



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

SECOND SECTION

CASE OF BOBEK v. POLAND

(Application no. 68761/01)

JUDGMENT

STRASBOURG

17 July 2007

FINAL

10/12/2007

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Bobek v. Poland,

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

Mrs F. TULKENS, *President*,

Mr A.B. BAKA,

Mr I. CABRAL BARRETO,

Mr V. ZAGREBELSKY,

Mrs A. MULARONI,

Mr L. GARLICKI,

Mrs D. JOČIENĖ

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 26 June 2007;

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

PROCEDURE

1. The case originated in an application (no. 68761/01) 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 Ms Wanda Bobek.

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

3. The applicant complained that the lustration proceedings in her case had been unfair, in violation of Article 6 of the Convention. She alleged, in particular, that she had not had adequate access to the case file and that the proceedings were not public. Further, the written grounds of the judgments given in her case had never been made public.

4. By a decision of 24 October 2006, the Court declared the application partly admissible. It decided to join to the merits of the case the examination of the Government's preliminary objection based on non-exhaustion of domestic remedies.

5. The applicant and the Government each filed further written observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1929 and lives in Rzeszów.

7. The applicant, who was an advocate, made a declaration under the provisions of the Lustration Act 1997 that she had never secretly collaborated with the communist secret service. She only admitted that between 1945 and 1953 she had been working at the Security Office (*Urząd Bezpieczeństwa*) in Rzeszów as an office assistant, but in 1953 she had left the job.

8. On 14 April 1999 the Commissioner of Public Interest (*Rzecznik Interesu Publicznego*) applied to the Warsaw Court of Appeal (*Sąd Apelacyjny*), acting as the first-instance Lustration Court (*sąd lustracyjny*), to institute proceedings in the applicant's case under the Lustration Act (*ustawa lustracyjna*) on the ground that the applicant had lied in her declaration by denying her collaboration with the secret services after 1953. (This security service was known as *Urząd Bezpieczeństwa*, but after 1956 it was called *Slużba Bezpieczeństwa*.)

9. On 31 May 1999 the applicant was notified that lustration proceedings had been instituted concerning her declaration (*oświadczenie lustracyjne*).

10. On 9 September 1999 the Warsaw Court of Appeal, acting as the first-instance court, held a hearing in the applicant's case. The Commissioner of Public Interest requested the court to conduct a public hearing and the applicant supported this motion. She was questioned by the court and commented on the evidence at the court's disposal. The file of the case was composed of the applicant's lustration declaration, copies of certain documents contained in the applicant's file compiled by the communist secret police and of the Commissioner's application for lustration proceedings to be instituted. Towards the end of the hearing, both the Commissioner and the applicant declared that they had no request for further evidence to be taken by the court. The court closed the hearing.

11. However, on 13 September 1999 the applicant requested the court to take further evidence. She submitted various documents concerning her professional career, her character and morality.

12. On 15 September 1999 the court re-opened the hearing and admitted the applicant's documents to the case file. It then closed the hearing again.

13. On 16 September 1999 the court sent the applicant the operative part of its judgment of 15 September 1999, by which it had found that the applicant had submitted an untrue lustration declaration because she had been an intentional, secret collaborator of the communist secret services after 1953. It further informed the applicant that the written grounds of the judgment had been prepared under Article 100 § 5 of the Code of Criminal

Procedure and that she could consult them in the office of its secret registry (*kancelaria tajna*). As she had not appointed legal representation, the full written grounds could only be read by herself, to the exclusion of all other persons, except the Commissioner of Public Interest.

14. The applicant appealed.

15. On 8 November 1999 the Warsaw Court of Appeal, acting as the second-instance lustration court, dismissed her appeal and upheld the first-instance judgment.

16. On 22 November 1999 the same court informed the applicant that the written grounds of that judgment had been prepared under Article 100 § 5 of the Code of Criminal Procedure, and that she could consult them at the office of the court's secret registry.

17. The applicant lodged a cassation appeal with the Supreme Court, which held a hearing on 10 October 2000, but the applicant chose not to attend. The Court allowed the Commissioner's request to examine the applicant's appeal *in camera*, having regard to Article 360 § 1 (3) of the Code of Criminal Procedure. By a judgment of the same date the Court dismissed the applicant's cassation appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution

18. Article 45 of the Constitution, insofar as relevant, reads:

“Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court. ...”

Article 79 § 1 of the Constitution provides as follows:

“In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Court for a judgment on the conformity with the Constitution of a statute or another normative act on the basis of which a court or an administrative authority has issued a final decision on his freedoms or rights or on his obligations specified in the Constitution.”

Under the established case-law of the Constitutional Court, it has jurisdiction only to examine the compatibility of legal provisions with the Constitution and is not competent to examine the way in which courts interpreted applicable legal provisions in individual cases (e.g. SK 4/99, 19 October 1999; Ts 9/98, 6 April 1998; Ts 56/99, 21 June 1999).

B. The Lustration Act

19. On 3 August 1997 the Lustration Act (*Ustawa o ujawnieniu pracy lub służby w organach bezpieczeństwa państwa lub współpracy z nimi w latach 1944-1990 osób pełniących funkcje publiczne*) entered into force. Its purpose was to ensure transparency as regards those people exercising public functions who had been secret collaborators with the secret service during the communist era. It lost its binding force on 15 March 2007.

20. Pursuant to section 4 of the Act, “collaboration” was understood as the “intentional and secret collaboration with the operational or investigative branches of the State's security services as a secret informer or assistant, supplying them with information”.

21. Section 6 (1) of the Act read:

“Persons in the categories listed in Article 7 of this law shall submit a declaration concerning work for or service in the State's security services or collaboration with these services between 22 July 1944 and 10 May 1990 (hereafter called 'the declaration').”

22. Section 7 (1) contained a list of public functions and professions, the holders of which must make the declaration under Article 6.

23. Under section 7 (1) item 10 (a) as amended in 1998, candidates to the bar and advocates were also obliged to make such declarations. Their declarations were to be submitted to the Minister of Justice.

24. The declarations were also transmitted to the Lustration Court. Pursuant to section 1 of the Act, the Warsaw Court of Appeal was vested with powers to conduct lustration proceedings. Such proceedings could be instituted at the request of the Commissioner of Public Interest (*rzecznik interesu publicznego*).

25. The Commissioner would institute proceedings before the Lustration Court when he or she had doubts whether the declaration of non-collaboration was truthful.

26. According to section 17(d), the duties of the Commissioner included in particular:

“1. i) analysing the lustration declaration submitted to the court;

ii) collecting the information necessary for a correct assessment of the declaration;

iii) lodging an application with the court with a view to initiating lustration proceedings; ...

2. In carrying out his or her duties enumerated in points 1 and 2 above, the Commissioner may require to be sent or shown the relevant case files, documents and written explanations, and if necessary may hear witnesses, order expert opinions or conduct searches; in this respect, and as regards the duties described in section 17(1), the provisions of the Code of Criminal Procedure concerning the prosecutor shall likewise apply to the Commissioner.”

Pursuant to section 17 (e), the Commissioner had full access to all documents and other sources of information, regardless of the form in which they were recorded, created before 10 May 1990 by organs specified in that provision, including sources within the Ministry of Internal Affairs.

27. Under section 19, matters not covered by the Act and relating to lustration proceedings were governed by the provisions of the Code of Criminal Procedure.

28. According to section 20, the person under scrutiny was afforded the same defence rights as an accused in criminal proceedings.

The proceedings before the Lustration Court terminated with a decision on whether the declaration made by the person concerned was true. A decision of this court could be appealed to the second-instance Lustration Court. Such an appeal was examined by a different panel of three judges of the Warsaw Court of Appeal.

29. Pursuant to section 23, the decisions of the Lustration Court were to be served on the person concerned with their written grounds.

30. A cassation appeal to the Supreme Court lay against the second-instance judgment.

31. The final judgment, finding a particular declaration untrue, was immediately made public in the “Official Law Gazette” (*Monitor Polski*).

32. Pursuant to section 30, the final judgment of an untrue declaration established the loss of moral qualifications which were, according to the relevant laws, necessary for the exercise of certain public functions, including the profession of advocate. It therefore entailed disbarment.

C. Code of Criminal Procedure

33. Article 156 § 4 of the Code provides that, when a danger arises that State secrets may be revealed to the public, access to the case files, making notes and copying documents from such files shall only be allowed under special arrangements provided for by the president of the court or by the court.

34. Article 100 § 5, which concerns the delivery of a judgment, provides:

“If the case has been heard *in camera* because of the substantial interests of the State, instead of reasons, notice will be served to the effect that the reasons have been prepared.”

35. Article 360 § 1 (3) of the Code provides that the court shall order a hearing to be held *in camera* if its public character could disclose circumstances which should remain secret in the light of important State interests.

D. Laws on classified information

36. Section 2 (1) of the Protection of State Secrets Act 1982 (*Ustawa o ochronie tajemnicy państwowej i służbowej*), which was in force until 11 March 1999, read as follows:

“A State secret is information which, if divulged to an unauthorised person, might put at risk the State's defence, security or other interest, and concerns in particular: ...

2) the organisation of the services responsible for the protection of security and public order, their equipment and working methods, and the data enabling the identification of their officers and persons collaborating with the security services...”

37. Section 86 of the Protection of Classified Information Act 1999 (*Ustawa o ochronie informacji niejawnych*), in its relevant part, provided as follows:

“2. Persons referred to in section 21 (1) [those authorised to sign the document and to assign a confidentiality rating], or their legal successors in relation to documents containing information classified as a State secret, created before 10 May 1990, shall within 36 months from the date of enactment of this Act, review these documents with the purpose of adjusting their current security classification to the classifications provided by this Act. Until then, these documents shall be considered classified under the provisions of paragraph 1 unless otherwise provided by law...”

Appendix No. 1 to the Act provided, in so far as relevant:

“I. Information that can be classified as 'top secret': ...

21. information concerning documents that make it impossible to establish data identifying officers, soldiers or employees of State bodies, services and institutions authorised to engage in operational activities or on the resources that they use in their operational activities.”

Section 52 (2) of the 1999 Act concerned the organisation of the secret registry. It provided in so far as relevant:

“Documents marked “top secret” and “secret” (*ściśle tajne i tajne*) can be released from the secret registry only if the recipient can secure the protection of those documents from unauthorised disclosure. In case of doubts regarding the conditions of protection, the document can be made available only in the secret registry.”

E. Judgments of the Constitutional Court

38. Certain limited aspects of the Lustration Act 1997 have been examined by the Constitutional Court as to their compatibility with the Constitution. In a judgment of 10 November 1998, the Constitutional Court recalled the historical background to the Lustration Act and explained its purpose:

“As can be seen from the legislative history, the main aim of the Act was to 'make it impossible to use a person's political past', the fact of cooperating with the secret

services, 'for the purpose of blackmailing ... persons holding key decision-making functions in the Polish State'...

The concept of lustration as adopted by the legislator, in respect of the subject of scrutiny, decision-making and possible sanction in lustration proceedings, is the truthfulness of the declaration submitted under Article 6 of the [Lustration Act]. Thus, as follows directly from the Act and from the Constitutional Court's judgment of 21 October 1998, the law does not associate criminal or quasi-criminal liability with the sole fact of past collaboration with the State's security services... The legislator's intention is that persons who are exercising public functions or standing for election to posts involving the exercise of public functions shall submit a declaration regarding cooperation. The purpose of such regulation is to secure the open nature of public life, to eliminate [the possibility of] blackmail because of facts from the past which can be considered as compromising, and to submit those facts for public consideration. The collaboration itself does not prevent any citizen from exercising public functions, and lustration proceedings are designed only to scrutinise the truthfulness of those who exercise or wish to exercise public functions. It is therefore not the collaboration, but the submission of a false declaration which has negative consequences for those affected."

39. In a judgment of 21 October 1998 (K 24/98), the court examined the constitutionality of certain provisions of the Lustration Act as amended in 1998. These amendments concerned the provisions regulating the position of the Commissioner of Public Interest and, also, provisions to the effect that certain categories of persons, if found to have made a false lustration declaration, were to be regarded as having lost the moral qualifications necessary for the exercise of certain public functions.

40. In a judgment of 19 June 2002 (K 11/02), the court held that certain amendments to the Lustration Act, enacted on 15 February 2002, were incompatible with the Constitution because Parliament (*Seym*) had failed to respect the legislative procedure provided for by the relevant constitutional provisions.

41. In its judgment of 5 March 2003 (K 7/01), the Constitutional Court examined the compatibility with the Constitution of certain provisions of the Lustration Act which created the obligation to publish a lustration declaration made by candidates to certain public functions insofar as they did not make any distinction between various categories of collaboration with the secret services.

42. In its judgment of 28 May 2003 (K 44/02), the court examined the scope of the notion of secret collaboration as provided for by Article 4 of the Lustration Act as amended in September 2002.

43. The court also dealt with other problems concerning the Lustration Act in its judgments K 39/97, P 3/00, SK 10/99 and SK 28/01.

III. RELEVANT INTERNATIONAL INSTRUMENTS

44. The following are extracts from Parliamentary Assembly of the Council of Europe Resolution 1096 (1996) on measures to dismantle the heritage of former communist totalitarian systems:

“9. The Assembly welcomes the opening of secret service files for public examination in some former communist totalitarian countries. It advises all countries concerned to enable the persons affected to examine, upon their request, the files kept on them by the former secret services...

11. Concerning the treatment of persons who did not commit any crimes that can be prosecuted in accordance with paragraph 7, but who nevertheless held high positions in the former totalitarian communist regimes and supported them, the Assembly notes that some states have found it necessary to introduce administrative measures, such as lustration or 'decommunisation' laws. The aim of these measures is to exclude persons from exercising governmental power if they cannot be trusted to exercise it in compliance with democratic principles, as they have shown no commitment to or belief in them in the past and have no interest or motivation to make the transition to them now.

12. The Assembly stresses that, in general, these measures can be compatible with a democratic state under the rule of law if several criteria are met. Firstly, guilt, being individual, rather than collective, must be proven in each individual case - this emphasises the need for an individual, and not collective, application of lustration laws. Secondly, the right of defence, the presumption of innocence until proven guilty, and the right to appeal to a court of law must be guaranteed. Revenge may never be a goal of such measures, nor should political or social misuse of the resulting lustration process be allowed. The aim of lustration is not to punish people presumed guilty - this is the task of prosecutors using criminal law - but to protect the newly emerged democracy.

13. The Assembly thus suggests that it be ensured that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law, and focus on threats to fundamental human rights and the democratisation process. Please see the "Guidelines to ensure that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law" as a reference text.”

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

45. The Government submitted that the applicant had failed to exhaust the domestic remedies available to her, as required under Article 35 § 1 of the Convention. They argued that she had not raised before the domestic courts, even in substance, specific allegations regarding the unfairness of the

lustration proceedings. In particular, neither at the appellate nor at the cassation stage, had she challenged the restrictions concerning her access to the case files. Nor had she complained that the proceedings had not been public, as required by Article 6 of the Convention. The Government pointed out that this provision could be directly relied on in the proceedings before the domestic courts.

46. The Government further argued that the applicant had not availed herself of the remedy under Article 79 § 1 of the Constitution. They maintained that the Court had recognised that, even if the Constitutional Court was not competent to quash individual decisions because its role is to rule on the constitutionality of laws, its judgments declaring a statutory or other provision unconstitutional, gave rise to a right to have the impugned proceedings re-opened in an individual case, or to have a final decision quashed (cf. *Szott-Medyńska v. Poland*, no. 47414/99, 9 October 2003). Consequently, the Government argued that, if the applicant had been of the opinion that certain Articles of the Code of Criminal Procedure and the Lustration Act, as applied in her case, had violated her right to a fair hearing, she should have availed herself of the possibility of requesting the Constitutional Court to decide whether those provisions were compatible with the Constitution.

47. The applicant disagreed with the Government's arguments and submitted that, in her case, the individual constitutional complaint would not have been an effective remedy.

48. In its decision on admissibility (see paragraph 4 above), the Court considered that the question of whether the applicant could effectively challenge the legal rules governing access to the case file and the lustration proceedings was linked to the Court's assessment of Poland's compliance with the requirements of a "fair hearing" under Article 6 § 1 of the Convention and that it should therefore be joined to the examination of the merits of the case. The Court confirms its approach and will consider the matter below (see paragraphs 70-73).

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

49. The applicant alleged a breach of Article 6 of the Convention which provides, in so far as relevant:

"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:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

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

- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

A. The parties' submissions

1. The applicant's submissions

50. The applicant argued that she had not had access to the file to an extent sufficient to ensure the fairness of the proceedings. She could not make and retain full notes in the proceedings before the courts which had made the proceedings unfair and rendered her defence ineffective.

51. She further complained that the proceedings had not been public in that the written grounds of the judgments, explaining the full reasons of the judicial decisions given in her case had never been served on her or made accessible to the public.

2. The Government's submissions

52. The Government argued that the documents in the applicant's case file had been protected by official secrecy under the provisions of the Protection of Classified Information Act (see paragraphs 36-37 above). They had been classified as “top secret”. However, throughout the proceedings, the applicant had had full access to that file. Any restrictions on her access to the court file had been imposed pursuant to the provisions of the Code of Criminal Procedure, applicable in the lustration proceedings. Such restrictions had been necessary due to the danger of revealing State secrets. The manner in which the applicant could have had access to the case file had been regulated by Article 156 § 4 of the Code of Criminal Procedure. Under this provision, access to a case file containing classified documents, and making copies thereof, was subject to the conditions determined by the president of the court or by the court itself. Further, under the provisions of the Protection of Classified Information Act, documents classified as top secret or secret had been accessible to the applicant and to the Commissioner of Public Interest only at the office of the secret registry of the Lustration Court.

53. The Government submitted that the written grounds of the judgments given in the applicant's case could neither be made public nor

served on her because the evidence in the case file on which these judgments had been based had been covered by official secrecy. The applicant could read them in the office of the court's secret registry.

B. The Court's assessment

1. The scope of the case before the Court

54. The scope of the case before the Court is to determine whether in the proceedings instituted against the applicant under the Lustration Act 1997 she had a “fair hearing” within the meaning of Article 6 of the Convention. The Court recalls that in its admissibility decision of 24 October 2006 it established that the applicant was facing a criminal charge. Accordingly, the procedural guarantees of Article 6 of the Convention under its criminal head applied to her lustration proceedings (see also the admissibility decision in *Matyjek v. Poland*, no. 38184/03, ECHR 2006-...).

55. The Court observes further that the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial set forth in general in paragraph 1. For this reason it considers it appropriate to examine the applicant's complaint under the two provisions taken together (see *Edwards v. the United Kingdom*, judgment of 16 December 1992, Series A no. 247-B, p. 34, § 33; see also the judgment in the case *Matyjek v. Poland*, referred to above, §§ 53-54).

2. Compliance with Article 6 of the Convention

56. The Court reiterates that according to the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his or her case under conditions that do not place the individual at a substantial disadvantage *vis-à-vis* the opponent (see, for example, *Jespers v. Belgium*, no. 8403/78, Commission decision of 15 October 1980, Decisions and Reports (DR) 27, p. 61; *Foucher v. France*, judgment of 18 March 1997, *Reports of Judgments and Decisions* 1997-II, § 34; *Bulut v. Austria*, judgment of 22 February 1996, *Reports* 1996-II, p. 380-81, § 47). The Court further recalls that, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (see *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports* 1996-II, p. 471, § 72; *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, *Reports* 1997-III, p. 712, § 54).

57. The Court had already dealt with the issue of lustration proceedings in the *Turek v. Slovakia* case (no. 57986/00, § 115, ECHR 2006-... (extracts)). In particular the Court held in that judgment 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, the selection and disclosure of which documents is at the discretion of the current security service. 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 also *Matyjek v. Poland*, cited above, § 56).

58. Turning to the circumstances of the present case, the Court will first examine the applicant's complaints relating to the equality of arms in the proceedings concerned. In this connection, the Court first observes that the Government have pointed to the series of successive laws on the basis of which the materials from the communist-era security services continued to be regarded as State secrets (see paragraphs 35-36 above). 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 covered by official secrecy. However, the Court recalls that it has previously held that such a situation is inconsistent with the fairness of lustration proceedings, including the principle of equality of arms (see *Turek*, cited above, § 115; *Matyjek*, cited above, § 57).

59. 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 her court file. However, pursuant to Article 156 of the Code of Criminal Procedure and section 52 (2) of the Protection of Classified Information Act 1999, 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 (paragraphs 33, 37 and 53 above).

60. 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 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 or she could hear witnesses and order expert opinions. The Commissioner also had at his or her disposal a secret registry with staff who had 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 (see paragraph 26 above).

61. Furthermore, it was not in dispute between the parties that, when consulting her case file, the applicant had been authorised to make notes. However, any notes she took could be made only in special notebooks which were subsequently sealed and deposited in the registry's secret section. The notebooks could not be removed from this registry and could be opened only by the person who had made them. Similar constraints were imposed on any notes taken during the hearings. The Court observes that the Government did not invoke any provision of domestic law which would have given the applicant a right to remove the notebooks from the secret registry.

62. The Court reiterates that the accused's effective participation in the criminal trial must equally include the right to compile notes in order to facilitate the conduct of the defence, irrespective of whether or not he or she is represented by counsel (*Pullicino v. Malta* (dec.), no 45441/99, 15 June 2000). The fact that the applicant could not remove her own notes, taken either at the hearing or in the secret section of the registry, in order to seek advice from an expert or for some similar legitimate purpose, effectively prevented her from using the information contained in them fully and effectively, as she had to rely solely on her memory.

63. The Court observes that the applicant's good name was at stake in the proceedings. It further notes that, under the provisions of the Lustration Act, the judgment finding an untrue declaration was regarded as a loss of moral qualifications which were, according to the relevant laws, necessary for the exercise of certain professions, including the profession of advocate. In this connection the Court refers to its findings made in the cases of *Sidabras and Džiautas v. Lithuania* (nos. 55480/00 and 59330/00, ECHR 2004-VIII) and *Rainys and Gasparavičius v. Lithuania* (nos. 70665/01 and 74345/01, § 36, 7 April 2005). It observed therein that the State-imposed restrictions on a person's opportunity to exercise employment in a private sector for reasons of a lack of loyalty to the State in the past could not be justified from the Convention perspective in the same manner as restrictions on access to their employment in the public service, in particular in the light of the long period which had elapsed since the fall of the communist regime (*loc. cit.*, § 36). Hence, having regard to what was at stake for the present applicant, the Court considers that it was important for her to have unrestricted access to the court files and unrestricted use of any notes she

had made, including, if necessary, the possibility of obtaining copies of relevant documents (see *Foucher*, cited above, § 36).

64. Furthermore, the Court notes that only the operative parts of the judgments given in the applicant's case were notified to her (paragraphs 13 and 16 above). Pursuant to section 31 of the Lustration Act, the operative parts of the judgments of the Lustration Court were also published in the Official Gazette. The applicant could only consult the reasoned judgments in the office of the secret registry. As she had not appointed a lawyer, the written grounds could only be read by herself, to the exclusion of all other persons, except the Commissioner of Public Interest.

65. In this connection, the Court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in paragraph 1 of Article 6. This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair hearing, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention (see, for example, *Diennet v. France*, judgment of 26 September 1995, Series A no. 325-A, pp. 14–15, § 33).

66. The principles governing the holding of hearings in public also apply, *mutatis mutandis*, to the public delivery of judgments and have the same purpose of a fair hearing. In the *Pretto and Others v. Italy* judgment the Court held, having regard to the Court of Cassation's limited jurisdiction, that depositing the judgment in the court registry, which made the full text of the judgment available to everyone, was sufficient to satisfy the requirement (*Pretto and Others v. Italy*, judgment of 8 December 1983, Series A no. 71, p. 11, §§ 21 and 26 *in fine*). In another case the Court held that the public delivery of a decision of the Military Court of Cassation was unnecessary, as public access to that decision was ensured by other means, namely the possibility of seeking a copy of the judgment from the court registry and its subsequent publication in an official collection of case-law (*Sutter v. Switzerland*, judgment of 22 February 1984, Series A no. 74, pp. 14–15, § 34).

67. However, the Court observes that in the present case no public access to the grounds of the judgments concerned was possible. The operative part of the lustration judgments in the applicant's case was limited to a succinct statement that the person concerned had made a false lustration declaration within the meaning of the Lustration Act. Neither the findings of fact nor any reference to the evidence on which the courts had based their findings were to be found therein. Likewise, the parts of the judgments accessible to the public did not contain any judicial reasoning specifying the grounds on which the courts had reached their decisions.

68. In the light of its case-law and bearing in mind that it is through access to judicial decisions, including their grounds, that the public is able to scrutinise the administration of justice, the Court is of the view that the scope of public access to the lustration judgments was insufficient to ensure the transparency of the proceedings and an effective assessment of the way in which the courts had examined the applicant's case.

69. The Court recognises 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 the procedural guarantees of the Convention (see *Turek*, cited above, § 115; *Matyjek*, cited above, § 62). 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 which 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 the norm. The Court considers that a system under which the outcome of lustration trials depends to a considerable extent on the reconstruction of the actions of the former secret services, while most of the relevant materials remain classified as secret and the decision to maintain their confidentiality falls within the powers of the current secret services, creates a situation in which the lustrated person is put at a clear disadvantage.

70. 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 - in particular compared with the privileged position of the Commissioner of Public Interest in such proceedings - the applicant's ability to have her case examined fairly was 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 satisfy the requirements of a fair hearing or equality of arms between the parties to the proceedings.

71. It remains to be ascertained whether the applicant could have successfully challenged the features of the lustration proceedings in her appeal and cassation appeal. Given the Government's assertion that the rules on access to the materials classified as secret were regulated by the successive laws on State secrets and by the relevant provisions of the Code of Criminal Procedure, and that those legal provisions were complied with in this case, the Court is not persuaded that the applicant, in her appeals or cassation appeals, could have successfully challenged the decisions given in her case.

72. Insofar as the Government rely on the constitutional complaint, the Court points, firstly, to the fact that the Lustration Act had on several occasions been unsuccessfully challenged before the Constitutional Court (see paragraphs 38-43 above; *Matyjek v. Poland* (dec.), cited above). The Court further notes that the Government have failed to indicate which provisions of domestic law the applicant should have been challenged by way of a constitutional complaint. Moreover, the Court has held that a constitutional complaint was an effective remedy for the purposes of Article 35 § 1 of the Convention only in situations where the alleged violation of the Convention resulted from the direct application of a legal provision considered by the complainant to be unconstitutional (see *Szott-Medyńska v. Poland* (dec.), no. 47414/99, 9 October 2003; *Pachla v. Poland* (dec.), no 8812/02, 8 November 2005; *Wypych v. Poland* (dec.), no. 2428/05, 25 October 2005).

73. In this connection, the Court observes that the breach of the Convention complained of in the present case cannot be said to have originated from any single legal provision or even from a well-defined set of provisions. It rather resulted from the way in which the relevant laws were applied to the applicant's case and, in particular, from the "special arrangements" referred to in Article 156 § 4 of the Code of Criminal Procedure, allowing the President of the Lustration Court to limit the applicant's access to case files and her possibilities of taking notes and copying documents (see paragraph 33 above). However, it follows from the case-law of the Polish Constitutional Court that it lacks jurisdiction to examine the way in which the provisions of domestic law were applied in an individual case (see paragraph 18 above). The Government did not refer to any other domestic remedy which could have been successful in this case.

74. It follows that it has not been shown that the applicant had an effective remedy at her disposal under domestic law by which to challenge the legal framework setting out the features of lustration proceedings. Consequently, the Government's objection as to the exhaustion of domestic remedies must be rejected.

75. In these circumstances 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 in conjunction with Article 6 § 3. There has accordingly been a breach of those provisions.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

76. 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

77. The applicant claimed PLN 6,000,000 in respect of pecuniary and non-pecuniary damage.

78. The Government considered the claims excessive. Alternatively, they invited the Court to rule that the finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant (see the aforementioned *Matyjek v. Poland* judgment, § 69).

79. The Court does not discern any causal link between the violation found and the pecuniary damage alleged. It is not for the Court to speculate on what might have been the outcome of the proceedings had they complied with the fairness requirements of Article 6 (*Jalloh v. Germany* [GC], no. 54810/00, § 128, ECHR 2006-...). It therefore rejects this claim. The Court also 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 the applicant may have sustained.

B. Costs and expenses

80. The applicant also claimed PLN 31,532 for the costs and expenses incurred before the Court.

81. The Government contested this claim on the ground that the applicant had failed to submit any documents proving those costs either at the domestic level or before the Court.

82. According to the Court's case-law, an applicant is entitled to 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 the Court observes that the applicant submitted three invoices documenting the costs of translation incurred in connection with the proceedings before the Court in the amount of PLN 1,532. However, although the applicant's lawyer submitted a claim for her fee, it was not accompanied by any documents, other than an invoice dated 10 January 2007 in the amount of PLN 30,000. This invoice did not specify the acts which the representative had performed. The Court notes in this connection that the applicant only appointed her lawyer in January

2007, after the decision on the admissibility of the case had already been given.

83. Consequently, regard being had to the information in its possession and the above criteria, the Court rejects the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the sum of EUR 1,400 for the proceedings before the Court.

C. Default interest

84. 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. *Dismisses* the Government's preliminary objection;
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 by the applicant;
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 1,400 (one thousand four hundred euros) in respect of costs and expenses, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;
 - (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 17 July 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

F. TULKENS
President