch*, § 67; *Rasmussen*, § 50; *Górny*, § 40, all cited above).

45. 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).

46. Having regard to the foregoing, the Court concludes that the lustration proceedings against the applicant, taken as a whole, cannot be considered as 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 VIOLATION OF THE CONVENTION

47. The applicant also complained that the decisions given in his case had been based on incomplete evidence as part of his personal records had been destroyed. Further, due to the passage of time he had been unable to call witnesses to pursue his line of defence.

48. 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, *Garćia Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I, with further references).

49. 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

50. 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

51. The applicant claimed 3,000 euros (EUR) in respect of non-pecuniary damage for the breach of his Convention rights in the case.

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

53. 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

54. The applicant also claimed EUR 3,000 for the costs and expenses incurred before the Court. He submitted two invoices issued by his lawyer for the amount of PLN 4,880 (EUR 1,220) and PLN 6,100 (EUR 1,525) respectively.

55. The Government requested the Court to decide on this claim on the basis of its relevant case-law.

56. 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

57. 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 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. *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 31 May 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President